

GATS and Domestic Regulation Disciplines and Sustainable Development Principles and Operational Concepts: The Challenges - 26 June 2006

Draft

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INTRODUCTION

The World Trade Organisation (WTO) was established on 1 January 1995 following the Ministerial Meeting at Marrakech in April 1994. The General Agreement on Trade in Services (GATS) is one of the thirty multilateral agreements which form part of the WTO. The Council for Trade in Services (CTS) was established¹ “to facilitate the operation” of the GATS and to create and organise subsidiary bodies as appropriate, one of which was the Working Party on Professional Services (WPPS).

The task of the WPPS was to develop disciplines for the accounting sector in accordance with the mandate of paragraph 4 of GATS Article VI on *Domestic Regulation*. In May 1997 the CTS approved the “Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector” prepared by the WPPS and in December 1998, adopted the “Disciplines on Domestic Regulation in the Accountancy Sector”. The accountancy disciplines are due to become binding at the conclusion of the Doha Development Agenda for countries which have undertaken specific commitments in the accounting sector.

Subsequently, in April 1999, the CTS formed the Working Party on Domestic Regulation (WPDR) with the broad remit of developing disciplines as mandated under GATS Article VI:4. The WPPS was wound up, and the WPDR was entrusted with the work of the WPPS on the development of disciplines for professional services. Under its mandate, the WPDR is to develop generally applicable disciplines, and as appropriate, disciplines for individual sectors or groups of sectors. The WPDR, in particular is asked to “develop necessary disciplines” to ensure that “measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services.”

As part of the exercise, Members were invited by the WPDR to indicate whether the accountancy disciplines could be developed so as to apply to other regulated professions. In a way, the construct of these disciplines has influenced their thinking on the wider remit of developing disciplines on government measures covering all services sectors. The VI:4 mandate leaves it open as to whether the resulting disciplines apply generally to all measures affecting trade in services, as does much of the GATS itself, or just to measures related to sectors which Members have inscribed in their schedules of specific commitments. Pending the adoption of the VI:4 disciplines, there is the provision in VI:5 that where a Member has undertaken specific commitments it “shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments” in a manner which does not comply with criteria set out in VI:4 and “could not reasonably have been expected” when the specific commitments were made.

The WPDR has considered an extensive range of material submitted by Members and requested from the WTO Secretariat, including on relevant legal aspects of other WTO agreements. In an effort to focus this long debate, in May 2003, Japan submitted a draft of a GATS Annex on Domestic Regulation forming a complete set of disciplines under the VI:4 mandate, and to apply to specific commitments only. It is largely based on the accountancy disciplines, supplemented by elements from other relevant agreements. Since then other Members have tabled drafts, both of complete annexes, and certain aspects such

¹ Under its Article XXIV *Council for Trade in Services*

as licensing procedures and technical standards. This study includes a survey of the main material tabled at the WPDR and attempts an analysis of the various possible elements that the disciplines may include, based on the illustrative list attached to the report of the Chairman of the WPDR to the Special Session of the Council for Trade in Services on 15 November 2005, contained in document JOB(05)/280.

The first Chapter describes the principal GATS articles, noting their relationship to VI:4 and the likely issues arising. Chapter 2 summarises the key principles embodied in the GATS legal framework and the concepts applied when assessing how the principles are put into effect by conditioning legal measures controlling commercial activities. Chapter 3 describes the key concerns of developing countries that they propose should be taken into account when drafting the legal language so that their sustainable development is not compromised. Chapter 4 addresses the issues arising for the Mode 4 form of supply through the temporary movement of natural persons, which developing countries have set as a priority. Chapter 5 describes the elements for the development of VI:4 disciplines and the logic for their formulation, while Chapter 6 considers what the sequence and timing of the negotiations on VI:4 could be. Finally full language for the VI:4 disciplines is proposed in Chapter 7, taking account of the need for clear legal definitions that respect the sovereign rights of Members to regulate their domestic affairs.

The Annexes include the full wording of the GATS Articles on Domestic Regulation and Recognition, the mandate of the WPDR and the Accountancy Disciplines. There is also an overview of the proposals for the disciplines tabled by WTO Members, together with significant observations on the key principles and issues provided by the WTO Secretariat.

This paper is not a legal treatise and aims to avoid legalese so as to provide a commentary that is understandable by practitioners, NGOs and the general public as well as attempting to be technically accurate so that the negotiators, regulators and academics can find it a useful reference.

1 THE RELATIONSHIP OF VI:4 TO OTHER GATS PROVISIONS

The GATS Structure

The GATS structure consists of the following Parts:

	Preamble
Part I:	Scope and Definition
Part II:	General Obligations and Disciplines
Part III:	Specific Commitments
Part IV:	Progressive Liberalisation
Part V:	Institutional Provisions
Part VI:	Final Provisions

Annexes on:

Article II Exemptions, and the Movement of Natural Persons Supplying Services under the Agreement, and Air Transport, Financial, Maritime Transport and Telecommunications Services.

The assessment of what disciplines are to be created under the mandate of GATS Article VI:4, has to take into account their potential interaction with the other GATS provisions. In principle there is no hierarchy of the various provisions and each can potentially apply cumulatively to any particular government measure where relevant. The difference between Part II and Part III is significant. The obligations under Part III result from negotiations which benefit all Members once inscribed in the schedules of specific commitments. Members are allowed to undertake limited obligations in Part III by imposing limitations and conditions on access and treatment of foreign service suppliers. Pressure to remove the specified limitations only arises during successive negotiations over many years. The disciplines in the articles in Part II apply to all sectors, some from the outset and others when sectors are included in specific commitments. Parts IV to VI and the Annexes are already negotiated, but not all of the provisions in Part II have yet been negotiated, and this notably includes Article VI:4 itself.

The scope of Article VI covers Domestic Regulations generally, and that of VI:4 covers a sub-set of these, defined as measures relating to qualification requirements and procedures, technical standards and licensing requirements and procedures. Part III covers disciplines on the application of discriminatory measures while the Domestic Regulation article covers measures that are non-discriminatory. Parts II and III although apparently designed to be mutually exclusive, have probably not achieved this aim, which is significant when creating disciplines under VI:4.

The GATS Preamble

The Preamble states that the aim of WTO Members is to establish a multilateral framework of principles and rules for trade in services.

Early achievement of progressively higher levels of liberalisation are foreseen through successive rounds of multilateral negotiations aimed at promoting the interests of all participants on a mutually advantageous basis, while securing an overall balance of rights and obligations, and giving due respect to national policy objectives.

In addition, the Preamble explicitly recognises 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. Given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right is noted. (Underscoring added)

Members desire to facilitate the increasing participation of developing countries in trade in services and the expansion of their service exports including, *inter alia*, through the strengthening of their domestic services capacity and its efficiency and competitiveness, taking particular account of the serious difficulty of the least-developed countries in view of their special economic situation and their development, trade and financial needs.

Comment

The development of disciplines for VI:4 must take into account the overall aims expressed in the Preamble, together with the principles relevant to the restricted scope of VI:4.

The boundaries to the coverage of the GATS provisions, including those of VI:4, are defined in Article I.

GATS PART II GENERAL OBLIGATIONS AND DISCIPLINES

Article I: Scope and Definition

The GATS applies to measures by Members affecting trade in services, which is defined as the supply of a service in four different ways, or ‘modes’, though that term does not appear in the GATS. They are also referred to as cross-border supply, consumption abroad, commercial presence and the movement of natural persons. The definition of supply “includes the production, distribution, marketing, sale and delivery of a service” (XXVIII (b)).

‘Measures’ under the GATS include those taken by central, regional or local governments and authorities, and also by non-governmental bodies in the exercise of powers delegated by those authorities. A Member has to take such reasonable means as may be available to it to ensure the observance of the GATS provisions by regional and local governments and authorities and non-governmental bodies within its territory.

The definition of services includes any service in any sector, except services supplied in the exercise of governmental authority, which in turn means any service supplied neither on a commercial basis, nor in competition with one or more service suppliers.

Comment

The key issues arising here for VI:4 are that, among others, (i) the modes of supply cover both services and the suppliers of services, (ii) cross-border supply, the situations when consumers are abroad, and when the suppliers, whether firms or persons, are present in markets abroad and (iii) in federal states, the implementation of obligations bound under the GATS by regional and local authorities, where such bodies exist, is highly relevant; this issue is similarly pertinent in relation to non-governmental bodies to which any level of

government has delegated some powers. In various countries the levels of government include states or provinces, regional and local authorities, and securing their compliance may be a problem. How VI:4 applies to government services that are not supplied in the exercise of governmental authority, has also to be taken into account, and any boundary issues considered.

Given the economic importance and political sensitivity of Mode 4 - the movement of natural persons to supply services – its relationship with VI:4 is examined in the Chapter on the Movement of Natural Persons. Mode 4 is defined as “the supply of a service [] by a services supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.” (I:2(d))

Article II: Most-Favoured-Nation Treatment

MFN forms one of two aspects of the principle of non-discrimination.² Under this article each Member shall accord immediately and unconditionally, to services and service suppliers of any other Member, treatment no less favourable than that it accords to like services and service suppliers of any other country (or ‘MFN’).

The scope of VI:4 covers certain non-discriminatory measures.

A measure which contravenes the MFN principle could give rise to a violation case and should therefore be brought into conformity with Article II. However, in specific instances, Members have initially ‘opted out’ from MFN under the Annex on Article II Exemptions (that in principle are time-limited). Derogations from MFN arise in practice where mutual recognition agreements are formed (VII), from the provisions relating to balance of payments problems (XII), the Annex on Air Transport Services and the Annex on Financial Services in relation to prudential measures. There is also a footnote in the ‘Annex on Movement of Natural Persons Supplying Services under the Agreement’ which states that:

The sole fact of requiring a visa for natural persons of certain Members and not for those of others shall not be regarded as nullifying or impairing benefits under a specific commitment.

Comment

In the present paper the term ‘principle’ is applied to any normative precept, and is seen as distinct from other concepts that assist in the proper application of a principle so as to give it practical operational effect. For further discussion see the Chapter on Principles and Concepts.

In effect the disciplines of VI:4 can be suspended by these derogations, because if a measure is not applied MFN, then it is discriminatory and falls out of the scope of VI:4.

² National Treatment is the other – see Article XVII below.

The treatment accorded to the foreigners can be less favourable than that accorded to national services and services suppliers in the absence of a national treatment commitment. Treatment accorded to foreigners under MFN which is better than that accorded to nationals is not prohibited, even when national treatment is accorded.

Article III: Transparency

The Preamble of GATS refers to “the expansion of trade under conditions of transparency”. Transparency is a fundamental principle of the WTO. This GATS article provides for prompt publication (or making the information publicly available) of all relevant measures of general application which pertain to or affect the operation of the GATS, and also to international agreements pertaining to or affecting trade in services that Members enter into.

In addition Members must inform the Council for Trade in Services (CTS) at least annually about the introduction of any new, or any changes to existing, laws, regulations or administrative guidelines which significantly affect trade in services covered by their specific commitments.

They should also respond promptly to all requests by any other Member for specific information on any of their measures of general application or international agreements, and set up an enquiry point to facilitate this.

A Member may notify to the CTS any measure, taken by another Member, which it considers affects the operation of the GATS (sometimes referred to as ‘counter notification’).

Article III bis Disclosure of Confidential Information provides that Members are not required to provide confidential information, the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice the legitimate commercial interests of particular enterprises, public or private.

Comment

These provisions are couched in general terms, so it may be advisable for VI:4 to provide for more detailed interpretations relevant to its specific cases to achieve operational clarity, as discussed in the Chapter on Principles and Concepts. It should be considered whether the disciplines on transparency ought to go beyond government-to-government transparency, to cover transparency as between regulators and services suppliers. The need of SMEs in particular for regulatory transparency and predictability is paramount.

Article IV: Increasing Participation of Developing Countries

This article aims to increase the participation of developing country Members in world trade, to be facilitated through negotiated specific commitments that relate to the strengthening of their domestic services capacity and its efficiency and competitiveness, *inter alia* through access to technology on a commercial basis; the improvement of their access to distribution channels and information networks; and the liberalization of market access in sectors and modes of supply of export interest to them.

Particular account is to be taken of the serious difficulty of the least-developed countries in accepting negotiated specific commitments, in view of their special economic situation and their development, trade and financial needs.

Comment

This article is not self-executory in the sense that the preferential treatment desired by developing and least-developed country Members must be identified by the latter and negotiated and agreed with those trading partners from whom they seek that preferential treatment. The Hong Kong Ministerial Declaration in recognising the special economic situation and the difficulties faced by least-developed countries provided that these countries need not undertake new commitments in the Doha Round of negotiations.

There could be a range of non-discriminatory measures that relate to specific commitments in the cases envisaged by Article IV. The way in which the disciplines of VI:4 are couched could be significant, and how they are differentially applied as between Members according to the levels of development, might involve the temporary suspension or mitigated application of VI:4 disciplines to certain Members. This is discussed in the Chapter on Disciplines in the Annex on Domestic Regulation.

Article V: Economic Integration

This Article allows Members to be parties to agreements liberalising trade in services amongst them (or free trade agreements - FTAs), provided that there is substantial sectoral coverage (by which it is understood to be in terms of the number of sectors, the volume of trade affected and modes of supply, and that the agreements should not provide for the *a priori* exclusion of any mode of supply), and, significantly, that FTAs must ensure national treatment in effect.

Comment

Measures within FTAs that are not subject to specific commitment obligations under the GATS, and that derogate from MFN and national treatment, therefore fall outside the scope of VI, which forms a significant loophole. It should be considered whether at least where there are specific commitments under GATS by any of the FTA Parties, then VI:1, 3, 5 and 6 should apply because they relate to specific commitments. As for recognition agreements within FTAs, some observers argue that they are not protected by Article V, and would be required to comply with Article VII on Recognition.

Article VI: Domestic Regulation

This Article aims to create disciplines for non-discriminatory measures that fall outside the coverage of the market access and national treatment articles. Such measures may constitute unnecessary barriers to trade and yet need not be inscribed in the schedules of specific commitments. The disciplines of the Domestic Regulation article include both those that relate to specific commitments (in paragraphs 1, 3, 5 and 6) and those that are general obligations (in paragraph 2).

The wording of VI:4 is:

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.

Thus the disciplines mandated to be created under VI:4 will specifically cover “measures relating to qualification requirements and procedures, technical standards and licensing requirements”, which constitute a sub-set of potential non-discriminatory measures. It appears to be generally accepted by Members that licensing procedures are implicitly covered in the first part of VI:4, even though only specifically mentioned in VI:4(c). Indeed, in the “Disciplines on Domestic Regulation in the Accountancy Sector” the wording is extended to read “licensing requirements and procedures.”

There is no consensus yet under the GATS on what the other non-discriminatory measures are, that VI:4 does not cover.

The disciplines in Article VI:2 apply at all times, even in the absence of specific commitments. Governments must maintain “judicial, arbitral or administrative tribunals or procedures” which would promptly review administrative decisions and provide remedies if appropriate for affected service suppliers. If not independent of the deciding agency, the procedures must “in fact provide for an objective and impartial review”.

