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Report on the Latest Draft Disciplines on Domestic Regulation¹

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¹ This memorandum is a research paper prepared on a *pro bono* basis by students at the Graduate Institute of International and Development Studies (IHEID) in Geneva. It is a pedagogical exercise to train students in the practice of international trade law, not professional legal advice. As a result, this memorandum cannot in any way bind, or lead to any form of liability or responsibility for, its authors, the supervisors of the IHEID trade law clinic or the Graduate Institute.

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EXECUTIVE SUMMARY:

Since 2001 the Working Party on Domestic Regulation has been engaged in the negotiating process for future disciplines under GATS Article VI:4. While there has been plenty of progress ever since many questions still persist before the final draft becomes a reality.

The biggest hurdle remains in finding the appropriate balance between the liberalization objectives of the GATS and respect for Member countries' sovereign policy space. This issue plays out in many forms in the draft disciplines, notably in terms of the express inclusion of the right to regulate (RtR). Developing and LDCs Members were actively pushing for the explicit inclusion of the RtR in the paragraphs of the draft. RtR language used in the latest draft conditions regulatory freedom upon compliance with other GATS obligations, which effectively dilutes the legal value of the RtR provision.

Use of the terms "national policy objectives" provides more flexible policy space than that of "legitimate policy objectives" but it is still open to challenges in the absence of either general exceptions or a positive list clearly delineating what would qualify under the provision. Along the same topic, ambiguity surrounds the Universal Service Obligation (USO) members can maintain in the absence of a clear definition of what might be included. USO provisions are undermined, the same way the RtR is, due to the primacy given to compliance with GATS commitments.

In keeping with the spirit of GATS and other WTO Agreements, the future disciplines have tackled the developmental needs of developing and LDC countries especially through the use of mandatory language for technical assistance. However, the requirement for assistance to be on mutually agreed terms might impede the provision. Additionally, it is imperative to address in detail how extensions to phase-in periods will be renewed and following what criteria. Finally, technical assistance to LDCs from the application of future disciplines cannot be understood on a *quid pro quo* basis. Although exempt from the disciplines, LDCs still maintain their right to receive technical assistance in keeping with the WTO Agreements as a whole and the GATS I particular.

REQUEST SUMMARY:

An integral part of the work of the Trade Negotiations and Commercial Diplomacy Branch (TNCDB) within the United Nations Conference on Trade and Development (UNCTAD) is to provide analytical and technical assistance in trade negotiations in order to achieve a workable balance between trade and development. As part of this task, TNCDB has been monitoring negotiations aimed at developing new disciplines on domestic regulation under Article VI:4 of the General Agreement on Trade in Services (GATS). It is within this context that we have been asked by TNCDB to prepare a memo addressing select issues currently being negotiated.

Questions presented:

- a) What is the legal value of the language on Universal Service Obligation in Paragraph 12 of the draft?²
- b) What is the relationship between licensing requirement and concession and licensing contracts (e.g. for infrastructure services)?
- c) Could one really say that countries, which are “exempt” from the disciplines, do not have a right to benefit from any technical assistance/capacity building provisions set out?
- d) Take all the “alternative suggestions for necessity” and discuss which of these are more or less stringent than the necessity test as developed by WTO jurisprudence?
- e) Is the concept of “national policy objectives” really more flexible than “legitimate policy objectives” and would the former cover policy objectives developed at the sub-federal level?

I. INTRODUCTION

1. The services sector has come to play an increasingly prominent role in the world economy. Advances in telecommunications and information technology, growing privatization of formerly public industries, as well as the accelerating pace of globalization have spurred much debate about the need for further liberalization of the services industry.

² The term “draft disciplines” will be used throughout to refer to the 20 March 2009 draft Disciplines on Domestic Regulation pursuant to GATS Article VI:4, a copy of which is annexed at the end of this memo.

This is ever more important since services trade accounts for more than 68% of global GDP and employment while it is only at a meager 20% of global trade.³ Given the available data on the volumes of trade in services and the prospective benefits for all those engaged in it, further liberalization of the sector is essential for both developing and developed countries.

2. The Council for Trade in Services (CTS) established the Working Party on Professional Services (WPPS) on 1 March 1995 and charged it with developing future disciplines on professional services pursuant to GATS Article VI:4. The WPPS ultimately produced “Guidelines for mutual recognition in the Accountancy Sector” and “Disciplines on Domestic Regulation in the Accountancy Sector,” which were adopted in 1997 and 1998 respectively. Upon fulfillment of its mandate the CTS abolished the WPPS in April 1999 and created the Working Party on Domestic Regulation (WPDR). Negotiations on new disciplines were launched in February 2000 by member states of the World Trade Organization (WTO) with the goal of expanding upon work initiated in 1995 in the services sector in order to achieve “a progressively higher level of liberalization.”⁴ The new round of negotiations aims to “develop disciplines on domestic regulation pursuant to the mandate under Art. VI:4 of the GATS,”⁵ under the responsibility of “the Council for Trade in Services [which] shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines aim to ensure that requirements are, *inter alia*: a) based on objective and transparent criteria, such as competence and the ability to supply the service; b) not more burdensome than necessary to ensure the quality of the service; c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.”⁶

3. The lengthy process of negotiations has been inching, through various member submissions, drafts, working papers and Chairman’s notes, towards a final agreement. The

³ Pascal Lamy, *Doha Success Will Need Positive Outcome in Services*, Speech at the at the European Services Forum and the London School of Economics conference on 15 October 2007, available at <http://www.wto.org/english/news_e/sppl_e/sppl77_e.htm> accessed 20 April 2009. Also: Foreign Policy: Europa Commercial Policy, The General Agreement on Trade in Services available at <<http://www.diplomatie.be/en/policy/policynotedetail.asp?TEXTID=30517>> accessed 19 April 2009. And “The General Agreement on Trade in Services (GATS): objectives, coverage and disciplines” in <http://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm> accessed 15 April 2009.

