



... for trade matters

Services Liberalization and Domestic Regulation: Why is it important?

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INTRODUCTION

Domestic regulation is a very complex issue in services trade policy formulation but it is a critical element in the liberalization of services trade. On the one hand, it is necessary to ensure consumer protection, services standards and several other public interest objectives, and on the other, it can act as a very significant restriction and curtail the market access granted to foreign service suppliers in any trade agreement. In the World Trade Organization (WTO), negotiations on domestic regulation are limited to the development of disciplines on qualification requirements and procedures, technical standards and licensing requirements. While the General Agreement on Trade in Services (GATS) and all subsequent services trade agreements recognize the right of governments to regulate and to introduce new regulations, discriminatory (and to some extent, non-discriminatory) domestic regulations remain the predominant barriers to trade in services. This is why negotiation of disciplines on domestic regulations is very important. At the same time, regulatory deficiencies in developing countries and the resultant concerns regarding the potential negative impact of foreign competition, the need to ensure consumer protection and develop services standards, seriously limit the appetite for liberalization of services trade by governments in the South. Nevertheless, developing countries have much to gain from improved multilateral disciplines on domestic regulations for two principal reasons. Firstly, such disciplines can be instrumental in promoting and consolidating domestic regulatory reform efforts. Secondly, they can help services firms from developing countries to overcome barriers to their exports in foreign markets.

This paper will examine the various issues regarding services trade liberalization and domestic regulations and their implications for effective market access with the aim of striking a balance between the potential gains from liberalization and public interest concerns. It will first briefly review some of the key issues in the interface between services liberalization and domestic regulation and examine the different perspectives from developing and developed countries. Next, it will argue that notwithstanding the specific mandate of the multilateral services negotiations in the Doha Round, economic needs tests (ENTs) should be considered as domestic regulations and should be addressed in the current GATS negotiations. This is mainly due to the fact that ENTs proliferate in the services schedules of many countries and are very diverse in terms of their application but they all make market access unpredictable. In this regard, some examples from scheduled commitments in the WTO and in bilateral agreements will be analyzed.

The paper will then focus on the multilateral negotiations in Geneva and consider the evolving attempt to craft disciplines on qualification requirements and procedures, technical standards and licensing requirements. In critically examining the draft text of the Chair of the Working Party on Domestic Regulation of January 2008 and the various responses to it by different groups in the WTO and other commentators it proposes a final version to address domestic regulation issues in services negotiations.

DOMESTIC REGULATION AND THE LIBERALIZATION OF SERVICES MARKETS

Regulation and deregulation

There are fifteen references to regulations or regulatory matters in the GATS but the term “domestic regulation” is not defined. Instead, WTO Members maintained the right to regulate and to introduce regulations. The Preamble to the GATS 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.

As Suparnakar (2007) points out, “there is no universally agreed definition in the literature for the term “regulation”, which is used without distinction to refer both to acts of governance as well as means of influencing the behaviour of firms and individuals in society, and not necessarily only in the economic realm.” In principle, the purpose of regulations, whether for goods or services, is to manage risk through the use of standards or particular requirements. The first regulatory element in the case of goods is a gradual movement towards “science-based” policy and regulatory decision-making where scientific knowledge constitutes significant or effective inputs into the decision making process. There is therefore in the WTO agreements on Technical Barriers to Trade (TBT) and on Sanitary and Phytosanitary Measures (SPS) a requirement that tolerable barriers to trade must be based on science and risk analysis.

A second element of an operational regulatory system for goods is the product or case approval process. Through this means, a product can be tested and if it meets specific criteria regarding technical standards or sanitary requirements it must be allowed into the importing WTO Member’s territory. Unfortunately, it is not possible to do this in the case of services that cover a wide spectrum of economic and social activities and are in many instances, intangible. Furthermore, there are few truly international standards or scientifically agreed regulations for services provision, except perhaps for medical services and a few other sectors. A third element of any regulatory system is that of compliance and enforcement. In the case of goods, science is used through an inspection function and in the determination of certification and best practices. This is difficult for many service sectors due to intangibility, information asymmetries, and other factors; but the diversity of procedures and requirements regarding and qualification and licensing and the absence of internationally agreed practices creates tremendous problems for the global trade in services.

There is always a spatial or geographical dimension to regulatory compliance and enforcement and a set of choices as to how science or technical inspectors will function. This usually also falls within a specific legal jurisdiction. To some extent, governments have jurisdiction to administer regulations governing the “production, distribution, marketing, sale and delivery” of services. But the regulatory authority over many professional services, (and other services in some nations) is not controlled by governments but private associations, so regulatory control is diffuse; and governments can only persuade associations to adopt certain standards or approaches. This is particularly the case in developed countries, especially European states. Therefore it seriously limits the extent to which multilateral or bilateral services liberalization

can ensure effective market access in some sectors. So, by and large, there is limited monitoring function by government.

In popular literature, as in the mass media, services liberalization is often equated with deregulation. And “deregulation” is often seen as a negative process with bad potential social consequences in terms of consumer safety or interests, especially in statements by non-governmental organizations (NGOs).¹ It is important to point out that liberalization and deregulation is not the same thing. The former allows new entrants to a market (which nonetheless may have been closed to foreign competition through restrictive legislation or regulations); the latter suggests changes to the regulatory regime governing behaviour in a particular sector by firms and individuals (the do's and don'ts) and licensing, standards and other requirements regarding the production, marketing and distribution of any service. Whilst the liberalization of trade and investment in services may often require changes to regulations, it does not mean the removal of regulations that protect the public interest. This is a point that is often confused in comments on this subject. In fact, in many instances, the liberalization of a market usually requires the introduction of new regulations to govern the sector or activity. A clear example is the liberalization of the telecommunications market in many developing and developed countries in the past 10 years. The decision to liberalize resulted in the introduction of new telecommunications legislation and regulations which actually promoted consumer interests through new rules on competition, inter-connection, cost-based pricing for services, independent regulators, among other things.

There is a related “chicken and egg” issue regarding which should come first—regulations or liberalization of services markets. And most developing countries are advised (and they argue in the WTO context) that they should not open their services markets because their regulatory regimes are under-developed. In principle, it would be inadvisable to liberalize any services market if there are no domestic regulations in place. In reality, the reverse has occurred historically, especially in the case of new services. Formal liberalization of market access in a particular sector is a clear signal that governments are prepared to revamp the regulations or introduce regulations in that sector.

As ODI researchers point out, based on several case studies in finance, tourism, health, energy and ICT services in various countries there are some risks to market opening in services. These may include:

1. crowding out domestic providers and repatriating profits
2. excessive profits being made by private/foreign providers
3. negative impact on access to services especially in utilities or infrastructure sectors
4. sector specific risks such as environmental degradation due to tourism, financial sector instability, brain drain due to mode 4 access for professionals.

But the findings of the research also reveal that liberalization can still bring benefits in spite of the various risks as long as there is an appropriate regulatory environment.² This is particularly

¹ Note most of the publications by Oxfam, Council of Canadians, Gould (2005), etc.

² See Cali, Massimiliano, K. Ellis and D. W. te Velde. *The Contribution of Services to Development and the Role of Trade Liberalisation and Regulation*. London: Overseas Development Institute, June 2008. (forthcoming)

important in infrastructural services such as finance, telecommunications and energy. A strong example of the positive benefits of liberalization of financial services in a developing country is South Africa in the 1990's. As Hodge (1999) pointed out:

In banking, foreign entrants have secured 5% of the market but concentrated on commercial/syndicated loans, corporate finance advisory services, foreign exchange dealings, trade finance and securities trading. They have pioneered the introduction of new products which help firms manage risk and lower the cost of capital. They have improved industry regulation through strong support for initiatives from the regulatory authority (18) and provided easier access to international capital.

