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CHAPTER 6

DOMESTIC REGULATIONS IN SERVICES: A CHAIRMAN'S PERSPECTIVE

*By Peter Govindasamy**

"Members maintain the sovereign right to regulate within the parameters of Art VI of the GATS… Members' regulatory sovereignty is an essential pillar of the progressive liberalisation of trade in services, but this sovereignty ends whenever rights of other Members under the GATS are impaired."[1]

Members' "right to regulate trade in services formed part of the object and purpose of the GATS".[2]

I. Introduction

I was posted twice to the Permanent Mission of Singapore to the United Nations in Geneva: first, as First Secretary between March 1995 and September 1998, and subsequently as Counsellor from February 2005 to February 2008. During both stints, I was assigned to cover the services

* The views expressed in this article are the author's in his personal capacity and should not in any way be attributed to his employer — the Ministry of Trade and Industry, Singapore.

[1] *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Panel Report, WT/DS285/R, para 6.316.

[2] *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Appellate Body Report, WT/DS285/AB/R, paras 235 & 271.

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negotiations. One issue — central to the GATT/WTO regime — that has fascinated me is the endeavour by GATT/WTO Members, Panels and the Appellate Body (since 1995) to balance the GATT/WTO's objective of liberalising trade in goods and services against the avoidance of prejudice to the autonomy of WTO Members or their right to regulate in order to achieve legitimate objectives.[3] This is particularly relevant in services — an area which is regulation-intensive.

In June 2005, I was elected to chair the GATS Article VI:4 negotiations conducted under the auspices of the Working Party on Domestic Regulations (WPDR). I was thereafter re-elected to serve four more terms until April 2009. As Chairman, I worked with WTO Members to develop disciplines to meet the following objectives:

(i) GATS's objective of facilitating trade in services,
(ii) without unduly restricting Members' right to regulate to meet legitimate objectives,
(iii) while ensuring the outcome of the negotiations are in keeping with the development dimension of the GATS and the Doha Development Agenda (DDA).

As Article VI:4 is situated within Article VI, I will begin by assessing how the various provisions of Article VI, namely, Articles VI:1, 2, 3 and 6 seek to achieve the balance between the objectives highlighted above. I will then discuss how the current draft disciplines being negotiated pursuant to Article VI:4 also seek to achieve these objectives.

II. The GATS's Balancing Act

Due to their invisible character, services are rarely affected by border measures. Tariffs and quotas are very hard to uphold in services. In the absence of border measures, services are subject to a range of domestic regulation.[4]

[3] There are numerous commentaries written on the WTO's attempt to balance trade liberalisation and Members' regulatory autonomy. For discussions relating to the Agreement on Technical Barriers to Trade, please see Michael Ming Du, "Domestic Regulatory Autonomy under the TBT Agreement: From Non-Discrimination to Harmonization", (2007) 6.2 *Chinese Jo Int'l L* 269. Also see Margareta Djordjevic, "Domestic Regulation and Free Trade in Services — A Balancing Act", (2002) 29 *Legal Issues of Economic Integration* 305.

[4] In literal terms, all regulations at the national level affecting trade in services are "domestic regulations".

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Effective regulation or re-regulation can often be a pre-condition for liberalisation in order to produce efficiency gains without compromising on the quality of services and other legitimate policy objectives. These include measures to overcome market failures such as monopolies in network-based services, externalities, asymmetric information in knowledge and intermediation-based services, as well as measures to ensure universal and equitable access and consumer protection. But these legitimate objectives may distort competition and have trade-restricting effects. Regulation could also be used for overt or disguised protectionism.

During the Uruguay Round negotiations, GATS negotiators were conscious of the tensions between liberalising trade in services and ensuring Members' regulatory autonomy. The challenge for these negotiators was not to eliminate legitimate regulation, but rather how such regulation could be made less trade burdensome or restrictive. The GATS preamble reveals the negotiators' balancing exercise. On the one hand, the GATS aims to achieve progressively higher levels of liberalisation of trade in services:

> *Desiring* the early achievement of progressively higher levels of liberalisation of trade in services through successive rounds of multilateral negotiations aimed at promoting the interests of all participants on a mutually advantageous basis and at securing an overall balance of rights and obligations, while giving due respect to national policy objectives…

On the other hand, the GATS recognises the right of Members to regulate in order to meet "national policy objectives":

> *Recognising* the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right…

Jan Wouters and Dominic Coppens have characterised the notion of Members' right to regulate as a confirmation of the international law principle of a State's sovereignty in the conduct of its national policies within its own territory.[5]

[5] Jan Wouters & Dominic Coppens, "Domestic Regulation within the Framework of GATS", (2006) K.U. Leuven Faculty of Law Working Paper No. 9.