⁴ The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations. GATS Art. XIX:1 page 300.

⁵ Working Party on Domestic Regulation, Communication from the ACP Group, Pro-Development Principles for GATS Article VI:4 Negotiations. 13 June 2006.

⁶ The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations. GATS Art. VI:4 page 291-2.

2005 deadline set by the 2001 Doha WTO Ministerial Declaration has come and passed without a final agreement in sight mainly due to the difficulty of achieving consensus on certain crucial but essential issues such as the term “national policy objectives,” the meaning and placement of the term “disguised restrictions on trade in services,” the scope and application of the disciplines, possible consequences of the disciplines and many more.⁷ The development of the new disciplines primarily intends to plug a gap in the GATS based on the templates of agreements already concluded under GATT. There is considerable similitude between the GATS disciplines and the SPS/TBT Agreements under GATT. As a matter of fact, both attempt to deal with the same problem; domestic regulations that can hinder trade either in services or goods, respectively, without been discriminatory.

4. Whereas the relationship between the GATT and SPS/TBT is pretty straight forward, the relationship between the future disciplines and the GATS is not very clear. GATS Articles XVI and XVII have raised questions about an apparent overlap with the domain covered by disciplines under Article VI:4. On the one hand Article XVI sets the parameters for market access restrictions, which only apply where WTO Members have undertaken specific commitments, subject to the “terms, limitations and conditions agreed and specified in [their] schedule[s].”⁸ On the other hand Article XVII establishes the principle of national treatment based on non-discrimination between domestic and foreign services or service suppliers.⁹ The apparent contradiction is mitigated by the caveat that Article XVII is “only triggered for committed services sectors and subject to explicit exceptions in a Member’s schedule.”¹⁰ Notwithstanding this solution to the contradiction a measure could still violate GATS provisions especially under Article VI:4. The other apparent contradiction exists between Article VI and Article XVI and has led to considerable debate within the WTO and among academia as well as during the negotiations on the draft.¹¹

⁷ Working Party on Domestic Regulation, Annotated Agenda by the Chairman. 3 July 2008. Room Document. Also see Mashayekhi and Tuerk.

⁸ The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations. GATS Art. XVI page 298-9. Also see Joost Pauwelyn, Rien ne Va Plus, Distinguishing Domestic Regulation from Market Access in GATT and GATS. World Trade Review, July 2005.

⁹ The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations. GATS Art. XVII page 299-300.

¹⁰ Joost Pauwelyn, Rien ne Va Plus, Distinguishing Domestic Regulation from Market Access in GATT and GATS. World Trade Review, July 2005, p. 7. Also see P. Delimatsis & M. Molinuevo, in: Wolfrum, Stoll, and Feinaugle (eds), WTO Trade in Services, Martinus Nijhoff Publishers, Leiden 2008, p. 393.

¹¹ M. Krajewski in: Wolfrum, Stoll, and Feinaugle (eds), WTO Trade in Services, Martinus Nijhoff Publishers, Leiden 2008, p. 194. Also see the Working Party on Domestic Regulation, Annotated Agenda by the Chairman. 3 July 2008. Room Document.

5. In its *obiter dictum* in US-Gambling the Panel found that Articles VI and XVI are mutually exclusive, a view accepted by some but rejected by others.¹² Notwithstanding the Panel ruling, the latest draft of the disciplines slightly modified and expanded on this view under paragraph 10, which reads as follows: “These disciplines apply to measures by Members relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards affecting trade in services 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.”¹³ Effectively, any measures committed under Articles XVI or XVII will be excluded from the application of the disciplines on domestic regulation, provided that they are non-discriminatory relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards affecting trade in services.¹⁴ With this addition, the disciplines will essentially succeed in capturing measures beyond market access and national treatment and thereby edge one step closer to opening up markets for services and replicating the SPS/TBT Agreements.

II. THE RIGHT TO REGULATE

6. For many developing countries the Right to Regulate (RtR) remains a central demand in the ongoing negotiations. It would provide the necessary flexible policy space needed to maintain and preserve public control over strategic sectors of the economy and ensure the provision of crucial universal services to the most disadvantaged segments of society such as environmental services, water and energy distribution, operation of public utilities and other basic infrastructural services; all without infringing on their contractual obligations under GATS. The working papers submitted to the Working Party on Domestic Regulation (WPDR) by the ACP Group; the African Group; Brazil and the Philippines; the small and vulnerable economies (SVEs); and from Chile, India, Mexico, Pakistan and Thailand, all point to broadly shared similar concerns among developing countries dealing with this particular issue.

¹² *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (“US – Gambling”)*, Report of the Panel adopted on 10 November 2004, WT/DS285/R, para. 6.308. Also see Joost Pauwelyn, *Rien ne Va Plus, Distinguishing Domestic Regulation from Market Access in GATT and GATS*. World Trade Review, July 2005.

¹³ Refer to Annex appended at the end of this document, para. 10.

¹⁴ Working Party on Domestic Regulation, Annotated Agenda by the Chairman. 3 July 2008. Room Document, p. 3.

7. As expressed by the May 2006 African Group communication: “the main challenge for African countries in the Domestic Regulations negotiations is to achieve the right balance between: (a) the creation of specific and predictable disciplines to underpin Members’ specific commitments, particularly in sectors and modes of export interest to developing and least developed countries; (b) the preservation of the “Right to Regulate” (RtR), taking into account the fact that in many developing countries, many regulatory and institutional frameworks are still at an emerging state or at times non-existing; (c) the establishment and utilization of operational and effective provisions for special and differential treatment.”¹⁵ This communication pithily speaks to the crux of developing country demands, most of which are directly interconnected or emanate from the principle of the RtR. Compliance with GATS obligations, including future disciplines on domestic regulation, should be construed in a manner that does not hinder the ability of developing countries to effectively and freely regulate and implement national policy objectives.

