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BRIEFING MEMO

TO: Kay Wilkie, Chair, Intergovernmental Policy Advisory Committee (IGPAC)
FROM: Robert Stumberg
DATE: May 28, 2007 – *Draft 7 – for circulation – comments requested*
RE: WPDR chairman's third draft on domestic regulation, 18 April 2007

INTRODUCTION

Negotiations at the World Trade Organization (WTO) appear to be on the verge of endorsing new "disciplines" on domestic regulation that would apply at all levels of government – federal, state and local. The negotiations are authorized by the General Agreement on Trade in Services (GATS).[1] The chairman of the negotiations recently circulated his third draft of proposed disciplines in an effort to broker a compromise.[2] This third draft came two weeks after the United States posted its position on the second draft,[3] which the chairman circulated in February.[4]

The quickening pace of exchanges shows a serious commitment by the WTO nations to reach closure on domestic regulation. In fact, this may be the penultimate draft, the last real opportunity for reflection and comment. By what it deletes and what it keeps, the chairman's third draft (hereafter, third draft) reflects compromise between negotiators that want to safeguard regulatory authority versus those that want to constrain regulatory authority. For example:

- *Safeguarding regulatory authority.* The third draft still constrains regulatory authority, which is the purpose of the disciplines. However, the most explicit threat to regulatory authority – the necessity test – is gone. This would have required governments to use the approach that is least burdensome to service suppliers. Gone also are disciplines on equivalency, verification of qualification requirements, and expanded notification of technical standards to the WTO.

- *Constraining regulatory authority.* In place of "necessity," the third draft substitutes a new stated purpose of avoiding "disguised barriers to trade" and narrows the scope of the right to

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

[2] Working Party on Domestic Regulation, Draft Disciplines on Domestic Regulation Pursuant to GATS Article VI:4, Informal Note by the Chairman, 18 April 2007 (Room Document), available at http://www.tradeobservatory.org/library.cfm?refID=98264 (viewed May 10, 2007). The chairman of the WPDR is Peter Govindasamy of Singapore.

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

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

regulate at subnational levels of government. These are interpretive guidelines that could influence interpretation of the 30 proposed substantive and procedural disciplines. The most prominent substantive disciplines require regulations to be pre-established, based on objective criteria and relevant to the service. The pre-established test could affect the law of when development rights or property rights vest, meaning at what point in time regulatory changes are applicable. The objectivity test could affect delegation of power to regulatory agencies, especially if the objectivity test aims to rein in subjective judgment of what is in the public interest. The relevance test could exclude criteria based on environmental, historical or aesthetic impacts that are external to the service. Procedural disciplines include a simplicity test, a one-authority rule, and limits on licensing fees, to name a few.

This memo identifies these and other proposals in order to invite a close reading of disciplines that apply directly to state and local policy makers. The memo provides: (1) introductory background on the negotiations (retained from our March memo); (2) comments on the chairman's third draft, and (3) the complete third draft with shading to highlight key words and phrases.

With the third draft framed as a compromise, U.S. negotiators must decide whether to commit the U.S. federal system to disciplines that the U.S. Constitution does not impose and that Congress has never considered imposing on cities and states. The commentary below is designed to help state and local officials consider their response questions that set the agenda for state-federal consultation:

- Do the constraints on domestic regulation merit further state-federal consultation in terms of examples or importance?
- Are there options for clarifying ambiguous terms that might lead to confusion or conflict?
- Does the third draft reflect an appropriate balance between the nations that seek the least burdensome regulations versus nations that seek to safeguard policy space for domestic regulation?

BACKGROUND ON GATS NEGOTIATIONS ON DOMESTIC REGULATION

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

In addition, GATS authorizes negotiations on new "disciplines" on domestic regulation. If adopted, these would cover qualification requirements (*e.g.*, for professional licenses), licensing requirements and technical standards (for operating or providing a service). Any new disciplines would constrain domestic regulations, even if the regulations do not discriminate against foreign firms.[5]

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

The Chairman's third draft would apply to regulation of services within sectors where WTO nations have made their sector commitments.[6] For example, the United States has made or offered to make commitments[7] that cover regulation of –

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

The negotiations take place within the Working Party on Domestic Regulation (WPDR), which reports to the WTO's Council on Trade in Services. The chairman of the WPDR is Peter Govindasamy of Singapore. Now on his third draft, the chairman seeks to broker a compromise among countries with divergent views, even on the question of whether new disciplines are necessary. One group of countries demanded "ambitious" disciplines; these include Australia, Hong Kong, New Zealand, Switzerland, and others. Their most ambitious proposal is that domestic regulations must be "necessary" – that is, the approach that is least burdensome on trade – which would conflict with most compromise or middle-ground legislation. Another group including Brazil, the Philippines, the African group and others said that the proposed disciplines would undermine legitimate regulatory authority.[8] The United States supported Brazil and proposed that new disciplines should be limited to transparency only.[9]

COMMENTS ON THE CHAIRMAN'S THIRD DRAFT

1. Statement of purpose

a. ***Necessity – deleted.*** The third draft deletes the necessity test, which is an accomplishment for negotiators who viewed the test as a threat to regulatory authority.[10] Briefly, this change is

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[6] Chairman's third draft, ¶ 10.