In the insurance industry, foreign participation has focused on individual and corporate short-term insurance, creditor insurance and reinsurance. Their entry has resulted in increased price competition forcing local companies to respond. New products have been introduced, such as alternative risk transfer, which have helped corporates manage risk better.

Market expansion in all financial services has expanded employment in South Africa significantly. In addition, foreign entrants across all segments of the market have played an important part in growing SA as a regional financial centre. This it has developed partly because of their use of SA as a regional base, but also because their entry has improved the competitiveness of the financial services market through cutting prices, expanding the range of products and improving service.³

(18) For example, more stringent money laundering regulation.

In more recent studies of services liberalization in Bangladesh, the Gambia, India, Jamaica, Kenya and Zambia in a range of sectors the benefits of market opening were also catalogued. As one commentator noted:

The common factor that has spurred growth in the service sector is economic liberalization and reforms, including trade and investment liberalization, deregulation of commodity and factor markets, and privatization of state-owned enterprises, often in the context of structural adjustment programmes. In particular, as highlighted in several of the studies, the deregulation of key service subsectors such as telecommunications and financial services has helped drive the high growth rates in the service sector of most of these economies. In India it is the erstwhile government monopoly services such as telecommunications that have exhibited the highest rates of growth within the service sector, following the phasing out of government monopoly, and opening up of the sector to foreign and domestic private participation. ...

As argued by the authors of the Bangladesh country study, the rapid growth in communication services is mainly triggered by liberalization and reforms, which has created demand for new products, led to the entry of foreign telecommunications operators in segments such as mobile telephony, and enhanced competition. There has been a similar experience with financial services in Bangladesh which too have undergone deregulation and increased competition from private players. ...

³ James Hodge, "Examining the Cost of Services Protection in a Developing Country: The Case of South Africa." Paper prepared for the World Services Congress, 1999, p. 12.

The scenario is similar for Zambia where the most significant service subsectors and those which have also experienced higher growth rates, are those of trade and distribution, communication, and financial services. The reasons advanced are similar to those for the other countries, namely, those of liberalization, privatization, and economic reforms. In Jamaica, growth in services is mainly attributed to the telecommunications, transport, tourism, trade and distribution, and financial services subsectors, again reflecting a mix of unilaterally initiated liberalization and regulatory reform measures as well as external developments.⁴

Nevertheless, some analysts point out that many developing countries and most LDCs are hesitant to make services commitments in the WTO because they are unable to establish regulatory regimes in many areas. This is an area that should be addressed by aid for trade initiatives. The administrative capacity requirements for the development of a strong regulatory framework (and its enforcement) are often substantial, perhaps beyond the reach of some developing countries, so there is great scope for donors to assist in this process. However, while donors may already support regulatory reform programmes, such initiatives do not always explicitly consider the impact of regulation on services trade. Thus, a more coherent approach to assistance in this area should be developed.⁵

How to deal with regulatory diversity?

The nature and complexity of domestic regulations in any country depends on a range of factors, the most important of which is the age or maturity of the particular society. So, developed European countries have regulations that have evolved for hundreds of years and a sort of “acquis” or institutional experience in crafting and implementing regulations exists. On the other hand, developing societies in Africa and Asia and Latin America and the Caribbean have fewer regulations in every sector of the 160 services sector that are included in the Services Sectoral Classification List that is used as the basis of GATS negotiations.⁶ Since the barriers to trade in services are mainly regulatory, developing countries with less regulations are inherently at a disadvantage in services negotiations. It can be generally argued that once a developing country opens a particular service sector it is easier for foreign suppliers from developed economies to enter the market to provide services through any mode of supply while the reverse is not true for developed countries who open the same service sector. Service suppliers from the developing world have more “barriers” to face in terms of number and complexity of regulations in developed country markets, whether those regulatory barriers are discriminatory or non-discriminatory. This is apart from capacity constraints faced by the mainly small services firms in many developing countries.

In the case of professional and business services, most sectors are closely regulated, often self-regulated, usually through their trade associations which to a large extent seek to exclude rather than include or receive new foreign entrants. Professional associations (such as in legal, accounting, engineering or architectural services) ensure standards (apprenticeship or training), decide the conditions for entry to the profession (licensing requirements or procedures), grant exclusive rights to carry out certain activities but make sure it is not easy for outsiders who are

⁴ Rupa Chanda. Services Trade and Domestic Regulation: A Cross-Country Synthesis. Paper prepared for CUTS and the Commonwealth Secretariat, March 2008, pp. 4-5.

⁵ Massimiliano Cali, et al (2008).

⁶ WTO Secretariat document - MTN.GNS/W/120, 10 July 1991.

not familiar to the club to enter the profession. These usually also govern matters such as the conduct of members of the profession, and (often) the organizational structure of professional firms. And all their requirements are not necessarily transparent or easy to find. Unless disciplined, these regulations have the potential to become insurmountable market access barriers and undermine effective liberalization of internationally traded services. But some professional services associations are more standardized than others. Entry requirements are usually based on standards set in educational qualifications and experience, and in norms relating to licensing requirements and procedures. The problem is that even in such cases the diversity of approaches and criteria can hamper the cross-border supply of services.

In a more modern sector such as the information technology industry, the conditions for entry are usually less complicated and are mainly based on technical training. Most occupations in information and communications technology are not regulated in developed or developing countries. Therefore, employment is subject to demand, and qualification requirements are set by individual employers who may require certification or training in specific software and hardware. And there may be a higher level of fungibility of the technical skills in the IT sector. So it is not surprising that a programmer trained in a common computer language in any developing country can easily work in the United States or any developed country.⁷ In the competitive world of computer and related services, technical efficiency and productivity concerns are the most important priorities rather than licensing and codes of conduct. A similar level of fungibility of skills and training applies to the accounting profession but there are myriad qualifications, certification or licensing regulations governing or restricting the ability to practice in each country. The question remains why?

One could assume that due to the sensitive nature of accounting it is important to have special “initiation” into the profession to guard against risk or ensure competence and integrity; but this is not an adequate reason. One may contend on the other hand that IT specialists do not interface directly with the public so there may be a perception of less risk so there is no need to have similar levels of regulatory procedures and requirements. But many traditional accountancy associations in developed and developing countries have convoluted procedures and requirements that really make them “old boys clubs” rather than modern bodies seeking to ensure the integrity and efficiency of their service activity. This stems from the culture in the particular country and it is what makes the traditional professions “traditional” compared to a modern profession such as information technology. It is therefore interesting that multilaterally agreed rules on the accountancy sector were agreed in 1998. Nevertheless, these are still merely guidelines and have not formally been brought under the GATS regime.

NEGOTIATIONS ON DOMESTIC REGULATIONS AND THE GATS

What is the fuss about domestic regulations?

The potential of domestic regulations to act as barriers to services trade in sectors in which countries have made commitments has been discussed by numerous commentators. (See

⁷ Note for instance that Canada, the United States, the United Kingdom and other states have had special programs for temporary movement of IT workers from developing countries for several years.

