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Delimatsis, P.

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**Concluding the WTO Services  
Negotiations on Domestic Regulation –  
Walk Unafraid**

By  
Panagiotis Delimatsis

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# CONCLUDING THE WTO SERVICES NEGOTIATIONS ON DOMESTIC REGULATION – WALK UNAFRAID

*Panagiotis Delimatsis\**

## I. INTRODUCTION

Harnessing regulatory diversity in trade in services through adjudication becomes increasingly challenging and controversial, as the *US – Gambling* saga<sup>1</sup> amply demonstrated. However, consistent interpretation of the World Trade Organization (WTO) Agreements would require that the WTO adjudicating bodies denunciate protectionism also in the case of origin-neutral measures falling under the GATS.<sup>2</sup> Compliance with this duty becomes daunting due to the GATS peculiarities and most notably the fact that trade-restrictive effects can also be generated by origin-neutral regulatory measures. The condemnation by international courts of domestic measures that do not discriminate *de jure* or *de facto* brings about varying reactions from domestic cycles, as it traumatizes anachronistic views about sovereignty and state prerogatives. There may be several ways to properly answer to these criticisms, but an international court, the agent, meets the expectations of the principals (i.e. the WTO Members and indirectly their citizens) and adequately completes the WTO contract more often than not if it chooses the path of consistency, legal coherence, detailed argumentation and sophisticated judicial reasoning,<sup>3</sup> properly taking into account the balance established in the WTO Agreements ‘between the jurisdictional competences conceded by the Members to the WTO and the jurisdictional competences retained by the Members for themselves’.<sup>4</sup> Again, this does not alter the

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\* Assistant Professor of International Trade Law, Tilburg University, the Netherlands. Contact: [p.delimatsis@uvt.nl](mailto:p.delimatsis@uvt.nl).

<sup>1</sup> At issue was a total prohibition imposed by the United States against the remote (including cross-border) supply of gambling and betting services. The dispute drew the interest of many authors who expressed diverging views on the rightfulness of the Appellate Body ruling. See, inter alia, J. Pauwelyn, ‘*Rien ne Va Plus?* Distinguishing domestic regulation from market access in GATT and GATS, 4:2 *World Trade Review* (2005), p. 131-170; P. Delimatsis, ‘Don’t Gamble with GATS – The Interaction between Articles VI, XVI, XVII and XVIII GATS in the Light of the *US – Gambling* Case’, 40(6) *Journal of World Trade* (2006), pp. 1059-1080; P. Mavroidis, Highway XVI re-visited: The road from non-discrimination to market access in the GATS, 6(1) *World Trade Review* (2007), pp. 1-23. That the measure at issue was indeed a protectionist, self-defeating one was later proven during the Article 21.5 DSU proceedings. See Panel Report, *US – Gambling (21.5)*, paras. 6.31, 6.126, 6.130-6.135.

<sup>2</sup> Coming to grips with origin-neutral measures was one of the objectives of the Uruguay Round out of which new agreements were concluded such as the Agreement on Technical Barriers to Trade (TBT) and the Agreement on Sanitary and Phytosanitary Measures (SPS).

<sup>3</sup> The WTO adjudicating bodies form a sort of epistemic community which appears to be fully aware of its mission. Cf. Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 160-1 and fn. 313; also J. Bacchus, ‘Leeky’s Circle: Thoughts from the Frontier of International Law’, Address to the Institute of Advanced Legal Studies, University of London, 10 April 2003, p. 7, quoted in A. Cortell and S. Peterson, ‘Dutiful agents, rogue actors, or both? Staffing, voting rules, and slack in the WHO and WTO’ in: D. Hawkins, D. Lake, D. Nielson and M. Tierney, *Delegation and Agency in International Organizations* (Cambridge: Cambridge University Press, 2006), p. 274.

<sup>4</sup> Appellate Body Report, *EC Hormones*, para. 115.

fact that constructive ambiguity, which has been the drafting method *par excellence* throughout the GATT/WTO history, leaves the WTO judiciary without any guidance on the collective preferences of the WTO Membership. In the absence of any such guidance from the WTO legislative and executive which the judicial branch could utilize, the identification of the common intention of Members regarding a given issue can only be based on judicial constructions which inevitably cause controversy.<sup>5</sup>

Just as is the case with domestic courts, for the successful accomplishment of their delicate mission, the WTO adjudicating bodies cannot but use proxies to ensure equality of competitive opportunities among the service suppliers active in a given market and at the same time respect Members' regulatory autonomy. Notably in the case of origin-neutral measures which purportedly aim to guarantee a certain level of quality when a service is delivered, the WTO judiciary has to be particularly vigilant in the examination of the facts at issue and their legal characterization. The use of proxies allows for informed judgments and adds to the legitimacy and acceptability by the WTO Members of these judgments.

Necessity and transparency, together with the use of international standards, are the most important legal instruments or proxies that the WTO drafters bestowed with the Panels and the Appellate Body to allow for the detection of protectionist abuse. This emergence of proxies during the Uruguay Round was deemed necessary in view of Members' determination to shift their interest from non-discrimination to bringing some discipline to origin-neutral measures that may have deleterious effects on trade, as they could substantially undermine market access commitments. The obligations enclosed in several WTO agreements and notably the Agreement on Technical Barriers to Trade (TBT), the Agreement on Sanitary and Phytosanitary Measures (SPS) and the General Agreement on Trade in Services (GATS) fully manifest this determination. In all these areas, Members recognized that collective action by means of multilateral co-operation was the only adequate avenue to address the issues raised in an efficient manner. In an era of increasing preferentialism in trade relations, this explicit, 'against-the-preferential-odds' delegation at the multilateral level arguably demonstrates the limits of preferential solutions.

Now that the WTO negotiations on services and especially those on domestic regulation are in a critical turn, this Note aims to make a clear and thought-provoking case for the efficient incorporation of such proxies or benchmarks in the forthcoming regulatory disciplines on domestic regulation. The most important 'protectionism revelation' proxies that WTO Members early identified are necessity and transparency.<sup>6</sup> The Note argues that Members should conclude the negotiations on domestic regulation by including in the final text disciplines that give flesh to these proxies not only for the sake of loyalty to their previous commitments, but also in order to improve the quality and trade-responsiveness of their domestic regulations in services. Section II describes the framework within which Members negotiate the content of the rules on domestic regulation and the challenges that they face. Section

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<sup>5</sup> Cf. among manifold examples, the interpretation of the Schedules of Commitments in the *US – Gambling* case. One should add to this the practical problems that Panels and the Appellate Body have to tackle associated with the increasing workload and the lack of co-ordination among parties, or evidence submitted and claims raised in an advanced stage of the process. See Panel Report, *EC – Biotech*, paras 7.37-7.45.

<sup>6</sup> See WTO, Council for Trade in Services, 'Article VI:4 of the GATS: Disciplines on Domestic Regulation Applicable to All Services', Note by the Secretariat, S/C/W/96, 1 March 1999, p. 4.

III critically discusses the most recent Draft rules on domestic regulation, its novelties and its shortcomings. Based on the wording of the GATS and the proposals advanced to date as to the most adequate protectionist revelation test, Section IV argues that the adoption of a necessity test is inevitable, whilst Section V puts forward a possible framework for such a test that can gather considerable support among Members. An analysis of the proper way to enhance regulatory transparency lies at the heart of Section VI. Last, but not least, Section VII tackles few practical issues which, if not carefully considered, can render the forthcoming rules dead letter. Section VIII concludes.