[7] *See* United States, *Revised Services Offer*, Council for Trade in Services – Special Session, TN/S/O/USA/Rev.1, 2005, available at http://www.ustr.gov/assets/Trade_Sectors/Services/2005_Revised_US_Services_Offer/asset_upload_file77_7760.pdf, viewed February 23, 2007.

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

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

[10] The chairman's second draft included the necessity test in a section titled "Introductory Language," which implied that the purpose of disciplines is for " … Members to ensure that measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards … are no more burdensome than

important on three levels. First, if it had been a discipline, the necessity test would have required regulations to take the least burdensome approach.[11] Second, the test was stated as an obligation to "ensure" that domestic regulations are necessary, which connoted a duty on the part of a national government to enforce new disciplines over subnational governments. Third, the test was framed as an overriding purpose of all disciplines, which could have influenced interpretation of several provisions so that dispute panels would read them as operational necessity tests.[12]

b. ***New purposes – to avoid disguised restrictions.*** In place of "necessity," the third draft states that the purpose of disciplines is "to facilitate trade in services by ensuring that measures relating to [domestic regulation] are based on objective and transparent criteria, such as competence and the ability to supply the service, and do not constitute disguised restrictions on trade in services."[13] (emphasis added) Objectivity is also an operational discipline, so we comment on it under item 2 below.

The purpose of avoiding disguised restrictions on trade is modeled on language in several articles of GATS: recognition of qualifications or licenses,[14] conditions for invoking a general exception,[15] and conditions for invoking exceptions to the Telecom Annex.[16] Other WTO agreements have similar provisions, most notably the Agreement on Sanitary and Phytosanitary Measures (SPS), which directly prohibits disguised restrictions on trade.[17]

The foremost concern is whether avoiding "disguised restrictions" could be a kind of operational necessity test. In the third draft, avoiding disguised restrictions is stated as purpose, not a

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necessary to meet domestic policy objectives, including to ensure the quality of the service." Chairman's second draft, Introductory Language, ¶ 1 (emphasis added).

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

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

[13] Chairman's third draft, ¶ 2.

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

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

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

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

command. Indeed, the third draft deletes a discipline that in the second draft commands countries to prohibit disguised restrictions.[18] In other words, "disguised restriction" has changed from a command into an interpretive guideline, which could influence the meaning of the 30 disciplines such as the objectivity test, the relevance test and the simplicity test. The new language tracks with recommendations from the United States in its most recent statement of position.[19]

So as an interpretive guideline, what does "disguised restriction" mean? In *EC-Hormones* (SPS obligations for food safety measures), the Appellate Body stated that arbitrary or unjustifiable levels of protection are relevant but not conclusive factors in proving that a measure is a disguised restriction on trade.[20] In *U.S.-Reformulated Gasoline* (GATT exceptions), the Appellate Body interpreted "disguised restriction" to include disguised discrimination as well as concealed or unannounced restrictions.[21] More concretely, the Appellate Body described a disguised restriction as a violation of a trade rule (in that case, discrimination) that is foreseeable, not a violation that is "merely inadvertent or unavoidable." In that situation, the Appellate Body concluded that the United States had a duty to explore means of mitigating the restrictions on trade, including cooperation with the other governments involved (in that case, Venezuela and Brazil).[22]

If this logic translates from GATT national treatment to GATS domestic regulation, the purpose of avoiding disguised restrictions could animate the disciplines. A restriction on trade is foreseeable after one country complains to another. Once it is foreseeable, then *U.S.-Reformulated Gasoline* suggests there is a duty to consult and explore alternatives that are less trade-restrictive. If that is not a substantive necessity test, then it is a procedural analog to one.

c. ***Right to regulate & national policy objectives.*** The third draft recognizes countries' right to regulate to meet "national policy objectives," whereas the second draft referred to "domestic policy objectives."[23] As with avoidance of disguised restrictions on trade, the right to regulate is an interpretive guideline, which could influence the meaning of disciplines such as the objectivity test, the relevance test and the simplicity test.

Reference to "domestic" objectives was more deferential toward state and local authority than "national" objectives, which implies that subnational objectives deserve no deference. However, the third draft includes a footnote that defines "national policy objectives [to] include objectives identified at both national and sub-national levels."[24]

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

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

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

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

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

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

[24] Chairman's third draft, ¶ 3, fn. 1. (emphasis added)

The model for this approach is the preamble of GATS, which already states the right to regulate in terms of "national policy objectives."[25] The footnote definition gives meaning to "national" in keeping with the existing language of GATS. Yet the question remains, does switching from "domestic" to "national" place subnational objectives at a disadvantage?

It is clear that the policy objectives of a national government are included in either version. But with respect to subnational policies, the footnote definition is ambiguous. It could mean an objective that is identified by subnational government:

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

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

As applied to the U.S. federal system, the chairman's third draft appears to recognize a state's right to regulate only if it has a federal endorsement. This runs counter to the traditional deference that state and local governments enjoy. In the U.S. system of dual sovereignty, a state's regulatory objective only needs a congressional endorsement if it discriminates against interstate or international commerce or if it intrudes upon a federally regulated sector.

