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Domestic Regulation within the Framework of GATS

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1. Introduction

Today we are witnessing remarkable changes in the structure of service sectors: liberalization of service markets, transnationalization of service companies and growing foreign direct investment in service sectors.[1] Services which developed in the past 30 years into the largest economic sector in many countries are increasingly transcending national borders. The General Agreement on Trade in Services (GATS), the World Trade Organization's (WTO) set of multilateral rules governing international trade in services developed during the Uruguay Round, aims at facilitating this shift towards international liberalization by breaking down national barriers. These barriers are very different from the 'traditional' barriers that affect international trade of goods. Due to their 'invisible' character, services are barely affected by border measures: there are no tariffs, and quotas are very hard to uphold. Rather, services are subject to a "myriad of domestic regulations".[2] While the General Agreement on Trade in Goods (GATT) only recently became involved in sensitive domestic areas such as technical standards, GATS had to tackle from the outset internal policy issues ranging from qualification and licensing requirements in professional services, safety standards in transportation service, to universal access requirements in health and education. Therefore, GATS had to strike a balance between trade liberalization and the regulatory autonomy of WTO Members. This paper starts in section 2 with an exploration of both parts of the balance. This will offer us a useful lens through which we can analyze the content of GATS. Section 3 introduces briefly the general GATS framework. In section 4 our scope will be narrowed to Article VI GATS, which explicitly deals with disciplines on domestic regulations. The analysis of this provision will pick up other provisions that are linked to our discussion and that deeply influence domestic regulation. Finally, we return to the weighing scale outlined in section 2: what elements decide that a suitable equilibrium can be reached between trade liberalization and the regulatory freedom of WTO Members?

2. Exploring the Weighing Scale of GATS: Balancing Members' Right to Regulate and Trade Liberalization

[1] *See inter alia* United Nations Conference on Trade and Development, *World Investment Report 2004: the Shift towards Services,* New York and Geneva, United Nations, 2004.
[2] M. Matsushita, T.J. Schoenbaum and P.C Mavroidis, *The World Trade Organization. Law, Practice, and Policy,* Oxford, Oxford University Press, 2003, 229.

A close look at the preamble of GATS reveals the drafters' balancing exercise. According to the second recital, Members are "wishing to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and *progressive liberalization* and as a means of promoting the economic growth of all trading partners and the development of developing countries" (emphasis added). However, the drafters were conscious of possible tensions between trade liberalization in services and national regulatory autonomy. Therefore, the third recital introduces a weighing scale: "desiring the early achievement of progressive higher levels of *liberalization* of trade in services (…), while giving due respect to *national policy objectives*" (emphasis added). Furthermore, the fourth recital recognizes explicitly the "*the right of Members to regulate*, and to introduce new regulations, on the supply of services within their territories in order to meet *national policy objectives* (…)" (emphasis added).[3] Thus, on the one hand, GATS aims at progressive liberalization of services, while, on the other hand, it recognizes the right of Members to regulate in order to meet national policy objectives. The latter can be seen as a confirmation of the international law principle of a State's sovereignty in the conduct of its national policies on its territory.

The central concepts of the weighing scale, "regulation" and "liberalization" are not defined in GATS. We tend to adhere to the broad definition by Reagan, who defines regulation as "a process or activity in which government requires or proscribes certain activities or behaviour on the part of individuals and institutions, mostly private."[4] In fact, regulation encompasses the variety of instruments by which governments act. Regulation in service sectors is often designed to overcome market failures[5]: monopolies in network-based services[6], externalities and asymmetric information in knowledge and intermediation-based services[7] and the desire to ensure universal access in essential services.[8]

"Liberalization" is mostly understood as the process of the removal of legal or other barriers to competition and/or market access. Although liberalization often results in reducing burdensome regulations, in the literature it is often distinguished from the concept of deregulation.[9] While deregulation refers to the reduction or elimination of regulations,

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[3] Emphasis added.
[4] M.D. Reagan, *Regulation – The Politics of Policy,* Boston and Toronto, Little, Brown and Company, 1987, 15.
[5] *See* A. Mattoo and P. Sauvé, "Domestic Regulation and Trade in Services: Looking Ahead", in A. Mattoo and P. Sauvé (eds.), *Domestic Regulation and Service Trade Liberalization,* Washington, World Bank and Oxford University Press, 2003, 223-224.
[6] For example: telecommunications, transportation and energy services.
[7] For example: financial and professional services.
[8] For example: health and education services.
[9] A. Mattoo and P. Sauvé, "Domestic Regulation and Trade in Services: Key Issues", in A. Mattoo and P. Sauvé (eds.), *loc. cit*., supra n. 5, 1; H. Mamdouh, "The GATS and Domestic Regulation. Introduction", Workshop on Domestic Regulation, 2004, 2, available at:

liberalization often requires re-regulation. Five different approaches to liberalization can be distinguished in WTO law[10], each with its own position on the scale between progressive liberalization and regulatory autonomy. First, GATT as well as GATS attempt to ban quantitative restrictions, regardless whether they are discriminatory or not. This reflects the aim of the WTO system to convert quantitative restrictions into non-quantitative restrictions to trade. The general disciplines concerning such non-quantitative restrictions bring us to the second traditional tool of liberalization: non-discrimination, which prohibits a different treatment simply because a good or service is produced abroad. This is implemented by the requirements of most-favoured nation (MFN) and national treatment. The non-discrimination principle does not require the acceptance of the regulatory standards of other countries. The latter is mandated by a third tool of liberalization: mutual recognition. Fourth, under a system of harmonization or standardization, an international standard with which national regulations have to comply is set by an international or supranational organization. Clearly, this fourth category limits regulatory autonomy most because national regulations might have to be changed in order to conform to international standards. A fifth tool could be added to this list: the necessity test.[11] This test requires that regulations are not more trade-restrictive than necessary to attain a legitimate policy objective. Although the necessity test often frames an exception to an obligation (as in Article XX GATT), it also serves as a positive obligation, and thus as a tool of liberalization, in so-called "non-discrimination" or "non-restriction" provisions.[12] In these provisions the focus is shifted from "fair trade" (prohibition of discrimination) to trade as such. It is said that this reflects the influence of the neo-liberal political agenda of the 1980s on the drafting of GATS during the Uruguay Round.[13]

The implications of the necessity test as a tool of liberalization are particularly relevant for our study of Article VI GATS, which aims to tackle regulations that are not discriminatory *de jure* or *de facto* but are more trade-restrictive than necessary to achieve a certain policy goal.

To sum up the above, GATS aims, through a number of instruments of liberalization, to re-regulate domestic policy in order to establish competition and market access in service sectors without curtailing the freedom of Members to regulate so as to meet national policy

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http://www.wto.org/english/tratop_e/serv_e/workshop_march04_e/sess1_hamid1_e.ppt#435,2,Conceptual Basis.

[10] M. Krajewski distinguishes three general approaches to liberalization, supplemented by the application of a necessity test: non-discrimination, mutual recognition and harmonization/standardization. M. Krajewski, *National Regulation and Trade Liberalization in Services. The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy,* The Hague, Kluwer Law International, 2003, 6.

[11] M. Krajewski, *loc. cit.*, supra n. 10, 7.

[12] For example: Article 2.2 Agreement on Technical Barriers to Trade (TBT) and Article 2.2 Agreement on Sanitary and Phytosanitary Measures (SPS)

[13] M. Krajewski, *loc. cit.,* supra n. 10, 59.

objectives. This fine balance, or slippery slope, must be borne in mind while studying in depth the provisions of GATS.

3. General framework of GATS

3.1. Scope

Article I GATS sets out the broad scope of GATS. It applies to measures[14] by Members affecting trade in all services in any sector except those supplied in the exercise of governmental authority.[15] As in the case of GATT[16], the reach of this definition goes beyond central governments to include measures taken by regional and local governments and even measures of non-governmental bodies in the exercise of powers delegated by governments.

The concept of "service" is not defined in GATS.[17] The scope is framed by the concept of "trade in services," which is defined in terms of four different modes of supply: cross-border supply without the physical movement of supplier or consumer (Mode 1: cross border), movement of the consumer to the country of the supplier (Mode 2: consumption abroad), services sold in the territory of a Member by foreign entities that have established a commercial presence (Mode 3: commercial presence) and the admission of foreign natural persons to another country to provide services there (Mode 4: presence of natural persons)[18].

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[14] As to the question whether a "practice" may be challenged as a "measure" in WTO dispute settlement, s*ee* Report by the Panel, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* 10 November, 2004, WT/DS285/R, paras. 6.196 – 6.198; Report of the Appellate Body, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* 20 April 2005, WT/DS285/AB/R, paras. 129-132.

[15] "[A] service supplied in the exercise of governmental authority" is defined as "any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers": Article I.3.(c) GATS. However, some authors remark that the exact scope of this exception remains unclear. For example, it is uncertain whether user fees for public health services would imply that these services are provided on a commercial basis and thus fall within the scope of GATS. See, R. Howse and E. Türk, "The WTO negotiations on services: The regulatory state up for grabs", *Canada Watch,* September 2002, Volume 9, Numbers 1-2, 3. Also available at: http://faculty.law.umich.edu/rhowse/Drafts_and_Publications/services.pdf. D. Luff favours a rather broad applicability of health services under the GATS. D. Luff, "Regulation of Health Services and International Trade Law", in A. Mattoo and P. Sauvé (eds.), *loc. cit*., supra n. 5, 193-196. See also M. Krajewski, "Public services and trade liberalization: mapping the legal framework", 6(2) *JIEL*, 2003, 341-367.

[16] Article XXIV:2 GATT.

[17] This reflects the difficulties in formulating a clear-cut definition of services. *See* United Nations Conference on Trade and Development, *World Investment Report 2004: the Shift towards Services, loc. cit.,* supra n.1, 145. This lack of definition has far-reaching implications because the general obligations of GATS apply to all services except those which are scheduled by Members. A non-mandatory "Service Sectoral Classification List" was developed during the Uruguay Round and is largely based on the United Nations Central Product Classification System (CPC). *See* M. Matsushita, T.J. Schoenbaum and P.C Mavroidis, *loc. cit.,* supra n. 2, 235.

[18] The Annex on Movement of Natural Persons Supplying Services under the Agreement specifies the scope of Mode 4. The Annex excludes from the GATS measures affecting natural persons seeking

Thus, GATS provisions are relevant not only for services, but also for service suppliers that are legal (Mode 3) or natural (Mode 4) persons.[19] GATS covers, in a uniform manner, the wide variety of different services and service suppliers; still, three annexes attached to GATS add specific provisions or exceptions in some specific services such as air transport[20], financial services[21] and telecommunications.[22]

3.2. General Obligations

Part II of GATS sets out "general obligations and disciplines", which apply, in principle, to all services. Many of GATT's key disciplines have a close equivalent in this part of GATS.

Article II GATS sets forth the obligation of MFN and parallels the centrally important Article I of GATT. It prohibits less favourable treatment of like foreign services and service suppliers. Most of the exceptions correspond to exceptions in GATT.[23] However, in contrast to GATT, article II:2 GATS includes a negative list approach. Members are permitted to maintain measures inconsistent with the MFN requirement if this inconsistency is listed in the Annex on Article II Exemptions. [24]

A second basic principle carried over from GATT is that of transparency. This is particularly relevant for trade in services, because so many of the barriers consist of (often little known) domestic regulations. Article III GATS deals explicitly with this issue. It requires Members to publish promptly, except in emergency situations, "all relevant measures of general application" that affect the operation of the Agreement.[25] Furthermore, Members must notify the Council for Trade in Services of all new regulations "which significantly affect trade in services covered by its specific commitment under this Agreement."[26] Lastly, Members must respond to any request by other Members for specific information on any of

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access to the employment market of a Member and measures regarding citizenship, residence or employment on a permanent basis.

[19] M. Matsushita, T.J. Schoenbaum and P.C Mavroidis, *loc. cit.,* supra n. 2, 237.

[20] GATS, Annex on Air Transport Services.

[21] GATS, Annex on Financial Services.

[22] GATS, Annex on Telecommunications.

[23] For example: an exception for preferential trade areas (Article V and V*bis* GATS), the general exceptions (Article XIV GATS) and the exception for security (Article XIV*bis* GATS).

[24] General Agreement on Trade in Services, Annex on Article II Exemptions. The Annex states that "in principle, such exemptions should not exceed a period of 10 years." So, these exemptions do not terminate automatically after a period of 10 years. The Annex mandates that these exemptions "shall be subject to negotiation in subsequent trade liberalizing rounds," which are currently proceeding.

[25] Article III:1 GATS. Yet, Article III:2 notes that "where publication as referred to paragraph 1 is not practicable, such information shall be made otherwise available."

[26] Article III:3 GATS.

their measures of general application. In order to fulfil this requirement, they have to establish inquiry points that will help provide specific information upon request.[27]

The focal point of this paper, Article VI GATS, is also part of the "general obligations and disciplines". However, many disciplines of Article VI only apply to domestic regulation in sectors where specific commitments are made. This hybrid character of Article VI is not always recognized in the literature.[28] We will explore these disciplines in depth in section 4.

Article VII addresses the principle of recognition. Accordingly, Members "may recognize the education or experience obtained, requirements met, or licences or certifications granted in a particular country." Unlike provisions in the TBT and SPS Agreements, this does not require Members to accept, or even to give positive consideration to foreign standards. It merely allows mutual recognition among Members on a non-discriminatory basis.[29] Such recognition may be based on harmonization, an agreement or an autonomous decision.[30]

3.3 Specific Commitments

Part III of GATS reflects a positive list approach[31]: Members must fulfil the disciplines on market access and national treatment only to the extent that they make specific commitments in a certain service sector. Thus they apply only to those services listed in a Member's schedule, and then only to the degree that no qualifications or conditions are listed.[32] In

[27] Article III:4 GATS

[28] *See* M. Matsushita, T.J. Schoenbaum and P.C Mavroidis, *loc. cit.,* supra n. 2, 243. These authors write that "as a general obligation, Article VI of the GATS requires that domestic regulations concerning services be administered in a "reasonable, objective and impartial manner"." However, the scope of Article VI:1, which deals with this issue, is explicitly limited to sectors where specific commitments are undertaken.

[29] Article VII:2 and VII:3 GATS.

[30] Article VII:1 GATS.

[31] This positive list approach was a request of developing countries, which felt they did not have the administrative resources required to determine all the measures that apply to each sector and to decide which they want to exempt. *See* B.M. Hoekman and M.M. Kostecki, *The political economy of the World Trading System. The WTO and Beyond,* Oxford, Oxford University Press, 2001, 2nd ed., 254.

[32] Yet, as shown by the case *United States – Gambling,* Members should be careful about the description of the service sectors they want to include in their schedule. Although the United States argued that it did not intend to schedule a commitment for gambling and betting services and the Panel noted that this "may well be true" and even felt "some sympathy" with this argument, the Panel concluded that the scope of specific commitments cannot depend on the initial intention of the Member. The Panel decided that gambling could not be regarded as 'sporting' and thus fell under the specific commitment of the U.S. made under the section 'other recreational services (except sporting).' Report by the Panel, *US – Gambling, loc. cit.,* supra n.14, paras. 6.123 – 6.136. The Appellate Body upheld, "albeit for different reasons", the Panel's finding on this point. Report of the Appellate Body, *US – Gambling, loc. cit.,* supra n. 14, para. 213.

general, Members have made limited commitments, excluding many sectors and many modes of supply.[33]

The discipline on market access is the first specific commitment. It shapes Members' individual commitments to admit foreign services and service suppliers. It requires no less favourable treatment to services and service suppliers of other Members than is provided in a Member's schedule of commitments. Six types of market access restriction are, in principle, prohibited for scheduled sectors unless their use is clearly provided for in the schedule.[34] For example, limitations on the number of service suppliers are prohibited except if it is explicitly listed in the Member's schedule. To some degree, this provision is similar to Article XI GATT, which prohibits the use of quotas.[35]

The national treatment obligation also requires a specific commitment. Article XVII GATS obliges Members to give treatment to foreign services and service suppliers no less favourable than they give to their own services and suppliers. However, as a specific commitment, Members must fulfil this obligation "in the sectors covered by its schedule, and subject to any condition and qualifications set out in the schedule". This has the same character as a GATT-bound tariff: the stated conditions or qualifications represent the worst treatment that may be given, and there is nothing to prevent better treatment being given in practice.[36] The national treatment obligation covers both *de jure*[37] and *de facto*[38] discrimination since Article XVII:3 GATS extends the national treatment requirement to formally identical treatment. This was also implicitly confirmed by the Appellate Body in

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[33] A. Mattoo, "Shaping future GATS rules for Trade in Services", paper prepared for an NBER Conference on Trade in Services, June 2000, available at: http://econ.worldbank.org/files/1716_wps2596.pdf , 10. See also R. Chanda, "GATS and its implications for developing countries: Key issues and concerns", Discussion Paper of the United Nations Department of Economic and Social Affairs, November 2002, 7-11, available at: http://www.un.org/esa/esa02dp25.pdf

[34] These limitations are pursuant to Article XVI:VI:2 GATS: "(a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test; (b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic need test; (c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test; (d) limitations on the total number of natural persons that may be employed and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test; (e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and (f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

[35] M. Hoekman and M.M. Kostecki, *loc. cit.,* supra n. 31, 253.

[36] WTO Secretariat, Trade in Services Division, "An Introduction to the GATS", 1999, 8, available at: http://www.wto.org/english/tratop_e/serv_e/gsintr_e.doc .

[37] A measure discriminates *de jure* if it is based on the difference of origins of services or service suppliers (e.g. nationality of a service supplier). M. Krajewski, *loc. cit,* supra n. 10, 108.

[38] A measure discriminates *de facto* if it is origin-neutral but nevertheless has adverse, discriminating effects on foreign services or service suppliers.

EC-Bananas.[39] The implications of the broad range of measures that are covered by Article XVII will be explored hereafter because it is highly relevant for the scope of Article VI on domestic regulations.