8. The GATS preamble unequivocally recognizes “*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 [...]*.”¹⁶ This exert confirms *prima facie* developing countries’ right to regulate freely so as to achieve national policy objectives. However, the RtR “when being placed in the preamble [...] would lack operative character, but would still frame the goals and objectives of the treaty.”¹⁷ It does nonetheless embody the recognition on the part of WTO Members of the need to maintain a balance of rights and obligations and in that sense could be invoked to buttress a developing country’s right to regulate in case of conflicting claims about the disciplines. Paragraph 3 of the draft stipulates attempts to remedy that legal vulnerability by affirming that “Members recognize the right to regulate, and to introduce new regulations, [...] in order to meet national policy objectives [...]”¹⁸ Neither the preamble nor paragraph 3 carry the same mandatory weight as that of the subsequent paragraph 12 of the

¹⁵ Working Party on Domestic Regulation, *Communication by the African Group on Domestic Regulation*, 2 May 2006, Room Document.

¹⁶ Working Party on Domestic Regulation, *Disciplines on Domestic Regulation Pursuant to Article VI:4, Second Revision* 20 March 2009, Room Document.

¹⁷ M. Mashayekhi and E Tuerk in K. Alexander and M. Andenas (eds.), *The World Trade Organization and Trade in Services*, Koninklijke Brill NV. Printed in The Netherlands, p. 301.

¹⁸ Working Party on Domestic Regulation, *Disciplines on Domestic Regulation Pursuant to Article VI:4, Second Revision* 20 March 2009, Room Document.

draft.¹⁹ The former two both fall within what Frank Garcia termed “discretionary measures” because they employ language that is only permissive and purports to create neither a legal nor a moral obligation.²⁰

9. Language in paragraph 12 clearly dilutes both the GATS preamble as well as the provisions of paragraph 3. It creates interpretation difficulties and hence enforceability issues. It states that “*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*.” The dichotomy is more pronounced when we break down the paragraph into several sections:

i) “*nothing in these disciplines prevents*”

Read separately, the terms “*nothing [...] prevents*” express a categorical exclusion, *i.e.* there is nothing in the draft disciplines that would thwart members from “exercising the right to introduce or maintain regulations...”

ii) “*in a manner consistent*”

However, this initial blank check and granted advantage is immediately plucked right back with the imposition of a condition. So the blank check and regulatory freedom are no more, they come with strings attached.

iii) “*consistent with [...] obligations and commitments under GATS*.”

Consistency with obligations and commitments under the GATS dilutes the initial entitlement and renders the RtR devoid of the intended meaning. The language of obligations in the second part bears more legal duress and compulsion than the preliminary categorical exclusion expressed through the use of the term “nothing” in the first part. Indeed, there could potentially be a tacit hierarchy between the GATS obligations and commitments on the one hand and the RtR on the other. This immediately triggers two questions; one regarding the relationship between the disciplines and the GATS and the other dealing with the provision of universal services within the meaning of the RtR.

10. It is not yet known what form implementation of the disciplines on domestic regulation will take. The Council for Trade in Services has adopted the latest disciplines,

¹⁹ Refer to Annex appended at the end of this document.

²⁰ Garcia, Frank. Beyond Special and Differential Treatment available at <http://www.bc.edu/schools/law/lawreviews/meta-elements/journals/bcicl/27_2/05_TXT.htm> accessed 09 April 2009.

although not binding; concluded under GATS Art. VI:4 in the Accountancy sector.²¹ The Council also expressed its intent to eventually integrate the disciplines into the GATS without further clarification on their final form.²² GATS Art. VI:5 uses the terms “entry into force of disciplines,” which shows the intention of the framers to eventually transform them into sources of international law either as Annexes to the GATS or as additional commitments.²³ Under GATS Art. XXIX “Annexes to [the] Agreement are an integral part of [the] Agreement.”²⁴ In Krajewski’s view this would be a hard task given the difficulty of “achieving consensus both internationally and domestically for the necessary changes to the GATS framework.”²⁵ A good case in point is the GATS Annex on Financial Services, which ultimately failed to garner enough support among WTO Members relegating it instead to an Understanding on Commitments in Financial Services by a group of developed countries, a status that lacks legal force unless inserted in a Member’s Schedule under the financial services section.²⁶ The more probable alternative will be additional commitments pursuant to GATS Art. XVIII similar to the Reference Paper on Basic Telecommunications.²⁷

11. The GATS Agreement is already a complex and often impenetrable one. With 29 elaborate Articles, eight Annexes, eight Ministerial Decisions and further attachments and understandings dealing with varying subjects; adding another Annex to the agreement would not be an easy task to accomplish.²⁸ If, however, adoption as an annex were to be the case for the disciplines, then they would automatically become “an integral part” of the GATS Agreement pursuant to Article XXIX. Consequently, obligations undertaken by Members under the Annex would become incorporated into GATS obligations bearing a distinct legal status as part of the covered Agreements of the WTO subject to the Dispute Settlement and Understanding (DSU). This would subordinate paragraph 12 of the draft to the general

²¹ Council for Trade in Services, Decision on Disciplines Relating to the Accountancy Sector, Adopted by the Council for Trade in Services on 14 December 1998, S/L/63, 15 December 1998, No 1.

²² *Ibid.*

²³ M. Krajewski, in: Wolfrum, Stoll, and Feinaugle (eds), *WTO Trade in Services*, Martinus Nijhoff Publishers, Leiden 2008, p. 178-96.

²⁴ The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations. GATS Art. XIX:1 page 300.

²⁵ M. Krajewski, in: Wolfrum, Stoll, and Feinaugle (eds), *WTO Trade in Services*, Martinus Nijhoff Publishers, Leiden 2008, p. 178-96.

