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MEMORANDUM

TO: Kay Wilkie, Chair, Intergovernmental Policy Advisory Committee (IGPAC)
FROM: Robert Stumberg
DATE: February 12, 2008 – *Version 5 – Comments requested*
RE: WPDR chairman's fourth draft on domestic regulation, dated 23 January 2008

INTRODUCTION

On January 23, 2008, the chairman of the WTO's Working Party on Domestic Regulations (WPDR) released a fourth draft of proposed "disciplines."[1] If adopted, these disciplines would apply to sectors in which the United States has made commitments under the General Agreement on Trade in Services (GATS).[2] The disciplines would cover U.S. commitments and offers in over 90 service sectors, many of which are regulated by states or operated by local governments – *e.g.*, utilities, telecommunications, coastal and commercial development, professions, financial services, distribution services, health facilities, storage and transportation of fuels, and higher education, just to name a few.

Many of the proposed GATS disciplines reflect best practices. Yet neither Congress nor state legislatures have imposed such disciplines on regulatory agencies, primarily owing to the complexity of regulating service industries.

It is important to not overstate or understate the importance of the chairman's draft. The chairman notes that there is no consensus yet, so his draft does not necessarily reflect points of agreement. As discussed below, key provisions remain inconsistent with the published principles of U.S. negotiators. Yet there are reasons to take this draft seriously. The WTO's Director General recently called for an end to high-level negotiations in WTO's Doha Round so that he could propose a scenario for finishing the Round in 2008. As a fourth draft with major differences remaining, the chairman's document signals that a consensus on new GATS disciplines is unlikely unless WPDR participants make major concessions.

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[1] Working Party on Domestic Regulation, Revised Draft, Disciplines on Domestic Regulation Pursuant to GATS Article VI:4, Informal Note by the Chairman, 23 January 2008 (Room Document), available at http://www.tradeobservatory.org/library.cfm?refID=101417 (viewed January 25, 2008). The chairman of the WPDR is Peter Govindasamy of Singapore. (hereafter, chairman's fourth draft)

The chairman presented his third draft in April 2007: Working Party on Domestic Regulation, Draft Disciplines on Domestic Regulation Pursuant to GATS Article VI:4, Informal Note by the Chairman, 18 April 2007 (Room Document), available at http://www.tradeobservatory.org/library.cfm?refID=98264 (viewed May 10, 2007). (hereafter, chairman's third draft)

The chairman presented his second draft in April 2007: The chairman's second draft was an untitled and undated document, available at http://www.tradeobservatory.org/library.cfm?refid=97441 (viewed first on February 21, 2007). (hereafter, chairman's second draft) *See* Aileen Kwa, "Of Fireside and Other Chats: Analysis and Update on the Agriculture, NAMA and Services Negotiations," Focus on Trade #127, February 2007.

[2] General Agreement on Trade in Services, art. VI:4–5, Apr. 15, 1994, 33 I.L.M. 44 (1994), *available at* http://www.wto.org/English/docs_e/legal_e/legal_e.htm - services (viewed Jan. 24, 2007).

If proposed as domestic law, the disciplines as proposed by the chairman would be controversial. Lawyers will recognize some proposed disciplines as variations on substantive due process, one of the most contentious areas of constitutional law. Other disciplines, if adopted as domestic law, would be changes in the federal or state administrative procedure acts.

As if to underline the importance of proposed GATS disciplines, the Office of Management and Budget announced in December 2007 that it is proceeding with a bilateral initiative with the European Union to analyze the trade impact of domestic regulation. OMB requested comments on a joint US-EU initiative on "Regulatory Impact Assessment" (RIA).[3] Currently, the US approach focuses on cost-benefit analysis, while the EU approach considers compliance with "WTO rules" along with economic impact and sustainability.[4] The joint RIA initiative aims to avoid "establishing unnecessary barriers to trade"[5] and recommends RIA elements that could reinforce compliance with GATS disciplines.[6]

Despite their gravity, the proposed GATS disciplines have drawn little response from state and local officials outside of IGPAC. The purpose of this memo is to introduce the GATS proposals and invite a closer reading by the regulators and legislators whose authority the disciplines might constrain. This memo includes:

A reader with limited time can read the overview and the conclusion and still understand the questions they could be asking about the proposed Disciplines (attachment 1). For readers of prior versions of this memo, the substantive changes are in blue font (electronic copy).

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[3] Request for comments on the Draft Joint Report on the Review of the Application of European Union and United States Regulatory Impact Assessment Guidelines on the Analysis of Impacts on International Trade and Investment, Federal Register, Vol. 72, No. 236, Notices (December 10, 2007), 69719; available at http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/E7-23856.pdf (viewed Feb. 2, 2008).

[4] *Id.* at 11 and 4.

[5] Joint Report on the Review of the Application of European Union and United States Regulatory Impact Assessment Guidelines on the Analysis of Impacts on International Trade and Investment (8 November 2007) 13; available at http://www.whitehouse.gov/omb/inforeg/reports/draft_sg-omb.pdf (viewed Feb. 2, 2008). The initiative applies to federal rulemaking, not state law.

[6] The recommended RIA elements for international trade impact include: (1) need for a regulation (the term "necessity" is not used), (2) differential impact on foreign vs. domestic business and consumers, and (3) recommended use of international standards or regulatory approaches as an alternative to the domestic regulation. *Id.* at 25.

OVERVIEW

The headlines include …

- ***No consensus.*** After "extensive discussions" between June and December 2007, the WPDR has yet to reach a consensus on key disciplines. The chairman writes that changes in his fourth draft are in "paragraphs where I felt that progress could be made (in particular, see headlines below on subnational government and transparency).[7] For background on negotiations, *see page* 5

- ***No necessity language.*** The chairman's fourth draft continues to leave out the proposal from Australia, Hong Kong and New Zealand that requires domestic regulations to be "no more burdensome than necessary to ensure the quality of a service." This is no doubt due to resistance from the United States, Brazil and other nations who view the necessity test as incompatible with domestic regulatory authority. The strongest statement to date on this issue has been the March 2007 outline of negotiating principles by the United States Trade Representative (USTR).[8] To a great extent, the USTR statement reflects the recommendations from IGPAC. For comments on necessity, *see page* 6

- ***No disguised restrictions to trade.*** In place of ensuring "necessity," the fourth draft states that one purpose is to ensure that regulations "do not constitute disguised restrictions on trade in services." This purpose would inform how dispute panels interpret the disciplines. In recent disputes, the WTO has found disguised restrictions when countries have failed to consult and seek less-trade-restrictive alternatives in response to complaints that measures violate trade rules. In other words, avoiding "disguised barriers" has a meaning that is similar to the necessity test. *See page* 7

- ***Deletion of deference to subnational government.*** Like prior versions, the chairman's fourth draft recognizes the "right to regulate … in order to meet national policy objectives." However, the fourth draft deleted language that referred to subnational governments, and the third draft had weakened the previous version, which was the right to regulate in order to meet "domestic" policy objectives.[9] To come within the GATS right to regulate, states would have to seek an endorsement of state policy from the federal government. *See page* 8

- ***Deeper coverage under existing commitments.*** The disciplines would apply to measures that affect trade in sectors that are already committed. In effect, the disciplines would extend GATS rules to measures that are not discriminatory and not limits on market access. Governments would not have an opportunity to revisit their schedules to protect any existing measures that are inconsistent with the proposed disciplines. For example, coastal regulations that affect bulk storage of fuels (*e.g.*,

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[7] Chairman's fourth draft, introduction, p1.

[8] United States, Outline of the U.S. Position on a Draft Consolidated Text in the GATS Working Party on Domestic Regulation, undated (posted on March 27, 2007), available at http://www.ustr.gov/Trade_Sectors/Services/Section_Index.html (viewed May 10, 2007).

[9] Compare chairman's fourth draft, ¶ 3, with chairman's third draft, ¶ 3, fn.1. and the chairman's second draft, ¶ 2.

LNG terminals) are not discriminatory, but they have been criticized in terms that parallel the proposed disciplines. In addition, the extent to which the disciplines cover measures actually scheduled as limits on commitments is unclear. *See page* 10

- ***New transparency obligations.*** Another change in the fourth draft is where it defines an obligation on governments to publish "detailed information" on regulations. Mandatory details include applicable technical standards, appellate process, monitoring, public involvement, exceptions and normal time frames.[10] Originally proposed by Australia, *et al*., this information is more demanding than the U.S. transparency proposal to the WPDR or the publication requirements in federal or state administrative procedure acts. Also, the fourth draft limits a "best endeavor" requirement to seek comments from service suppliers; it does so by leaving out service customers and other interested parties.[11] *See page* 21

- ***Principal disciplines remain.*** The fourth draft retains 48 paragraphs of substantive and procedural disciplines from the prior drafts. The full text is attached after page 30. Among the most significant proposals, several create a spectrum of possible meanings. These meanings *could be* consistent with constitutional authority to regulate in the United States, but they *could also be* interpreted as an obligation to regulate in the least-burdensome way. For example:
  - *A relevance test* … could exclude criteria that are external to the quality of a service being supplied, criteria such as environmental, historical or aesthetic impacts. See page 13
  - *Pre-established test* … could affect the law of when development rights or property rights vest, meaning at what point in time regulatory changes are applicable. See page 14
  - *An objectivity test* … could exclude subjective standards such as "just and reasonable" authority that legislatures delegate to public utility commissions to regulate in the public interest. See page 17
  - *Simplicity test* … could affect licensing and standards of operation in the most complex service industries, where typically, procedures reflect a balance of regulator vs. industry needs. *See page* 27

  WTO dispute panels would have to interpret this array of tests, which are neither simple nor objective. Not only are they novel, thus lacking in precedents, but one test is likely to influence interpretation of another.

- ***Changes in the fourth draft.*** Other notable changes include:
  - *Licensing procedures* ... and impartial decisions. See page 28
  - *Qualification requirements* … and consideration of experience. *See page* 30

[10] Compare chairman's fourth draft, ¶ 13, with chairman's third draft, ¶ 14.

[11] Compare chairman's fourth draft, ¶ 15, with chairman's third draft, ¶ 16.

BACKGROUND ON GATS NEGOTIATIONS ON DOMESTIC REGULATION

GATS covers services that are traditionally regulated by states or provided by cities. As a leader in services negotiations, the United States has made commitments to follow GATS trade rules in over 90 service sectors. When they make sector commitments, countries agree in those sectors to honor GATS prohibitions on discrimination (national treatment) and quantitative limits on service suppliers (market access). As part of the Doha Round of negotiations, WTO nations are bargaining to expand their sector commitments, which apply to all levels of government.

In addition, GATS authorizes negotiations on new "disciplines" on domestic regulation. If adopted, these would cover qualification requirements (*e.g.*, for professional licenses), licensing requirements and technical standards (for operating or providing a service). Any new disciplines would constrain domestic regulations, even if the regulations do not discriminate against foreign firms.[12]

The Chairman's fourth draft would apply to regulation of services within sectors where WTO nations have made their sector commitments.[13] For example, the United States has made or offered to make commitments[14] that cover regulation of –

- Alcoholic beverages – wholesale distribution services
- Coastal zones – bulk storage of fuels (LNG terminals), wastewater (desalination)
- Energy and climate – distribution and services incidental to energy distribution
- Health facilities – including services of doctors and nurses
- Higher education
- Insurance – including health insurance
- Libraries – library services as well as data storage and retrieval
- Licensing of professions - accountants, architects, engineers, lawyers and others
- Prescription drugs – wholesale and retail distribution
- Tobacco – wholesale and retail distribution, advertising
- Utility companies – services incidental to energy distribution
- Waste management – environmental services
- Zoning and land use – wholesale and retail distribution including access to land

The negotiations take place within the Working Party on Domestic Regulation (WPDR), which reports to the WTO's Council on Trade in Services. The chairman of the WPDR is Peter Govindasamy of Singapore. The chairman seeks to broker a compromise among countries with divergent views, even on the question of whether new disciplines are necessary. One group of countries demanded "ambitious" disciplines; these include Australia, Hong Kong, New Zealand, Switzerland, and others. Their most ambitious proposal is that domestic regulations must be "necessary" – that is, the approach that is least burdensome on trade – which would conflict with most compromise or middle-ground legislation. Another group including Brazil, the Philippines,

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[12] *See* Joost Pauwelyn, *"RIEN NE VA PLUS? Distinguishing Domestic Regulation from Market Access in GATT and GATS"* (April 1, 2005), 138-139 and table 1 at 140. Duke Law School Legal Studies Paper No. 85 Available at SSRN: http://ssrn.com/abstract=638303 or DOI: 10.2139/ssrn.638303.