Delimatsis, 2007; Karmakar, 2007; Kox et al, 2007; Mattoo and Sauve, 2003; Schweltnus, 2007). The most restrictive regulations are actually usually scheduled in market access (Article XVI) or national treatment (Article XVII) limitations and consist primarily of residency and/or nationality requirements, restrictions on legal form, quotas, among others; but the Doha negotiations do not include disciplines on limitations that are scheduled. Appendix II to this paper contains a very wide range of regulatory barriers reported by WTO Members. It is not surprising that many of the measures listed in these contributions appear to be subject to scheduling under Articles XVI or XVII. Nevertheless, some of the measures submitted by Members seem to be covered by Articles VI:1 or VI:2, are not really VI:4 measures. While possibly non-discriminatory domestic regulatory measures, they do not seem to fit the Article VI:4 requirement of being a licensing requirement or procedure, a qualification requirement or procedure, or a technical standard.

In summary, the main barriers or trade-related issues regarding qualification requirements and procedures or licensing are:

1. Qualification requirements and procedures often are not transparent, objective, pre-established, or publicly available.
2. Professional experience which results in exemplary competence is not considered as a substitute for certain educational requirements.
3. Where the verification process finds the qualifications of service suppliers inadequate they are not told the additional requirements relating to course work, training or work experience service that they must fulfill to meet the qualification required to supply the service. Furthermore, service suppliers are not allowed to fulfill these additional requirements through examinations, course work, practical training or professional experience. And in instances in which this is possible, service suppliers are not allowed to fulfill such additional requirements in their home country or in third countries. Indeed, sometimes residency or work experience in the host country is a condition for eligibility for such examinations.
4. Fees charged for licensing or qualification have little regard to administrative costs and are an impediment in themselves to foreign service suppliers.
5. Service suppliers are not given an opportunity for review of decisions relating to fulfillment of qualification requirements; and in case of rejection, they are not given an opportunity to resubmit applications and related documents.

In principle, a necessity test could be used to encourage the adoption of economically efficient policy choices in remedying market failures and in pursuing non-economic objectives. For instance, in the case of professional licensing, a requirement to re-qualify could be deemed unnecessarily burdensome, since the problem (inadequate information about whether an individual possesses the required skills) could be solved by a less burdensome test of competence. Indeed, this should be the main rationale of professional licensing regimes in a world of increasing economic integration and trade in professional services. But the problem of licensing is not limited

to temporary service suppliers. Many professionals from developing countries who emigrate to North America and the European Union find that they are unable to practise their profession unless they re-qualify. And this often takes at least a year of university training and other requirements, usually work experience in the new jurisdiction which immigrant professionals cannot obtain because experience is a requirement by most employers for recruitment anyway! This problem is particularly acute in the case of Canada in which many professionals with several years of experience end up working in lower level categories of jobs than those for which they are qualified and have practised, or working in totally unrelated fields.⁸

A further issue is that one of the fundamental difficulties faced by service suppliers, especially small and medium enterprises (SMEs), in taking advantage of market access in services is the complexity, length and legal uncertainty of administrative procedures.⁹ In this regard, the rationale for the initiatives undertaken by the European Commission in the development of the European Single Market for services is pertinent. The EC Services Directive was intended to “eliminate the delays, costs and dissuasive effects which arise from unnecessary or excessively complex and burdensome procedures, the duplication of procedures, red tape involved in submitting documents, arbitrary and non-transparent use of powers by competent authorities and fees that appear to be exorbitant and have no relationship to the cost of the administrative process.”¹⁰ There should be a similar ambition and approach in bilateral and multilateral negotiating forums since in spite of services commitments in the WTO and in various bilateral free trade agreements (FTAs) domestic administrative and regulatory processes can still easily frustrate attempts at taking advantage of *de jure* market opening.

The GATS and Domestic Regulations

In principle, developing countries have much to gain from appropriate and effective multilateral disciplines on domestic regulation. First, the development of such disciplines can play a significant role in promoting and consolidating domestic regulatory reform efforts. Second, such disciplines can help developing countries address potential regulatory barriers to their services exports in foreign markets. The main dilemma for developing countries is thus how best to use multilateral rule-making efforts in the WTO in order to promote sound regulatory institutions and practices at the national level. While the greatest barriers to services trade are regulations, the multilateral rules on domestic regulations are not particularly rigorous. GATS Article VI on domestic regulation is somewhat modest; it is really a framework on which more substance is supposed to be developed over time.

⁸ In recent years the federal human resources department has been studying this issue but since accreditation is controlled by professional associations of engineers, lawyers, doctors, dentists, accountants, etc., it is very difficult to resolve.

⁹ For instance, in its services commitments in the EPA between the EU and Caribbean countries Italy scheduled a horizontal reservation which states: “Access to industrial, commercial and artisanal activities is subject to a residence permit and specific authorization to pursue the activity.” This simple statement must refer to a very broad range of domestic regulatory measures or requirements in a range of economic activities, both large scale and small scale. And most likely it will include licensing requirements. But there is no clear mechanism for a service supplier or government to find out the meaning of this broad reservation which can seriously constrain market access.

¹⁰ Proposal for a Directive of the European Parliament and of the Council on Services in the Internal Market. (Presented by the Commission). Brussels, 5.3.2004, COM(2004) 2 final/3, paragraph 22.

The general obligation is that: “In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.” But the negotiations on domestic regulations have a limited or specific focus in GATS Article VI:4:

4. With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, *inter alia*:

- (a) based on objective and transparent criteria, such as competence and the ability to supply the service;
- (b) not more burdensome than necessary to ensure the quality of the service;
- (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

5. (a) In sectors in which a Member has undertaken specific commitments, pending the entry into force of disciplines developed in these sectors pursuant to paragraph 4, the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which:

- (i) does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c); and
- (ii) could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made.

(b) In determining whether a Member is in conformity with the obligation under paragraph 5(a), account shall be taken of international standards of relevant international organizations¹¹ applied by that Member.

6. In sectors where specific commitments regarding professional services are undertaken, each Member shall provide for adequate procedures to verify the competence of professionals of any other Member.

More than thirteen years after the GATS entered into force, it is not clear whether all WTO Members have implemented the obligations in Article VI. The main active negotiating issue in GATS Article VI is nevertheless the obligation to develop disciplines to ensure that “qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services”. We must recognize that this is a very limited aspect of the universe of domestic regulations that can act as barriers to trade; but it is the

¹¹ The term "relevant international organizations" refers to international bodies whose membership is open to the relevant bodies of at least all Members of the WTO.

key part of multilateral deliberations for the past seven years with no consensus on disciplines in sight.

The GATS seeks to discipline the use of measures by governments that restrict trade in services only in sectors in which commitments are made. Regulatory measures are considered to be any kind of action by a WTO Member since "measure" "means any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form."

And Article I.3 indicates that the obligation reaches to all levels of government:

For the purposes of this Agreement:

- (a) "measures by Members" means measures taken by:
 - (i) central, regional or local governments and authorities; and
 - (ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities;

In fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory;

In spite of these provisions, the differences in regulations at the sub-national level in federal states remain a major barrier to trade in services. This can cause very significant unpredictability about the regulatory barriers that constrain foreign service suppliers from contesting the market in countries in which any particular sectors are liberalized. And this problem even extends to bilateral FTAs. For instance, in the trade agreement between the United States and Central American countries (CAFTA) and in both the US-Chile FTA and US-Dominican Republic FTA the United States scheduled a horizontal reservation (which includes all regulations) that can act as a major barrier to market access in all sectors of services trade. It states that "the US reserves all existing non-conforming measures of all states of the US, the District of Columbia and Puerto Rico with respect to three obligations: National Treatment, MFN Treatment and Local Presence." On the other hand the services obligation in the recently concluded Economic Partnership Agreement (EPA) between the European Union and CARIFORUM states apply to all measures at all levels of government as in the GATS.

