



ASIA-PACIFIC ECONOMIC COOPERATION

## **APEC GROUP ON SERVICES**

### **MENU OF OPTIONS FOR VOLUNTARY LIBERALIZATION, FACILITATION AND PROMOTION OF ECONOMIC AND TECHNICAL COOPERATION IN SERVICES TRADE AND INVESTMENT**

*ADDITIONAL ELEMENTS\**

15 AUGUST 2003

*\*This document supplements the Menu of Options for Voluntary Liberalization, Facilitation and Promotion of Economic and Technical Cooperation in Services Trade and Investment, APEC #201-CT-01.6, Singapore, 20 August 2001.*

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## ***FOREWORD***

*This document, "Menu of Options for Voluntary Liberalization, Facilitation, and Promotion of Economic and Technical Cooperation in Services Trade and Investment: Additional Elements," is the outcome of the work by the members of the APEC Group on Services (GOS) during 2002 and 2003, in collaboration with the Pacific Economic Cooperation Council (PECC). The document was approved by the APEC GOS as a main deliverable for the year 2003 and is being distributed for use by trade policy officials in all APEC member economies.*

*The work was carried out under the "Menu of Options" project, Phase III, with a focus on three areas of domestic regulation, namely: good regulation for services; regulatory disciplines for services; and transparency. The document summarizes the ideas, suggestions and comments articulated by APEC member economies in these three areas during GOS meetings over the course of 2002 and 2003. This work has contributed to building capacity of member economies in the area of domestic regulation for services by enhancing understanding of these issues at the multilateral, regional and national levels, as well as fleshing out the policy linkages between them.*

*Completion of this work provides APEC economies with additional elements to add to the earlier "Menu of Options" document finalized by the GOS in August 2001 (APEC Publication No. APEC#201-CT-01.6). Options outlined in the present document are meant to supplement and deepen the earlier work through assisting member economies in the design of their domestic regulation, the conduct of regulatory impact analysis, and the improvement of regulatory transparency. Improvement in these areas will help to facilitate services trade in the APEC region. Additionally, discussions under the project have strengthened member economies in their ability to participate in the on-*

*going discussions on domestic regulation in the services negotiations of the WTO Doha Development Agenda.*

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*Thanks are due to APEC member economies, the PECC, individual authors of the background papers, and experts who led the workshops. The efforts of all involved have been fundamental to the successful conclusion of the "Menu of Options" project in 2003.*

*We thus wish to express great appreciation to Chinese Taipei, who has overseen the "Menu of Options" project. We recognize the PECC, specifically Sherry Stephenson and Soonhwa Yi, who put tireless effort into coordinating this project from its outset and who labored to facilitate discussions of the issues, synthesize the Group's ideas and comments in written form and who summarized the background papers and presentations, as set out in Part II of this document. Special gratitude is extended to all of the authors and experts, who prepared high quality background papers and participated in the discussion of those papers under the project and led the workshops. We are convinced that the outcome of this work has contributed to building APEC member economies' capacity in the area of understanding and implementing good quality regulation at the national level and the link between national regulation and multilateral disciplines, in conducting regulatory impact analysis and in improving transparency in domestic regulation for services.*

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## Background

The *Menu of Options for Voluntary Liberalization, Facilitation and Promotion of Economic and Technical Cooperation in Services Trade and Investment* (hereon termed *Menu of Options*) is designed to advance the core objective of the APEC Group on Services, that is to foster the liberalization and facilitation of services trade and investment, along with the promotion of capacity building in the services and investment areas. The major purposes served by the *Menu of Options* are to provide an organizational framework for the work of the GOS on services, to assist APEC members in understanding what types of measures they may wish to include in their Individual Action Plans, and to facilitate the discussion of how APEC member economies may achieve free and open services trade and investment. The *Menu of Options* has been developed according to the guidelines set out in Annex I.

The work on the *Menu of Options* project has been carried out over three phases. The initial work, *Menu of Options*, Phase I, commenced in 2000, followed by Phase II in 2001 and Phase III in 2002-2003.\* This document represents the outcome of the *Menu of Options* Phase III (2002-2003) agreed by the APEC Group on Services (GOS) as one of its deliverables for the year 2003, through the inclusion of additional elements of the *Menu of Options* that the GOS achieved during its work for the year 2003 along with a summary of background papers and exercises that the GOS carried out for the year 2002.

The work of Phase III of the *Menu of Options* was designed to deepen the discussion and analysis of two key issues under the pillar of trade facilitation – transparency and domestic regulation – which were identified by GOS members during Phase II for further consideration. Work in Phase III has

been undertaken by the GOS with the objective of allowing APEC member economies a better understanding of how improvements in the drafting of disciplines and application of rules and procedures for transparency and domestic regulation for services could be carried out at both the national and multilateral levels, as well as how capacity-building measures could be designed and implemented. This work should also contribute to support the participation of APEC economies to negotiate improved rules for services trade in the WTO in the context of the ongoing GATS 2000 services negotiations.

To achieve the above objectives, three workshops were carried out for the GOS during Phase III of the *Menu of Options* (2002), in which five background papers on aspects of the issues of transparency and domestic regulation were presented. As well, two practical exercise sessions were conducted for GOS members, one on regulatory reform in network-based service industries (using the energy sector as an illustration) and another on the conduct and best practices for regulatory impact analysis. During the second year of Phase III of the Menu of Options (2003), the Group discussed, in-depth, the five background papers and two presentations with the objective of preparing conclusions that represent GOS' members understanding of these issues contained in those materials. Annex II contains a list of the papers and presentations that were presented to the GOS during Phase III.

This document sets out in Part I in a non-legal manner additional elements of the *Menu of Options* with respect to the five papers and two presentations in the areas of good regulations, regulatory impact analysis and disciplines for domestic regulation of services, including transparency. The additional elements were those agreed by the GOS during the discussion of

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\* Please see Annex III for the detail on the work of the *Menu of Options* over three phases.

the relevant papers and presentations in 2003. Part II of this document contains a summary of the points made in these papers and presentations and is entitled *Towards Improving the Understanding and Application of Services Regulation* (2003/SOMI/GOS/008). Section I summarizes points in the papers related to transparency and domestic regulation. Section II sets out “Good Practices for Regulatory Impact Analysis”, as well as suggestions for capacity-building measures, drawn from the presentations and discussion carried out during the workshops on this issue.

Note: This document does not attempt to define terms included in the *Menu of Options for Voluntary Liberalization, Facilitation and Promotion of Economic and Technical Cooperation in Services Trade and Investment* from a legal point of view. Therefore, no description contained in the document should be taken as constituting a legal text.

## **PART I. ADDITIONAL ELEMENTS OF THE *MENU OF OPTIONS***

### **A. ELEMENTS TO BE ADDED TO THE MENU OF OPTIONS RELEVANT TO GOOD REGULATION, REGULATORY DISCIPLINES AND TRANSPARENCY**

This part sets out the elements to be added to the *Menu of Options for Voluntary Liberalization, Facilitation and Economic Cooperation and Technology Development for Services Trade and Investment* in the areas relevant to good regulation for services, regulatory impact analysis, disciplines for domestic regulation of services and transparency, as discussed by the APEC Group on Services during its February SOM I and May SOM II 2003 meetings. Annex II sets out the list of papers and presentations from which the elements found in the seven sections below are drawn.