²⁶ A. Von Bogdandy & J. Windsor in: Wolfrum, Stoll, and Feinaugle (eds), *WTO Trade in Services*, Martinus Nijhoff Publishers, Leiden 2008, p. 650-652

²⁷ *Ibid.*

²⁸ Gary P. Sampson. *The WTO and Sustainable Development*. United Nations University Press, Paris, 2005, p. 164.

principles and provisions enunciated under the GATS Agreement, which effectively dilutes the RtR.

12. The other alternative is to follow along the lines of the Reference Paper on Basic Telecommunications (RP) and adopt the disciplines as additional commitments pursuant to GATS Article XVIII. Currently over sixty Members have “incorporated the RP in their Schedules either in its entirety or with only a few modifications.”²⁹ Following the example of the RP will garner much more support for the disciplines, support hinged on the latitude of options it offers to Members; either full, partial, or even customized commitment in order to address the individual needs of Members, especially developing countries.³⁰ Following this approach will also make the disciplines an “integral part” of the GATS pursuant to Article XX:3. Consequently, the commitments would become part of the covered Agreements of the WTO subject to the Dispute Settlement and Understanding (DSU).

13. Article 3.2 of the DSU states that, in order to “clarify the existing provisions of the [covered] agreements” resort must be made to customary rules of international law.³¹ This effectively makes the application of the Vienna Convention on the Law of Treaties (VCLT) mandatory, especially Articles 31 and 32 dealing with interpretation.³² Therefore, if the right to regulate was put before a WTO jurisprudence microscope the “ordinary meaning” of the term must take account of the “context” in which it is used given the “object and purpose” of the treaty. While the “ordinary meaning” of the term “right to regulate” within the “context” of the disciplines is very unambiguous and clearly stated, it might not bear the weight of been subject to the “object and purpose” of the treaty. However, GATS preamble clearly includes “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

²⁹ H. Gao, in: Wolfrum, Stoll, and Feinaugle (eds), *WTO Trade in Services*, Martinus Nijhoff Publishers, Leiden 2008, p. 724.

³⁰ H. Gao and M. Krajewski, in: Wolfrum, Stoll, and Feinaugle (eds), *WTO Trade in Services*, Martinus Nijhoff Publishers, Leiden 2008, p. 724 and 192.

³¹ *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*. GATS Art. 3.2 of the DSU. Cambridge University Press, Cambridge, p. 355.

³² Vienna Convention on the Law of Treaties, done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; (1969) 8 *International Legal Materials* 679.

countries, the particular need of developing countries to exercise this right.”³³ But as has already been stated before, preambles merely serve as context to treaties and do not create legal obligations beyond the operative part of the treaty.³⁴ In this particular case the “object and purpose” of the treaty is subject to two conflicting and even mutually exclusive principles; on the one hand the right of Members to freely regulate the supply of services within their territories, and on the other hand the goal of achieving progressive liberalization of trade in services.

14. The meaning of the term RtR is unambiguous and does not necessitate recourse to VCLT Article 32 and “supplementary means of interpretation, including the preparatory work on the treaty and the circumstances of its conclusion.”³⁵ Nevertheless, ambiguity remains following application of VCLT Article 31(1) and the “object and purpose” of the treaty cannot be discerned simply from the preamble. Application of the substantive rules of the treaty serves to balance the preambular conflict between liberalization and regulation. The substantive articles of GATS, such as Article I on scope and definition, and the draft disciplines leave no doubt as to the subordinate position of the RtR when juxtaposed against the other obligations. Paragraph 12’s requirement of consistency with other GATS commitments and obligations is central to the weakening of the RtR provision under both the preamble and paragraph 3 of the draft.

III. UNIVERSAL SERVICE OBLIGATION

What is the legal value of the language on Universal Service Obligation in Paragraph 12 of the draft?

Paragraph 12 of the draft reads as follows: “Nothing in these disciplines prevents Members from exercising the right to introduce or maintain regulations in order to ensure provision of

³³ The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations. GATS Preamble. Cambridge University Press, Cambridge 2008, p. 286.

³⁴ H. Hestermeyer, in: Wolfrum, Stoll, and Feinaugle (eds), WTO Trade in Services, Martinus Nijhoff Publishers, Leiden 2008, p. 19. Also see *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (“US – Shrimp”), Report of the Appellate Body, WT/DS58/AB/R, adopted on 12 October 1998, para. 153.

³⁵ *European Communities – Customs Classification of Certain Computer Equipment* (“EC – Computer Equipment”), Reports of the Appellate Body, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted on 5 June 1998, para. 86.

universal service, in a manner consistent with their obligations and commitments under the GATS.”

15. The general obligation to supply a service universally at affordable rates, without supply cost discrimination between different regions is closely linked to and operates as a narrower subset of the principle of the RtR. With the RtR proven to stand on rather tenuous legal ground, where is the principle of universal service obligation (USO) left within the draft? It is important to note that USO has so far been confined, in WTO Agreements, to telecommunications where it denotes basic services, such as voice telephony, telex, facsimile and data transmission, “available to all prospective users at a guaranteed level of quality and at affordable prices.”³⁶ The RP on telecommunications, concluded in 1998, provides that “any Member has the right to define the kind of universal service obligation it wishes to maintain. Such obligations will not be regarded as anti-competitive *per se*, provided they are administered in a transparent, non-discriminatory and competitively neutral manner and are not more burdensome than necessary for the kind of universal service defined by the Member.”³⁷ Taken at face value, this RP exert grants governments a vast margin of policy space to retain USO but so far only a portion of WTO Members have included the RP in their scheduled commitments.³⁸ However, interpretive ambiguity and lack of a general textual definition of the term in the disciplines bear tremendous potential for application difficulties for both developed and developing countries.

16. The inherent assumption upon reading the definition of USO provided in the RP is that governments can liberalize their telecommunications service sector while simultaneously protecting crucial public services for the most disadvantaged. The findings and Panel interpretation of the Telecommunications Reference Paper in Mexico–Telecoms partially discredited that notion. The Panel ruled that an outside service supplier could not be charged interconnection fees beyond the cost of the service it provided.³⁹ In fact, the cost of a service to a foreign provider cannot be expected to include other costs such as those “having regard to

³⁶ W. Goode, *Dictionary of Trade Policy Terms*. Cambridge University Press 5th Ed., Cambridge 2007, p. 469.