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The GATS also seeks to cater to the interests of developing countries. Indeed, the GATS is generally accepted to be the most development friendly among the WTO Agreements.[6] The GATS Preamble describes its development objectives as follows:

> *Desiring* to facilitate the increasing participation of developing countries in trade in services and the expansion of their services exports including, inter alia, through the strengthening of their domestic services capacity and its efficiency and competitiveness…

The development dimension has obtained greater currency, including in the Article VI:4 negotiations, with the launch of the Doha Development Agenda, in Doha, Qatar, in November 2001.

III. GATS Article VI (Domestic Regulation)

During the Uruguay Round, services negotiators recognised that market access and national treatment commitments might not be sufficient to facilitate effective access for services and services suppliers in foreign markets. Domestic regulation such as those mandating multiple licensing requirements may be burdensome and have trade restrictive effects, hence frustrating the benefits of services liberalisation. Disciplines on domestic regulation would thus be necessary to ensure that these regulations are not unduly burdensome or trade restrictive. Aaditya Mattoo and Pierre Sauve have aptly characterised disciplines on domestic regulations to be the "third complementary dimension of a three-pronged approach to effective access to services markets".[7] GATS negotiating history indicates that the negotiators decided to complete the work on market access and national treatment before dealing with domestic regulation.[8] They managed to agree on a set

[6] OECD, "Special and Differential Treatment Under the GATS", TD/TC/WP(2005) 24/FINAL, 26 January 2006, 9; Patrick Messerlin, "Enlarging The Vision for Trade Policy Space: Special and Differentiated Treatment and Infant Industry Issues", (2006) 29 *World Economy* 1404.

[7] Aaditya Mattoo & Pierre Sauve, "Domestic Regulation and Trade in Services: Key Issues", in A. Mattoo & P. Sauve (eds.), *Domestic Regulation and Services Trade Liberalisation* (Washington/Oxford: World Bank/OUP, 2003), 3.

[8] See GATT, "Note of the Meeting of 10–25 July 1991", 28 August 1991, MTN. GNS/44.

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of legally binding provisions, largely of a procedural nature, in GATS Articles VI:1, 2, 3 and 6. However, having not been able to complete the work on domestic regulation, they agreed on a set of interim disciplines in Article VI:5 (discussed in Section VIII below) and to continue negotiations as part of the unfinished business/built-in agenda of the Uruguay Round.

Even though the domain of Article VI is one of domestic regulation, Article VI:4 mandates negotiations for the development of multilateral disciplines for only the following five domestic regulatory measures, i.e. licensing requirements, licensing procedures, qualification requirements, qualification procedures and technical standards (hereinafter referred to as the DR measures, unless otherwise specified). These disciplines were intended to ensure that domestic regulations are:

(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; and
(c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

IV. An Overview of Obligations Arising From GATS Articles VI:1, 2, 3 & 6[9]

Article VI:1 calls for the "reasonable, objective and impartial" administration of all "measures of general application". This serves to prevent arbitrary and biased administration of domestic regulations, hence contributing to the consistency and predictability of administrative decisions and practices. Article VI:1 is however subject to the following qualifications:

- It applies only to "measures of general application", and not measures addressing specific situations.[10]

[9] This section draws from Panagiotis Delimatsis, "Due Process and 'Good' Regulation Embedded in the GATS — Disciplining Regulatory Behaviour in Services through Article VI of the GATS", (2007) 10 *Jo Int'l Econ L* 13.

[10] *Id.* According to Delimatsis, "measures of general application are measures which apply to an unidentified number of cases. They are typically of an abstract nature. In most legal systems, general laws and regulations fall within this definition. Administrative decisions and decisions of courts or tribunals are therefore generally not covered by Article VI:1".

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- It applies only to the administration of a measure and not to its substantive content.
- It applies only to sectors where commitments have been made.

With a view to preventing arbitrary decision-making in any sector, Article VI:2(a) requires Members to maintain or institute "practicable judicial, arbitral or administrative tribunals or procedures" for the "prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services". Unlike Article VI:1, Article VI:2 is a general obligation applying to all measures in all sectors irrespective of whether specific commitments have been made for the sectors. Members must thus establish and maintain review procedures for administrative decisions across all sectors.