Economies recognize that any of the elements included below may be adapted to take into account the characteristics of particular services sectors.<sup>†</sup>

#### **1. What Constitutes Good Regulation for Services**

##### **➤ Good regulation**

Good regulation is a product of both good policy advice and good decision-making. Good quality regulation for services is important because it helps to achieve public policy objectives and to improve economic performance and can, where appropriate, promote both competition and trade. Good regulation should be transparent, have a clear policy objective, and be efficient.

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<sup>†</sup> Referenced in this document is a *Menu of Options* document examined by GOS members as part of a prior discussion. While this *Menu of Options* may prompt further discussion in certain areas, it should not be interpreted as an exhaustive or definitive statement of policy views of APEC member economies.

➤ **Poor quality regulation**

Poor quality regulation for services results in adverse impacts on the domestic economy. Some of the reasons behind poor quality regulation are lack of transparency, choice of inappropriate regulatory instrument, and unclear policy objectives in the regulation-making process.

➤ **Models vs. principles of good regulatory practice**

Both models and principles guide the adoption of national regulation. Taking into account national capacity constraints, it may be more appropriate for developing economies to adopt regulatory models rather than principles. However, models of good regulatory practices must be adapted for application in a given domestic context, must have the support of domestic constituency and must be flexible. It is important to remember that there is no one-size fits all approach. The key is the need to have a sufficiently well-equipped tool box so that one can develop the regulatory approach/package (including voluntary measures) that best fits the situation.

## **2. Regulatory Impact Analysis for Services**

➤ **Main benefits of Regulatory Impact Analysis (RIA)<sup>‡</sup> for national economies.**

The main benefits of conducting RIA for national economies are the following:

- development of a broader base of information for decision making,
- heightened procedural transparency<sup>§</sup>
- increased incentives to produce effective and efficient regulation.

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<sup>‡</sup> While tools such as RIA can inform and thereby improve regulatory judgment, the ultimate means to good quality regulation is sound regulatory judgment, which will take into account a range of factors including but not limited to the outcome of RIA analysis.

➤ **Relevance of RIA for the trade policy process**

RIAs can, where appropriate, include an assessment of trade effects of proposed regulation.

➤ **Building linkages between regulators and trade policy makers**

It is important to build and maintain a communication channel between trade policy-makers and regulatory officials designed to improve integration of trade and regulatory objectives.

➤ **Options for government intervention**

There are a variety of approaches that governments can consider in assessing how to best achieve an objective. These include:

- No intervention
- Retaining the 'status quo'
- Extending current legislation
- Increasing enforcement of an existing regulation
- Conducting an information and education campaign
- Using economic instruments
- Voluntary standards
- Self regulation
- Co-regulation (Combining legislative provisions with functions administered by a professional association.).

➤ **Main elements of a Regulatory Impact Analysis statement**

An RIA statement may contain the following elements:

- a statement of the nature and magnitude of the problem and the need for government action
- a statement of the public policy objective(s)

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<sup>§</sup> Procedural relates to how regulation is developed, not dictating any particular regulatory outcome.

- a statement of feasible options that may constitute viable means for achieving the desired objective(s)
- a cost and benefit analysis
- a statement of administrative and compliance costs

➤ **Assessment of costs and benefits**

The costs and benefits of a proposed regulation can be assessed by identifying its key impacts, e.g. environmental, security, health, and safety impacts and the regulatory burden. The nature of such impacts should be specified in the costs and benefit analysis statement.

### **3. Improving Capacity for Carrying out and Enforcing Regulatory Impact Analysis**

➤ **Status of a national regulatory body**

A national regulatory body may enjoy the status of either an independent body or a part of a governmental body/authority. In either case, the body should be independent from political influence.

➤ **Application of RIA**

Because RIA is an analytical tool which incorporates good regulation criteria, it should be applied at the stage when domestic regulations are developed and should be used until the final policy decision is taken.

➤ **Purpose of the RIA review process**

The purpose of the RIA process is to review and identify policy objectives, in order to demonstrate the benefit of a proposed regulation and to review the alternative options available. This process provides policy-relevant information to decision makers and helps them to obtain quality regulation that achieves those policy objectives.

➤ **Function of public consultation in the RIA process**

Public consultation should be incorporated in the RIA process. The function of such transparency is to make information available to the public, listen to a wide range of interests and to obtain a broad range of information from potentially affected parties. Agencies should consider, evaluate, and take into account what is heard in subsequent regulatory development. Experience suggests that the result is often improved regulatory outcomes.

➤ **Capacity-building in the areas of development of domestic regulation and of RIA**

Capacity-building in the area of domestic regulation and RIA can be carried out via effective training courses and seminars for government officials involved in RIA and in developing domestic regulation, through on-line guideline for the RIA process, and through the provision of special courses in response to specific requests and technical needs.

#### **4. Issues in Domestic Regulation of Services: Horizontal vs. Sectoral Disciplines**

➤ **Potential benefits of horizontal disciplines**

- reduction of the probability of regulatory capture
- stimulation of regulatory reform of all services sectors
- lessening of the risks of over-regulating dynamic technology-driven service sectors but may increase the risk of under-regulating some sectors, such as financial services, where strong supervision is key for prudential reasons.

➤ **Possible constraints of having horizontal disciplines**

Broad horizontal disciplines can be somewhat abstract, may not be specific enough or may not adequately take into account the characteristics of particular sectors.

➤ **Approach to developing horizontal disciplines at the multilateral level**

A systematic approach can be designed to capture the benefits of horizontal disciplines while maintaining intact the right to regulate. An illustrative example follows.

- Stage 1: Undertake an open international dialogue between domestic regulators and competition authorities to explore whether meaningful horizontal disciplines can be developed.
- Stage 2: Develop a comprehensive system in which the key principles/disciplines are bound in international agreements (such as GATS), voluntary guidelines are established as a benchmark for domestic policy-making, and other private and public bodies and associations develop sector-specific standards.
- Stage 3: Develop horizontal disciplines to promote the openness of markets while recognizing national regulatory sovereignty in the areas pertinent to, inter alia, health, safety and prudential objectives.

➤ **Areas in which GATS Article VI on “Domestic Regulation” could be strengthened**

- Expansion of the scope of Article VI to recommend an explicit statement of the policy objectives to be achieved by a regulation
- Clarification of the concept of “quality of service” for areas where it is appropriate
- Emphasis on performance-based regulations, consistent with the “objective and transparent criteria” stated in Article VI.4.a), for appropriate sectors
- Strengthening of transparency requirements
- Encouragement of market-based regulations, as appropriate

- Encouragement of self-regulation, as appropriate, by the industry.
- **The APEC process could play a role in the following areas for the development of horizontal disciplines at the multilateral level**
- Furthering discussion of whether to develop deeper international commitments on horizontal principles
- Elaboration of model commitments for those sectors that warrant explicit treatment, a goal consistent with the Menu of Options document

## **5. Deepening Sectoral Disciplines for Services Regulation**

### ➤ **The role of sectoral disciplines at the multilateral level**

Sectoral disciplines play a role in identifying the derogations and additional disciplines that may be necessary to adapt the general disciplines to the unique features of a particular sector. Those special features may relate to market structure and social requirements. Sectoral disciplines may also become a vehicle for facilitating the liberalization of barriers to trade specific to a particular sector.