³⁷ Telecommunications Services: Reference Paper, Negotiating Group on Basic Telecommunications 24 April 1996 available at <http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm> accessed 12 April 2009.

³⁸ H. Gao, in: Wolfrum, Stoll, and Feinaugle (eds), *WTO Trade in Services*, Martinus Nijhoff Publishers, Leiden 2008, p. 724. Exapnd on this by stating the exact available data from the citation above.

³⁹ *Mexico – Measures Affecting Telecommunications Services (“Mexico – Telecoms”)*, Report of the Panel adopted on 2 April 2004, WT/DS204/R, para. 7.183.

economic feasibility,” expansion of domestic infrastructure or other universal service obligations. It is important to note that Mexico had undertaken commitments in telecommunications in its schedule, which effectively restrained the range of policy choices available to it. Indeed, it is these scheduled commitments that served as a basis for panel decisions in both Mexico-Telecoms as well as US-Gambling.⁴⁰ Notwithstanding this, the potential for intrusion on developing countries’ sovereignty and ability to regulate to expand their infrastructure and extend some of the costs to foreign suppliers who might be using them does exist.

17. The essence of USO resides in the difficulties posed by any attempt to define what is and what is not within its reach particularly in the absence of WTO jurisprudence and especially given the divergent expectations and approaches resulting from Members’ differing schedules.⁴¹ As it stands the meaning and scope of services that would be covered by universal service provisions is open to interpretation and could be either broad or rather restricted. To a certain extent, this replicates the contentious debate surrounding the scope of GATS Article 1:3 (b) and (c); a complex debate centered on the rather “broad factual range of activities which are attributed to the public sector in the individual WTO Members.”⁴² Undefined, USO would lead to inconsistent treatment of Members due to variable institutional arrangements from country to country; some essential services that would be covered such as public transportation, health services, education etc... are publicly provided in some countries whereas they may be relegated to the domain of private enterprise in other countries. Just as there is no agreement on what is covered or not by the public service provisions of Article I:3 there is also a great deal of ambiguity surrounding the provision of USO under the draft. The absence of a formal definition of the concept casts doubt on the legal value of including such a provision under paragraph 12.

⁴⁰ In US-Gambling the Panel said that it fully recognizes the sovereign right of Member countries to freely regulate, however that cannot be against scheduled commitments they have already undertaken. The US has already scheduled a commitment, according to the Panel, and therefore it must respect its obligations under international law.

⁴¹ Mexico-Telecoms was the first Panel case dealing with a purely GATS dispute. The Panel recognized the difficulty of the case given the absence of jurisprudence dealing with the Agreement and in particular the different approaches used by Members and their divergent understandings and expectations arising from their different schedules. Para. 7.2.

⁴² D. Zacharias, in: Wolfrum, Stoll, and Feinaugle (eds), WTO Trade in Services, Martinus Nijhoff Publishers, Leiden 2008, page 58-9.

18. Unlike the RP on telecommunications, which provides a detailed definition of what USO encapsulates, the current version of the draft leaves USO undefined and therefore subject to the same potential legal wrangling as the RtR. The legal value of USO language under the current draft in paragraph 12 is inadequate and will not stand as a meaningful defense. In light of the rather uncertain legal ground established under paragraph 12 for the broader RtR, absence of a definition of the much narrower USO, clearly setting its parameters, will further weaken the provision. Arguably, defining USO might restrict potential for future jurisprudential adaptations, but given the current wording USO risks been nothing more than window-dressing. Even heeding the Mexico-Telecoms lesson by not committing their most crucial sectors will only provide temporary reprieve for developing countries, as they are required to eventually lift restrictions and fully liberalize, subject to an undetermined phase-in period.⁴³ The best approach is to include a positive list of what should qualify as USO thereby circumventing the current ambiguity.

IV. NATIONAL VERSUS LEGITIMATE POLICY OBJECTIVES

Whether the concept of “national policy objectives” is really more flexible than that of “legitimate policy objectives”?

19. In their paper submissions to the WPDR, Members have alternatively and often interchangeably used “national policy objectives” and “legitimate policy objectives.”⁴⁴ The GATS preamble as well as Art. XIX:2 employ “national policy objectives,” whereas the already concluded accountancy disciplines only speak of legitimate policy objectives. This variance begs the question of whether there is potential for confusion in the use of the terms. The Oxford English dictionary defines the term legitimate as “conformable to, sanctioned or authorized by, law or principle,” while it defines national as something “pertaining to a nation or country, especially as a whole.”⁴⁵ Clearly the two concepts are very different since the first focuses mainly on sanction and conformity to law while the latter revolves around the notion of serving the interests of the whole country or nation.

⁴³ Refer to Annex appended at the end of this document, para. 42.

⁴⁴ Paper submissions by Brazil et al.

⁴⁵ Brown Lesley (ed), *The New Shorter Oxford English Dictionary on Historical Principles*, Volumes I and II. Clarendon Press, Oxford, 1993.

20. Although a particular policy objective could be legitimate and by extension national it is also possible to envisage a national policy objective that is not legitimate pursuant to a country's obligations under GATS such as national policies of a protectionist nature or measures that are administered in an unreasonable, partial and subjective manner.⁴⁶ The Accountancy disciplines add a new dimension to legitimate objectives At this point it is important to ask whether the necessity test, enshrined in GATS Article VI:4 and so opposed by many WTO Members, might be brought back through the backdoor?⁴⁷

21. Neither one of the concepts achieves the necessary adequate balance between the objectives of the agreement and those of signatories; the concept of "legitimate policy objectives" affirms the primacy of obligations by restricting the range of policies available to Members only to those conforming to the Agreement while the concept of "national policy objectives" provides leeway beyond to pursue policies even if not explicitly provided for in the Agreement. The legitimacy notion becomes largely restricted if read in conjunction with GATS Art. I:3 (a) which states that "measures by Members' means measures taken by: (i) central, regional or local governments and authorities; and (ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities."⁴⁸ According to this reading measures taken by governmental or non-governmental authorities must respect legal obligations and commitments entered into under the GATS Agreement. Allowance for legitimate objectives under GATS includes, *inter alia*, protection of human, animal or plant life or health, and protection of public morals and order.⁴⁹ The Accountancy disciplines on the other hand have included an open-ended list of legitimate objectives subject to the necessity test such as consumer protection, quality of service and competence.