Should it not be the intent of WPDR negotiators to require national endorsement of subnational objectives, then the footnote definition could simply delete "both" so that it reads: "National policy objectives include objectives identified at [*] national or subnational levels."

d. ***Needs of developing countries.*** The third draft recognizes asymmetries of regulation, for example, when a sophisticated service supplier is being regulated by a developing country that has only begun to develop its system of domestic regulation.[26] It also recognizes the difficulties of service suppliers from developing countries when they face regulatory systems away from home.[27] However, it is hard to see how these "recognitions" would impart any WTO deference to developing countries.[28] The third draft also provides for a transitional period (as yet undefined) during which the disciplines would not apply to developing countries.[29] This transition would provide additional time for developing countries to ensure that their domestic regulations and

[25] The fourth paragraph of the GATS preamble states: "Recognizing the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right …".

[26] Chairman's third draft, ¶ 3.

[27] Chairman's third draft, ¶ 4.

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

[29] Chairman's third draft, ¶ 42.

regulatory structures conform to the new disciplines, but in due course, the disciplines would apply to all WTO members except the Least Developed Countries (LDCs).[30]

2. General provisions

a. ***Limitations on commitments – excluded from coverage.*** The chairman's second draft did not explain the scope of coverage. This left open the prospect that disciplines would cover more than regulations that are covered by sector commitments, but also the measures that countries carve out of their commitments in the GATS schedule.[31] The chairman's third draft makes clear that measures carved out from schedule commitments are not covered by the disciplines: "These disciplines apply to measures … in sectors where specific commitments are undertaken. They do not apply to measures which constitute limitations subject to scheduling under Article XVI or XVII."[32] However, this scope of coverage is ambiguous with respect to "measures … in sectors." This could mean only measures that affect *committed modes* (*e.g.,* commercial presence but not movement of natural persons) within a committed sector. Or, more literally, it could mean measures that affect any mode within a committed sector.

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

b. ***Pre-established test.*** The third draft requires that domestic regulations "shall be pre-established, based on objective criteria and relevant to the supply of the services to which they apply."[33] (emphasis added) Like many of the disciplines that follow it, this discipline reflects a general practice in U.S. law, but not the practice in many situations. While legislation is presumed to have prospective effect, it is constitutionally permissible for legislation to apply retroactively if the legislature expressly states its intent to do so and the law does not amount to a taking, which is rare.[34] Other possible conflicts with a "pre-established" test are more likely:

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

In short, a requirement that domestic regulations must be pre-established treads upon the

[30] Chairman's third draft, ¶ 46.

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

[32] Chairman's third draft, ¶ 10.

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

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

contentious ground of vesting of development rights, property rights or contract rights. To our knowledge, this issue has not been discussed within the WPDR.[35] The points to consider are (1) whether the meaning of "pre-established" can be clarified so that it reflects current domestic practice, and if not, (2) whether "pre-established" could be a significant change in domestic regulation and perhaps even constitutional law. Rather than ponder the vesting of rights in a theoretical sense, it helps to consider it in more concrete situations such as these:

- *Commercial zoning*[36] – Zoning of commercial development is becoming increasingly complex, contentious and subject to active citizen input during the zoning process. This is most evident in the local battles over shopping centers with "big box" stores. However, local land use is now an international issue. International developers have focused zoning in GATS negotiations[37] and investment disputes.[38] U.S. courts uphold challenges to zoning regulations that change development criteria after a development permit is requested but before it is granted.[39] This is true even when a zoning change aims to block or influence the complaining developer's license.[40] In the local zoning context, a pre-established test could affect several zoning situations. The first is when zoning or permitting policy changes before a development permit is final. The second is when land use authorities reject a development permit after public hearings in which nearby residents oppose the development. The third is when land use authorities place conditions on development permits in order to mitigate community or environmental impacts. Occurring as they do before a final permit is issued, do any of these situations violate a pre-established test?

- *Mining and reclamation*[41] – Similar vesting issues arise with respect to mining that is governed by regulations at both the state and national levels. For example, while a federal mining permit was pending, the California legislature recently adopted a requirement that

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

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

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

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

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

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

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

operators of an open-pit mine must fill the pit at the end of operations if the mine is within a mile of an historic or cultural district. This had the effect of greatly increasing the cost of a gold mine being developed by *Glamis Gold, Ltd.* Rather that file a claim in federal or state courts that it was likely to lose, *Glamis Gold* filed a claim as a Canadian investor under NAFTA chapter 11.[42] A case like this illustrates not only the timing and vesting issue, but also the importance of "national policy objectives" when a state adopts regulatory standards during the long process that a federal license is pending. If a state adopts regulations after a federal permit is requested but before it is granted, does it violate a pre-established test?