## II. TACKLING NON-DISCRIMINATORY REGULATORY CONDUCT IN SERVICES – THE LONG AND WINDING ROAD

Since regulatory intensity and diversity is the common theme in manifold services sectors and border measures are essentially inapplicable in the case of trade in services, ‘within-the-border’ unduly burdensome domestic regulations are targeted as the most arduous potential barriers to trade in services.<sup>7</sup> The WTO in general, and the GATS in particular, do not interfere with Members’ regulatory sovereignty and this is expressed in no uncertain terms. In the GATS, this is most obviously made clear in the structure of the agreement: while measures limiting market access or violating national treatment are explicitly prohibited in sectors where commitments were undertaken, unless scheduled, the right to maintain or introduce origin-neutral measures aiming at quality assurance is upheld and Members are not required to eliminate such measures. Nevertheless, economic theory suggests – and practice has shown – that Members always have a short-term incentive to ‘cheat’ while their trading partners comply with their WTO obligations. Such measures, because of the a priori WTO deference towards regulatory autonomy, are the ‘ideal’ gateway for a Member to substantiate its intention to circumvent the WTO obligations.

Therefore, the GATS drafters early realized the need for a mechanism that polices trade-inhibitory regulatory behaviour that is not necessary for the pursuit of domestic regulatory objectives; yet they could not agree on the content of an instrument that would allow the minimization of the negative trade impact of regulatory conduct. In the end of the Uruguay Round, negotiators had to reconcile with the idea of leaving some of the GATS obligations unfinished. Members fell short of concluding the legal framework in four areas of rulemaking, that is, domestic regulation; emergency safeguards; government procurement; and subsidies. These areas constitute the ‘built-in’ agenda for the ongoing services negotiations that have begun in early 2000.

As to domestic regulation notably, Article VI:4 GATS comes into the matter. This provision incorporates a legal mandate by requiring that Members adopt the necessary disciplines which would ensure that measures relating to qualification requirements and procedures (QRP), licensing requirements and procedures (LRP) and technical standards (TS) are, *inter alia*, (a) based on objective and transparent criteria; (b) not more burdensome than necessary to ensure the quality of the service; and (c) with respect to procedures, not in themselves a restriction on the supply of a given service. Priority was given to professional services and the Working Party on Professional Services (WPPS) was thereby established, which completed its task by

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<sup>7</sup> P. Delimatsis, ‘Due Process and “Good” Regulation Embedded in the GATS – Disciplining Regulatory Behaviour in Services through Article VI of the GATS’ (2007) 10(1) *JIEL*, pp. 15-17.

developing disciplines on domestic regulation in the accountancy sector in December 1998.<sup>8</sup> In May 1999, the CTS established the Working Party on Domestic Regulation (WPDR), which assumed the work of WPPS and is charged with the development of meaningful and coherent disciplines on domestic regulation which would be horizontally (i.e. across services sectors) applicable.<sup>9</sup> Through this legal mandate, Members are required to restore the balance between the three prongs leading to effective market access (i.e. GATS Articles XVI, XVII and VI) and establish regulatory disciplines for measures relating to QRP, LRP and TS, including the procedures for enforcing these standards ('the covered measures').

Domestic regulation is the only area of rulemaking where tangible progress has been witnessed during the ongoing round of services negotiations. Again, this is not a coincidence, but rather an informed decision by Members to advance this agenda item even within a rather currently inexistent overall enthusiasm for achieving progress in the other negotiating areas.<sup>10</sup>

At the December 2005 Hong Kong Ministerial Conference, Members pledged to agree on a text that would incorporate concrete regulatory disciplines on *non-discriminatory non-quantitative* domestic regulations before the end of the current negotiating round.<sup>11</sup> Members currently negotiate within the WPDR (since April 2007 in informal mode) based on a draft text and subsequent revisions prepared by the WPDR Chair circulated in the form of room documents. This secrecy is just another element reminiscent of the delicate phase that negotiations on domestic regulation have entered. Regulatory capture is just around the corner and domestic services industries do not seem to have realized the full potential of the forthcoming disciplines.

Indeed, the importance and ground-breaking nature of the forthcoming disciplines should not be underestimated: Adherence to these disciplines when regulating the supply of services through origin-neutral measures would reflect the *minimum* level of protection and transparency from which service suppliers benefit.<sup>12</sup> In several instances, once the forthcoming disciplines are adopted, service suppliers will be benefitting from rights that were not previously available to them. Thus, the creation of these disciplines is among the few endeavours to date by WTO Members to move away from the traditional negative integration approach and achieve positive integration, at least as regards those measures affecting trade in services which relate to qualifications, licensing and technical standards.

Additionally, *post-Doha* the completion of the Article VI:4 mandate will reveal the need for national regulatory audits to ensure compliance with the ensuing regulatory disciplines. This 'screening' exercise will induce considerable domestic regulatory reforms at all levels of government, improve regulatory quality, boost

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<sup>8</sup> WTO, Trade in Services, 'Disciplines on Domestic Regulation in the Accountancy Sector', S/L/64, 17 December 1998.

<sup>9</sup> Development of sector-specific disciplines at a later stage is not *a priori* excluded.

<sup>10</sup> Anecdotal evidence suggests that a recent attempt by a Member representative to link further progress in the negotiations on domestic regulations to advancements in agriculture and NAMA was fiercely criticized.

<sup>11</sup> Annex C to the *Hong Kong Ministerial Declaration*, adopted on 18 December 2005, WT/MIN(05)/DEC, para 5.

<sup>12</sup> In the case of intellectual property rights, Part III of the TRIPS Agreement also incorporates enforcement procedures which 'provide for an internationally-agreed minimum standard which Members are bound to implement in their domestic legislation'. See Appellate Body Report, *US – Section 211 Appropriations Act*, paras 206-7, 221.

regulatory co-operation, facilitate trade and lead to minimum harmonization of domestic regulations that aim to ensure the quality of the services supplied. In the medium run, this managed approximation of laws is expected to generate strong and justified pressures for mutual recognition agreements (MRAs), as Members will be identifying similarities between their regulatory systems in certain services sectors and be aware of the costs of maintaining a rigid stance towards foreign suppliers. Viewed under this angle, Article VI complements and serves the object and purpose of Article VII GATS.<sup>13</sup>

### III. THE DRAFT DISCIPLINES ON DOMESTIC REGULATION<sup>14</sup>

Members' sovereign prerogative to regulate and to introduce new regulations on the supply of services to pursue legitimate objectives is explicitly recognized in the GATS Preamble and in paragraph 3 of the draft disciplines on domestic regulation.<sup>15</sup> The disciplines are neutral as to the regulatory approach chosen, leaving ample scope for domestic regulators. Nevertheless, regulatory discretion is not unlimited; it is rather circumscribed by Article VI:4 which considers the creation of effective, enforceable and operationally useful regulatory disciplines as an apposite remedy against Members' incentive to circumvent multilateral obligations.<sup>16</sup> Through the adoption of regulatory disciplines pursuant to Article VI:4, the GATS essentially aims to facilitate drawing the line of equilibrium between the multilateral interest in progressive liberalization of trade in services and each Member's interest in preserving its regulatory autonomy.<sup>17</sup> The disciplines constitute the first serious attempt and at the same time a unique opportunity to concretize the utmost GATS objective and how to achieve it in certain categories of domestic regulations relating to qualifications, licensing and technical standards.