[13] Chairman's fourth draft, ¶ 10.

[14] *See* United States, *Revised Services Offer*, Council for Trade in Services – Special Session, TN/S/O/USA/Rev.1, 2005, available at http://www.ustr.gov/assets/Trade_Sectors/Services/2005_Revised_US_Services_Offer/asset_upload_file7_7760.pdf, viewed February 23, 2007.

and the African group said that the proposed disciplines would undermine legitimate regulatory authority.[15] The United States supported Brazil's position and proposed that new disciplines should be limited to transparency only.[16]

After the chairman's third draft of proposed disciplines on domestic regulation, it looked like the WPDR would try to reach a consensus. In April 2007, the WPDR began to meet in "informal mode"; it ceased reporting its deliberations in public minutes, and drafts were closely guarded to prevent public disclosure during the vetting process.[17] Yet after "extensive discussions" between June and December 2007, the WPDR did not reach a consensus. In his fourth draft, the chairman said in effect that a compromise on some key issues was not within his reach, and more negotiations were needed.[18]

COMMENTS ON THE CHAIRMAN'S FOURTH DRAFT

1. Statement of purpose

a. ***Necessity – deleted.*** The fourth draft continues to exclude the necessity test, which is an accomplishment for negotiators who viewed the test as a threat to regulatory authority.[19] Briefly, this change is important on three levels. First, if it had been a discipline, the necessity test would have required regulations to take the least burdensome approach.[20] Second, the test was stated as an obligation to "ensure" that domestic regulations are necessary, which connoted a duty on the part of a national government to enforce new disciplines over subnational governments. Third, the test stated in the chairman's second draft was framed as an overriding purpose of all disciplines, which could have influenced interpretation of several provisions so that dispute panels would read them as operational

[15] Aileen Kwa, "Analysis and Update on the Agriculture, NAMA and Services Negotiations," Focus on the Global South, December 8, 2006; Riaz Tayob, "Developing countries voice opposition to 'necessity test' in GATS domestic regulation," TWN Info Service, Geneva , 21 November 2006. *See* South Centre, *The Development Dimension of the GATS Domestic Regulation Negotiations*, August 2006, 12-16.

[16] *See* Communication from the United States, *Horizontal Transparency Disciplines in Domestic Regulation*, JOB(06)/182, 9 June 2006.

[17] Working Party on Domestic Regulation, *Report on the Meeting Held on 20 April 2007*, S/WPDR/M/36 (May 24, 2007), ¶¶ 5-6.

[18] Chairman's fourth draft, introduction, p1.

[19] The chairman's second draft included the necessity test in a section titled "Introductory Language," which stated that the purpose of disciplines is for " … Members to ensure that measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards … are no more burdensome than necessary to meet domestic policy objectives, including to ensure the quality of the service." Chairman's second draft, Introductory Language, ¶ 1.

[20] Under the U.S. Constitution, courts only apply this kind of strict scrutiny when a regulation discriminates against foreign commerce or on the basis of religion or nationality. Under U.S. law, economic regulation that is not discriminatory may place a burden on commerce so long as it has a rational basis. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985) ("When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.") An obligation to ensure that all (even nondiscriminatory) economic regulation is "necessary" would reverse the presumptions of U.S. constitutional law, and perhaps those of other countries as well.

necessity tests.[21]

b. ***Purpose – to avoid disguised restrictions.*** In place of "necessity," the fourth draft retains the purpose, "to facilitate trade in services by ensuring that measures relating to [domestic regulation] are based on objective and transparent criteria, such as competence and the ability to supply the service, and do not constitute disguised restrictions on trade in services."[22] (emphasis added) Since objectivity and transparency are operational disciplines, we comment on those purposes below.

The purpose of avoiding disguised restrictions on trade is modeled on language in several articles of GATS: recognition of qualifications or licenses,[23] conditions for invoking a general exception,[24] and conditions for invoking exceptions to the Telecom Annex.[25] Other WTO agreements have similar provisions, most notably the Agreement on Sanitary and Phytosanitary Measures (SPS), which directly prohibits disguised restrictions on trade.[26]

The foremost concern is whether avoiding "disguised restrictions" could be a kind of operational necessity test. In the fourth draft, avoiding disguised restrictions is stated as purpose, not a command. Indeed, the fourth draft excludes a discipline that in the second draft commanded countries to prohibit disguised restrictions.[27] In other words, "disguised restriction" has changed from a command into an interpretive guideline, which could influence the meaning of the 30 disciplines such as the objectivity test, the relevance test and the simplicity test. The new language tracks with recommendations from the United States in its most recent statement of position.[28]

So as an interpretive guideline, what does "disguised restriction" mean? In *EC-Hormones* (SPS obligations for food safety measures), the Appellate Body stated that arbitrary or unjustifiable levels of protection are relevant but not conclusive factors in

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[21] Examples of provisions that could be interpreted as operational necessity tests require that regulations must: be relevant to the activity for which a license is sought; not constitute disguised restrictions on trade; or be as simple as possible. The United States signaled its awareness of how "necessity" could influence interpretation of other provisions by stating that it opposed even "operational necessity tests". Communication from the United States, Outline of U.S. Position on a Draft Consolidated Text in the WPDR - Job (06)/223 (July 11, 2006), at B.3, available at http://www.tradeobservatory.org/library.cfm?refID=88410, viewed February 23, 2007.

[22] Chairman's fourth draft, ¶ 2.

[23] GATS art. VI:3 (Recognition).

[24] GATS art. XIV, first paragraph (General Exceptions).

[25] GATS Annex on Telecommunications, ¶ 5(d).

[26] SPS, preamble (limit on declaration of right to regulate), art. 2:3 (basic obligation), art. 2:5 (inconsistent levels of protection that result in a disguised restriction on trade), art. 5.5 (arbitrary or unjustifiable level of protection that result in a disguised restriction on trade). *See also* General Agreement on Tariffs and Trade, art. XX (conditions for invoking general exceptions); Agreement on Technical Barriers to Trade, preamble (limit on declaration of right to regulate); Agreement on Government Procurement, art. XXIII (conditions for invoking general exceptions).

[27] The chairman's second draft, Licensing Requirements, ¶ 2 stated that "each Member shall ensure that licensing requirements do not constitute disguised restrictions on trade in services."

[28] United States – Outline of the U.S. Position, p. 1.

proving that a measure is a disguised restriction on trade.[29] In *U.S.-Reformulated Gasoline* (GATT exceptions), the Appellate Body interpreted "disguised restriction" to include disguised discrimination as well as concealed or unannounced restrictions.[30] More concretely, the Appellate Body described a disguised restriction as a violation of a trade rule (in that case, discrimination) that is foreseeable, not a violation that is "merely inadvertent or unavoidable." In that situation, the Appellate Body concluded that the United States had a duty to explore means of mitigating the restrictions on trade, including cooperation with the other governments involved (in that case, Venezuela and Brazil).[31]

If this logic translates from GATT national treatment to GATS domestic regulation, the purpose of avoiding disguised restrictions could animate the disciplines. A restriction on trade is foreseeable after one country complains to another. Once it is foreseeable, then *U.S.-Reformulated Gasoline* suggests there is a duty to consult and explore alternatives that are less trade-restrictive. That is not a substantive necessity test, but it could operate as a procedural analog to one. In other words, it is more likely that a challenge based on the proposed disciplines would succeed if a country fails to respond to a complaint by actively consulting and seeking less trade-restrictive or burdensome alternatives.

c. ***Right to regulate & subnational policy objectives.*** The fourth draft recognizes countries' right to regulate to meet "national policy objectives."[32] It repeats the preamble of GATS, which already states the right to regulate in terms of "national policy objectives."[33] This "right" is an interpretive guideline, which could influence the meaning of disciplines such as the objectivity test, the relevance test and the simplicity test. The degree of deference that it connotes to national objectives is unclear. What is clear is that the deference does not extend to subnational policy, as the drafting history shows:
   - The first draft recognized the right to regulate in terms of "national policy objectives."
   - The second draft replaced "national policy objectives" with "domestic policy objectives,"[34] so as to include both national and subnational objectives.

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[29] *EC Measures Concerning Meat and Meat Products (Hormones)*, 16 January 1998, WT/DS26/AB/R, WT/DS48/AB/R, ¶ 240.

[30] *United States - Standards for Reformulated and Conventional Gasoline*, adopted 20 May 1996, WT/DS2/AB/R, p. 25.

[31] *Id.* at pp. 28-29.

[32] Chairman's fourth draft, ¶ 3.

[33] The fourth paragraph of the GATS preamble states: "Recognizing 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 and, 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 …".

[34] *Compare* chairman's third draft, ¶ 3, with chairman's second draft, ¶ 2. The chairman's third draft is a partial return to the language of his first draft (July 2006), which required that "Each member shall ensure that licensing requirements do not act as barriers to trade in services and are not more trade restrictive than required to fulfill national policy objectives." Note by the Chairman, *Disciplines on Domestic Regulation Pursuant to GATS Article VI:4 Consolidated Working Paper*, JOB(06)225, July 2006, ¶ F.2 (emphasis added)

- The third draft changed this back to "national policy objectives," but then defined "national policy objectives [to] include objectives identified at both national and sub-national levels."[35]
- The fourth draft kept "national policy objectives," but dropped the definition that included subnational objectives.

If the fourth draft language is adopted, a dispute panel could cite this drafting history as evidence that the right to regulate does not apply to subnational regulations. This would be particularly problematic in a trade dispute that challenges state or local regulations based upon the variation between levels of government (vertical) or among subnational governments (horizontal). Disciplines of this nature include the relevance test (¶ 11), the simplicity test (¶ 18), and the single authority test (¶¶ 18 and 30), among others.

The federal government would have to endorse or ratify state and local policies in order for them to be recognized by this right to regulate. This runs counter to the traditional deference that state and local governments enjoy. In the U.S. system of dual sovereignty, a state's regulatory objective only needs a congressional endorsement if it discriminates against interstate or international commerce or if it intrudes upon a federally regulated sector.

d. ***Needs of developing countries.*** The fourth draft recognizes asymmetries of regulation, for example, when a sophisticated service supplier is being regulated by a developing country that has only begun to develop its system of domestic regulation.[36] It also recognizes the difficulties of service suppliers from developing countries when they face regulatory systems away from home.[37] However, it is hard to see how these "recognitions" would impart any WTO deference to developing countries.[38] The fourth draft also provides for a transitional period (as yet undefined) during which the disciplines would not apply to developing countries.[39] This transition would provide additional time for developing countries to ensure that their domestic regulations and

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[35] Chairman's third draft, ¶ 3, fn. 1. (emphasis added) This definition in the third draft was ambiguous. It could mean an objective that is identified by subnational government:

- even if the objective is not recognized at the national level (synonymous with "domestic policy objective"), or
- only if the objective is also recognized at the national level.

The latter, less-deferential interpretation is more likely for two reasons. First, it is the literal reading of the definition: both national and subnational. Second, since "national" objective replaced "domestic" objective, it is likely be interpreted to produce a different meaning than "domestic."

[36] Chairman's fourth draft, ¶ 3.

[37] Chairman's fourth draft, ¶ 4.

[38] In *Mexico – Telecommunications*, Mexico was not successful in arguing that its status as a developing nation should influence interpretation of its obligations under GATS regarding domestic regulation of telephone rates. The dispute panel ruled that under section 5(g) of the GATS Telecom Annex (developing country conditions), Mexico may impose reasonable limits on its GATS commitments, but it must do so in its schedule of commitments, as could any member nation. *Mexico – Measures Affecting Telecommunications Services*, WT/DS204/R, 2 April 2004, ¶¶ 7.386–7.388 (hereafter, *Mexico – Telecommunications*).

[39] Chairman's fourth draft, ¶ 42.

regulatory structures conform to the new disciplines, but in due course, the disciplines would apply to all WTO members except the Least Developed Countries (LDCs).[40]

2. General provisions

a. *Coverage*

(1) *Scope of sector commitments.* The fourth draft states, "These disciplines apply to measures by Members relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards affecting trade in services in sectors where specific commitments are undertaken."[41] (emphasis added) This sentence has not changed from the third draft. However, considering the differences among parties over substantive disciplines, it may help to revisit coverage as a way to shrink the potential impact of a discipline that it otherwise objectionable. Several terms in the first sentence on coverage are rather expansive in their scope of coverage:

(a) *Relating to* – This phrase means that the disciplines would apply not only to measures that are licensing requirements, etc., but also to a broader class of measures that relate to licensing requirements, etc.