- *Land fill permits*[43] – Similar issues have arisen in situations where foreign investors responded to denial of land fill permits by avoiding domestic courts; instead, they filed claims as foreign investors under NAFTA chapter 11. In a successful claim against Mexico, an American investor challenged denial of a municipal building permit for the facility.[44] In a pending claim against Canada, an American investor challenged failure to renew a water withdrawal permit as well as revocation of operating permits by the province.[45] Does failure to renew a permit that expires during a lengthy permitting process violate a pre-established test?

- *Utilities*[46] – Public Utility Commissions typically grant licenses to acquire, merge or operate a utility based upon general "public interest" criteria. After a public hearing, PUCs often grant a license with numerous conditions that are much more specific than the broad regulatory criteria. Coming as they do after a license is requested, would these conditions violate a pre-established test?[47]

- *Park concessions*[48] – Concessions for private service suppliers to operate state or national parks are becoming increasingly popular.[49] Because concessions may last for a long period,

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

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

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

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

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

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

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

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

their profitability could be affected by changes in technical standards that apply to operating the park. If operating standards are changed during the term of a concession, would those standards be in conflict with a pre-established test?

These examples illustrate the ambiguity of "pre-established" as to timing of licensing decisions: before, during, or after a licensing decision, or before the *next* licensing period. One alternative to clarify its meaning would be to insert a footnote to define pre-established as referring to a final licensing decision, but not to include technical standards of general applicability that cover all licensed service suppliers. This is how development rights vest under U.S. law. Another alternative would be to limit the discipline, for example, to licensing of professionals as was done with the disciplines on accountancy.[50]

c. ***Objectivity test.*** In two key places, the third draft requires that regulations must be "objective" in addition to being transparent and publicly available.[51] The first place is in the introductory statement that the purpose of the disciplines is to "facilitate trade in services by ensuring that [domestic regulations] are based on objective and transparent criteria, such as competence and the ability to supply the service … ". The second place is in a discipline of general applicability, which states that domestic regulations "shall be pre-established, based on objective criteria and relevant to the supply of the services to which they apply."[52] (emphasis added)

(1) *Meaning of "based on"* – In *Mexico-Telecommunications* (GATS commitments for setting telephone rates), a dispute panel considered "based on costs" to be interchangeable with "cost-oriented," meaning a defined relation or founded on known costs or cost principles.[53] This is consistent with an Appellate Body decision of SPS obligations for adopting food safety measures. The Appellate Body interpreted "based on" to mean founded or built upon, a meaning that is more open than conformity or compliance.[54] The AB rejected a minimum procedural "taking into account" as too subjective, reasoning that "based on" refers to an "objective relationship between two elements" that persists and is observable.[55]

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

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

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

[52] *Id.*

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

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

[55] *Id.* at ¶ 189.

allow some flexibility.

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

(2) *Meaning of "objective"* – The term "objective" is not defined in the chairman's third draft or any of the other WPDR proposals. We have found that it has at least five different meanings in WTO documents, four of which could significantly constrain regulatory authority under domestic law. In shorthand, the definitions include:[56]
- Not arbitrary (the traditional standard of review for nondiscriminatory U.S. law)
- Not subjective
- Not biased
- Relevant to ability to perform the service
- Based on international standards

To take one definition, "objective" could mean not subjective. If so, this would conflict with delegation of plenary authority to public service commissions to set "just and reasonable" rates, which requires a broad exercise of discretion. Likewise it could conflict with authority to approve utility mergers based on balancing diverse, even competing criteria such as interests of the consumer, interests of the utility company and impact on the environment.[57] Even a flexible interpretation of "based on" could generate conflict with regulation in the public interest because (a) the criteria are not externally derived, and (b) the decision of what is in the public interest involves balancing of competing interests, which requires subjective judgment.

To take another definition, "objective" could mean relevant to ability to perform the service. This definition could be drawn from the third draft's statement of purpose, which is itself modeled on GATS article VI:4(a). This assumes that the phrase, "such as competence and ability to provide the service", modifies "objective criteria."[58] If so, the canon of interpretation, *ejusdem generis,*[59] could be used to limit the definition of "objective" to modifiers "of the same class" as competence and ability, which would exclude external regulatory criteria such as environmental or aesthetic impact, which is discussed further

[56] For analysis of how the term "objective" could be defined, we have prepared a companion memorandum: Jonathan Allen and Robert Stumberg, *GATS proposal that domestic regulations must be "objective,"* Harrison Institute for Public Law (March 1, 2007), available at http://www.forumdemocracy.net/, viewed March 15, 2007.

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

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

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

below. The United States has itself applied this interpretation in WTO cases.[60]

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

> On the surface, objectivity is a desirable goal. To raise objectivity to the level of an international obligation, however, undermines the ability of domestic regulators to deal with the inherent complexity of service industries. An international objectivity test moves in the direction of standardized and technocratic regulation and away from regulation in the public interest by legislatures and utility commissions that are accountable for balancing diverse public interests.[61]

Perhaps as a response to this concern, U.S. negotiators altered their approach to domestic regulation in proposed bilateral free trade agreements with Peru, Colombia and Panama. In the chapters on services, the article on domestic regulation replaces "shall" with "… shall endeavor to ensure, as appropriate for individual sectors, that such measures are: (a) based on objective and transparent criteria, such as competence and the ability to supply the service;"[62] (emphasis added) This approach does two things. First, it changes objectivity from a command to "best endeavor." Second, it recognizes that not all sectors lend themselves to basing regulation on externally derived standards or factual criteria.