### ➤ **Potential benefits of sectoral disciplines at the multilateral level**

- A mechanism for clarifying, elaborating, or supplementing the application of horizontal disciplines to sectors with unique characteristics
- A vehicle for facilitating the liberalization of barriers to trade specific to a particular sector
- A convenient way of addressing issues that require more extensive involvement of sectoral regulators

- A means to pursue disciplines for licensing requirements and procedures, qualification requirements and procedures.
  
- **Possible guidelines for developing sectoral disciplines in the WTO**
- To develop simple multilateral rules to assure that domestic policy measures do not create unnecessary barriers or distortion to trade. Details of rules can be developed by national government or subsidiary bodies consistent with the achievement of various social goals.
- To prepare the ground for reform by identifying common regulatory objectives, economic benefits of reform, institutional and human resource requirements.
- To develop a softer form of disciplines than legally binding commitments, such as non-binding guidelines, recommendations and model schedules that will facilitate regulatory reform and trade liberalization.
- To negotiate national schedules for implementing desired reforms.
- To serve as a sounding board when national governments or other national or international institutions fail to reform rules that hamper trade.
  
- **Steps that could be undertaken prior to negotiating sectoral disciplines**
- Analyze national regulations for the purpose of identifying common regulatory objectives, prior to the development of sectoral disciplines

- Accompany the analysis with institutional and human resource requirements for implementing market-oriented regulatory reforms and technical assistance that will help in carrying out these reforms

➤ **Principles of good governance for sectoral regulatory disciplines**

General principles of good governance for domestic regulations can be incorporated in sectoral disciplines. These are:

- transparency for regulatory purposes or objectives,
- allowing foreign suppliers to rent or lease essential facilities that only national providers are allowed to own,
- establishing a preference for the use of price-oriented measures, such as variable pricing or auctions, to allocate scarce resources, and
- providing for alternative dispute resolution mechanisms, including consultations among regulators, where sectoral disciplines cover complex regulatory issues or sensitive social issues.

➤ **Areas where existing GATS sectoral disciplines may be applied**

- *Professional services* – the WTO Disciplines on Domestic Regulation in the Accountancy Sector could be generalized and applied to other professional services.

## **6. The ‘Necessity Test’ in Domestic Services Regulation**

In certain sectors, a measure should be understood as more trade-restrictive than necessary if there is another measure, reasonably available taking into account technical and economic feasibility, that achieves a legitimate policy objective and is significantly less restrictive to trade.

## 7. Transparency in Regulation of Services

### ➤ **The role of transparency**

Transparency is a mechanism to make regulatory requirements clear for service providers and investors. It plays an important role in lending certainty and accountability to a market. Further, it assists in assessing the discriminatory elements present in services regulation and in promoting competition.

### ➤ **Transparency and trade in services**

Opaque regulatory practice may cause a shift in the pattern of supplying services, e.g. from services supplied via commercial presence to cross-border services supply, thus influencing the location of foreign direct investment.

### ➤ **Mechanisms to ensure effective transparency**

An effective transparency mechanism should operate as an 'ex ante' as well as an 'ex post' instrument: that is, regulatory transparency should be a process by which interested parties can participate in the design of new regulations as well as a way in which regulations can be disclosed and clarified.

#### **a. Design of regulation**

- *Prior consultation.* Regulators will, where possible, provide interested parties an opportunity to comment on a proposed regulation.
- *Regulatory impact analysis.* When proposing a regulation, regulators should seek to attach a regulatory impact analysis or other similar report (e.g. cost and benefit analysis) to the proposal. Regulatory impact analysis is one of useful mechanisms to achieve transparency with respect to the objectives contained in regulations.

**b. Application of regulation**

- *Publication.* Governments should publish existing measures affecting trade in services in a timely manner. Where possible, governments should publish explanatory notes to help in the understanding of measures. The publication can be achieved via means of electronic methods, e.g. APEC E-IAPs.
- *Notification.* New or amended regulations that affect trade in services should be notified in a timely manner. APEC member economies can achieve this by updating the information in their respective E-IAPs.
- *Enquiry point.* Governments should endeavor to develop a list of enquiry points on a national basis to provide interested parties with information on regulation, when requested.
- *Sectoral transparency.* Where necessary, alternative transparency requirements can be developed on a sectoral basis, e.g. financial services.

**➤ Transparency and the APEC E-IAPs**

APEC member economies can ensure regulatory transparency through the APEC E-IAPs. Economies can publish existing measures affecting trade in services in their E-IAPs; notify new or amended measures by updating their E-IAPs; and posting contact/ enquiry points by sector. To achieve enhanced regulatory transparency, APEC member economies can complete their E-IAPs, including:

- A description of any regulatory measure that have a horizontal effect on all services sectors,
- Any proposals to change or eliminate existing regulations,
- Where possible, a complete list of sectoral contact points, and
- A regular review and timely update of E-IAPs.

## **PART II. TOWARDS IMPROVING THE UNDERSTANDING AND APPLICATION OF SERVICES REGULATION: SUMMARY OF BACKGROUND PAPERS\*\***

### **A. IMPROVING REGULATION FOR SERVICES**

#### **1. Transparency in Regulation of Services**

- **A summary of the main points presented in the paper on Transparency in Regulation of Services by Sherry Stephenson and Soonhwa Yi**

##### **a. The importance of transparency**

Transparency is a pivotal mechanism to assess the discriminatory elements present in services regulations, make regulatory requirements clear for service providers and investors, provide certainty and accountability, and foster and encourage competition.

##### **b. Transparency and trade in services**

Opaque regulatory practice may shift the pattern supplying services (for example, from mode 3 to mode 1) and may influence the location of foreign direct investment.

##### **c. Mechanisms to ensure effective transparency**

An effective transparency mechanism should operate as both an 'ex ante' as well as 'ex post' instrument: that is, regulatory transparency should be a process by which market players can participate in the design of new regulations as well as a way in which regulations can be disclosed and clarified.

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\*\* The summary of background papers in this section covering work carried out for the *Menu of Options* project on "Improving the Understanding and Application of Services Regulation" was prepared by the PECC Coordinators of the *Menu of Options* project and does not in any way represent the views of the members of the APEC Group on Services. The summary is presented to facilitate the understanding of the readers of this document.

The following are desirable goals for the design and application of services regulations.

- *Design of regulation*
  - Prior Consultation: Prior consultation provides the public with an opportunity to participate in the formulation of regulatory instruments through their comments. This mechanism exists at the multilateral level (i.e. the WTO TBT agreement) as well as the national level (e.g. Japan, Korea and USA).
  - Regulatory Impact Analysis (RIA): RIA is an important complimentary mechanism to achieve transparency with respect to objectives underlying regulations and policies.
  
- *Application of regulation*
  - Publication: Timely publication of measures affective trade in services and publication of explanatory notes via means of electronic methods.
  - Notification: Timely notification of any new laws or regulations affective trade in services.
  - Enquiry point: Development of an expanded list of enquiry points on a national basis to which central registry system could be complimented.
  - Sectoral transparency requirement: Use of sectoral transparency disciplines which is specifically applicable to a certain sector.
  - A comprehensive negotiating modality: An alternative negotiating modality that enhances transparency (e.g. negative list approach or hybrid approach).

#### **d. The APEC E-IAPs**

The publication of E-IAPs by APEC member economies would be an effective way to ensure regulatory transparency. In order to further enhance transparency, member economies may complete e-IAPs, including:

- A description of any regulatory measures that have a horizontal effect on all services sectors;
- Any proposals to change or eliminate existing regulations;
- A complete list of sectoral contact points; and
- Regular review and timely update of e-IAPs.