(b) *Affecting* – This phrase means that the disciplines would apply not only to measures that govern services in a committed sector, but also measures that affect services in committed sectors.

(c) *Sectors where specific commitments are undertaken* – The phrase, "sectors where commitments are undertaken," is ambiguous. It could mean only measures that affect sector commitments, meaning *committed modes* within a sector (*e.g.*, commercial presence but not movement of natural persons). Or, it could mean measures that affect a committed sector, meaning all modes for that sector. The latter is the plain meaning. Hence, the disciplines are likely to cover more than measures that are covered by specific commitments.

An alternative to clarify this ambiguity would be to limit coverage to measures that affect committed modes within committed sectors.

(2) *Scope of commitments subject to scheduling.* The chairman's fourth draft provides that disciplines "do not apply to measures to the extent that they constitute limitations subject to scheduling under Article XVI or XVII."[42] This sentence is important because it could make a difference in the range of domestic regulations that are covered by the proposed disciplines.

The sentence is vague to the point that it could be interpreted in a number of different ways. WTO dispute panels would have to make those decisions, and until they do, it

[40] Chairman's fourth draft, ¶ 46.

[41] Chairman's fourth draft, ¶ 10.

[42] The fourth draft amended the third draft to cover measures "to the extent that" they are subject to scheduling, as opposed to "where" they are subject to scheduling. *Compare* chairman's third draft, ¶ 10, with chairman's second draft, ¶ 10.

would be difficult for GATS negotiators to know what they are committing to. More importantly, the vagueness makes it difficult for domestic regulators to know what they are exposed to in terms of the risk of trade disputes. Here are the issues we see with this language:

(a) *To what extent would disciplines cover measures that might conflict with rules on Market Access and National Treatment?*

Various commentators have reasoned that the logical structure of GATS creates mutually exclusive sets of measures: (1) quantitative limits that are covered by commitments on Market Access; (2) discriminatory measures that are covered by National Treatment; and (2) other types of measures that could be disguised barriers to trade, which could be covered by disciplines on domestic regulation. The structural logic of GATS is reinforced by the difficulty that negotiators face if they schedule limits on a commitment, only to have them covered by another overlapping discipline.[43]

The chairman's draft states that the disciplines would not cover measures "to the extent that they constitute limitations subject to scheduling" under Market Access and National Treatment. One interpretation is that "subject to scheduling" refers to the logic that GATS creates mutually exclusive sets of measures, and that if a measure might conflict with Market Access or National Treatment, it is excluded from coverage under disciplines on domestic regulation. For example, even if a discriminatory measure is not actually scheduled, it is "subject to" scheduling. If a discriminatory measure is not scheduled, it can be challenged under National Treatment.

A challenger of domestic regulations could argue that the chairman's draft excludes only limitations that are subject to scheduling, not all measures that are subject to scheduling. The implication of this argument is that unless a measure is actually scheduled as a limitation, a challenger should be able to challenge it under both National Treatment (or Market Access) and disciplines on domestic regulation. Should the discrimination argument fail, the disciplines on domestic regulation would still apply.

For measures that are explicitly discriminatory, this distinction may be moot. However, a measure that is not explicitly (*de jure*) discriminatory might be discriminatory in effect (*de facto*) in ways that are not obvious or intended. It is the potential for such discrimination in effect that makes "subject to scheduling" difficult to interpret. Thus, coverage under the proposed disciplines is difficult to predict in all cases.

What is clear is that the chairman's draft excludes from coverage those measures that GATS clearly prohibits as either (a) discriminatory under National

[43] *See* Jan Wouters and Dominic Coppens, *Domestic Regulation within the Framework of GATS*, Institute for International Law, Working Paper No. 93 (May 2006), Faculty of Law at the University of Leuven, 12-13. *See also* Joost Pauwelyn, *"RIEN NE VA PLUS? Distinguishing Domestic Regulation from Market Access in GATT and GATS"* (April 1, 2005), 138-139 and table 1 at 140. Duke Law School Legal Studies Paper No. 85 Available at SSRN: http://ssrn.com/abstract=638303 or DOI: 10.2139/ssrn.638303.

Treatment or quantitative or other limits on Market Access, and (b) countries properly schedule as limits on those commitments. However, it is not clear whether the disciplines would cover a measure if it is actually scheduled, and (a) it is not clearly a violation of National Treatment or Market Access, or (b) it includes some provisions that violate those rules, but other provisions that do not.

(b) *To what extent would disciplines cover measures actually scheduled as limits on commitments?*

Brazil, Australia, Hong Kong and other countries had proposed covering "measures administering such limitations," while technically not covering the scheduled measures themselves.[44] The chairman's draft answers that proposal by stating that the disciplines do not cover such measures, but only "to the extent that they constitute limitations subject to scheduling …" One interpretation is that the disciplines simply do not cover measures that countries actually schedule as limits on their commitments. But the chairman chose not to say so in plain and direct terms.

A challenger of domestic regulations could argue that only measures that are properly scheduled are excluded from coverage. For example, a country might schedule a measure out of concern that it might be discriminatory in effect. A challenger of that measure could argue that the problem with the measure is not that it discriminates, but rather, that it is unnecessarily complex or not based on objective criteria. In other words, the challenger would argue that the measure is not subject to scheduling because it is not discriminatory. If it is not "subject to" scheduling, then it would be covered under the disciplines.

In a similar vein, a challenger could argue that some parts of a measure might be discriminatory, but other parts are not. The challenger could argue that the nondiscriminatory parts violate disciplines on domestic regulation. In other words, the challenger would argue that the measure is only excluded from the disciplines to the extent that it is discriminatory and thus subject to scheduling.

To summarize, the disciplines are likely to exclude measures that are properly scheduled as limits on commitments under National Treatment or Market Access. However, the disciplines might cover measures that are not properly scheduled. More broadly, it is possible that a measure could be challenged under both National Treatment (or Market Access), and if that challenge fails, also the disciplines on domestic regulation.

An alternative approach would be to explicitly state that the disciplines do not cover:

(a) any measure that a country schedules, and
(b) quantitative and other limits that are prohibited in GATS Article XVI (Market Access), and
(c) discriminatory measures that are prohibited by GATS Article XVII

[44] Brazil, Australia, Hong Kong and others proposed covering "measures administering such limitations," while technically not covering the scheduled measures themselves. Communication from Brazil, Colombia *et al*., *Elements for Draft Disciplines on Domestic Regulation*, Room Document, Working Party on Domestic Regulation, undated (May 2006), ¶ 4; Australia, Hong Kong *et al*., *Article VI:4 Disciplines – Proposal for Draft Text*, JOB(06)/193, 19 June 2006, ¶ 5.

(National Treatment).

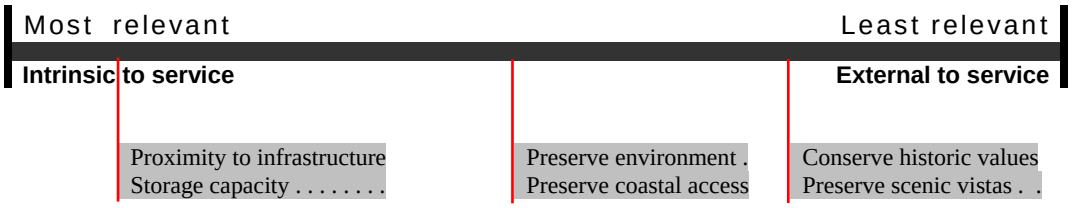
This alternative does not resolve the structural overlap between GATS rules, but it does resolve some the vagueness in the chairman's draft.

b. ***Disciplines of general applicability.*** In one sentence, the fourth draft proposes several disciplines of general applicability; they would apply to licensing requirements and procedures, qualification requirements and procedures, and technical standards. The disciplines require these domestic regulations to be "based on objective and transparent criteria and relevant to the supply of the services to which they apply."

These proposals could be described as "best practices" for government. But there is a reason that the US Congress has not imposed such disciplines on federal agencies or the states. Each proposed GATS discipline creates a spectrum of potential meanings -- a degree of relevance, timeliness, objectivity or simplicity -- that on one extreme would curtail the scope of government authority in ways that the Constitution does not.

(1) ***Relevance test.*** As noted before, the fourth draft requires that domestic regulations "shall be pre-established, based on objective and transparent criteria and relevant to the supply of the services to which they apply."[45] (emphasis added) A relevance test could be a flexible approach that is consistent with U.S. constitutional law. However, by linking relevance to the supply of services, this discipline could be interpreted narrowly to rule out regulation based on impacts that are external to the service. In other words, there is a range, a spectrum of relevance. To illustrate, consider how a relevance test might apply to requirements for a coastal development permit for an LNG port.

Relevance Test:
Applied to Licensing Requirements for Coastal Development of LNG Port



On the left end (most relevant) of a relevance spectrum are license requirements that are intrinsic to the supply of a service (*e.g.*, storage capacity). On the right end (least relevant) are requirements that relate to external impacts (*e.g.*, preserving scenic vistas) and not the service, per se. If the purpose of this discipline is to "ensure that … measures are necessary to ensure the quality of the service," dispute panels could reject requirements that are not intrinsic to the service.

As with "necessity," one end of the spectrum would require measures to be least-burdensome, while the other end would tolerate measures that are more burdensome. Negotiators can avoid resolving their differences by creating ambiguity in the text

[45] Chairman's fourth draft, ¶ 11. In the second draft, this test appeared in two other places: Licensing Requirements (¶ 1) and Qualification Requirements (¶ 1).

and kicking the real interpretation into the future, when a WTO dispute panel will determine what relevance means.

In the context of licensing, other situations where states decide land use licenses or permits based on external impacts include coastal zone development of desalination facilities utility plants.[46] Similarly, local commercial zoning permits are often based on the residential character of neighborhoods or impact on historic values.

In the context of qualification requirements, a relevance test might exclude education requirements that are not necessary to perform a service. For example, some states require education that exceeds the technical skill set for licensed professionals (*e.g.*, a course diversity requirement or a local history requirement).[47]

As noted above, the statement of purpose provides interpretive guidance on the scope of relevant qualifications, "such as competence and the ability to supply the service."[48] One could argue that this is an open class of qualifications that might include not only technical competence to perform, but also cultural competence or criteria not related to competence. But in WTO cases, the United States has used the canon of interpretation to argue the opposite, which is that listing a class of qualifications excludes criteria of a different kind (in this case, competence to perform).[49]

This question about the scope of relevance could be influenced by the statement on the right to regulate to meet national policy objectives. For example, if qualification requirements other than competence exist at both the national and subnational level, they would be entitled to deference under the right to regulate. But if they exist only at the subnational level in the United States, they would not receive the same deference.

One way to avoid ambiguity in this discipline would be to define "relevance" as including the external impact of a service as well as its relation of the quality of a service. Another alternative would be to limit the relevance test to professional services, which is in keeping with the reference to "competence and ability to supply the service" in the statement of purpose.

(2) ***Pre-established test.*** The fourth draft requires that domestic regulations "shall be pre-established, based on objective criteria and relevant to the supply of the services to which they apply."[50] (emphasis added) Like many of the disciplines that follow it, this discipline reflects a general practice in U.S. law, but not the practice in many situations. While legislation is presumed to have prospective effect, it is

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[46] *See* Orly Caspi, *LNG Facility Siting & GATS Negotiations: The Impact of GATS Domestic Regulation Rules on State & Local Authority*, Harrison Institute for Public Law (May 25, 2006).

[47] *See* Kevin Sinclair, *Regulation of Registered Nurses, supra*.

[48] Chairman's third draft , ¶ 2.

[49] *See* Report of the Panel, *United States – Softwood Lumber, supra.*

[50] Chairman's fourth draft, ¶ 11 (general provisions). This discipline is consistent with the second draft, Licensing Requirements, ¶ 1. Licensing Procedures, ¶¶ 1 and 4, Qualification Requirements ¶¶ 1 and 2, and Technical Standards, ¶ 1.

constitutionally permissible for legislation to apply retroactively if the legislature expressly states its intent to do so and the law does not amount to a taking, which is rare.[51] Other possible conflicts with a "pre-established" test are possible:

- *Pre-license* – when regulators deny a license based on community opposition;
- *Pre-license* – when regulations change while a license is pending;
- *Pre-license* – when conditions are imposed as part of the licensing process; and
- *Post-license* – when any of the above occurs with respect to renewal of a license.