The remaining provision in Part III, Article XVII GATS, allows Members to negotiate "additional commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII, including those regarding qualifications, standards or licensing matters." So, the drafters of GATS realized that there might exist measures that are not captured by Article XVI (not one of the six listed types of market restrictions) or Article XVII (not be discriminatory) but nevertheless constitute barriers to trade. [40] Members can thus negotiate and schedule *additional* commitments related to measures that fall outside the scope of Article XVI or Article XVII.

3.4. General Exceptions

Article XIV GATS contains a general exception similar to Article XX GATT. Like GATT, it is limited to a closed list of legitimate objectives on the basis of which Members can justify a violation of the Agreement[41], though the list has a broad coverage. It states that, subject to certain requirements, "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures" necessary to protect a specific legitimate objective. Therefore, it applies both to general obligations and to specific commitments. Consequently, violations of disciplines imposed by Article VI (VI:1, VI:2, VI:3, VI:5 and VI:6) can still be justified on the basis of Article XIV. Moreover, Article XIV encompasses future disciplines developed under Article VI:4. After all, as discussed below, these (future) disciplines will be integrated into GATS by the creation of a GATS Annex or by additional commitments made by Members on the basis of Article XVIII and both a GATS Annex and Article XVIII are obviously part of the GATS Agreement. Consequently, it can be submitted that violations of, for instance, the Accountancy Disciplines (*infra*), once these Disciplines are integrated in GATS, could still be justified on the basis of Article XIV. In practice, though, if a measure does not pass the necessity test required by Article VI:5 or by future disciplines (for example

[39] Report of the Appellate Body, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, 9 September 1997, WT/DS27/AB/R, para. 233.
[40] For an interpretation of the rationale of Article XVIII, see Report of the Panel, *US – Gambling, loc. cit.,* supra n. 14, para. 6.311
[41] Contrary to GATT, this list includes measures necessary for the protection of the privacy of individuals with respect to data collection (Article XIV(c)(ii))and measures aimed at preventing or reducing double taxation and inequitable imposition of taxes (Article XIV(d) and (e). On the other hand, GATS does not list measures relating to the conservation of exhaustible natural resources, which is an important and regrettable omission. Some authors advocate that Article XIV should be modified into an open-list approach. *See* J.P Trachtman, "Lessons for the GATS from existing WTO Rules on Domestic Regulation", in A. Mattoo and P. Sauvé (eds.), *loc. cit*., supra n.5, p. 77.

the Accountancy Disciplines), it will be hard to justify it on the basis of Article XIV, which also includes a necessity test (see *infra*).[42]

3.5. Progressive Liberalization

From the above, it has become clear that the GATS package is only the starting point of the progressive liberalization of trade in services. Therefore, Article XIX obligates Members to "(…) enter into successive rounds of negotiations (…) with a view to achieving a progressively higher level of liberalization." Article XIX is a guarantee that the present GATS package is only "the first fruit of a continuing enterprise, to be undertaken jointly by all WTO Members to raise the level of their service commitments towards one another."[43]

3.6. Institutional issues

The WTO Agreement establishes a Council for Trade in Services ("Services council"), which operates under the general guidance of the General Council.[44] It is responsible for overseeing the functioning of GATS. The Services council created subsidiary bodies to deal with sector-specific issues (e.g. the Committee on Financial Services) or horizontal issues (e.g. the Working Party on Domestic Regulation, *infra*).[45]

4. Article VI on Domestic Regulation within the Framework of GATS

4.1. The role of Article VI in the framework of GATS

Given the importance of regulatory barriers to trade in services, Article VI on domestic regulation plays a central role in the liberalization of services markets in the context of GATS. As Mattoo and Sauvé mention, Article VI can be seen as the third complementary dimension of a three-pronged approach to effective access to service sectors.[46] Firstly, Article XVI on market access addresses discriminatory and non-discriminatory quantitative

[42] See also J. Pauwelyn, "Rien ne Va Plus? Distinguishing domestic regulation from market access in GATT and GATS", *World Trade Review,* July 2005, Vol. 4, Issue 2, p. 138-139.
[43]WTO Secretariat, Trade in Services Division, "An Introduction to the GATS", 1999, 9, available at: http://www.wto.org/english/tratop_e/serv_e/gsintr_e.doc,.
[44] Article IV.5 Agreement establishing the World Trade Organization (WTO Agreement); Article XXIV:1 GATS.
[45] Article IV.6 WTO Agreement; Article XXIV:1 GATS.
[46] A. Mattoo and P. Sauvé, "Domestic Regulation and Trade in Services: Key Issues", *loc. cit.,* supra n. 9, 3.

restrictions affecting trade in services. Secondly, Article XVII on national treatment prohibits *de jure* and *de facto* discriminatory treatment. Non-quantitative measures that are not discriminatory at all do not fall within the reach of these two specific commitment provisions. However, such measures can seriously impede trade in services. For example, fundamental differences between WTO Members in qualification requirements for professional services can result in significant barriers to trade. The drafters of the GATS seem to have developed a two-fold track to tackle this third category of measures, which were considered to be related mainly to matters on qualifications, standards and licensing. Firstly, Members can autonomously decide, pursuant Article XVIII, to make additional commitments related to these measures.[47] Secondly, Article VI GATS provides a framework to prevent these measures from constituting unnecessary barriers to trade in services.

One should recall that Article VI does not focus on "fair trade" in services (prohibition of discrimination) but on trade in services as such. Unnecessary barriers to trade are targeted, regardless of whether these barriers discriminate against foreign services or service suppliers. This reflects "the hybrid character of the GATS"[48] whereby some provisions go beyond the question of discrimination between foreign and domestic services.[49] Non-discriminatory requirements in the goods sector are found in the Agreement on Technical barriers to Trade (TBT) and the Agreement on Sanitary and Phytosanitary Measures (SPS). These Agreements also aim to balance the right to regulate and progressive liberalization, and are based on the same normative approach, requiring that domestic regulatory measures do not constitute unnecessary barriers to trade. Therefore, they often serve as a comparator for the GATS provisions on domestic regulations.[50]

Two different parts in Article VI can be distinguished. Article VI:4 mandates the Services council to develop future disciplines. This dynamic aspect of Article VI is discussed in section 4.3, together with the related Article VI:5. These (future) disciplines can have a significant impact on the substance of domestic regulations. The other subsections of Article VI, elaborated upon in the next paragraph, develop procedural disciplines, which are applicable to current domestic regulations. However, attention should be paid to the specific scope of each subsection. Although Article VI is part of the "the general obligations and

[47] Article XVIII refers explicitly to qualifications, standards or licensing matters but its scope is not limited to this type of measure. Therefore, the scope of Article XVIII is broader than the scope of Article VI:4 (see infra).
[48] M. Krajewski, *loc. cit.*, supra n. 10, 59.
[49] Article XVI GATS on market access does not address the question of discrimination either. However, the scope of this Article is limited to certain forms of (discriminatory or non-discriminatory) quantitative restrictions.
[50] See for example: WTO, Working Party on Professional Services, note of the Secretariat, "The relevance of the disciplines of the Agreement on the Technical Barriers to Trade (TBT) and on import licensing procedures to Article VI:4 on the General Agreement in Trade of Services", 11 September 1996, S/WPPS/W/9.

disciplines", some subsections are limited to "services where specific commitments are undertaken". An unanswered question is whether this requires commitments in both market access and national treatment columns,[51] though the general wording seems to suggest that specific commitments in one domain are sufficient.

4.2. Administration and Application of Domestic Regulations

Paragraphs 1-3 and 6 of Article VI GATS contain disciplines that only affect the procedural side of law and do not contain any substantive requirement.[52] They are closely related to the transparency provision of Article III that was discussed above.

Article VI:1, which is equivalent to Article X.3(a) GATT, requires that "all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner". This provision applies to the same type of measure as Article III:1. However, in contrast to the transparency requirement under Article III:1, which is a general obligation under GATS, Article VI:1 is explicitly limited to sectors where specific commitments are made.

The concept of "measure of general application" is not as such defined in GATS. Article XXVIII defines only the broader concept of "measure", which includes "any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form." Measures with a specific scope such as administrative decisions are disciplined by Article VI:2, Article VI:3 and Article VI:6.

Such measures of general application must be "administered in a reasonable, objective and impartial manner." How should this vague standard of Article VI:1 be interpreted? On the one hand, Trachtman remarks that the requirement of "reasonableness" may be developed in the dispute settlement system to impose substantive obligations of proportionality upon general measures.[53] On the other hand, Trachtman also recognizes that Article VI:1 disciplines "the administration" of general measures rather the measure itself.

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[51] G. Verhoosel, *National Treatment and the WTO Dispute Settlement, Adjudicating the Boundaries of Regulatory Autonomy,* Oxford, Hart Publishing, 98.

[52] The Panel in *United States – Gambling* confirmed that "Article V.1 and Article V.3 contain disciplines of a procedural nature." Report of the Panel, *US – Gambling, loc. cit.,* supra n. 14, para. 6.432.

[53] Trachtman points to the definition of "reasonable" in the New Shorter Oxford English Dictionary that refers inter alia to "proportionate". *See* J.P Trachtman, "Lessons for the GATS from existing WTO Rules on Domestic Regulation", in A. Mattoo and P. Sauvé (eds.), *loc. cit*., supra n. 5, p. 66. *See also* J.P. Trachtman, "Negotiations on domestic regulation and trade in services (GATS Article VI): a legal analysis of selected current issues", in E-U. Petersmann, *Reforming the World Trading System – legitimacy, efficiency, and democratic governance,* Oxford, Oxford University Press, 2005, 211.

Recent case law adheres to the limited interpretation of Article VI:1. The Panel in *US – Gambling* stated that Article VI:1 "does not apply to measures of general application themselves but, rather, to the *administration* of these measures" and contains a discipline of a "procedural nature". [54] The Panel thus, in our view correctly, rejected reading into Article VI:1 a substantive obligation of proportionality. Krajewski also approaches Article VI:1 as a procedural requirement, which seems not to extend beyond the prohibition of discriminatory and arbitrary administration of measures.[55] The exact content of this procedural standard remains, though, unclear.

Article VI:2(a), which corresponds to Article X:3(b) and (c) GATT, requires Members to "maintain or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures that provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services." This is a general obligation and thus not limited to sectors where a Member has made specific commitments.

This provision can be useful to contest delays due to structural problems in the judicial or administrative systems of many countries.[56] It could have a significant impact on national administrative procedures. However, this requirement is tempered in two ways. Firstly, Members are not required to set up independent agencies for this review.[57] Members are to ensure only that the procedures in fact provide for an objective and impartial review.[58] As a consequence, the review can in principle be carried out by the decision-making agency itself.[59] Secondly, Article VI:2(b) states that "the provisions of subparagraph (a) shall not be construed to require a Member to institute such tribunals or procedures where this would be inconsistent with its constitutional structure or the nature of its legal system." This qualification is not found in the parallel GATT provisions.

Article VI:3 GATS deals with services where authorization is required and on which a specific commitment has been made. Members are obliged to inform the applicant within a reasonable period of time of the decision concerning the application. No guidance is offered by GATS to determine what period of time would be considered reasonable. So, this issue

[54] Report of the Panel, *US – Gambling, loc. cit.,* supra n. 14, para. 6.432.
[55] M. Krajewski, *loc. cit.*, supra n.10, 128.
[56] D. Luff, *Le Droit de L'Organisation Mondiale du Commerce. Analyse Critique,* Bruxelles, Bruylant, 2004, 604.
[57] This is equivalent to Article X.3 (c) GATT.
[58] Article VI:2(a) GATS.
[59] M. Krajewski, *loc. cit.*, supra n.10, 127.

will be determined on a factual basis.[60] Furthermore, the Members must provide at the request of the applicant, without undue delay, information concerning the status of the application. There is no equivalent provision in GATT, but Article 5 TBT and Annex C SPS require similar procedures.

Lastly, Article VI:6 obliges Members, in sectors where specific commitments are made, to provide for adequate procedures to verify the competence of professionals of any other Member. There is no similar provision in GATT. The concept of "adequate procedure" is not defined further. Therefore, Members attempt to specify this standard in the Working Party on domestic regulation, a subsidiary body of the Services council (*infra*). For example, New Zealand submitted an informal paper that focused on the way it had implemented its Article VI:6 obligations relating to the engineering sector.[61]

4.3. Future Disciplines on Domestic Regulation

In what follows, we shall discuss in depth Article VI:4 GATS, which recognizes the unfinished nature of the existing framework on domestic regulation. It reads as follows:

> "With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, *inter alia*:
>
> (a) based on objective and transparent criteria, such as competence and the ability to supply the service;
>
> (b) not more burdensome than necessary to ensure the quality of the service;
>
> (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service."

Pending the entry into force of future disciplines developed under paragraph 4, Article VI:5 requires that:

> "(a) In sectors in which a Member has undertaken specific commitments, (…), the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which:

[60] J.S Jarreau, "Interpreting the General Agreement on Trade in Services and the WTO Instruments Relevant to the International Trade of Financial Services: the Lawyer's Perspective", *North Carolina Journal of International Law and Commercial Regulation,* fall 1999, 22.

[61] WTO, Working Party on Domestic Regulation, Note by the Secretariat, "Report on the Meeting Held on 31 March 2004", 18 May 2004, S/WPDR/M/25, para. 93-102; WTO, Working Party on Domestic Regulation, Note by the Secretariat, "Report on the Meeting Held on 24 September 2004", 15 November 2004, S/WPDR/M/27, paras. 97-100. Paper circulated as JOB(03)/219, 3 December 2003, revised paper circulated as JOB(04)/136, 24 September 2004.

(i) does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c); and

(ii) could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made.

(b) In determining whether a Member is in conformity with the obligation under paragraph 5(a), account shall be taken of international standards of relevant international organizations[62] applied by that Member."

The mandate of Article VI:4 (and the provisional application through Article VI:5) goes clearly beyond the strengthening of procedural disciplines of the other subsections of Article VI, discussed above. Of course, future disciplines can complement and enlarge procedural and transparency disciplines[63]; the provisions relating to transparency in the Accountancy Disciplines are a good example. But the scope is much broader: Article VI:4 also aims to develop disciplines that ensure that domestic regulations are not more burdensome than necessary to ensure the quality of the service. The inclusion, for example, of a necessity test in future disciplines and in Article VI:5 can cut deep into the substance of national regulatory regulations.[64] This test does not only mandate administrative or procedural guarantees but also decides which requirements are legitimate.

4.3.1. The Working Party on Domestic Regulation (WPDR)

Soon after the entry into force of the WTO Agreement, the Services council created a Working Party on Professional Services (WPPS) and entrusted it with the mandate of Article VI:4 in the field of professional services.[65] The WPPS was to focus on the development of disciplines in the accountancy sector.[66] This resulted in the Accountancy Disciplines, which were adopted by the Services council on 14 December 1998.[67]

In 1999, the WPPS was replaced by the Working Party on Domestic Regulation (WPDR), which received a broader mandate.[68] It has to "develop any necessary disciplines to ensure that measures relating to licensing requirements and procedures, technical standards and qualification requirements and procedures do not constitute unnecessary barriers to trade."

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[62] The term "relevant international organizations" refers to international bodies whose membership is open to the relevant bodies of at least all Members of the WTO. Footnote Article VI:5.
[63] This can be based on Article VI:4 (a).
[64] G. Verhoosel, *loc. cit.,* supra n. 51, 17; M. Krajewski, *loc. cit.*, supra n. 10, 130.
[65] WTO, Council for Trade in Services, "Decision on Professional Services", 4 April 1995, S/L/3.
[66] WTO, Council for Trade in Services, "Decision on Professional Services", 4 April 1995, S/L/3, para. 2.
[67] WTO, Council for Trade in Services, "Disciplines on Domestic Regulation in the Accountancy Sector", 17 December 1998, S/L/64.
[68] WTO, Council for Trade in Services, "Decision on Domestic Regulation", 26 April 1999, S/L/70.

The negotiations in the WPDR are complementary to, but formally separate from, the trade liberalization negotiations in the Services council that are based on Article XIX GATS and that take place in Special Sessions of the Services council.[69] Krajewski reveals a certain tension between these two sets of negotiations.[70] On the one hand, Members may hesitate to make further commitments to market access and national treatment until the scope of future disciplines is clarified; on the other, Members that are sceptical about strong domestic regulation disciplines may want to see substantial commitments in sectors of their interest by their trading partners before agreeing to such disciplines. The Services council attempted to prevent these Members from paralyzing the future negotiations on domestic regulation disciplines by stressing in its guidelines that "Members shall aim to complete negotiations under Articles VI:4 (…) prior to the conclusion of negotiations on specific commitments."[71] The tension between the two sets of negotiations, together with the broad and vague agenda of the WPDR, could explain why, to date, no new sector-specific or horizontal disciplines have been developed in the WPDR. [72] The working process shows that the WPDR also becomes a forum for the exchange of information on domestic regulations among countries.[73]

The WPDR has adopted a specific methodology in order to tackle its broad mandate in a systematic way.[74] It asked the Secretariat to list examples of the kind of measure that would be addressed by disciplines under Article VI:4.[75] Members were requested to

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[69] WTO, Council for Trade in Services, "Guidelines and Procedures for the Negotiations on Trade in Services", 28 March 2001, S/L/93, para. 8. These Guidelines and Procedures are reaffirmed by the Doha Ministerial Declaration. WTO, Ministerial Conference, Fourth Session, "Ministerial Declaration adopted on 14 November 2002", 14 November 2001, WT/MIN(01)/DEC/1, para. 16.

[70] M. Krajewski, *loc. cit.*, supra n. 10, 132.

[71] WTO, Council for Trade in Services, "Guidelines and Procedures for the Negotiations on Trade in Services", 28 March 2001, S/L/93, para. 7. See also WTO, General Council, decision on the Doha Agenda work programme (the "July package"), 2 August 2004, WT/L/579, Annex C, letter (e).