There is some level of discipline in Article III.3 which requires transparency regarding new regulations:

Each Member shall promptly and at least annually inform the Council for Trade in Services of the introduction of any new, or any changes to existing, laws, regulations or administrative guidelines which significantly affect trade in services covered by its specific commitments under this Agreement.

Perhaps the broadest latitude for governments to pursue regulatory measures that restrict services trade or investment is contained in the General Exceptions in Article XIV, albeit with some firm conditions:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

- (a) necessary to protect public morals or to maintain public order;¹²
- (b) necessary to protect human, animal or plant life or health;
- (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
 - (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;
 - (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
 - (iii) safety;

However, it is highly unlikely that a government could justify denying the recognition of professional qualifications on the basis of a GATS exception.

Regulations regarding professional services have as their primary objective the need to ensure and maintain a certain quality of the service, and hence to protect consumers. The potential impact of regulatory measures on competition and hence on market access and national treatment of foreign professionals under the GATS would need to be assessed carefully against this regulatory objective. Typical market access limitations would include restrictions on the form of commercial presence (only natural persons or partnerships allowed), often in joint operation or joint venture with local professionals. For natural persons, entry may be subject to economic needs tests, or nationality requirements. Market access of foreign suppliers may be limited to projects of above a certain amount. National treatment limitations could include residency requirements and requirements to use local services or to employ local professionals. But even the non-discriminatory domestic regulations can disadvantage foreign suppliers.

While regulatory harmonization is not a practical goal, and perhaps regulatory convergence is more feasible, the diversity of regulations for any professional service varies tremendously among WTO Members. And it is unlikely that new disciplines on licensing and qualification procedures and requirements will significantly improve effective market access. To illustrate, the differences in complexity of regulation regarding access to and practice of a traditional profession let us consider the case of engineering in a developed and developing country.

¹² The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

Case Example - Engineering Services

A comparison of the regulatory process for practising engineering in Canada with that of Trinidad and Tobago illustrates the difference between developed and developing countries in terms of a “regulatory divide” in domestic regulation and hence the potential imbalance in terms of trade in professional services.

The Canadian regulatory regime for engineering

Licensing and qualification requirements

A professional engineering association exists under provincial and territorial legislation in each of the ten Canadian provinces and three territories. These associations have the necessary responsibility and authority to govern the profession and its practitioners within their jurisdiction. The provincial and territorial legislation is similar in terms of the key elements but conditions and requirements vary among some jurisdictions. In Canada, the title "P. Eng." designates the status of a Professional Engineer. Approximately 160 000 Professional Engineers are registered. It is illegal for non-licensed engineers to approve engineering drawings or reports, use the title "professional engineer" or any variation of it, or offer engineering services to the public. Most other technical work may be performed by non-licensed engineers without restriction.¹³ To be eligible for a licence, candidates must graduate from an accredited Canadian university program or recognized engineering program, have four years of engineering experience (three in Quebec) with at least one year in Canada, pass a professional practice examination and be proficient in English and/or French. In addition, many associations also have mandatory continuing competence or practice review requirements.¹⁴

Each province requires anyone practising engineering to be a registered professional engineer (P.Eng.), whether the work is performed as an employee for industry or government or is provided as a consultant to the public. In some jurisdictions, there are additional registration requirements beyond the P.Eng. for certain categories of work. Professional registration is available to those individuals who have met the requirements with respect to academic qualification, language competency, satisfactory experience and knowledge of professional practice and ethics, and who are of good character. A number of provinces maintain residency and local presence requirements for practice under a permanent licence. All provinces have procedures for temporary licensing of foreign non-resident engineers that are valid for one year and are renewable. This may facilitate trade in engineering services. In Ontario temporary licences require qualifications equivalent to

¹³ See www.engineerscanada.ca. The Canadian Council of Professional Engineers (CCPE) was renamed Engineers Canada in February 2007.

¹⁴ For comparison, in the United Kingdom, the title "Chartered Engineer" is similar to "Professional Engineer." The Engineering Council (UK) maintains the register of Chartered Engineers. Candidates must be members of an engineering institution, such as the IEE, which is licensed to assess and admit individuals for CEng to the register. The United Kingdom does not require licensing to practice engineering before the public. To become a CEng, candidates must meet educational standards and undergo formative professional development to acquire the competence required of CEngs, which typically takes four years. Candidates also have to produce a portfolio of their capabilities. The Professional Review is the final step before registration. This is a peer assessment and in-depth interview by two Chartered Engineers familiar with the candidate's engineering field. Candidates also are required to demonstrate a commitment to professional conduct and continuing professional development. (www.ieee.org).

Canadian licence requirements or 10 years experience in the field for which the licence is requested; written verification of registration with a professional engineering board; collaboration with a licensed member of the Professional Engineers of Ontario; proof of liability insurance; and academic transcripts.

Market access for foreigners

Canada's GATS Schedule sets out commitments in this area, including some limitations on market access and on national treatment by certain provinces. In engineering and integrated engineering services, market access for modes 1, 2 and 4 is limited in British Columbia, Newfoundland, Alberta, Ontario and New Brunswick by the requirement for engineers to be permanent residents for accreditation purposes. In Manitoba, consulting engineers are required (for modes 1 and 2) to establish a commercial presence for accreditation. There are also certain limitations on market access and on national treatment by certain provinces..

Apart from the clear market access barriers in Canada's GATS schedule, it is not easy to deal with non-discriminatory domestic regulations either. If an engineer is trained in Canada and has experience there it is a relatively straightforward process to meet the licensing requirements but if one's credentials are foreign it is extremely difficult. In fact, a survey of over 1,000 immigrants with engineering backgrounds drawn from 73 countries, revealed that less than 5% of immigrants with engineering backgrounds actually become licensed and even fewer are able to practice as Professional Engineers in Canada. This epitomizes the problems posed by qualification requirements at all levels, much more for traders or service suppliers.¹⁵

Regulation of Engineering in Trinidad and Tobago

The Engineering Profession Act, No. 34 of 1985 regulates the profession in Trinidad and Tobago and provides for mandatory registration of persons and firms providing engineering services to the public. There is no licensing requirement. A person is qualified to be registered as a registered engineer if: (i) he has been awarded a degree, diploma or other qualification in engineering granted by a University or School of engineering that in the opinion of the Board, is evidence of satisfactory training in engineering; and (ii) he has had not less than four years experience in the practice of engineering and has acquired such standard of proficiency as may be approved by the Board. The basic academic training or qualification requirement for engineering is a three-year degree.¹⁶ The Association of Professional Engineers of Trinidad and Tobago and subsequently the Board of Engineering of Trinidad and Tobago (BOETT), in the past kept a listing of Engineers in private consulting practice. Individuals and firms who met criteria as stated were included in the list. This list of consultants eventually became the Association of Consulting Engineers of Trinidad and Tobago (ACETT), and access to membership is by voluntary application.

The fairly limited regulatory regime for engineering in Trinidad and Tobago makes it easy for foreign engineers who work on projects there to practise since they do not need to obtain a licence. Indeed foreign engineers have been working in many industrial projects without much

¹⁵ See details at http://www.capeinfo.ca/eng_in_canada.php#can_become_lic.