In short, a requirement that domestic regulations must be pre-established treads upon the contentious ground of vesting of development rights, property rights or contract rights. To our knowledge, this issue has not been discussed within the WPDR.[52] The points to consider are (1) whether the meaning of "pre-established" can be clarified so that it reflects current domestic practice, and if not, (2) whether "pre-established" could be a significant change in domestic regulation and perhaps even constitutional law. Rather than ponder the vesting of rights in a theoretical sense, it helps to consider it in more concrete situations such as these:

- *Commercial zoning*[53] – Zoning of commercial development is becoming increasingly complex, contentious and subject to active citizen input during the zoning process. This is most evident in the local battles over shopping centers with "big box" stores. However, local land use is now an international issue. International developers have focused on zoning in GATS negotiations[54] and investment disputes.[55] U.S. courts uphold challenges to zoning regulations that change development criteria after a development permit is requested but before it

[51] *See* Ann Woolhandler, Public Rights, Private Rights and Statutory Retroactivity, 94 Geo. L.J. 1015, 1019-1022 (2006); *see generally*, Peter Wittenborg Time When Statutes Take Effect, Crocker's Notes on Common Forms Volume II, Chapter 24 (Real Estate Bar Association for Massachusetts). Similar principles apply in common law systems outside of the United States. *See generally* John Prebble, Rebecca Prebble, Catherine Vidler Smith, Retrospective Legislation: Reliance, the Public Interest, Principles of Interpretation and the Special Case of Anti-Avoidance Legislation, 22 N.Z.U. L. Rev. 271 (2006).

[52] "Pre-established" is mentioned in a few WTO contexts outside of the WPDR, but these convey only a general sense that regulations must precede regulation. For example, in the Working Party on GATS Rules, Hong Kong stated that an economic needs test (ENT) could not be applied as an emergency safeguard (ESM) measure because: "Economic needs tests were supposed to be based on clear, objective and pre-established criteria. Their application should thus be predictable. An ESM would be intended, in contrast, to address unforeseen or emergency circumstances. An ENT could thus not be used to address the latter set of circumstances." Working Party on GATS Rules, Report of the Meeting of 2 December 2003, Note by the Secretariat, S/WPGR/M/45, 18 December 2003, ¶ 9. In other words, Hong Kong asserted that "pre-established" limits the exercise of regulatory discretion, but it did not address the ambiguity of timing.

[53] The United States has a GATS commitment under Horizontal Commitments, All Sectors: Acquisition of Land, and Distribution Services, C. Retailing, as well as Horizontal Commitments, U.S. Revised Services Offer, TN/S/O/USA/Rev.1, 2005, pp. 7 and 66.

[54] *See* Michael Duke, Executive Vice President for Administration, Wal-Mart Stores, Inc., Comments with Respect to Doha Multilateral Negotiations and Agenda in the World Trade Organization, May 1, 2002 (Public Version). Apparently, there was a private version of this letter as well.

[55] *See* Matthew Porterfield, An International Common Law of Investor Rights?, 27 U. Pa. J. Int'l Econ. Law 79, 95-96, fns. 57 and 58 (2006).

is granted.[56] This is true even when a zoning change aims to block or influence the complaining developer's license.[57] In the local zoning context, a pre-established test could affect several zoning situations. The first is when zoning or permitting policy changes before a development permit is final. The second is when land use authorities reject a development permit after public hearings in which nearby residents oppose the development. The third is when land use authorities place conditions on development permits in order to mitigate community or environmental impacts. Occurring as they do after a permit is sought, but before a final permit is issued, these situations might violate a pre-established test.

- *Mining and reclamation*[58] – Similar vesting issues arise with respect to mining that is governed by regulations at both the state and national levels. For example, while a federal mining permit was pending, the California legislature recently adopted a requirement that operators of an open-pit mine must fill the pit at the end of operations if the mine is within a mile of an historic or cultural district. This had the effect of greatly increasing the cost of a gold mine being developed by *Glamis Gold, Ltd.* Rather that file a claim in federal or state courts that it was likely to lose, *Glamis Gold* filed a claim as a Canadian investor under NAFTA chapter 11.[59] A case like this illustrates not only the timing and vesting issue, but also the importance of "national policy objectives" when a state adopts regulatory standards during the long process that a federal license is pending. If a state adopts regulations after a federal permit is requested but before it is granted, it might violate a pre-established test.

- *Land fill permits*[60] – Similar issues have arisen in situations where foreign investors responded to denial of land fill permits by avoiding domestic courts; instead, they filed claims as foreign investors under NAFTA chapter 11. In a successful claim against Mexico, an American investor challenged denial of a municipal building permit for the facility.[61] In a pending claim against Canada, an American investor challenged failure to renew a water withdrawal permit as

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[56] *See* Heather B. Sanborn, Striking an Equitable Balance: Placing Reasonable Limits on Retroactive Zoning Changes After Kittery Retail Ventures, LLC v. Town of Kittery, 58 Me. L. Rev. 602 (2006).

[57] *See, e.g., Kittery Retail Ventures, LLC v. Town of Kittery*, 2004 ME 65, 856 A.2d 1183, cert. denied, 125 S. Ct. 1603 (2005).

[58] The United States has a GATS commitment under Other Business Services, Services Incidental to Mining, U.S. Revised Services Offer, TN/S/O/USA/Rev.1, 2005, p. 46.

[59] *Glamis Gold, Ltd. and the United States,* Claimant's Memorial, 196-215 and 307-310 (May 5, 2006).

[60] The United States has a GATS commitment under Environmental Services – Solid/hazardous waste management (contracted by private industry) – refuse disposal services, U.S. Revised Services Offer, TN/S/O/USA/Rev.1, 2005, p. 70 as limited by fn. 39 to "… maintenance and repair of environment-related systems and facilities." While this is a narrowly drafted commitment, it could nonetheless trigger application of disciplines on domestic regulation under the chairman's third draft, ¶ 10, to measures "relating to licensing requirements … affecting trade in services in sectors where specific commitments are undertaken." (emphasis added)

[61] International Centre for the Settlement of Investment Disputes, *Metalclad Corp. and the United States of Mexico,* Final Award, 2 September 2000, ¶ 104. available at http://www.naftaclaims.com/disputes_mexico_metalclad.htm, viewed May 28, 2007.

well as revocation of operating permits by the province.[62] Failure to renew a permit that expires during a lengthy permitting process might violate a pre-established test.

- *Utilities*[63] – Public Utility Commissions typically grant licenses to acquire, merge or operate a utility based upon general "public interest" criteria. After a public hearing, PUCs often grant a license with numerous conditions that are much more specific than the broad regulatory criteria. Coming as they do after a license is requested, these conditions might violate a pre-established test.[64]

- *Park concessions*[65] – Concessions for private service suppliers to operate state or national parks are becoming increasingly popular.[66] Because concessions may last for a long period, their profitability could be affected by changes in technical standards that apply to operating the park. If operating standards are changed during the term of a concession, would those standards be in conflict with a pre-established test?

These examples illustrate the ambiguity of "pre-established" as to timing of licensing decisions: before, during, or after a licensing decision, or before the *next* licensing period. One alternative to clarify its meaning would be to insert a footnote to define pre-established as referring to a final licensing decision, but not to include technical standards of general applicability that cover all licensed service suppliers. This is how development rights vest under U.S. law. Another alternative would be to limit the discipline, for example, to licensing of professionals as was done with the disciplines on accountancy.[67]

(3) ***Objectivity test.*** In two key places, the fourth draft requires that regulations must be "objective" in addition to being transparent and publicly available.[68] The first place

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[62] Notice of Intent to Submit a Claim to Arbitration, *V.G. Gallo v. Canada*, 12 October 2006, ¶¶ 19-28, available at http://www.naftaclaims.com/disputes_canada_gallo.htm, viewed May 28, 2007.

[63] The United States has a GATS commitment under Other Business Services, Services Incidental to Energy Distribution, U.S. Revised Services Offer, TN/S/O/USA/Rev.1, 2005, p. 46.

[64] *See, e.g.,* Vermont (30 V.S.A. § 2801, general duties; rates; powers of public service board over gas and electric utilities); California, West's Ann.Cal.Pub.Util.Code § 702 (Compliance with orders and rules of the commission).

[65] The United States has a GATS commitment under Environmental Services, F. Protection of biodiversity and landscape and G. Other environmental and ancillary services (not listed elsewhere), and Recreational, Cultural and Sporting Services, D. Other Recreational Services (except sporting), U.S. Revised Services Offer, TN/S/O/USA/Rev.1, 2005, pp. 73 and 100.

[66] *See, e.g.,* California, West's Ann.Cal.Pub.Res.Code § 5080.03 (concession contracts; purpose and compatibility of concession); West's Ann.Cal.Pub.Res.Code § 5002.2 (General plan; revision of existing plan; elements).

[67] Council on Trade in Services, Disciplines on Domestic Regulation in the Accountancy Sector, S/L/64, 17 December 1998, ¶ 8.

[68] Chairman's fourth draft, ¶ 2 (statement of purpose) and ¶ 11 (general provisions). This provision is consistent with the second draft, Licensing Requirements (¶ 1), Qualification Requirements (¶ 1), Technical Standards (¶ 1).

is in the introductory statement that the purpose of the disciplines is to "facilitate trade in services by ensuring that [domestic regulations] are based on objective and transparent criteria, such as competence and the ability to supply the service … ". The second place is in a discipline of general applicability, which states that domestic regulations "shall be pre-established, based on objective and transparent criteria and relevant to the supply of the services to which they apply."[69] (emphasis added) As this phrasing makes clear, "based on objective criteria" refers to something in addition to transparency.[70]

(a) *Meaning of "based on"* – In *Mexico-Telecommunications* (GATS commitments for setting telephone rates), a dispute panel considered "based on costs" to be interchangeable with "cost-oriented," meaning that rates must be defined in relation to or founded on known costs or cost principles.[71] This is consistent with an Appellate Body decision on SPS obligations for adopting food safety measures. The Appellate Body interpreted "based on" to mean founded or built upon, a meaning that is more open than conformity or compliance.[72] The AB rejected "taking into account" as an interpretation that is too subjective, reasoning that "based on" refers to an "objective relationship between two elements" that persists and is observable.[73]

The connotation is that "based on" requires more than subjectively taking criteria into account (and perhaps rejecting them); it requires an observable and persistent relationship between a regulatory measure and some objective criterion that is external to the regulation. This formulation is logical when a regulatory measure is "based on" a scientific body of knowledge (*e.g.*, a risk assessment) or standard-setting (*e.g.*, food safety standards). A discipline that requires such a logical connection would constrain regulators, but it would allow some flexibility.

A more serious problem arises when a law is not designed to draw regulatory criteria from external sources, but rather, delegates to regulators the plenary power to decide whether granting a license is just, reasonable or in the public

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[69] Chairman's fourth draft, ¶ 11.

[70] The chairman's fourth draft uses "objective and transparent" criteria in ¶ 11, whereas the third draft used only "objective criteria." A prior version of GATS omitted the word "transparent," stating that "requirements shall be based upon objective criteria, such as competence and the ability to provide such services." *See* Council on Trade in Services Secretariat, *Article VI:4 of the GATS: Disciplines on Domestic Regulation Applicable to All Services*, ¶ 2, S/C/W/96 (Mar. 1, 1999). It could be interpreted that this prior version indicates that the proviso only applies to "objective" criteria. Further, transparency is often referred to in terms of a Member's laws being open and publicly available, not in terms of substance of the standards.

[71] *Mexico – Telecommunications*, ¶¶ 7.167–7.168.

[72] "A measure that 'conforms to' and incorporates a Codex standard is, of course, 'based on' that standard. A measure, however, based on the same standard might not conform to that standard, as where only some, not all, of the elements of the standard are incorporated into the measure." *EC Measures Concerning Meat and Meat Products (Hormones)*, 16 January 1998, WT/DS26/AB/R, WT/DS48/AB/R, ¶ 163, *referring to* L. Brown (ed.), The New Shorter Oxford English Dictionary on Historical Principles (Clarendon Press), Vol. I, p. 187.

[73] *Id.* at ¶ 189.

interest.