Article VI:2(a) however contains the following caveats:

- Article VI:2(a) does not stipulate a general obligation to review administrative decisions. Administrative decisions are to be reviewed only at the request of the affected service supplier.
- While the affected service supplier has the right to request review, this could be based on the service supplier meeting certain conditions. For example, the affected service supplier could be required to submit the request in written form, within a certain timeframe, only upon the identification of the contested administrative decision, and to state the grounds for the challenge and provide evidence as to how the services supplier is affected.
- Apart from requiring that the remedy must be "appropriate", Article VI:2(a) does not specify the type of remedy which must be granted. For example, remedies could take the form of restitution[11] or compensation.[12]
- Article VI:2 does not seem to stipulate specific requirements regarding the institutional structure of the review mechanism. It can therefore be argued that Members can use the mechanism that best suits their administrative or constitutional framework.
- In addition, Article VI:2(b) exempt Members from the requirement in Article VI:2(a) where the establishment of a review mechanism is

[11] Restitution would entail the removal of the contested measure whenever appropriate.

[12] Compensation may be applicable particularly in a situation where the service supplier suffers economic loss.

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"inconsistent with the constitutional structure or the nature of its legal system".

Article VI:3 then goes on to recognise that burdensome application procedures can frustrate the ability of services suppliers to provide their services. It also recognises that Members may need adequate time to thoroughly process applications. With a view to balancing these competing objectives, Article VI:3 stipulates that:

- Members must, within a reasonable period of time after the submission of an application (which is considered complete under domestic laws and regulations), inform the applicant of the decision concerning the application.
- At the request of the applicant, regulating authorities shall provide, without undue delay, information concerning the status of the application.

These obligations are also limited to sectors where specific commitments have been made.

In recognition of the pervasiveness of regulation in the professional services sector, and to ensure that the value of market access commitments in professional services is not undermined by the lack of verification procedures, Article VI:6 requires Members to provide adequate procedures to verify the competence of foreign professionals. This is however subject to the following qualifications:

- It only applies to professional services sectors where specific commitments have been made.
- Implicit in Article VI:6 is the understanding that regulatory authorities have the right to verify the competence of professional service suppliers because market access is only granted to service suppliers which are sufficiently qualified.

We can now consider the negotiations held pursuant to the mandate in Article VI:4 and the interim disciplines in Article VI:5. But before we proceed further, the reader would have observed that the terms in Article VI:1, 2, 3 and 6 ("reasonable, objective and impartial", "administrative procedures", "undue delay", "adequate procedures" and "reasonable period of time") are rather broad and general. They are not defined in the GATS. Unless Members undertake to define these terms (which they have not

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attempted, to date, to do) the meaning of these terms would be interpreted by Panels and the Appellate Body in the context of GATS disputes, on a *case-by-case* basis, on the facts of each individual situation. In interpreting these terms, Panels and the Appellate Body could be guided by relevant GATT jurisprudence. For example, in interpreting the terms "reasonable, objective and impartial", Panels and the Appellate Body could draw from rulings on GATT Article X:3.[13]

V. Kicking Off the Article VI:4 Mandate: Disciplines on Domestic Regulation in the Accountancy Sector

Regulation is especially pervasive in the case of professional services. Accordingly, as a first step in implementing the mandate in Article VI:4, at the 1994 Ministerial Meeting in Marrakesh, Ministers adopted the Decision on Professional Services and established the Working Party on Professional Services (WPPS).[14] Following over three years of negotiations between 1995 and 1998, Members agreed on:

(a) Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector.[15]
(b) Disciplines on Domestic Regulations in the Accountancy Sector.[16]

While the Guidelines and the Disciplines are applicable only to regulations governing the accountancy sector, the general nature of many of their provisions has the potential for broader application to other professions and to other sectors. A key aspect of the accountancy disciplines is the inclusion of the "necessity test". It provides that Members ensure that licensing requirements, licensing procedures, qualification requirements, qualification

[13] *EC — Selected Customs Matters*, Appellate Body Report, WT/DS315/AB/R. See also Panagiotis Delimatsis, "Due Process", *op. cit.*

[14] WTO, "Decision on Professional Services", S/L/3, 4 April 1995.

[15] WTO, "Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector", S/L/38, 27 May 1997. These guidelines do not have legal status. Their objective is to provide guidance for the negotiation of mutual recognition agreements in the accountancy sector.

[16] While Members adopted these disciplines in December 1998, they however decided to suspend their application until the conclusion of the new round of services negotiations which began in 2000.

See WTO, "Decision on Disciplines Relating to the Accountancy Sector", S/L/63, 15 December 1998.

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procedures and technical standards are not "more trade restrictive than necessary to fulfill a legitimate objective". The accountancy disciplines also include a non-exhaustive, illustrative list of legitimate objectives which includes quality of the service, consumer protection, professional competence and integrity of the profession.