The Draft incorporates regulatory disciplines that aim to enhance the objectivity and transparency of domestic measures relating to licensing, qualifications and standards and ensure observance of contemporary dictates of due process in the domestic regulatory making. *Rationae materiae*, the Draft only covers measures that affect trade in services in committed sectors.<sup>18</sup> In addition, it attempts to draw the line between Article VI measures and measures falling under Articles XVI and XVII. While the latter escape the purview of the disciplines, the manner Members *administer* (or apply)<sup>19</sup> these measures would still be subject to the disciplines.<sup>20</sup>

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<sup>13</sup> See, generally, A. B. Zampetti, 'Market Access through Mutual Recognition: The Promise and Limits of GATS Article VII' in P. Sauvé and RM Stern (eds), *GATS 2000: New Directions in Services Trade Liberalization* (Brookings Institution, 2000), pp. 283-306.

<sup>14</sup> Our comments are based on the most recent draft text submitted by the WPDR Chairman (hereinafter 'the Draft'). See WPDR, 'Disciplines on Domestic Regulation Pursuant to GATS Article VI:4', Room Document, 20 March 2009 (on file with the author).

<sup>15</sup> This right forms part of the object and purpose of the GATS. See Panel Report, *US – Gambling*, paras 6.107-9 and 6.314-7.

<sup>16</sup> P. Delimatsis, *International Trade in Services and Domestic Regulations – Necessity, Transparency, and Regulatory Diversity* (Oxford University Press, 2007), p. 167.

<sup>17</sup> In the *US – Gambling* Panel's words, '[m]embers' regulatory sovereignty is an essential pillar of the progressive liberalization of trade in services, but this sovereignty ends whenever rights of other Members under the GATS are impaired'. Panel Report, *US – Gambling*, para. 6.316.

<sup>18</sup> This limitation of the coverage of the disciplines goes against the letter of Article VI:4. See Delimatsis, above n 16, pp. 187-9.

<sup>19</sup> Cf. Appellate Body Report, *EC – Selected Customs Matters*, paras 224-6.

<sup>20</sup> Take the case of economic needs tests (ENTs). Cf. WTO, Council for Trade in Services (Special

Furthermore, the Draft requires that the covered measures be *pre-established*, based on *objective* and *transparent* criteria, and *relevant to the supply* of the service to which they apply. This provision hints at the overall objective of the draft disciplines to limit the otherwise broad regulatory authority of Members, avert regulatory arbitrariness and unnecessary bureaucracy, and ensure the creation or preservation of a stable, predictable and trade-friendly regulatory environment for service suppliers.

Depending on the category of measures at issue, the level of detail varies. For instance, and quite unsurprisingly, the procedural disciplines are the most refined and call for the simplification and the streamlining of the applicable procedures to ensure that they do not constitute in themselves a restriction on the supply of services.<sup>21</sup> In this sense, the draft disciplines elaborate on the procedural obligations set out in Article III or in paragraphs 1, 2, 3 and 6 of Article VI GATS. To a lesser extent they also ‘flesh out’ the substantive obligation included in Article VI:4<sup>22</sup> in that they incorporate provisions aiming at improving the domestic procedures relating to granting a license to, or verifying the competences of, a service supplier.

Thus, the procedural novelties in the disciplines are significant and accord with good governance principles. They, *inter alia*, urge countries to provide a single point of contact or competent authority dealing with a supplier’s application (*one-stop-shops*), process applications and administer application procedures and examinations in an objective manner, and ensure the reasonableness of fees requested. In case an application for a license or assessment and verification of qualifications is dismissed, the authorities are required to inform the applicant of this dismissal and the timeframe for an appeal against this decision in writing and without undue delay. If requested, the authorities have to explain the reasons that led to the dismissal of the application and a service supplier should in principle be able to ascertain the reasons for a decision negatively affecting her.<sup>23</sup> This give-reason requirement is an essential good-governance obligation and diminishes authorities’ leeway for arbitrary or unreasonable decisions.<sup>24</sup>

Interestingly, the competent authorities enforcing the licensing procedures are explicitly required to be impartial, operationally independent of and not accountable to any supplier of the services for which the license is warranted. Surprisingly, however, this obligation does not apply to the domestic authorities in charge of verifying and assessing qualifications. This omission is inexplicable and unnecessarily creates confusion regarding the motives of the drafters. Operational impartiality and independence of the competent domestic authorities administering

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Session), ‘Economic Needs Tests’, Note by the Secretariat, S/CSS/W/118, 30 November 2001, para. 7; also Delimatsis, above n 16, pp. 152-4.

<sup>21</sup> In several instances, the Draft reminds one of the recent EU initiatives for better regulation and simplification of procedures in legislating the internal market. Notably with regard to services, EU Member States are also required to create single points of contacts, allow for the use of electronic means to comply with procedures or accept copies instead of requiring the original documentation. See Directive 2006/123 on services in the internal market [2006] OJ L 376/36, Chapter II on ‘administrative simplification’.

<sup>22</sup> Notably the requirement that such measures are based on transparent and objective criteria pursuant to Art. VI:4(a) GATS.

<sup>23</sup> Cf. in the EU context, the landmark decisions on *Heylens* and *Vlassopoulou*. Case 222/86 *Unected v Heylens* [1987] ECR 4097, paras 14-16; and C-340/89, *Vlassopoulou* [1991] ECR I-2357, para. 17.

<sup>24</sup> Cf. Appellate Body Report, *US – Shrimp*, para 183. The requirement to give reasons is also very useful for a proper judicial review. See M Shapiro, ‘The Giving Reasons Requirement’ (1992) University of Chicago Legal Forum 179.



domestic qualification procedures seem to be equally quintessential as in the case of licensing procedures. Consider for instance a committee verifying qualifications of lawyers and which is composed exclusively of domestic lawyers. The danger for prejudiced, negative decisions appears to be relatively high in this type of cases.

This imbalance is all the more to be criticized due to the nuanced definition of qualifications vis-à-vis licensing adopted in the aftermath of the Uruguay Round. Licensing requirements are defined as ‘substantive requirements, *other than* qualification requirements’. Hence a requirement relates to licensing only to the extent that it does not relate to qualifications. The aforementioned imbalance would create an incentive for the responding party to ‘name’ all requirements as qualification rather than licensing requirements to avoid the administrative burden of an obligation to create impartial and independent authorities. Recall here that while juridical persons are subject to licensing requirements only, natural persons can be subject to both licensing and qualifications requirements. Therefore, the latter may be subject to unjustifiable discrimination which can potentially dissuade them from offering their services.

Of course, a possible *raison d'être* for the requirement of establishing impartial and operationally independent authorities can be the legacy of regulating network industries. Even so, however, this fails to explain why authorities verifying qualifications should not be equally required to be impartial and operationally independent. As it is, the Draft unduly perplexes terms and situations and leaves plentiful room for misinterpretations and sophisticated legalistic creativity that can have harmful effects to the expansion of trade in services. Members would be well-advised here to opt for simplification and level the playing field as regards qualifications *versus* licensing. An additional element to consider is the utility of having different definitions and categorizations between licensing and qualifications. For the sake of comparison, the EU Services Directive avoids superfluous room for misleading interpretations by adopting a sweeping definition of the terms ‘requirement’ and ‘authorization scheme’.<sup>25</sup>

Regarding licensing requirements, the disciplines merely call upon Members to reflect on the need of using non-discriminatory residency requirements for licensing. Residency requirements are, however, treated more strictly in the case of qualification requirements, as they are ruled out if they are a precondition for the assessment and verification of the competence of a given service supplier unless they are scheduled as limitations to the national treatment obligation.<sup>26</sup> Again, this obligation, as it is drafted now, begs the question of whether the use or existence of such requirements overall is precluded. In addition, it is not clear whether residency can be a prerequisite for sitting examinations. In the draft accountancy disciplines the text provides in no uncertain terms that this is not allowed.<sup>27</sup> It would be helpful if Members clarify this provision to also outlaw any residency requirements for sitting examinations. The EU Services Directive is clearer in this respect by considering as prohibited any requirement that service suppliers be resident within the territory.<sup>28</sup> Even so, this is a welcome addition in the Draft and will greatly contribute to the elimination of one of the major barriers to international trade in services from which service suppliers currently suffer.