(b) *Meaning of "objective"* – The term "objective" is not defined in the chairman's fourth draft or any of the other WPDR proposals. We have found that it has at least five different meanings in WTO documents, four of which could significantly constrain regulatory authority under domestic law. In shorthand, the definitions include:[74]

- Not arbitrary (traditional standard of review for nondiscriminatory U.S. law)
- Not subjective
- Not biased
- Relevant to ability to perform the service
- Based on international standards

To take one definition, "objective" could mean not subjective. If so, this would conflict with delegation of plenary authority to public service commissions to set "just and reasonable" rates, which requires a broad exercise of discretion. Likewise it could conflict with authority to approve utility mergers based on balancing diverse, even competing criteria such as interests of the consumer, interests of the utility company and impact on the environment.[75] Even a flexible interpretation of "based on" could generate conflict with regulation in the public interest because (a) the criteria are not externally derived, and (b) the decision of what is in the public interest involves balancing of competing interests, which requires subjective judgment.

To take another definition, "objective" could mean relevant to ability to perform the service. This definition could be drawn from the third draft's statement of purpose, which is itself modeled on GATS article VI:4(a). This assumes that the phrase, "such as competence and ability to provide the service", modifies "objective criteria." If so, the canon of interpretation, *ejusdem generis*,[76] could be used to limit the definition of "objective" to modifiers "of the same class" as competence and ability, which would exclude external regulatory criteria such as environmental or aesthetic impact, which is discussed further below. The United States has itself advocated this interpretation in WTO cases.[77]

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[74] For analysis of how the term "objective" could be defined, we have prepared a companion memorandum: Jonathan Allen and Robert Stumberg, *GATS proposal that domestic regulations must be "objective,"* Harrison Institute for Public Law (March 1, 2007), available at http://www.forumdemocracy.net/, under news archives, viewed January 29, 2008.

[75] *See, e.g.*, CAL. PUB. UTIL. CODE § 854.

[76] This canon of statutory interpretation means "of the same kind, class, or nature." *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about how Statutes are to be Construed*, 3 VAND. L. REV. 395, 405 (1950) ("It is a general rule of construction that where general words follow an enumeration they are to be held as applying only to persons and things of the same general kind or class specifically mentioned.")

[77] *See* Report of the Panel, *United States -- Measures Affecting Imports of Softwood Lumber From Canada*, para. 199, SCM/162 (Feb. 19, 1993) (summarizing U.S. argument that "[j]ust as the doctrine of *ejusdem generis* applied as an aid to statutory construction, so this doctrine was equally applicable when interpreting an international agreement, such as the General Agreement or the Agreement . . . Application of the maxim of *ejusdem generis*, therefore, supported the conclusion that the export log restrictions in British Columbia constituted another type or kind of illustrative "domestic subsidy" within the meaning of the Agreement").

In June of 2006, a working group of state and local officials explained their concerns with an objectivity test this way:

> On the surface, objectivity is a desirable goal. To raise objectivity to the level of an international obligation, however, undermines the ability of domestic regulators to deal with the inherent complexity of service industries. An international objectivity test moves in the direction of standardized and technocratic regulation and away from regulation in the public interest by legislatures and utility commissions that are accountable for balancing diverse public interests.[78]

Perhaps as a response to this concern, U.S. negotiators altered their approach to domestic regulation in proposed bilateral free trade agreements with Peru, Colombia and Panama. In the chapters on services, the article on domestic regulation replaces "shall" with "… shall endeavor to ensure, as appropriate for individual sectors, that such measures are: (a) based on objective and transparent criteria, such as competence and the ability to supply the service;"[79] (emphasis added) This new approach does two things. First, it changes objectivity from a command to "best endeavor." Second, it recognizes that not all sectors lend themselves to basing regulation on externally derived standards or factual criteria.

Another alternative would be to define "objective."[80] The definition that would be most consistent with dual sovereignty in the United States would be that "objective" means not arbitrary. This approach would be consistent with the GATS scheduling practices of the European Union.[81]

c. ***Universal service obligations.*** The fourth draft states, "Nothing in these disciplines prevents Members from exercising the right to introduce or maintain regulations in order to ensure provision of a universal service, in a manner consistent with their obligations and commitments under the GATS."[82] (emphasis added) In other words, if a country wants to avoid disciplines that cover universal service obligations, they can either avoid undertaking GATS commitments in those sectors, or they can schedule limits on their GATS commitments. Otherwise, universal service regulations are covered by the same disciplines as any other domestic regulations.

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[78] Letter from State Representative George Eskridge (Idaho), Chair of the State and Local Working Group on Energy and Trade Policy, to Carol Balassa, Director of Service Trade Negotiations on Media, Communication and Energy Policy, Office of the U.S. Trade Representative (June 16, 2006), *available at* http://www.forumdemocracy.net/public_leadership/documents/Eskridge_letter_2006-06-16.pdf.

[79] *See e.g.*, Proposed Colombia-U.S. Trade Promotion Agreement, Chapter 11, Cross-Border Trade in Services, draft of 8 May 2006, art. 11.7.2.

[80] As noted above, the chairman's third draft defined "national policy objective" in a footnote.

[81] *See* Allen and Stumberg, *GATS proposal that domestic regulations must be "objective," 4-5.*

[82] Chairman's fourth draft, ¶ 12. This provision is consistent with the second draft, Introductory Language, ¶ 4.

3. Transparency

a. ***Publication of detailed information.*** The chairman's third draft required governments to publish regulations, and if publication is not practicable, to make them publicly available. Governments must also publish or make publicly available regulatory measures "as well as detailed information … that enables any interested persons to become acquainted with them."[83] The third draft did not mandate a particular format, and the obligation could have been met by providing a publication or library that contains all relevant regulations. This approach was consistent with the transparency proposal by the United States, which required regulations to be publicly available.[84]

The fourth draft inserts a new definition of "detailed information" that does mandate a particular format. In addition to publishing the text of regulations, it states that "detailed information … shall include" a list of 10 items that includes 20 kinds of specific information. The list is drawn from a June 2006 proposal by Australia and other nations.[85]

(1) *Required information.* The mandate to publish regulatory measures "as well as detailed information" implies that it does not suffice to publish the measures as they appear in statutory or administrative codes. The list of required detailed information includes the following:[86]

(a) *Routine notice.* The first two items are routine notice. They include:
- (i) "whether any authorization, including application and/or renewal where applicable, is required for the supply of services;
- (ii) the official titles, addresses and contact information of relevant competent authorities."

(b) *Legal content.* The remaining eight items include:
- (i) "licensing requirements and criteria, terms and conditions of licenses, and licensing procedures including fees;
- (ii) qualification requirements, criteria and procedures for verification and assessment of qualifications including fees;
- (iii) technical standards;
- (iv) procedures relating to appeals or reviews of applications;
- (v) monitoring, compliance or enforcement procedures including notification procedures for non-compliance;
- (vi) where applicable, how public involvement in the licensing process, such as hearings and opportunity for comment, is provided for;

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[83] Chairman's third draft, ¶ 13-14.

[84] Proposal by the United States, Horizontal Transparency Disciplines in Domestic Regulation, Room Document (18 February 2005), ¶ B.1 and 2.

[85] Communication from Australia; Chile; Hong Kong, China; Korea, New Zealand and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, Article VI:4 Disciplines – Proposal for Draft Text, Job 06/193 (19 June 2006), ¶ 12, available at http://www.tradeobservatory.org/library.cfm?refID=88253 (viewed January 28, 2008).

[86] Chairman's fourth draft, ¶ 13.

(vii) exceptions, derogations or changes to measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards; and
(viii) the normal timeframe for processing of an application."

We have yet to find an exact model for this proposal in Australian law or elsewhere. The Australian analog to the U.S. Administrative Procedure Act does require publication of an "explanatory statement," but it is less exacting than the publication requirements noted above. The Australian law requires a publication that explains "the purpose and operation" of a regulation and describes any cross-referenced documents and how to obtain them,[87] and Australia publishes periodic notices of rulemaking activity.[88]

While more information about the origin of this proposal would be helpful, the consequences of imposing the "detailed information" requirements will vary depending on the country, level of government and specific regulatory system. Questions for assessing the impact of the proposal include: (a) to what extent does any level of government currently provide such "detailed information," (b) (c) what would be the net new cost of staff effort and publication for government

[87] Under Australian law, the analogy to agency rulemaking in U.S. law is also referred to as "rulemaking" under Australia's Legislative Instruments Act of 2003, Act No. 139 of 2003 as amended. Rulemakers exercise authority to "make" a "legislative instrument," which is "an instrument in writing: (a) that is of a legislative character; and (b) that is or was made in the exercise of a power delegated by the Parliament." Legislative Instruments Act of 2003, § 5. Legislative instruments include "regulations" and "statutory rules." Legislative Instruments Act of 2003, § 6. The Act requires rulemakers to register each legislative instrument in the Federal Register of Legislative Instruments (FRLI). In effect, this entails electronic publication of legislative instruments ("lodge" in electronic form). Legislative Instruments Act of 2003, § 25. The act also requires electronic publication of an explanatory statement, although failure to publish an explanatory statement does not affect the validity of the instrument. Legislative Instruments Act of 2003, § 26. An explanatory statement:

(a) is prepared by the rule-maker; and

(b) explains the purpose and operation of the instrument; and

(c) if any documents are incorporated in the instrument by reference—contains a description of the documents so incorporated and indicates how they may be obtained; and

(d) if consultation was undertaken under section 17 before the instrument was made—contains a description of the nature of that consultation; and

(e) if no such consultation was undertaken—explains why no such consultation was undertaken; and

(f) contains such other information as is prescribed.

Legislative Instruments Act of 2003, § 4. The Legislative Instruments Act is available at http://www.frli.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/411BD649F40D9867CA2573AD007D869D?OpenDocument (viewed Feb. 1, 2008).

[88] Australia publishes the Government Notices Gazettes, which are available at http://www.ag.gov.au/portal/govgazonline.nsf/(custom-govnot-pub-view)?OpenView (viewed Feb. 1, 2008). It is published by the Attorney-General's Office of Legislative Drafting and Publishing, http://www.ag.gov.au/www/agd/agd.nsf/Page/Organisational_StructureCivil_Justice_and_Legal_Services_GroupOffice_of_Legislative_Drafting_and_PublishingLegislative_Services_and_Publications (viewed Feb. 1, 2008).

at each respective level, and (d) how would the benefits compare to the costs?

To publish these eight items of detailed information, it might suffice to summarize what a measure provides on each item – but only if the measure is self-contained and not part of a larger law. However, if a measure amends or supplements a larger regulatory system, the information required by some of the eight items is not likely to be in the measure itself. It will be in other parts of the legislative, administrative or judicial code of the national or subnational government. In other words, it may be necessary to complete a careful legal analysis in order to publish "detailed information" about all of the eight items.

Finally the fourth draft provides that where publication is not "practicable," governments must make the information publicly available. To what extent does this sentence reduce the detailed mandate to a recommendation? For example, would it suffice to simply publish relevant regulations but not the additional information? The "practicable" test applies only to publishing; it would still require governments to make the detailed information publicly available. So when is publishing not practicable?[89] A WTO dispute panel would have to decide whether such a vague opt-out would be allowed broadly (*e.g.*, when governments have not budgeted the incremental cost to existing publication budgets) or narrowly (*e.g.*, when governments have insufficient time for interim or short-term publishing or when governments do not publish their regulations at all). In addition, it is presumably not practicable to insert additional information into an entire regulatory code. It would be harder to argue that it is impracticable to publish the additional information as new measures are adopted.

(2) *Levels and departments of government.* Greater transparency brings benefits at a cost. We are not aware of any government in the United States that presently meets the obligations of this proposal. Thus, it may be useful to evaluate the cost of compliance before rather than after undertaking an international obligation to do so:

(a) *Municipal governments* - A quick search of major municipal governments shows that publication of legislation or agency rule making is common, but we have yet to find any city that requires more than publishing it code. Most require only that the municipal code be available for inspection, copying or sale.[90]

(b) *National and subnational codes* - Even in countries that have adopted codes of administrative procedure, there is considerable variation in publishing information in addition to the actual legislative or administrative measures,

[89] The OED defines "practicable" to mean, "able to be put into practice; able to be effected, accomplished or done; feasible." Shorter Oxford English Dictionary, Fifth Ed. (2002).