Though included in the accountancy disciplines, the "necessity test" has become a controversial issue in the broader Article VI:4 negotiations. A more detailed assessment of the "necessity test" is contained in Section VIII below. Other provisions are designed to improve the transparency of the regulatory regime, provide due process in the processing of applications and ensure fair, transparent and impartial treatment of license applicants. The accountancy disciplines apply to both natural and legal persons and include, for example, the need to give consideration to least trade-restrictive alternatives to measures affecting the legal reach of firms (i.e. residency requirement for agents for services), and to allow the use of international firm names.[17]

VI. GATS Article VI:4 Negotiations

Having completed the accountancy disciplines, Members embarked on negotiations to develop disciplines on domestic regulations applicable to all sectors. The WPDR was established in April 1999 as a successor to the earlier WPPS.[18] The WPDR has two specific tasks:

(a) to develop generally applicable disciplines for the five regulatory measures, and
(b) to develop disciplines, as appropriate, for individual sectors or groups thereof.

The Guidelines and Procedures for the Services Negotiations adopted in 2001[19] drew the link between the negotiations on domestic regulation and GATS Article XIX relating to specific commitments. It mandated that

[17] For more details on the Accountancy Disciplines, see Claude Trolliet & John Hegarty, "Regulatory Reform and Trade Liberalization in Accountancy Services", in Mattoo & Sauve (eds.), *op. cit.*

[18] WTO, "Decision on Domestic Regulation", S/L/70, 28 April 1999.

[19] WTO, "Guidelines and Procedures for the Negotiations on Trade in Services", S/L/93, 29 March 2001.

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Members aim to conclude the negotiations on domestic regulation prior to the conclusion of the negotiations on specific commitments. The Doha Development Agenda, adopted by Ministers in November 2001,[20] confirmed the Guidelines and Procedures, hence incorporating the Article VI:4 negotiations into the single undertaking of the Doha Round.

The WPDR spent a number of years in technical and fact-finding mode,[21] until Members began submitting textual proposals in 2003. By the 2005 Hong Kong Ministerial Conference, over 18 textual proposals from a broad cross-section of members and regional groupings had been tabled.[22] I assumed the Chairmanship of the WPDR in June 2005. The run-up to the Hong Kong Ministerial Conference saw an intensification of the Article VI:4 negotiations. At the request of Members, I circulated an "Illustrative List of Elements for Article VI:4 Disciplines".[23] The Hong Kong Ministerial Declaration states that Article VI:4 negotiations would be guided by these illustrative elements. The Declaration set out specific timeframes for the various negotiating issues of the DDA. For services, further to stipulating a timeframe for the submission of revised market access offers, the Declaration also called on WTO Members to conclude the negotiations on domestic regulation before the end of the "current round of negotiations" and "develop text for adoption" by the end of the DDA.

With a view to fulfilling the Hong Kong mandate, I circulated a consolidation of members' negotiating proposals in June 2006.[24] Progress on the domestic regulation negotiations was hindered by the general

[20] WTO, Ministerial Conference, 4th Session, Doha, 9–14 Nov 2001, Ministerial Declaration, WT/MIN(01)/DEC/1, 20 November 2001, para 15.

[21] Among others, the WPDR spent a considerable amount of time discussing the type of measures to be addressed by future disciplines under Article VI:4. See, for example, WTO, "Examples of Measures to be Addressed by Disciplines under GATS Article VI:4", Job(02)/20/Rev.10, 22 Sep 2003.

[22] See Attachment II, WTO, "Report of the Chairman of the Working Party on Domestic Regulation to the Special Session of the Council for Trade in Services", JOB(05)/280, 15 November 2005.

[23] See Attachment I, WTO, "Report of the Chairman of the Working Party on Domestic Regulation to the Special Session of the Council for Trade in Services", JOB(05)/280, 15 November 2005.

[24] WTO, "Disciplines on Domestic Regulations Pursuant to GATS Article VI:4 Consolidated Working Paper", JOB (06)/225, 12 July 2006.

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suspension of the overall DDA negotiations in July 2006 on account of the impasse on agriculture. With the suspension of the DDA, negotiations on Article VI:4 went into low gear in the second half of 2006. Notwithstanding this, I continued extensive low-key informal technical consultations. As a result of these consultations, I obtained Members' agreement to circulate the first draft of the negotiating text in April 2007.[25] The elements in the draft text broadly represented my estimation of what the general traffic could take in the WPDR. The text was guided by the imperative of finding the right balance in achieving trade liberalisation without unduly hampering Members' right to regulate. Not surprisingly, no Member was pleased with the text. It did not fully meet the demands of any Member.