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<sup>25</sup> See Article 4:6 and 4:7 as well as Recital 39 of the EU Services Directive.

<sup>26</sup> For a discussion on residency requirements, see Delimatsis, above n 16, pp. 195-6.

<sup>27</sup> See WTO, Trade in Services, above n 8, para. 24.

<sup>28</sup> See Art. 14:1(b) of the EU Services Directive.

The regulatory disciplines on qualification requirements are fairly detailed and call for fair and flexible assessment of qualifications and professional experience. The disciplines also generalize Article VI:6 to apply across services sectors. The latter provision, as it stands now, only applies to professional services in which commitments were undertaken. In conducting this comparative examination procedure, the competent authorities shall satisfy themselves that the qualifications, including diplomas and practical training, are at least equivalent to those possessed by the national suppliers.<sup>29</sup> Article VI:6 in its current form does not explicitly impose any obligation other than the verification of competences, such as establishing the equivalence between home country and host country requirements.<sup>30</sup>

In the Draft, eminent role is given to professional experience acquired as a complement to diplomas and other educational qualifications, as the competent authorities are required to take due consideration thereof when they verify the competence of the applicants.<sup>31</sup> The proposed disciplines go as far as to offer the possibility of fulfilling any additional educational requirements in the home or in a third country. Nevertheless, with regard to equivalence, the Draft does not echo the far-reaching obligations contained in Articles 4.1 SPS or 2.7 TBT according to which (albeit the TBT in a somewhat smoother manner) Members are required to accept the equivalence of SPS or TBT measures of other Members to their own, even if they differ. Pursuant to Article 4.1 SPS, the importing Member has to accept such equivalence if the exporting Member can demonstrate that the attainment of the desired level of protection domestically is ascertained. Article 2.7 TBT, however, suggests that 'positive consideration' shall be given to accepting equivalence, unless the importing Member believes that such measures do not adequately attain the objectives of their own measures. In the latter case, it appears that the burden of proof will be on (or at least easily shift to) the importing Member. Even so, the Draft goes far beyond the highly unsatisfactory provision relating to equivalence contained in paragraph 19 of the draft accountancy disciplines and thus demonstrates the level of maturity reached within the negotiating group (the WPPS and later the WPDR) dealing with the Article VI:4 negotiations since the end of the Uruguay Round.

Being it as it may, the previous discussion reveals once more the close links of the adoption of the Article VI:4 regulatory disciplines with the expansion of trade through mode 4. Qualification or licensing requirements and procedures that ensure objectivity, transparency and impartiality; promote administrative simplification and the expedited clearance of applications; and prevent that fees are set at prohibitive levels constitute essential prerequisites for any further increase of international labour flows.<sup>32</sup> However, as noted earlier, there are several instances where the Draft appears to offer conditions under licensing procedures that are more favourable than qualification procedures. For instance, while in both cases Members are encouraged to accept certified copies instead of original documents,<sup>33</sup> the Draft recognizes the

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<sup>29</sup> Cf. C-31/00, *Dreessen* [2002] ECR I-663, para. 24.

<sup>30</sup> See WTO, Council for Trade in Services, above n 6, p. 3; also Delimatsis, above n 7, pp. 47-48.

<sup>31</sup> *Ibid.*, para. 31.

<sup>32</sup> See S. Chaudhuri, A. Mattoo and R. Self, 'Moving People to Deliver Services: How can the WTO help?', (2004) 38(3) *Journal of World Trade*, pp. 365.

<sup>33</sup> At the EU level, the European Court of Justice (ECJ) has consistently found that requiring original documentation from applicants is disproportionate to the objective pursued relating to the protection of the public interest that service suppliers indeed have certain qualifications attested by a recognized diploma, and that other forms of evidence which are less burdensome such as certified copies or even simple copies can allow the attainment of the public policy objective. See C-298/99, *Commission v*

efficiency of allowing for electronic applications only for applications relating to licensing. Nevertheless, this red-tape-avoidance requirement is equally important in the case of verification of qualifications. Currently, several countries are in the process of further simplifying their legislation and diminishing unnecessary bureaucracy. For instance, the EU has pursued a strategy which aims at the identification of overlaps, gaps, inconsistencies, obsolete measures and the potential for reducing regulatory burdens – and this regardless of whether applications of natural or legal persons are at stake and benefit from such reforms.<sup>34</sup>

With respect to technical standards, the Draft requires that Members take into account relevant international standards, unless the latter would not achieve the national policy objective(s) pursued in an effective and appropriate manner. This provision will most likely replace Article VI:5(b) once the disciplines on domestic regulation are adopted. It echoes Article 2.4 TBT, the important difference being that under the TBT provision Members have an *obligation* to use such standards as a basis for their technical regulations. The reasons why GATS negotiators were wary of accepting an equally strong obligation and the background of their seemingly deliberate decision to maintain some flexibility in the use and adoption of international standards have been discussed elsewhere.<sup>35</sup> This cautious approach seems to have certain advantages, notably when one takes into account the lack of representativeness and thus legitimacy that may characterize the processes that lead to the adoption of certain international standards. On the other hand, however, this stance creates a precarious vicious circle in that Members do not have an incentive to partake seriously and actively in international standard-setting efforts. The Draft attempts to alleviate this concern by requiring that developed country Members, when they design their technical assistance programs directed towards developing countries and LDCs, assist in the establishment of technical standards by such countries, but they also facilitate the participation of these Members in the relevant international standard-setting organizations. Thus, *à la* Articles 11.2 TBT and 10.4 SPS, the Draft alludes to the usefulness of well-minded standardization that reflects the interests and views of a broader group of countries and thus can be considered as sufficiently legitimate.

In *EC – Sardines*, the Appellate Body underscored that it is for the *complainant* to adduce evidence demonstrating the effectiveness and appropriateness of the international standard at issue.<sup>36</sup> This preference for the wording adopted in TBT over the one adopted in SPS is yet another element demonstrating Members' willingness to make the task of the complaining party to establish a *prima facie* case even more difficult. Additionally, the Draft incorporates a best-effort provision encouraging Members to harness the behaviour of non-governmental bodies when they develop and apply domestic or international standards. Similar provision, albeit with stronger 'bite' are included in Articles 3.1 TBT and 13 SPS. Non-governmental bodies can play a decisive role regarding access to a profession or, more generally, to the supply of a given service. Therefore, close monitoring and maximum transparency of their activities can allow for objective and accelerated entry in a profession/industry, while preserving and enhancing the desired level of quality of

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*Italy* [2002] ECR I-3129, paras 37-39.

<sup>34</sup> See para 6 of the Protocol No 30 on the application of the principles of subsidiarity and proportionality of 1997, annexed to the EC Treaty; also European Commission (2009), 'Third strategic review of Better Regulation in the European Union', COM(2009)15 final.