The disciplines that apply where specific commitments have been undertaken specify how measures should be administered in a “reasonable, objective and impartial manner” (VI:1); applications considered “within a reasonable period of time” and provided “without undue delay, information concerning the status of the application” (VI:3); the observation of the criteria in VI:4 should take into account “international standards of relevant international organisations” (VI:5); and Members must provide for “adequate procedures to verify the competence of professionals” (VI:6).

Comment

Because there may be other non-discriminatory measures that do not fall under the scope of VI:4, there is a need to be clear as to the applicability of VI:4 in relation to these other categories of measures. Examples mentioned in official discussions include laws that relate to retail shop opening hours, land planning zoning, the independence of regulators, universal service obligations and access to networks or essential facilities.

The disciplines enshrined in Article VI apply horizontally to all sectors, and the analysis of the potential VI:4 disciplines has to address whether there should be disciplines for certain sectors that add value in the context of their specificity, as was decided in the case of basic telecommunications and embodied in the Annex on Telecommunications and the Basic Telecommunications Reference Paper (see below). At this stage, the prevailing sentiment

is in favour of concentrating on the horizontal disciplines, and leaving the sector specifics until later.

Since the provisions of VI:1, 2 and 3 cover all measures affecting the supply of services, there is the implication that there is an overlap of Article VI with the market access and national treatment articles, and thus a measure could be found to violate both VI:4 and the market access provisions.

A note by the Chairman at the time of the approval of the revised Scheduling Guidelines in 2001, indicated that “the new disciplines developed under VI:4 must not overlap with other provisions already existing in the GATS, including XVI and XVII, as this would create legal uncertainty. [] The disciplines to be developed cover Domestic Regulatory measures which are not regarded as market access restrictions as such.”

The limitations under Article XVI should perhaps be interpreted in a narrowly defined way that it does not encroach on the regulatory autonomy of Members to enact non-discriminatory laws under VI:4. Only if a measure is clearly covered by the specific market access definitions should VI:4 not apply, or as lawyers would say it “cannot be saved by VI:4.” Some see the appropriate ‘threshold’ that would trigger the application of VI:4 disciplines to particular measures as a crucial element to consider. The Appellate Body report in the case of *US-Gambling* (contained in document WT/D285/AB) has been criticised by some trade experts in this regard for having made a finding that a measure which prohibits the cross-border supply of gambling services amounts to a ‘zero quota’ which thus constitutes a numerical limitation under Article XVI:2(A). Critics of this decision emphasise that this broad interpretation of the coverage of Article XVI may result in regulatory measures which effectively restrict access of foreign service suppliers in a way which may be translated into numerical limits being ruled in the future as Article XVI measures rather than Article VI-type regulatory measures.

An interpretation that could be taken up in cases where a measure aimed to protect the quality of a service or its performance also has a quantitative side effect, would be that the market access rules ban measures that set maximum quantitative limits, whereas VI:4 measures set minimum requirements on the way in which services are supplied and therefore are not to be interpreted as falling under the market access prohibitions.

Article VI:4 can apply, within its scope, to both the substance of measures and the processes of their application. Consideration is needed as to whether VI:4 should provide for more detailed interpretations of the other parts of Article VI, as relevant to its specific remit.

Article VI:5 protects certain long-standing practices and circumstances and contains the non-violation concept. There is some question whether, in the interregnum while disciplines are being negotiated, regulatory measures which cause nullification or impairment in a manner inconsistent with the minimum requirements set out in VI:4 can give rise to a violation complaint. Where there is a violation, then nullification and impairment is presumed – see Article XXIII below.

The provisions in VI:5 relating to measures not reasonably anticipated, cannot cover measures adopted afterwards, as their content could not be expected in advance. The Secretariat Note S/C/W/96 1 Mar 99 VI:5(a) implies that at least all those measures which

were already in place in 1995 are exempt from VI:5. It should be noted in relation to VI:5(a)(ii) that a legal doctrine of ‘reasonable expectations’ has not yet been established – see the Chapter on Principles and Concepts. This is seen as putting developing countries at a disadvantage where they have minimal or no regulations and they have to comply with the greater burden of the VI:4 disciplines when enacting new measures.

One Member proposed that the national treatment language be specifically included in the VI:4 disciplines to end all doubt about any possible overlap between GATS Parts II and III. It would indicate that the exception is for measures only to the extent of any elements which make them inconsistent with Article XVII that have been inscribed in that Member’s schedule of specific commitments. (See Annex on WPDR papers).

There is the option for negotiators under Article VI:4 to agree disciplines which can be open ended in their criteria for determining whether a measure meets the objective of ensuring the quality of a service. Given that the domain of VI:4 has not yet been defined, this will need consideration. This reference to the quality of a service is the only one in the GATS, and is an important aspect in relation to trade. Rules to assure the quality of many services feature in domestic legislation for the protection of consumers, their assets, the environment and so on. As such rules imply adding to the costs of production through mandating actions by suppliers, it can effectively be a separate issue from measures which cause trade restrictions alone.

From the broadest perspective, where measures are not prohibited under the market access article, the VI:4 disciplines should ensure that a measure is not more trade restrictive than necessary to meet national policy objectives³.

Because the setting of standards for services shifts the focus from objective, scientifically measurable products, and from standards which can be mandated beforehand, to those for invisible, immeasurable services, instead it is necessary to require that the supplier demonstrate competence to practise, with licences for education and professional training and experience. However, the definition under VI:6 of “adequate procedures to verify competence” is not spelt out, nor the criteria for assessing competence.

Sectoral disciplines under VI:4: the Accountancy sector

Before the Working Party on Domestic Regulation was set up, the CTS approved the “Disciplines on Domestic Regulation in the Accountancy Sector” (S/L/64 of 17 December 1998) (see Annex on Accountancy Disciplines below). These disciplines give an indication of some of the chief issues which VI:4 must take into account, for example:

- The aim is to facilitate trade in accountancy services
- Unnecessary barriers to trade should not be created
- Measures should not be more trade restrictive than necessary to fulfil a legitimate objective. A non-exhaustive list of legitimate objectives includes: the protection of consumers (in general and users of accountancy services), the quality of the service, professional competence and integrity of the profession.
- Transparency, and information available from the enquiry and contact points

³ As proposed by Brazil, Colombia, the Dominican Republic, Peru and the Philippines in a Room Document circulated at the WPDR on 26 April 2005.

There followed specific requirements for licensing and qualification requirements and procedures, and technical standards. In effect the recognition of professional qualifications is required.

These obligations are due to be integrated into the GATS at the conclusion of the Doha Round. However, they do apply in the meantime to specific commitments already made, and no new measures should be made relating to accountancy services that are inconsistent with the principles.

Comment

It would seem the 'Disciplines for Domestic Regulation for the Accountancy Sector' are written in sufficiently general terms in the sense that, in the main, they could be adapted to apply to other professions and sectors.

Article VII: Recognition

The GATS article on recognition follows on after the Domestic Regulation article and states that:

1 For the purposes of the fulfilment, in whole or in part, of its standards or criteria for the authorization, licensing or certification of services suppliers, and subject to the requirements of paragraph 3, a Member may recognize the education or experience obtained, requirements met, or licenses or certifications granted in a particular country. Such recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously.

2 A Member that is a party to an agreement or arrangement of the type referred to in paragraph 1, whether existing or future, shall afford adequate opportunity for other interested Members to negotiate their accession to such an agreement or arrangement or to negotiate comparable ones with it. Where a Member accords recognition autonomously, it shall afford adequate opportunity for any other Member to demonstrate that education, experience, licenses, or certifications obtained or requirements met in that other Member's territory should be recognized.

3 A Member shall not accord recognition in a manner which would constitute a means of discrimination between countries in the application of its standards or criteria for the authorization, licensing or certification of services suppliers, or a disguised restriction on trade in services.

(Paragraph 4 deals with the notification requirements relating to such agreements.)

5 Wherever appropriate, recognition should be based on multilaterally agreed criteria. In 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.

The Accountancy sector: Guidelines for recognition agreements

The “Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector” (S/L/38 of 28 May 1997) approved by the CTS gives non-binding practical guidance on the operation of Article VII in this sector.

Comment

Recognition is authorised but not required under this article.

The article is designed to deal with the acknowledged problems that arise for MFN when applying the disciplines of VI:4 to recognition agreements. However, if the logic is accepted that mutual recognition agreements (MRAs) involve derogations from MFN, then VI:4 cannot apply in such circumstances. Although formally not constituting an exception to MFN, in practical terms this is what the provisions of the article on recognition amount to, because it is accepted that mutual recognition agreements have only been signed between two parties, or at most just a few - apart from the notable achievements in the EU which took a few decades to create.

It is usually only feasible initially to conduct MRA negotiations on a bilateral basis, though there are a few examples that have started plurilaterally among just a few well-matched professional associations. It is inconceivable that it could be possible to negotiate a multilateral MRA at the WTO.

Architects have reached agreement within the International Union of Architects on a broad framework for MRAs, which could be assessed by other professions as a model to follow. The accountants are being progressively successful in erecting international standards of wide acceptability. Other professions might follow their lead.

Technical assistance aid will be needed for developing countries who cannot afford the heavy costs involved in negotiating MRAs. However in this, the WTO will have to play primarily a catalyst role due to its meagre resources. Assistance will also be needed for developing countries to participate in the development, by official bodies, of international standards of wide acceptability, which can become ‘recognised’ by the WTO.

Some countries are already protesting that existing mutual recognition agreements are being operated either in a discriminatory manner, or are closed to them. Probably this mainly relates to privately concluded MRAs. The processes involved to conclude an MRA successfully are extremely time consuming and expensive to undertake, which puts developing countries at a general disadvantage.

The WTO does not define standards as it is not a standard setting body. Some of its agreements acknowledge standards set by international bodies, but there appears to be no general principle under the WTO on what constitutes such ‘recognition’, and how the interface with the myriad standard setting organisations should be managed. This may prove of increasing importance because recognised standards become justiciable under the WTO’s powerful dispute settlement mechanism.

In many fields standards are devised by bodies that include private sector members, and these tend to be the major commercial first movers. Since the results of their

deliberations may be used to decide multilateral trade law cases, the democratic accountability of these bodies becomes an issue, and also the competition policy position due to the risk of ‘regulatory capture’ by producers.

In the case of the use of standards applying to traded goods, the *Technical Barriers to Trade Agreement* of the WTO, mandates the use of international standards to prevent local standards being used for protectionist purposes, and they mainly rely on criteria that can be measured scientifically, and thus objectively. In the case of ‘intangible’ services the criteria used for standards may not be easily measurable, if at all. Ethical standards may be especially difficult to deal with. This may pose a severe strain on the process of settling disputes under the GATS, with the risk of falling back ultimately on subjective, politicised judgements.

The Annex on Financial Services also has a section on recognition in its paragraph 3 *Recognition* (see below).

Equivalence

Once some minimal, but essential, harmonisation is in place, reliance has then to be founded on the recognition of equivalence whereby the rules of two Members, though different, are reciprocally accepted as achieving essentially the same results. The problem arises in agreeing the criteria to be applied for assessing equivalence. It may be difficult to separate the manner of administration from the substance of rules.

In situations where there is partial recognition, probably in the majority of cases, the operation of the necessity test may influence the proportionality of what is partially recognised.

Article VIII: Monopolies and Exclusive Service Suppliers

Each Member shall ensure that any monopoly supplier of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that Member's obligations under Article II and its specific commitments. Where a Member's monopoly supplier competes, either directly or through an affiliated company, in the supply of a service outside the scope of its monopoly rights and which is subject to that Member's specific commitments, the Member shall ensure that such a supplier does not abuse its monopoly position to act in its territory in a manner inconsistent with such commitments.

Comment

The purpose of any controls to be imposed by the disciplines of Competition Policy is to counter market failure, such as the abuse of dominant power, asymmetric information and externalities, and to fulfil social objectives, including universal access.

The disciplines of VI:4 will have to take account of the provisions of this article.

Article X: Emergency Safeguard Measures

This article provides for multilateral negotiations on emergency safeguard measures based on the principle of non-discrimination.

Comment

Proposals for disciplines under VI:4 can only take account of the provisions on Emergency Safeguard Measures when they have been agreed.

Article XIII: Government Procurement

Presently, the GATS articles on MFN, market access and national treatment do not apply to laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale.

Comment

Presumably the disciplines of VI:4 should apply in due course to any non-discriminatory measures affecting the purchase of services by governments, but can only take account of the provisions on Government Procurement when agreed.

Article XIV: General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in the GATS shall be construed to prevent the adoption or enforcement by any Member of measures:

- (a) necessary to protect public morals or to maintain public order;
- (b) necessary to protect human, animal or plant life or health;
- (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
 - (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;
 - (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
 - (iii) safety
- (d) inconsistent with Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members;
- (e) inconsistent with Article II, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound.

Comment

The significant relationship between the VI:4 disciplines and measures taken under the general exceptions provisions is discussed in the Chapter on Principles and Concepts.

Article XV: Subsidies

Members recognize that, in certain circumstances, subsidies may have distortive effects on trade in services. Members shall enter into negotiations with a view to developing the necessary multilateral disciplines to avoid such trade-distortive effects. Such negotiations shall recognize the role of subsidies in relation to the development programmes of developing countries and take into account the needs of Members, particularly developing country Members, for flexibility in this area.

Comment

This article does not exempt measures on subsidies from other GATS disciplines and therefore the disciplines of VI:4 will apply. However, the interaction between the provisions of this article and VI:4 can only be taken into account when the disciplines on subsidies has been agreed.

GATS PART III SPECIFIC COMMITMENTS

The market access and national treatment articles in Part III define the quantitative, qualitative and discriminatory measures that in principle are not permitted in sectors where specific commitments have been taken unless they are specifically inscribed in a Members' schedules of specific commitments.

The schedules of specific commitments can either indicate that there are no restrictions ('None') except for those specifically listed, or indicate there is no commitment ('Unbound') apart from the form of supply specifically listed as permitted. The latter approach is usual under Mode 4 in the form "Unbound except at indicated in the horizontal section."

The Part III disciplines can apply independently in the same case and at the same time as Part II disciplines and this can be of operational significance to certain cases falling within the scope of VI:4.

Article XVI: Market Access

The provisions of the market access article constitute an exhaustive (or closed) list of measures that a Member must eliminate when binding specific commitments, unless any "terms, limitations and conditions" are agreed and specified in its schedule. Economic needs tests in any form including labour market tests are prohibited under this article, unless they have been scheduled, (See Annex A for the full text).

Any measure that affects both market access and national treatment has to be inscribed under market access, when specifying limitations in schedules of specific commitments.

Comment

Significantly, the specified measures that are prohibited, apply to both foreign and domestic services and services suppliers, once specific commitments with no limitations have been taken.

The restrictions specified in schedules can potentially affect the requirements for the issue of qualifications, licences and technical standards that VI:4 covers. The interface between the market access measures and the VI:4 disciplines therefore needs particular analysis. This is made more difficult in practice, as already noted, because qualitative trade barriers can have quantitative effects, and therefore the way in which the line between quantitative and qualitative measures is drawn, so as to exclude the latter from the market access provisions, is a key issue.

The market access restrictions cannot limit the application of the general VI:4 disciplines. Some Members therefore see it as sensible to proceed at first with VI:4 disciplines that only apply to specific commitments. The accountancy disciplines clearly state that they do not apply where the market access and national treatment provisions apply.