22. In contrast, using the terms "national policy objectives" provides much needed flexibility and space for governments to regulate in an effective manner. Like many other sections of the draft, the apparent linguistic ambiguity intends to garner utmost support for the agreement. Yet use of the terms "national policy objectives" in the preamble could well limit

⁴⁶ The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations. GATS Article VI:1. Cambridge University Press, Cambridge 2008, p. 291.

⁴⁷ There has been serious debate about the inclusion of the necessity test in the disciplines. The latest draft of the Disciplines on Domestic Regulation, March 2009, does not contain a necessity test.

⁴⁸ The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations. GATS Article III:1. Cambridge University Press, Cambridge 2008, p. 287-8.

⁴⁹ The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations. GATS Article XIV. Cambridge University Press, Cambridge 2008, p. 296.

developing member countries' right to regulate if such objectives are not clearly stated. According to Hestermeyer, use of those terms in the preamble intends to allow Members to pursue their "national policy objectives" by "not undertaking commitments in certain sectors."⁵⁰ That is, the concept of "national policy objectives" is neither flexible nor is it a blank check to circumvent obligations entered into. A Member country will not be able to raise the national policy objective defense in sectors where it has undertaken specific commitments. This was clearly demonstrated in Mexico-Telecoms.⁵¹ Furthermore, the Panel in US-Gambling highlighted this very point when it emphatically stated that "WTO Members have a right to regulate and to prohibit gambling and betting services," but this right is curtailed by "scheduled commitments and the relevant provisions of the GATS."⁵²

23. Notwithstanding the issues raised in the US-Gambling Appellate Body opinion relating to GATS Article XIV exceptions; there is emerging consensus within the WPDR that future disciplines on domestic regulation should only apply where specific commitments have been undertaken.⁵³ This is based on the letter of the Agreements as well as practice as demonstrated by the Mexico-Telecoms case. Nonetheless, the new disciplines on domestic regulation stipulate that Members will only have a certain number of years before they are required to comply with the Agreement, in which case the phase-in period functions as a mere time delay before complete liberalization. Some members in their paper submissions have argued for the inclusion of general exceptions along those already in the GATS that would clearly delineate what is meant by "national policy objectives." This can also be accomplished through a positive list of goals that would limit confusion on the meaning of the terms in the absence of jurisprudence on the issue.

V. SUB-FEDERAL MEASURES:

Whether the concept of "national policy objectives" covers policies developed at the sub-federal level?

⁵⁰ H. Hestermeyer, in: Wolfrum, Stoll, and Feinaugle (eds), *WTO Trade in Services*, Martinus Nijhoff Publishers, Leiden 2008, p. 19-29.

⁵¹ Cite appropriate para. of Mexico Telecoms...

⁵² *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services ("US-Gambling")*, Report of the Panel, adopted on 10 November 2004, WT/DS285/R, para. 5.17.

⁵³ M. Krajewski, in: Wolfrum, Stoll, and Feinaugle (eds), *WTO Trade in Services*, Martinus Nijhoff Publishers, Leiden 2008, p. 183.

24. Any conception or interpretation of “national policy objectives” will have direct implications on sub-federal measures in particular whether national policy objectives cover both measures taken on a federal/national level as well as those taken by sub-federal or local authorities. GATS Art.1 clearly states that the “agreement applies to measures by Members affecting trade in services” and that “measures by members” include both those taken by federal or sub-federal authorities as well as non-governmental bodies authorized to make policy on the federal or sub-federal levels. The Panel in EC-Bananas defined the scope of application of the GATS such that “no measures are excluded *a priori* from the scope of application of the GATS as defined by its provisions. The scope of the GATS encompasses any measure of a Member to the extent it affects the supply of a service regardless of whether such measure directly governs the supply of a service or whether it regulates other matters but nevertheless affects trade in services.”⁵⁴ However, it is not clear whether the broad scope of application of GATS Article I would also cover domestic regulation exceptions envisaged under the draft.

25. The delegations were clearly aware of the need to elucidate the meaning and implications of the term “national policy objectives” for sub-federal measures. The April 2007 Chairman’s draft confirmed, in a footnote, that “national policy objectives include objectives identified at both national and sub-national levels.”⁵⁵ However, the footnote did not figure in later drafts for fear that it might “lead to the erroneous conclusion that the identical term used in paragraph 4 of the preamble to the GATS” has a different meaning.⁵⁶ A later WPDR document by the Chairman expressed the delegations’ agreement to include the following language in a Chairman’s note; “For the purpose of these disciplines, the term “national policy objectives” in paragraph 3 is understood to refer to objectives identified at either the national or sub-national level.”⁵⁷ Although “national,” under its ordinary meaning, would exclude sub-federal measures from the scope of application of the disciplines, the inclusion of the last sentence in a Chairman’s note would effectively trigger VCLT Article 32 and recourse to supplementary works if a dispute on the scope of “national policy objectives” arises.

⁵⁴ Panel report on EC-Bananas III, para. 7.285. (full citation pending)

⁵⁵ Working Party on Domestic Regulation, *Outstanding Issues for Discussion*, Informal Note by the Chairperson, 12 March 2008. Room Document.

⁵⁶ Working Party on Domestic Regulation, Chairman’s Draft Note. 12 March 2008. Room Document.

