

THE DRAFT GATS DOMESTIC REGULATION DISCIPLINES – POTENTIAL CONFLICTS WITH DEVELOPING COUNTRY REGULATIONS

SYNOPSIS

This Analytical Note updates a 2006 South Centre Analytical Note (SC/AN/TDP/SV/11) 'The Development Dimension of the GATS Domestic Regulation Negotiations', which discusses the implications of the GATS Article VI: 4 disciplines on domestic regulation for developing countries.

The aspects that are most problematic in the domestic regulations draft text (20 March 2009 version) for developing countries include: various provisions that operate as necessity tests, and provisions that could limit countries' right to regulate, for example, the pre-establishment criteria; and that countries' regulatory measures should be 'transparent', 'objective' and 'relevant'. Specific examples used in this paper are drawn from various developing countries' regulations in key service sectors including the financial sector; the education sector; the utilities sector; and with regard to land development.

October 2009
Geneva, Switzerland

This Analytical Note is produced by Ellen Gould with contributions by Robert Stumberg for the Trade for Development Programme (TDP) of the South Centre to contribute to empower the countries of the South with knowledge and tools that would allow them to engage as equals with the North on trade relations and negotiations.

Readers are encouraged to quote or reproduce the contents of this Analytical Note for their own use, but are requested to grant due acknowledgement to the South Centre and to send a copy of the publication in which such quote or reproduction appears to the South Centre.

Electronic copies of this and other South Centre publications may be downloaded without charge from:
<http://www.southcentre.org>.

THE DRAFT GATS DOMESTIC REGULATION DISCIPLINES – POTENTIAL CONFLICTS WITH DEVELOPING COUNTRY REGULATIONS

TABLE OF CONTENTS

EXECUTIVE SUMMARY	1
I. INTRODUCTION	2
II. THEMES RAISED IN THE DOMESTIC REGULATION NEGOTIATIONS	2
A. Necessity Tests.....	3
B. The Right to Regulate.....	4
III. CLARIFYING KEY DISCIPLINES TO SAFEGUARD THE RIGHT TO REGULATE	6
A. Defining “Pre-established” Criteria.....	7
B. Defining “transparent” Criteria.....	7
C. Defining “objective” Criteria.....	8
D. Defining “relevant” Criteria.....	10
E. Clarifying Transparency.....	10
IV. SCOPE OF THE DISCIPLINES	10
V. EXAMPLES OF REGULATORY CONFLICTS WITH DISCIPLINES	12
VI. SECTORAL IMPLICATIONS OF THE DOMESTIC REGULATION DISCIPLINES	15
A. Application of the Disciplines to the Financial Sector.....	15
B. Application of the Disciplines to the Education Sector.....	21
C. Application of the Disciplines to the Utility Sector.....	25
D. Application of the Disciplines to Land Development.....	29
ANNEX 1	i

EXECUTIVE SUMMARY

1. The WTO's proposed "disciplines on domestic regulation" are likely to affect regulation of service sectors that are crucial for development such as financial services, education, utilities and land development. This Analytical Note identifies examples of potential conflict between the proposed disciplines and regulations in Argentina, South Africa, Kenya and the Philippines.

2. Article VI:4 of the General Agreement on Trade in Services (GATS) authorizes the negotiations. They take place in the WTO's Working Party on Domestic Regulation (WPDR). In 2006, the South Centre published *The Development Dimension of the GATS Negotiations on Domestic Regulation*, which advised that:

These negotiations will aim to set parameters on how Members utilise regulatory tools to fulfill policy objectives. (¶ 67) ... Broadly, the concern of Article VI: 4 disciplines ... is its potential for straight-jacketing developing countries into using certain "acceptable" regulatory tools and frameworks. (¶ 69) ... Setting regulatory parameters based on foreign values or "best practices" ignores the unique historic, cultural, political and other important characteristics that shape the type of governance that is successful for a country. (¶ 71)