Another alternative would be to define "objective," much as the chairman defined "national policy objective" in a footnote. The definition that would be most consistent with dual sovereignty in the United States would be that "objective" means not arbitrary. This is also consistent with the GATS scheduling practices of the European Union.[63]

d. ***Relevance test.*** As noted before, the third draft requires that domestic regulations "shall be pre-established, based on objective criteria and relevant to the supply of the services to which they apply."[64] (emphasis added) By linking relevance to services, this discipline could be interpreted to rule out regulation based on impacts that are external to the service.

In the context of licensing, states make land use and development decisions based on impacts that are external to services such as retail shopping centers, pipeline transportation of fuel or distribution of energy. For example, states issue coastal development permits based on criteria

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

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

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

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

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

such as environmental protection, recreational access, and historic and scenic values – all of which are external to the development (*e.g.,* a desalination facility, a utility plant or an LNG terminal) for which a permit is sought.[65] Similarly, commercial zoning permits are often based on the residential character of neighborhoods or impact on historic values.

In the context of qualification requirements, a relevance test might exclude education requirements that are not necessary to perform a service. For example, some states require education that exceeds the technical skill set for licensed professionals (*e.g.*, a course diversity requirement or a local history requirement).[66]

As noted above, the statement of purpose provides interpretive guidance on the scope of relevant qualifications, "such as competence and the ability to supply the service."[67] One could argue that this is an open class of qualifications that might include not only technical competence to perform, but also cultural competence or criteria not related to competence. But in WTO cases, the United States has used the canon of interpretation to argue the opposite, which is that listing a class of qualifications excludes criteria of a different kind (in this case, competence to perform).[68]

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

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

e. ***Universal service obligations.*** The third draft states, "Nothing in these disciplines prevents Members from exercising the right to introduce or maintain regulations in order to ensure provision of a universal service, in a manner consistent with their obligations and commitments under the GATS."[69] (emphasis added) In other words, if a country wants to avoid disciplines that cover universal service obligations, they can either avoid undertaking GATS commitments in those sectors, or they can schedule limits on their GATS commitments. Otherwise, universal service regulations are covered by the same disciplines as any other domestic regulations.

3. Licensing requirements

a. ***Definition.*** In the third draft, all but one of the second draft provisions on licensing requirements have been moved or deleted. Yet this definition remains important because it triggers coverage of the general provisions, which now include the objectivity and relevance tests. The third draft

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

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

[67] Chairman's third draft , ¶ 2.

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

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

defines "licensing requirement" to encompass any "substantive requirements" for obtaining "authorization to supply a service."[70] This covers not only licensing of professionals, but also licensing or concessions for companies to operate (*e.g.,* utilities, transportation or education). As the United States has pointed out, this an extremely broad range of government actions including "permits related to construction, operation or use of facilities, use of natural resources, or that service to implement and enforce certain laws, *e.g*., food safety inspections, vehicle safety and emission inspection, environmental protection, etc."[71]

b. Residency requirements. The remaining discipline under licensing requirements states, "Where residency requirements for licensing not subject to scheduling under Article XVII of the GATS exist, each Member shall consider whether alternative less trade restrictive means could be employed to achieve the purposes for which these requirements were established."[72] (emphasis added)

In his first draft, the chairman himself identifies this discipline as a necessity test.[73] This discipline would be a significant constraint on regulators because it requires them to consider using means that are less restrictive than a residency requirement. For example, Australia proposed using temporary licensing as a less restrictive alternative to residency requirements.[74]

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

This discipline is a priority of developing countries such as India, China, Hong Kong and the Philippines with export capacity on professional services (movement of natural persons under Mode 4). For example, China emphasized in a WPDR meeting that residency requirements can prevent foreign engineers from signing off on drawings and managing projects.[75] The discipline also raises boundary and security questions that are sensitive in the United States. At the same WPDR session, the U.S. delegate "sought clarification on licensing requirements and procedures versus specific commitments under mode 4, and where the line was to be drawn between trade policy, immigration policy and security policy."[76] It would be useful to know whether the United States is satisfied that the boundaries between service trade, immigration policy and security

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

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

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

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

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

[75] Working Party on Domestic Regulation, *Report on the Meeting Held 1 July 2003*, S/WPDR/M/22, 22 September 2003. China "recalled that the Examples paper [Examples of Measures to Be Disciplined Under Article VI.4] included an example under licensing requirements of restrictions on registration (*i.e*. residency requirements which prevented foreign engineers from signing off on drawings and managing projects).

[76] *Id.*

policy are now clear in this discipline.

The issue for American states is (a) whether their residency requirements still matter to them, and if so, (b) whether their residency requirements would be covered by this discipline. As to what matters, the traditional value of residency requirements include ensuring the quality of a service as well as regulatory enforcement and taxation. Without further study, we must defer to state regulators for comments on less-restrictive alternatives such as Australia's proposal.