[72] The 2004 Annual Report of the WPDR to the Services council seems to indicate that discussions on new disciplines will not be concluded in the near future. The WPDR remarks that "regarding the next stage of negotiations, there were some differences of view on when the Working Party would be ready. There was, however, the general view that further progress would depend on receiving new submissions, the discussion of those submissions, and whether Members in the WPDR agree on how to proceed." WTO, Working Party on Domestic Regulation, "Draft – Annual Report of the Working Party on Domestic Regulation to the Council for trade in Services", 11 November 2004, S/WPDR/7, para. 4.

[73] *See* for example: WTO, Working Party on Domestic Regulation, Communication from Canada, "Transparency Template – Canada's revised horizontal mode 4 offer", 25 May 2005, S/WPDR/W/33.

[74] WTO, Working Party on Domestic Regulation, Note by Secretariat, "Report on the Meeting Held on 29 November 2000", 12 March 2001, S/WPDR/M/9. WTO, Working Party on Domestic Regulation, Note by Secretariat, "Report on the Meeting Held on 22 October 2002", 3 December 2002, S/WPDR/M/18, para. 8. WTO, Working Party on Domestic Regulation, Note by Secretariat, "Report on the Meeting Held 4 December 2002", 29 January 2003, S/WPDR/M/19, para. 11.

[75] The latest version of the Examples Paper: WTO, Working Party on Domestic Regulation, Informal Note by the Secretariat, Revision, "Examples of Measures to be Addressed by Disciplines under GATS Article VI:4", 31 January 2005, Job(02)/20/Rev10. The Secretariat stresses that this list is merely indicative and is thus not an authoritative interpretation of Article VI:4, which remains the exclusive authority of Member States. The Examples Paper only aims to facilitate the work of the WPDR.

contribute to this Examples paper.[76] In this regard, Members agreed to ask themselves a cascade of four questions when looking at individual measures:

(a) Is the measure already covered by Articles XVI and/or XVII?
(b) If not, is it addressed by any other provisions of the Agreement (e.g. Articles II, III, VIII, IX)?
(c) If not, does it fall clearly within the scope of Article VI, in particular VI:4 (licensing requirements, qualification requirements, technical standards, licensing procedures and qualification procedures)? and
(d) If so, is the measure adequately addressed by the relevant provisions of the Accountancy Disciplines, or are modifications required?

To date, only ten Members have submitted a contribution. Moreover, the Secretariat observes that the examples in these contributions often fail to pass the cascade of four questions.[77] Our elaboration will reveal why this is in fact not an easy exercise to perform.

4.3.2. Disciplines Developed under Article VI:4: the Accountancy Disciplines

The methodology of the WPDR highlights the importance of the Accountancy Disciplines for the development of future disciplines.[78] So, a brief introduction of the most important parts of these disciplines could be useful before looking in a more systematic way to the key questions raised by Article VI:4. Some elements will be elaborated further in the discussion on Article VI:4.

As mentioned above, the Accountancy Disciplines are so far the only set of disciplines that have been developed under Article VI:4.[79] They were adopted by the Services council on 14 December 1998.[80] However, this does not, of course, imply that the Accountancy Disciplines have the same legal status as GATS, a multilateral trade agreement legally binding for all WTO Members. The Services council stated in its approval that "no later than the conclusion of the forthcoming round of services negotiations, the disciplines

[76] The Examples Paper is based on these contributions from Members and on a review by the Secretariat of the work in the WPPS regarding the accountancy disciplines.
[77] The Secretariat states, for example, that "in a substantial number of cases, the measures listed in these contributions appear to be subject to scheduling under Articles XVI or XVII: (…) Other measures submitted by Members appear to be covered by Articles VI:1 or VI:2, but do not seem to be Article VI:4 measures. While possibly non-discriminatory domestic regulatory measures, they do not seem to fit the VI:4 requirement of being a licensing requirement or procedure, a qualification requirement or procedure, or a technical standard." WTO, Working Party on Domestic Regulation, Informal Note by the Secretariat, Revision, "Examples of Measures to be Addressed by Disciplines under GATS Article VI:4", 16 November 2004, Job(02)/20/Rev.9, paras. 4-6.
[78] The Accountancy Disciplines also serve as a basis for consultations of the Secretariat with several international professional services associations which are selected by Members in the WPDR. These international professional services associations were invited to comment on the appropriateness of the Accountancy Disciplines for their professions. WTO, Working Party on Domestic Regulation, informal note by the Secretariat, "Results of Secretariat consultations with International Professional Services Associations", Revision, 15 November 2004, Job(03)/126/Rev.4.
[79] WTO, Council for Trade in Services, "Disciplines on Domestic Regulation in the Accountancy Sector", 17 December 1998, S/L/64.
[80] Council for Trade in Services, Decision on Disciplines relating to the Accountancy Sector, 14 December 1998, S/L/63

developed by the WPPS are intended to be integrated into the General Agreement on Trade in Services." Before this formal integration, "Members shall, to the fullest extent consistent with their existing legislation, not take measures which would be inconsistent with these disciplines." The Services council approval also limits the application of the Accountancy Disciplines to Members that have entered specific commitments on accountancy in their schedules. This limited scope is not as such required by Article VI:4, but can possibly be traced to the specific mandate of the WPPS, which requires giving priority to the development of disciplines in the accountancy sector "so as to give operational effect to specific commitments."[81] Paragraph 1 of the Accountancy Disciplines further narrows the reach to measures that do not fall under Article XVI (market access) and Article XVII (national treatment).[82]

The most important element of the Accountancy Disciplines is found in paragraph 2, which mandates a necessity test for all applicable regulatory measures. Members shall ensure that such measures are not more trade-restrictive than necessary to fulfil a legitimate objective. Examples of such legitimate objectives mentioned in the Accountancy Disciplines are the protection of consumers, the quality of the service, professional competence and the integrity of the profession. The other provisions of the Accountancy Disciplines are related to transparency (see infra) and specific types of regulation.[83] Some of these provisions elaborate the disciplines of Article III on transparency and of Article VI:1-3 and 6. For example, it requires that details of procedures for the review of administrative decisions, as provided for by Article VI:2, shall be made public, including the prescribed time-limits, if any, for requesting such a review.[84] Other provisions spell out the necessity test for certain types of measure and could therefore be useful as an illustration of the potential scope of a necessity test.[85] However, in some key provisions the specific rules contain language weaker than that in the necessity test.[86]

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[81] WTO, Council for Trade in Services, "Decision on Professional Services", 4 April 1995, S/L/3, para. 2. *See* C. Trolliet and J. Hegarty, "Regulatory Reform and Trade Liberalization in the Accountancy Sector", in A. Mattoo and P. Sauvé, *loc. cit*., supra n.5, 151.

[82] *See* WTO, Working Party on Professional Services, Informal Note by the Chairman, "Discussion of Matters Relating to Article XVI and XVII of the GATS in connection with the disciplines on Domestic Regulation in the Accountancy Sector", 25 November 1998, Job No. 6496, available at: http://docsonline.wto.org/DDFDocuments/t/S/WPPS/4.DOC.

[83] Such as: licensing requirements and procedures, qualification requirements and procedures and technical standards.

[84] Paragraph 7 Accountancy Disciplines.

[85] M. Krajewski, *loc. cit.*, supra n.10, 133.

[86] C. Trolliet and J. Hegarty, "Regulatory Reform and Trade Liberalization in the Accountancy Sector", in A. Mattoo and P. Sauvé, *loc. cit*., supra n.5, 152. For example, the provision on residency requirements states that Members "shall consider" whether less trade restrictive means could be used to achieve the same policy objective."

4.3.3. Key Issues for Future Disciplines

a) Legal Status of Future Disciplines

Article VI:4 mandates the Services council to develop disciplines and does not include in itself a binding principle. This is contrary to the first draft of GATS, which contained a binding necessity test.[87] However, the legal status of future disciplines is not specified in Article VI:4. As mentioned above, a mere decision of the Services council to adopt certain disciplines lacks legal enforceability. Two distinct approaches were developed to make such disciplines binding.

The first one, which has been adopted for the Accountancy Disciplines, integrates disciplines into the GATS framework by the creation of a GATS Annex. Consequently, all Members that fall under the scope of the particular disciplines would be bound by the Annex. For example, with regard to the Accountancy Disciplines this would imply that all Members that made specific commitments in the accountancy sector would be bound. However, this approach requires a modification of GATS.

An alternative approach is the construction of a 'reference paper', as in the telecommunications negotiations[88], which could be inscribed in the additional commitments column of Members. Disciplines are integrated in the GATS framework by provision of Article XVIII that allows Members to add commitments that concern neither market access nor national treatment, in their schedules. Thus, a modification of GATS is not requisite by this approach. Unlike a GATS Annex, a reference paper attains only binding legal status to the extent Members have scheduled it as an additional commitment. Therefore, these disciplines would not be legally binding for all Members, not even for all Members that made specific commitments in the particular sector at hand. This approach would leave the widest discretion to Members to set their own adequate level of commitments in particular sectors.

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[87] Article VI of the draft reads as follows: "Parties may require that services or providers of services of other parties meet certain regulations, standards or qualifications. Such requirements shall be based upon objective criteria, such as competence and the ability to provide such services, and not be more burdensome than necessary to achieve the national policy objective." WTO, Council for Trade in Services, Note by Secretariat, "Article VI:4 of the GATS: Disciplines on Domestic Regulation applicable to all Services", 1 March 1999, S/C/W/96, para.2.

[88] A Reference Paper on Procompetitive Regulatory Principles was developed during the negotiations on basic telecommunications following the Uruguay Round. It is a tool for the negotiation of additional commitments regarding regulatory measures concerning basic telecommunications. So, it only applies to Members that scheduled it as an additional commitment. Furthermore, Members are allowed to commit themselves to only parts of the Reference Paper. *See* D. Roseman, "Domestic Regulation and Trade in Telecommunications Services: Experience and Prospects under the GATS", in A. Mattoo and P. Sauvé, *loc. cit.*, supra n.5, 88; M. Krajewski, *loc. cit.*, supra n.10, 171.

During the negotiations on the Accountancy Disciplines, Members could not choose for several months between these options. Finally, they opted for a "third way" and adopted merely a Services council decision, which implies that the disciplines are not yet legally enforceable. Most Members seemed to prefer a GATS Annex but this option was abandoned because of difficulties of procedures of ratification by national legislatures. [89] The Services council decision stated the intention that disciplines should be integrated in the GATS "no later than the conclusion of the forthcoming round of services negotiations", which might indicate the idea that the Accountancy Disciplines are integrated as an Annex to the GATS as part of the overall negotiating package, which would circumvent the need for a separate ratification procedure. A consensus is not yet reached in the WPDR regarding the legal form of other, future disciplines.[90]

b) Scope of Future Disciplines

1. Type of Measures

Article VI:4 refers explicitly to measures relating to qualification requirements and procedures, technical standards and licensing requirements. Here, the question arose as to whether this list is exhaustive. For one category of regulations, namely licensing *procedures*, there is consensus about their inclusion within the reach of Article VI:4. A legal argument for this expansion can be found in Article VI:4(c), which mentions explicitly licensing procedures. Disciplines on licensing procedures were also included in the Accountancy Disciplines.[91] What is interesting in this regard is the extensive proposal of the European Community and EU Member States in the WPDR for the development of disciplines in licensing procedures.[92]

There is no agreement on whether future disciplines should be limited to these five items. Japan proposed an Annex on Domestic Regulation with an open scope. It would apply

[89] D. Honeck, "Background to the Accountancy Disciplines", paper presented at Workshop on Domestic Regulation, 29-30 March 2004, available at: http://www.wto.org/english/tratop_e/serv_e/workshop_march04_e/sess3_honeck2_e.doc.
[90] *See* WTO, Working Party on Domestic Regulation, Note by the Secretariat, "Report on the Meeting Held on 31 March 2004", 18 May 2004, S/WPDR/M/25, para. 6. Japan's proposal would take the form of an Annex to the GATS. WTO, Working Party on Domestic Regulation, Communication from Japan, "Draft Annex on Domestic Regulation", 2 May 2003, Job(03)/45/Rev.1.
[91] Paragraph V of the Accountancy Disciplines deals with Licensing Procedures.
[92] WTO, Working Party on Domestic Regulation, Communication from the European Community and its Member States," Proposal for Disciplines on Licensing Procedures", 10 July 2003, S/WPDR/W/25.

to "measures affecting trade in services", including the five items listed above.[93] However, there is no legal basis in Article VI:4 that could justify such an open scope.[94] Moreover, previous discussions in the WPDR already highlighted that most Members did not support such a broad scope.[95] Lastly, the limited scope is reflected in the working methodology of the WPDR.[96]

Nevertheless, a close look at Japan's proposal reveals that the core of their proposal is limited in scope to the five listed items.[97] Only disciplines that elaborate the transparency provisions of Article III and the provision on the procedure of judicial tribunals (Article VI:2) are applied to "measures",[98] whereby the concept of "measure" is defined as in Article I.3(a) GATS.[99] In fact, this approach is parallel to the Accountancy Disciplines. While the Accountancy Disciplines do not explicitly define their general scope, the provisions on transparency (including strengthening Article VI:2) are not restricted to one of the five items. For example, Members shall, according to paragraph 6 Accountancy Disciplines, provide opportunity for public comment when introducing "measures which significantly affect trade in accountancy services." Thus, the scope of the Accountancy Disciplines, relating to the disciplines on transparency, seems not be restricted either.[100]

GATS does not specify the categories "qualification requirements and procedures, technical standards and licensing requirements". The Secretariat attempted in a Background Note to define these different concepts.[101] It should be stressed that such a Background Note

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[93] WTO, Working Party on Domestic Regulation, Communication from Japan, "Draft Annex on Domestic Regulation", 2 May 2003, Job(03)/45/Rev.1. Article II.3,

[94] The Panel, in US – Gambling, also implicitly decided that the scope of Article VI:4 is limited: "it should be noted, however, that the scope of Article XVIII goes beyond that of Article VI:4. The former provides the possibility for negotiation commitments on matters other than qualifications, standards or licensing." Report of the Panel, *US – Gamling, loc. cit.,* supra n. 14, para. 6.312.

[95] WTO, Working Party on Domestic Regulation, Note by the Secretariat, "Report on the Meeting Held on 2 October 2001", 21 November 2001, S/WPDR/M/13, para. 11; WTO, Working Party on Domestic Regulation, Note by the Secretariat, "Report on the Meeting Held on 2 October 2001, Annex, Informal Summary of the Checklist of issues for WPDR", 21 November 2001, S/WPDR/M/13, para. 4.

[96] See *supra*, question (c) in the cascade of questions which the Members should ask themselves in the development of concrete examples of measures which fall under Article VI:4.

[97] This is explicitly confirmed by Japan. See WTO, Working Party on Domestic Regulation, Communication from Japan, "Draft Annex on Domestic Regulation", 2 May 2003, Job(03)/45/Rev.1, 2

[98] WTO, Working Party on Domestic Regulation, Communication from Japan, "Draft Annex on Domestic Regulation", 2 May 2003, Job(03)/45/Rev.1, Articles IV, XII and XIII.

[99] Thus the scope of these disciplines is "any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form."

[100] The other parts of the Accountancy Disciplines are clearly restricted. The necessity test in Article II refers to measures relating to "licensing requirements and procedures, technical standards and qualification requirements and procedures". The remaining sections discuss each of the five items.

[101] "Qualification requirements" include substantive requirements that a professional service supplier is required to fulfil in order to obtain certification or a licence; "Qualification procedures" are administrative or procedural rules relating to the administration of qualification requirements; "Licensing requirements" are substantive requirements, other than qualification requirements, with which a service supplier is required to comply in order to obtain formal permission to supply a service; "Licensing procedure" are administrative procedures relating to the submission and processing of an application for a licence; "technical standards" are requirements that may apply both to the

does not have legal implications. Members of the WPDR felt that those definitions were acceptable, but could be reviewed as necessary.[102]

If the scope were limited to the five items concerned, Krajewski argues that voluntary standards would, contrary to the TBT Agreement, not be subject to future disciplines developed under Article VI:4.[103] However, the concept of "technical standard" should not as such be limited to mandatory standards. The definition provided by the Secretariat refers to "requirements" but does not explicitly rule out voluntary standards.[104] Moreover, the WPDR working process on technical standards seems to rely on a broad approach towards technical standards, including both voluntary and mandatory standards[105], and some Members even point to the opposite direction, whereby "technical standards" are voluntary, while "technical regulations" are mandatory.[106]

2. Restricted to Non-Discriminatory Measures?

One of the most debated legal questions on domestic regulation involves the relationship between Article VI:4 (and Article VI:5[107]), on the one hand, and the GATS' provisions on market access (Article XVI) and national treatment (Article XVII), on the other hand. Can certain measures fall both within the scope of Article XVI or Article XVII and Article VI:4, or are these provisions mutually exclusive? Neither Article VI:4 nor Articles XVI and XVII answer the question. As noted above, the national treatment requirement prohibits *de jure* and *de facto* discrimination of foreign services and service suppliers. However, Article VI:4 is not explicitly limited to strictly non-discriminatory measures.

In the WPPS work on accountancy it has been concluded that there should be no overlap between those provisions. This conclusion is in the first place based on the argument

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characteristics or definition of the service itself and to the manner in which it is performed. WTO, Working Party on Professional Services, "the relevance of the disciplines of the Agreement on the Technical Barriers to Trade (TBT) and on import licensing procedures to Article VI:4 on the General Agreement in Trade of Services", 11 September 1996, S/WPPS/W/9, para. 4.

[102] *See* M. Krajewski, *loc. cit.*, supra n.10, 135.

[103] M. Krajewski, *loc. cit.*, supra n. 10, 135.

[104] See supra n. 101.