<sup>35</sup> Delimatsis, above n 7, pp. 45-7.

<sup>36</sup> Appellate Body Report, *EC – Sardines*, paras 275, 282, 287.

the service supplied.

Finally, the Draft includes several development-friendly provisions such as phased-in periods for developing countries the duration of which remains to be decided and the obligation for technical assistance towards developing countries and LDCs. Both administrative burden and lack of the necessary regulatory capacities make such provisions indispensable. However, it is doubtful whether exempting the LDCs from applying the rules on domestic regulation described above is an appropriate approach which is commensurate with the developmental needs of these countries and conducive to the development of their service industries.<sup>37</sup> Instead of creating concrete incentives for these countries to ameliorate their regulatory and institutional framework governing the supply of services domestically and developed countries to assist in this effort, the Draft merely adopts a purportedly reverent, but essentially static stance of dubious results in the long run.

The Draft also contains institutional provisions. Thus, a new Committee on Domestic Regulation is thereby created which will be responsible not only for supervising the implementation of the prospective disciplines, but also for ensuring adherence to the other obligations of Article VI.<sup>38</sup> As a 'double' guarantee, the Council for Trade in Services shall also review the operation of the disciplines if one Member so requests.

#### IV. THE UNAVOIDABLE ADOPTION OF A NECESSITY TEST

In the case of origin-neutral measures, the quest for a balance between the competing rights of expanding multilateral trade in services, on the one hand, and avoiding any circumvention of market access commitments and GATS substantive obligations, on the other, can only be successful if proxies are developed which the WTO judiciary can use.<sup>39</sup> In the GATS vernacular so-called 'necessity tests' have long been used in other WTO agreements as the prevailing proxies for identifying and disciplining unduly burdensome or protectionist regulatory behaviour.<sup>40</sup> Because Article VI:4 seeks the creation of disciplines ensuring that the covered measures do not constitute *unnecessary* barriers to trade in services, the creation of a horizontal necessity test lies at the heart of this mandate. Thus, already a textual interpretation of the mandate contemplated by Article VI:4 hints at the need to agree on what can be *unnecessarily* restrictive of trade in services; in other words, a necessity test. Such a test would allow the attenuation of the most egregious requirements and procedures entrenched in domestic regulatory regimes and, in medium/long term, lead to extensive recognition of foreign qualifications, licensing or standards, since domestic authorities will be called upon to compare the equivalence of foreign requirements or processes.<sup>41</sup>

For several Members, including the United States, Brazil and several developing

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<sup>37</sup> See, along these lines, R. Adlung, 'Services Liberalization from a WTO/GATS Perspective: In Search of Volunteers', 2009, p. 18.

<sup>38</sup> For an analysis of these obligations, see Delimatsis, above n 1.

<sup>39</sup> Also P. Delimatsis, 'Determining the Necessity of Domestic Regulations in Services – The Best is Yet to Come' (2008) 19(2) *EJIL*, pp. 365-408.

<sup>40</sup> Other proxies include transparency and adherence to international standards.

<sup>41</sup> Recognition has here a broad meaning to also incorporate cases where requirements and procedures or standards, while different, are considered as equivalent because they equally achieve the desired level of protection or ensure the quality of the service supplied.

countries and LDCs,<sup>42</sup> the inclusion of a necessity test in the draft disciplines on domestic regulation appears to be regarded as a deal breaker. Due to these objections against the application of the principle of necessity across services sectors, the most recent Draft replaces the requirement that measures be ‘not more burdensome than necessary’ to ensure the quality of a service with the requirement that the covered measures not constitute ‘disguised restrictions on trade in services’. Furthermore, these measures should be ‘relevant to the supply of the services to which they apply’. Thus the necessity test has been replaced by a ‘disguised trade restriction’ test and a ‘relevance’ test. We analyze these two types of tests in turn.

The ‘disguised trade restriction’ test is reminiscent of the language (and the test) of the chapeau of Articles XX GATT and XIV GATS.<sup>43</sup> Consistent GATT/WTO case-law suggests that the concept of ‘disguised restriction to trade’ has been associated with discrimination and the manner a certain measure is *applied* or *administered*.<sup>44</sup> In *US – Gasoline*, the Appellate Body emphasized that concealed or unannounced restriction does not exhaust the term ‘disguised trade restriction’.<sup>45</sup> This term clearly includes disguised discrimination and it can be read as also encompassing restrictions resulting in arbitrary or unjustifiable discrimination. However, WTO case-law also suggests that disguised trade restriction can exist even without any discrimination. This seems to be the intent of the WPDR negotiators who advance this language, i.e. to cover measures which, while *not* discriminating de jure or de facto, still constitute disguised trade restrictions, that is, restrictions that are not merely inadvertent or unavoidable, but rather foreseeable violations of WTO obligations.<sup>46</sup> The choice of this term will inevitably lead the WTO judiciary to interpret it according to previous WTO case-law which classified as disguised trade restrictions several acts or omissions such as the treatment of similarly situated trading partners in a different manner; the lack of serious, good faith consultations with other trading partners (or, alternatively, with some of them, but not others) to find a commonly agreed solution; or the fact that significant costs that are only incumbent on the exporters are not taken into account when regulating, while the costs that domestic producers bear are. Hence, just as with the application of a necessity test, under the new ‘disguised trade restriction’ test, the pursuit of less trade-restrictive alternatives and the comparison of regulatory conduct in similar situations will be important evidence for the WTO judiciary. Therefore, the proposed test in its application will be interpreted as a sort of necessity test.

By the same token, a ‘relevance’ test would be construed as a ‘soft’ necessity test. An interpretation along the lines of the *US – Shrimp* case law regarding Article XX(g) seems plausible. This means that the adopted measures should not be necessary, but they should be at least directly connected with, or primarily aimed at, the objective pursued and this connection should be a close and real one.<sup>47</sup> This test would again operate similarly to a necessity test, notably if we consider the judicial restraint in cases involving objectives of vital importance and the description of

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<sup>42</sup> *Ibid.*, pp. 395, 399.

<sup>43</sup> Similar tests are to be found in Articles 2.3 and 5.5 SPS or VII:3 GATS.

<sup>44</sup> Cf. the chapeau of Article XIV GATS or para. 5(d) of the Telecoms Annex; also T. Cottier, P. Delimatsis and N. Diebold, ‘Article XIV’, in R. Wolfrum, P.-T. Stoll and C. Feinäugle (eds), *Max-Planck Commentaries on World Trade Law, Volume 6: WTO-Trade in Services* (Brill Publishers, 2008), p. 325.

<sup>45</sup> Appellate Body Report, *US – Gasoline*, p. 25.

<sup>46</sup> *Ibid.*, p. 28.

<sup>47</sup> Appellate Body Report, *US – Shrimp*, paras 136, 141.

necessity as a continuum in *Korea – Beef*.<sup>48</sup>

In sum, it is submitted that these two tests that were aimed at replacing the unjustifiably tarnished necessity test may still be interpreted through recourse to concepts that are inherently associated with the principle of necessity under the GATT/WTO. Therefore, instead of denying the need for the inclusion of a necessity test in the forthcoming rules harnessing domestic regulations, negotiators may want to concentrate their efforts on finding the best recipe for a wording that will gather broad support. Few ideas and a concrete proposal are discussed in the Section that follows.