As to coverage of state measures, the proposed discipline is ambiguous. It would cover "residency requirements not subject to scheduling under Article XVII of the GATS." (emphasis added) Two meanings are possible. The first is that "not subject to" means that a measure is covered by a commitment, and it is not literally scheduled as a limit on the commitment. The second meaning is almost the opposite: "not subject to" means that a measure is not covered by a commitment under national treatment.

Coverage under the first meaning, covered and not scheduled, makes sense as a way to clarify that the discipline does not cover residency requirements that countries have in fact scheduled. This meaning of coverage is fairly easy to diagnose. The United States lists approximately 70 residency requirements as limits to its schedule of commitments under six business services: legal,[77] accounting,[78] integrated engineering,[79] real estate,[80] investigation and security,[81] and direct insurance.[82] Under this meaning, the discipline would cover a residency requirement if it relates to a sector in which the United States has a commitment under national treatment and (a) the relevant service is not one of the six where there are limits on the commitment, or (b) if it is one of the six, a state's residency requirement is not listed in the U.S. schedule (see footnotes for the states listed).

Coverage under the second meaning, not covered by commitments under national treatment, is open to debate. As a starting point, the proposed disciplines cover only those measures that affect trade in sectors where specific commitments are undertaken, excluding measures that are scheduled as limits on those commitments."[83] This discipline refines its particular coverage to a smaller subset of measures within committed sectors that are "not subject to scheduling" under national treatment. There are two ways that a residency requirement could affect a committed sector and yet not be subject to scheduling. First, a WTO Member could have a sector commitment, but not under all modes of supply in that sector. The United States has carefully avoided making commitments under Mode 4 (movement of natural persons). This discipline is written to cover such uncommitted modes of supply, notably Mode 4.

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

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

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

[80] *Id.,* p. 45, listing SD (citizenship).

[81] *Id.,* p. 51, listing MI.

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

[83] Chairman's third draft, ¶ 10.

Second, "not subject to scheduling" could mean that there are some residency requirements that in theory are not covered by a commitment under national treatment because they are not discriminatory. In other words, if a measure does not discriminate, it is not covered by national treatment, and consequently, it is not "subject to" scheduling. By the same token, if a measure does discriminate, it is covered by national treatment, and it is subject to scheduling. WTO Members have been divided about whether residency requirements properly fall under article XVII (national treatment), and if they are, whether they are also covered under Article VI.4 (domestic regulation).[84] As drafted, this discipline would cover residency requirements that are nondiscriminatory. The discipline appears to cover all modes of supply so long as there is a commitment under one mode of supply, so it might cover Mode 4, even though the United States has avoided making commitments in that sector except for a few select professions.

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

4. Licensing and qualification procedures

a. ***Simplicity test.*** The Chairman's draft requires that both licensing and qualification procedures "shall be as simple as possible."[85] This discipline is vague; it will require a dispute panel to interpret "simple as possible" in settings where complex decisions require complex procedures. Examples of likely conflict include procedures that require expensive environmental impact statements, scientific testing, or periods for public hearings or other forms of participation. For example, an international partnership seeking a permit to build an LNG (liquefied natural gas) terminal at Long Beach, California has complained that the process was complex and burdensome.[86]

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

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

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

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

b. ***One licensing authority.*** The third draft requires "in principle" that license applicants "have to approach only one competent authority in connection with an application for a license."[87] It is unclear whether "in principle" defuses a discipline that would otherwise conflict with the practice of states or provinces that license professionals or business organizations. A one-authority test could create conflicts in two dimensions of the U.S. federal system. The first is where states are the primary regulators as in licensing of professionals. While many states participate in compacts to facilitate licensing of professionals in multiple states, some states have opted not to participate at this time.[88] The second is where the states and federal government have overlapping regulatory authority as in regulation of utilities, coastal zones and environmental protection. Here there are often multiple permits that cover different aspects of a service.

An alternative for avoiding this source of conflict is to limit the discipline to the licensing of professionals.

c. ***Impartial decisions.*** The third draft requires that the "decision of and the procedures used by the competent authority preparing, adopting or applying licensing procedures shall be impartial with respect to all market participants."[89] To the extent that this discipline applies to government procurement,[90] it could conflict with small business preferences, affirmative action for minorities and other purchasing preferences in the United States and other countries. Carve-outs from U.S. commitments under the Government Procurement Agreement (GPA) would not apply to such a GATS discipline.

d. ***Licensing fees.*** The chairman's third draft requires WTO nations to "ensure that any licensing fees are commensurate with the costs incurred by the competent authorities …".[91] This "commensurate with" test is tighter than the second draft, which required that fees "have regard" to administrative costs.[92] Limiting fees to costs of administration would rule out common uses of license fees to raise dedicated revenues that seek to offset the impact of licensed activities (*e.g.,* habitat restoration based on tourism fees), pay for the costs of conservation programs (*e.g.,* fish hatcheries), or fund affordable housing (sometimes in the form of an in-kind contribution of housing units). The only fees that are excluded are auction fees, tendering fees to bid on concessions, and mandated contributions to provide for universal services.[93]

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

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

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

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

[90] GATS does not cover government procurement with respect to its rules under Articles II (MFN), XVI (Market Access) or XVII (National Treatment). GATS art. XIII. By inference, GATS disciplines on domestic regulation under article VI:4 would apply to government procurement. Procurement entails both qualification requirements and technical standards.