Analysts point out that if a measure does not fall under one of the categories of XVI:2 then it is not prohibited under XVI:2 even if it effectively restricts market access (or is a de facto restriction on market access). This underlines the importance of ensuring that legitimate VI:4 measures do not fall under XVI:2, but if a measure does fall clearly as prohibited under XVI:2, then it should not be justifiable as a domestic regulatory measure to be subjected to disciplines upon completion of negotiations under VI:4.

Further, some hold that XVI:2 is just an elaboration of XVI:1 with respect to 'limitations' and that further 'terms' and 'conditions' could also be inscribed in a schedule.

A potential problem arises where a sector is inscribed in a specific commitment without reference to any of its sub-sectors. It would be presumed that all sub-sectors are included in the absence of any specific exception, as was ruled by a WTO Panel and the Appellate Body in *US-Gambling* (contained in documents WT/D285/R and WT/D285/AB).

Article XVII: National Treatment

The provisions of the national treatment article, in full, are:

1 In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers. (The footnote to this paragraph states that: Specific commitments assumed under this Article shall not be construed to require any Member to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers.)

2 A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.

3 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 the Member compared to like services or service suppliers of any other Member.

The sectors inscribed can be selected (referred to as ‘positive listing’), but once listed the exceptions and limitations in these sectors have to be specified (‘negative listing’).

Comment

Significantly this article also covers market access restrictions since it relates to “all measures affecting the supply of services” – i.e., the scope of the application of XVII covers all XVI measures also.

As noted already, it is consistent with MFN and national treatment to accord foreigners better treatment than nationals, which is probably common practice under FDI incentive schemes.

There are two aspects to consider when relating the disciplines of VI:4 to the provisions of national treatment article: the treatments that are formally identical or formally different. It should be feasible to identify each type of measure. Problems arise in assessing whether either may constitute a modification in favour of the Member’s services or suppliers.

Whereas it should be readily feasible to identify measures that fall under the closed list of the market access article, the analysis is much more demanding under the open coverage of the national treatment article. In this light the ‘boundary’ definitions raised by the national treatment article becomes a central issue for resolving the problems of developing the disciplines for VI:4 in practice, and perhaps most significantly for the ‘formally different’ treatment domain.

Formally identical treatment with regard to measures relating to qualifications, standards and licensing, could often accord less favourable treatment to foreign services and suppliers. Measures that accord formally different treatment to foreign services and suppliers could even more readily accord less favourable treatment. This situation is one for which the VI:4 disciplines must be designed to provide practical solutions.

The notion of what constitute like services and suppliers under different competitive relationships and modes of supply needs special attention, given that measures can apply to both services and services providers. For this reason some suggest that the disciplines of VI:4 should first tackle then narrower de jure range of treatments, and defer until later the wider range of formally different treatments.

It should be considered whether local language tests are or are not a violation of national treatment.

Article XVIII: Additional commitments

This article states that:

Members may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under [*the market access and national treatment articles*], including those regarding qualifications, standards or licensing matters. Such commitments shall be inscribed in a Member's Schedule.

Comment

It appears to be clearly stated that the provisions of this article do not overlap with those of the market access and national treatment articles, which tends to support that VI:4 and XVI / XVII are mutually exclusive.

A significant aspect of applying the disciplines of VI:4 arises in relation to this article, because specific commitments can be undertaken that are operationally specific and so provide greater predictability to the non-discriminatory legal framework under which the service suppliers have to work.

PART IV: PROGRESSIVE LIBERALIZATION

Article XIX: Negotiation of Specific Commitments

The process of liberalisation shall take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors. There shall be appropriate flexibility for individual developing country Members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching to such access, conditions aimed at achieving the objectives referred to in Article IV.

Comment

This article provides a further element of flexibility in the GATS for developing country Members, though it does not amount to an exception from GATS obligations. The flexibility actually applied results from the request and offer negotiations on market access and national treatment, and not how existing GATS principles and rules are applied.

Article XX: Schedules of Specific Commitments

This article specifies what should be inscribed in schedules of specific commitments. Importantly XX:2 states that measures inconsistent with both the market access and national treatment articles shall be inscribed in the market access column, and are considered to provide a condition or qualification to national treatment as well.

Comment

It is clear from XX:2 that there can be an overlap in the coverage between the market access and national treatment articles. Indeed legal analysts say that the national treatment provisions also apply to the measures covered by the market access article. This raises the question as to whether, having made a national treatment commitment, but not a market access commitment, a measure can be found to violate the market access provisions due to the application of the national treatment provisions.

PART V: INSTITUTIONAL PROVISIONS**Article XXIII: Dispute Settlement and Enforcement**

If a Member considers that any benefit it could reasonably have expected to accrue to it, under a specific commitment of another Member under Part III of GATS, is being nullified or impaired as a result of the application of any measure which does not conflict with the GATS provisions, the affected Member may have recourse under XXIII:3 to the Dispute Settlement Understanding (DSU) of the WTO.

Comment

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system, and serves to preserve the rights and obligations of its Members. It can clarify the existing provisions of the various WTO agreements, in accordance with customary rules of interpretation of public international law. Panels and Appellate Board cannot add to or diminish these rights and obligations.

In particular, panels are guided by the Vienna Convention (see Chapter on Principles and Concepts).

Some analysts say that the VI:4 disciplines should be drafted as specifically as possible so that there is no need to take them to the dispute settlement mechanism to be clarified.

Article XXV: Technical Cooperation

Technical assistance to developing countries shall be provided at the multilateral level by the Secretariat and shall be decided upon by the Council for Trade in Services.

Comment

This article is of relevance to the phasing in of VI:4 disciplines by developing countries.

Article XXVI: Relationship with Other International Organizations

The General Council shall make appropriate arrangements for consultation and cooperation with the United Nations and its specialized agencies as well as with other inter-governmental organizations concerned with services.

Comment

This provision is relevant to the setting of standards and recognition agreements under GATS VI and VII.

GATS ANNEXES**Annex on Movement of Natural Persons Supplying Services under the Agreement**

This GATS Annex applies to measures affecting natural persons who are service suppliers of a Member, and natural persons of a Member who are employed by a service supplier of a Member, in respect of the supply of a service. It does not cover measures affecting natural persons seeking access to the employment market of a Member, nor to measures regarding citizenship, residence or employment on a permanent basis.

A Member can apply measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment. A footnote states: The sole fact of requiring a visa for natural persons of certain Members and not for those of others shall not be regarded as nullifying or impairing benefits under a specific commitment.

Comment

Some have suggested that a distinction could be drawn between entry and stay 'immigration' measures - conceptually at the border, to which GATS disciplines do not apply, and work permit conditions that apply behind the border where VI:4 would apply if such conditions were non-discriminatory.

Annex on Financial Services

The 'prudential carve-out' from GATS disciplines referred to earlier, is found in paragraph 2 (a) of this Annex, which states:

- (a) Notwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement.

Comment

This is both a very broad exception and a sensitive one which apparently Members have been loth to reconsider. Where any non-discriminatory measure is claimed to be an exception under this provision, there could be interaction with the disciplines of VI:4 if the boundary is not clear.

Annex on Telecommunications

Paragraph 4, Transparency states that:

In the application of Article III of the Agreement, each Member shall ensure that relevant information on conditions affecting access to and use of public telecommunications transport networks and services is publicly available, including: tariffs and other terms and conditions of service; specifications of technical interfaces with such networks and services; information on bodies responsible for the preparation and adoption of standards affecting such access and use; conditions applying to attachment of terminal or other equipment; and notifications, registration or licensing requirements, if any.

Paragraph 5 (a) Access to and use of Public Telecommunications Transport Networks and Services, states that:

Each Member shall ensure that any service supplier of any other Member is accorded access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions, for the supply of a service included in its Schedule. [The term "non-discriminatory" is understood to refer to most-favoured-nation and national treatment as defined in the Agreement, as well as to reflect sector-specific usage of the term to mean "terms and conditions no less favourable than those accorded to any other user of like public telecommunications transport networks or services under like circumstances".]

5 (e):

Each Member shall ensure that no condition is imposed on access to and use of public telecommunications transport networks and services other than as necessary:

- (i) to safeguard the public service responsibilities of suppliers of public telecommunications transport networks and services, in particular their ability to make their networks or services available to the public generally;
- (ii) to protect the technical integrity of public telecommunications transport networks or services.

5 (g):

Notwithstanding the preceding paragraphs of this section, a developing country Member may, consistent with its level of development, place reasonable conditions on access to and use of public telecommunications transport networks and services necessary to strengthen its domestic telecommunications infrastructure and service capacity and to increase its participation in international trade in telecommunications services. Such conditions shall be specified in the Member's Schedule.

Paragraph 7 (a) states that:

Members recognize the importance of international standards for global compatibility and inter-operability of telecommunication networks and services and undertake to promote such standards through the work of relevant international bodies

Comment

These provisions form part of the agreed GATS obligations, and apply even in the absence of specific commitments in the sector. They are significant to take account of when creating disciplines under VI:4 on transparency, access and standards.

Basic Telecommunications Reference Paper

Although the Basic Telecommunications Reference Paper is not an Annex to the GATS it is referred to here because a significant number of Members have adopted it as an additional commitment in their schedules.

The provisions of this reference paper include regulatory principles some of which could be extended horizontally to other sectors, while the others appear to be specific to basic telecommunications, or possibly in certain other sectors.

The horizontal principles are:

- Competition safeguards – to prevent the abuse of market power
- Transparency in licensing
- Independence of the regulator

and the sector-specific principles are:

- Inter-connection guarantees
- Competition neutral universal service obligations
- Fairness in allocating scarce resources (radio spectrum, rights of way)

Comment

The reference paper is designed to refer to the supply of services by commercial presence, or Mode 3, according to legal analysts who contest the finding to the contrary in the *Mexico-Telecommunications or 'Telmex'* dispute. This dispute between the US and Mexico on the latter's specific commitments for telecommunications and the applicability of the Reference Paper provides significant lessons that are noted in the Chapter on Principles and Concepts.

2 GATS PRINCIPLES AND CONCEPTS

Chapter 1 explored how many of the provisions in the various parts of the GATS may relate to those of VI:4. This Chapter examines the legal tools that will be used to decide on the interpretation of the principles and disciplines involved and what the rules may mean in the particular circumstances of each case. International law and precedents enunciated by the former GATT and the WTO dispute systems point to some likely outcomes, or at least help to foresee where the outcomes may not be easy to predict, in the new situations created by the GATS.

The picture for the import of goods products under GATT shows that once they have complied with the conditions of entry imposed at the border and been allowed in, thereafter they have to be accorded national treatment, and any variance from this strict standard is the area of inter-governmental consultation and dispute resolution. The main issues relate to the composition and performance of the physical products (though there are debates also on how they are made), which involves reference to standards for health and safety for example, and to risk management.

In principle under GATS the same legal framework applies to services, but as they are mostly intangible and it may not be possible to assure any standards before the supply has occurred, the main focus for assessing health and safety, and for reducing the risk of faulty performance, is the regulation of the suppliers. When services are supplied cross-border there is a direct analogy with the goods imports, though in practice it is not feasible to create a border post to control entry. By analogy with Mode 2, consumption abroad, there are no GATT rules conditioning the purchases of goods abroad if they are used while the purchaser is abroad, only on their import when the traveller returns home.

The GATT is silent on how the branches or subsidiaries of manufacturers should be treated if they are established in a foreign jurisdiction. This is the purview of the hundreds of Bilateral Investment Treaties, and to an increasing extent bilateral and plurilateral FTAs. The GATS, by contrast with the GATT, has rules for the treatment of foreign suppliers when they are either established abroad (termed commercial presence) in whatever juridical form (such as branches, subsidiaries, partnerships or joint ventures), or as temporarily present in the case of 'natural persons', whether as employees or self-employed. To this end GATS includes some elements of an investment treaty, and in the telecoms sector, even initial elements of competition law. The four GATS modes of supply complicate the legal analysis greatly because different modes may need to be used jointly or could be used as alternatives in substitution, and may or may not be 'like' services from the point of view of consumers.

Whereas the GATT rules provide for automatic national treatment, under the GATS not only can governments set down the conditions for market access (at the border, as it were - though in effect they may also result in operational constraints within the jurisdiction), but they can also impose exceptions to national treatment, with the two acting cumulatively.

The first part (2.1) of this analysis of how VI:4 rules may be interpreted is the examination of the principles at issue, and the second (2.2) the concepts that enable the principles to be realistically applied in operationally practical ways.

2.1 The normative principles that underlie the future disciplines of VI:4 include:

The principles of transparency and non-discrimination (MFN and national treatment) are discussed in Chapter 1.

The main debate on disciplines for transparency relate to advance notice and public consultation, which is the norm in many advanced economies but resisted by many developing countries as being too burdensome.

The legitimacy of measures

In the GATS some provisions include closed lists of measures prohibited (as in XIV and XVI), and others cite open ended lists such as VI:4 itself and the Accountancy Disciplines. This is a significant aspect for dispute panels to take into account.

The VI:4 disciplines will not set up a challenge to the legitimacy of national policy objectives in pursuance of which Members have the right to regulate.

Box 1

Measures often cited as being legitimate are those that aim to protect:

Consumers	The broad public interest
The quality of a service	Investors
Supplier competence	Financial markets
Reliability of a service	Public confidence in a profession
Human health or safety	Supplier independence
Animal or plant life or health	Codes of ethics
Public morals	The prestige of a profession
The maintenance of public order	High professional standards
National security requirements	Access to essential services
Supplier integrity and responsibility to society	

or the prevention of deceptive and fraudulent purposes.

Necessity

The necessity test is the mechanism to balance potentially conflicting priorities - sovereign regulatory rights *versus* trade liberalisation in the context of VI:4. It has two different aims, depending on the context. First, it links the measure to the policy objective, and then assures that the impact on trade in services is not unnecessarily trade restrictive. If a satisfactory and effective alternative means to achieve the objective is reasonably available, the WTO Member is bound to use the measure which entails a lesser degree of inconsistency with other GATS provisions.⁴ As the Appellate Body put it in *US-Gambling*, a “measure will be found ‘necessary’ (within the terms of XIV (a)) if it

⁴ It seems open to debate whether this equates with the least restriction expressed in economic terms, or even proportionate to the risk being guarded against.

is significantly closer to the pole of ‘indispensable’ than to the opposite pole of simply ‘making a contribution to’ achieving the objectives.”

There appears to be consensus that when dispute panels consider the necessity of a measure to achieve the policy objective, the panels would not question:

- The policy objectives themselves
- The legitimacy of the policy objectives
- The level of attainment of the policy objectives.

Certainly it would be anathema for GATS disputes to assess the relative importance of different policy goals, and it should only consider the contribution of a measure to its goal balanced against its degree of trade restrictiveness. This would then lead on to an alternative measure that is less trade restrictive even if weaker, in some respect to achieving policy goals.

It may be conceptually difficult to separate out whether an individual measure is actually indispensable to achieve the policy objective when it was enacted, from the necessity thereby to restrict trade to some extent, and how this eventuates, and how to judge whether it is done in a less trade restrictive way, and furthermore that the costs to suppliers of compliance (burdensomeness) are kept to a minimum.