[105] See, for example, the definition provided by Switzerland in its proposal for Disciplines on Technical Standards in Sevices: "(…) technical standards are measures by Members, whether they are mandatory or voluntary if not otherwise specified, are defined as requirements, which may apply both to the characteristics or definition of the service itself and to the manner in which it is performed." WTO, Working Party on Domestic Regulation, Communication from Switzerland, "Proposal for Disciplines on Technical Standards in Services", 1 February 2005, S/WPDR/W/32, para. 13.

[106] See, for example, Mexico and Hong Kong, China. WTO, Working Party on Domestic Regulation, Note by the Secretariat, "Report on the meeting held on 22 November 2004", 25 January 2005, S/WPDR/M/28, paras. 9 and 22.

[107] This discussion is equally relevant for the scope of Article VI:5, which provides for disciplines pending the entry into force of disciplines developed pursuant Article VI:4. Therefore, reference to Article VI:4 in this subsection includes Article VI:5.

that there is a fundamental legal distinction in GATS between the provisions involved: while Articles XVI and XVII belong to part III of the Agreement relating to specific commitments, Article VI belongs to Part II on general obligations and principles.[108] Furthermore, it was noted that the legal status of these measures differs naturally. Measures restricting market access and national treatment are prohibited, unless scheduled, in sectors where specific commitments have been undertaken, whereas they can be maintained in sectors that are not committed. The right to maintain domestic regulatory measures is, however, specifically recognized and will be subject to the disciplines to be developed under Article VI:4 with the aim of minimizing the negative impact of such measures on trade. These measures cannot be entered as limitations in a Member's schedule.[109] Lastly, the WPPS realized that an overlap would create legal uncertainty. Therefore, the Accountancy Disciplines do not address measures falling within the scope of Article XVI or XVII GATS.

The WPDR seems to follow the approach of mutual exclusiveness. For example, as noted by the Secretariat, licensing systems can be composed of both Articles XVI, XVII and Article VI:4 measures and there is no overlap. In the GATS context, a distinction is needed between a licensing system and its various components, in terms of their different requirements and different measures. The existence of a licensing system does not necessarily imply that it should be scheduled, provided it is composed only of measures within the scope of Article VI:4. Thus, the relationship between those provisions seems to be one of "complementarity" since Articles XVI and XVII and Article VI:4 both deal with trade restrictions, albeit of a different nature.[110] On this issue, it seems that the WPDR has achieved a common understanding.[111] This is also reflected in the methodology of the WPDR, which was discussed above. The first question in the cascade asks if the measure is already covered by Article XVI and/or XVII and therefore aims to exclude such measures from the Examples paper.

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[108] This argument neglects to a certain extent the hybrid character of Article VI GATS. Although it belongs to general obligations and principles, several paragraphs of Article VI are explicitly restricted to sectors were specific commitments are made (see *supra*).

[109] WTO, Working Party on Professional Services, note by the Secretariat, "Article VI:4 of the GATS: Disciplines on Domestic Regulation Applicable to All Services", 1 March 1999, S/C/W/96, para. 13.

[110] WTO, Working Party on Domestic Regulation, Note by the Secretariat, "Report on the Meeting Held on 2 October 2001", 21 November 2001, S/WPDR/M/13, para. 9.

[111] WTO, Working Party on Domestic Regulation, Note by the Secretariat, "Report on the Meeting Held on 4 December 2002", 23 January 2003, S/WPDR/M/19, para.12. However, Japan's proposed Annex on Domestic Regulation does not, contrary to the Accountancy Disciplines, explicitly exclude measures falling under Article XVI or Article XVII. It is silent on the relationship with these provisions. The scope of the Annex is framed by "measures affecting trade in services including those relating to licensing requirements and procedures, qualification requirements and procedures as well as technical standards." It remains an open question under which provision (the Annex or Article XVII) such measures which are discriminatory will fall.

Although some authors criticize this narrow approach[112], most tend to agree with the WPDR that there should be no overlap.[113] The argument is that it coincides with the rationale of disciplines for domestic regulation. As mentioned above, Article VI should be seen as the third complementary dimension of a three-pronged approach to effective access to service sectors.[114] Moreover, as Krajewski has pointed out, an overlap would limit the rights of Members under Articles XVI and XVII. If Members make specific commitments in a specific sector, they are still allowed to restrict market access or discriminate between domestic and foreign services and service suppliers as long as these restrictions are scheduled.[115] This right of Members would be limited if such scheduled restrictions could be disciplined under Article VI:4.

The Panel in *US – Gambling* followed the interpretation of mutual exclusiveness. It explicitly declared that "Articles VI:4 and VI:5 on the one hand and XVI on the other hand are mutually exclusive."[116] The Panel derives[117] this conclusion from the different object[118] and nature of obligations[119] of both provisions and the context of the GATS.[120] This conclusion of the Panel can be extended to the relationship between Article VI:4/5 and Article XVII. First, the arguments that the Panel developed are equally applicable to this relationship. Second, this extension is implicitly confirmed by the Panel in its statement that "the organization of the GATS (…) cast(s) light on the inter-relationship between Articles XVI, XVII and XVIII, *the last of which* can include measures falling within the scope of

[112] See, e.g., R. Janda, "GATS Regulatory Disciplines Meet Global Public Goods: The Case of Transportation Services", in A. Mattoo and P. Sauvé, *loc. cit*., supra n. 5, 119-120;
[113] See *inter alia* A. Mattoo, "Shaping future GATS rules for Trade in Services", June 2000, available at http://econ.worldbank.org/files/1716_wps2596.pdf, 3; M. Krajewski, *loc. cit.*, supra n.10, 140; G. Verhoosel, *loc. cit.,* supra n. 51, 97; H. Mamdouh, *loc. cit.,* supra n. 9, 8.
[114] A. Mattoo and P. Sauvé, "Domestic Regulation and Trade in Services: Key Issues"*, loc. cit.,* supra n.5 , 3.
[115] Article XX GATS sets out the different elements that should be specified in Member's Schedule of Specific Commitment. These contain *inter alia* (a) terms, limitations and conditions on market access and (b) conditions and qualifications on national treatment. *See* M. Krajewski, *loc. cit.*, supra n.10, 113. This author gives the example of a Member that would list a prior residence requirement in its schedule of specific commitments. The right of the Member to schedule this restriction would be undermined if a Panel could conclude that this requirement was a violation of an Article VI:4 discipline because it was more burdensome than necessary.
[116] Report by the Panel, *US – Gambling, loc. cit.,* supra n. 14, para. 6.305.
[117] The Panel determines that its interpretation is based on the ordinary meaning of the words. Yet, it is hard to see how the Panel can derive this from their line of reasoning. Report by the Panel, *US – Gambling, loc. cit.,* supra n. 14, para. 6.308.
[118] Report by the Panel, *US – Gamling, loc. cit.,* supra n. 14, para. 6.302.
[119] Report by the Panel, *US – Gamling, loc. cit.,* supra n. 14, para. 6.303-6.304.
[120]Report by the Panel, *US – Gamling, loc. cit.,* supra n. 14, para 6.307-6.308. The Panel referred to the 1993 Scheduling Guidelines, as part of the context (para.6.307) and found confirmation for its interpretation in the Annex to the Revised Scheduling Guidelines of 2001 (S/L/92) that contains an informal note by the Chairman as cited in footnote 87.

Article VI:4"[121] Thus, there can be no overlap between measures falling within the scope of Article VI:4 and Article XVII.

One should be careful about the exact parts of Article VI that should be excluded from the measures falling under Article XVI and/or XVII. The Panel merely refers to Articles VI:4 and VI:5 and does not exclude that measures can fall within the reach of Article XVI or XVII on the one hand and other parts of Article VI (VI:1-3 and VI:6) on the other hand. The Panel even seems to recognize implicitly that a measure can violate both provisions at the same time.[122] Pauwelyn also submits that there might be some overlap between Article XVI and Article VI:1-3 since the scope of the latter apparently covers market access restrictions.[123]

This line of reasoning begs the question whether the entire scope of future disciplines developed pursuant Article VI:4 should be excluded from measures falling under Article XVI/XVII. After all, such future disciplines can, on the one hand, strengthen existing procedural disciplines, e.g. transparency disciplines (Article III) and disciplines of Articles VI:1-3 and VI:6, pursuant to Article VI:4(a) and, on the other hand, prescribe substantive obligations that ensure that regulations are not more burdensome than necessary, e.g. a necessity test in general or spelled out, pursuant to Article VI:4(b).

As mentioned above, such a necessity test in an obligation provision is hard to reconcile with Articles XVI and XVII. We do not think that a parallel with the necessity test in obligation provisions in TBT (Article 2.2) and SPS (Article 2.2), which apply in addition to the GATT requirements (such as non-discrimination in Article I and III), should be too readily applied here. First, the arsenal of domestic regulations concerning services is much broader and often more sensitive than the measures captured by TBT and SPS. Second, and more fundamentally, Articles XVI and XVII concern specific commitments and Members are allowed, when making a specific commitment, to schedule limitations and restrictions. This feature of GATS differs fundamentally from the multilateral agreements on trade in goods (e.g. GATT, TBT and SPS). Disciplining such measures under Article VI:4/5 would curtail the right of Members to schedule restrictions. The core-part of the argument is that Article VI:4/5 and Articles XVI/XVII, *juncto* Article XIV, install a necessity test[124], and thus the

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[121] Report by the Panel, *US – Gamling, loc. cit.,* supra n. 14, para. 6.309. (Emphasis added)

[122] Antigua argued that the US measures violated both Article XVI on the one hand and Article VI:1 and VI:3 on the other hand. The Panel, after finding a violation of Article XVI, also examined whether the US measures violated Article VI:1/3 and decided that "that Antigua has not made a prima facie demonstration that the measures at issue are inconsistent with Articles VI:1 and VI:3." Report by the Panel, *US – Gamling, loc. cit.,* supra n. 14, para. 6.437.

[123] For example, Article VI:1 includes "all measures of general application affecting trade in services". *See* J. Pauwelyn, *loc. cit.,* supra n. 42, p. 152.

[124] The necessity test in obligation provisions such as future disciplines pursuant Article VI:4 (see Accountancy Disciplines) or Article VI:5. The necessity test as a defense on the basis of Article XIV to justify a violation of Article XVI or XVII.

same substantive requirement, while Articles XVI/XVII allow Members to exclude some measures regarding the service sectors, for which they have made a specific commitment, from the reach of the necessity test. If the same measure can be scrutinized by the necessity test of Article VI:4/5, the right to schedule restrictions would become meaningless. This argument underpins, as mentioned above, the exclusion of overlap between measures falling under Article VI:4/5 and Articles XVI/XVII.[125]

Nevertheless, the same argument is not valid for disciplines of a *procedural* nature. Since there can be an overlap between the existing procedural disciplines and Article XVI/XVII (see *supra*), the strengthening of these procedural disciplines in future disciplines developed pursuant Article VI:4 could also encompass measures falling under Article XVI/XII. In addition, such procedural aspects of a measure cannot be entered as limitations in a Member's schedule (Article XX) since only limitations on market access and national treatment can be scheduled. Members cannot, of course, exclude the general obligations of the GATS, such as the transparency requirements, that apply by definition regardless of specific commitments. Moreover, Members cannot exclude (procedural) disciplines that require a specific commitment in the sector (such as Article VI:1, VI:3 and VI:6[126]). So, if Members make a market access or national treatment commitment in a certain sector, other 'conditional' requirements (see *infra*) will have to be fulfilled and cannot be excluded by scheduling it. For example, a Member cannot make a market access commitment in a certain sector and inscribe in its schedule that it is not bound by the discipline of Article VI:1. Future disciplines of a procedural nature could strengthen the current disciplines of the GATS without curtailing as such any right of Members. Therefore, the exclusion of overlap between Article VI:4 and Articles XVI/XVII is only needed insofar future disciplines are of a substantive nature, i.e. aim to ensure that measures are not more burdensome than necessary.

The approach of mutual exclusiveness raises a difficult question: where should the line be drawn between measures falling under Articles XVI and XVII and those falling under Article VI:4?

The six specific types of quantitative restrictions that constitute market access limitations and are listed in Article XVI can at first sight easily be excluded from the scope of Article VI:4. Nevertheless, the *US - Gambling* case raised the question whether measures resulting in the total prohibition on the cross-border supply of gambling and betting services constitute a quantitative restriction within the meaning of Article XVI. Put otherwise, does a prohibition constitute a "numerical" quota (Article XVI:2(a) and (c)) because it limits the

[125] *See*, for example; Report by the Panel, *US – Gamling, loc. cit.,* supra n. 14, para. 6.303.

[126] In contrast, Article VI:5 is of a substantive nature since it includes a necessity test.

supply to zero ("zero quota")? Both the Panel and Appellate Body answered this question in the affirmative. In the, somewhat peculiar, reasoning of the Appellate Body: "because zero is quantitative in nature, it can, in our view, to be deemed to have the 'characteristics of' a number – that is, to be "numerical"".[127] Pauwelyn firmly criticises this conclusion since it risks equating the *effect* of a zero quota with a numerical quota.[128] He argues that the US laws regulate *how*, i.e. the manner in which, certain gambling services must be performed, namely by prohibiting their remote supply, and therefore do not impose a quantitative limitation but should be subject to Articles VI and XVII. He is concerned that the broad interpretation of market access restrictions (Article XVI) by the Panel and Appellate Body caries the risk that the ongoing negotiations under Article VI:4 would loose much of their purpose.[129] Legally, in his view, it risks "that a driving test for taxi drivers automatically becomes a prohibited market access restriction simply because aspiring drivers that *fail* to pass the test do not get a taxi license."[130] However, given the reasoning of the Appellate Body, this concern should be tempered since the example is clearly not quantitative in nature nor has the characteristic of a number, except if all taxi drivers would fail in practice for the test and the measure would thus have the effect of a 'zero quota'. The legal consequence of bringing the US measures under Article XVI is that they are *per se* prohibited and should be justified on the basis of Article XIV (see infra). Otherwise, if measures resulting in 'zero quotas' would fall under Article VI:4/5, they would not violate this provision, though they might violate Article XVII.[131]

The dividing line between the national treatment provision (Article XVII) and Article VI:4 is even less straightforward. Therefore, we should study which measures fall outside the scope of Article XVII. As discussed above, Article XVII encompasses *de jure* discriminatory measures as well as *de facto* discriminatory measures. *De facto* discriminatory measures are origin-neutral (no formal discrimination) but have a discriminating effect. On the other hand, Article VI would deal with non-discriminatory measures. This is reaffirmed by the Panel in *US – Gambling*.[132] We can reformulate our question: where is the line drawn between *de facto*

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[127] Report of the Appellate Body, *US – Gamling, loc. cit.,* supra n. 14, para. 227.
[128] *See* J. Pauwelyn, *loc. cit.,* supra n. 42, p. 161-168. *See also* J.P. Trachtman, *loc. cit.,* supra n. 53, 207.
[129] *See* J. Pauwelyn, *loc. cit.,* supra n. 42, p. 133.
[130] J. Pauwelyn, *loc. cit., supra n*. 42, p. 160.
[131] It does not violate Article VI:4 (mandate to develop *future* disciplines) or Article VI:5. After all, the US laws existed at the time when the specific commitment in the gambling sector was made (Article VI:5(ii), see *infra*). Pauwelyn also remarks that the US laws "may violate the non-discrimination principles in Article XVII (a question not addressed in this paper, nor decided in the Gambling dispute)". *See* J. Pauwelyn, *loc. cit.,* supra n. 42, p. 167.
[132] Report by the Panel, *US – Gamling, loc. cit.,* supra n. 14, para. 6.304. "Yet, non-discriminatory measures relating to, for instance, the quality of the service supplied or the ability of the supplier to supply the service (i.e. technical standards or qualification of the supplier) can be maintained provided

discriminatory measures (falling under Article XVII) and non-discriminatory measures related to qualification, standards and licensing matters (falling under Article VI)?

Can the difference be found in the underlying intent of the measure? In this view, only measures that are intended to give less favourable treatment to foreign services or service suppliers are discriminatory. However, it may be recalled that the Appellate Body in *EC-Bananas* firmly rejected an "aim and effect" test. The EC argued in this case that its licensing system is not discriminatory under Article III GATT and Article XVII GATS because it pursued legitimate objectives and was not inherently discriminatory in design or effect. The Appellate Body rejected this argument, stating that "we see no specific authority (…) in Article XVII for the proposition that the "aim and effects" of a measure are *in any way* relevant in determining whether that measure is inconsistent with those provisions."[133] It is only pertinent whether the measure has, in practice, a discriminatory effect.[134] This finding is in accordance with the Appellate Body report *Japan-Taxes on alcoholic beverages* that rejected the aims and effect test in the context of GATT.[135] It may be observed that if discrimination is only defined in terms of effects, nearly any domestic regulation could fall under Article XVII. After all, almost any domestic regulation has adverse effects on foreigners simply because of the foreign character of the latter.[136] For example, foreigners will, in practice, always have more difficulties fulfilling licensing requirements.[137] However, different elements reflect the intention of the drafters that Article XVII should not be interpreted so broadly. First, Article XVIII on additional commitments, focuses precisely on measures that fall outside the scope of Article XVI and Article XVII. Thus, Members were aware that there might be barriers to trade, related inter alia to qualifications, standards or licensing matters that are non-discriminatory and not related to one of the six categories listed in Article XVI. An overly broad interpretation of *de facto* discrimination would render Article XVIII meaningless. Second, the reach of *de facto* discrimination is limited to measures that modify the conditions of competition in favour of the domestic service and service suppliers.[138] Third, the interpretative footnote of Article XVII might, at first sight,

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that they conform to criteria to be developed by the Council for Trade in Services pursuant to Article VI:4 and, in the meantime, to the criteria contained in Article VI:5."

[133] Report of the Appellate Body, *EC – Bananas*, *loc. cit.,* supra n. 39, para. 241.

[134] Report of the Appellate Body, *EC – Bananas*, *loc. cit.,* supra n. 39, paras. 243, 245 and 248.