## **2. Issues in Domestic Regulation of Services: Horizontal vs Sectoral Disciplines**

- **A summary of the main points presented in the paper on Issues in Domestic Regulation of Services: Horizontal vs Sectoral Disciplines by Alexandra Sidorenko and Christopher Findlay**

#### **a. Benefits of horizontal disciplines**

The various benefits to be derived from the adoption and application of horizontal disciplines for domestic regulation of services include the following, among others:

- Reduction of the probability of regulatory capture;
- Avoidance of unnecessary policy linkages;
- Stimulation of regulatory reform of all services sectors, rather than only the ones on the political agenda;
- Assistance in the mobilization of countervailing political interests that offset resistance to change;
- Automatic application to new services or new modes of service supply;
- Lessening of the risks of over-regulating dynamic technology-driven service sectors.

- Provision of a framework within which to settle disputes among trading partners arising over access to markets.

**b. Systematic approach to developing horizontal disciplines at the multilateral level**

The following systematic approach is designed to capture the benefits of horizontal disciplines while maintaining intact national sovereignty to regulate:

- First, to undertake an open international dialogue of domestic regulators and competition authorities to explore whether meaningful horizontal disciplines can be developed.
- Second, to apply a judicial system in which the key principles/disciplines are bound in international agreements (such as the GATS), voluntary guidelines established as a benchmark for domestic policymaking, and other private and public bodies and associations to develop sector-specific standards.
- Third, to develop horizontal disciplines along the lines of safeguarding the contestability of markets while recognizing national regulatory sovereignty in the areas pertinent to health, safety and prudential objectives.

**c. Strengthening GATS Article VI**

- Article VI (and Article III on Transparency) could be expanded to require explicit statement of the policy objectives to be achieved by a regulation.
- The concept of "quality of service" could be clarified.
- A provision could be agreed to limit regulation to the minimum necessary, i.e. the measure should be the least trade restrictive to achieve a stated objective.

- Accent could be placed on performance-based regulations, consistent with “objective and transparent criteria”, as set out in Article VI(4)(a).
- Market-based regulations could be encouraged.
- Self-regulation by industry could be encouraged.

**d. Specific rules for harmonization and mutual recognition**

An alternative to the development of horizontal disciplines for services regulation is harmonization. It is noted however that the costs of harmonization of services standards may outweigh the benefits derived. An alternative approach is that of mutual recognition. These alternatives have been considered during Phase II of the Menu of Options work.

**e. Narrowing the scope of horizontal disciplines**

It would be desirable to apply horizontal disciplines to regulations that are applicable to sectors with “natural monopoly” characteristics. Regulations that are formulated in order to prevent other instances of market failure can be disciplined by a generalized necessity test.

**f. The role of the APEC process in the development of horizontal disciplines at the multilateral level**

- The APEC process could serve to promote further dialogue on the value of a horizontal approach for services regulation and could provide examples of its application.
- The APEC process could deepen discussion of the question of where to make international commitments on horizontal principles, or is the generalized necessity test plus national treatment sufficient;
- developing model commitments in those areas which demand explicit treatment, a goal which is consistent with the work in progress on the menu of options;

- continuing to extend the commitments to services liberalization in APEC and binding them in the multilateral process.

### **3. Deepening Sectoral Disciplines for Services Regulation**

➤ **A summary of the main points presented in the paper on *Deepening Sectoral Disciplines for Services Regulation* by Geza Feketekuty**

**a. Benefits of sectoral disciplines**

- Sectoral disciplines are an efficient way to liberalize services trade when liberalization calls for i) reform of restrictive sectoral regulations aimed at legitimate social objectives and ii) dismantling common forms of protection in particular sectors.
- Sectoral disciplines serve as a useful mechanism for clarifying, elaborating, or supplementing the application of horizontal disciplines to sectors with unique characteristics such as network based infrastructure services (e.g. telecommunications and transportation) and services regulated to protect consumers and correct the operation of markets (e.g. financial and professional services).
- Sectoral disciplines are a convenient way of addressing issues that require the involvement of sectoral regulators.

**b. Principles for deepening sectoral disciplines**

- Subsidiarity: The principle of subsidiarity keeps global rules simple and leaves details to lower levels of governance consistent with the achievement of various social goals. The WTO should focus on assuring that domestic policy measures do not create unnecessary barriers or distortions of trade, and leave substantive rule making to regional trade institutions,

international or non-governmental organizations, and national governments. In effect, this principle accommodates differences in social preferences within internationally agreed norms. Subsidiarity needs to be analyzed on the basis of the following criteria: regulatory effectiveness, economic efficiency, and political legitimacy.

- **Specialization:** It is important for the WTO to leave detailed technical issues to other inter-governmental or non-governmental organizations that specialize in those areas. This approach is consistent with GATS Article VII that calls for inter-governmental and non-governmental organizations to take up the task of developing international standards for the recognition of the professional competence of service providers and of the quality of service produced.
- **Dispute settlement:** It would be desirable to develop and utilize alternative, more collaborative forms of dispute settlement in sectoral agreements. Deeper sectoral disciplines would contribute to resolve disputes over trade-related domestic regulatory issues that often involve delicate issues of social policy affected by the operation of many service sectors.

### **c. General principles of good governance**

The following principles of good government might be incorporated in some or all sectoral disciplines: transparency of regulatory objectives; limiting the scope of regulatory intervention to what is necessary to accomplish the desired objective; right for foreign service providers to lease or rent essential facilities that only national providers are allowed to own; and use of price-oriented measures such as viable pricing or auctions, to allocate scarce resources.

**d. Deepening of sectoral disciplines for internet-based cross-border services trade**

The development of sectoral disciplines in this area requires a high degree of cooperation between financial regulators, trade officials and service providers. The development of international standards for the protection of consumers will be one of the prerequisites for the liberalization of such trade.

**e. Approach to negotiations on sectoral disciplines**

Negotiations on sectoral disciplines should be preceded by an in-depth analysis of regulatory objectives in the sectors involved, how such objectives might be pursued in an open trade environment, and the economic benefits that could be derived from the reduction of internal and external barriers to domestic and international competition in regulated services. The negotiation should be accompanied by an analysis of institutional and human resource requirements for implementing market-oriented regulatory reforms and required technical assistance.

**f. The General Agreement on Basic Telecommunications (ABT) – A Model for Sectoral Disciplines**

The GATS General Agreement on Basic Telecommunications features a set of model schedules for the liberalization of international competition in different areas of telecommunications and a reference paper that sets out common regulatory guidelines for assuring a competitive market.

This model could be followed in the development of other sectoral disciplines that could make appropriate use of voluntary regulatory guidelines where this will facilitate regulatory reforms and trade liberalization. Likewise, model schedules could be established for the liberalization of trade-distorting regulations in such sectors (e.g. quantitative limitations). Network-based infrastructure services (e.g. transportation, energy, and water) are especially,

those that could usefully follow the ABT as a model framework, in developing sector-specific disciplines.

#### **4. The ‘Necessity Test’ in Domestic Services Regulation**

- **A summary of the main points presented in the paper on *The ‘Necessity Test’ in Domestic Services Regulation* by Joel Trachtman**

##### **a. Necessity**

The necessity test generally requires that a domestic regulation be the least trade restrictive method available for achieving the desired policy objective.