Since April 2007, Members have had extensive negotiations on this text. At Members' request, I circulated two further revisions in January 2008[26] and March 2009.[27] Guided by comments and drafting suggestions received during the negotiating sessions, I attempted to close gaps and suggest compromises on a number of provisions where I felt progress could be made. The current (March 2009) text (hereinafter referred to as "the March text") is an attempt to cater to the various and often competing interests and concerns of the WTO membership. The March text is certainly not perfect. But from my vantage point as someone who has overseen the negotiating process over the past five years, the text is the best approximation of what the general traffic can take in the WPDR. It attempts a delicate balance between facilitating trade in services while respecting both the Members' right to regulate and the development dimension. The following provisions from the text demonstrates how a balance between these competing objectives has been attempted.

A. *Facilitating Trade in Services*

The March text does not seek to discipline the substance of the regulations. The purpose of the disciplines is to reduce and eliminate the trade

[25] WTO, "Draft Disciplines on Domestic Regulation Pursuant to GATS Article VI:4", Room Document, 18 April 2007.
[26] WTO, "Draft Disciplines on Domestic Regulation Pursuant to GATS Article VI:4", Revision, Room Document, 22 January 2008.
[27] WTO, "Draft Disciplines on Domestic Regulation Pursuant to GATS Article VI:4", Second Revision, Room Document, 20 March 2009.

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restrictiveness of domestic regulations. In this connection, the Preamble adds that the "purpose of the disciplines is to facilitate trade in services by ensuring that measures relating to Licensing Requirements, Licensing Procedures, Qualification Requirements, Qualification Procedures and Technical Standards are based on *objective* and *transparent criteria*, such as *competency* and the *ability to supply* the service, and do not constitute *disguised restrictions on trade in services*". Paragraph 11 of the text adds that "measures relating to Licensing Requirements, Licensing Procedures, Qualification Requirements, Qualification Procedures and Technical Standards shall be *pre-established*, based on *objective* and *transparent* criteria and *relevant* to the supply of the service to which they apply". The text would subject domestic regulations to the following tests:

- Regulations should be pre-established;
- They should be based on objective criteria;
- They should be based on transparent criteria;
- They should be based on the competency of the service supplier;
- They should be based on the ability of the service supplier;
- They should be relevant to the supply of the service;
- They should not be disguised restrictions to the trade in services.

In addition, licensing procedures and qualification procedures are further subject to a "*simplicity test*". Paragraphs 17 and 31 of the text states that licensing procedures and qualification procedures shall be as "*simple as possible* and should *not in themselves constitute a restriction* on the supply of services". It is clear that the all the above-mentioned disciplines would help to *reduce* trade restrictiveness, even if they do not *eliminate* the restrictiveness of domestic regulations. While these disciplines are useful, they are not without interpretational difficulties. For example, what is meant by the requirement that licensing and qualification procedures be "as simple as possible"? Literally, this can be understood to require Members to strive for a minimal level of complexity with regard to these procedures. For example, if requirements could be verified in one or two steps, then a Member should not require five or six steps instead. Moreover, who is to judge whether a particular regulation is "objective"? What is "objective" to one Member may not be so for another Member. Panels and the Appellate Body may be called on to interpret such terms in the context of future disputes.

It should be mentioned in passing that unlike licensing and qualification requirements and procedures, the draft disciplines on technical

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standards are few and less onerous. Despite the efforts of two Members, there was a general view that there was not much by way of standards in services and that this issue was not well understood, least of all by the regulators. As such, as Chairman, I decided that Members accept these few disciplines and revisit this issue in the future when there is a better understanding of standards in services.

B. *Respecting Members' Right to Regulate*

The text attempts to balance the substantive obligations highlighted above, through the following elements to ensure that Members' right to regulate are not unduly impaired:

(i) Like the GATS, the text contains language that specifically calls for respect for Members' right to regulate and to introduce new regulations, in order to meet national policy objectives and ensure the provision of universal service.
(ii) It further states that the disciplines should not be construed to prescribe or impose particular regulatory approaches or particular regulatory provisions in domestic regulations.
(iii) Unlike GATS Articles VI:4 and VI:5, the text does not have a "necessity test", in response to concerns by a large majority of the Membership that this test would unduly impinge on regulatory autonomy. However, with a view to balancing the opposition of the majority and the insistence of a few in relation to having a "necessity test", the text presents a potential middle-ground test relating to "disguised restrictions to trade in services". More will be said about this in Section VII below.
(iv) The text applies only in sectors where specific commitments have been undertaken.
(v) The proposed disciplines do not apply to measures to the extent that they constitute limitations subject to scheduling under Article XVI or XVII.