#### V. A PROPOSAL FOR A NECESSITY TEST APPLICABLE TO ALL SERVICES SECTORS

To avoid judicial activism and interpretive loans from other WTO agreements which may not be apposite in the context of services, Members should consider the adoption of a horizontally applicable necessity test that would be clear, effective and operationally useful and which would include several concepts that accommodate the domestic demands for regulatory flexibility. While constructive ambiguity has traditionally been deemed beneficial and allowed reaching an agreement among Members, in this case, it can jeopardize the long-term viability of the regulatory disciplines and therefore intensive endeavours to clarify the content of necessity can be essential. We believe that a necessity test drafted along the following lines could enjoy a ‘critical mass’ of support:

In sectors where specific commitments are undertaken, Members shall ensure that measures relating to qualification requirements and procedures, licensing requirements and procedures and technical standards are not prepared, adopted, applied or administered with a view to creating unnecessary barriers to trade in services. For this purpose, Members shall ensure that these measures are (a) based on objective and transparent criteria, such as competence and the ability to supply a service; (b) not more trade-restrictive than necessary to fulfil a national policy objective,\* including to ensure the quality of the service; and (c) in the case of licensing and qualification procedures, not in themselves a restriction on the supply of the service.

Members shall endeavour to ensure that measures relating to qualification requirements and procedures, licensing requirements and procedures and technical standards in sectors where commitments have not been undertaken do not constitute unnecessary barriers to trade in services.

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\* A measure falling under this provision cannot be considered more trade-restrictive than necessary, unless there is another, reasonably available alternative measure that would equally attain the objective pursued and which is significantly less trade-restrictive. When evaluating the reasonable availability of an alternative measure, Panels shall take into account several factors such as economic and technical feasibility, the associated risks, or the creation of any undue burden to the regulating Member, including prohibitive costs, substantial administrative resources, costly technologies or advanced know-how.

The proposed test adopts an open-ended list of legitimate objectives, including

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<sup>48</sup> Appellate Body Report, *Korea – Beef*, para. 161.

ensuring the quality of the service delivered, that a Member may want to pursue. In this test, the covered measures should not aim to unduly hamper trade in services, starting from the stage at which they are prepared and up to the stage of application/administration. Nevertheless, contrary to the necessity test adopted in the draft accountancy disciplines,<sup>49</sup> this necessity test, which is meant to be generally applicable, does not cover the *effects* of the covered measures.

Furthermore, the quest for alternatives is intentionally ‘managed’ to allow for a certain margin of manoeuvre for the regulators and allay their concern of losing good-minded regulatory autonomy. Indeed, the proposed interpretive footnote aims to qualify or narrow the pool of measures that can be regarded as alternatives and combines previous WTO rulings on necessity, notably the Appellate Body findings in *EC – Asbestos*,<sup>50</sup> *US – Gambling*,<sup>51</sup> and *Brazil – Tyres*.<sup>52</sup> It bears mention that the inclusion of this necessity test would not affect the development-friendly provisions described above, such as phase-in periods for the application of the disciplines to developing countries or the LDCs exemption. As noted earlier, however, the forthcoming disciplines, and the application of the principle of necessity in particular, can lead to the improvement of the efficiency and trade-responsiveness of any domestic regulatory framework.

In addition, Members could contemplate on the possibility of adopting an interpretive rule suggesting that the existence of doubt concerning the availability or effectiveness of a less-trade-restrictive reasonably available measure should benefit the respondent, in accordance with the maxim *in dubio mitius*. Although such a statement seems to be already reflected in the WTO case-law, Members, especially those which regard the inclusion of a necessity test with suspicion, may consider as relieving the introduction of such a rule to the forthcoming disciplines.

Not incorporating a necessity test in the future disciplines under Article VI:4 would of course go against the letter and spirit of Members’ legal mandate,<sup>53</sup> but it would also distort the effective enforcement of the prospective disciplines. In the absence of a necessity test, the WTO judiciary, when called upon to rule over the consistency of a domestic regulation measure with the disciplines, could use its own benchmarks or a sort of a test based on necessity, since the latter principle will be creeping in the disciplines anyway, e.g. in the ‘disguised trade restriction’ or ‘relevance’ tests. This, nonetheless, would mean that Members have missed the unique opportunity to design themselves a necessity test that would encompass concepts and elements that allow for more flexibility when regulating.

Another fact which strongly calls for the adoption of a precise, effective and enforceable necessity test is that the WTO judiciary will read all applicable GATS provisions, i.e. both Article VI:4 as it stands now and the new disciplines in a way that gives meaning to all of them harmoniously, in accordance with the fundamental principle of effectiveness.<sup>54</sup> Disregarding the utmost objective of the legal mandate

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<sup>49</sup> WTO, Trade in Services, above n 8, para 2.

<sup>50</sup> Appellate Body Report, *EC – Asbestos*, para. 174.

<sup>51</sup> Appellate Body Report, *US – Gambling*, para. 308. Also Appellate Body Report, *Dominican Republic – Import and Sales of Cigarettes*, para. 70.

<sup>52</sup> Appellate Body Report, *Brazil – Tyres*, paras 156, 171, 174-5.

<sup>53</sup> In this direction, see Australia’s intervention in WTO, WPDR, ‘Report of the Meeting held on 19 and 20 June 2006’, S/WPDR/M/35, 14 August 2006, paras 7-8.

<sup>54</sup> Cf. Appellate Body, *Argentina – Footwear (EC)*, para 81; Appellate Body Report, *Korea – Dairy*, para. 81.

enshrined in Article VI:4, which is to ensure that measures relating to LRP, QRP and TS do not constitute ‘unnecessary barriers to trade in services’, would amount to an interpretation that reduces parts of the GATS to ‘redundancy or inutility’,<sup>55</sup> contrary to the principle of *effet utile* to which the WTO judiciary adheres. At a minimum, Article VI:4 in its current form would be considered as context when interpreting the regulatory disciplines. Can such a constellation be considered as judicial activism? The question should be answered in the negative. Already the first paragraph of the Draft provides that Members have agreed on regulatory disciplines ‘pursuant to Article VI:4 of the GATS’. This means that the Draft actually hints at the interpretation by the WTO adjudicating bodies of the regulatory disciplines in the aforementioned manner. Therefore, it appears that necessity will form part of the interpretive tools in the toolbox of the WTO judiciary regarding measures falling under Article VI:4, *regardless* of whether the disciplines incorporate a necessity test.

## VI. PROMOTING GOOD GOVERNANCE THROUGH DISCIPLINES ON REGULATORY TRANSPARENCY

Transparency is the second ‘protectionism revelation’ proxy that is equally essential as necessity and allows identification of beggar-thy-neighbour policies.<sup>56</sup> Enhanced transparency is an object and purpose not only of the GATS, but of the WTO in general.<sup>57</sup> WPDR discussions on transparency have been intense, since several countries consider that it is one of the areas where rules applicable across services sectors would seem sensible.<sup>58</sup> As noted earlier, the Draft contains fairly detailed provisions that streamline and guarantee transparent application processes. Furthermore, the Draft requires that Members publish, or make otherwise publicly available, detailed information regarding the covered measures. This information will, *inter alia*, relate to the procedures to follow or the timeframe for application processing, but also to the legal content of the measures such as licensing or qualification criteria. Such information need not be notified to the WTO, but only published promptly,<sup>59</sup> through printed or electronic means. The Draft foresees to extent to any service supplier the use of enquiry and contact points created pursuant to Articles III and IV GATS in the aftermath of the Uruguay Round and thus detailed information can flow through these points. To date, these government-to-government information points have been barely used, as those who are the most interested in receiving this type of information, that is, the traders, do not have access to them.