##### **b. Necessity and National Treatment**

GATS Article XVII seems to indicate that a regulation imposed on a foreign service provider must meet two tests: it must provide i) treatment no less favorable than that accorded domestic like services, and ii) treatment no less favorable than that accorded domestic like service providers. A better reading would separate the evaluation of the treatment of services from the evaluation of the treatment of service providers. Regulation of service providers would be evaluated to determine only whether like service providers, as service providers, are treated alike. Using this interpretation, there would be no violation of national treatment if like services were to be treated differently, where the reason for the difference in treatment is the regulation of the service provider, as a service provider.

Given the broad definition of ‘like services’ and ‘like service providers’, it is likely that WTO dispute settlement will place increasing emphasis on the ‘no less favorable’ component of national treatment obligations. On the other hand, ‘no less favorable’ is defined with reference to conditions of competition. This focus on the competitive relationship might

not reliably allow for regulatory distinctions to translate into "unlikeness," resulting in inappropriate invalidation of regulation.

**c. Necessity and Proportionality**

Proportionality, *stricto sensu*, examines whether the means of a regulation are proportionate to the ends: whether the costs are excessive in relation to the benefits.<sup>††</sup> It is suggested that proportionality test in GATS Article XIV is not likely to be needed in connection with regulatory barriers, as there are few significant GATS prohibitions that would apply to invalidate non-discriminatory domestic regulations. GATS Article VI(5) disciplines, however, are quite weak, when compared to SPS and TBT requirements of proportionality.

**d. Necessity and Balancing**

Under the GATT/WTO jurisprudence as extended in Korea-Beef and Asbestos case, the necessity test may require a more complex analysis. The Appellate Body interpreted the necessity test under Article XX(b) of GATT to require a more extensive balancing than previously understood. This balancing test considers the degree to which national regulatory ends are met by alternative measures, instead of assuming that national regulatory ends must be met in full, and considers the importance of the common interests or values pursued.

**e. Necessity and Recognition**

The GATS generally does not impose strong recognition requirements. Necessity has a complex relationship with recognition. A strong standard of necessity might lead to what is effectively judicially required recognition. The Accountancy Disciplines include a greatly enhanced

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<sup>††</sup> A wider definition of proportionality developed in the EC context includes three tests: (i) proportionality, *stricto sensu*, (ii) a least trade restrictive alternative test, and (iii) a simple means-ends rationality test.

requirement of equivalency in connection with qualification requirements relating to education, experience and examination.

#### **f. Necessity and International Standards**

With respect to rules and standards GATS has somewhat greater legislative capacity and weaker integration capacity than GATT, SPS, and TBT. The Accountancy Disciplines set out a strengthened necessity discipline, and also take into account international standards in determining the conformity of foreign providers.

#### **g. A menu of definitions**

- *Suitability.* A domestic regulation is “suitable” if it constitutes one available rational means to achieve a legitimate policy objective.
- *Necessity.* A measure shall be understood as more trade-restrictive than necessary if there is another measure, reasonably available taking into account technical and economic feasibility, that achieves a legitimate policy objective and is significantly less restrictive to trade.
- *Proportionality.* A measure shall be considered “proportionate” if the significance of the resulting restriction on trade is not excessive compared to the significance of the resulting regulatory benefits.
- *Necessity with a proportionality caveat.* A measure shall be understood as more trade-restrictive than necessary if there is another measure, reasonably available taking into account technical and economic feasibility, that achieves a legitimate policy objective and is significantly less restrictive to trade, provided that no measure shall be considered more trade-restrictive than necessary where it is proportionate.

- *Balancing*. A measure shall satisfy the balancing test if after weighing and balancing the following factors, the measure appears beneficial: (i) the importance of the policy objective, (ii) the degree to which the national measure contributes to the achievement of the policy objective, (iii) the restrictive effect on trade, (iv) the availability of other measures that may achieve, in whole or in part, the national policy objective, and (v) the reasonable availability of such other measures in comparison to the existing measure.
- *Cost-Benefit Analysis*. A measure shall withstand cost-benefit analysis if it is the measure that, compared to other available measures, maximizes the positive difference between (x) and (y), where: x=the value of achievement of the policy objective, discounted by the degree to which the national measure contributes to the achievement of the policy objective, and y=the sum of (i) the value of the restrictive effect on international trade occasioned by the measure, plus (ii) the cost of implementation of and compliance with the measure.

#### **h. Ways in which the 'Necessity Test' might be improved**

- A menu of clear and agreed definitions for the concepts related to the necessity test might be developed.
- Horizontal requirements of least trade restrictive alternative testing might be added to the definition of necessity, with a caveat that would provide an exception for "unnecessary" regulation that is nevertheless "proportionate".
- New regulations may be tested under regulatory impact analysis applying cost-benefit analysis.

- The possibility of incorporating reference to the work of standard-setting bodies in disciplines on domestic regulation may be considered.

## **B. REGULATORY IMPACT ANALYSIS**

### **1. Good Regulation for Services**

- **A summary of the main points presented in the paper on *What Constitutes Good Regulation for Services?* by Peter Mumford**

#### **a. Approach to regulation**

Regulation is likely to be associated with regulatory costs composing of fiscal costs to government, compliance costs to business and consumers, and dynamic costs to economic performance. In addition, the problem of poor quality regulation increases the costs. Regulation should therefore be approached with a clear understanding of its potential benefits, and equally, its potential costs. Proposals to regulate need to be subjected to proper analysis and scrutiny as to their necessity, efficiency, and net impact on public welfare.

#### **b. Poor regulation**

Poor regulation stems from a number of related factors: the incentives, procedures, institutions of government not working effectively, a lack of transparency in the policy making process and a bias to regulate. Therefore, efforts to improve the quality of domestic regulation require that the right incentives, principles, procedures and institutions of government are in place and are working effectively to ensure high quality regulatory outcomes.

#### **c. Good Regulation**

Good regulation is a product of both good policy advice and good decision-making. While the basic principles for developing good regulation are

generic, the characteristics of certain markets will necessitate more sophisticated regulatory regimes.

#### **d. Strategies and Tools adopted by New Zealand**

New Zealand's framework for the development of quality regulation draws on generally accepted international best practices and is thus generic in nature. It aims to enhance regulatory outcomes and reduce the risk of regulatory failure.

- *The Principles of Code of Good Regulatory Practice:* The Code of Good Regulatory Practice, a key measure in New Zealand's quality of regulation framework, promotes the development of quality regulation through a comprehensive set of principles which comprises of a) efficiency, b) effectiveness, c) transparency, d) clarity, and e) equity.

- *Regulatory Impact Statements (RISs) /Business Compliance Cost Statements (BCCS):* The RIS assists in the development of policy that accords with the standards set by the Code of Good Regulatory Practice. It aims first to generate better information for effective decision making, and second to increase the transparency of regulation making process.

It is required to include BCCS in the RIS if the policy proposal has compliance cost implications for business. The purpose of this is to ensure that policies which have compliance cost implications for business are subject to scrutiny at an early stage. Both RIS and BCCS should be publicly released. The RIS/BCCS process is evaluated by a Business Compliance Cost Unit.

- *Legislation Advisory Committee's (LAC) Guidelines on the Process and Content of Legislation:* The Guidelines provide an important reference for policy makers on the process and content that

need to be considered in the promotion of legislative changes in the country, whether these be effected by statute or by regulation, rules, orders, notices or other subordinate legislation. The Guidelines include a checklist for the development of new legislation.