C. *Development Aspects of Disciplines on Domestic Regulation*

The GATS is generally recognised to be the most development friendly among the WTO Agreements. In this connection, and taking into account the development dimension of the GATS, the March text seeks

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to achieve the development aspect of the GATS through the following provisions:

(i) The text recognises the different economic development levels of Members by highlighting:

- Asymmetries existing with respect to the degree of development of services regulation in different Member economies;
- The difficulties which may be faced by individual developing Members in implementing the disciplines on domestic regulation, particularly difficulties relating to level of development, size of the economy, and regulatory and institutional capacity; and
- The difficulties which may be faced by service suppliers, particularly those of developing Members, in complying with measures of other Members.

(ii) Developing Members are provided with a transition period to apply the disciplines.

(iii) Further to the transitional time period envisioned for developing Members in (ii), the Council for Trade in Services (CTS) may extend the time period for them to implement these disciplines, upon request by individual Members. In considering the duration of the transition period, the CTS would also consider the particular Member's level of development, the size of its economy, and its regulatory and institutional capacity. This is an innovation over the current practice of the WTO and GATS, which contained fixed transitional timeframes. The WTO Agreements generally contain five-year and eight-year transition periods for developing and least developed Members respectively.

(iv) There are also provisions relating to technical assistance and capacity building. These provisions require developed countries and, where possible, other Members to provide technical assistance to developing and least developed Members, upon their request and on mutually agreed terms and conditions. Among others, the purpose of these provisions is to develop and strengthen the developing and least developed Members' institutional and regulatory capacities to regulate the supply of services and to implement disciplines contained in the text.

(v) LDCs are not required to apply these disciplines (they are nonetheless encouraged to apply these disciplines, to the extent compatible

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with their special economic situation and their development, trade and financial needs).

VII. Necessity Test:[28] "Trade Liberaliser" or "Mother of All Interventions"?[29]

The "necessity test" has been the most controversial issue in the Article VI:4 negotiations. Though the "necessity test" appears in a number of WTO Agreements,[30] many Members, both developed and developing, have opposed the inclusion of this test in future disciplines. They were concerned that the presence of the "necessity test" would create regulatory uncertainty, as regulators would not be certain whether a particular domestic regulation intended to achieve a legitimate objective would be deemed to be more restrictive or burdensome than necessary by a future Panel and/or the Appellate Body. This concern has been reinforced by the ruling in *US-Gambling*[31] which, according to a number of commentators, has had the effect of expanding the reach of the GATS; blurring the line between market access and domestic regulation.[32] In short, the "necessity test" could enable Panels or the Appellate Body to second guess and rule

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[28] This section draws from WTO, "'Necessity Tests' in the WTO", Note by the Secretariat, S/WPDR/W/27, 2 December 2003.

[29] "Necessity Test is Mother of GATS Intervention", *Observer*, 15 April 2001.

[30] The "necessity test" is not peculiar to the Article VI:4 negotiations. It is also found in other WTO Agreements such as the exceptions in GATT Article XX and GATS Article XIV; the Telecoms Annex; Agreement on Sanitary and Phytosanitary Measures, Articles 2.2 & 2.6; Agreement on Trade-Related Intellectual Property Rights, Articles 3.2, 8.1 & 27.2; and Agreement on Government Procurement, Article 23.2.

[31] *US — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Panel Report, WT/DS285/R; *US — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Appellate Body Report, WT/DS285/AB/R.

[32] There are numerous commentaries written on the *US-Gambling* case. See, for example, Pangiotis Delimatsis, "Don't Gamble with GATS — The Interaction between Articles VI, XVI, XVII and XVIII GATS in the Light of *US-Gambling* Case", (2006) 40 *Jo World Trade* 1059; Donald H. Regan, "A Gambling Paradox: Why an Origin-Neutral 'Zero-Quota' is not a Quota Under GATS Article XVI", (2007) 41 *Jo World Trade* 1297; Nancy J. King & Kishani Kalupahana, "Choosing Between Liberalisation and Regulatory Autonomy under GATS: Implications of *US-Gambling* for Trade in Cross-Border E-Services", (2007) 40 *Vanderbilt Jo Transnat'l L* 1189.

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against measures that Members deem necessary to achieve their legitimate objectives.

Other Members are keen to have this test. In their view, such a test would ensure a more trade liberalising outcome. They have argued that this test is already mandated in Article VI:4 and should therefore be included in future disciplines. In addition, such future disciplines should not be approached from the perspective of regulators and the need merely to safeguard their regulatory autonomy. While they accord importance to regulatory concerns, they have also highlighted that the *raison d'etre* of the WTO and the GATS is to liberalise trade. As such, future disciplines should facilitate the ability of service suppliers to effectively access and supply services in foreign markets. In addition, a number of Members have highlighted that the inclusion of a "necessity test" in goods agreements such as the Agreements on Technical Barriers to Trade (TBT Agreement) and Sanitary and Phytosanitary Measures (SPS Agreement) had enabled the provisions in these agreements to be couched in more general terms. If the "necessity test" is not included in the future disciplines on domestic regulation, this has to be made up by having more detailed and prescriptive disciplines.