Considering the potential administrative burden involved, the draft disciplines use hortatory, best-endeavour language to initially encourage Members to publish GATS Article VI:4 relevant measures in advance to enable service suppliers, both foreign and domestic, to comment. Additionally, Members are encouraged to address collectively in writing the substance of these comments. Contrary to paragraph 6 of the draft accountancy disciplines, this ‘soft’ requirement of prior comment

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<sup>55</sup> Cf. Appellate Body Report, *Canada – Dairy*, para. 133; Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 271.

<sup>56</sup> Delimatsis, above n 16, pp. 255-9.

<sup>57</sup> Panel Report, *US – Gambling*, para. 6.107. Also Appellate Body Report, *US – Underwear*, p. 21; Panel Report, *EC – Selected Customs Matters*, paras 7.107-8.

<sup>58</sup> WTO, WPDR, ‘Report on the Meeting Held on 22 June 2005’, S/WPDR/M/30, 6 September 2005, paras. 40ff.

<sup>59</sup> For an analysis of the ‘prompt publication’ concept, see P. Delimatsis, ‘Article III GATS’, in R. Wolfrum, P.-T. Stoll and C. Feinäugle (eds), above n 44, p. 97.



procedures concerns *all* measures of general application, not distinguishing between measures that *significantly* affect trade in services and measures that do not. Prior notice and comment procedures applied at all levels of regulatory authority are conducive to the internationalization of decision-making and increase the legitimacy, accountability, representativeness and – ultimately – acceptance of the proposed measures by the service suppliers.<sup>60</sup> Such procedures were implemented at the national level in several countries and admittedly improved the function of domestic regulatory processes. The EU experience of introducing and gradually reinforcing a ‘culture of consultation and dialogue’<sup>61</sup> is revealing in this respect.<sup>62</sup> Ensuring the coherence and consistency of the procedures that precede the adoption of legislation leads to more active involvement of stakeholders and to more optimal regulatory results.<sup>63</sup> This is another example of the inspiration that international law draws from national jurisdictions. The former borrows instruments from the toolbox of the domestic regulatory frameworks in place and transforms – or better, adjusts – them before crystallizing them in the form of an international obligation, in this case an obligation to offer procedural participation rights to foreign constituents and sovereign States.<sup>64</sup>

However, the lack of a provision in the Draft equivalent to Article 2.5 TBT and paragraph 5 of the draft accountancy disciplines requiring that Members, upon request, explain the rationale behind domestic measures and their connection to a legitimate objective weakens the ‘bite’ of the transparency provisions included in the draft disciplines. In the categories of measures covered by the disciplines where the scope of regulatory discretion is virtually unlimited, such a provision would significantly facilitate the distinction between necessary and unnecessary impediments to services trade. However, informal requests will in all likelihood be directed to the host countries when complaints are filed domestically, leading to consultations and, if necessary, to recourse to the dispute settlement proceedings. Overall, the draft disciplines on regulatory and administrative transparency are a critical, tentative step towards ‘good’ regulation, as they promote good governance. They are all the more important for those countries whose constitutional and administrative law tradition may not include this type of procedures and this level of openness. Implementation of the draft disciplines, therefore, will be a critical challenge for them and regulatory co-operation and information exchange at an interstate level becomes paramount, notably when procedures risk failing due to information deficits, ignorance, or collective action problems.<sup>65</sup>

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<sup>60</sup> J. Habermas, *The Theory of Communicative Action: Reason and the Rationalization of Society* (Beacon Press, 1981); D. Esty, ‘Good Governance at the Supranational Scale: Globalizing Administrative Law’ (2006) 115 *Yale Law Journal* 1530; Delimatsis, above n 16, pp. 277-280.

<sup>61</sup> European Commission (2001), ‘European Governance – A White Paper’, COM(2001)428. See also Art. 11:2 of the Lisbon Treaty. See, however, T-135/96, *UEAPME v Council* [1998] ECR II-2335.

<sup>62</sup> Also C. Harlow, ‘Global Administrative Law: The Quest for Principles and Values’ (2006) 17(1) *EJIL*, p. 201. The EU adopts this stance in its external relations as well. See European Commission, ‘On the External Dimension of the Lisbon Strategy for Growth and Jobs: Reporting on Market Access and Setting the Framework for More Effective International Regulatory Co-operation’, COM(2008)874.

<sup>63</sup> European Commission (2002), ‘Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission’, COM(2002)704.

<sup>64</sup> See S. Cassese, ‘Global Standards for National Administrative Procedure’ (2005) 68 *Law and Contemporary Problems*, p. 121.

<sup>65</sup> W. Mattli and T. Büthe, ‘Global Private Governance: Lessons from a National Model of Setting

The amalgam of the transparency provisions contained in the forthcoming regulatory disciplines constitute a critical building block underpinning the further liberalization of trade in services, as they require regulatory reforms and help identify trade-restrictive measures. The disciplines will also lead to significant positive integration in the regulation of the covered measures and guarantee minimum levels of legal certainty and due process.

#### VII. PRACTICAL ISSUES: LEGAL NATURE OF THE DISCIPLINES; JUSTICIABILITY AND ENFORCEMENT OF THE DRAFT DISCIPLINES ON DOMESTIC REGULATION

Members have yet to decide on the most adequate way to incorporate the disciplines in the GATS. If Members choose the option of an Annex, a slight, but still consensus-based amendment of the GATS would probably be necessary. This amendment would, inter alia, include an agreement on the future of Article VI:5 in the post-Doha era. While Article VI:5(a), alias the transitional substantive provision of Article VI, can easily be deleted, a similar solution would not be adequate for Article VI:5(b) referring to international standards. The Draft, as it stands, only covers technical standards and thus cannot be regarded as incorporating Article VI:5(b). It seems reasonable that Members start considering the possibility of including a new paragraph in the disciplines, most adequately under the section on 'General Provisions' which would incorporate Article VI:5(b). The Annex, just like the other GATS Annexes, would form an integral part of the GATS by virtue of Article XXIX GATS. The option of a reference paper which would require Members to make positive commitments under the additional commitments column of their Schedules would not ensure a uniform application of the disciplines and should rather not be considered as a meaningful option.

Through Article VI and the completion of the mandate contemplated by paragraph 4, the GATS creates multilaterally established private rights against domestic administrators and regulators and adds a multilateral layer of scrutiny regarding the adherence of the competent authorities to the rule of law and due process in a non-discriminatory manner.<sup>66</sup> This is yet another example of the changing patterns in international law and its effects on domestic rule-making and is revealing of a trend for increasing regulatory co-operation or even convergence.<sup>67</sup> These newly created private rights have to be protected and a multilateral scrutiny can be too time-consuming or technically difficult to pursue. To avoid that the draft disciplines become dead letter, Members have to ensure that their regulators and judicial or other review organs abide by the draft disciplines when they regulate or a service supplier has recourse to those organs, respectively.

As to judicial review in particular, it is argued that the requirement of Article VI:2 GATS regarding the creation of prompt review mechanisms is not sufficient. Rather, Members would be well-advised to agree on a provision (or set of provisions) that allows for the possibility of negatively affected service suppliers to directly invoke before national courts their rights stemming from the disciplines. This would appear as going against the current view that, generally, the WTO agreements are not

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Standards in Accounting' (2005) 68 *Law and Contemporary Problems*, pp. 226-7.

<sup>66</sup> Delimatsis, above n 7, p. 34.