[90] *See, e.g.*, Los Angeles Charter, 251 (publication or posting of ordinances); Los Angeles Administrative Code, 2.13 (publication of ordinances); New York Charter § 1045 (compilation of city rules); San Francisco Sunshine Ordinance (Added by Ord. 265-93, App. 8/18/93, amended by Proposition G, November 2, 1999, available at http://www.sfgov.org/site/sunshine_page.asp?id=34495 (viewed Feb. 10, 2008); Burlington, VT see http://www.municode.com/resources/gateway.asp?pid=13987&sid=45 (viewed Feb. 10, 2008); Portland, ME, Sec. 1-13, Distribution of Code (code available at office of city clerk), available at http://www.portlandmaine.gov/citycode.htm (viewed Feb. 10,2008); Seattle, SMC 3.02.070, Public information (code available for public inspection), available at http://clerk.ci.seattle.wa.us/~scripts/nph-brs.exe?d=CODE&s1=3.02.070.snum.&Sect5=CODE1&Sect6=HITOFF&l=20&p=1&u=/~public/code1.htm&r=1&f=G (viewed Feb. 10, 2008).

particularly at the subnational level. Most states require agencies to merely publish their administrative rules, although some require additional information before the adopt rules. However, this rulemaking information tends to be about potential policy impact, which is different than the information required by the WPDR chairman's draft (e.g., technical standards, appeals process, public participation, etc.). Here are some examples:

(i) *Maine* – requires agencies to publish a "brief description of the substance" of an agency rule and where to obtain a copy.[91]

(ii) *Vermont* – requires agencies to publish their rules. Before agencies adopt a rule, they must publish a the title and subject of a rule, a concise summary of effects, an explanation of affected people, enterprises and governmental entities, and a brief summary of economic impact.[92]

(iii) *Washington State* – requires agencies to publish their rules. Before agencies adopt a rule, they must publish a short explanation, a description of purpose and anticipated effects, and a statement of the reasons supporting the proposed rule and other information including a small business economic impact statement.[93]

(c) *Developing countries* – The South Centre observed that "that the most costly obligations in Article VI: 4 disciplines will fall within transparency disciplines. In this regards, developing countries have proposed disciplines for transparency that are more general in nature and in line with their capacity levels."[94] The disciplines that the South Centre cites are those that are practiced by most American cities:

- ensure access to information in an accessible and understandable manner
- publish information on a regular basis through printed or electronic media
- notify measures prior to their entry into force in an official journal/gazette
- provide text of regulations through enquiry points
- make available names and addresses of responsible authorities
- provide relevant information related to measures upon request.[95]

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[91] Maine Revised Statutes, Title 5 – Administrative procedures and services, ch. 375, § 8056 (2), Filing and publication, available at: http://janus.state.me.us/legis/statutes/5/title5sec8056.html (viewed Feb. 10, 2008).

[92] Vermont Statutes, Title 3, Ch. 25 – Administrative Procedure, § 839, available at http://www.leg.state.vt.us/statutes/fullsection.cfm?Title=03&Chapter=025&Section=00839 (viewed Feb. 10, 2008).

[93] Revised Code of Washington, 34.05 RCW § 210, Administrative Procedure Act, available at http://apps.leg.wa.gov/RCW/default.aspx?cite=34.05.210 (viewed Feb. 10, 2008); for notice of proposed rule making, *see, e.g.*, § 34.05.320, "Notice of Proposed Rule – Content – Distribution by Agency – Institutions of Higher Education, available at http://apps.leg.wa.gov/RCW/default.aspx?cite=34.05.320 (viewed Feb. 10, 2008).

[94] South Centre, *The Development Dimension of the GATS Domestic Regulation Negotiations*, (August 2006) 20, available at http://www.southcentre.org/publications/publist_issue_area_TradeInServices_index.htm (viewed January 29, 2008).

[95] *Id.*

4. Licensing requirements

a. ***Definition.*** In the third and fourth drafts, all but one of the second draft provisions on licensing requirements have been moved or deleted. Yet this definition remains important because it defines coverage of the general provisions, which now include the objectivity, relevance and pre-establishment tests. The fourth draft defines "licensing requirement" to encompass any "substantive requirements" for obtaining "authorization to supply a service."[96] This covers not only licensing of professionals, but also licensing or concessions for companies to operate (*e.g.*, utilities, transportation or education). As the United States has pointed out, this an extremely broad range of government actions including "permits related to construction, operation or use of facilities, use of natural resources, or that service to implement and enforce certain law (*e.g.*, food safety inspections, vehicle safety and emission inspection, environmental protection, etc."[97]

b. ***Residency requirements.*** The remaining discipline under licensing requirements states, "Where residency requirements for licensing not subject to scheduling under Article XVII of the GATS exist, each Member shall consider whether alternative less trade restrictive means could be employed to achieve the purposes for which these requirements were established."[98] (emphasis added)

In his first draft, the chairman identified this discipline as a necessity test;[99] it requires regulators to consider using means that are less restrictive than a residency requirement. For example, Australia proposed using temporary licensing as a less restrictive alternative to residency requirements.[100]

It remains ambiguous as to whether the discipline is a literal necessity test (regulators must use less-restrictive alternatives) or whether it is a modified necessity test (regulators must consider less-restrictive alternatives, but then they may reject them). The latter meaning would be more of a procedural obligation.

This discipline is a priority of developing countries such as India, China, Hong Kong and the Philippines with export capacity on professional services (movement of natural persons under Mode 4). For example, China emphasized in a WPDR meeting that residency requirements can prevent foreign engineers from signing off on drawings and managing projects.[101] The discipline also raises boundary and security questions that are

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[96] Chairman's fourth draft, ¶ 5. This definition is unchanged from the third draft, ¶ 5, and the second draft, Definitons, ¶ 1.

[97] Communication from the United States, Outline of U.S. Position on a Draft Consolidated Text in the WPDR - Job (06)/223 (July 11, 2006), at D.11, available at http://www.tradeobservatory.org/library.cfm?refID=88410, viewed February 23, 2007.

[98] Chairman's fourth draft, ¶ 16. This definition is consistent with the third draft, ¶ 17, and the second draft, Licensing Requirements, ¶ 3.

[99] Chairman's first draft, ¶ F.3, fns. 4 and 5. The footnotes to this discipline stated, "Many delegations have made no proposals on the concept of necessity and have expressed their opposition to its inclusion in the disciplines." The chairman dropped this acknowledgement from his second and third drafts.

[100] Communication from Australia, *Development of Disciplines on Domestic Regulation for the Legal and Engineering Sectors*, S/WPDR/W/34, 6 September 2005.

[101] Working Party on Domestic Regulation, *Report on the Meeting Held 1 July 2003*, S/WPDR/M/22, 22 September 2003. China "recalled that the Examples paper [Examples of Measures to Be Disciplined

sensitive in the United States. At the same WPDR session, the U.S. delegate "sought clarification on licensing requirements and procedures versus specific commitments under mode 4, and where the line was to be drawn between trade policy, immigration policy and security policy."[102] It would be useful to know whether the United States is satisfied that the boundaries between service trade, immigration policy and security policy are now clear in this discipline.

The issue for American states is (a) whether their residency requirements still matter to them, and if so, (b) whether their residency requirements would be covered by this discipline. As to what matters, the traditional purpose of residency requirements is to ensure the quality of a service and to establish jurisdiction for regulatory enforcement and taxation.

As to coverage of state measures, the proposed discipline is ambiguous. It would cover "residency requirements not subject to scheduling under Article XVII of the GATS." (emphasis added) Two meanings are possible. The first is that "not subject to" means that a measure is covered by a commitment, and it is not scheduled as a limit on the commitment. The second meaning is almost the opposite: "not subject to" means that a measure is not covered by a commitment under national treatment, so there would be no reason to schedule it.

Coverage under the first meaning, covered and not scheduled, makes sense as a way to clarify that the discipline does not cover residency requirements that countries have in fact scheduled. This meaning of coverage is fairly easy to diagnose. The United States lists approximately 70 residency requirements as limits to its schedule of commitments under six business services: legal,[103] accounting,[104] integrated engineering,[105] real estate,[106] investigation and security,[107] and direct insurance.[108] Under this meaning, the discipline would cover a residency requirement if it relates to a sector in which the United States has a commitment under national treatment and (a) the relevant service is not one of the six where there are limits on the commitment, or (b) if it is one of the six, a state's residency requirement is not listed in the U.S. schedule (see footnotes below for the states listed).

Under Article VI.4] included an example under licensing requirements of restrictions on registration (*i.e*. residency requirements which prevented foreign engineers from signing off on drawings and managing projects).

102 *Id.*

103 United States, *Revised Services Offer*, Council for Trade in Services – Special Session, TN/S/O/USA/Rev.1, 2005, available at http://www.ustr.gov/assets/Trade_Sectors/Services/2005_Revised_US_Services_Offer/asset_upload_file77_7760.pdf, viewed February 23, 2007, pp. 16 – 40, listing HI, IA, KA, MA, MI, MN, MS, NE, NJ, NH, OK, RI, SD, TX, VT, VA, WA, WY.

104 *Id.*, p. 42, listing AZ, AR, CT, DC, ID, IN, IA, KA, KY, LA, ME, MI, MN, MS, MO, NE, NH, NM, NC, ND, OH, OK, RI, SC, TN, WV.

105 *Id.*, p. 43, listing ID, IA, KA, ME, MS, NV, OK, SC,SD, TN, TX, WV.

106 *Id.*, p. 45, listing SD (citizenship).

107 *Id.*, p. 51, listing MI.

108 *Id.*, p. 84, listing AR,CA, ID, KA, ND, ME, MN, MS, MT, TX, VT, WY.

Coverage under the second meaning, not covered by commitments under national treatment, is open to debate. As a starting point, the proposed disciplines cover only those measures that affect trade in sectors where specific commitments are undertaken, excluding measures that are scheduled as limits on those commitments."[109] This discipline refines its particular coverage to a smaller subset of measures within committed sectors that are "not subject to scheduling" under national treatment.

There are two ways that a residency requirement could affect a committed sector and yet not be subject to scheduling. First, a WTO Member could have a sector commitment, but not under all modes of supply in that sector. For example, the United States has carefully avoided making commitments under Mode 4 (movement of natural persons). This discipline appears to be written to cover such uncommitted modes of supply, notably Mode 4.

Second, "not subject to scheduling" could mean that there are some residency requirements that in theory are not covered by a commitment under national treatment because they are not discriminatory. In other words, if a measure does not discriminate, it is not covered by national treatment, and consequently, it is not "subject to" scheduling. By the same token, if a measure does discriminate, it is covered by national treatment, and it is subject to scheduling. WTO Members have been divided about whether residency requirements properly fall under article XVII (national treatment), and if they are, whether they are also covered under Article VI.4 (domestic regulation).[110] As drafted, this discipline would cover residency requirements that are non-discriminatory. The discipline appears to cover all modes of supply so long as there is a commitment under one mode of supply, so it might cover Mode 4, even though the United States has avoided making commitments in that sector except for a few select professions.

An alternative to clarify the scope of this discipline would be to limit its application to the *specific modes* of sectors in which WTO members make specific commitments.

5. Licensing and qualification procedures

a. ***Simplicity test.*** The Chairman's draft requires that both licensing and qualification procedures "shall be as simple as possible."[111] This discipline is vague; it will require a dispute panel to interpret "simple as possible" in settings where complex decisions require complex procedures. Examples of likely conflict include procedures that require expensive environmental impact statements, scientific testing, or periods for public hearings or other forms of participation. For example, an international partnership seeking a permit to build an LNG (liquefied natural gas) terminal at Long Beach,

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[109] Chairman's fourth draft, ¶ 10.

[110] *See* Working Party on Domestic Regulation, *Report on the Meeting Held on 16 July 2002*, S/WPDR/M/17, 1 October 2002, where the minutes state: "Regarding residency requirements, some Members said these [residency requirements] were Article XVII measures; others, however, said Members needed to further specify, and to look at the details of the implementation of such requirements. That was sufficient to prove that some licensing requirements were related to, and affected, the movement of natural persons."

[111] Chairman's fourth draft, ¶ 18. This definition is unchanged from the third draft, ¶ 18, and the second draft, Licensing Procedures, ¶ 2, Qualification Procedures, ¶ 2.

California has complained that the process was complex and burdensome.[112]

An alternative to avoiding the vagueness of this discipline would be to convert its command from "shall" to "should" or "best endeavor." Or, the discipline could be limited to professional services.

b. ***One licensing authority.*** The third draft requires "in principle" that license applicants "have to approach only one competent authority in connection with an application for a license."[113] It is unclear whether "in principle" defuses a discipline that would otherwise conflict with the practice of states or provinces that license professionals or business organizations.[114] A dispute panel could interpret the phrase to mean "theoretically," or something more onerous, "as a general rule."