¹⁶ See <http://rgd.legalaffairs.gov.tt/laws/Ch.%2090/90.01/90.01%20aos.htm> and www.boett.org/ACETT.htm.

difficulty for years. But it is practically impossible for an engineer from Trinidad and Tobago to work on projects in any province in Canada (or other OECD countries) even on a temporary basis without meeting all the licensing and certification requirements exerted by the engineering association in Canada (or other OECD states). In this regard, it should be noted that the Canadian authorities will not issue a work permit if a foreign worker does not meet certification and licensing requirements for regulated occupations in Canada (e.g. doctors, engineers, tradespersons). Therefore, while bilateral trade negotiations are expected to start soon between Canada and the CARICOM countries, Caribbean engineers feel that any market access granted by Canada will not be of much practical benefit to them since they will not be able to take advantage of the opportunity. On the other hand, any access granted by CARICOM states can be utilized by Canadian engineers.

Is Mutual Recognition an Alternative?

Some analysts have argued that mutual recognition of qualifications is perhaps the best means of addressing regulatory divergences across countries and in recent years various attempts have been made to negotiate mutual recognition agreements (MRAs) in the context of bilateral trade agreements. Under the North America Free Trade Agreement (NAFTA) a mutual recognition agreement (MRA) for temporary and permanent licensing of engineers, recognizing professional qualification, was signed by Canadian, Mexican and American federal authorities after ten years of discussions (in 2003). In the process, Mexico restructured its regulatory regime regarding how engineers are trained and accredited from the old regime of government control of the process to a system largely run by the industry. This trilateral agreement provides mutual recognition for engineers from signatory partners; but the MRA remains to be ratified by all US states except Texas, as well as the important Canadian provincial jurisdictions of Ontario and Quebec.¹⁷ With only Texas having ratified the MRA it is clear that the US engineering bodies do not support mutual recognition across the NAFTA countries for one reason or the other.

The NAFTA experience with engineering services raises the question that if it is so difficult for three contiguous economies with a fully-fledged FTA to agree on mutual recognition of qualifications for engineers, is it realistic to expect generic multilateral disciplines on qualification requirements and procedures for a range of professional services among 153 countries to do anything of significance to actually reduce barriers to trade? Consider further, for instance, that many LDCs in the WTO do not even have registration or licensing requirements for professionals. They will not be willing to subject themselves to disciplines crafted by larger, more developed countries with sophisticated professional services bodies or associations and very complicated regulatory regimes.

¹⁷ WTO. Trade Policy Review: Canada. Report by the Secretariat. WT/TPR/S/179, February 14, 2007, p. 131.

ECONOMIC NEEDS TESTS

While the negotiations on domestic regulation in the GATS context has a relatively limited mandate, qualification and licensing requirements and procedures are not the most significant barriers to mode 4 access of service suppliers. A major constraint to actual market access for services is the regulatory requirement or condition of economic needs tests (ENTs) or labour market tests or labour certification tests. There are numerous indications of these in the market access schedules of developed and developing WTO Members. In 1999, UNCTAD pointed out that:

Of 134 WTO members, 67 have used economic needs tests to regulate trade flows in one or more modes and all or selected services sectors. Economic needs tests have qualified commitments on market access in all sectors in a few countries, but others may also apply them since no mechanism exists in GATS to limit the scope of their application. Some countries have identified categories of persons that are likely to be subject to needs tests in their horizontal commitments, but this does not mean that these and other countries would not apply needs tests to categories of persons not included in the schedules of commitments.

A few countries have also referred to the economic needs tests as qualifying their national treatment commitments. The GATS, however, includes economic needs tests among the market access barriers listed in Article XVI (Market Access).¹⁸

Economic needs tests are unfortunately not defined in the GATS. Article XVI:2(d) and the Scheduling Guidelines set out the rules on ENTs in mode 4. They should either: (i) not be applied to the categories of persons covered by a Member's commitments on mode 4; or (ii) if they are applied they must be included in a Member's schedule of commitments. The Scheduling Guidelines also stipulate that if a Member schedules an ENT it should describe the criteria in the market access column of the schedule. Nevertheless the lack of clarity or grey area regarding ENTs or labour market tests in schedules is widespread and it certainly restricts market access in a very tangible manner since services supplier do not know the rules of engagement in many countries. As the WTO Secretariat pointed out:

Of the 253 entries, 96 provide no guidance concerning the criteria on which the test is based. Of the 157 entries that provide criteria on which the tests are based, very few have described these criteria as set out in the Scheduling Guidelines. The 39 horizontal entries in mode 4 establish as the sole criterion for the admission of a service supplier the non-availability of qualified personnel in the local market. Other entries provide minimal indications on the objectives and criteria applied in the test. ENTs containing criteria are frequently phrased in a way that nevertheless leaves wide discretion as to their application. Typical formulations are "criteria include" or the relevant agency "shall have regard to, *inter alia*, the following criteria". Work from UNCTAD and the OECD has pointed out that the absence of a definition of ENTs in the GATS has led to scheduling inconsistencies and a lack of transparency as to the operation of ENTs."¹⁹

¹⁸ UNCTAD. Lists of Economic Needs Tests in the GATS Schedules of Specific Commitments. UNCTAD/ITCD/TSB/8, 6 September 1999, pp. 3-5.

¹⁹ WTO. Economic Needs Tests: Note by the Secretariat. (S/CSS/W/118), 30 November 2001, pp. 3-4.

And ENTs are not limited to multilateral agreements. For example, in its commitments on temporary entry for contractual service suppliers (CSS) and independent professionals (IPs) in the Economic Partnership Agreement (EPA) between the European Union and the CARIFORUM countries the European Commission included ENTs for several of its Members in a wide range of service activities.²⁰ While the overall commitments in many sectors are GATS-plus and there are no economic ceilings or quotas, the ENTs create a sense of uncertainty or unpredictability of effective market access for Caribbean service suppliers. The actual procedure for conducting the ENT most likely will vary from one EU state to the next. The criteria indicated for the ENTs are as follow:

In those sectors where economic needs tests are applied, their main criteria will be the assessment of the relevant market situation in the Member State or the region where the service is to be provided, including with respect to the number of, and the impact on, existing services suppliers.²¹

While this description is an improvement on language in some GATS schedules, it is still vague and open to all kinds of interpretation at the national level. EC negotiators argued that since there are 27 member states and no quotas for the 29 and 11 sectors respectively in which commitments on CSS and IP were made, it was too difficult to get full commitments from their Member States without the comfort of ENTs. But service suppliers will have little or no information on how the assessment of the market situation will actually be done and how long will that process take if they get a contract.²² This certainly reduces the value of the market access commitment for mode 4 in those countries which scheduled ENTs.