3. The chair of the WPDR has advanced five drafts of proposed disciplines, the most recent being March 20, 2009. Most of the discussion within the WPDR has focused on how domestic regulations are a barrier to trade. This Analytical Note updates the South Centre's 2006 study with specific examples of how the proposed disciplines could be used to challenge emerging regulatory systems in developing countries, for example:

- Prudential regulation on banking services in Argentina.
- Black empowerment preferences for procurement of services in South Africa.
- Regulation of spending on salaries within private universities in the Philippines.
- Community impact standards for regulation of electric utilities in Kenya.

Given this potential for conflict, and considering the advanced stage of negotiations, it would be useful for WTO delegations to consult their domestic regulators of banks, universities, utilities and developers on the impact of the proposed disciplines, including issues such as the following:

- Regulators must publish 20 kinds of information related to each regulation. Does any country do this?
- Measures must be based on objective criteria. Are not some standards subjective?
- Measures must be pre-established. What about standards that evolve over time?
- Measures must be as simple as possible. What is the cost and capacity for developing countries to meet this standard?

THE DRAFT GATS DOMESTIC REGULATION DISCIPLINES – POTENTIAL CONFLICTS WITH DEVELOPING COUNTRY REGULATIONS

I. INTRODUCTION

1. Negotiations to discipline domestic regulation over services have been an ongoing aspect of the overall negotiations to expand the General Agreement on Trade in Services (GATS). This work began with regulations over professional services and was then broadened to encompass all service sectors.

2. The Council for Trade in Services established the Working Party on Domestic Regulations (WPDR) in 1999, and its members have produced various drafts and position papers. The latest draft, 'Disciplines on Domestic Regulation Pursuant to GATS Article VI: 4' is dated March 20, 2009. A copy of this text can be found in Annex I. It was prepared under the responsibility of the WPDR's Chairperson with the proviso that it does not address "issues on which differences persist."

3. Disciplines on the regulation of accounting services are already complete and await the conclusion of the Doha Round to be implemented. Disciplines on the regulation of all services may come into force in the same way, with agreement on a text being finalized in the GATS Working Party on Domestic Regulation (WPDR) and then approved when an overall Doha agreement is reached. Attention to the Working Party's proposals at this stage is worthwhile, since the implications of these proposals are significant but may be overlooked at the point when an overall Doha agreement is ready to be signed.

4. This update builds on the Analytical Note, "The Development Dimensions of the GATS Domestic Regulation Negotiations", the South Centre published in 2006.¹ The note assessed the implications of the proposed disciplines on developing countries in light of their generally weaker regulatory capacity and their use of regulations for development purposes. In this update, specific examples are provided from four developing countries that have been active participants in the WPDR. The focus is on measures in the financial, education, utility, and land development sectors.

II. THEMES RAISED IN THE DOMESTIC REGULATION NEGOTIATIONS

5. The most recent draft by the WPDR chairperson would impose seventy-one separate disciplines on domestic regulation that could be used separately or in combination to challenge services regulations through the WTO dispute process. The South Centre's 2006 Analytical Note identified a number of common themes in the

¹ This South Centre Analytical Note can be found at http://www.southcentre.org/index.php?option=com_content&task=view&id=225&Itemid=67

submissions developing countries have made to the WPDR. These themes are used below to organize discussion of key disciplines.