If it means more than "in theory," a one-authority test could create conflicts in two dimensions of the U.S. federal system. The first is where states are the primary regulators as in licensing of professionals. While many states participate in compacts to facilitate licensing of professionals in multiple states, some states have opted not to participate at this time.[115] The second is where the states and federal government have overlapping regulatory authority as in regulation of utilities, coastal zones and environmental protection. Here there are often multiple permits that cover different aspects of a service.

An alternative for limiting the potential for conflict is to limit the discipline to the licensing of professionals.

c. ***Impartial decisions.*** The fourth draft requires countries to ensure that procedures decisions are "impartial with respect to all applicants," and regulators "should be operationally independent of and not accountable to any supplier of the services for which the licence is required."[116] Compared to the third draft, the reference to "all

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[112] *See* Christopher Hanson, "Sound Energy Solutions decries decision to kill LNG report as bad precedent," Press-Telegram, February 9, 2007 ("… Sound Energy indicated it has spent $20 million on the abandoned EIR and $8 million for required harbor development seismic, engineering, safety and environmental studies, among other things."). Apart from environmental studies, the California Coastal Act provides for meetings and hearings for voicing public questions and concerns about proposed projects. *See, e.g.* Cal. Pub. Res. Code § 30621. In some states, a negotiation process may give the public an opportunity to participate through voting in which the public considers short-term and long-term impacts on town safety, property values, economic impacts on nearby residential properties, and social impact on public properties such as schools. *See* NARUC, The Need for Effective and Forthright Communication Planning for LNG Facility Siting: A Checklist for State Public Utility Commissions 7 (2005), http://www.naruc.org/displaycommon.cfm?an=1&subarticlenbr=313.

[113] Chairman's fourth draft, ¶¶ 18 and 30. This discipline is unchanged from the third draft, ¶¶ 18 and 30, and the second draft, Licensing Procedures, ¶ 2, Qualification Procedures ¶ 2.

[114] The most relevant OED definitions of "principle" include "a general law or rule adopted or professed as a guide to action," and "in principle" equates with "theoretically." Shorter Oxford English Dictionary, 5th Ed. (2002).

[115] *See* Kevin Sinclair, *The Impact of Proposed Disciplines on Domestic Regulation upon California's Regulation of Registered Nurses*, Harrison Institute for Public Law (May 19, 2006).

[116] Chairman's fourth draft, ¶ 18.

applicants" replaced "all market participants."[117] Arguably, a small business preference would violate a discipline that requires impartial treatment of all market participants, which would include large businesses as well. Changing "all market participants" to "all applicants" would enable governments to maintain a preference for special classes of applicants (*e.g.*, small business, veterans, women-owned businesses and minority-owned businesses), so long as the decisions are impartial within each special class.[118]

d. ***Licensing fees.*** The chairman's third draft requires WTO nations to "ensure that any licensing fees are commensurate with the costs incurred by the competent authorities …".[119] This "commensurate with" test is tighter than the second draft, which required that fees "have regard" to administrative costs.[120] A dispute panel would have to interpret the scope of "costs incurred." It could be broad (*e.g.*, a pro-rata share of the costs of running a regulatory agency) or narrow (*e.g.*, the costs of processing an individual license application).

Limiting fees to costs of administration would rule out common uses of license fees to raise dedicated revenues that seek to offset the impact of licensed activities (*e.g.*, habitat restoration based on tourism fees), pay for the costs of conservation programs (*e.g.*, fish hatcheries), or fund affordable housing (sometimes in the form of an in-kind contribution of housing units). The only fees that are excluded are auction fees, tendering fees to bid on concessions, and mandated contributions to provide for universal services.[121]

As with other disciplines noted above, an alternative would be to limit this discipline to licensing of professionals.

6. Qualification requirements

a. ***Equivalence and verification – deleted.*** The third and fourth drafts eliminate two problematic obligations. One was to allow a service provider to operate where "qualifications have been recognized as equivalent."[122] The other was to ensure that mechanisms to verify qualifications are "based on criteria that are pre-established, objective and apply to both local and non-local qualifications."[123]

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[117] Chairman's third draft, ¶ 19. This discipline is unchanged from the second draft, Licensing Procedures, ¶ 3.

[118] GATS does not cover government procurement with respect to its rules under Articles II (MFN), XVI (Market Access) or XVII (National Treatment). GATS art. XIII. By inference, GATS disciplines on domestic regulation under article VI:4 would apply to government procurement. Procurement entails both qualification requirements and technical standards. To the extent that this discipline applies to government procurement, carve-outs from U.S. commitments under the Government Procurement Agreement (GPA) would not safeguard a procurement measure from coverage under a GATS discipline.

[119] Chairman's third draft, ¶ 26.

[120] Chairman's second draft, Licensing Requirements, ¶ 4.

[121] Chairman's third draft, ¶ 26, fn. 2.

[122] Chairman's second draft, Qualification Requirements, ¶ 1.

[123] Chairman's second draft, Qualification Requirements, ¶ 2.

b. ***Professional experience.*** The third draft required that regulators "shall give positive consideration to professional experience of the applicant as a complement to academic qualifications.[124] This could have been read to conflict with requirements that are based only on testing and academic qualifications. It was not clear whether "positive" consideration required a positive outcome if an applicant has experience. The fourth draft avoided these problems by changing "positive consideration" to "due consideration" to professional experience.[125]

7. Technical standards

Definition. The fourth draft defines "technical standards" to include all "measures that lay down the characteristics of a service or the manner in which it is supplied."[126] Under GATS, a measure includes any law, regulation, rule, procedure, decision or administrative action.[127] Given such a universal scope of domestic regulation, the United States has observed that many countries are only beginning to develop their approach to regulating services.[128] The implication is that disciplines on technical standards could have many unanticipated consequences, especially for developing countries and for new types of services in such fields as climate conservation, pollution control, energy efficiency, waste management, or homeland security.

a. ***Notice to the WTO – deleted.*** The third and fourth drafts eliminate a problematic obligation to notify the WTO of "the establishment and application of measures relating to national or international technical standards relating to services and service providers."[129] There is already a WTO notice requirement of standard-setting under the Agreement on Technical Barriers to Trade (TBT), which applies to trade in goods.[130] Notices under the TBT are managed in the United States by the National Institute of Standards and Technology (NIST). Deletion of this discipline avoids expanding and complicating the existing notification system.

b. ***International standards.*** The fourth draft provides that domestic regulators "should" take international standards into account "except when such international standards … would be an ineffective or inappropriate means for fulfillment of national policy objectives."[131] This is more deferential than the prior proposals, which stated that regulators "shall" do so. Yet two questions remain. The first is whether the reference to

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[124] Chairman's third draft, ¶ 27. The third draft deleted a "shall ensure" clause that connoted an obligation on the part of national governments to police subnational governments." Chairman's second draft, Qualification Requirements, ¶ 5.

[125] Chairman's fourth draft, ¶ 27.

[126] Chairman's fourth draft, ¶ 9. This definition is unchanged from the third draft, ¶ 9, and the second draft, Definitons, ¶ 5.

[127] GATS art. XXVIII(a).

[128] Communication from the United States, *supra*, at G.4.

[129] Chairman's second draft, Technical Standards, ¶ 2.

[130] Agreement on Technical Barriers to Trade (TBT), art. 2.9, available at http://www.wto.org/english/docs_e/legal_e/17-tbt.pdf, viewed February 23, 2007.

[131] Chairman's fourth draft, ¶ 41. This discipline changes the second draft, Technical Standards, ¶ 4, by replacing "domestic policy objectives" with "national policy objectives."

"national" policy objectives makes this a serious constraint on state policy innovation. The second is how this discipline creates a context for interpreting the "objectivity" test that appears in several other disciplines. For example, one definition of "objective" in WTO documents is consistency with international standards. This discipline might influence the meaning of "objectivity" to require use of international standards in certain situations.

8. Ongoing work on disciplines

The fourth draft creates a ongoing Committee on Domestic Regulation to oversee the implementation of the disciplines as well as "any further work under Article VI:4 of the GATS."[132] This ambiguous provision could be read as providing a forum for continued negotiations to develop further disciplines on domestic regulation. The United States stated that it "does not support the creation of a new negotiating mandate for disciplines on domestic regulation …"[133]

CONCLUSION

The chairman's fourth draft seeks to promote compromises between countries that take polar views on whether disciplines on domestic regulation are needed. It should not be surprising, then, that the chairman's draft preserves rather than clarifies the ambiguity of legal tests about which the parties disagree. Here is what a WTO dispute panel said about ambiguity in negotiations:

> WTO negotiators sometimes praise the political wisdom of resorting to "constructive ambiguity" as a diplomatic means of enabling consensus on WTO rules. The limited legal task of dispute settlement findings is very different. It is to decide on the legal claims, in a particular dispute, based on the "ordinary meaning" of the WTO provisions concerned "in their context" and in light of the "object and purpose" of the agreement.[134]

From the statement of purpose and the 30 proposed disciplines, we have identified 14 ambiguous legal tests that bear directly on state and local regulatory authority. If these are adopted, it will be the plain language of the disciplines that matters, not the intent of negotiators. The following chart lists these 14 points of ambiguity, as well as changes in the third draft that safeguard regulatory authority better than in the second draft. The purpose of the chart is to help state and local officials set a reasonably short agenda for state-federal consultation to address these:

- Do the constraints on domestic regulation merit further state-federal consultation in terms of examples or importance?

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[132] Chairman's fourth draft, ¶ 47.

[133] U.S. Outline of Position, p. 3 (review mechanism).

[134] *Mexico – Telecommunications*, Report of the Panel, WT/DS204/R, 2 April 2004, p. 140.

- Are there options for clarifying ambiguous terms that might lead to confusion or conflict?

- Does the fourth draft reflect an appropriate balance between the nations that seek the least burdensome regulations versus nations that seek to safeguard policy space for domestic regulation?

State of Play on GATS & Domestic Regulation:
The WPDR Chairman's Fourth Draft

¶	Safeguards Regulatory Authority	Constrains Regulatory Authority
Statement of purpose		
1	Excludes the necessity test	
2		Based on objective and transparent criteria
2		Avoid disguised restrictions on trade
3	Right to regulate: national policy objectives	"National" excludes state and local objectives
General provisions		
10	Coverage excludes limits on commitments	
11		Pre-established
11		Based on objective and transparent criteria
11		Relevant to supply of services
Licensing requirements & procedures		
2		Broad scope of licensing, not just professions
17		Less-restrictive means than residency requirements
18		Procedures as simple as possible
18		One competent authority
19		Impartial to all market participants
26		Fees commensurate with costs of regulation
Qualification requirements & procedures		
*	Excludes recognition of equivalent req's	
*	Excludes discipline on verification of req's	
27	Deletes positive consideration of experience	
Technical standards		
9		Broad scope of technical standards
41	Deletes WTO notification requirement	
41	Retains "should" in place of "shall"	Should take international standards into account

The WTO proposals are complex, and it is state regulators and legislators who have the expertise that is needed to offer balanced and helpful advice to U.S. negotiators. Yet apart from IGPAC, state and local governments have yet to respond to the proposed GATS disciplines – at least not as they would to a bill in Congress that would change state regulatory authority.

Do you have comments on this memo or on the chairman's fourth draft? Please send them to Robert Stumberg, <stumberg@law.georgetown.edu>, or call 202-662-9603.

Attachment 1

OVERSIGHT QUESTIONS

State oversight bodies could play a timely oversight role by discussing the impact of the GATS proposals with their office of attorney general, public utility commission or other agencies. Here are some questions to help frame such a discussion on proposed GATS disciplines:

1. ***Regulations must be relevant to the service*** – Some regulations are intrinsic to the quality of a service, while others deal with external environmental, community or economic impacts of a service.
    a. *Question:* Could any state regulations be challenged on grounds that they are not "relevant to a service"?
    b. *Potential solution:* Is there a way to define "relevant" that is consistent with current state authority? Would it suffice to define relevance in relation to both quality of service and regulating the external impact of a service on a community or the environment?

2. ***Regulations must be based on objective criteria*** – Some technical standards are objective in the sense that they are quantitative. But it is common for legislatures to delegate plenary power to agencies that regulate based on subjective criteria like "the public interest" or "just and reasonable."
    a. *Question:* Could any state regulations be challenged as not "objective" in the sense that they are subjective?
    b. *Potential solution:* Would it suffice to define "objective" as not arbitrary or independent of financial interests of a regulated industry?