VI. DEVELOPMENT:

26. Within the GATT system special and differential treatment (SDT) aims to establish special measures to counteract the structural imbalances that exist between developing and developed countries as part of the WTO agreements. But unlike GATT, GATS does not have such provisions. Its stated goal is to achieve development objectives through liberalization rather than SDT or preferential trade agreements. GATS tries to make up for this deficiency through the inclusion of provisions favoring developing countries such as “wider access to information via contact points, more flexibility with respect to integration agreements, technical cooperation, more flexibility with respect to conditions on access to and use of public telecommunications transport networks.”⁵⁸ Thus far, there are more than 145 SDT measures in the WTO treaty and they have overwhelmingly been nothing more than a plethora of statements of good intentions and empty promises lacking much legal compulsion. The paragraphs tackling the development dimension in the disciplines on domestic regulation might be jeopardized and run the risk of repeating old mistakes in the SDT mechanisms.

27. The section on development⁵⁹ employs the term “developing country” as though there exists in fact a lucid and straightforward all-encompassing category of such countries. There are vast differences between “developing countries;” some Southeast Asian nations have reached a level of economic maturity where they cannot exactly be compared or accorded the same treatment as other WTO Members categorized as developing countries. This is especially relevant when disputes arise as a result of extension requests for temporary exemptions or phase-in periods. The WTO Agreements do not really define developing countries although Article XVIII:1 of GATT 1994 does briefly mention some indicators, namely countries whose economies can only support low standards of living and are in the early stages of development.⁶⁰ The traditional principle of self-selection is open to challenges

⁵⁷ Working Party on Domestic Regulation, Annotated Agenda by the Chairman. 3 July 2008. Room Document.

⁵⁸ H. Hestermeyer, in: Wolfrum, Stoll, and Feinaugle (eds), *WTO Trade in Services*, Martinus Nijhoff Publishers, Leiden 2008, p. 28.

⁵⁹ Refer to Annex appended at the end of this document.

⁶⁰ H. Hestermeyer, in: Wolfrum, Stoll, and Feinaugle (eds), *WTO Trade in Services*, Martinus Nijhoff Publishers, Leiden 2008, p. 22. *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*. Ad Article XVIII paragraphs 1 and 4 GATT 1994 p. 486.

by other Members and would pose challenges to the interests of developing countries in the realm of the disciplines.

28. The development perspective under the TBT is much more forward than it is under the disciplines on domestic regulation. The language used under the latter leaves much to be desired whereas language under TBT Article 11 consistently employs terms such as “Members shall, if requested, [...]”⁶¹ The terms used under TBT Articles 11 as well as 12 have an unmistakable binding character as opposed to paragraph 44 on development in the current draft, which states that “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* [...]” Compliance with this type of discretionary measure is determined by a cooperative agreement, which puts the developing or LDC country at a great disadvantage and indeed subject to pressure.

29. Paragraph 42 of the draft tackles the transition period granted developing countries before they have to bring their measures into compliance with the disciplines. Many questions immediately come to mind: a) will there be separate transition periods for members? b) Following what criteria are transition period lengths determined? c) What is the process for the extension of such periods? If the goal of GATS is to achieve economic development through liberalization, does it still make sense to allow permanent exemptions from the disciplines on domestic regulation?

30. Transition periods have thus far been controversial in the other agreements; they are often arbitrary and fall short of their intended goal of readying developing countries to assume their responsibilities under the agreements. Paragraph 42 does not establish any substantive criteria or mechanisms clearly delineating how a transitional period could be extended. It merely proclaims that “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.*” The Panel, in Brazil-Aircraft, found that Brazil could not avail itself of the terms of Art.3, paragraph 2 of

⁶¹ The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations. TBT Article 11. Cambridge University Press, Cambridge 2008, p. 132.

Directive 374 to grant an additional 96-month interest rate support extension for its regional aircraft because the said paragraph uses the phrase “*may be extended*.”⁶² The combination of the vague notion of “level of development” with the terms “may extend” without substantive criteria for such a process will certainly thrust many developing countries into the arena of liberalized trade in services without the adequate tools to defend their public policy space and deal with competition from well-developed service providers.

31. The level of inequality between developed and developing countries and even within the broad category of developing countries, especially in the area of domestic regulation, is so stark that the eventual arbitrary transitional time periods will not be enough to prepare for a full phase-in of the disciplines.⁶³ Outlining a detailed process for implementation of paragraph 42 of the draft should take care to balance between developing countries’ almost assured need to eventually extend transitional time periods without falling into the trap of perpetual renewals. The viability and effectiveness of these periods is closely linked with the level of commitment demonstrated by developed countries in implementing their promises of providing easy access and differential treatment for developing countries to address the inherent imbalances between the two groups. It is therefore imperative that any talk of extending transition periods should also take into consideration not only progress achieved by developing countries but also developed countries’ compliance with their obligations towards the former.

VII. TECHNICAL ASSISTANCE FOR EXEMPT LDC MEMBERS

Whether one can really say that countries, which are “exempt” from the disciplines, do not have a right to benefit from any technical assistance/capacity building provisions set out?

32. There are plenty of sections in the WTO Agreements addressing the need of both developing country and particularly LDC Members’ need for technical assistance in order to comply fully with the goals of the multilateral trading system. More recently, the Doha

⁶² *Brazil – Export Financing Programme for Aircraft (“Brazil–Aircraft”)*, Report of the Panel (“Second Recourse by Canada to Article 21.5 of the DSU”), adopted on 20 August 1999, WT/DS46/R, para. 5.187.

⁶³ Experience has so far shown this in TRIMS and TRIPS agreements where developing countries could not comply with the phase-in periods or temporary exemptions.