In comparison, the commitments on temporary entry or mode 4 in the North American Free Trade Agreement (NAFTA) do not include ENTs and neither are there economic ceilings or quotas in the sectors which the three countries liberalized. The provisions relevant to labour mobility in NAFTA are contained in Chapter 16 on temporary entry for business persons. It provides for the entry of four categories of workers and business people from Mexico, Canada and the United States: business visitors; traders and investors; intra-company transferees; and professionals. They are facilitated by the removal of prior approval procedures or labour certification tests for individuals requesting entry, provided they comply with immigration requirements applicable to temporary entry (public health, security issues). In most countries, the entry of temporary workers is subject to controls through which domestic authorities evaluate domestic labour market needs before authorizing the entry of foreign workers. In Canada, this approval procedure is called the confirmation process and is performed by the federal department responsible for Human Resources. In this process, HRSDC "assesses offers of employment made by Canadian employers to foreign workers and develops an opinion on the likely effect of the

²⁰ The ENTs were listed mainly for the new members of the EU, (EC-10 and Bulgaria and Romania) but there were also ENTs by a few other more developed economies in some service sectors. Commitments on CSS were made in 29 sectors and on IPs in 11 sectors by all EU states, except for Belgium in the case of Entertainment services.

²¹ There is an overall total of 469 ENTs listed by individual EU states in a total of 31 sectors in which commitments were made on either CSS or IP. See cover note to Annex IV.D on Reservations on Contractual Services Suppliers and Independent Professionals. The EPA and Annexes can be found at - www.crnmm.org.

²² The period for temporary entry for CSS and independent professionals in the EPA is a maximum of six months or the term of the service contract.

employment of the foreign national on the labour market in Canada." ²³ The facilitated procedure for the temporary entry of business persons under NAFTA differs from the usual process with the absence of the confirmation process.

NAFTA's labour mobility provisions also remove the labour market test for professionals included in the list of 63 professions covered by the agreement.²⁴ To qualify, a professional must be able to show a contract or a letter of offer from an employer in the country to which she/he is seeking entry and to prove her/his professional-level qualifications (in most cases a bachelor's degree). Self-employed professionals are excluded from these provisions. This category of visa stands out from the others included in Chapter 16, which are clearly aimed at facilitating international trade and investment.

The NAFTA example makes it clear that for significant trade in professional and other services supplied through mode 4 to take place governments have to relinquish much of their intervention or rigid control. And they must eliminate economic needs tests if they are serious about allowing their economies to benefit from efficiencies to be gained from greater competition. This is particularly important in a rapidly integrating global services market in particular sectors. Perhaps the traditional professions may never become "globalized" and will remain segmented into national markets but the scale economies and efficiency gains that benefit an economy from effective liberalization in other sectors also are relevant in the case of professional services.

THE DRAFT DISCIPLINES ON DOMESTIC REGULATIONS IN THE WTO

In trying to craft generic disciplines on domestic regulations for a range of sectors, delegations in Geneva focused their attention initially on the principles and approaches in the Disciplines on Domestic Regulation in the Accountancy Sector (document S/L/64), approved by the Services Council in December 1998. The relevant Council Decision (document S/L/63) provides that the "accountancy disciplines" are applicable only to Members who have scheduled specific commitments on accountancy. The accountancy disciplines are to be integrated into the GATS, together with any new results the Working Party on Domestic Regulation (WPDR) may achieve in the interim, at the end of the current round. A core feature of the disciplines is their focus on (non-discriminatory) regulations that are not subject to scheduling under GATS Articles XVI and XVII.

In January 2008, after much discussion over the years in the WPDR, the Chair produced a revised draft text regarding Disciplines on Domestic Regulations on his own initiative.²⁵ It was

²³ The labour market opinion is based on several criteria. 1) Is the work likely to result in direct job creation or job retention for Canadians? 2) Is the work likely to result in skills and knowledge creation or transfer for the benefit of Canadians? 3) Is the work likely to fill a labour shortage? 4) Are the wages and conditions offered sufficient to attract Canadians to, and retain them in, that work? 5) Has the employer made reasonable efforts to hire or train Canadians? 6) Is the employment of the foreign national likely to affect the settlement of any labour dispute in progress or the employment of any person involved in the dispute? Human Resources and Social Development Canada (www.hrsdc.gc.ca)

²⁴ Note that there are no limits on the length of stay of these professionals.

²⁵ See WPDR Room Document, Disciplines on Domestic Regulation Pursuant to Article VI.4: Informal Note by the Chairman, January 23, 2008. The earlier draft of April 18, 2007 had been less ambitious.

intended to capture the areas of consensus regarding positions expressed by the delegations in Geneva. It is interesting to note that the WPDR itself could not arrive at a text after more than five years of discussions due to the wide differences among countries in terms of the positions regarding disciplines on requirements and procedures for licensing and qualification and on technical standards. Not surprisingly, the Chair's text although quite relevant and appropriate in many respects, was met with mixed reactions among the WTO membership; some delegations thought it had gone too far, others thought that it had not gone far enough. Developing countries and developed countries had different positions on the proposed disciplines; and the group of small and vulnerable economies (SVEs) argued for special provisions to address their needs. But the fastidious positions of some members seem to suggest that there is no real interest in crafting disciplines on domestic regulations.

The protracted and tedious negotiations on domestic regulations in the WTO seem to indicate a lack of political will by Members to complete the work on disciplines on domestic regulation. Over the past five years, the chairs of the WPDR have consulted extensively with many delegations. Nevertheless, the chairman of the Council for Trade in Services reiterated in his latest report before the WTO mini-ministerial meeting in July 2008:

In accordance with paragraph 5 of Annex C of the Hong Kong Ministerial Declaration, Members are called upon to develop disciplines on domestic regulation pursuant to the mandate under Article VI:4 of the GATS before the end of the current Round of negotiations. Members welcome the progress achieved since the Hong Kong Ministerial Conference and, in particular, that the negotiations have moved into a text-based phase. In light of the extensive and constructive discussions that have taken place, Members call upon the Working Party on Domestic Regulation to intensify its work and finalize text for adoption. Members invite the Chairman to continue to consult on drafting revisions, with a view to developing and adopting text before the end of the negotiations.²⁶

In addressing the various concerns raised about the restrictive effect of varied domestic regulations governing licensing and qualification across the WTO Membership we have made slight revisions to the Chair's draft disciplines from January 2008 and it is presented as Appendix I to this paper. The revisions were based on careful consideration of the issues and the various negotiating positions of countries that submitted comments since the first draft in April 2007. We feel that it is a constructive compromise, but it is rooted in the reality that disciplines on domestic regulation must be established sooner than later if the effective barriers to trade in a range of professional services are to be reduced. The recommended Annex on Domestic Regulations proposed in Appendix I is a balance between the overly fastidious positions of some delegations and economy in terms of the level of detail and clarity to be included in the Annex. As in the drafts by the Chairs of the WPDR in the past two years, its main focus is on qualification and licensing issues and less on technical standards. The proposed Annex should be adopted by the WTO Members.

²⁶ Council for Trade in Services, Special Session. Elements Required for the Completion of the Services Negotiations: Note by the Chairman. JOB (08)/79, 17 July 2008.

CONCLUSIONS

In conclusion, domestic regulation is very critical to services trade liberalization both from a market access perspective (ensuring that commitments are not undermined by regulations) and from a public interest concern (to ensure that when foreign firms supply services consumers are protected). But as this paper has shown, the negotiations on domestic regulation in the Doha Round will have limited impact on a broad range of market access limitations since they do not cover items scheduled in the market access limitations in the commitments of many WTO Members.

If one accepts that the actual situation regarding domestic regulations governing licensing and qualification requirements and procedures are such that developing countries are at a disadvantage since the regulatory regimes in developed countries are the most developed and complicated, then perhaps the approach should be to address the concerns of developing countries in the WTO. The disciplines proposed in the attached Annex on Domestic Regulations should achieve that balance. However, it is equally important for the WTO membership to start addressing the larger problem of ENTs or labour market tests which proliferate in GATS schedules and which make the conditions of market access granted in schedules rather unclear.