Thus the necessity test lies at the heart of any assessment of what and how measures are applied. Dispute panels will look first at the value or importance of a measure’s objective; thereafter, at how it contributes to the achievement of its objective, then its trade restrictive effects and finally at the reasonable availability of any proposed alternatives that would not be unacceptably risky. These different factors have to be weighed and balanced at each step.

Practical problems arise for the necessity test where a measure has more than one goal, each considered legitimate but of disparate importance. If the defence results in such ‘goal slicing’ there may be no answer.

The necessity test has to take into account both the substantive, or material, obligations and procedural aspects.

In many sectors the remit of regulators has to be taken into account by trade officials. In the past where this has not been done, regulators have prevented liberalisation. This also works the other way round, namely that ways have to be found of ensuring that the regulators take proper account of trade policy, including liberalisation priorities, when they are setting their regulatory principles and guidance.

Progressive liberalisation

The principle of progressive liberalisation and progressivity in undertaking specific commitments is discussed in the first Chapter and the Chapter on Special and Differential Treatment.

Proportionality

The principle of ‘proportionality’ seeks to match the legislative remedy to the nature and extent of the risk. Under this principle, often cited in GATS negotiations, though not present in the GATS language, any adverse impact on international trade should be taken into consideration.

The strict application of proportionality would allow WTO dispute panels to outlaw measures the trade-restrictive effects of which they considered excessive or out of balance – and would involve balancing economic against other factors. Most argue that such balancing should remain the prerogative of domestic legislators and adjudicators.

European Communities law, which is in a clearly different dimension from international WTO law, employs the principle of proportionality (see Annex E). Some legal observers suggest that assessing the extent a measure achieves its objective by seeking alternative less trade-restrictive measures amounts to imposing the substance of obligations through proportionality, which should therefore be resisted.

There is relevance to the disciplines of VI:1 which require that “all necessary measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner”. Some might argue that the ‘reasonable’ test could import proportionality. Nonetheless, it would be advisable to avoid the debate on proportionality in the negotiations under VI:4 and leave this particular issue to academic lawyers.

Technologically neutral rules

Given the way in which services are supplied, often in a combination of modes, it is sometimes advocated that measures should be technologically neutral, so as not to distort trade by reference to supply through the use of any particular technical means or equipment. Governments retain the right to restrict the mode of supply in general, for example, to ban cross-border supply of certain health services, where the risks of neglect or error cannot be prevented in advance, or of certain financial services products. It is proposed that such ‘discrimination’ should not be based purely on the technology employed. The advocates of this principle point out that as the GATS language is silent on this issue, it must therefore be a basic, though implicit, intention.

No panel has pronounced on the distinction between a mode of supply and the means of delivery employed to effect the supply. If a specific commitment does not specify the means (for example that electronic means is prohibited for cross-border supply but carrier pigeons are permitted), then it seems likely that any means could be used.

The *Telmex* dispute distinguished between cross-border supply from remote supply because the former is necessarily remote but only as between two different Members. The means of delivery, such as telephone, telex, fax and internet are not identical with the GATS Mode 1, and all are covered by the concepts of cross-border supply and remote delivery.

Special and Differential Treatment for Developing Countries

The GATS framework of principles and rules has built-in flexibility for developing countries, which in effect constitutes S&D Treatment. Article XIX provides for further flexibility for developing countries during negotiations on specific commitments. The Chapter on Sequencing and Phasing-in discusses the practical way in which the principle might be applied in the case of the application of the VI:4 disciplines and rules.

The main issues include the imposition of import quotas and other limitations, the sequencing and progressive phasing-in of measures in different sectors, and mandatory or targeted aid for capacity building. Some have suggested that only when institutional capacity is at an acceptable level should compliance with the disciplines be obligatory, as is being considered in the negotiations on trade facilitation.

Judicial economy

The principle of judicial economy is recognised in WTO law, and whereas the dispute settlement mechanism aims to secure a positive solution to a dispute or a satisfactory settlement, it should not develop jurisprudence. Panels are only meant to make law by clarifying existing provisions of the WTO agreements within the context of resolving a particular dispute. Their findings have to provide sufficiently precise recommendations and rulings to allow for prompt compliance by the Members concerned.

Right to seek information

It is perhaps relevant to note that Article 13 of the DSU empowers panels with the right to seek information and technical advice (or ‘discovery’) from any individual or body deemed appropriate and from any relevant source, and they may consult experts to obtain their opinions and even request advisory reports in writing from an expert review group in certain cases.

2.2 Concepts assuring the operation of the principles in practice

WTO dispute panels aim to promote coherence in the interpretation of the provisions of the WTO framework of international trade law.

Precedents to note

Under the WTO, there is no strict rule on precedents, and panels are free to reach their own conclusions, without being bound by precedents. If a precedent constitutes a convincing piece of legal reasoning, and if the pattern of facts is similar, then it will be examined to determine the legal reasoning to adopt, because legal certainty is of value commercially, as elsewhere.

In the discussions of the WPDR it has been suggested that the principles, rules and precedents of other Agreements can be learnt from, even if it is not possible automatically to transpose from one of these to the VI:4 situations.

 Box 2

Precedents mentioned at the WPDR include:

Technical Barriers to Trade Agreement
 Sanitary and Phyto-Sanitary Agreement
 Agreement on Import Licensing Procedures
 Basic Telecommunications Reference Paper
 Disciplines on Domestic Regulation in the Accountancy Sector
 Guidelines for Mutual Recognition Agreements or Arrangements
 in the Accountancy Sector
 GATS Annex on Financial Services
 Dispute decisions of WTO panels and the Appellate Body
 Agreement on Government Procurement
 International Law Convention

Definitions to be addressed by VI:4:

It is inevitable in the GATS, which is a binding international treaty, that some terms were left undefined due to the level of abstraction of its framework, and that some politically necessary ‘constructive ambiguities’ of the language were included. If the negotiators had tried to define each term at the outset, they would not have reached agreement in the given time frame of the Uruguay Round. Uncertainties in technical cases are therefore bound to arise.

Each term used in the WTO and GATS will have a meaning in its own context, and future dispute cases may need to interpret any relevant key words.

Panels have indicated that dictionaries can be guides to definitions but do not constitute dispositions when they approach the definition of terms.

Box 3

The terms not defined in the GATS include:

Service	Transparent criteria
Licence	Quality
Delegated authority	Ability
Objective	Residency
Reasonable expectations	Establishment
Technical standard	Nationality
Domicile	Citizenship
Competence	Technical standards - product and performance

Trade restrictive measures

The debate on trade restrictiveness is on how, in the pursuit of economic efficiency, to find alternative measures reasonably available and relevant to the particular case that are less trade restrictive. Most Members say that it is not to impose measures that are “least trade restrictive”, which would unduly restrict the choice of regulatory tools by governments.

There is some precedence in the WTO and its predecessor the GATT, to indicate that the necessity test involves assessing whether a measure is the least trade-restrictive necessary to achieve its aim. The 'Disciplines for Domestic Regulation for the Accountancy Sector' already referred to, spell out that measures not subject to scheduling shall "not be more trade restrictive than necessary to fulfil a legitimate objective."

When assessing the degree of restriction of trade, there can be no absolute test, so the GATS could become a forum for the exchange of information about ‘best practices’ - some might see it as an exercise in benchmarking - so that a government might accept it as reasonable to adopt a different form of regulation, following in the path of proven experience. Although the benchmarking approach has been mentioned in the WPDR it has not yet been addressed, because an objective approach may not be possible. Some developing countries are wary of benchmarking in principle, because such practices may not take their interests into account, nor the existing asymmetry in the level of regulatory conditions.

Burdensomeness of measures

The reference to “burdensome” in VI:4(b) implies that costs to suppliers should be the least necessary once the trade restrictiveness aspect has been taken into account. Clearly these injunctions are difficult to manage in differing situations. The economic rationale to test the burdensomeness of a measure is complex. To some developing countries it is even objectionable.

Problems arise from assessing burdensomeness, including the avoidance of restriction on the attainment of other regulatory goals, such as reducing externality costs or imposing capital reserve requirements on providers.

Measures often prohibit something, and the burdensomeness of the effect on suppliers will be relative depending on the categories of supply involved. Some measures aim at objectives that curtail risk, and this has to be taken into account.

Members are wary that the scrutiny of burdensomeness may be too strict and curtail their regulatory sovereignty.

Quality of a service

The level of quality for service suppliers is more likely to be intuitively assessed, rather than by using particular objective standards due to the inherent difficulty of doing so.

Some see this reference to one legitimate objective as constraining regulators from including a broader set of legitimate objectives, hence the proposal of some Members to expand the reference of the necessity test to national policy objectives.

As noted, where qualitative measures also restrict the quantity of supply, the disciplines of VI:4 must be defined as not subject to the market access provisions of Article XVI, at least as long as the qualitative measures as such do not impose an outright prohibition, which as likewise noted previously, has been ruled by the Appellate Body in *US-Gambling* as tantamount to a zero quota and thus a definite numerical limitation.

Abuse of rights

This is the opposite of acting in good faith.

Nullification or impairment

The concept of a benefit being nullified or impaired can be rather vague and is one that has to be experienced before direct action can be taken, and risks being an intuitive standard for services which are not easily measured.

However, if a WTO obligation is violated, nullification and impairment are presumed.

As seen, VI:5 of GATS incorporates the concept and acts rather as a standstill.

Non-violation

Even where no GATS provision has been violated, there remains the possibility that the benefit of a specific commitment could be nullified or impaired. This can be remedied under the WTO dispute settlement mechanism.

Causality

The adverse effect claimed has demonstrably to flow directly from the original cause.

In the case of Emergency Safeguard Measures, yet to be developed, the elementary analysis will no doubt have to demonstrate that the adverse effects flow from a particular action, which will not be easy in the case of services.

Burden of proof

The DSU rules on the burden of proof, in essence, require that a party asserting an allegation must prove it. This is reflected in most jurisdictions where the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.

The incidence of the burden of proof in different cases could be over-rated as a problem. Where something is asserted it has to be demonstrated, and this is where the burden of proof lies. For example if an exception is asserted under the Article XIV *General*

Exceptions, then the burden of proof is on the defendant, who has to make a prima facie case. The notion of prima facie case is the key where logical links are to be proven. Where this is successful, the other party has then to rebut it. If no effective rebuttal follows then the case is decided in favour of the first party.

If the rebuttal can make a prima facie case, then the alternative measures put forward must be examined. Thus the complaining party must propose such alternatives, and the panel is not empowered to pluck them out of the air.

In the case of VI:5(a), which includes the concept of reasonable expectations, the burden of proof lies with the complainant to make a prima facie case on their legitimate expectations. This could be a difficult matter to achieve.

Cumulative criteria

Where it is relevant in a particular case for more than one criterion to apply, then they both apply with cumulative effect.

International standards

International standards issues are of systemic importance to the operation of the WTO. They are bound to feature more centrally for services trade as time goes by. The WTO does not define standards and is not a standard setting body, but it can become an enforcer of certain standards. However, some of its agreements provide for standards set by international bodies to be acknowledged: “account shall be taken of international standards of relevant international organisations applied by that Member” is wording from Article VI.5 (b)⁵, as already noted.

The WTO Secretariat sees technical standards as applying both to the substance of a service (its characteristics and definition) and to the way it is performed (the process of delivery).

Some argue for making a reference to international standards a permanent part of the necessity test of any generally applicable discipline. Politically it might be easier to argue on grounds of economic efficiency to curb protectionism, rather than directly challenge the rights of sovereign nations to regulate and set standards.

The pace of change in the real world of information technology, for example, poses particular problems in relation to the formation of international standards, the processes for which are too slow when governments are involved. However, they do have to be part of the process so as to maintain its legitimacy, and to gain ‘recognition’ of the standards under the WTO.

A major problem is that developing countries lack the resources to participate in the setting of international standards.

⁵ GATS footnote 3 states that “The term ‘relevant international organisations’ refers to international bodies whose membership is open to the relevant bodies of at least all Members of the WTO.”

Harmonisation

Although an attempt to harmonise legal principles and practice across jurisdictions, in order to reduce business uncertainty and transaction costs, and thus prices to consumers, is a valid aim, experience has shown this is politically very difficult and legislatively expensive to achieve.

It is going to prove a tough area for the GATS negotiations due to the intangible nature of services, because the application of *ex ante* tests and rules - ie before supply, such as is usual with goods products, is often not possible for the supply of services. There can only be recourse for redress and to compensation *ex post*, after an incident, and then the consequent disciplining of a supplier found culpable.

As noted, GATS Article VII *Recognition*, requires that eventually international standards are to be followed, which will achieve some degree of *de facto* harmonisation, but this has not yet been addressed under the GATS, even in the Accountancy Disciplines.

Objective

The term objective has no general meaning yet in WTO, and therefore it will be related under VI:4(a) only to the qualitative factors of competence and ability to supply services.

Reasonable expectations

There is no legal definition of reasonable expectations, including under the WTO. As noted, it would be difficult to prove that reasonable expectations had been violated under VI:5.

Administrative guidance

It has been proposed that a distinction be made between a measure and official guidance. In a dispute this would become an issue if the guidance were in effect a measure, as would be the case if the guidance had any normative value, in that it instructs something be done.

Scheduling Guidelines

The GATS Scheduling Guidelines are regarded only as a secondary means of interpreting the commitments made by Members, according to the ruling of the Appellate Body in the *US-Gambling* case. This is because they are neither agreed principles in the GATS framework, nor an agreement by Members in the context of agreeing to the GATS and Members' schedules of commitments.

3 SEQUENCING, PHASING AND SUSTAINABLE DEVELOPMENT FOR DEVELOPING COUNTRIES

The remit of the GATS is far reaching, in that it covers any measure that affects the supply of a service whether it directly regulates a service or regulates other matters and in doing so also affects trade in services.

The Doha Work Programme has a focus on development issues and the creation of disciplines under VI:4 must take full account of the expressed priorities of developing countries. They wish to ensure that the disciplines respect their policy making space and that their inalienable sovereign right to regulate is not weakened or unduly curtailed. The framework must allow for a broad definition of policy objectives on matters central to society. However, they are not looking for an official programme of derogations from the disciplines.

The disciplines should be general enough to accommodate a wide variety of national circumstances, but not so general as to render them ineffective in practice, and a balance will be needed between national applicability and their effectiveness.

Some point out that as the aim of the GATS is to expand trade “under conditions of transparency and progressive liberalisation” this is an economic mandate and thus more limited than promoting good governance through rules on Domestic Regulation as implied by the test for measures of being “not more burdensome than necessary to assure the quality” of a service. The test for non-discriminatory measures should therefore not focus on regulatory soundness, but solely on trade restrictiveness effects and the costs of compliance, with the balance held in favour of achieving social objectives. The disciplines should deal with issues that might be common across many sectors, such as the abuse of dominant market power by monopolists, the asymmetry of information on supply, access to networks and universal service. While acknowledging transparency as a fundamental principle, and that transparency regimes must be holistic, in their practical operation the disciplines should not be too burdensome. However, they should not permit disguised restrictions on trade.

The GATS does not provide a definition of Domestic Regulation for the VI:4 disciplines, and perhaps there is no universally agreed definition of ‘regulation’ to call on. Clearly in usual parlance it refers to different acts of government over a wide variety of state interventions in the economy, and other means of influencing the behaviour of firms and individuals in society, in the social and environmental areas, for example. The VI:4 disciplines will aim principally at a definition that covers measures laying down what private sector service suppliers can or cannot do.