- *Occupational Regulation Framework*: The regulation of occupations has also been introduced in order to promote quality in the area of domestic regulation with a specific focus on services. The framework identifies the circumstance where occupational regulation is required to achieve the protection on the public; defines methods of occupational regulation to fit particular situations; and list the principles and processes for effective occupational regulation by statute.

#### **e. Benefit of RIA**

The RIA process, which uses tools such as a Code of Good Regulatory Practice and RIS/BCCS, promotes increased transparency, openness and scrutiny of the policy-making process, and as such should be seen as a necessary but not sufficient condition for improving regulatory policy.

## **2. Regulatory Impact Analysis**

- **A summary of presentations on “Regulatory Impact Analysis” and on “Improving Capacities and Enforcing Regulatory Impact Analysis” by Peter Mumford and by Ali Haddou-Ruiz, respectively**

Regulatory impact analysis (RIA) is a method of systematically and consistently examining potential impacts arising from government action and communicating the information to decision-makers. The most effective RIA processes are built upon a strong foundation of adequate resources. In this

respect, capacity-building is vital in the area of RIA as it contributes to developing the resources needed to carry out an RIA process.

**a. Building a nexus between trade policy-makers and regulators**

An open and competitive services market is a function of the development of good domestic regulations that are equitable, transparent, effective, and efficient. Trade policy input into the RIA would ensure good domestic regulations to be developed. As such, it is important to build a nexus between trade policy-makers and regulatory officials, through which they can cooperate in RIA that is part of the process of the development of good domestic regulations.

**b. RIA quality** is a function of active training programs and guidance tools among others. A strong and effective training program can contribute to regulatory capacity-building.

**c. Capacity building steps for RIA:**

- Development of on-line guide for RIA conduct
- Carrying out of training courses for government officials involved in RIA and development of regulations.
- Carrying out of special courses in respond to demand

**d. For Carrying out Effective RIA**

Capacity-building is important in the area of RIA so that regulators can meet the following five objectives in carrying out their task.

- *Efficiency*: Regulators should adopt and maintain only regulations for which the costs imposed on society are justified by the benefits derived by society, and that achieve objectives at lowest cost, taking into account alternative approaches to regulation, such as:
  - Consideration of alternatives to regulation

- Minimum necessary regulation
  - Regulatory costs and benefits
  - Reasonable compliance cost
  - Minimal fiscal impact
  - Minimal adverse impact on competition
  - International compatibility
- *Effectiveness:* Regulators should design regulations that are the most effective to achieve the desired policy objectives, given the following considerations.
    - Reasonable compliance rate
    - Compatibility with the general body of law
    - Compliance with basic principles of the legal and constitutional system
    - Flexibility of regulation and standards
    - Performance-based requirements that specify outcomes
    - Review regulations systematically to ensure they continue to meet - their intended objectives efficiently and effectively
  - *Transparency:* Regulators should ensure that the regulation making process is transparent to both the decision-makers and those affected by regulation, taking into account the following transparency steps.
    - Adequate identification of the nature and extent of the problem
    - Clear identification of the objective of regulation
    - Cost benefit analysis of regulatory proposals
    - Risk assessment of regulatory proposals
    - Public consultation
    - Adoption of direct approaches aimed at the root cause of an identified problem

- *Clarity.* Regulators should ensure that regulatory processes and requirements are as understandable and accessible as practicable to the public, taking into account the following considerations.
  - Make things as simple as possible to achieve the regulatory objective.
  - Draft in plain language.
  - Keep discretion to a minimum.
  - Educate the public for best results.
  
- *Equity:* Regulators should ensure that regulation is fair and that those affected *are* treated equitably, taking into account the following considerations.
  - Obligations, standards, and sanctions should be designed in such a way that they can be imposed impartially and consistently.
  - Regulation should be consistent with the stated principles.
  - People in like situations should be treated in a similar manner.
  - The processes and procedures of the regulatory system should be reliable.

### **3. Good Practices for the Conduct of Regulatory Impact Analysis**

- **Based upon the document, “A Guide to Preparing Regulatory Impact Statements, New Zealand” (2002/SOM I/CTI/GOS/025)**

The Regulatory Impact Analysis (RIA) formalizes and provides evidence of the steps that should be taken in policy formulation, and provides consistency in the presentation of this information. Completion of an RIA helps provide governments with assurance that new or amended regulatory proposals are subject to proper analysis and scrutiny as to their necessity,

efficiency, and net impact on community welfare. This enhances the government's ability to make well-informed decisions.

The RIA should contain the following information:

- a statement of the nature and magnitude of the ***problem*** and the need for government action;
- a statement of the public policy ***objective(s)***;
- a statement of feasible ***options*** (regulatory and/or non regulatory) that may constitute viable means for achieving the desired objective(s);
- a statement of the ***net benefit*** of the proposal, including the total regulatory costs (administrative, compliance, and economic costs) and benefits (including non-quantifiable benefits) of the proposal, and other feasible options; and
- a statement of the ***consultative program*** undertaken.

#### **a. Problem Definition**

Government interventions should be based on clear evidence that a problem exists and that government action is justified. The RIA should discuss the nature and the extent of the problem and identify the likely risks associated with not intervening.

#### **b. Analytical Framework**

An explicit analytical framework helps to identify i) what government wants to achieve (objectives, and possibly sub-objectives); ii) how, in general terms, it considers those objectives can be promoted (principles); and iii) the main impacts (costs and benefits) against which the policy options are expected to be assessed.

- *Specifying Desired Objective(s):* Objectives should be clear and concise. The objective should be specified broadly enough to allow consideration of all relevant alternative solutions, but should not be so broad or general that the range of alternatives becomes too large to assess, or the extent to which the objectives have been met becomes too hard to establish.  
The objective should be specified in relation to the underlying problem and desired outcomes. Also, the objective should not pre-justify a preferred solution, but should allow for an examination of alternative solutions to the underlying problem. The objective should also be outcome or impact based.
- *Specifying Key Principles:* The principles, or broad statements of how the government considers the proposed objective will be achieved, should be identified at an early stage.  
For example, relevant principles for the development of a preferred option relating to minimizing environmental costs (air and water) from roads might include:
  - clearly specifying and enforcing property rights;
  - providing mechanisms to ensure people face the true cost of their actions;
  - ensuring people in like situations are treated the same; and
  - avoiding unnecessary, conflicting and complicated regulations, thereby minimizing compliance costs and other distortionary costs.
- *Identifying Key Impacts:* The key impacts identified should relate directly to the objectives for the reform. The key objective(s) should be broken down into their constituent costs and benefits, and any other impacts identified (if the objectives are correctly specified, these additional impacts should be minimal).

The costs and benefits could be specified in terms of, for example:

- the incidence of the impacts (government, consumers, business);
- the transitional or long term nature of such impacts; and/or
- direct or indirect impacts.

### **c. Identifying Feasible Options**

The RIA should carry out, early in the policy development process, an informed consideration of the options available to deal with an identified problem. The decision about how to intervene may be as important as the decision about whether to intervene. A variety of options are available. These are likely to have very different implications, differing magnitudes of costs and benefits, differing distributional effects, and administrative requirements.