[135] Report of the Appellate Body, *Japan – Taxes on Alcoholic Beverages*, 4 October 1996, WT/DS8/AB/R.

[136] *See* G. Verhoosel, *loc. cit.,* supra n.51, 55.

[137] An analogy can be made in this respect with the difficulties which the case law of the European Court of Justice sometimes displays in terms of the conceptual distinction between "discriminatory" and "non-discriminatory" restrictions to the free movement of goods, persons and services under the EC Treaty.

[138] Article XVII:3 GATS: "formally identical or formally different treatment shall be considered to be less favourable *if it modifies the conditions of* competition in favour of services or service suppliers of

limit the reach of *de facto* discrimination. It states that "specific commitments assumed under this Article shall not be construed to require any Member to compensate for any *inherent competitive disadvantages* that result from the foreign character of the relevant services or service suppliers"(emphasis added). So, *de facto* discrimination should not capture disadvantages that merely result from the foreign character of the service. But how could we distinguish between *de facto* discriminatory measures and inherent competitive disadvantages? Zdouc proposes a three-step test[139]: first, the inherent disadvantage should be measured on the basis of a comparison between foreign and domestic services or service suppliers (*variable 1*). Second, the impact of a measure (label it measure *X*) on domestic services and suppliers should be measured (*variable 2)*. Third, the impact of measure *X* on foreign services and suppliers should be measured *(variable 3*). If the third variable is less or equal to the sum of the other two variables, *de facto* discrimination does not exist. If the third variable has a higher value than the two others, this would point to *de facto* discrimination. However, on a practical level, it might be very hard to quantify the variables separately.[140] Additionally, from a conceptual point of view, it is hard to construe the concept of inherent competitive disadvantage as a useful instrument to limit the scope of *de facto* discrimination. After all, *inherent* competitive disadvantage refers, by definition, to a disadvantage *that results* from the foreign character of the service or service suppliers (see definition) and that thus not results from a certain measure. But how can it restrict the scope of *de facto* discriminatory *measures* if the "inherent competitive disadvantage" is, by definition, disconnected from any particular measure? If measure *X* has a higher impact on foreign services and suppliers compared to domestic services and suppliers (variable 3 is higher than variable 2), it seems discriminatory in effect. Why does it matter that this difference in effect would be less than the inherent disadvantage?[141] Interpreting measure *X* as *de facto*

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the Member compared to like service suppliers of any other Meber" (emphasis added). This provision is inspired by GATT case law on national treatment. The Panel in *United States – Taxes on Petroleum and Certain Imported Goods* stated that Article III:2 GATT referred to competitive conditions and not to trade effects. This jurisprudence was confirmed under the WTO. For example, in *Korea – Measures; Affecting Import of Fresh, Chilled and Frozen Beef,* the Appellate Body stated that article III only prohibits discriminatory treatment which "modifies the conditions of competition in the relevant market to the detriment of imported products." Report of the Panel, *United States – Taxes on Petroleum and Certain Imported Goods,* 17 June 1987, L/6175 – 34S/136, para. 5.1.9. Report of the Appellate Body, *Korea – Measures Affecting Import of Fresh, Chilled and Frozen Beef,* 10 January 2001, WT/DS161 and WT/DS169, para. 137.

[139] W. Zdouc, "WTO Dispute Settlement practice relating to the GATS", in F. Ortino and E.-U. Petersmann (eds.), *The WTO Distpute Settlement System 1995-2003,* London, Kluwer Law International, 2004, 607 p.

[140] See, M. Krajewski, *loc. cit.*, supra n.10, 111.

[141] Suppose, for example, that the "inherent disadvantage" can be measured (1000 €) as well as the impact of measure *X* : 50 € (domestic services and suppliers) and 1010 € (foreign services and suppliers). Pursuant to the test of Zdouc, no *de facto* discrimination would exist (1010 < 1000 + 50). So, the foreign services and suppliers, which are already disadvantaged due to their foreign character

discriminatory does not contradict the interpretative footnote, since it clearly does not result in compensation for any inherent competitive disadvantage but merely for discriminatory effects of the measure itself. This is exactly what the panel in *Canada – Automotive Industry* seems to point too:

"We further consider that treatment less favourable granted to services supplied outside Canada cannot be justified on the basis of inherent disadvantages due to their foreign character. Footnote 10 to Article XVII only exempts Members from having to compensate for disadvantages due to foreign character in the application of the national treatment provision; *it does not provide cover for actions which might modify the conditions of competition against services and service suppliers which are already disadvantaged due to their foreign character.*(…)We also find that any eventual inherent disadvantages due to the foreign character of services supplied through modes 1 and 2 do not exempt Canada from its national treatment obligation with respect to the CVA requirements."[142]

Therefore, Zdouc's attempt to link "inherent competitive disadvantage" and any particular measure, not by referring to the measure in its definition of inherent disadvantage (see step 1) but by the setting up of its test, is hard to defend.

In order to distinguish between measures falling under Article VI and measures falling under Article XVII, Verhoosel suggests a division based on a temporal basis, not on a functional one: Article XVII prohibits unnecessary measures[143] during the "post-establishment", which refers to the period when the service supplier is established in a foreign country. On the other hand, Article VI should apply to measures relating to the "pre-establishment" phase.[144] However, such a temporal distinction does not have any legal basis in the text of GATS.[145]

Krajewski and Türk propose limiting *de facto* discrimination under Article XVII to measures with a *foreseeable* discriminatory effect[146], whereby a discriminatory effect would be foreseeable if the regulatory measure uses a distinguishing condition that is apparently and typically more easily fulfilled by domestic suppliers. After all, Members have the right, when making specific commitments in a certain sector, to maintain *de jure* and *de facto* discriminatory measures in that sector if they schedule them. If the discriminatory effect of a measure is not foreseeable, a Member could impossibly schedule this measure as a limitation

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(1000 €), should bear an additional cost of 1010 €, while measure *X* costs the domestic services and suppliers 50 €.

[142] Report of the Panel, *Canada – Certain measures affecting the automotive industry,* WT/DS139/R and WT/DS142/R, 11 February 2000, paras. 10.300 and 10.301. (emphasis added)

[143] Verhoosel reads a necessity test into Article XVII by equating the requirement of non-discrimination with necessity. See G. Verhoosel, *loc. cit.,* supra n.51, 51.

[144] G. Verhoosel, *loc. cit.,* supra n.51, 97.

[145] M. Krajewski, *loc. cit.*, supra n.10, 112.

[146] E. Türk and M. Krajewski, "The right to Water and Trade in Services: Assessing the impact of GATS negotiations on Water Regulation", 2003, available at: http://www.ciel.org/Publications/GATS_WaterHR_28Oct03.pdf, 11; M. Krajewski, *loc. cit.*, supra n.10, 113.

to its specific commitment. Consequently, panels and the Appellate Body would, in the view of Krajewski, act *ultra vires*[147] when they condemn such measure with unforeseeable adverse effects as violating the national treatment obligation of Article XVII. Therefore, *de facto* discrimination under Article XVII should be restricted to measuring with a foreseeable discriminatory effect such as residence, prior practice in the country or local content rules.[148] Thus, measures, related to qualifications, standards or licensing with no foreseeable discriminatory effect would fall within the sphere of Article VI:4. This interpretation would limit substantially the scope of Article XVII. Krajewski finds support for "a similar approach"[149] to *de facto* discrimination in the panel report in *Canada – Automotive Industry*[150] when the panel held that "(a)lthough none of the criteria for granting the import duty exemption is expressly based on nationality, the manufacturing presence requirement, (…), has allowed only three service suppliers of the United States (…)."[151] Such a "manufacturing presence requirement" could fall within the scope of his definition of *de facto* discrimination, because it is typically and apparently more easily fulfilled by domestic suppliers. However, no element in this panel's finding suggests that the panel adheres to the same limited approach to *de facto* discrimination. It merely performs a traditional *de facto* discrimination test whereby the measure, coincidentally, fell within the reach of *de facto* discrimination as developed by Krajewski. Additionally, the paragraph cited by Krajewski examines less favourable treatment in the context of the MFN-treatment provision (Article II GATS)[152] and does not concern the National Treatment provision (Article XVII).[153] Krajewski, himself,

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[147] Thus violate Article 3.2 DSU.

[148] M. Krajewski, *loc.cit*., supra n.10, 113.

[149] M. Krajewski, *loc. cit*., supra n.10,114. Krajewski thus clearly analysed the Panel report as supportive of his limited approach to national treatment. This is also confirmed by his analysis of the Appellate Body report: "Even though the Appellate Body reversed the Panel's findings, it did not base this revision on arguments rejecting a limited approach to national treatment."

[150] Report of the Panel, *Canada – Certain Measures Affecting the Automotive Industry,* 11 February 2000, WT/DS139 and WT/DS142.

[151] Report of the Panel, *Canada – Certain Measures Affecting the Automotive Industry,* 11 February 2000, WT/DS139 and WT/DS142, para. 10.261.

[152] The Panel analysed in this paragraph less favourable treatment of service suppliers from certain Member countries in comparison with service suppliers of other Members such as the United States (see para. 10.261). It concluded that "the import duty exemption, (…), results in less favourable treatment accorded to services and service suppliers of any other Member within the meaning of Article II.1 of the GATS, as such benefit is granted to a limited and identifiable group of manufacturers/wholesalers of motor vehicles of some Members" Report of the Panel, *Canada – Certain Measures Affecting the Automotive Industry,* 11 February 2000, WT/DS139 and WT/DS142, para. 10.262.

[153] The Panel dealt with less favourable treatment in the context of national treatment in paragraphs 10.306-10.308 whereby it analysed whether the CVA requirements (value-added requirements) implemented by Canada accorded less favourable treatment to foreign services and service suppliers. The Panel noted that the CVA requirements do not discriminate between domestic and foreign services and service suppliers operating in Canada under modes 3 and 4. Yet, the Panel considered that services supplied through modes 3 (commercial presence) and 4 (presence of natural persons) and those supplied from the territory of other Members through modes 1 (cross-border supply) and 2 (consumption abroad) are "like" services. Therefore, the Panel found that the CVA requirements

advocates that it is likely that the standard of non-discrimination differs in Article II and Article XVII because MFN is a general obligation, whereas national treatment is a specific commitment (and thus depends on specific schedules).[154] He seems to suggest that his limited approach to de facto discrimination in the context of national treatment should not *as such* be transposed to the MFN-treatment. To conclude, it is disputable whether this panel's finding is supportive of a *limited* approach to national treatment.

Hong Kong, China submitted a communication in the WPDR[155] in an attempt to clarify the distinction between Article XVI-XVII and VI:4:

"Articles XVI/XVII and Article VI:4 are designed to deal with different aspects of a measure. In principle, licensing and qualification measures could have both MA/NT and regulatory aspects. The MA/NT aspects of such measures (e.g. separate certification required specifically for foreign suppliers) would be addressed by Articles XVI/XVII, while the regulatory aspects (e.g. the burdensomeness of the procedures in administering the certification requirement) would be addressed by Article VI:4 disciplines. There should be no question of overlap between Articles XVI/XVII and Article VI:4. In other words, the relationship of Articles XVI/XVII and Article VI:4 could be described as complementary, and the complementarity is in their functions rather than the respective scope of measures to which they apply: Articles XVI/XVII tackle restriction to market access and whatever forms of NT discrimination; while Article VI:4 focuses on necessity, transparency, etc. of licensing and qualifications requirements and procedures etc. Thus procedures administering discriminatory requirements scheduled in Article XVII could still be subject to the disciplines of Article VI:4 in respect of their regulatory aspects e.g. for lack of transparency or being more trade-restrictive than necessary."

In order to address the uncertainty and stress that the difference relates to the function rather than the scope of the articles, Hong Kong, China proposes to include an explicit reference to national treatment in regulatory disciplines developed pursuant Article VI.[156] At first sight, their proposed distinction seems to be based both on the aspects of the measure (substantive versus procedural)[157] as well as on the separate functions of the articles (Market Access and

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accorded less favourable treatment to services of other Members supplied through mode 1 and 2. Report of the Panel, *Canada – Certain Measures Affecting the Automotive Industry,* 11 February 2000, WT/DS139 and WT/DS142, para. 10.307-10.308.

[154] M. Krajewski, loc. cit. n. 10, 122.

[155] WTO, Working Party on Domestic Regulation, Communication from Hong Kong, China, "Relationship of regulatory disciplines with National Treatment", 31 March 2004, JOB(04)/24

[156] "A Member shall ensure that, in respect of measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards, services and service suppliers of any other Member shall be accorded treatment no less favourable than that it accords to its own like services and service suppliers, except to the extent of any elements which make them inconsistent with Article XVII that have been scheduled in that Member's schedule of specific commitments."

[157] See also the example made by the U.S. which is cited by Hong Kong, China as relevant to illustrate their proposal. Equity limits would fall under Articles XVI and XVII, whereas the procedural aspects under Article VI. Yet, the United States raised this example to illustrate that it was not convinced that a clear distinction between measures subject to Article VI and Article XVI/XVII was "either necessary, or in all cases feasible." Another example Hong Kong, China made are examination requirements for foreign service suppliers. Such measures, in their view, were apparently subject to scheduling under Article XVII as a discriminatory measure, but the procedural aspects or administration of the examination could still be the subject of Article VI:4. WTO, Working Party on Domestic Regulation, Note by the Secretariat, "Report on the Meeting Held on 24 June 2004", 8 September 2004,

National Treatment versus transparency and necessity). Nevertheless, the necessity test developed pursuant Article VI:4 also touches upon the substance of the measure.

Moreover, the WPDR attempts to clarify the distinction between Article XVII and Article VI on an empirical approach. The Examples paper (see supra) lists examples of measures that would fall outside the reach of Article XVII and therefore could be disciplined under Article VI:4. However, as affirmed by the Secretariat, a substantial number of examples supplied by Members appear to be subject to scheduling under Article XVI or Article XVII. Future disciplines should, for example, prohibit requirements for fluency in language of the host country that are not relevant to ensuring the quality of the service or they should make it unnecessary that in the banking service "when producing the financial statement, firms are required to follow the headings and codes specified by the local competent authority, rather than those of international practices".[158] Other examples in the Examples Paper refer to prior residency requirements. While such measures are often not intended to discriminate, they are arguably *de facto* discriminating. Residency requirements are even explicitly mentioned by Krajewski as having a *foreseeable* discriminatory effect.[159]

Although the WPDR and most authors advocate a clear distinction between Article VI:4 and Articles XII and XIII, it is difficult to draw a clear line between these provisions. Wherever this line may be drawn, we should be conscious that Article VI:4 encompasses at least measures that are not discriminatory in intent or in effect. Future disciplines might target for example, "unreasonable environmental and safety standards" in maritime services[160] regardless of whether these regulations discriminate between national services/service suppliers and foreign services/service suppliers.

3. Unconditional or Conditional Disciplines?

Should future disciplines be applied only where specific commitments in the sector are made (conditional) or regardless of the existence of such specific commitments (unconditional)? This is another key question about the scope of future disciplines. As mentioned above,

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S/WPDR/M/26, para.56. WTO, Working Party on Domestic Regulation, Note by the Secretariat, "Report on the Meeting Held on 24 September 2004", 15 November 2004, S/WPDR/M/27, para. 57.

[158] WTO, Working Party on Domestic Regulation, Informal Note by the Secretariat, Revision, "Examples of Measures to be Addressed by Disciplines under GATS Article VI:4", 16 November 2004, Job(02)/20/Rev.9.

[159] *See* M. Krajewski, *loc. cit.*, supra n.10, 113.

[160] WTO, Working Party on Domestic Regulation, Informal Note by the Secretariat, Revision, "Examples of Measures to be Addressed by Disciplines under GATS Article VI:4", 16 November 2004, Job(02)/20/Rev9

Article VI is part of the general obligations of GATS, which apply to all measures and service sectors. Contrary to some other provisions of Article VI, paragraph 4 is not explicitly limited to sectors where specific commitments are made. The fact that four other paragraphs in this article are specifically stated to apply only where there are commitments suggest that the absence of such limitation was intentional.[161] Therefore, the scope of future disciplines should not be limited to sectors where specific commitments were made.

However, nothing in Article VI:4 prevents Members from narrowing the scope to sectors where specific commitments are made. As stated above, the Accountancy Disciplines only apply to Members that have entered specific commitments on accountancy in their schedule. Such a narrow approach fits the rationale behind Article VI:4 better, which is to ensure that non-discriminating domestic regulations do not in effect render market access and national treatment commitments meaningless.[162] This limited coverage also seems to be advocated by most Members in the WPDR because it would be difficult in their view to examine all their service measures to ensure compatibility with regulatory disciplines.[163] Additionally, if disciplines developed pursuant Article VI:4 are of a substantive nature, such as a necessity test (see for example the Accountancy Disciplines), it would be illogical to impose it on Members that made no specific commitments in that sector. This would imply, for example, that those Members should ensure that non-discriminatory measures are not more trade restrictive than necessary while they could uphold all discriminatory measures since they made no specific commitment. One could argue, however, that this argument is not so convincing for procedural disciplines, which strengthen, for example, the transparency requirements. After all, some current transparency disciplines, for example Article III:1 and Article VI: 2, are also unconditional.

4. Level of Government

[161] WTO, Working Party on Professional Services, note by the Secretariat, "Article VI:4 of the GATS: Disciplines on Domestic Regulation Applicable to All Services", 1 March 1999, S/C/W/96, para. 15.
[162] This result could also be achieved by a combination of unconditional sectoral disciplines with the format of a 'reference paper' (see *supra*). After all, Members will be free to inscribe these disciplines in their additional commitments, which they probably will merely undertake in case they already made market access and/or national treatment commitments in that sector.
[163] Many Members objected to the scope of Japan's Draft Annex on Domestic Regulation that applied regardless of whether specific commitments had been made. Therefore, Japan had limited the reach of the core provisions of their proposal to sectors where specific commitments had been made. WTO, Working Party on Domestic Regulation, Communication from Japan, "Draft Annex on Domestic Regulation", 2 May 2003, Job(03)/45/Rev.1. WTO, Working Party on Domestic Regulation, Note by Secretariat, "Report on the Meeting Held on 31 March 2004", 18 May 2004, S/WPDR/M/25, para. 38. Though a consensus on this issue has not yet been reached in the WPRD. Mexico, for example, supported the unconditional scope of Japan's proposal. WTO, Working Party on Domestic Regulation, Note by the Secretariat, "Report on the Meeting Held on 31 March 2004", 18 May 2004, S/WPDR/M/25, para. 37.