This should also apply to the burden of proof rules, so that the threshold is not raised in view of the limited developing country capacity.

The VI:4 disciplines must take account of the institutional weaknesses and low regulatory capabilities of the state in most developing countries, the fragility of the private sector institutions, and of the limitations of SME's for compliance.

One aspect not so far given much thought is how to ensure that the framework of the VI:4 disciplines can allow for flexibility in their implementation both as to national

circumstances and particular sectors and to evolving national social aims and circumstances. Perhaps an Annex on Domestic Regulation should itself be constructed so as to be readily modified so as to adapt to developments yet remain effectively applicable. The typical multilateral trade round of negotiations takes about a decade, and in the meantime markets change more rapidly driven by societal needs and innovative technology.

Experience under the TRIPS Agreement must be borne in mind, so that GATS rules on VI:4 do not compromise other international agreements.

Protectionism and imbalance

The principles must ensure that government measures that are non-discriminatory and non-quantitative do not in practice act as protectionism favouring incumbent suppliers and in this way restrict trade.

There is concern if the GATS Members adopt a universally applicable regulatory framework of principles and international standards, it inevitably may be based mainly on the best practices of developed countries, which in turn might not fully accommodate the national, and diverse sectoral particularities of developing country Members. This could result in implementation conflicting with their domestic values, institutions and practices, which would be counterproductive since it would have taken no account of differences in legal infrastructure, bureaucracy, cultural issues, market realities and political values.

The same may be the case for international technical standards which are likely to reflect the interests of the major private sector firms from the richer countries.

As with technical standards, other norms and codes can be imposed both by government mandate (or some would add their sanction or coercion) on the one hand and voluntary private sector organisations on the other, and since these have been developed primarily in the more advanced economies, they may not represent the interests of developing countries, and in taking these up under the VI:4 disciplines may also result in an unbalanced effect to the detriment of the latter.

An extreme position can include the following aspects. The scope of VI:4 should be tightly restricted and interpreted at this stage to avoid uncertainty on its universe of measures. The developing countries do not want to live with intrusive rules. They should not be faced with challenges under the DSU on sensitive domestic policy matters. They consider that horizontal rules will be less intrusive than sectoral rules. The first step in the creation of disciplines foreseen in the DDA should not test the final limits inherent in the multilateral approach.

The necessity test

There is particular concern on the operation of the necessity test, which must be given a precise meaning in the context of VI:4 disciplines so that the objectives of measures and their relative policy importance cannot be challenged. This is a sovereign right issue. The necessity test must not limit the aims set out in the GATS Preamble. There must be no room for ambiguity in the operation of the necessity test. The concept of the

reasonable availability of alternative measures must be carefully considered in the light of limited regulatory capacity.

Costs of measures

The cost of measures arises both from the administration of necessary regulatory institutions and the enforcement processes, and from those borne by private sector firms complying with the measures, which can impact especially on SMEs and the self-employed. Both aspects could have trade restrictive effects.

Grants

Developing countries ideally want to call on formal obligations for the grant of capacity building assistance, rather than rely on the current 'best endeavours' regime.

Such grants should include funds for participation in international organisations, including those setting standards relevant to supply of services.

Sustainable development: the need for sequencing and phasing

Developing countries acknowledge that there is flexibility built into the GATS structure, but want to ensure that 'special and differential treatment' be made operational.

They still have a high proportion of economic activity in the informal sector.

At present the regulatory capacity of developing countries is limited, and in some sectors even non-existent. The sector regulators must be able to have the means to develop standards and the leeway for progressivity as they develop regulatory capacity. Variable geometry for different levels of development, the sequencing of the rules in line with liberalisation and progressivity of their application must be observed. The rules relating to the observance by sub-federal authorities and non-governmental bodies with delegated powers must be clear and made effective without being too onerous for those developing countries which have such governance structures.

The developing countries would find it easier to handle the necessary administration if the disciplines were to cover all specific commitments, including the current bindings, and not just further commitments added into schedules at the conclusion of the DDA negotiations.

Mode 4

The Mode 4 form of supply is of great importance to developing countries, because it is where their comparative advantage lies, and the VI:4 disciplines must take full account of this. Clarity is needed on the position for conditions of entry and stay, visas, work permits and the criteria for economic needs tests are important, because for the recognition of qualifications, licences and standards there can only be formally different (de facto) treatment, not formally identical treatment (de jure).

4 THE MOVEMENT OF NATURAL PERSONS

Introduction

There is the potential for the disciplines of Article VI:4 to apply the supply of services through the temporary movement of natural persons to work abroad, or GATS Mode 4, and to the provisions of the Annex on the Movement of Natural Persons. Mode 4 is frequently deployed in combination with the supply of services cross-border (Mode 1) and through commercial presence (Mode 3), and this should be taken into account.

For developing countries the liberalisation of Mode 4 is important because this is where their comparative advantage lies, due to the relatively lower earnings per head of their workers. They seek clarity on the conditions of entry and stay, including visas, work permits and the criteria for economic needs tests. Further, under Article VII *Recognition* there are problems for Mode 4 in connection with the recognition of qualifications, licences and standards to which the disciplines of VI:4 could also apply.

Immigration controls

Immigration authorities need to assess the risk of admitting particular individuals into their countries. In addition the controls on people entering and leaving a country have to take into account a far wider range of policies than the liberalisation of international trade in services, some being of far more fundamental nature, such as social balance, the treatment of dependents, permanent migration, asylum seeking, the prevention of terrorism, fraud, prostitution and the modern equivalents of slavery and so on. Some of the controls resulting from these policies can be seen as operating at the border (pre-entry requirements) and others once the person is present in the jurisdiction (post-entry). It is not surprising therefore that the control procedures can be cumbersome and often slow moving, and can involve much paperwork and often visits in person to embassies for applications, submission of documents and even interviews, followed by reporting procedures after entry. Most national systems are simply not designed to cope with the modern pressures of globalisation where speed of reaction to client needs and multi-national teams are becoming the norm in various sectors, particularly for professional and business services. It is not surprising that where a visitor's visa is relatively easy to obtain, many business people masquerade as tourists, despite the risks of being identified as acting illegally.

The movement of workers, whether permanent or temporary, also raises other issues such as workers' rights, labour regulations and social welfare payments and benefits.

Scope of GATS Mode 4 provisions

The GATS Agreement "applies to measures by Members affecting trade in services" (Article I:1), and Mode 4 is defined as the supply of services "by a services supplier of one Member, through the presence of natural persons of a Member in the territory of any other Member (I:2(d)) The "Annex on the movement of natural persons supplying services under the agreement" (which implies presence in the territory) "applies to measures affecting natural persons who are service suppliers of a Member, and natural persons of a Member who are employed by a service supplier of a Member, in respect of the supply of a service." (Para 1) Note that the words 'any other' were not included

before the last occurrence of ‘Member’, and thus it also applies to the employees of any firm supplying services, whether a foreign affiliate or owned by nationals of the host country.

However, the “Agreement shall not apply to measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis.” (Para 2) Presumably the normal interpretation of the last phrase is that “on a permanent basis” refers only to employment and not to residence, and thus any requirement for residence, whether temporary or permanent, falls outside the GATS coverage, as do any citizenship requirements.

Not only is greater precision and transparency for non-discriminatory regulation desirable, so as to clarify the exact reach of non-discriminatory restrictions, but also the negative impact on trade in services should be reduced where possible. The disciplines of VI:4 will have to take account of both the substantive and procedural aspects of the Mode 4 supply of services.

Mode 3

One important consideration is that Mode 4 does not *per se* cover employees within a foreign affiliate as these persons are in employment and not themselves suppliers under the definitions of Article I. The supplier is the employer as defined in Art I:2(c) “by a service supplier of one Member, through commercial presence in the territory of any other Member”. A service supplier through commercial presence (Mode 3) cannot also be a supplier from another Member under Article I:2(d) (Mode 4). Despite this logic, in practice Members have made specific commitments under Mode 4 for employees in Mode 3 foreign affiliates (ie firms that have a commercial presence).

A further dimension of complication arises under the GATS provisions where its framework lacks definitional clarity both in conceptual and operational terms. This is most relevant for Mode 4 where it is not clear whether there is a definite demarcation between the disciplines of Part II *General Obligations and Disciplines* and further obligations undertaken under Part III *Specific Commitments*, and indeed whether there is an overlap between these two Parts. In this analysis the distinction is drawn between the need for regulatory reform (ie to make non-discriminatory regulation less trade restrictive where possible under Part II) and the need for trade liberalisation commitments under Part III.

Even under Part III there is a lack of clarity on how the obligations inscribed under Articles XVI *Market Access* and XVII *National Treatment* interact. There is also lack of certainty on whether non-discriminatory regulations, that do not have to be scheduled under Part III, can have quantitative aspects that could be deemed as prohibited under Article XVI. Even further, whether non-discriminatory qualitative criteria can also have quantitative implications and how to deal with such situations.

Entry Visas

There continues to be debate over the extent to which GATS disciplines apply to the issue of entry visas. Some have suggested that because VI:4 is in Part II of GATS it

should deal with pre-entry requirements, and Part III should cover post-entry and stay requirements, including residency and prior residency. Other Members argue that visa procedures are excluded from the GATS, and therefore the case-by-case issue of visas cannot be a Domestic Regulation issue.

The Annex on MNP provides that once a specific commitment has been undertaken then “measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders” (Para 4) must not “nullify or impair” the benefits accruing to any Member under the terms of the specific commitments. Also the MFN provision applies (Article II:1), but in relation to visas footnote 13 to the Annex (in para 4) states that “The sole fact of requiring a visa for a natural person of certain Members and not for those of others shall not be regarded as nullifying or impairing benefits under a specific commitment.” This still leaves “measures to regulate ... their temporary stay” in the territory as covered, such as work permits and many other requirements, including qualifications and so on. Thus if any of these are non-discriminatory in application, Art VI:4 applies.

Application of VI:4 disciplines

The analysis of whether and how the disciplines of VI:4 should apply should deal with the following aspects:

1. Requirements for individual foreign workers
2. Requirements of a general nature applying to individuals in any occupation who are permitted entry to supply services
3. Transparency of legal and administrative procedures

Where possible, the disciplines should build on existing GATS provisions, importantly including the concept of necessity.

The disciplines could apply either horizontally or be specific to any one sector. This analysis only addresses the horizontal issues, as those for sectors would become too detailed and lengthy.

The disciplines must apply at both the federal level and the sub-federal levels, and with private sector entities with devolved authorities.

Because at present barriers arising from non-discriminatory regulations are relatively hidden, therefore objective criteria are needed for:

- Quantitative limitations
- Qualitative requirements
- Further obligations to sign onto under Article XVIII and by analogy with the BTRP.

In general, regulation affecting Mode 4 supply should be coherent and adaptable to changing conditions.

Creating rules for transparency

Provisions on the transparency of administrative and procedural rules should ensure that:

- Fees relate directly to administrative costs, and do not themselves act as barriers
- Reasonable time frames are applied for verifying the competence of foreign professionals
- Applications may be resubmitted
- An appeal or review mechanism for non-recognition be established.

Qualifications

- Mechanisms are in place for the verification of educational qualifications and professional competence
- Examination requirements should be directly linked to subjects related to the practice of the profession at issue
- The relevant examinations should be conducted fairly and at reasonably frequent intervals
- The possibility of taking examinations in the home country - or through electronic means - should be available
- Examinations should be open to all eligible applicants, including foreigners.
- Education and training (certificates, diplomas, degrees etc)
- Bridging mechanisms for recognition
- Aptitude tests
- Adaptation periods under supervision

Licences

Requirements for the issue of licences should be specific in relation to:

- Registration with government regulators or private self-regulatory bodies
- Professional qualifications to practise
- Good conduct
- Professional indemnity insurance
- Level of fees charged

Technical standards

Since technical standards, as such, do not apply directly to natural persons, this aspect is omitted here.

Disciplines for Mutual recognition

In addition there should be a broad framework for mutual recognition agreements – the subject of Article VII, relating to:

- Competence
- Equivalence

- Criteria for recognising foreign qualifications based on equivalence
- Facilitating accession to mutual recognition agreements
 - Notification of existing and planned mutual recognition agreements

Pre-entry and establishment requirements

Visas and work permits are the primary barrier to the movement of natural persons. Residence permits are also a problem.

Visas

The administrative aspects to be considered will need to include:

- Timeliness and due procedure terms
- One-stop shops for visas and work permits
- Provisions for appeal
- Use of intermediary placement firms for services personnel and the screening of such firms

Proposals for a Services Providers Visa, with multiple entry could be considered

Work Permits: categories of occupation:

- Intra-corporate transferees
 - Directors, managers, professionals, specialists, etc
- Business Visitors
- Contractual Services Suppliers
 - different skill levels
- Independent Suppliers
 - different skill levels

Prior employment

Residency requirements

Framework

The framework for specific commitments under Mode 4, addressing both horizontal and sector specific limitations might include provisions on:

The application of necessity to the Mode 4 dimension

In the EC ‘proportionality’ is an unwritten principle requiring that any general regulation affecting its Member States should ensure the least restriction on a service, for example, of general economic interest. In the WTO it has not yet been recognised even as an unwritten principle.

Other factors:

Social Security Regimes

Payment of charges and eligibility for benefits

Labour laws (workers' rights, ILO conventions, working conditions), wage parity

ENTs

GATS rules may have to deal also with Economic Needs Tests (or their equivalent such as Local Market Tests and Management Tests) which usually apply to foreigners only, and therefore VI:4 does not apply to them. Any quotas inscribed in specific commitments over-ride any ENTs in operation.

The issues include:

Clarifying the objectives

Transparency of the criteria

Listing the sectors subject to ENTs

Drafting a Model Schedule

Guidelines for (a) the inscription of ENTs in schedules of specific commitments, and (b) their operation in practice

Further elaboration of the framework of principles and its rules are the subject of a further paper by a different author to be issued in parallel.

Some Members argue that visa procedures are excluded from the GATS, and therefore the case-by-case issue of visas is not a Domestic Regulation issue'

5 THE DISCIPLINES IN THE ANNEX ON DOMESTIC REGULATION

This chapter provides a commentary on the rationale for the inclusion of the various elements in the VI:4 disciplines incorporated in the Annex on Domestic Regulation.

Despite the contention of some GATS critics that its obligations can intrude too far into the regulatory ‘space’ of Member governments and even threaten democratic governance, this study views disciplines on domestic regulation in the GATS, while they have to respect the right to regulate, as a necessary, even an indispensable, complement to market access commitments in order to assure that those commitments will not be nullified by regulation being applied solely for protectionist purposes. GATS obligations can even play a significant role in promoting and consolidating domestic reform in developing countries, and assist their exporters address regulatory barriers faced in foreign markets.

The balance between retaining regulatory freedom and curbing protectionist restrictions on trade in services will always be difficult to attain, so that developing effective multilateral disciplines on the domestic regulation of services without seeming to encroach upon national sovereignty and unduly limiting regulatory freedom is challenging.