Ministerial Declaration reaffirmed the special need for special treatment of LDCs.⁶⁴ Technical assistance to LDCs is expressly addressed under paragraphs 45 and 46 of the draft disciplines on domestic regulation. Paragraph 45 states that “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. [...]”⁶⁵ Unlike previous S&D provisions in other WTO Agreements, which were largely of a best-endeavor nature, the language on technical assistance to LDCs in the disciplines on domestic regulation is legally binding. This was in response to pressure from developing and LDC Members on account of the shortcomings and failures of previous provisions on the subject in TRIPS, TBT and SPS Agreements.

33. Paragraph 46 of the draft disciplines on domestic regulation issues a blanket exemption from the application of the disciplines.⁶⁶ LDCs are, however, “encouraged to apply these disciplines, to the extent compatible with their special economic situation and their development, trade and financial needs.”⁶⁷ Technical assistance is subjected to one caveat; it ought to be based on mutually agreed on terms and conditions between the receiver and the donor.⁶⁸ The inclusion of this part in the paragraph was in response to fears by some developing and in particular least developed countries of conditional aid from developed countries, which might subject technical assistance to the objectives of donors. Ironically, this provision might, in the end, “derail the practical implementation of selected technical assistance projects.”⁶⁹

34. Aside from the caveat placed on the way technical assistance is dispensed above, no other conditions are placed on the blanket exemption from the disciplines to LDCs. Indeed, considering the larger goals of the GATS and the explicit terms of the Hong Kong Ministerial Declaration, a *quid pro quo* approach to technical assistance would violate the terms of the GATS, the Doha Ministerial Declaration, the Council for Trade in Services’ Guidelines and

⁶⁴ Doha Work Program, Ministerial Declaration, WT/MIN(05)/DEC, 22 December 2005, Adopted on 18 December 2005, <http://www.wto.org/english/thewto_e/minist_e/min05_e/final_text_e.htm> accessed 25 April 2009.

⁶⁵ Refer to Annex appended at the end of this document.

⁶⁶ Refer to Annex appended at the end of this document, para. 46.

⁶⁷ Ibid.

⁶⁸ Refer to Annex appended at the end of this document, para. 45.

⁶⁹ *M. Mashayekhi and E Tuerk in K. Alexander and M. Andenas (eds.), The World Trade Organization and Trade in Services, Koninklijke Brill NV. Printed in The Netherlands, p. 311.*

Procedures for the Negotiations on Trade in Services, as well as the spirit of the WTO. An exemption from the disciplines on domestic regulation does not and should not trigger an exclusion from enjoyment of technical assistance. Considering the intricate linkages between trade in services and trade in goods, accrued benefits from any technical assistance provided cannot be limited to trade in services alone, and certainly not to liberalization of domestic regulation. It would be illogical to tie technical assistance and capacity building to liberalization of specific sectors.

35. On the one hand the text of paragraph 45 unambiguously mandates that technical assistance be extended to LDCs contingent upon mutual agreement on its terms. On the other hand paragraph 46, while providing a blanket exemption from the disciplines to LDCs, nonetheless encourages them to apply them “to the extent compatible with their special economic situation and their development, trade and financial needs.”⁷⁰ If developing country Members can benefit from technical assistance while subject to a phase-in period of the disciplines, it follows that LDCs ought to also benefit from these provisions given their explicitly recognized serious difficulties.⁷¹ Considering the stated goals of the GATS of fostering economic development through liberalization of trade in services, encouraging LDCs to apply those disciplines that fit their needs surely assumes LDCs can eventually bring some sectors to liberalization levels, a goal that can be accomplished more efficiently if technical assistance and capacity building are extended to them.

⁷⁰ Refer to Annex appended at the end of this document, para. 46.

⁷¹ The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations. GATS Preamble, Cambridge University Press, Cambridge 2008, p. 286.

Annex:
Room Document
Working Party on Domestic Regulation

20 March 2009

– DRAFT –
DISCIPLINES ON DOMESTIC REGULATION PURSUANT TO GATS
ARTICLE VI:4
Second Revision
Informal Note by the Chairman

Please find attached a second revised draft of possible regulatory disciplines pursuant to Article VI:4 of the GATS.

This draft has been prepared, under my responsibility, with a view to registering progress in discussions that have taken place in the Working Party since February 2008. It is intended to provide a point of departure for the work of the WPDR under its incoming Chairperson.

This revision only reflects drafting suggestions on a few issues which I feel have enjoyed wide support by delegations during our discussions. It does not address other issues on which differences persist. Although, in several instances, work on these has advanced significantly, I have refrained from suggesting any compromise language, as I do not wish to influence future consideration of these issues under the guidance of my successor. The absence of any drafting changes regarding those issues should not be construed to solidify the language as it stands.

Therefore, the content of my Note on outstanding issues (Room Document of 12 March 2008), as well as the 20 or so issues raised by delegations (Room Document of 25 June 2008), will require further negotiation and debate in the Working Party.

– 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. These disciplines should not be construed to prescribe or impose particular regulatory approaches or any particular regulatory provisions in domestic regulation.

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 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 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 publish promptly, through printed or electronic means, 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. 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 licenses, 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.

Where publication is not practicable, such information shall be made otherwise publicly available.

14. Each Member shall maintain or establish appropriate mechanisms for responding to enquiries from any service supplier 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 endeavor 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 endeavor 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 no 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 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 license 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 license.

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 license 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 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 endeavor to establish the normal timeframe for processing of an application.

25. Each Member shall ensure that a license, once granted, enters into effect without undue delay in accordance with the terms and conditions specified therein.

26. Each Member shall ensure that licensing fees¹ are reasonable in terms of the costs incurred by the competent authority, including those for activities related to regulation and supervision of the relevant service, 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, where the competent authority finds it relevant, it shall give due consideration to relevant professional experience of the applicant as a complement to educational qualifications. Where the competent authority considers that 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 allow applicants to fulfill 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 shall 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 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 endeavor 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 the 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 fulfillment 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 Members may accord reduced administrative fees to services 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 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 operation of these disciplines and make recommendations as appropriate.

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