In more detail, options available to a government might include (but not be limited to): i) no government intervention; ii) status quo; iii) extending current legislation; iv) increasing enforcement; v) information and education campaigns; vi) economic instruments (taxes, subsidies, and tradable property rights); vii) voluntary standards/codes of practice; viii) self regulation; and ix) co-regulation.

- *No Government Intervention:* This option involves relying on the market in conjunction with existing laws (general liability law). No government intervention is particularly important to consider when undertaking reviews of existing regulation.

By holding individuals and firms responsible for their actions and requiring them to pay damages where liable, incentives may develop for individuals and firms to take appropriate action. Through legal remedies (litigation and common law), individuals

can enforce their rights rather than relying on government action to do so.

This approach is more appropriate where flexibility is needed in the application of the law, such as where there is a heavy emphasis on the circumstances surrounding the case (for example, where the degree of culpability is important).

- *Status Quo*: The status quo is a dynamic concept. It is the situation that will arise if current policy settings are maintained. Maintaining policy settings could lead to deterioration in the public interest, for example, escalating environmental damage in the event allowable maximum pollution discharge limits are not reduced as the number of polluting factories increases. Equally, evaluation of the status quo should include consideration of the potential for a problem to "self-correct". The status quo should always be considered as an option, to ensure that alternatives are not chosen which would lead to worse outcomes than expected by maintaining the current policy settings. The status quo is frequently the option against which other options should be compared.
- *Extending Current Legislation of General Application*: In some circumstances, legislation with proven ability to overcome problems of the nature being addressed may already exist, but does not have sufficient coverage to deal with the circumstances under consideration. In such cases it may be more appropriate to expand coverage of this existing legislation than to attempt to create a new regime. The major advantages of this approach lie in addressing the problem through a proven means, and ensuring

consistency between the treatment of the same issue in different circumstances.

- *Increasing Enforcement:* Another approach is to consider the implications of increasing the level of enforcement associated with the current regulation, rather than implementing new or amended provisions. It may be the case that existing regulations are adequate in and of themselves, but are not enforced adequately.
- *Information and Education Campaigns:* This approach acts to change the quality and level of the information available to the public, or to change its distribution. This can be achieved by regulating for certain information to be provided, or by government providing the information itself. This may involve requiring information about the attributes of a product, process, or situation (e.g., dangerous working conditions) be disclosed. These measures improve markets by allowing people to make decisions that better match their preferences. The main advantage of these strategies over some other approaches is that they allow individuals to choose what is best for themselves given the information available, rather than government imposing one solution on all.
- *Economic Instruments:* Economic instruments seek to influence market behavior by altering the relative prices of goods and services in a market, or by creating a market where none previously existed. Market behavior can be influenced either directly (for example, through a tax or user charge), or indirectly (for example, through controlling the level of supply). Economic

instruments will generally require a regulatory basis. The two main types of economic instruments are:

- *Taxes, charges, or subsidies*: Government can alter private incentives (and therefore behavior) by taxing actions it wishes to discourage and subsidizing action it wishes to encourage. For example, by taxing pollution or subsidizing education to correct for perceived externalities. A tax or charge used to influence behavior in this way is distinct from a general tax, where the objective is to raise revenue for government spending programs while seeking to minimize behavioral change.
- *Tradable quota (marketable rights)*: These are a means of controlling, for *example*, the quantity of some externality produced, or the amount of a scarce resource taken. Under tradable quota systems, the government sets an overall maximum supply level for the outcome of a specific activity. Producers must then hold a right to produce or take, and may not produce or take any more than the level provided for by the quota. Quota is a valuable property right. Providing for tradable quotas places strong incentives on the market to use resources efficiently, and ensure the quotas go to where they are valued the most.
- *Voluntary Standards/Codes of Practice*: Positive behavior can be achieved through *instruments* such as voluntary standards and codes. The standards can be developed by industry or cooperatively with government as codes of practice or guidelines that seek to detail what is deemed to be acceptable practice.

Voluntary codes maximize the potential for flexibility of response to allow easy adjustment in response to changes in the industry or occupation. They are best applied where there are strong occupational or industry bodies, where the implications of non-compliance do not pose significant or irreversible risks, and where non-compliance with the standard or code is visible (certification, for example, will tell consumers whether their provider complies with specified standards).

- *Self-Regulation:* Self-regulation can be defined as an arrangement in which an organized group (such as an industry association or professional body) regulates the behavior of its members, and where that organized group can impose sanctions. The advantages of self-regulation are; rules are more likely to be observed if they are made by insiders, changes and updating can be more rapid, rules are developed using the expertise of those being regulated, and it is cheaper for the government as the regulated group bears the costs of regulating (and also have strong incentives to minimize those costs). Compliance is achieved because the players involved may find it in their interest to obey the (non-binding) rules. This can be driven by a concern by individuals and firms about their reputation, or by peer pressure.

As it is the industry that formulates the rules and codes of conduct, there is a risk that self regulation could result in anti-competitive behavior. That is, unnecessary barriers to entry to an occupation or market, or other undesirable practices such as price fixing may occur.

- *Co-Regulation:* Co-regulation refers to a situation where the regulatory role is shared between government and an industry body. Co-regulation can range from simple endorsement of industry self regulation, to providing legislative backing to privately defined rules when industry lacks sufficient sanctions to ensure compliance, thus bordering on traditional regulation.

Co-regulation is used for certain types of occupational regulation (e.g., lawyers, doctors, financial advisers). In such cases, the legislature may delegate regulatory authority to an organization

representing members practicing that occupation. The organization makes rules, levies charges, and applies discipline. These can have the same force and legal authority as if the government itself carried them out. Again, care needs to be taken to ensure the interests of consumers are given prominence, and that opportunities for anti-competitive practices are minimized.

#### **d. Regulatory Impact Assessment**

- *Context:* The fundamental purpose of the RIA is to demonstrate that the expected benefits of the proposed regulations will exceed the expected costs; that is, there is a net benefit, when considered from the perspective of society as a whole, associated with the proposed regulation(s).

A cost-benefit analysis is a systematic approach to demonstrate that this requirement will be met. A cost-benefit analysis is a conceptual framework for the economic evaluation of programs and projects in the public sector. It differs from a financial evaluation in that it considers all gains (benefits) and losses (costs) regardless of from where or to whom they accrue.

Opportunity costs may be direct in terms of the costs imposed on businesses and consumers - resources that could be allocated to other uses. Opportunity costs may also take the form of policies that have been displaced or must be foregone because a particular policy has been adopted.

- *Identifying All Significant Impacts:* A fundamental requirement of sound policy *development* is to ensure that no significant impact of the proposal is overlooked. While many impacts are easily identified, others - particularly those which are indirect in their

effects - may not be taken into account. Common types of costs and benefits include:

- *Direct and Indirect:* Direct impacts are those clearly related to the purpose or objective of the regulatory proposal. Indirect impacts are incidental to this main purpose, although they may, nonetheless, be of significant magnitude.
- *Tangible and Intangible:* Tangible impacts are those values that can be identified and quantified. An example is the cost of employing people to collect information from the public. The term "intangible" is often applied to those impacts to which it is difficult to attribute a dollar value. Examples might include time, health, comfort, environmental, and cultural impacts.
- *Administrative and Compliance:* These are the paperwork and related costs of complying with the regulations, and with monitoring and enforcing compliance. Administrative costs will be incurred by both the regulatory agency and the "target" group (in the form of compliance costs) of the regulations. Compliance and administrative costs will often include both one-off (capital, systems, training, etc.) and ongoing costs.
- *Avoidance of "Double Counting" Errors:* Although it is important to identify and include all impacts, it is also critical to avoid double counting any impact. While this appears an obvious caveat, double counting can often occur due to a failure to recognize the redistributive impacts of particular policies.
- *Resource Allocation and Distributional Impacts:* Resource allocation is a *central* concept underlying economic efficiency. For efficiently operating markets, resources are allocated optimally if prices reflect full costs. In this way resources are consumed only up to the point where the benefit from consuming the "extra" resource equals the cost of providing that resource.