The aim of the GATS Annex on Domestic Regulation is to present a complete set of disciplines for measures by governments. The basic assumption is that eventually there will have to be regulations – their absence is not an option. Therefore the Annex records the maximum position for disciplines on such regulation to be eventually achieved by all WTO members with some taking much longer than others. The VI:4 final objectives and level of disciplines must be made clear for which Members are in support - or at least do not demur. Thus the variables for developing countries are the sequencing of new measures and their phasing-in over time to assure the achievement of sustainable development and temporary suspension, not abrogation.

Wherever the problem is one of institutional and human capacity, the central issue for the application of ‘Special and Differential Treatment’ resolves itself into the progressive uptake of the disciplines in parallel with progressive liberalisation by means of specific commitments, which resolves itself to sequencing and phasing-in of the observance of the disciplines. The mode and rate of implementation is the sovereign choice of each government, and only the pressure of the GATS negotiations and peer review can establish the acceptability of any position in relation to the level of development and resources available to the Member.

Overlap between GATS Parts II and III

There are especial concerns over the possibilities of overlap between the disciplines of VI:4 and the scope of the market access and national treatment articles. Where this could occur, clear boundaries must be established to remove uncertainty.

The developing countries support the aim of attaining clarity between the domains of Parts II *General Obligations and Disciplines* and III *Specific Commitments* of the GATS. This raises complex issues for the VI:4 disciplines. In principle each article of the GATS can apply to a particular case depending on its circumstances. Two central issues are (a) whether the VI:4 disciplines apply in the absence of any specific commitments and the

answer, under the usual legal interpretation, and given here is ‘Yes’ because Part II is not concerned with market access issues, and (b) whether the limitations inscribed in schedules of specific commitments can ‘carve out’ any of the VI:4 disciplines. The language of the Annex clarifies this.

A more fundamental point is made by those who assert that since specific commitments are made progressively (the so-called bottom-up approach), any general disciplines under VI:4 would impose the opposite (or ‘top down’) approach where specific commitments are not made, and this also raises the inter-relationship of VI:4 disciplines with the market access and national treatment rules of Articles XVI and XVII. The disciplines to be adopted for the accountancy sector do not apply to specific commitments. The proposed wording of the Annex on Domestic Regulation attempts to settle these issues definitively within its own context.

The Annex specifies that the VI:4 disciplines are to be distinct from Part III measures in that VI:4 measures set minimum requirements on the way services are supplied that do not comprise market access prohibitions, whereas XVI prohibits maximum quantitative and other limits.

This is also the case on how VI:4 applies when measures are defended under Article XIV General Exceptions.

In addition to the market access and national treatment aspects of Part III, under XVII *Additional Commitments* there is the option to bind certain aspects of non-discriminatory measures giving the predictability sought by private sector services suppliers that such measures will not become more trade restrictive in future.

Transparency

The disciplines of Article III *Transparency* require information to be published and notified on measures and trade agreements once in place (the ‘ex-post’ position). Transparency for administrative processes is the aim of VI:1, 2 and 3 as already noted. A key issue is whether these disciplines should be extended under VI:4 to cover prior publication of draft measures and provision for public comment (or ‘ex-ante’ transparency). The private sector is keen to have the objectives and rationale of proposed legislation made available for their consideration in the belief that this can lead to more appropriate and effective legislation. This is something that is taken for granted in many countries, yet may pose burdens on the administrations of developing countries with limited capacity. The ability of developing countries under the Annex to sequence and phase-in their obligations, takes account of this.

Due process

Where specific commitments are made, Article VI already provides disciplines for the administrative process of regulation “in a reasonable, objective and impartial manner” (in VI:1), and for the institution of “judicial, arbitral or administrative tribunals or procedures” (VI:2) and the provision of information on decisions on applications for authorisation to supply a service and on the status of such applications (VI:3). The issue is therefore whether these disciplines should be extended to non-discriminatory measures than do not have to be scheduled as specific commitments. The Annex does so.

Proportionality

Under EC law the principle of proportionality is a central element, and as it does not yet feature in the GATS, the EC suggests it could be used under the test of whether a measure is more trade restrictive than necessary, and an alternative route that is of closer proportionality should be employed if reasonably available. However, some Members would resist the test being one of proportionality to the objectives of the measure, as this could intrude upon regulatory autonomy.

The Annex treats as a principle the existence of a measure acting as a barrier to trade in services whilst the test of its being not more trade restrictive than necessary is an issue of degree.

The Annex does not recognise the principle of proportionality even though its logic may be relevant in certain situations that arise under the application of the necessity test.

Scheduling

In practice it might be advisable for the CTS to consider laying down a common approach to scheduling, especially for Mode 4 (as proposed by India and other developing countries in TN/S/W/31, and by the EC and other Members in TN/S/W/32, both documents dated 18 February 2005).

MFN Exemptions

The disciplines of this Annex do not apply where scheduled MFN Exemptions exist.

Temporary suspension of VI:4 disciplines

The CTS has the power to authorise the temporary suspension of the disciplines under VI:4 at the request of a developing country Member, and so this is not provided for in the Annex.

Coverage of non-discriminatory measures

A non-exhaustive list of measures not covered by this Annex includes those providing for: the independence of regulators, land zoning, shop opening hours, access to networks and essential facilities and universal service obligations.

The quality of a service

The Annex leaves as open-ended the types of measures that can be deployed to ensure the quality of a service.

Peer review

The Annex does not provide for a peer review of the sequencing and progressive phasing-in of the VI:4 disciplines by developing countries, but this would be possible under the WTO Trade Policy Review Mechanism.

Horizontal, or sectoral disciplines

There appears to be a general preference of Members to develop horizontal disciplines first, and then use these as the basis for developing any additional disciplines for specific sectors or services, so as to avoid duplication. The developing countries would prefer to leave the development of sector-specific disciplines until after the conclusion of the DDA.

An indication of what Members might consider the VI:4 disciplines should include can be gauged from the paper tabled by Brazil and other Members, which provides a complete development of the article. The chief elements set out are:

- Definition of Terms
- Licensing Requirements
- Licensing Procedures
- Qualification Requirements
- Qualification Procedures
- Technical Standards
- Application of Measures
- Special and Differential Treatment.

The proposed Annex takes the following form:

Preamble

Part I Horizontal Obligations Applying Generally

- I Scope and Definitions
- II Levels of Government
- III Transparency
- IV Judicial, Arbitral and Administrative Tribunals
- V Technical Standards
- VI Sequencing and Phasing-In for Sustainable Development in Developing Countries

Part II Horizontal Obligations Applying to Specific Commitments

- VII Specific Commitments
- VIII Qualification Requirements
- IX Licensing Requirements
- X Qualification and Licensing Procedures

ANNEX A: the provisions of Articles VI and XVI and the Movement of Natural Persons

Article VI

1. In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.

2. (a) Each Member shall maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures which 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. Where such procedures are not independent of the agency entrusted with the administrative decision concerned, the Member shall ensure that the procedures in fact provide for an objective and impartial review.

(b) 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.

3. Where authorization is required for the supply of a service on which a specific commitment has been made, the competent authorities of a Member shall, within a reasonable period of time after the submission of an application considered complete under domestic laws and regulations, inform the applicant of the decision concerning the application. At the request of the applicant, the competent authorities of the Member shall provide, without undue delay, information concerning the status of the application.

4. 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.

5. (a) In sectors in which a Member has undertaken specific commitments, pending the entry into force of disciplines developed in these sectors pursuant to paragraph 4, the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which:

(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 organizations³ applied by that Member.

6. In sectors where specific commitments regarding professional services are undertaken, each Member shall provide for adequate procedures to verify the competence of professionals of any other Member.

Annex on Movement of Natural Persons Supplying Services under the Agreement

“1. This Annex applies to measures affecting natural person who are service suppliers of a Member, and natural persons of a Member who are employed by a service supplier of a Member, in respect of the supply of a service.”

2. The Agreement shall not apply to measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis.

3. In accordance with Parts III and IV of the Agreement, Members may negotiate specific commitments applying to the movement of all categories of natural persons supplying services under the Agreement. Natural persons covered by a specific commitment shall be allowed to supply the service in accordance with the terms of that commitment.

4. The Agreement shall not prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment.”

A footnote here states that “The sole fact of requiring a visa for natural persons of certain Members and not for those of others shall not be regarded as nullifying or impairing benefits under a specific commitment.”

³ 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.

ANNEX B: The GATS Working Party on Domestic Regulation

The GATS Working Party on Domestic Regulation (WPDR) was set up by the Council for Trade in Services (CTS) (reference S/L/70 of 28 April 1999), under WTO Article IV and GATS Article XXIV (the latter states that “The Council for Trade in Services may establish such subsidiary bodies as it considers appropriate for the effective discharge of its functions.”) The WPDR replaced the former Working Party on Professional Services.

The mandate of the WPDR is:

(§ 2) “In accordance with paragraph 4 of Article VI of the GATS, the Working Party shall 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 in services. This shall also encompass the tasks assigned to the Working Party on Professional Services, including the development of general disciplines for professional services as required by paragraph 2 of the Decision on Disciplines Relating to the Accountancy Sector (S/L/63).”

(§ 3) “In fulfilling its tasks the Working Party shall develop generally applicable disciplines and may develop disciplines as appropriate for individual sectors or groups thereof.”

ANNEX C: DISCIPLINES ON DOMESTIC REGULATION IN THE ACCOUNTANCY SECTOR S/L/64

Adopted by the Council for Trade in Services on 14 December 1998

I OBJECTIVES

1 Having regard to the Ministerial Decision on Professional Services, Members have agreed to the following disciplines elaborating upon the provisions of the GATS relating to domestic regulation of the sector. The purpose of these disciplines is to facilitate trade in accountancy services by ensuring that domestic regulations affecting trade in accountancy services meet the requirements of Article VI:4 of the GATS. The disciplines therefore do not address measures subject to scheduling under Articles XVI and XVII of the GATS, which restrict access to the domestic market or limit the application of national treatment to foreign suppliers. Such measures are addressed in the GATS through the negotiation and scheduling of specific commitments.

II GENERAL PROVISIONS

2 Members shall ensure that measures not subject to scheduling under Articles XVI or XVII of the GATS,⁶ relating to licensing requirements and procedures, technical standards and qualification requirements and procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary barriers to trade in accountancy services. For this purpose, Members shall ensure that such measures are not more trade-restrictive than necessary to fulfil a legitimate objective. Legitimate objectives are, *inter alia*, the protection of consumers (which includes all users of accounting services and the public generally), the quality of the service, professional competence, and the integrity of the profession.

III TRANSPARENCY

3 Members shall make publicly available, including through the enquiry and contact points established under Articles III and IV of the GATS, the names and addresses of competent authorities (i.e. governmental or non-governmental entities responsible for the licensing of professionals or firms, or accounting regulations).

4 Members shall make publicly available, or shall ensure that their competent authorities make publicly available, including through the enquiry and contact points:

- a where applicable, information describing the activities and professional titles which are regulated or which must comply with specific technical standards;
- b requirements and procedures to obtain, renew or retain any licences or professional qualifications and the competent authorities' monitoring arrangements for ensuring compliance;
- c information on technical standards; and
- d upon request, confirmation that a particular professional or firm is licensed to practise within their jurisdiction.

5 Members shall inform another Member, upon request, of the rationale behind domestic regulatory measures in the accountancy sector, in relation to legitimate objectives as referred to in paragraph 2.

⁶ The text of GATS Articles XVI and XVII is reproduced in an appendix to this document

6 When introducing measures which significantly affect trade in accountancy services, Members shall endeavour to provide opportunity for comment, and give consideration to such comments, before adoption.

7 Details of procedures for the review of administrative decisions, as provided for by Article VI:2 of the GATS, shall be made public, including the prescribed time-limits, if any, for requesting such a review.

IV LICENSING REQUIREMENTS

8 Licensing requirements (i.e. the substantive requirements, other than qualification requirements, to be satisfied in order to obtain or renew an authorization to practice) shall be pre-established, publicly available and objective.

9 Where residency requirements not subject to scheduling under Article XVII of the GATS exist, Members shall consider whether less trade restrictive means could be employed to achieve the purposes for which these requirements were set, taking into account costs and local conditions.

10 Where membership of a professional organisation is required, in order to fulfil a legitimate objective in accordance with paragraph 2, Members shall ensure that the terms for membership are reasonable, and do not include conditions or pre-conditions unrelated to the fulfilment of such an objective. Where membership of a professional organization is required as a prior condition for application for a licence (i.e. an authorization to practice), the period of membership imposed before the application may be submitted shall be kept to a minimum.

11 Members shall ensure that the use of firm names is not restricted, save in fulfilment of a legitimate objective.

12 Members shall ensure that requirements regarding professional indemnity insurance for foreign applicants take into account any existing insurance coverage, in so far as it covers activities in its territory or the relevant jurisdiction in its territory and is consistent with the legislation of the host Member.

13 Fees charged by the competent authorities shall reflect the administrative costs involved, and shall not represent an impediment in themselves to practising the relevant activity. This shall not preclude the recovery of any additional costs of verification of information, processing and examinations. A concessional fee for applicants from developing countries may be considered.

V LICENSING PROCEDURES

14 Licensing procedures (i.e. the procedures to be followed for the submission and processing of an application for an authorization to practise) shall be pre-established, publicly available and objective, and shall not in themselves constitute a restriction on the supply of the service.

15 Application procedures and the related documentation shall be not more burdensome than necessary to ensure that applicants fulfil qualification and licensing requirements. For example, competent authorities shall not require more documents than are strictly necessary for the purpose of licensing, and shall not impose unreasonable requirements regarding the format of documentation. Where minor errors are made in the completion of applications, applicants shall be given the opportunity to correct them. The establishment of the authenticity of documents shall be sought through the least burdensome procedure and, wherever possible, authenticated copies should be accepted in place of original documents.

16 Members shall ensure that the receipt of an application is acknowledged promptly by the competent authority, and that applicants are informed without undue delay in cases where the application is incomplete. The competent authority shall inform the applicant of the decision concerning the completed application within a reasonable time after receipt, in principle within six months, separate from any periods in respect of qualification procedures referred to below.

17 On request, an unsuccessful applicant shall be informed of the reasons for rejection of the application. An applicant shall be permitted, within reasonable limits, to resubmit applications for licensing.

18 A licence, once granted, shall enter into effect immediately, in accordance with the terms and conditions specified therein.

VI QUALIFICATION REQUIREMENTS

19 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.

20 The scope of examinations and of any other qualification requirements shall be limited to subjects relevant to the activities for which authorization is sought. Qualification requirements may include education, examinations, practical training, experience and language skills.

21 Members note the role which mutual recognition agreements can play in facilitating the process of verification of qualifications and/or in establishing equivalency of education.

VII QUALIFICATION PROCEDURES

22 Verification of an applicant's qualifications acquired in the territory of another Member shall take place within a reasonable time-frame, in principle within six months and, where applicants' qualifications fall short of requirements, shall result in a decision which identifies additional qualifications, if any, to be acquired by the applicant.

23 Examinations shall be scheduled at reasonably frequent intervals, in principle at least once a year, and shall be open for all eligible applicants, including foreign and foreign-qualified applicants. Applicants shall be allowed a reasonable period for the submission of applications. Fees charged by the competent authorities shall reflect the administrative

costs involved, and shall not represent an impediment in themselves to practising the relevant activity. This shall not preclude the recovery of any additional costs of verification of information, processing and examinations. A concessional fee for applicants from developing countries may be considered.