There is substantial jurisprudence on the "necessity test", which has evolved quite considerably over the past 20 years, which does not help to assuage the concerns of Members who are opposed to this test. In general, when adjudicating whether or not an otherwise WTO-inconsistent (say, GATT-inconsistent) measure can be saved under, for example, Article XX(b), panels must determine whether or not the measure is "necessary" to fulfil the objectives listed under the relevant provision. In GATT disputes during the late 1980s and early 1990s (e.g. *US-Section 337*[33] and *Thailand-Cigarettes*[34]), panels established a requirement that a measure has to be the "least trade restrictive" measure in order to decide whether a measure is "necessary" under GATT Articles XX(b) and (d). For example, in *Thailand-Cigarettes*, the Panel stated that "the import restrictions imposed by Thailand could be considered necessary in terms of Article XX(b) only if there were no alternative measure consistent with GATT, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives.

The jurisprudence relating to the necessity test has however evolved over the years from a "least trade restrictive" test to a "less trade restrictive"

[33] *US — Section 337 of the Tariff Act of 1930*, BISD 36S/345-402, para 5.26.

[34] *Thailand — Restrictions on Importation of and Internal Taxes on Cigarettes*, BISD 37S/200.

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test. For instance, in *Korea-Beef*,[35] the Appellate Body first stated that for a measure to be necessary, the measure does not need to be "indispensable" or "inevitable". The Appellate Body created a three-factor balancing test to decide whether or not a measure is necessary: (i) the contribution made by the measure to the legitimate objective; (ii) the importance of the common interests or values protected; and (iii) the impact of the measures on trade. The Appellate Body indicated that the process of weighing and balancing were part of a process of determining whether an alternative WTO-consistent or less inconsistent measure was reasonably available. In this connection, the WTO's jurisprudence also points to the importance of determining the importance of legitimate objectives to be protected. In *EC-Asbestos*,[36] the Appellate Body stated that the preservation of human life and health was both vital and important to the highest degree, hence making it easier to meet the requirements of Article XX(b).

The *Korea-Beef* weighing and balancing test appears to have been further loosened in *Brazil-Tyres*[37] with the articulation of a "material contribution" test. The Appellate Body stated that a trade ban for health or environmental reasons cannot be "by design as trade-restrictive", nor is the word "necessary" limited to that which is 'indispensable'. A measure will be sufficiently linked to an objective if it is "apt to make a material contribution to the achievement of its objective".[38] While the jurisprudence seems to be evolving more in the direction of environmental, health and regulatory considerations, many Members have highlighted that as there is no doctrine of precedent or strict *stare decisis* in the WTO, it should not be taken for granted that jurisprudence will evolve in this direction. Moreover, as highlighted above, the interpretation of Article XVI (market access) in *US-Gambling* has made many Members adopt a more cautious approach in the negotiations. It has made the negotiations more difficult.

To placate and balance the demands of those who have insisted on the deletion of the necessity test and others who want to have this test, I came up

[35] *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Appellate Body Report, WT/DS/161,169/AB/R, para 160.

[36] *EC — Measures Affecting Asbestos and Asbestos-Containing Products*, Appellate Body Report WT/DS/135/AB/R, para 172.

[37] *Brazil — Measures Affecting Imports of Retreaded Tyres*, Appellate Body Report, WT/DS/332/AB/R.

[38] *Brazil — Measures Affecting Imports of Retreaded Tyres*, Appellate Body report, WT/DS/332/AB/R, para 161.

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with a middle-ground solution. The text contains a looser test relating to "disguised restrictions to trade in services".[39] Though this term has been presented as a middle-ground solution, WTO jurisprudence has not, to date, provided full clarity to this term. It raises a number of interpretational issues.

VIII. Interim Disciplines on Domestic Regulation in Article VI:5

Article VI:5 states that until the entry into force of the disciplines developed pursuant to the Article VI:4 negotiations and in sectors in which a Member has undertaken specific commitments, a Member shall not apply domestic regulations that nullify or impair the specific commitments in a manner which:

(a) does not comply with the criteria in Article VI:4; and
(b) could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made.

This begs the question: When the Article VI:4 negotiations are concluded, what would happen to Article VI:5? Given the interim nature of this provision, one would expect it to "disappear". If so, are there any elements in Article VI:5 that Members need to take into account in the Article VI:4 negotiations? Should these elements ultimately find their way into the Article VI:4 disciplines?