3. ***Regulations must be pre-established*** – U.S. courts have upheld changing regulatory criteria after a license is requested but before it is granted.
    a. *Question:* Could any state decisions be challenged on grounds that criteria (including license conditions) are not pre-established before a license is granted?
    b. *Potential solution:* Would it suffice to define "pre-established" with reference to the time a license or permit is granted, rather than when an application is filed?

4. ***Regulations must be as simple as possible*** - For regulating complex industries, simplification of procedures shifts a greater burden onto government resources.
    a. *Question:* Do service industries complain that regulatory procedures are more complex than they need to be?
    b. *Potential solution:* Would it suffice to define "simple as possible" as a reasonable effort in light of objectives and available resources?

5. ***Governments must publish detailed information*** – The obligation to publish 10 kinds of information about regulatory measures appears to require analysis of law that is likely to be outside the scope of a particular measure, including technical standards, fees, appeals process, public participation, etc.
    a. *Questions:* How does this obligation compare with existing duties under the administrative procedure act? What are the staff and cost implications of publishing such detailed information?
    b. *Potential solution:* Would it suffice to limit this obligation to federal laws and agency rules, where Congress would accept responsibility for funding the costs of compliance?

Attachment 2 – WPDR Chairman's Revised Draft – 23 January 2008
Shaded highlights are added to the text.

474.08

Room Document 23 January 2008

Working Party on Domestic Regulation

- REVISED DRAFT -

DISCIPLINES ON DOMESTIC REGULATION PURSUANT TO GATS ARTICLE VI:4

Informal Note by the Chairman

This revised draft of possible regulatory disciplines pursuant to Article VI:4 of the GATS is based on the extensive discussions of the 18 April 2007 draft that have taken place between June and December 2007.

Guided by these discussions, I have attempted to close gaps and suggest compromises on a number of paragraphs where I felt that progress could be made. However, on several issues where persisting divergences were apparent in our discussions, I have not seen myself in a position to propose new language, and I believe that further negotiation on the basis of this revised draft is needed.

- DRAFT -

DISCIPLINES ON DOMESTIC REGULATION

I. INTRODUCTION

1. Pursuant to Article VI:4 of the GATS, Members have agreed to the following disciplines on domestic regulation.

2. The purpose of these disciplines is to facilitate trade in services by ensuring that measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards are based on objective and transparent criteria, such as competence and the ability to supply the service, and do not constitute disguised restrictions on trade in services.

3. Members recognize the right to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, 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.

4. Members recognize the difficulties which may be faced by individual developing country Members in implementing disciplines on domestic regulation, particularly difficulties relating to level of development, size of the economy, and regulatory and institutional capacity. Members recognize the difficulties which may be faced by service suppliers, particularly those of developing country Members, in complying with measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards of other Members.

II. DEFINITIONS

5. "Licensing requirements" are substantive requirements, other than qualification requirements, with which a natural or a juridical person is required to comply in order to obtain, amend or renew authorization to supply a service.

6. "Licensing procedures" are administrative or procedural rules that a natural or a juridical person, seeking authorization to supply a service, including the amendment or renewal of a licence, must adhere to in order to demonstrate compliance with licensing requirements.

7. "Qualification requirements" are substantive requirements relating to the competence of a natural person to supply a service, and which are required to be demonstrated for the purpose of obtaining authorization to supply a service.

8. "Qualification procedures" are administrative or procedural rules that a natural person must adhere to in order to demonstrate compliance with qualification requirements, for the purpose of obtaining authorization to supply a service.

9. "Technical standards" are measures that lay down the characteristics of a service or the manner in which it is supplied. Technical standards also include the procedures relating to the enforcement of such standards.

III. GENERAL PROVISIONS

10. These disciplines apply to measures by Members relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards affecting trade in services in sectors where specific commitments are undertaken. They do not apply to measures to the extent that they constitute limitations subject to scheduling under Article XVI or XVII.

11. Measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards shall be pre-established, based on objective and transparent criteria and relevant to the supply of the services to which they apply.

12. Nothing in these disciplines prevents Members from exercising the right to introduce or maintain regulations in order to ensure provision of universal service, in a manner consistent with their obligations and commitments under the GATS.

IV. TRANSPARENCY

13. Each Member shall ensure that measures of general application relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards, as well as detailed information regarding these measures, are promptly published through printed or electronic means, or otherwise. Where publication is not practicable, such information shall be made publicly available. This information shall include, *inter alia*:

(a) whether any authorization, including application and/or renewal where applicable, is required for the supply of services;

(b) the official titles, addresses and contact information of relevant competent authorities;

(c) applicable licensing requirements and criteria, terms and conditions of licences, and licensing procedures and fees;

(d) applicable qualification requirements, criteria and procedures for verification and assessment of qualifications including fees;

(e) applicable technical standards;

(f) procedures relating to appeals or reviews of applications;

(g) monitoring, compliance or enforcement procedures including notification procedures for non-compliance;

(h) where applicable, how public involvement in the licensing process, such as hearings and opportunity for comment, is provided for;

(i) exceptions, derogations or changes to measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards; and

(j) the normal timeframe for processing of an application.

14. Each Member shall maintain or establish appropriate mechanisms for responding to enquiries from any service suppliers regarding any measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards. Such enquiries may be addressed

through the enquiry and contact points established under Articles III and IV of the GATS or any other mechanisms as appropriate.

15. Each Member shall endeavour to ensure that any measures of general application it proposes to adopt in relation to matters falling within the scope of these disciplines are published in advance. Each Member should endeavour to provide reasonable opportunities for service suppliers to comment on such proposed measures. Each Member should also endeavour to address collectively in writing substantive issues raised in comments received from service suppliers with respect to the proposed measures.

V. LICENSING REQUIREMENTS

16. Where residency requirements for licensing not subject to scheduling under Article XVII of the GATS exist, each Member shall consider whether less trade restrictive means could be employed to achieve the purposes for which these requirements were established.

VI. LICENSING PROCEDURES

17. Each Member shall ensure that licensing procedures, including application procedures and, where applicable, renewal procedures, are as simple as possible and do not in themselves constitute a restriction on the supply of services.

18. Each Member shall ensure that the procedures used by, and the decisions of, the competent authority in the licensing process are impartial with respect to all applicants. The competent authority should be operationally independent of and not accountable to any supplier of the services for which the licence is required.

19. An applicant shall, in principle, not be required to approach more than one competent authority in connection with an application for a licence.

20. An applicant should be permitted to submit an application at any time, except where licenses are limited in numbers, including in public tendering. Where specific time periods for applications exist, an applicant shall be allowed a reasonable period for the submission of an application. The competent authority shall initiate the processing of an application without undue delay. Where possible, applications should be accepted in electronic format under the same conditions of authenticity as paper submissions.

21. The competent authority shall, within a reasonable period of time after receipt of an application which it considers incomplete, inform the applicant, to the extent feasible identify the additional information required to complete the application, and provide the opportunity to correct deficiencies.

22. Authenticated copies should be accepted, where possible, in place of original documents.

23. If an application for a licence is rejected by the competent authority, the applicant shall be informed in writing and without undue delay. In principle, the applicant shall, upon request, also be informed of the reasons for rejection of the application and of the timeframe for an appeal against the decision. An applicant should be permitted, within reasonable time limits, to resubmit an application.

24. Each Member shall ensure that the processing of an application for a license, including reaching a final decision, is completed within a reasonable timeframe from the submission of a complete application. Each Member shall endeavour to establish the normal timeframe for processing of an application.

25. Each Member shall ensure that a licence, once granted, enters into effect without undue delay

in accordance with the terms and conditions specified therein.

26. Each Member shall ensure that any licensing fees[1] are commensurate with the costs incurred by the competent authorities and do not in themselves restrict the supply of the service.

VII. QUALIFICATION REQUIREMENTS

27. Where a Member imposes qualification requirements for the supply of a service, it shall ensure that adequate procedures exist for the verification and assessment of qualifications held by service suppliers of other Members. In verifying and assessing qualifications, the competent authority shall give due consideration to relevant professional experience of the applicant as a complement to educational qualifications. Where membership in a relevant professional association in the territory of another Member is indicative of the level of competence or extent of experience of the applicant, such membership shall also be given due consideration.

28. Provided an applicant has presented all necessary supporting evidence of qualifications, the competent authority, in verifying and assessing qualifications, shall identify any deficiency and inform the applicant of requirements to meet the deficiency. Such requirements may include *inter alia* course work, examinations, training, and work experience. Where appropriate, each Member shall provide the possibility for applicants to fulfil such requirements in the home, host or any third jurisdiction.

29. Residency requirements, other than those subject to scheduling under Article XVII of the GATS, shall not be a pre-requisite for assessing and verifying the competence of a service supplier of another Member.

30. Once qualification requirements and any applicable licensing requirements have been fulfilled, each Member shall ensure that a service supplier is allowed to supply the service without undue delay.

VIII. QUALIFICATION PROCEDURES

31. Each Member shall ensure that qualification procedures are as simple as possible and do not in themselves constitute a restriction on the supply of services.

32. An applicant shall, in principle, not be required to approach more than one competent authority for qualification procedures.

33. An applicant should be permitted to submit an application at any time. The competent authority shall initiate the processing of an application without undue delay.

34. Where examinations are required, each Member shall ensure that they are scheduled at reasonably frequent intervals. Applicants for examinations shall be allowed a reasonable period to submit applications.

35. The competent authority shall, within a reasonable period of time after receipt of an application, which it considers incomplete, inform the applicant, to the extent feasible, identify the additional information required to complete the application, and provide the opportunity to correct deficiencies.

36. Authenticated copies should be accepted, where possible, in place of original documents.

37. If an application for verification and assessment of qualification is rejected by the competent authority, the applicant shall be informed in writing and without undue delay. In principle, the

applicant shall, upon request, also be informed of the reasons for rejection of the application and of

[1] Licensing fees do not include payments for auction, tendering or other non-discriminatory means of awarding concessions, or mandated contributions to universal service provision.

the timeframe for an appeal against the decision. An applicant should be permitted, within reasonable time limits, to resubmit an application.

38. Each Member shall ensure that the processing of an application, including verification and assessment of a qualification, is completed within a reasonable timeframe from the submission of a complete application. Each Member shall endeavour to establish the normal timeframe for processing of an application.

39. Each Member shall ensure that any fees relating to qualification procedures are commensurate with the costs incurred by the competent authorities and do not in themselves restrict the supply of the service.

IX. TECHNICAL STANDARDS

40. Members are encouraged to ensure maximum transparency of relevant processes relating to the development and application of domestic and international standards by non-governmental bodies.

41. Where technical standards are required and relevant international standards exist or their completion is imminent, Members should take them or the relevant parts of them into account in formulating their technical standards, except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of national policy objectives.

X. DEVELOPMENT

42. A developing country Member shall not be required to apply these disciplines for a period of [X] years from their date of entry into force. Before the end of this transitional time period, upon request by a developing country Member, the Council for Trade in Services may extend the time period to implement these disciplines, based on that Member's level of development, size of the economy, and regulatory and institutional capacity.

43. A Member may accord reduced administrative fees to service suppliers from developing country Members.

44. Where circumstances allow for the phased introduction of new licensing requirements and procedures, qualification requirements and procedures, and technical standards, Members shall consider longer phase-in periods for such measures in service sectors and modes of supply of export interest to developing country Members.

45. Developed country Members, and to the extent possible other Members, shall provide technical assistance to developing country Members and in particular least-developed country Members (LDCs), upon their request and on mutually agreed terms and conditions. Technical assistance shall be aimed, *inter alia* at:

(a) developing and strengthening institutional and regulatory capacities to regulate the supply of services and to implement these disciplines;

(b) assisting developing country and in particular LDC service suppliers to meet the relevant requirements and procedures in export markets;

(c) facilitating the establishment of technical standards and participation of developing country Members and in particular LDCs facing resource constraints in the relevant international organizations;

(d) assisting, through public or private bodies and relevant international organizations, service suppliers of developing country Members in building their supply capacity

and in complying with domestic regulation in their markets. Such assistance may also be provided directly to the respective service suppliers.

46. LDCs shall not be required to apply these disciplines. LDCs are nonetheless encouraged to apply these disciplines, to the extent compatible with their special economic situation and their development, trade and financial needs.

XI. INSTITUTIONAL PROVISIONS

47. The Council for Trade in Services shall establish a Committee on Domestic Regulation to oversee the implementation of these disciplines and the operation of Article VI of the GATS including any further work under Article VI:4 of the GATS.

48. The Council for Trade in Services shall, upon request from any Member, review the peration of these disciplines and make recommendations as appropriate.