24 Residency requirements not subject to scheduling under Article XVII of the GATS shall not be required for sitting examinations.

VIII TECHNICAL STANDARDS

25 Members shall ensure that measures relating to technical standards are prepared, adopted and applied only to fulfil legitimate objectives.

26 In determining whether a measure is in conformity with the obligations under paragraph 2, account shall be taken of internationally recognized standards of relevant international organizations⁷ applied by that Member.

⁷ 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.

ANNEX D: Summary of recent WPDR papers, including Secretariat Notes

PART A: OVERVIEW OF PROPOSALS BY WTO MEMBERS

Part A gives a brief overview of the proposals tabled at the WPDR by Members (in alphabetical order). Fuller summaries are given in Part B.

Australia: in June 2003 Australia's paper described the measures which regulate professionals in Australia, with examples of the acts and bodies involved, both official and private. Some professions are only partially regulated by the state, and others are self-regulated.

Canada: in March 2001 Canada recommended an exploration on how to enhance the existing GATS provisions on regulatory transparency and predictability.

China, People's Republic of: in December 2002 China's paper gave examples of restrictions in the construction, architectural and engineering sectors which are contained in various Domestic Regulations encountered by their service providers when seeking foreign market access.

Colombia: in July 2004 Colombia's paper listed administrative measures relating to procedures for obtaining and renewing visas or entry permits, which their private sector identified as the main obstacle to trade. They include procedural delays, complexity of formalities, high costs and lack of transparency, and relate to the application requirements and procedures, documentation, length of stay, fees and administration.

EC: in May 2001 the EC's paper considered transparency, saying that VI:4 should better provide for transparency, predictability and certainty for regulators and operators. In addition a new horizontal concept of necessity is needed to give coherence across sectors, not to assess the validity or rationale of policy objectives, but to ensure a measure is 'not more trade restrictive' than necessary, rather than 'least trade restrictive'. This could replace 'not more burdensome'. A list of legitimate regulatory objectives would restrict governmental autonomy.

In July 2003 the EC tabled a set of elements for disciplines on licensing procedures, building on GATS Articles III, VI:2 and VI:4, and taking account of other relevant documents.

Hong Kong, China: in March 2004 Hong Kong, China's paper suggested that any new disciplines developed under VI:4 must not overlap with other GATS provisions, including particularly those on market access and national treatment. But it was recognised that careful consideration needs to be given as to whether an individual measure falls under VI:4 or is subject to scheduling under XVII, for example those relating to residency and recognition.

Work done by Hong Kong, China on analysing the examples of measures tabled by Members is incorporated in the Secretariat Note Job(02)/20/Rev.10 of 31 January 2005 described in Annex C.

Japan: in October 2002 Japan's paper discussed the difference between basic (or general disciplines) on Domestic Regulation which cover a wide range of measures, and the coverage of advanced disciplines which tends to be limited. Japan suggested therefore that the disciplines to be developed under VI:4 should not *a priori* be limited to measures in sectors where specific commitments are undertaken.

In May 2003 Japan tabled a proposal for a complete set of disciplines under the mandate of the WPDR. The form suggested is an Annex to the GATS – which would comprise a general obligation being an integral part of the GATS, but to apply to specific commitments only. It left open whether or not measures regulating the entry of natural persons should be related to the scope of VI:4

Mexico: in September 2004 Mexico's paper summarised the history of the evolution of GATT guidelines and disciplines on standards for goods products, and the consequent legal implementation through its Federal Law on Metrology and Standardisation. Some elements were put forward for disciplines on technical standards for services, including the definition of 'technical standard', 'international standards' and 'relevant international organisations'.

New Zealand: in December 2003 New Zealand described the comprehensive procedures it applies to verify the competence of professionals in the context of its specific commitments, and the bodies involved in registration and oversight.

Switzerland: in February 2005 Switzerland tabled a proposal providing a comprehensive set of disciplines on technical standards to be integrated with the draft Annex on Domestic Regulation submitted by Japan in May 2003. It aims to underpin GATS Articles II and III, and excludes matters covered by the market access and national treatment articles. Standards should cover both service characteristics and rules for service performance. S&D provisions for developing countries would enable them not to comply with international standards under time-limited exceptions, to carry out phased and longer implementation, and to receive technical assistance.

USA: in July 2001 the US proposed elements for improving transparency, including those for prior notification and comment.

In April 2005 the US tabled comprehensive proposals for a coherent set of transparency disciplines in Domestic Regulation which build on international discussions and proposals, including advance publication and opportunity to comment. The issue of 'travel documents or the authorisation of persons travelling' is excluded.

Papers by Groups of Countries (in date order):

In February 2005 (modified in April), **Brazil, Colombia, Dominican Republic and The Philippines** tabled a paper "Elements for Draft Disciplines on Domestic Regulation", which constitutes the second complete set of elements for disciplines on Domestic Regulation to be proposed, and is designed to apply to specific commitments only. The section on S&D treatment aims to help developing countries overcome barriers to their exports and lack of capacity, and includes elements for phasing, the grant of aid and technical assistance, and participation in international organisations.

In April 2005 **Chile, India, Mexico, Pakistan and Thailand** tabled a paper “Proposed elements for disciplines on Qualification Requirements and Procedures”. It described the problems suppliers of professional services face arising from qualification requirements and procedures, and proposed elements for rules on transparency, equivalence, the verification and due process for educational qualifications and competence, language and registration.

Later in April 2005, **Chile**, [China], **Hong Kong, China, Korea**, [Mexico], **Switzerland and Thailand** tabled a paper “Application of Regulatory Disciplines to different levels of Governments and Non-Governmental Bodies”. It proposes certain cross-cutting elements concerning how the regulatory disciplines to be developed under Article VI:4 should be applied to different levels of governments and non-governmental bodies, which may play a central role in regulating services in respect of qualification requirements and procedures, licensing requirements and procedures, and technical standards. It is a contribution to the identification of possible elements of regulatory disciplines, and how such elements may be developed into concrete disciplines.

Taken together the proposals tabled by the EC, Japan, Switzerland, and the US, and those by the three Groups of co-sponsors, constitute an extensive coverage of the likely elements for the disciplines to be created under VI:4.

PART B: SUBMISSIONS BY WTO MEMBERS

WT/CTE/W/147 27 June 2000 European Communities The Precautionary principle

This paper outlines the European Commission’s approach to using the Precautionary Principle and its guidelines for applying it. The legal status in the EU is described and that under international law, where it is incorporated in many UN conventions and has become a fully fledged and general principle of international law.

The various constituent parts of the principle are described, and the distinction is drawn between a political decision to act or not to act, and how to act using measures to apply it as part of risk management in conditions of scientific uncertainty. The general principles of application include: proportionality, non-discrimination, consistency, examination of the benefits and costs of action or lack of action, and examination of scientific developments. The measures envisaged must make it possible to achieve the appropriate level of protection, and they must not be disproportionate to the desired level of protection, and must not aim at zero risk, something which rarely exists.

Where prior approval is mandated for new products, the substances are deemed hazardous until proven otherwise, and the burden of proof rests with business to carry out the work needed to evaluate the risk of new products, and where the human health risk cannot be evaluated the legislator is not legally entitled to authorise use. In cases where prior approval does not exist anyone can endeavour to demonstrate the nature of a danger and the level of risk posed by a product or process, and then the burden of proof rests with the producer, manufacturer or importer on a case-by-case basis to demonstrate an acceptable level of risk.

S/CSS/W/47 14 Mar 2001 Canada
Initial Negotiating Proposal on Regulatory Transparency and Predictability

This paper focuses on SMEs, many of which have not yet directly encountered trade barriers abroad. They need information on the conditions for entering a foreign jurisdiction and operating there, on the procedures to comply with regulatory requirements, the processes to seek changes in the regulatory environment, and options available for input to, or redress from, regulatory changes.

In Canada their practice is to consult with firms giving them the chance to participate in developing or modifying regulations. The authorities have to demonstrate the problems and risks that justify intervention, that the benefits outweigh the costs, and that the impact is minimised so there is no unnecessary regulation. Canada recommends an exploration of how to enhance the existing GATS provisions on transparency.

S/WPDR/W/14 1 May 2001 EC and its Member States
Domestic Regulation: Necessity and Transparency

The paper aims to identify and analyse the main criteria to be reflected in possible necessity requirements. VI:4 should develop new levels of guarantee on the provision of transparency, predictability and certainty for regulators and operators. The disciplines should ensure there is no overlap between Parts II and III of the GATS, and indicate how to differentiate between the two. The disciplines should be applied to certain self-regulatory measures issued under delegated powers. Further study is needed in this respect of paragraphs 2 (a) and (b) of the Annex on Financial Services in the context of transparency.

A horizontal concept of necessity would be useful, to the extent it could be relevant to all sectors, to give coherence, but more detail might be necessary for some sectors to allow for sectoral interpretation. A measure should be considered not more trade restrictive or burdensome than necessary if it is not disproportionate to the objective pursued. The necessity test should not assess the validity or rationale of policy objectives. The tests of 'not more burdensome' and 'not more trade restrictive' have essentially the same meaning and are preferable to the test 'least trade restrictive', which would unduly restrict the choice of regulatory tools available. There is a concern that a list of legitimate regulatory objectives would restrict government autonomy in defining policy objectives and regulating to achieve them. This has been done in the case of the TBT and SPS, but their scope is more restricted and more technical in nature, and in the Accountancy Disciplines the list applies only to that one profession.

It is considered that Article III applies to VI:4, as it does to the Accountancy Disciplines. No scope is seen for introducing obligatory prior consultation, and so the Accountancy Disciplines approach of best endeavours should be followed. Although the principle of transparency enhances legal certainty and reduces the trade restrictiveness of regulatory systems, it is not sufficient, so provisions on necessity will impose the disciplines.

The application of international standards as they exist should not be made obligatory, as they can play different roles.

S/CSS/W/102 13 July 2001 US
Transparency in Domestic Regulation

This paper proposes elements for improving transparency under three headings, which include, for example:

A. Prior Notification and Comment: to include meaningful notice and comment periods. It foresaw that after the initial start-up costs, the maintenance costs should be low, given the increasing use of electronic communications.

B. Application Process: a clear open process, specifying the list of documents needed, the criteria for any revocation, suspension or termination of licenses. Clear deadlines, notification of violations, extent of disciplinary actions, responses to enquiries, and the regular scheduling of examinations.

C. Procedural Review and Remedies: the right to file complaints, and agreed review procedures.

Job(02)/150 22 October 2002 Japan
Coverage of Disciplines to be Developed on Domestic Regulation

This paper noted that the coverage of a discipline depends, in part, upon its contents. The coverage of GATS Articles III and VI general or basic disciplines cover a wide range of measures, while the coverage of a specific or advanced discipline tends to be limited. Under III the requirement on publication is wider than that for informing the CTS, and the requirement to set up tribunals in VI:2 is not limited to decisions concerning specific commitments. It is suggested therefore that the disciplines to be developed under VI:4 should not *a priori* be limited to measures in sectors where specific commitments are undertaken. The scope should rather be examined with respect to measures falling within exceptions of GATS, including XII, XIV, the Annex on Movement of Natural Persons and the Annex on Financial Services (2(a)).

Job(02)/203 3 December 2002 People's Republic of China
Restrictions Contained in Various "Domestic Regulations" Encountered by China's Service Providers Seeking Foreign Market Access

Examples given of restrictions in the construction, architectural and engineering sectors: they include requirements for nationality, residency, qualifications, previous working experience, local performance, hiring, and standards, and onerous and stringent visa application procedures.

Job(03)/45/Rev.1 2 May 03 Japan
Draft Annex on Domestic Regulation

This paper represents the first proposal tabled by a Member, in draft, for a complete set of disciplines under the mandate of the WPDR. The form suggested is an Annex to the GATS – which would comprise a general obligation being an integral part of the GATS, but to apply to specific commitments only. The core part of the Annex language draws on the Accountancy Disciplines, with a few additional elements, for example from the TBT. In addition elements of transparency and tribunals are included to supplement Articles III and VI:2, and are to apply to all services sectors. It also includes the necessity principle, with the wording taken from the Accountancy Disciplines. The proposal left

open whether measures regulating the entry of natural persons are related to the scope of VI:4 on licensing and qualification, or to technical standards, and suggests that if so, the issues should be subject to a separate discipline to be developed in addition.

The section on 'Scope and definition' adopts certain definitions taken from a Secretariat background paper (S/WPPS/W/9 of 11 September 1996). One of the elements in the section on transparency is taken from work on transparency standards under APEC. A section on administrative guidance relating to licences and qualifications aims to prevent the abuse of administrative discretionary powers. It finally makes it clear that the provisions do not prevent Members taking measures pursuant to Articles XII, XIV or XIV bis, or under paragraph 2 of the Annex on Financial Services.

S/WPDR/W/25 10 July 2003 EC and its Member States
Proposal for Disciplines on Licensing Procedures

The suggested disciplines would not address the substance of regulation (the 'regulatory intensity'), nor the 'prudential carve-out'. The proposal builds on GATS Articles III, VI:2 and VI:4, and takes account of the Accountancy Disciplines, the Basic Telecommunications Reference Paper and the Agreement on Licensing Procedures, though without using identical language in every case. The proposed elements first refer to the general principles, then set out general provisions for licensing procedures covering applications, documentation, decisions, fees and entry into force. The Transparency section contains ten elements, and finally the review of licensing decisions is covered.

Job(03)/219 3 Dec 03 New Zealand
Implementation of Article VI:6 Obligations in Engineering Services

The comprehensive procedures applied by New Zealand to verify the competence of professionals are described, in the context of its specific commitments. The aim of the measures is to protect the health, welfare and safety of its population, and also to achieve international compatibility and competitiveness for its professionals. The Chartered Professional Engineers of New Zealand Act 2002 provides for a registration process based on competency assessment, and for professional self-regulation. The standards for competence are benchmarked against international practice and are designed to be a mark of quality. Applicants must also demonstrate knowledge of the relevant NZ standards, codes of practice and regulations. The title 'Chartered Engineer' is protected and if not registered no one must hold out to be a Chartered Engineer. About 3,000 of the 20,000 engineers in the country were expected to register. Certain official positions have to be held by registered engineers with current Annual Practising Certificates. The sole registration body is the Institution of Professional Engineers New Zealand Incorporated, and it is charged with developing rules for assessing competency. The Chartered Professional Engineers Council ensures the neutrality of the Institution, and it has four members nominated by the relevant Minister and four by engineers.

Job(04)/24 31 March 2004 Hong Kong, China
Relationship of Domestic Regulation with National Treatment

The paper recalls the consensus in the former WPPS that the new disciplines developed under VI:4 must not overlap with other GATS provisions, including particularly the market access and national treatment articles. But it was recognised that careful consideration needs to be given as to whether an individual measure falls under VI:4 or is subject to scheduling under XVII, for example those relating to residency and recognition. Where a Member has scheduled limitations to national treatment, then they are exhaustive and no other inconsistent measures can be maintained. The paper, looking at the precedent of GATT III and TBT 2:1 and 3:1, proposes inserting the national treatment language into the VI:4 disciplines indicating that the exception is for measures only “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.”