In the WPDR the question has arisen about the preferable reach of future disciplines. Should they only apply to measures at the federal or national level or should they also apply to measures at the sub-federal or sub-national level?[164] This question is particularly relevant because many domestic regulations are constructed at sub-national levels. The scope of Article VI:4 is not limited to measures at the national level. In general, GATS applies to measures taken by central, regional or local governments and authorities and each Member must ensure the observance of GATS by regional and local governments and authorities.[165] However, future disciplines could be explicitly limited to measures taken by the national government. This could be inspired by the concern that it may be difficult for countries, certainly for developing countries, to ensure compliance at all different levels. [166] However, such a limitation would lead to an uneven application of disciplines between countries with a different regulatory structure. Moreover, it would increase legal uncertainty because the determination of the exact governmental level of regulation is often difficult. Therefore, it is arguably preferable not to exclude sub-national levels. The legitimate concerns of developing countries could be met by special exemptions or longer time-phases to comply with domestic regulation disciplines.[167]

Another question raised in the discussions in the WPDR is whether future disciplines should encompass standards developed by non-governmental bodies to which no standardizing power has been formally delegated. Switzerland, in its proposal for disciplines on technical standards, remarks that such voluntary "private" standards may constitute important barriers to trade and therefore should fall within the scope of future disciplines on the subject. Nevertheless, in its communication, Switzerland submits that there should be some degree of connection to governmental action needs but it needs not to be formal or concrete. However, it is questionable whether this link will have any effect in practice since it is sufficient "that governmental action is just generally authorizing certain private activities (…)".[168] Moreover, instead of narrowing the scope to non-governemental bodies which are, at least loosely,

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[164] *See* WTO, Working Party on Domestic Regulation, Note by the Secretariat, "Report on the Meeting Held on 2 October 2001", S/WPDR/M/13, para. 13.

[165] Article I.3 GATS.

[166] Japan's proposal for an Annex on Domestic Regulation covers in principle measures taken at any level of government. One provision, relating to the public comment procedure, is explicitly limited to regulations formulated by the central government. This was inspired by the concern of developing countries about the administrative burden. WTO, Working Party on Domestic Regulation, Communication from Japan, "Draft Annex on Domestic Regulation", 2 May 2003, Job(03)/45/Rev.1. WTO, Working Party on Domestic Regulation, Note by the Secretariat, "Report on the Meeting Held on 31 March 2004", 18 may 2004, S/WPDR/M/25, para. 38.

[167] *See* M. Krajewski, *loc. cit.*, supra n.10, 137.

[168] WTO, Working Party on Domestic Regulation, Communication from Switzerland, "Proposal for Disciplines on Technical Standards in Services", 1 February 2005, S/WPDR/W/32, para. 9.

linked to the government, Switzerland includes in its proposal a more flexible discipline on governments towards "private" standards.[169]

5. Sectoral or Horizontal Level?

A final issue related to the scope of Article VI:4 is the question of whether future disciplines should be developed on a sectoral or horizontal level. The WPPS focused on a sectoral approach and developed disciplines specific for the accountancy sector.[170] The WPDR received an open mandate.[171] In general, the debates have focused so far on horizontal disciplines, which would apply to all sectors.[172] Some Members are nevertheless advocating a more sectoral focus within the WPDR.[173]

Mattoo, stresses that, even though service sectors differ greatly, there is considerable similarity in the underlying economic and social reasons for regulatory interventions. Therefore, the argument can be advanced that a horizontal approach to disciplines on domestic regulation is possible within GATS. These horizontal rules can emerge from sectoral experimentation.[174] Yet, in the view of Krajewski, sectoral disciplines may be more suitable because they can address the specific needs and circumstances of regulation in a particular sector better than horizontal disciplines applying to all sectors.[175] While general horizontal disciplines might emerge, there may always be a need for sector-specific disciplines to capture the particularities of an individual sector. [176] Interestingly, the

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[169] "Members *shall ensure* that technical standards are not prepared, adopted or applied with a view to or with the effect of creating unnecessary barriers to trade. They should also *make every effort* that non-governmental standardizing bodies do not apply technical standards creating such barriers to trade" WTO, Working Party on Domestic Regulation, Communication from Switzerland, "Proposal for Disciplines on Technical Standards in Services", 1 February 2005, S/WPDR/W/32, para. 15.

[170] The WPPS was mandated to focus on the Accountancy sector: "As a matter of priority, the Working Party shall make recommendations for the elaboration of multilateral disciplines in the accountancy sector". WTO, Council for Trade in Services, "Decision on Professional Services", 4 April 1995, S/L/3, para. 2.

[171] "In fulfilling its tasks the Working Party shall develop generally applicable disciplines and may develop disciplines as appropriate for individual sectors or groups thereof". WTO, Council for Trade in Services, "Decision on Domestic Regulation", 26 April 1999, S/L/70, para. 3.

[172] For example, the European Communities and its Member States proposed a horizontal necessity test (see infra). WTO, Working Party on Domestic Regulation, "Communication from the European Communities and their Member States", 1 May 2001, S/WPDR/W/14.

[173] WTO, Working Party on Domestic Regulation, Note by the Secretariat, "Report on the Meeting Held on 31 March 2004", 18 May 2004, S/WPDR/M/25, paras. 7-14.

[174] *See* A. Mattoo and P. Sauvé, "Domestic Regulation and Trade in Services: Looking Ahead", in A. Mattoo and P. Sauvé (eds.), *loc. cit.,* supra n.5, 222-223.

[175] M. Krajewski, *loc. cit.*, supra n.10, 139.

[176] For example, Japan's proposal for an Annex on Domestic Regulation is in principle of a horizontal nature. It should be noted that Japan states that "taking into account the specific characteristics of each service sector, the possibility of developing separate, additional or alternative disciplines for a specific

Secretariat requested international professional associations to comment on the potential applicability of the Accountancy Disciplines for their specific sector, such as, inter alia, legal services, architectural services or engineering.[177] For example, the International Bar Association (IBA), recommended that the potential inclusion of a "necessity test" in disciplines on lawyer services should explicitly recognize that regulatory bodies have a reasonable discretion in making decisions and the (open) list of legitimate objectives should also include specific objectives such as the protection of the independence of the profession.

c) Content of Future Disciplines

1. Transparency disciplines

The transparency disciplines on measures of general application under the GATS (Article III) are not as far- reaching as parallel provisions in TBT and SPS. To recapitulate, GATS, on the one hand, obliges in general the publishing of relevant measures of general application (Article III:1) and those which significantly affect trade in services covered by its specific commitment should be notified to the Services council (Article III:3). Moreover, Members are required to establish inquiry points to respond to requests for information (Article III). On the other hand, TBT and SPS contain stronger transparency disciplines. They oblige Members *inter alia* to explain the justification of a regulation upon request by other Members[178], to notify other Members of the scope, objective and rationale of proposed regulation[179], to provide, upon request, copies of the proposed regulation[180] and to allow other Members to make comments that should be taken into account.[181]

An OECD Working Party suggested transplanting some of these transparency disciplines of the TBT Agreement to service sectors. These disciplines, which are far more intrusive for national regulatory procedures, could be extended to service sectors by

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sector should not be eliminated." WTO, Working Party on Domestic Regulation, Communication from Japan, "Draft Annex on Domestic Regulation", 2 May 2003, Job(03)/45/Rev.1.

[177] WTO, Working Party on Domestic Regulation, informal note by the Secretariat, "Results of Secretariat consultations with International Professional Services Associations", Revision, 15 November 2004, Job(03)/126/Rev.4. The consultations are based on the list of associations selected by Members, as contained in JOB(01)/98, dated 28 June 2001.

[178] Article 2.5 TBT.

[179] Article 2.9.2 TBT; Annex B, no.5(b) SPS.

[180] Article 2.9.3 TBT; Annex B, no.5(c) SPS.

[181] Article 2.9.4 TBT; Annex B, no.5(d) SPS.

developing disciplines under Article VI:4.[182] The OECD Working Party proposed including the obligation to provide an explanation on the rationale or justification for the covered measure. However, in its view, it would not be effective to transplant in the same manner the requirements on prior notification and the obligation to allow and take into account comments of other Members since it would place a heavy administrative burden on countries and could lead to delays in finalizing regulatory decisions.[183] Additionally, it can be argued that these requirements would also change fundamentally the national legislative and administrative procedures: they would "internationalize" national proceedings to a certain degree, because it would no longer be sufficient for a Member's parliament or administration to take only the interests of domestic stakeholders into account.[184]

Adopted on the basis of Article VI:4, the Accountancy Disciplines[185] include some obligations relating to the transparency. Firstly, they oblige Members to make publicly available some specific relevant information to fulfil qualifications, licensing and standards.[186] Secondly, they require Members to inform another Member, upon request, of the rationale behind domestic regulatory measures, in relation to the legitimate objectives.[187] Moreover, Members shall, when introducing measures which significantly affect trade in accountancy services endeavour to provide for opportunity for comment, and give consideration to such comments, before adoption.[188] Drafters were aware of the administrative burden of a too stringent provision. Therefore, in contrast to the TBT and SPS provisions in question, Members are only required to "endeavour" to allow comments and take these into account. Remarkably, as noted above, these transparency disciplines are not strictly limited to measures concerning licensing, qualification and standards.

Within the WPDR, proposals are made to develop horizontal transparency disciplines, which are thus applicable to all service sectors.
The United States submitted a Proposal for Transparency Disciplines that would include, inter alia, the effectiveness of contact points and the procedural aspects of the development of

[182] Insofar as they are related to the scope of Article VI:4. However, remark the open scope of the Accountancy Disciplines concerning transparency disciplines.
[183] OECD, Trade Committee, Working Party on Trade Committee, "Strengthening Regulatory Transparency: Insights for the GATS from the Regulatory Reform Country Reviews", 11 April 2000, TD/TC/WP(99)43/FINAL, 56.
[184] See also M. Krajewski, *loc. cit.*, supra n.10, 128.
[185] WTO, Council for Trade in Services, "Disciplines on Domestic Regulation in the Accountancy Sector", 17 December 1998, S/L/64. Adopted by the Council for Trade in Services by: WTO, Council for Trade in Services, "Decision on Disciplines Relating to the Accountancy Sector", 15 December 1998, S/L/63.
[186] Article III:3, Article III:4 and Article III:7
[187] Paragraph 5 Accountancy Disciplines.
[188] Paragraph 6 Accountancy Disciplines.

regulations such as prior notification and comment.[189] Article III GATS and the Accountancy Disciplines would serve as the starting point for the new disciplines. Members in general welcomed this proposal of the United States but some stressed the importance of taking into account the administrative burden and capacity for developing countries. This is a relevant element in the discussion whether the transparency disciplines should be applicable to all levels of government or restricted to central government. Developing countries also stressed that the transparency disciplines should cover the movement of natural persons (Mode 4), which is of particular interest for them.

The Annex on Domestic Regulation, proposed by Japan, also contains several disciplines relating to transparency.[190] It includes, for example, disciplines relating to public comment procedures that should provide for an opportunity for comments by the public and give consideration to such comments, before adoption.[191] However, like the comment procedure in the Accountancy Disciplines (supra), this provision is not as stringent as parallel provisions in the TBT and SPS Agreements. After all, the public comment procedure is restricted to regulations formulated by the central government and Members are merely obliged "to the extent possible" to provide for such public comment procedures.[192]

2. Necessity Test

In general, the necessity test examines whether a measure is necessary to achieve certain legitimate objectives. Such a test goes to the heart of the balance between trade liberalization and the right to regulate. It allows Members to regulate and pursue legitimate objectives only if these regulations do not unduly restrict trade. Should such a necessity test be applied to measures that fall under Article VI:4?

The first draft of GATS contained a necessity test with regard to domestic regulations. It stated that "(…) requirements shall (…) not be more burdensome than necessary to achieve the national policy objectives." However, such a directly operating necessity test was not kept in the final version of Article VI. This shift was inspired by the concern that a direct and general necessity test on domestic regulations would have been

[189] WTO, Working Party on Domestic Regulation, Note by the Secretariat, "Report on the Meeting Held on 24 September 2004", 15 November 2004, S/WPDR/M/27, paras. 2-29. Paper circulated as JOB(04)/128, 15 September 2004

[190] WTO, Working Party on Domestic Regulation, Communication from Japan, "Draft Annex on Domestic Regulation", 2 May 2003, Job(03)/45/Rev.1., article IV. These provisions are inspired by the Accountancy Disciplines, the TBT Agreement or the Leaders' Statement to implement the APEC (Asia-Pacific Economic Cooperation) Transparency Standards (27 October 2002).

[191] WTO, Working Party on Domestic Regulation, Communication from Japan, "Draft Annex on Domestic Regulation", 2 May 2003, Job(03)/45/Rev.1.,article IV.13.

[192] Moreover, the procedure is only applicable in sectors where specific commitments are undertaken and cases of emergency or of a purely minor nature are explicitly excluded.

insufficient to provide guidance for the settlement of disagreement or disputes about particular measures.[193] Indirectly, Article VI:5 imposes on Members a necessity test, which will be discussed below. Article VI:4 only contains a mandate to negotiate disciplines that ensure that requirements, relating to measures within the scope of Article VI:4, are *inter alia* not more burdensome than necessary to ensure the quality of the service. This wording of Article VI:4 implies that 'necessity' is bound to play a central role in the development of disciplines.[194]

It did therefore not come as a surprise that the Accountancy Disciplines implemented a necessity test. A similar necessity test for non-discriminatory measures can be found in Article 2.2 TBT and Article 2.2 SPS. Contrary to Article XX GATT and Article XIV GATS, these provisions create an obligation and do not frame an exception to an obligation.[195] In other words, a prior violation of another provision is not required in order to apply the necessity test under the Accountancy Disciplines and TBT/SPS. Moreover, these provisions cannot be used to justify any violation of an obligation under the other provisions of the particular Agreement. Two differences between a necessity test in obligation provisions and those in exception provisions can be pointed out. First of all, a necessity test in exception provisions appears to be associated with a finite set of policy objectives that are more limited and fundamental in nature, while a necessity test in obligation provisions is associated with a non-exhaustive list of objectives.[196] Furthermore, in dispute settlement proceedings the initial burden of proof in relation to a necessity test in exception provisions is on the party that wants to justify a violation of another GATT or GATS provision[197], while in the case of a necessity

[193] "the purpose of developing these general principles into "disciplines" could be seen as being to give them enough specificity to make them operationally useful."WTO, Working Party on Professional Services, note by the Secretariat, "Article VI:4 of the GATS: Disciplines on Domestic Regulation Applicable to All Services", 1 March 1999, S/C/W/96, para. 3.

[194] M. Djordjevic, "Domestic Regulation and Free Trade in Services – A Balancing Act", *LIEI*, 2002, no.3, 309.

[195] *See* WTO, Working Party on Domestic Regulation, Note by the Secretariat, ""Necessity tests" in the WTO", 2 December 2003, S/WPDR/W/27.

[196] On the contrary, as we will see later, the necessity test in Article VI:5, which provides also for a necessity test in an obligation provision, does not contain an open list of objectives.

[197] The Appellate Body in *US-Gambling* clarified the content of this obligation: "(…) it is not the responding party's burden to show, in the first instance, that there are *no* reasonably available alternatives to achieve its objectives. In particular, a responding party need not identify the universe of less trade-restrictive alternative measures and then show that none of those measures achieves the desired objective. (…)Rather, it is for a responding party to make a *prima facie* case that its measure is "necessary" by putting forward evidence and arguments that enable a panel to assess the challenged measure in the light of the relevant factors to be "weighed and balanced" in a given case. (…)If, however, the complaining party raises a WTO-consistent alternative measure that, in its view, the responding party should have taken, the responding party will be required to demonstrate why its challenged measure nevertheless remains "necessary" in the light of that alternative or, in other words, why the proposed alternative is not, in fact, "reasonably available"." Report of the Appellate Body, *US – Gamling, loc. cit.,* supra n. 14, paras. 309-311.

test in obligation provisions the burden of proof is on the complaining party.[198] Therefore, necessity tests in existing obligation provisions seem to be less intrusive to national regulatory autonomy than necessity tests which frame an exception to an obligation. Most Members tend to agree with the approach of the Accountancy Disciplines to include an open-ended list of legitimate objectives.[199] Many also rejected a list of "non-legitimate objectives" because it would be too limiting.[200]

The specific content of the necessity test is a subject of intense debate in the WPDR. Which elements should be taken into account to examine the "necessity" of measures falling under Article VI?[201] The European Community and the EU Member States proposed the following proportionality test: "a measure should be not more trade restrictive/not more burdensome than necessary if it is not disproportionate to the objectives pursued."[202] The concept of proportionality would "have to relate to the type of measures at stake" and would take into account "the technical and economic context, including the level of development of a Member, the specific nature of the sector in which the measure is used, and also the risks that non-fulfilment would bring."[203] Such a proportionality test installs "a balancing exercise between the trade restrictiveness of a measure and the policy objective."[204] The Appellate

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[198] WTO, Working Party on Domestic Regulation, Note by the Secretariat, ""Necessity tests" in the WTO", 2 December 2003, S/WPDR/W/27.para. 7; M. Djordjevic, *loc. cit*. 194, supra n., 319

[199] However, Japan's draft proposal includes a necessity test that does not contain an open-ended list of legitimate objectives. The necessity test is described as follows: "Member shall ensure that such measures are not more burdensome than necessary in order to fulfil its national policy objectives". So, it does not refer to "legitimate objectives" but to the concept of "national policy objectives" which can be found in the Preamble of GATS. Japan defends this approach by pointing out the failure in the WPDR to agree upon a clear definition of "legitimate objectives". WTO, Working Party on Domestic Regulation, Communication from Japan, "Draft Annex on Domestic Regulation", 2 May 2003, Job(03)/45/Rev.1. Also, the European Communities and its Member States do not consider such an open list as an indispensable requirement due to the broad nature of the GATS. Their proposal for a horizontal proportionality test (infra) would merely refer to "the objective pursued." WTO, Working Party on Domestic Regulation, "Communication from the European Communities and their Member States", 1 May 2001, S/WPDR/W/14, paras 19 - 23.