[91] Chairman's third draft, ¶ 26.

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

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

5. Qualification requirements

a. ***Equivalence and verification – deleted.*** The third draft deletes two problematic obligations. One was to allow a service provider to operate where "qualifications have been recognized as equivalent."[94] The other was to ensure that mechanisms to verify qualifications are "based on criteria that are pre-established, objective and apply to both local and non-local qualifications."[95]

b. ***Professional experience.*** The third draft requires that regulators "shall give positive consideration to professional experience of the applicant as a complement to academic qualifications."[96] While this language is the same as the second draft, the third draft deleted a "shall ensure" clause that connoted an obligation on the part of national governments to police subnational governments."[97] The meaning of "positive consideration" is vague; it could be read to conflict with requirements that are based only on testing and academic qualifications. It is also not clear whether this discipline is met by considering and rejecting an applicant's experience, or whether "positive" consideration requires a positive outcome if an applicant has experience.

One alternative to resolving this vagueness is to delete the word "positive," so that the discipline requires "consideration professional experience."

6. Technical standards

a. ***Definition.*** The third draft defines "technical standards" to include all "measures that lay down the characteristics of a service or the manner in which it is supplied."[98] Under GATS, a measure includes any law, regulation, rule, procedure, decision or administrative action.[99] Given such a universal scope of domestic regulation, the United States has observed that many countries are only beginning to develop their approach to regulating services.[100] The implication is that disciplines on technical standards could have many unanticipated consequences, especially for developing countries and for new types of services in such fields as climate conservation, pollution control, energy efficiency, waste management, or homeland security.

b. ***Notice to the WTO – deleted.*** The third draft deletes a problematic obligation to notify the WTO of "the establishment and application of measures relating to national or international technical standards relating to services and service providers."[101] There is already a WTO notice requirement of standard-setting under the Agreement on Technical Barriers to Trade (TBT), which applies to trade in goods.[102] Notices under the TBT are managed in the United States by the National Institute of Standards and Technology (NIST). Deletion of this discipline avoids

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

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

[96] Chairman's third draft, ¶ 27.

[97] Chairman's second draft, Qualification Requirements, ¶ 5.

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

[99] GATS art. XXVIII(a).

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

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

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

expanding and complicating the existing notification system.

c. ***International standards.*** The third draft provides that domestic regulators "should" take international standards into account "except when such international standards … would be an ineffective or inappropriate means for fulfillment of national policy objectives."[103] This is more deferential than the prior proposals, which stated that regulators "shall" do so. Yet two questions remain. The first is whether the reference to "national" policy objectives makes this a serious constraint on state policy innovation. The second is how this discipline creates a context for interpreting the "objectivity" test that appears in several other disciplines. For example, one definition of "objective" in WTO documents is consistency with international standards. This discipline might influence the meaning of "objectivity" to require use of international standards in certain situations.

7. Ongoing work on disciplines

The third draft creates a ongoing Committee on Domestic Regulation to oversee the implementation of the disciplines as well as "any further work under Article VI:4 of the GATS."[104] This ambiguous provision could be read as providing a forum for continued negotiations to develop further disciplines on domestic regulation. The United States stated that it "does not support the creation of a new negotiating mandate for disciplines on domestic regulation …"[105]

CONCLUSION

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

> WTO negotiators sometimes praise the political wisdom of resorting to "constructive ambiguity" as a diplomatic means of enabling consensus on WTO rules. The limited legal task of dispute settlement findings is very different. It is to decide on the legal claims, in a particular dispute, based on the "ordinary meaning" of the WTO provisions concerned "in their context" and in light of the "object and purpose" of the agreement.[106]

From the statement of purpose and the 30 proposed disciplines, we have identified 15 ambiguous legal tests that bear directly on state and local regulatory authority. If these are adopted, it will be the plain language of the disciplines that matters, not the intent of negotiators. The following chart lists these 15 points of ambiguity, as well as changes in the third draft that safeguard regulatory authority better than in the second draft. The purpose of the chart is to help state and local officials set a reasonably short agenda for state-federal consultation, keeping in mind our opening questions:

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

[104] Chairman's third draft, ¶ 47.

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

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

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

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

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

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

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

We conclude with these comments on the questions presented above:

- *Examples and importance.* The plain language of the general provisions – that domestic regulations must be pre-established, based on objective criteria, and relevant to the service – could be interpreted by dispute panels as a significant departure from U.S. constitutional law and regulatory practice. The disciplines could affect federal domestic regulations almost as deeply.