As Members have focused on developing disciplines pursuant to the Article VI:4 negotiations, there has not been much discussion on Article VI:5. Nevertheless, there are perhaps three elements in Article VI:5 that Members may need to consider as they continue work on Article VI:4 negotiations. The first element is found in Article VI:5(a)(ii). When read in conjunction with Article V:5(a), Article VI:5(a)(ii) refers to "domestic regulations applied in a manner which could not reasonably have been expected of a Member at the time that the commitments were made". What this could mean is that Article VI:5(a)(ii) applies only to domestic regulations which are introduced after the time that the specific commitments in those sectors

[39] WTO, WPDR-Chairman Consultations, "Disguised Restrictions on Trade in Services", 5 November 2007. See also Timothy M. Reif & Julie Eckert, "Courage You Can't Understand: How to Achieve the Right Balance Between Shaping and Policing Commerce in Disputes Before the World Trade Organisation", (2004) 42 *Columbia Jo Transnat'l L* 657.

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were made (i.e. new domestic regulations). In other words, a Member is expected to ensure that new domestic regulations that nullify or impair specific commitments shall not be applied in a manner that could not have been reasonably expected of that Member.

As for domestic regulations existing at the time that the specific commitments were made, it is likely that these measures could be considered to be applied in a manner reasonably expected of the Member since they already exist and are in effect. Therefore, Article VI:5(a)(ii) appears to have the effect of "grandfathering"[40] domestic regulations applied in a manner which could have been "reasonably expected" or which existed at the time that the commitments were undertaken.

The second element to be considered is the notion of "nullification or impairment" which is reflected in Article VI:5(a). When examining the notion of "nullification or impairment", Article 3:8 of the DSU has a bearing on this issue. Article 3:8 states that where a provision of a WTO Agreement is violated, "nullification or impairment" is presumed. Article 3:8 of the DSU thus places the burden of rebutting the existence of "nullification or impairment" on the respondent.

However, under Article VI:5, the burden of proof appears to be on the complainant. The manner in which Article VI:5 is drafted suggests that "nullification or impairment" should first be established or be present before violation can be confirmed. If so, this means that the onus may fall on the complaining party to show the existence of "nullification or impairment".

IX. Conclusion

The discussion above has demonstrated the balancing act attempted in relation to Articles 1, 2, 3 and 6 discusses the text which has been circulated pursuant to the ongoing negotiations under Article VI:4. While no one is satisfied with everything that is in the text, Members have agreed to use it as a basis for the negotiations. At one level, the general sense is that the text is broadly in the ballpark. My efforts until the time I relinquished the Chairmanship of the WPDR in March 2009 was devoted to fine-tuning the text. The second revision of the text that I circulated in March 2009 was the outcome of this fine-tuning exercise.

[40] It is qualified that the term "grandfathering" is used in this communication to facilitate an easy understanding of the issue. It is not intended to have any legal connotation.

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Whether or not Members will accept the current text in the foreseeable future is dependent on two factors:

(i) As the Article VI:4 negotiations are now part of the DDA's single undertaking, its outcome is dependent on the outcome of the overall DDA negotiations.
(ii) While Members have engaged with the text, the onus is on all of them to decide whether the text achieves the objectives of trade liberalisation, right to regulate, and development in a balanced manner.

Besides the contents of future disciplines, Members also have to agree on the legal form that future disciplines should take. As Chairman, I proposed that future disciplines could take the form of an Annex to the GATS. This means that the relevant GATS terms, definitions and provisions would apply automatically to these disciplines. Further to this, also proposed the following for Members' consideration:

(i) Establishment of a Committee on Domestic Regulation to oversee: (a) the implementation of these disciplines; (b) the operation of Article VI; and (c) any further work (e.g. sectoral disciplines) that Members may decide to undertake under Article VI:4.
(ii) The Council for Trade in Services shall, upon request from any Member, review the operation of these disciplines and make recommendations as appropriate.

Going forward, as I impressed upon Members, the March text is not only relevant for new commitments that are expected from the DDA negotiations. They are also needed to facilitate effective access with respect to Members' existing commitments. With the conclusion of the DDA proving elusive (at least until 2011), Members should explore applying the March text on an interim basis until the conclusion of the DDA. The experience gained in applying these disciplines could facilitate efforts to further fine-tune the disciplines, as necessary.

To conclude, my WTO stint, particularly the five years that I served as Chairman of the WPDR has been a fascinating learning experience of how the GATT/WTO system has achieved balance between its many competing objectives.