[200] WTO, Working Party on Domestic Regulation, Note by the Secretariat, "Report on the Meeting Held on 3 July 2001, Annex, Informal Summary of the checklist of issues for WPDR", S/WPDR/M/12, para. 6.

[201] This is often called the "third aspect" of the necessity test. The other aspects are the measure that is subject to the test and the objective which the measure seeks to achieve. D. Honeck, "The GATS and "Necessity"", Workshop on Domestic Regulation, March 2004, 4, available at: http://www.wto.org/english/tratop_e/serv_e/workshop_march04_e/sess2_dale_e.ppt

[202] WTO, Working Party on Domestic Regulation, "Communication from the European Communities and their Member States", 1 May 2001, S/WPDR/W/14, paras 17 and 22.

[203] WTO, Working Party on Domestic Regulation, "Communication from the European Communities and their Member States", 1 May 2001, S/WPDR/W/14, paras. 16 and 22. Trachtman has observed that this is probably a proportionality test *sensu stricto*, which examines whether the means are "proportionate" to the ends; whether the costs are excessive in relation to the benefits. Proportionality *sensu lato* is developed in the EU internal market context and encompasses three different tests: (a) proportionality *sensu stricto* (b) a least trade-restrictive alternative test, and (c) a simple means-end rationality test. J.P Trachtman, "Lessons for the GATS from existing WTO Rules on Domestic Regulation", in A. Mattoo and P. Sauvé (eds.), *loc. cit*., supra n.5, p. 69.

[204] M. Krajewski, *loc. cit.*, supra n.10, 143.

Body in *Korea-Beef*[205] also made a shift towards a balancing exercise in the context of GATT. The examination of whether a less trade restrictive alternative measure is reasonably available involves a process of "weighing and balancing a series of factors."[206] The factors the Appellate Body referred to in *Korea-Beef* were the importance of the value protected, the extent to which the challenged measure contributes to the realization of the end pursued by that measure and the effect of the measure on imports and exports.[207] This balancing exercise was reaffirmed by the Appellate Body in *EC – Asbestos*. [208] Moreover, the panel and Appellate Body in *US – Gambling* explicitly applied this weighing and balancing test and its different components, as articulated in *Korea-Beef*, in the context of the GATS (Article XIV(a)GATS).[209] Hereby, the Appellate Body noted that the factors identified in *Korea – Beef* should not be considered as an exhaustive list.[210]

Elaborating the necessity test as a balancing exercise has the merit that it recognizes that it is not a clear-cut test but that different elements should be considered and balanced. Nevertheless, it also shows that such a balancing exercise can leave a considerable margin of appreciation in the dispute settlement system, for example to evaluate the importance of the goal pursued by a Member. This jurisprudence expanded thus the elements that are taken into account in the examination whether a less trade-restrictive alternative measure is "reasonably available".[211] Interestingly, the Panel in *EC – Asbestos* explicitly declared that elements relating to the administrative burden should be taken into account.[212] Similarly, the Appellate

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[205] Report of the Appellate Body, *Korea – Bee , loc. cit.*, supra n. 138 .

[206] Report of the Appellate Body, *Korea – Beef, loc. cit.*, supra n. 138 , para. 164.

[207] Report of the Appellate Body, *Korea – Beef, loc. cit.*, supra n. 138, paras. 162-166. Factors that should be taken into the process of balancing "include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interest or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports." Report of the Appellate Body, *Korea – Measures Affecting Import of Fresh, Chilled and Frozen Beef,* 10 January 2001, WT/DS161 and WT/DS169, para. 164.

[208] Report of the Appellate Body, *European Communities – Measures Affecting the Prohibition of Asbestos and Asbestos Products,* 5 April 2001, WT/DS/135, para. 55. Report of the Appellate Body, *US – Gamling, loc. cit.,* supra n. 14, para. 305-306.

[209] Report by the Panel, *US – Gamling, loc. cit.,* supra n. 14, paras. 6.123 – 6.136.

[210] Report of the Appellate Body, *US – Gamling, loc. cit.,* supra n. 14, para. 305-306.

[211] Before, the necessity test was already being interpreted to require that the measure was the least trade-restrictive *reasonably* available. In United States – Gasoline, the Panel reaffirmed this interpretation of necessity by Panels under GATT 1947. Report of the GATT Panel, *United States – Section 337 of the Tarrif act of 1930,* 7 November 1989, BISD 39S/206, para. 5.26. Report of the Panel, *United States – Standards for Reformulated and Conventional Gasoline,* 29 January 1996, WT/DS2/R, para. 6.24. However, it remained unclear how "reasonably available" should be defined. It certainly did not take into account the different factors of the balancing exercise as developed by the Appellate Body in *Korea - Beef* . The Appellate Body set up the balancing exercise in the context of the examination whether a less-trade restrictive measures is reasonably available. Report of the Appellate Body, *Korea – Beef, loc. cit.*, supra n. 138 , para. 166.

[212] The Panel had stated that "we consider that the existence of a reasonable, available measure must be assessed in the light of the economic and administrative realities facing the Member concerned but also by taking into account the fact that the State must provide itself with the means of implementing its policies." Report of the Panel, *European Communities – Measures Affecting the Prohibition of Asbestos and Asbestos Products,* WT/DS/135/R, para. 8.196.

Body in *US – Gambling* decided that "an alternative measure may not be 'reasonably available' (…) where the responding Member is not capable of taking it, or where the measures imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties".[213] Moreover, the Appellate Body affirmed that the alternative measure should preserve the Members' right to achieve their desired level of protection with respect to the objective pursued.[214] Contrary to the GATT and GATS, the SPS Agreement, in the footnote of Article 5.6, literally refers to the "reasonable availability" of an alternative measure, taking into account the technical and economic feasibility. In the WPDR, Members are stressing the importance of the notion of "reasonable availability" for necessity tests in future disciplines, whereby for example the administrative capacity could be taken into account.[215] The Accountancy Disciplines merely require that measures are not more trade restrictive than necessary and thus do not contain explicitly this element of "reasonable availability". The question has been raised whether this element should be added to the Accountancy Disciplines.[216] It would add legal certainty but would not have considerable legal consequences given that the dispute settlement system already reads the necessity test as requiring that there is no alternative measure "reasonably available". Members could in future disciplines opt for a proportionality test, as proposed by the EC, that still seems to be more lenient in respect of domestic regulations than the necessity test, even in its broad interpretation given by the dispute settlement organs.[217] In addition, Members could work out a non-exhaustive list of factors, such as the level of development of the responding Member, which should be taken into account in the balancing exercise.

Some scholars question the issue of inclusion of a general necessity test in future disciplines. Mattoo wonders whether this test should be applied to measures that do not discriminate in any way, given that any protectionist effect of regulatory requirements will already have come under rigorous scrutiny under Article XVII.[218] Moreover, he points out the difficulties for an adequate application of the necessity test by the panels and Appellate Body. Therefore, in his view the institution of a necessity test for strictly non-discriminatory measures concerning licensing and qualification *requirements* is only legitimate if it is based on (a) establishing empirically that strictly non-discriminatory requirements significantly

[213] Report of the Appellate Body, *US – Gamling, loc. cit.,* supra n. 14, para. 305-306.
[214] Report of the Appellate Body, *US – Gamling, loc. cit.,* supra n. 14, para. 305-306.

[215] WTO, Working Party on Domestic Regulation, note by the Secretariat, "Report on the Meeting Held on 31 March 2004", S/WPDR/M/25, para. 72-74.
[216] D. Honeck, *loc. cit.*, supra n. 201, 12.
[217] See also J.P. Trachtman, *loc. cit.*, supra n.53, 216.
[218] A. Mattoo, "Domestic Regulation and Trade in Services: Designing GATS Rules", Workshop on Domestic Regulation, March 2004, 7, available at: http://www.wto.org/english/tratop_e/serv_e/workshop_march04_e/sess1_aaditya_mattoo_e.doc; A. Mattoo and P. Sauvé, "Domestic Regulation and Trade in Services: Looking Ahead", in A. Mattoo and P. Sauvé (eds.), *loc. cit.,* supra n.4.

impede trade and (b) demonstrating credibly that such a test can be applied in a way that does not threaten legitimate regulatory autonomy. In order to fulfil this second condition, it might be sufficient in Mattoo's view to ensure that non-discriminatory measures are "not obviously unnecessary" to secure compliance with a legitimate public policy objective. In the case of licensing and qualification *procedures*, contrary to substantive requirements, he is less concerned that the application of a necessity test is over-intrusive.

Krajewski shares the concerns relating to the adequate application of a necessity test by the panels and Appellate Body.[219] He doubts whether the members of panels and of the Appellate Body have suitable legal expertise because they are specialists in trade law and not experts of national regulations. This background could lead to an overemphasis of the trade-restrictiveness of a measure and an underestimation of the importance of the national regulatory objective.[220]

According to Howse and Türk, a general necessity test in non-discrimination provisions would transform the dispute settlement organs into "something like a global regulatory review agency, second-guessing domestic regulatory trade-offs in service regulations (…)."[221] WTO dispute settlement organs are, in their opinion, not the appropriate forum to perform the balancing exercise required by this necessity test because they would have to make judgments weighing fundamental societal values.

The WTO counters this criticism by pointing out that "(the Accountancy Disciplines) do not set standards for the accountancy sector nor do they provide for the review of national standards. Their main purpose is to increase transparency (…). The GATS does not involve setting standards in any context and does not require Member Governments to submit any legislation or regulation for review by their trading partners. The only circumstances in which a country could be asked to demonstrate that a given measure is not more trade-restrictive than necessary would be in the event of a dispute with another Member."[222] This remains however a procedural, rather than a substantial, defence. The dispute settlement organs will act as something like a standard review organization in any case when a Member submits a dispute.[223] A close look at the Examples Paper reveals that future disciplines might reinforce

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[219] M. Krajewski, *loc. cit.*, supra n. 10, 156.

[220] Yet, Krajewski acknowledges that the Appellate Body in *EC – Asbestos* set up a careful balancing exercise. Nevertheless, the regulatory goal (protection of human life and health) in this case was both vital and important in the highest degree. So, he doubts whether balancing exercises involving less important goals will be equally satisfying. M. Krajewski, *loc. cit.*, supra n.10, 156.

[221] R. Howse and E. Türk, loc. cit., supra n. 15, 4.

[222] WTO, "GATS: Fact and Fiction, Misunderstandings and scare stories", available at: http://www.wto.org/english/tratop_e/serv_e/gats_factfictionfalse_e.htm .

[223] This is recognized by the WTO: "The only circumstances in which a country could be asked to demonstrate that a given measure is not more trade-restrictive than necessary would be in the event of a dispute with another Member. Only then could the necessity or the trade restrictiveness of a measure

the standard reviewing role of the dispute settlement organs. They will have to perform a sensitive balancing act when examining, for example, whether a Member imposes "unreasonable environmental and safety standards in maritime transport" or "unreasonable restrictions on licensing in legal services". Of course, a Member should file a prior complaint. Yet, the complaining Member need not prove that such regulations of the defendant Member are discriminatory but merely that they constitute an unnecessary barrier to trade. The argument of the WTO that the main purpose of the Accountancy Disciplines is to increase transparency and that it does not set any standard might for some Members point to a failure rather than to a success of the Services Council in the implementation of its mandate, which is inter alia to develop disciplines that ensure that regulations concerning licensing, qualification and technical standards are not more burdensome than necessary to ensure the quality of the service. By including a general necessity test, the Members passed the difficult exercise to decide whether a standard is more burdensome than necessary on to the Dispute Settlement organs (negative integration).[224] The following statement of the Secretariat clearly reflects this mechanism: "the treatment of technical standards proved quite difficult in the creation of Accountancy Disciplines, and Members could agree only to two paragraphs. The main difficulty was that (…) sensitivity to any perceived threat to regulatory sovereignty was still an important element. Notably, the Accountancy Disciplines did apply a necessity test to technical standards."[225] However, as explained above, the purpose of the indirect approach adopted under Article VI:4 was that the disciplines developed by the Services Council would give guidance to the settlement of disputes. So, a direct and general necessity test was rejected and replaced by a mandate for the Services council to develop disciplines that ensured that regulations were not more burdensome than necessary. Some measures proposed by Members in the Example Paper can clearly be prohibited by disciplines that spell out the necessity test. Future disciplines should prohibit regulations that, for example, require that in the engineering sector "at least half of all the directors or shareholders who are actually conducting the business of an engineering consulting firm shall be licensed professional engineers" or that concerning hospital services "at least one-third of the directors should be medical professionals" because they are not necessary to ensure the quality of the service. Two main kinds of disciplines can be developed to prohibit such measures, with each its own level of "guidance" to the dispute settlement organs.

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become an issue." WTO, "GATS: Fact and Fiction, Misunderstandings and scare stories", available at: http://www.wto.org/english/tratop_e/serv_e/gats_factfictionfalse_e.htm .

[224] As explained above, some provisions of the Accountancy Disciplines spell out the necessity test but they do not give a lot of guidance to the Dispute Settlement organs and they are often formulated in weaker language than that in the necessity test.

[225] WTO, Working Party on Domestic Regulation, Note by the Secretariat, "Report on the meeting held on 22 November 2004", 25 January 2005, S/WPDR/M/28, para. 25.

First, the given example can be captured by a general necessity in the domain of medical services. In this instance, the WTO can uphold that "it does not involve setting standards in any context", but this is possible simply because the balancing exercise is the responsibility of the Dispute Settlement organs. However, the outcome of the balancing act by the dispute settlement organs is uncertain. They'll have to decide in a dispute whether, for example, the regulation that one-third of the directors should be medical professionals is necessary to ensure the quality of the medical service.

Second, Members in the WPDR can agree, for example, to develop a discipline in the medical sector that prescribes that the board of directors of a hospital should be open to persons without medical expertise. National regulations will have to comply with this standard. In this case, Members perform themselves the balancing act imposed by the necessity test. Yet, such a discipline would shift the WTO towards an international standardization organization, a role that the WTO firmly rejects. Such international standardization raises fundamental questions about the legitimacy of the WPDR and the WTO as a whole.[226] Moreover, it will be difficult in practice to find a consensus within the WPDR to list specific measures that are seen as unnecessary to ensure the quality of the service.

Therefore, future disciplines will probably opt for the first approach and follow the path of the Accountancy Disciplines. They will, complimentary to a type of a general necessity test, reinforce the GATS provisions on mutual recognition (concerning national standards of other Members) and on the use of international standards (concerning standards developed by international standardization organizations).

3. Mutual Recognition

The concept of recognition or equivalence is based on the idea that a service supplier, who already fulfilled certain licensing and qualification requirements in his home country, should not be obliged to meet the same qualifications again.[227] As mentioned above, Article VII GATS deals explicitly with this issue. It states that Members "may recognize the education or experience obtained, requirements met, or licences or certifications granted in a particular country." Article VII thus merely allows Mutual Recognition Agreements (MRAs) among Members on a non-discriminatory basis.[228] It reflects the concern that, due to substantial regulatory diversity in service sectors, implementing recognition on a multilateral basis is

[226] Although the WPDR is open to all Members, capacity constraints of developing countries often prevent them from fully participating.
[227] M. Krajewski, *loc. cit.*, supra n.10, 147.
[228] The TBT and SPS Agreement also encourage MRAs (Article 6.3 TBT Agreement and Article 4 SPS Agreement).

very difficult to achieve. Thus, unlike provisions in respectively the SPS and TBT Agreements, GATS does not require Members to "accept", nor even "to give positive consideration to", certain foreign standards.[229]

Could a multilateral approach towards recognition be developed on the basis of Article VI:4? Recognition can be covered under Article VI:4 insofar as it concerns licensing, qualifications and technical standards.[230] On this basis, the Accountancy Disciplines include a provision regarding recognition: "A Member shall ensure that its competent authorities take account of qualifications acquired in the territory of another Member, on the basis of equivalency of education, experience and/or examination requirements."[231] The provision goes beyond Article VII but it is, at the same time, not as strict as the TBT and SPS provisions.[232] Its careful wording has been welcomed by Krajewski.[233] It only adds a procedural requirement and leaves the equivalence-awarding decision to the Member. If WTO dispute settlement organs determined whether there is equivalence or not, the national authorities would be too severely curtailed.

Trachtman points out the dynamic interplay between Article VI and Article VII.[234] These provisions work together to provide a complex system for managed mutual recognition. Future disciplines developed under Article VI:4 can provide incentives for recognition under Article VII. This interplay is also reflected in the work of the WPDR. Although Article VII is not part of the WPDR mandate, discussions on MRAs form an important element of the WPDR work.[235]

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[229] Article 4.1 SPS Agreement requires an importing Member to accept SPS regulations of an exporting Members, "if the exporting Member objectively demonstrates to the importing Member that its measures achieve the importing Member's appropriate level of sanitary and phytosanitary protections." The TBT Agreement is less stringent since it obliges Members merely to give positive consideration to accepting foreign regulation as equivalent if the foreign regulation fulfils the importing State's objective (see Article 2.7 TBT Agreement).

[230] WTO, Working Party on Domestic Regulation, Note by the Secretariat, "Report on the Meeting Held on 24 February 2003", S/WPDR/M/20, para. 54.