<sup>67</sup> See, generally, B. Kingsbury, N. Krisch and R.B. Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems*, p. 15.

recognized by national courts as producing direct effect in domestic legal orders.<sup>68</sup> In the EU, for instance, settled case-law suggests that the nature and economy of these agreements prevents the ECJ from examining the legality of Community acts based on the rules included in these agreements and thus no rights to private parties are thereby conferred.<sup>69</sup> However, in this specific case, and due to the peculiar nature of future complaints (take the case of individuals/natural persons negatively affected by the disrespect of their rights by the host State who will most probably be unable to convince their government to file a complaint before the WTO due to the insignificant economic rents), Members should consider this option if the forthcoming disciplines are to produce any meaningful effects and really ameliorate the everyday operation of service suppliers worldwide.

What it also seems to be worth reflecting on is the reason why matching the sophisticated level of detail set out in Part III of the TRIPS Agreement does not make sense in the case of the Draft disciplines on domestic regulation under GATS. For instance, the procedural rights contemplated by Articles 41: 2 and 3 or 42 TRIPS are also incorporated in the Draft, albeit not articulated in a similarly powerful manner. TRIPS and enforcement of intellectual property rights seems to offer a useful model in the quest for strong enforcement mechanisms in the case of the forthcoming disciplines governing domestic regulations in services.

Taking again the EU example, it bears mention that the ECJ has been more lenient when an issue relating to intellectual property rights and the TRIPS Agreement is raised before the Court. For instance, in *Hermès International*, the ECJ found that the national courts within the EU are obliged to apply national rules relating to provisional measures for the protection of intellectual property rights *in the light of* the text and the finality of the TRIPS and not only in the light of the Community legislation at issue.<sup>70</sup> More interestingly, in cases where the Community has *not* exercised its competences in a given field (in the case at issue, the minimum duration of patent protection), a national legal order and its courts can accept the direct effect of a given TRIPS provision and thus give the right to private parties to invoke that provision directly.<sup>71</sup> Again, the ECJ merely allows for a TRIPS-consistent (if possible) application in cases where Community legislation already exists.<sup>72</sup> Despite the last statement, however, it appears that under certain circumstances, the ECJ would not outlaw the recognition of direct effect of a multilateral obligation at the national level.

Another option which may enhance the possibilities of apposite enforcement of the forthcoming disciplines is the establishment of a complaint mechanism within the new Committee on Domestic Regulation empowering private parties to notify the regulatory barriers they have encountered. However, this ‘name and shame’ strategy may have limited chances of success. A similar, albeit possibly more promising

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<sup>68</sup> See, generally, J. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (Cambridge University Press, 2006), pp. 329ff.

<sup>69</sup> See, *inter alia*, C-149/96, *Portugal v Council* [1999] I-8395, paras 47-49, and more recently, C-351/04, *Ikea Wholesale* [2007] ECR I-7723, paras 29-30. The ECJ accepted direct effect only in two concrete cases, that is, when, by adopting a given Community act, the Community aims to execute a particular obligation taken under the WTO (C-69/89, *Nakajima* [1991] ECR I-2069, paras 27-31) or the Community act explicitly refers to concrete provisions of any WTO agreement (70/87, *Fediol* [1989] ECR 1781, paras 19-22).

<sup>70</sup> C-53/96, *Hermès International* [1998] ECR I-3603, paras 25-29.

<sup>71</sup> C-431/05, *Merck Genéricos Produtos Farmacêuticos* [2007] ECR I-7001, paras 34, 46, 48.

<sup>72</sup> *Ibid.*, para. 35.

option is to establish a complaint mechanism at the national level, eg within the one-stop-shop dealing with applications, that will receive complaints by service suppliers and which will be notified and monitored by the Committed on Domestic Regulation. Under this option, Members could consider to allow private parties to directly refer to the multilateral disciplines and describe how the rights conferred to them were violated at the domestic level.

These are only few of the options that Members may consider to avoid rendering the forthcoming disciplines unenforceable. It would erroneous to take the proper application and enforcement of the disciplines for granted. In a multilateral trading system which is traditionally based on State-to-State resolution of disputes, low-level private-to-State disputes may not find their way unless alternative routes are offered to these privates to enforce their rights or seek remedies for administrative decisions which may adversely affect their interests. It is contended here that Members should consider these possible options before concluding their negotiations on domestic regulation in the current Round to give full meaning to the disciplines and allow for their proper enforcement at the national level.

#### VIII. CONCLUDING REMARKS

In this critical turn for the GATS negotiations on the creation of rules governing domestic regulations, this Note attempted to draw the attention of negotiators to several essential issues which have to be carefully considered before the end of these negotiations. The Note identified several shortcomings of the draft disciplines in their current form and brought forward various proposals which may improve the efficacy of the disciplines and allow for a more adequate and expedited enforcement at the national level of the procedural rights created at the multilateral level. The Note makes a strong case for the inclusion in these disciplines of a necessity test applicable across services sectors. It goes on to advance a concrete wording which may enjoy a critical mass of support. GATT and WTO tradition has confirmed that necessity and transparency are key proxies for drawing the fine line between legitimate regulatory interference and disguised protectionism. At the risk of stating the obvious from a good governance perspective, operational regulatory disciplines that embody a necessity test and strong transparency disciplines are in the interest of all Members and would boost international trade in services when implemented.

In addition, and from a dispute resolution perspective, notably when interpreting non-discriminatory measures, the import of such protectionism revelation proxies is beyond any doubt. The absence of a horizontally (i.e. across sectors) applicable necessity test would render any regulatory disciplines on domestic regulation of limited value, because no benchmark or proxy would be available to the WTO judiciary against which to judge the challenged measures. Even worse, the use of other tests may still lead to their interpretation as a sort of a soft necessity test, the content of which will be specified by the WTO adjudicating bodies. Therefore, to avoid undesirable judicial interpretations, Members should re-consider the value of a straightforward necessity test with commonly agreed caveats.

The current negotiations constitute a unique opportunity to create a meaningful and operational set of rules to improve domestic regulations governing service supply worldwide. Negotiations at the horizontal level have advanced admirably smoothly. However, leaving this set of rules incomplete will in all likelihood not be remedied in the future due to the considerable transaction costs that negotiations of

this type entail. In addition, the prospects for a deal in this area at the multilateral level have never been more optimal. This is evident from the myriad of PTAs that accept the superiority of the negotiations at the multilateral level and pledge to transpose the results of these negotiations, once they are finalized, in their bilateral deals. Regardless of whether they adopt a negative or positive list approach, all PTAs outsource the development of such disciplines at the multilateral level. Thus, in this specific area, Members strive for coherence by favouring multilateral negotiations that would lead to the creation of minimum standards or rights of private parties in their capacity as service suppliers. In an era of growing fragmentation of the international trade regulation, domestic regulation is the expression of Members' willingness to achieve coherence when it comes to the arguably most important category of measures affecting trade in services. Thus, along with the mandate included in Article VI:4 GATS, there is another set of mandates contemplated by these PTAs, which constitutes a sort of *carte blanche* in favour of the negotiators at the multilateral level.

This is also revealing of the level of responsibility that the GATS negotiators bear. Creating enforceable rules on domestic regulation and translating Article VI:4 into operational and meaningful obligations has proven to be particularly challenging. More importantly, it revealed the clear limits of peripheral experimentation in key areas of rule-making (i.e. rules that are not directly related to market access or liberalization outcomes), with increasing deference of the periphery (i.e. PTAs covering services) towards the centre (i.e. the GATS) in regard to solutions on the bulk of the unfinished rule-making agenda in services trade.

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