S/WPDR/W/28 22 June 2003 Australia
Professional Recognition in Australia

The paper describes the measures which regulate professionals in Australia, with examples of the acts and bodies involved, whether official or private. Some professions are only partially regulated by the state, and others are self-regulated. The situation on mutual recognition is also set out, and the treatment accorded in their bilateral FTAs.

S/WPDR/W/29 7 July 2004 Colombia
Examples of Measures Relating to Administrative Procedures for Obtaining Visas or Entry Permits

The private sector in Colombia have identified administrative measures relating to procedures for obtaining and renewing visas or entry permits as the main obstacle to trade. They include procedural delays, complexity of formalities, high costs and lack of transparency. There is also excessive discretion exercised and a failure to draw a clear distinction between temporary movement and permanent immigration. The examples are listed under the headings: application requirements and procedures, documentation, length of stay, fees and administration. The paper ends with the questions as to which GATS articles cover the examples listed, and if not covered, where it would be most appropriate to address the issues.

S/WPDR/W/30 24 September 2004 Mexico
Mexico’s Experience of Disciplines on Technical Standards and Regulations in Services

The paper summarises the history of the evolution of GATT guidelines and disciplines on standards for goods products, and the consequent legal implementation through its Federal Law on Metrology and Standardisation. Some elements are then put forward for disciplines on technical standards for services, including the definition of ‘technical standard’, ‘international standards’ and ‘relevant international organisations’. It suggests consideration be given to the extent of harmonisation, the scope of the term ‘unnecessary barrier to trade’ and provisions for S&D treatment, such as time scale, flexibility and technical assistance.

S/WPDR/W/32 1 February 2005 Switzerland
Proposal for Disciplines on Technical Standards in Services

The proposal provides a comprehensive set of disciplines on technical standards to be integrated with the draft Annex on Domestic Regulation submitted by Japan on 2 May 2003. It aims to underpin GATS Articles II and III, and excludes matters covered by the market access and national treatment articles. Standards should cover both service characteristics and rules for service performance. It provides an open list of legitimate objectives for measures, and takes full account of GATS Article VI, the Basic Telecommunications Reference Paper, the Accountancy Disciplines and the TBT, as well as proposals tabled by Japan, Mexico, the EU and Canada (on the SPS). It incorporates the need for a regulatory impact assessment of the technical, economic and legal viability and effects on trade. S&D provisions for developing countries would enable them not to comply with international standards under time-limited exceptions, to carry out phased and longer implementation, and technical assistance.

**Room Document 18 February 2005 Brazil, Colombia, Dominican Republic,
 The Philippines**
Elements for Draft Disciplines on Domestic Regulation

This is the second complete set of elements for disciplines on Domestic Regulation to be proposed, and is designed to apply to specific commitments only. The section on S&D treatment aims to help developing countries overcome barriers to their exports and lack of capacity, and includes elements for phasing, the grant of aid and technical assistance, and participation in international organisations.

Room Document February 2005 Chile, India, Pakistan, Thailand
Qualification Requirements

This paper describes the problems suppliers of professional services face arising from qualification requirements and procedures. It proposes elements for rules on transparency, equivalence, the verification and due process for educational qualifications and competence, language and registration.

Job(05)/25 1 March 2005 US
Horizontal Transparency Disciplines in Domestic Regulation

As foreseen in the US paper Job(04)/128 "US Proposal for Transparency Disciplines in Domestic Regulation: building on existing international disciplines and proposals", this paper aims to develop coherent disciplines on transparency. It takes account of language featuring in GATS Articles III and IV, the Accountancy Disciplines, accession agreements, NAFTA, FTAs, BITs, APEC and proposals by Japan and the EU. It proposes the creation of mechanisms for responding to enquiries about measures of general application respecting specific commitments from 'interested persons' – which includes persons that are not WTO Members. It includes provisions for advance publication and the opportunity to comment. Procedural rules on the regulation of licensed economic activities are seen as constituting an extension of VI:3. The issue of 'travel documents or the authorisation of persons travelling' is excluded.

S/WPDR/W/34 6 September 2005 Australia
Development of Disciplines on Domestic Regulation for the Legal and Engineering Sectors

These proposals draw substantially on papers tabled at the WPDR and include input provided to the WTO Secretariat by international professional services associations. The two draft sectoral annexes each comprise a comprehensive set of disciplines and rules covering the elements of VI:4, with mainly identical language, and drafted to stand alone without reference to a horizontal set of disciplines of general obligation for every sector. For Legal Sector the list of legitimate objectives extends beyond those given in the Accountancy Disciplines, and the notion of technical standards is extended to cover ethical and professional conduct rules. The substantive aspects of qualification and licensing requirements are defined, including the concept of 'equivalence', with rules for residency, membership of professional organisations, firm names, professional indemnity insurance, language fluency and the content of examinations. The specifics in the draft Annex for the Engineering Sector on qualifications and licensing requirements are somewhat simpler than for the lawyers. The rules include reference to Competency Assessment at two levels, and to Continuing Professional Development. Technical standards are not extended to cover ethical and professional conduct.

S/WPDR/W/36 14 September 2005 Taiwan
Transparency Disciplines on Domestic Regulation in the Telecommunications Sector

The paper calls for a comprehensive set of transparency disciplines for the tele-communications sector accounting for sectoral specificities, and acting as a supplement that goes beyond those set out in GATS III *Transparency*. They would cover specific enquiry points, prior consultation and comment, an explanation of the rationale of measures, and relate to interconnection issues and licensing criteria and requirements, such as universal service obligations and the allocation of frequencies, numbers and rights of access.

NOTES BY THE CHAIRMEN OF WPDR

Job(02)/46 29 May 2002

In this informal note the chairman asked three key questions that have been the focus of much of the discussions in WPDR meetings since. They are in the context of clarifying which measures could fall within the scope of VI:4, as opposed to other provisions of the GATS:

- (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 (eg 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)?

The later notes in 2002 related principally to the order of procedure for the discussions and possible deadlines. The note of 19 May 2004 suggested a Roadmap for agreeing disciplines, with transparency put first, followed by qualifications and finally recognition.

NOTES BY THE SECRETARIAT

S/WPPS/W/9 11 September 1996

The Relevance of the Disciplines of the Agreements on Technical Barriers to Trade (TBT) and on Import Licensing Procedures to Article VI:4 of the GATS

This Note provides a brief description of the scope of the GATS Article VI:4, the TBT and the AILP procedures. The key elements of the TBT are described and their applicability to measures in GATS VI:4 are analysed. Importantly definitions for the categories of measures covered by VI:4 were put forward, which have been often quoted:

Qualification requirements: these comprise substantive requirements which a professional service supplier is required to fulfil in order to obtain certification or a licence. They normally related to matters such as education, examination requirements, practical training, experience or language requirements.

Qualification procedures: these are administrative or procedural rules relating to the administration of qualification requirements. They include procedures to be followed by candidates to acquire a qualification, including the administrative requirements to be met. This covers *inter alia* where to register for education programmes, conditions to be respected to register, documents to be filed, fees, mandatory physical presence conditions, alternative ways to follow an educational programme (eg distance learning), alternative routes to gain a qualification (eg through equivalences) and organising of qualifying examinations, etc..

Licensing requirements: these are substantive requirements, other than qualification requirements, with which a service supplier is required to comply in order to obtain formal permission to supply a services. They include measures such as residency requirements, fees, establishment requirements, registration requirements, etc..

Licensing procedures: these are administrative procedures relating to the submission and processing of an application for a licence, covering such matters as time frames for the processing of a licence, and the number of documents and the amount of information required in the application for a licence.

Technical standards: these are requirements which may apply both to the characteristics or definition of the service itself and to the manner in which it is performed. For example, a standard may stipulate the content of an audit, which is akin to definition of the service; another standard may lay down rules of ethics or conduct to be observed by the auditor.

The relevance is examined of the disciplines in the AILP to the GATS requirement that licensing procedures should not in themselves contribute to trade restrictions. The focus is on the applicability of normative approaches to VI:4 measures, and how principles are made operational

The final section summarises the main issues requiring consideration and discussion. Regulatory interventions and procedures should be transparent, predictable and no more disruptive or limiting of trade than necessary to attain the desired policy objectives, given

the aim of the WTO to preserve and promote an open multilateral trading system. The challenge is how to fashion the detailed requirements and procedures necessary to create an appropriate regulatory environment for service sectors, for both services and services suppliers, especially in service sectors that are highly regulated. A general regulatory framework based on principles is required on which to base sector-specific rules.

The conclusions contain the following aspects:

- * The distinction between mandatory and voluntary standards.
- * Further elaboration of the illustrative list of legitimate policy objectives.
- * Elaboration of the content of the concept of necessity.
- * A consultative mechanism to discuss the variation in standards, especially in areas where international standards have not been developed.
- * The GATS does not claim competence for substantive content of standards.
- * The elaboration of the GATS requirements on standards in relation to international standards.
- * Notification where international standards are not used, and provision for prior notification and consultation to justify a particular standard.
- * The establishment of eligibility criteria for the grant of licences, and the distinction between automatic and other forms of licensing.
- * Rules for neutral application and equitable administration of licensing procedures.
- * The notion of ‘a reasonable period of time’ under VI:3 to be elaborated to include specific time periods, and the level of sectoral specificity.

S/WPPS/W/11

5 May 1997

Synthesis of the Responses to the Questionnaire in the Accountancy Sector

This Note presents a synthesis of the responses of 29 WTO Members (counting the EU as one) to the WTO ‘Questionnaire on the Accountancy Sector’. The material is set out under the following headings, which were identified in January 1996 by the WPPS as issues for consideration for its work on discipline on Domestic Regulation.

Qualification requirements and procedures

Licensing requirements (other than qualification requirements) and procedures

Regulations governing the establishment of a commercial presence

Nationality/Citizenship/Residency requirements

Ethics

Regulations governing entry and temporary stay of persons for the purpose of supply accountancy services.

Where relevant, material supplied by UNCTAD, OECD and IFAC was included.

S/C/W/96

1 March 1999

Article VI:4 of the GATS: disciplines on Domestic Regulation applicable to all services

This Note provides an overview of some of the issues to consider when developing disciplines on Domestic Regulation applicable to all service sectors, as required by VI:4. The principles of VI:4 are too general to bind them as rules, and therefore specific

disciplines are needed, to make the principles operational, with adequate guidance for the settlement of disputes over particular measures. An earlier Note suggested definitions for the categories of measures covered by VI:4 (see above).

Although the work of the WPPS on accountancy was not a decision to carry out work under VI:4 on a sector-by-sector basis, much of the discussions at the WPPS constituted helpful background material for later work under VI:4 in general. Under GATS the progressive liberalisation of trade in services is approached through the elimination of restrictions to trade rather than by deregulation. VI:1, 3, 5 and 6 apply to Domestic Regulation on services where specific commitments have been undertaken, and these were described in the Note. The legal distinction between GATS Parts II and III was underlined, the latter being subject to negotiations on specific commitments, and there should be no overlap to ensure legal certainty and conformity of the disciplines with the GATS structure. Nothing in VI:4 suggests that its disciplines were to be limited to the services on which specific commitments are undertaken.

The Note then described the key elements of VI:4, referring to precedents under the GATT, TBT and SPS: the necessity test (which includes legitimate objectives and necessity), transparency, equivalence and international standards.

S/C/W/97 **1 March 1999**
International Regulatory Initiatives in Services

This Note provides a general overview of the development of regulatory disciplines and related measures at the international level. It provides information on existing GATS provisions and an overview of VI:4-related work (to February 1999), and presents relevant information taken from sectoral background papers by the Secretariat on progress at the international level in the development of regulatory 'disciplines' and other related initiatives. In a separate section the relevant work of ISO, ITU, UNCTAD, APEC and OECD are noted. The final section notes the major VI:4-related issues identified in each sector, taken from the background papers.

5929 **9 March 2001**
Application of the necessity test

This Note quotes the forms of the necessity test in the TBT and SPS Agreements, the GATS Annex on Telecommunications, GATT Article XX and GATS XIV General Exceptions, and points out that most of the legitimate objectives found in the TBT and SPS are already covered under GATS XIV. There are two aspects of the necessity test of relevance to any disciplines under VI:4: the first is the general requirement that regulations be not more trade restrictive than necessary, and the second is to examine whether an individual measure is actually necessary to achieve the specified legitimate objective, as it is most probable that in future dispute settlement, cases on services will be resolved on a case-by-case basis.

The discussions on legitimate objectives at the former WPPS are noted and it is suggested that the quality of a service and the protection of consumers – to include the users of a particular service and the public generally - could be of general application.

Consideration should also be given to the following from the TBT: protection of the environment, harmonisation, lowering or removal of trade barriers, cost savings and increasing productivity - - and others such as 'economic efficiency' (or 'promoting competition'), 'administrative efficiency' and 'economic development'. Perhaps the political acceptability would be greater if primacy were given to economic efficiency in the attainment of objectives. Finally, it is pointed out that the underlying logic of VI:4 inherently is to serve legitimate policy objectives, and it is suggested that pending the entry into force of disciplines developed under VI:4, reference should be considered to including international standards as a permanent part of the necessity test of any generally applicable disciplines.

S/WPDR/W/27 2 December 2003
"Necessity Tests" in the WTO

The background to necessity tests in WTO agreements is briefly described. The paper points out that VI:4 does not impose a direct necessity test on Members, but requires them to negotiate any needed disciplines to ensure that such measures do not constitute unnecessary barriers to trade. However, the Accountancy Disciplines do contain a necessity test in the form of an obligation. The issues that have arisen in WTO jurisprudence are rehearsed where relevant to VI:4 under sections covering: legal rulings on objectives of measures, the level of attainment sought to achieve a measure, and legal rulings on necessity and burden of proof. It concludes that the provisions on necessity in different WTO agreements cannot be used interchangeably, but must be read in the context and light of the object and purpose of the agreement concerned. The distinction is drawn between necessity tests in the context of active obligations, usually associated with open illustrative lists of policy objectives, and those applied in exception cases, which are pre-defined. In the former the onus is on the complaining Member to demonstrate a measure is more trade restrictive than necessary to pursue the objective(s) involved, while the onus in the latter case is on the Member taking the measure, to prove its necessity in the light of the stated objectives.

Job(02)/20/Rev.10 31 January 2005
Examples of Measures to be Addressed by Disciplines under GATS Article VI:4

This Note is the most recent in a progressively updated series that lists in its Annex I of examples (now submitted to the WPDR by eleven Members), of the kinds of measures that might be addressed by disciplines under GATS Article VI:4, but excluding those that are not already covered by the Accountancy Disciplines, and are not Article XVI or XVII measures. It lists those that arose in the former WPPS in its Annex II. Its Annex III outlines the issues in this domain discussed at meetings of the WPDR. Annex IV reproduces the matrix paper submitted by Hong Kong – China on 16 November 2004 (Job(04)/166).

EC Principle of Proportionality

In the EC 'proportionality' is an unwritten principle requiring that any general regulation affecting its Member States should ensure the least restriction on a service, for example, of general economic interest. In the WTO it has not yet been recognised even as an unwritten principle.

PROPOSALS BY THE PRIVATE SECTOR

European Services Forum 2 March 2005 Position Paper on Domestic Regulation

The ESF position paper includes proposals for detailed rules on transparency for standard setting, licensing procedures and tribunals (judicial, arbitral and administrative).

ANNEX E: References

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