- *Clarification of vague or ambiguous terms.* Important legal tests can be clarified in a footnote definition. For example: "national policy objectives" can be defined as objectives identified at

the national or subnational level; "pre-established" can be defined as referring to a final (not pending) license decision or as limited to licensing of professionals; "objective" can be defined as not arbitrary or having a rational basis; and "relevant" can be defined to encompass the external impact of a service. Any of these can be stated as "best endeavor" rather than "shall."

- *Overall balance in the compromise.* Overall balance is a political judgment that calls on state and local officials to consider "trade offense" as well as "regulatory defense". Considering that new disciplines deepen sector commitments, striking that balance would be easier if the disciplines are accompanied by a process to clarify or limit sector commitments in light of the new disciplines.

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

Room Document 18 April 2006

Working Party on Domestic Regulation

- DRAFT -

DISCIPLINES ON DOMESTIC REGULATION PURSUANT TO GATS ARTICLE VI:4

Informal Note by the Chairman

- DRAFT -

DISCIPLINES ON DOMESTIC REGULATION

I. INTRODUCTION

1. Having regard 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[107] and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right.

4. Members recognize the difficulties which may be faced by individual developing countries in implementing disciplines on domestic regulation, particularly difficulties relating to level of development, size of the economy, and regulatory and institutional capacity. Members also note the difficulties which may be faced by service suppliers of developing countries 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.

[107] National policy objectives include objectives identified at both national and sub-national levels.

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

III. GENERAL PROVISIONS

10. These disciplines apply to measures by Members relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards affecting trade in services in sectors where specific commitments are undertaken. They do not apply to measures which 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 criteria and relevant to the supply of the services to which they apply.

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

IV. TRANSPARENCY

13. Each Member shall ensure that measures of general application relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards are promptly published through printed or electronic means. Where publication is not practicable, these measures shall be made publicly available in a manner that enables any interested persons to become acquainted with them.

14. In fulfilling its obligations under paragraph 13, each Member shall ensure that detailed information regarding the measures concerned is also published through printed or electronic means, or otherwise made publicly available in a manner that enables any interested persons to become acquainted with them.

15. Each Member shall maintain or establish appropriate mechanisms for responding to enquiries from any interested persons 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.

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

V. LICENSING REQUIREMENTS

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

VI. LICENSING PROCEDURES

18. 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. Applicants shall be allowed a reasonable period for the submission of licence applications and, in principle, not be required to approach more than one competent authority in connection with an application for a licence.

19. Each Member shall ensure that the decisions of, and the procedures used by, the competent authority are impartial with respect to all market participants. To this end, a competent authority should be separate from and not accountable to any supplier of the services for which a licence is required.

20. An applicant should be permitted to submit an application at any time. The competent authority shall initiate the processing of an application without undue delay. Wherever possible, applications should be accepted in electronic format under the same conditions of authenticity as paper submissions.

21. The competent authority shall, after receipt of an application, inform the applicant whether the application is considered complete. In the case of an incomplete application, the competent authority shall identify the additional information required to complete the application and provide the opportunity to correct deficiencies within a reasonable timeframe. Upon request, the competent authority shall notify the applicant without undue delay of the status of the application.

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

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

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

25. A licence, once granted, enters into effect without undue delay.

26. Each Member shall ensure that any licensing fees[108] are commensurate with the costs incurred by the competent authorities and do not in themselves restrict the supply of the service.

VII. QUALIFICATION REQUIREMENTS

27. In verifying and assessing qualifications, the competent authority shall give positive consideration to relevant professional experience of the applicant as a complement to educational

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

qualifications. Where membership in a relevant professional association in the territory of another Member is indicative of the level of competence or extent of experience of the applicant, such membership shall also be given positive consideration.

28. 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.

29. 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

30. 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. Applicants shall, in principle, not be required to approach more than one competent authority for qualification procedures.

31. Each Member shall ensure that adequate procedures exist for the verification and assessment of qualifications held by service suppliers of other Members.

32. Provided an applicant has presented supporting evidence of qualifications, the competent authority, in verifying and assessing qualifications, shall identify any deficiency and advise the applicant of requirements to meet the deficiency. Such requirements may include course work, examinations, training, and work experience. Each Member shall provide the opportunity to applicants to fulfil such requirements in the home, host or any third jurisdiction, wherever possible.

33. Each Member shall ensure that examinations, if required, are scheduled at reasonably frequent intervals. Applicants for examinations shall be allowed a reasonable period for the submission of applications.

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

35. The competent authority shall, after receipt of an application, inform the applicant whether the application is considered complete. In the case of an incomplete application, the competent authority shall identify the additional information required to complete the application and provide the opportunity to correct deficiencies within a reasonable timeframe. Upon request, the competent authority shall notify the applicant without undue delay of the status of the application.

36. Authenticated copies should be accepted, wherever 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 endeavour to establish and to publish the normal timeframe for processing of an application.

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

IX. TECHNICAL STANDARDS

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

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

X. DEVELOPMENT

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

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

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

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

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

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

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

(d) assisting, through public or private bodies and relevant international organizations, service suppliers of developing country Members in building their supply capacity and in complying with domestic regulation in their markets. Such assistance may also be provided directly to the respective service suppliers.

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

XI. INSTITUTIONAL PROVISIONS

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

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