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APPENDIX I

ANNEX ON DISCIPLINES ON DOMESTIC REGULATION

I. INTRODUCTION

1. Pursuant to Article VI:4 of the GATS, Members have agreed to the following disciplines on domestic regulation.
2. The purpose of these disciplines is to facilitate trade in services by ensuring that measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards are based on objective and transparent criteria, such as competence and the ability to supply the service, and do not constitute disguised restrictions on trade in services.
3. Members recognize the right to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives²⁷ and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right.
4. Members recognize the difficulties which may be faced by individual developing country Members in implementing disciplines on domestic regulation, particularly difficulties relating to level of development, size of the economy, and regulatory and institutional capacity. Members recognize the difficulties which may be faced by service suppliers, particularly those of developing country Members, in complying with measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards of other Members.

II. DEFINITIONS

5. "Licensing requirements" are substantive requirements, other than qualification requirements, with which a natural or a juridical person is required to comply in order to obtain, amend or renew authorization to supply a service.
6. "Licensing procedures" are administrative or procedural rules that a natural or a juridical person, seeking authorization to supply a service, including the amendment or renewal of a licence, must adhere to in order to demonstrate compliance with licensing requirements.
7. "Qualification requirements" are substantive requirements relating to the competence of a natural person to supply a service, and which are required to be demonstrated for the purpose of obtaining authorization to supply a service.
8. "Qualification procedures" are administrative or procedural rules that a natural person must adhere to in order to demonstrate compliance with qualification requirements, for the purpose of obtaining authorization to supply a service.

²⁷ National policy objectives include objectives identified at both national and sub-national levels. This interpretation of the term is without prejudice to how "national policy objectives" is used in the GATS or the WTO Agreements.

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

III. GENERAL PROVISIONS

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

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

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

IV. TRANSPARENCY

13. Each Member shall promptly publish through printed or electronic means, or otherwise, measures of general application relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards, as well as detailed information regarding these measures. This information shall include, *inter alia*:

- (a) whether any authorization, including application and/or renewal where applicable, is required for the supply of services;
- (b) the official titles, addresses and contact information of relevant competent authorities;
- (c) applicable licensing requirements and criteria, terms and conditions of licences, and licensing procedures and fees;
- (d) applicable qualification requirements, criteria and procedures for verification and assessment of qualifications including fees;
- (e) applicable technical standards;
- (f) procedures relating to appeals or reviews of applications;
- (g) monitoring, compliance or enforcement procedures including notification procedures for non-compliance;
- (h) where applicable, how public involvement in the licensing process, such as hearings and opportunity for comment, is provided for;
- (i) exceptions, derogations or changes to measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards; and
- (j) the normal timeframe for processing of an application.

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

13. Each Member shall maintain or establish appropriate mechanisms for responding to enquiries from any service suppliers regarding any measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards. Such enquiries may be addressed through the enquiry and contact points established under Articles III and IV of the GATS or any other mechanisms as appropriate.

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

V. LICENSING REQUIREMENTS

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

VI. LICENSING PROCEDURES

16. 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. Each Member shall

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

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

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

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

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

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

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

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

25. Each Member shall ensure that any licensing fees²⁸ are commensurate with the costs incurred by the competent authorities and do not in themselves restrict the supply of the service.

VII. QUALIFICATION REQUIREMENTS

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

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

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. Once qualification requirements have been fulfilled and, where applicable, licences have been granted, each Member shall ensure that a supplier is allowed to supply the service without undue delay in accordance with the terms and conditions specified in the licence.

31. An applicant shall, in principle, not be required to approach more than one competent authority for qualification procedures. In instances in which it is necessary for applicants to deal with more than one competent authority Members shall ensure that there is clear detail on the exact responsibility of each competent authority and the exact timeframe within which each must consider the application and provide its comments or make a decision.

²⁸ Licensing fees do not include payments for auction, tendering or other non-discriminatory means of awarding concessions, or mandated contributions to universal service provision.

32. An applicant should, where feasible, be permitted to submit an application for assessment of his or her qualifications at any time. The competent authority shall initiate the processing of an application without undue delay.

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

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

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

36. 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.

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

38. 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

39. 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.

40. Where technical standards are required and relevant international standards²⁹ 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

41. A developing country Member shall not be required to apply these disciplines for a period of [three] 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.

²⁹ International standards are those developed by international bodies whose membership is open to the relevant bodies of at least all Members of the WTO.

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

43. 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.

44. 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.

45. 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

46. 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.

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

APPENDIX II

EXAMPLES OF BARRIERS DUE TO QUALIFICATION REQUIREMENTS AND PROCEDURES, TECHNICAL STANDARDS AND LICENSING REQUIREMENTS (INDICATED BY WTO MEMBERS)³⁰

A. {All Sectors} These examples appear to meet the requirements set by Members, i.e. specific measures not already covered by the *Accountancy Disciplines*, which are also not GATS Article XVI or XVII measures:

Transparency

1. Lack of opportunity for interested non-governmental market participants to meet with government officials to discuss the impact of new or proposed regulations.
2. Inadequate information available, or information not readily available, to non-governmental market participants about new or proposed regulations affecting their interests.

Licensing requirements

1. Restrictive regulations relating to zoning and operating hours, to protect small stores.
2. Federal and sub-federal licensing and qualification requirements and procedures are different, making a licence or qualification recognition obtained in one state not valid in other states.
3. Too many licences required in order to operate a business.
4. Overly burdensome licensing requirements (e.g. minimum age required for a physiotherapist is 25 years old).
5. Lengthy censorship procedures; too many censoring agencies with different criteria.
6. Overly large capital asset or office-size requirements for establishment or registration (road transportation, construction, and distribution).
7. Minimum requirements for number of vessels (maritime).
8. Precondition for providing/maintaining licence is a two-year working period, but a two-year working visa is difficult to obtain (construction).
9. Minimum paid-in capital requirements: to apply for a Fixed Network Business, the applicant shall subscribe to the applicable minimum paid-in capital (telecommunication services).
10. Minimum build-out requirements: to apply for an Integrated Network Business, the applicant shall, within the effective period of the Network Construction Permit (i.e. six years), construct a local network possessing the minimum capacity requirements (telecommunication services).
11. [Subject to Members' interpretation.] The requirement that foreign agents, brokers, and adjusters for insurance services who apply for establishing commercial presence in the host Member shall employ at least one individual who has secured a domestic agent, broker, or adjuster (insurance services).

Licensing procedures

12. It is necessary to obtain/renew the same licence in every regional government.

³⁰ Taken from "Examples of Measures to be Addressed by Disciplines Under GATS Article VI:4." Informal Note by the Secretariat. JOB(02)/20/Rev.7, 22 September 2003.

13. All the important papers necessary to establish business operation have to be certified by the Public Notary which can take a long time to process with no other alternative available.
14. The effective period of licensing is very short.
15. Authorization may not be handled through a single point.
16. Inability of applicants to file complaints regarding review of their applications.