- *Comparing Options:* It is important to clearly identify the base case option against which the impacts of the preferred option are being assessed.

#### **e. Public Consultation**

A key aim of systematic public consultation is to make information available to the public, to listen to a wide range of interests, to obtain more and better information from affected parties, and to be more responsive to what is heard. This process should result in more efficient decision-making.

Effective consultation is based on principles of openness, transparency, integrity, and mutual respect. It requires that:

- key information be provided to those being consulted;
- those being consulted are in a position to influence policy formulation;
- sufficient time is allowed for a considered response to be compiled by those being consulted;
- the agency undertaking the consultation has the capability to interpret and use the information derived correctly; and
- the information gained is considered in good faith, that is, the advice obtained cannot be discounted without good reason, and must be sought prior to final decisions being taken.

There is a wide range of different consultative approaches. These include departmental advisory bodies, secondment of personnel from the private sector, public discussion papers, multi-stakeholder negotiations, focus (consultative) groups, targeted briefings, workshops, questionnaires, public notice and comment, hearings and select committees. The appropriateness of each approach will depend on the issues under consideration, the nature of the group being consulted, and the resources, including time, available for undertaking the consultation.

## **ANNEX I**

### **Guidelines for Development of the “Menu of Options for Voluntary Liberalization, Facilitation and Promotion of Economic and Technical Cooperation in Services Trade and Investment”**

The following guidelines were agreed by members of the APEC Group on Services at the initiation of this work in 2000 as the basis for the development of the *Menu of Options for Voluntary Liberalization, Facilitation and Promotion of Economic and Technical Cooperation in Services Trade and Investment*. They define the Menu of Options as:

1. A synthesis of GOS work and an organizational framework for GOS work in the future;
2. A product of the GOS;
3. Voluntary in nature and non-binding;
4. Balanced between the three pillars of APEC, which mutually support and reinforce each other;
5. An illustrative listing of measures affecting trade in services;
6. Of a generic nature, not economy-specific or sector-specific;
7. Providing options for APEC members to draw upon for inclusion of actions into their own IAPs;
8. Developing elements that were discussed in depth by GOS members;
9. Contributing to the understanding of issues relevant to the objectives of liberalization and facilitation of trade in services within APEC, and therefore specially tailored in this fashion to address APEC needs; and
10. Contributing to advance the work in the services area of the WTO.

## ANNEX II<sup>‡‡</sup>

### **Accomplishments of the GOS in carrying out work on Phase III of the *Menu of Options* during 2002: Background Papers and Presentations**

Five background papers were commissioned from services experts from various APEC member economies during Phase III of the *Menu of Options for Voluntary Liberalization, Facilitation and Promotion of Economic and Technical Cooperation in Services Trade and Investment*. These papers were presented to enhance understanding and stimulate discussion on issues of transparency and domestic regulation contained in the *Menu of Options*. The contents of the background papers represent the views of the authors and do not necessarily reflect the views of the members of the GOS. The background papers in their revised form can be found at the website of the APEC Group on Services (<http://www.apecsec.org.sg>). The five background papers are the following:

- i) *What Constitutes Good Regulation for Services*, by Peter Mumford;
- ii) *Transparency in Regulation of Services*, by Sherry Stephenson and Soonhwa Yi;
- iii) *Issues in Domestic Regulations of Services: Horizontal vs. Sectoral Disciplines*, by Alexandra Sidorenko and Christopher Findlay;
- iv) *Deepening Sectoral Disciplines for Services Regulation*, by Geza Feketekuty; and
- v) *The 'Necessity Test' in Domestic Services Regulation*, by Joel Trachtman.

Additionally, three presentations were made to the GOS in 2002 for the purpose of the practical exercises carried out during two workshops on

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<sup>‡‡</sup> This is Annex of a document presented to the APEC Committee on Trade and Investment entitled "Services: Convenor's Summary Report and 2002 CAP" (2002/SOM III/CTI/005 Rev.1) and represents one of the GOS main deliverables for 2002.

"Towards Improving Regulation in the Services Sector". These presentations are the following:

- i) Presentation on *Good Regulatory Practices for Energy Services* by Michele Foss;
- ii) Presentation on *Regulatory Impact Analysis for Services* by Peter Mumford; and
- iii) Presentation on *Improving Capacity for carrying out and enforcing Regulatory Impact Analysis* by Ali Haddou-Ruiz

In 2003, the GOS will complete Phase III of the Menu of Options by carrying out a substantive discussion of the issues contained in these papers and presentations, and in the document prepared by the PECC entitled ***Towards Improving The Understanding and Application of Services Regulation***, with the objective of preparing conclusions that represent GOS' members understanding of these issues.

## **ANNEX III**

### **The Development of the Menu of Options: 2000-2003**

The *Menu of Options* serves to provide APEC members with a broad range of policy choices in the services trade area that could be suitable for different national economic circumstances, relevant to the promotion of liberalization and facilitation of services trade and investment. A description of the work carried out is as follows.

**Phase I (2000):** This phase was during year 2000 voluntarily by the PECC without request for funding. During early 2000, the APEC Group on Services approved the idea of developing a "*Menu of Options*". At its May 2000 meeting, GOS members encouraged the further elaboration and development of this project on the basis of the *Prototype Menu of Options for Voluntary Liberalization, Facilitation, and Promotion of Economic and Technical Cooperation in Services Trade and Investment* presented by PECC. The *Prototype Menu of Options* was approved by the GOS in September 2000 as one of the items of its Collective Action Plan and became a deliverable for the year 2000.

**Phase II (2001):** Phase II of the *Menu of Options* was completed during the GOS meeting at SOM III in August 2001 and culminated in a document that was prepared by the PECC, approved and finalized by GOS members, and subsequently published by the APEC Secretariat. This document was a deliverable of GOS for the year 2001. The document was developed according to the guidelines set out in Annex III and structured according to the three pillars of APEC, namely trade liberalization, trade facilitation, and economic and technical cooperation (ECOTECH). The document can be found on the web site of the APEC GOS and in print under the publication number

APEC#201-CT-01.6. APEC Ministers Responsible for Trade made reference to the work of the GOS on the *Menu of Options* in their statement of October 2001.

**Phase III (2002-2003)**: The work in Phase III has involved the exploration and further development of the two areas of transparency and domestic regulation identified by the GOS within the *Menu of Options* as relevant issues for the WTO services negotiations. The work in year 2002 was concentrated on the preparation and presentation of background studies in these two areas, along with practical exercises on regulatory impact analysis. This work constituted one of the deliverables for the GOS in 2002 (reference Annex II). The work in year 2003, as contained in this document, focused on discussing the studies mentioned above with the objective of reaching agreement on additional elements to add to the *Menu of Options* in the two areas of transparency and domestic regulation. The present consolidated document represents one of the GOS main deliverables for 2003.