[231] Paragraph 19 Accountancy Disciplines. Moreover, the Accountancy Disciplines "note the important which MRA's can play in facilitating the process of verification of qualifications and/or in establishing equivalence of education" (Paragraph 21 Accountancy Disciplines).

[232] However, the obligation to "take into account" comes close to the obligation to "give positive consideration" which is found in the TBT Agreement.

[233] M. Krajewski, *loc. cit.*, supra n.10, 148.

[234] J.P Trachtman, "Lessons for the GATS from existing WTO Rules on Domestic Regulation", in A. Mattoo and P. Sauvé (eds.), *loc. cit*., supra n.5, p. 75.

[235] The OECD was invited in the WPDR to present a paper on Mutual Recognition Agreements (MRA). WTO, Working Party on Domestic Regulation, Note by the Secretariat, "Report on the Meeting Held on 24 February 2003", S/WPDR/M/20, para. 38. India also submitted a Paper on Recognition in the WPDR. WTO, Working Party on Domestic Regulation, Note by the Secretariat, "Report on the Meeting Held on 31 March 2004", S/WPDR/M/25, 103-116. Circulated as JOB(03)/192, 29 September 2003. India suggested linking the examination of multilateral guidelines on MRAs to the ongoing examination of the applicability of the Accountancy Disciplines to other professions, drawing upon the existing *MRA Guidelines for accountancy* (S/L/38). WTO, Working Party on Domestic Regulation, Note by the Secretariat, "Report on the Meeting Held on 24 September 2004", 15 November 2004, S/WPDR/M/27.

4. Role of International Standards

GATS does not specifically require Members to use international standards. Article VI:5(b), discussed below, requires only that, in determining the conformity of a Member with the obligations under Article VI:5(a), "account shall be taken of compliance with international standards of relevant international organizations".[236] Furthermore, according to Article VII:5, "(i)n appropriate cases, Members shall work in cooperation with relevant intergovernmental and non-governmental organizations towards the establishment and adoption of common international standards and criteria for recognition and common international standards for the practice of relevant services trades and professions." So, contrary to SPS and TBT[237], GATS does not require Members to "use" international standards or to "base" their regulations on international standards. It also does not provide for a presumption in favour of international standards, as do TBT and SPS.[238]

Disciplines developed under Article VI:4 could fortify the role of international standards in GATS. The Accountancy Disciplines set a similar standard as Article VI:5(b) by requiring Members to take international standards into account. This is, as in the case of mutual recognition, only a procedural requirement. It does not require, for example, using International Accounting Standards (IAS) as a basis for their own standards.

The WTO Secretariat advocates the inclusion in future horizontal disciplines of a presumption in favour of international standards.[239] This would facilitate the application of the necessity test by at least pointing out trade-restrictive measures adequate to secure the policy objective. It would also create a strong incentive for the use of international standards. The inclusion of the obligation to use international standards would, in their view, go even further, and would therefore take account of the characteristics of the various service sectors. Mattoo agrees that efforts should be made in GATS to create a stronger presumption in favour of genuinely international standards in services trade.[240] In sectors where such global standards exist, the probability of disguised or needlessly restrictive impediments to trade and investment may be significantly lower. Janda shares this view, while emphasizing that such a presumption can be rebutted when justified.[241] The proposal of Switzerland for disciplines on

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[236] Emphasis added.
[237] Article 3.1 SPS and Article 2.4 TBT.
[238] Article 3.2 SPS and Article 2.5 TBT.
[239] WTO, Council for Trade in Services, note by the Secretariat, "Article VI:4 of the GATS: Disciplines on Domestic Regulation applicable to all services", paras. 35 and 42.
[240] A. Mattoo and P. Sauvé, "Domestic Regulation and Trade in Services: Looking Ahead", in A. Mattoo and P. Sauvé (eds.), *loc. cit.,* supra n.5, 228.
[241] R. Janda, "GATS Regulatory Disciplines Meet Global Public Goods: The Case of Transportation Services", in A. Mattoo and P. Sauvé (eds.), *loc. cit.,* supra n.5., 123.

technical standards in services is inspired by the TBT Agreement: it obliges Members to "use" relevant international standards "as a basis" for their standards "except when it would be an ineffective or inappropriate means for the fulfilment of the legitimate national policy objective pursued (…)" [242] and includes a presumption in favour of international standards.[243]

In the opinion of Krawеski, however, the procedural requirement of the Accountancy Disciplines is already far-reaching enough.[244] Substantive requirements to use international standards are in his view too restrictive for national regulatory autonomy. Moreover, the structure of international standard-setting organizations would prevent such a substantive role for international standards. International standards are, after all, often drafted as voluntary standards. A presumption in favour of such standard or the requirement to use such standard would alter the nature of these international standards. Although such international standard-setting organization should be open to all WTO Members[245], developing countries often lack the capacity to fully participate in the construction of the international standard. Therefore, Krawеski advises not adopting the stricter approaches to the role of international standards taken by TBT and SPS.

4.3.4. Article VI:5 on Provisional Application

Can a Member that has made full market access and national treatment commitments in a certain sector maintain non-quantitative and non-discriminatory barriers to trade in this sector that relate to requirements on qualifications, standards and licensing? Obviously, these measures fall outside the reach of Article XVI and Article XVII. Second, if that Member has not made an additional commitment related to these specific measures, it does not violate Article XVIII: Third, Article VI:4 provides for a framework to develop future disciplines and as such does not contain a binding necessity test that would apply to such barriers to trade. Moreover, until now, no such disciplines have been developed that already entered into force. However, Article VI:5 provides for disciplines that would scrutinize such barriers to trade in case they nullify or impair specific commitments. These disciplines apply pending the entry into force of future disciplines developed under paragraph 4. Contrary to Article VI:4, this

[242] WTO, Working Party on Domestic Regulation, Communication from Switzerland, "Proposal for Disciplines on Technical Standards in Services", 1 February 2005, S/WPDR/W/32, para. 20. Parallel to Article 2.4 TBT Agreement. The non-exhaustive list of legitimate objectives differs from the TBT Agreement since it refers to infant industry development or fundamental technological problems.
[243] WTO, Working Party on Domestic Regulation, Communication from Switzerland, "Proposal for Disciplines on Technical Standards in Services", 1 February 2005, S/WPDR/W/32, para. 23. Parallel to Article 2.5 TBT Agreement.
[244] M. Krajewski, *loc. cit.*, supra n.10, 147.
[245] This is always required to fall under the term of "relevant international organization". See, for example, the footnote of Article VI:5.

provisional application is explicitly restricted to sectors in which a Member has undertaken specific commitments. Two criteria must be fulfilled to breach Article VI:5.

First, measures, relating to licensing and qualification requirements and technical standards, do not comply with one of the criteria outlined in paragraph 4. Therefore, the measure must be (a) not based on objective and transparent criteria or (b) more burdensome than necessary to ensure the quality of the service or (c) in the case of licensing procedures, in itself a restriction on the supply of the service. It is up to the complainant to show that the measure does not comply with one of these criteria. The necessity test (see (b)) is probably the most important discipline that is indirectly applied by Article VI:5. It requires measures that fall under the scope of Article VI:5 to be not "more burdensome than necessary to ensure the quality of the service." Trachtman rightly remarks that this last clause could be very interventionist.[246] It could prohibit a regulatory goal that is not to maintain the quality of the service but that is to avoid some other externalization or regulatory harm by the service supplier. Contrary to necessity tests in other obligation provisions, it does not provide for an open list of legitimate objectives. This possible broad impact of Article VI:5 is, however, at least partially, limited by the second criterion.

Secondly, the licensing or qualification requirements or technical standards must nullify or impair specific commitments in a manner that could not have been reasonably expected at the time the specific commitments were made. This seems to introduce a non-violation concept of nullification and impairment.[247] Article VI:5 is thus "a novel mingling of violation and non-violation concepts."[248] The complaining party has to prove that the measures attacked nullified and impaired a specific commitment in a manner which could not have been reasonably expected at the time the specific commitments were made. This excludes certainly regulations that existed at the time specific commitments were made.[249] Therefore, Article VI:5 is "first and foremost merely a standstill obligation."[250] Trachtman remarks that this clause may disadvantage developing countries. After all, developed countries have at the moment more extensive regulations of services than developing countries.[251] These regulations will survive the scrutiny of Article VI:5 since they could "reasonably be expected". Nonetheless, this disadvantage should be tempered in part.

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[246] J.P Trachtman, "Lessons for the GATS from existing WTO Rules on Domestic Regulation", in A. Mattoo and P. Sauvé (eds.), *loc. cit*., supra n. 5, p. 68.
[247] M. Krajewski, *loc. cit.*, supra n.10, 153; J.P Trachtman, "Lessons for the GATS from existing WTO Rules on Domestic Regulation", in A. Mattoo and P. Sauvé (eds.), *loc. cit*., supra n.5, 67. J.P. Trachtman, *loc. cit.,* supra n. 53, 212-213.
[248] G. Verhoosel, *loc. cit.,* supra n.51, 95.
[249] See WTO, Council for Trade in Services, Note by Secretariat, "Article VI:4 of the GATS: Disciplines on Domestic Regulation applicable to all Services", 1 March 1999, S/C/W/96, para. 3.
[250] J.P Trachtman, "Lessons for the GATS from existing WTO rules on Domestic Regulation", in A. Mattoo and P. Sauvé, *loc. cit*., supra n.5, 67. J.P. Trachtman, *loc. cit.,* supra n. 53, 213.
[251] J.P. Trachtman, *loc. cit.,* supra n. 53, 206 and 213.

Developing countries can still extend regulations in service sectors as long as they make no specific commitment in that sector (see *supra*). On the other hand, once a specific commitment is made in that sector, new regulations can be scrutinized under Article VI:5 if they nullify or impair specific commitments in a way that could not have reasonably be expected at the time the specific commitment was made. Therefore, developing countries should think twice before they make specific commitments in sectors that still require extensive new regulations.

So, Article VI:5 disciplines new regulations that could not have been reasonably expected at the time specific commitments in the sector were made. These regulations may, inter alia, not be more burdensome than necessary to ensure the quality of the service. In making this examination, "account shall be taken of international standards of relevant international organizations applied by that Member."[252] As discussed above, violations of Article VI:5 can still be justified on the basis of the general exceptions clause (Article XIV). This combines a necessity test in an obligation provision (Article VI:5) with a necessity test in an exception provision (Article XIV). Trachtman points out "the odd legal circumstances" regarding the burden of proof.[253] On the one hand, the complainant has to reverse the necessity of the measure under Article VI:5, while on the other hand, the defending party has to prove its necessity under Article XIV.

5. Conclusion: Balancing the Right to Regulate and Trade Liberalization, Equilibrium Reached?

At the beginning of this paper we explored the weighing scale of GATS, which aims at finding an equilibrium between trade liberalization and the right of Members to regulate in order to meet national policy objectives. Is there a balance reached in the existing GATS framework?

At first sight, regarding the existing GATS package, the balance seems not to lean over on the side of trade liberalization, especially compared with the provisions related to trade in goods. First, the prohibition of certain quantitative restrictions, spelled out in the provision on market access (Article XVI), is conditional upon specific commitments of Members in certain sectors. Second, the provisions prohibiting discrimination, the principal tool of liberalization, are limited in reach. Contrary to GATT, the MFN principle (Article II)

[252] Article VI:5 (b).
[253] *See* J.P Trachtman, "Lessons for the GATS from existing WTO rules on Domestic Regulation", in A. Mattoo and P. Sauvé, *loc. cit*., supra n.5, 68. J.P. Trachtman, *loc. cit.,* supra n. 53, 215.

is subjected to a negative list approach and the national treatment requirement (Article XVII) is restricted to specific sectors and limitations inscribed in a Member's schedule. Moreover, concerning the third tool, mutual recognition, article VII just allows mutual recognition among Members on a non-discriminatory basis. Unlike similar provisions in SPS and TBT, Members are not required to accept, nor even to give positive consideration to, foreign standards. Likewise, there are low incentives in GATS for the fourth instrument of liberalization, international standardization. There is only Article VI:5(b), requiring that account shall be taken of compliance with international standards of relevant international organizations in determining whether a Member meets the three criteria under Article VI:(a), and Article VII:5 that encourages Members to develop international standards. However, the potential of Article VI:5(a) nuances this preliminary conclusion since it provides for a necessity test as a positive obligation, the fifth tool of liberalization, imposed on measures related to qualification, standards and licensing matters. As explained, the mere reference to ensuring the quality of the service as a legitimate policy objective makes it an intrusive provision. While we strongly argue for opening this list of objectives, we also note that Article VI:5(a) is weakened in a double sense: it is limited to sectors in which a Member has undertaken specific commitments and these non-discriminatory measures must nullify or impair specific commitments in a manner that could not have been reasonably expected at the time the specific commitments were made..

The GATS provisions relating to procedural requirements are also not as intrusive as parallel GATT provisions for national regulatory autonomy. Disciplines on the transparency and the administration of general measures, found in Article III and Article VI:1, are not as far-reaching as similar provisions in TBT and SPS. Article VI:2, which requires the prompt review of administrative decisions, is doubly weakened : Members are not required to set up independent agencies for the review and they are not obliged to institute such procedures in a way that would be inconsistent with their constitutional structure or the nature of their legal system. Article VI:3, that deals with services where authorization is required, is also less demanding than equivalent provisions in TBT and SPS. Finally, Article VI:6 requires adequate procedures to verify the competence of professionals. This sets only a vague standard that is not further defined. We should also recall that Articles VI:1,VI:3 and VI:6 are limited to sectors where specific commitments are undertaken.

Nevertheless, future disciplines developed on the basis of Article VI:4 could shift the balance towards trade liberalization. These disciplines could go beyond the strengthening of transparency provisions and include provisions relating to the tools of liberalization applicable to non-discriminatory measures involving licensing requirements and procedures, qualification requirements and procedures and technical standards. An illustration of this can be found in the Accountancy Disciplines, which not only elaborate on the transparency

disciplines but also include a necessity test and enhance prudently the existing disciplines on mutual recognition and international standardization.

The exact content of these issues, which can influence the substance of domestic regulations and thus lie at the core of the balancing issue, is still highly debated in the WPDR work on the development of future disciplines. Is a general necessity test too intrusive for non-discriminatory measures or not? Should this test explicitly be tempered by the inclusion of the element of "reasonable availability" or replaced by a proportionality test? Should mutual recognition disciplines preferably be as far-reaching as under TBT and SPS Agreements? Should future disciplines include a presumption in favour of international standards? In addition to these questions, the specific scope of future disciplines is also not yet clearly defined. Should future disciplines apply only where specific commitments were made? Should future disciplines be limited to non-discriminatory measures? If so, where is the line between measures falling under Article VI and measures falling under Articles XVI and XVII?

The answers to these questions will influence the evaluation of whether GATS will find a proper balance between trade liberalization and the right of Members to regulate. Within the general WTO liberalization perspective, the potential for national regulation needs to be guarded in a manner that both optimizes service liberalization goals and promotes the efficacy of governments in pursuing regulatory objectives. Hereby, it should be stressed that, while the goods sector (GATT, TBT, SPS…) might be a useful point of comparison from a conceptual viewpoint, the difference between trade liberalization in the good and service sectors should not be overlooked. First, trade liberalization of services at the international level just started a decade ago (GATS) while this process in the goods service kicked off more than half a century ago (GATT 1947) (temporal difference). Second, the characteristics of services and goods also differ (substantive difference). The concept of services encompasses a wide variety of activities which are often closely linked to the national identity of States (for example, cultural services), have significant spill-over effects on the entire economy (for example, financial services) or have a direct and major impact on the well-being of the population (for example, health services). This explains the diversity in domestic regulations among countries (and sectors) as well as the sensitivity of trade liberalization in these sectors. These differences require a special attention that trade liberalization in the service sector is carefully sequenced. Therefore, the balancing act in the field of the GATS might require putting more weight on the "domestic regulation" part of the balance.

This diversity and sensitivity might also have inspired the drafters of the GATS to not include a direct necessity test for domestic regulations which are not discriminatory, but to mandate the Members of the WTO to work out disciplines that ensure *inter alia* that those

regulations are not more burdensome than necessary. The rather weak results point out that this is not an easy task. The Accountancy Disciplines are so far the only output and they even are not yet legally binding as of yet. One thing this contribution might have shown is that too many questions are left open by the GATS, which still causes numerous discussions in the WPDR and also creates legal uncertainty about the implications of commitments. The more fundamental reason might be found in the scope of the WPDR's mandate itself, which seems difficult to implement. On the one hand, Members can agree among themselves on the outcome of the balancing exercise in concrete service sectors and thus develop disciplines that ensure that domestic regulations are not more burdensome than necessary. This could bring the WTO close to becoming an international standard-setting organization, which would raise a variety of organisational and legitimacy questions. On the other hand, future disciplines can, which is more likely, strengthen the procedural disciplines (for example, transparency requirements) of the current GATS framework, as well as some of the liberalization instruments. They might reinforce GATS provisions on mutual recognition (concerning national standards of other Members) and on the use of international standards (concerning standards developed by international standardization organizations). In addition, instead of making the balancing exercise themselves, Members might pass it on to the dispute settlement system by including a general necessity test. Hereby, it will be dependant upon the dispute settlement system whether a proper balance will be found. Such necessity test in the framework of non-discriminatory services regulations might give raise to legal uncertainty and put too much responsibility upon the shoulders of the dispute settlement system. Moreover, Members should be aware of the complex interactions between the different instruments. Implementing stringent mutual recognition disciplines without providing a "level playing field" might be unwise. At the same time, reinforcing international standards should take into account the mandate, structure and legitimacy of the international standard-setting organizations that have developed such standards. Last but not least, special care should be given to the needs of developing countries. Future procedural disciplines and the necessity test should be sensitive to the administrative, technical and financial capacity of developing countries and contribute to their development needs.