Qualification requirements

1. Only persons who have specific certification from a government agency can take up managerial posts (e.g. managers of an insurance company must have certification from the insurance agency in that country).
2. Requirement for fluency in language of the host country which in some cases is not relevant to ensure the quality of service.
3. Different sub-federal regulations for recognition of qualifications.
4. Minimum requirements for local hiring (accountancy).
5. Qualification procedures
6. A large number of documents is required (application procedures).
7. Need for in-country experience before sitting examinations (accountancy).
8. The chairperson of the board and the general manager of an engineering consulting firm are both required to be licensed professional engineers of the host Member (engineering services).
9. At least half of all the directors or shareholders who are actually conducting the business of an engineering consulting firm shall be licensed professional engineers (engineering services).
10. At least one third of the directors should be medical professionals (hospital services).

Qualification procedures

1. In a certain sector, prior approval is required by the competent authority for the employment of managers, assistant managers and supervisors of certain departments as designated by the authority (banking services).

Technical standards

1. Unreasonable environmental and safety standards (maritime transport).
2. Local standards requirements: in some federal system Members, the sub-federal governments maintain different technical standards from one another, which has constituted severe impediments to foreign construction firms contracting projects.
3. The required minimum paid-in capital is adjusted in accordance with the domestic inflation rate every year (banking services).
4. The internal documents of a foreign establishment have to be written in a local official language (banking services).
5. When producing the financial statement, firms are required to follow the headings and codes specified by the local competent authority, rather than those of international practices (banking services).

B. {Non-Accountancy Sectors} The following measures also appear to meet the requirements set by Members – provided they apply to sectors other than accountancy (otherwise they seem to already be covered by the *Accountancy Disciplines*):

Transparency

1. Regulatory changes without adequate prior notice, making the applicants not eligible to apply or have to find new supporting documents within a short period of time.
2. Non-transparent regulatory environment (architecture, postal and courier, audiovisual, distribution, education, energy, environmental, sporting, and tourism services).
3. Domestic laws and regulations are unclear and administered in an unfair manner; subsidies for higher and adult education, and training are not made known in a clear and transparent manner.
4. A lack of transparency in domestic town planning regulations, that might prejudice decisions on the location of installations to provide such services through commercial presence (distribution services).
5. Long delays when government approval is required, and, if approval is denied, no reasons or information given on what must be done to obtain approval in the future (postal and courier services).
6. Domestic regulations contain ambiguous criteria and conditions for service suppliers to observe (e.g. when applying to form an establishment, the applicant should have an “adequate asset base as well as appropriate management and support staff and be unlikely to disturb the local economy”) (banking services).
7. Lack of transparent regulations or standards for a company’s risk management (banking services).

Licensing requirements

1. Absence of pre-determined, clear criteria for licensing requirements (including postal and courier, and distribution services).
2. Unreasonable restrictions on licensing (legal services).
3. Restrictive licensing practices (tourism).
4. Unclear licensing and approval requirements (energy services).
5. Unspecified approval and licensing requirements (environmental, financial and tourism services).
6. Irrelevant requirements to obtain licence (e.g. jewellery artists must obtain a permit or licence from the National Bank).
7. Too many steps for business registration and such registration must be renewed relatively frequently (e.g. every 2 years) at considerable time and expense.
8. Non-transparent registration procedures; unpredictable timeframe for registering process.
9. Restrictions on registration (e.g. residency requirements), which prevents foreign engineers from signing off on drawings and managing projects.
10. Unduly burdensome requirements.
11. Onerous licensing requirements (consulting, engineering, construction, and distribution services).
12. As licences can be difficult or impossible to obtain, forwarders often have to resort to intermediaries or form partnerships (Other transport services).
13. Registration is required both at the central and local governments (or local commercial courts); the procedures at the local level are often not transparent and taking a long time without adequate explanation for the delay.
14. Residency requirements (including computer, telecommunications, audiovisual, construction, distribution, energy, financial, sporting, and tourism services).
15. Residency requirements for advertising production professionals filming in some countries and/or for employees of the advertising firm.
16. Mandatory membership of a Chamber of Commerce or a local association required as a pre-condition to operate business in local areas.
17. To be licensed as a professional, there is a requirement or pre-requirement to be a member of an affiliate organization. This organization has no regulatory authority over the profession (i.e. union,

- country club). To be a member of this organization, the licensee must be a resident of the territory or have lived in the territory for the past six months.
18. Requirement to have numerous different legal entities as a pre-condition to apply for a business operation licence.
 19. Applicant must possess indemnity insurance or be bonded prior to licensing.
 20. Licensing fees that are considered as expensive by international standards.
 21. Registration/approval is required in order to provide services.
 22. Special registration requirements for firms to operate in individual countries (construction service).
 23. Authorization requirements are cumbersome: e.g. a permit is required for every single project.
 24. Residency requirements: architects or other registered professional must stay in the host regions for a long period of time and in case of no fulfilment of such requirements, licence will be lifted.

Licensing procedures

1. Work history and letters of reference from all previous employers unrelated to the authorization sought.
2. Documented proof of physical and mental well-being.
3. Overly complicated licensing procedures (e.g. have to go through many steps in many agencies in order to obtain a licence).
4. Excessive, vexatious formalities, lacking in transparency, for professional licensing purposes, etc.
5. Only original documents will be accepted.
6. Only documents translated or authenticated by that country's embassy will be accepted, causing unnecessary delays and expenses (especially if additional documents for an application are required at short notice).
7. Delays in receiving an application.
8. Delays in informing the applicant of the decision (unreasonable time).
9. Where government approval is required but denied, no reasons are given for denial, and no information is given on what must be done to gain approval in the future.
10. No possibility for the applicant of correcting minor errors in its application form.
11. No possibility of resubmitting applications for licensing after a first rejection.
12. Delays in implementing the terms of the licence
13. Lack of transparency.
14. The period of time required for the processing of a licence application is not very clear.
15. The processing period for a licence application is long.
16. A great deal of documents must be submitted throughout several stages in order to obtain authorization.
17. Excessive application and processing fees (including postal and courier, distribution, and educational services).
18. Authorization procedures are costly.
19. Authorization procedures take up a considerable amount of time.

Qualification requirements

1. Residency requirements.
2. The scope of examinations of qualification requirements goes beyond subjects relevant to the activities for which authorization is sought.
3. Requirements needed for eligibility to take exams are more burdensome than necessary and not relevant to ensure the quality of service (e.g. must stay in that country at least 3 years to be eligible to take exam).

4. Qualification requirements other than education, examinations, practical training, experience and language skills.
5. Examinations that do not appear to be directly related to the concerned qualifications are required.
6. Educational background in certain countries/regions is the prerequisite for granting of licences, while the academic background of foreign professionals is not recognized.
7. Requirements of previous working experiences in host markets: Natural persons applying for professional licences should have certain years of working experiences in the host markets.

Qualification procedures

1. Long delays in the verification of an applicant's qualifications acquired in the territory of another Member.
2. Lack of a legal framework for accepting professionals with foreign qualifications, or lack of internal consistencies of such a framework.
3. Non-recognition of foreign qualifications (including engineering, construction, financial and sporting services).
4. Limited or no recognition of foreign qualifications (architecture, legal services).
5. Non-recognition of qualifications obtained in country of origin (e.g. not accepting cooking certificate from a government institute) and refusal to consider past working experiences and/or apprenticeship in country of origin.
6. Common exclusion of developing countries from mutual recognition agreements
7. Unreasonable intervals for examination of applications.
8. Limited openness of process (all eligible applicants do not benefit from the same level of openness).
9. Unreasonable period of time for the submission of applications.
10. Excessive administrative costs that do not reflect fees charged.
11. Residency requirements for sitting examinations (not subject to Article XVII).