A. Necessity tests

6. The majority of developing countries have expressed opposition to inclusion of necessity tests, which are employed to determine whether a measure that is trade restrictive is absolutely essential or if there are other less trade restrictive ways to achieve a certain end. These tests can severely restrain the right to regulate and be applied in unpredictable ways in dispute settlement. The March 2009 draft of the disciplines does not include necessity tests. However, it does include a number of provisions that could operate as necessity tests, including:

1. Avoiding “disguised restrictions on trade” (paragraph 2 of the draft disciplines)

7. One of the stated purposes of the disciplines is to ensure measures related to regulations "do not constitute disguised restrictions on trade in services." Dispute panels could assess whether specific disciplines had been violated in light of this overall purpose. The WTO Appellate Body has ruled that a “concealed or unannounced restriction or discrimination in international trade does not exhaust the meaning of ‘disguised restriction’.”²

8. WTO Members would have to do more than ensure their measures are transparent if avoiding disguised restrictions on trade is made a purpose of the disciplines. Professor Robert Stumberg of Georgetown University has reviewed WTO rulings on similar wording in the GATT and concluded that this provision makes it “more likely that a challenge based on the proposed disciplines would succeed if a country fails to respond to a complaint by actively consulting and seeking less trade-restrictive or burdensome alternatives.”³

2. Requirement that measures be “relevant” to the supply of the services to which they apply (paragraph 11)

9. The term "relevant" is not defined, but may be interpreted to exclude considerations not strictly related to the supply of a service. For example, regulations requiring vocational colleges to provide general education courses as well as technical ones might be deemed to be not relevant to the supply of vocational training. A relevance test could end up operating in the same way as a necessity test – restricting measures such as licensing requirements only to what is the least burdensome.

3. Requirement that licensing and qualification procedures be “as simple as possible” (paragraph 17)

² WTO, “United States - Standards for Reformulated and Conventional Gasoline – Report of the Appellate Body”, WTO document WT/DS2/AB/R, 29 April 1996, p. 25.

³ Robert Stumberg, Memo on WPDR chairman’s fourth draft on domestic regulation, dated 23 January 2008, Harrison Institute for Public Law, 12 February 2008.

10. This proposed discipline is equivalent to a requirement that procedures be no more burdensome than necessary. It is unqualified, making simplicity a paramount goal in the licensing of all services, even highly complex ones such as banking. Procedures that involve multiple stages could violate the simplicity discipline. For example, some WTO Members require higher education institutions to operate for a certain period and demonstrate the standard of their services before they can be considered for degree granting authority, creating an approval process that is not as simple as possible.

11. Proposals for such strict disciplines on procedures ignore the challenges faced by regulators in many developing countries that do not have the resources in place to undertake streamlined, efficient and sophisticated procedures.

B. The right to regulate

12. Some developing countries have sought inclusion of strong right to regulate language in the disciplines. Protection of the right to regulate is especially important for developing countries given their need to advance development goals through regulation and to strengthen their regulatory frameworks.

13. The March 2009 draft of the disciplines reiterates (paragraph 3) the right to regulate statement of the GATS preamble. In relation to the right to regulate, the panel in the US-Gambling case stated that "Members maintain the sovereign right to regulate *within the parameters of Article VI of the GATS* [emphasis added]. Members' regulatory sovereignty is an essential pillar of the progressive liberalization of trade in services, but this sovereignty ends whenever rights of other Members under the GATS are impaired."⁴

14. At the request of some developing countries, the March 2009 draft includes the statement: "These disciplines should not be construed to prescribe or impose particular regulatory approaches or any particular regulatory provisions in domestic regulation." (paragraph 3). Particular regulatory approaches and provisions, however, are prescribed by a number of the disciplines, including:

1. Requirement to base measures on objective and transparent criteria (paragraph 11)

15. Under the statement of purpose at the beginning of the disciplines, "competence and the ability to supply the service" are given as examples of objective and transparent criteria. Establishing criteria of this kind as the only permissible bases for regulation could mean that requirements could only serve the interests of individual consumers but not those of the broader society. Objectivity disciplines could conflict with approaches that allow regulators to exercise discretion in balancing competing interests. Objectivity and transparency disciplines could also conflict with provisions based on aesthetic or other hard-to-quantify criteria.

⁴ WTO, "United States – Measures Affecting the Cross-border Supply of Gambling and Betting Services – Report of the Panel", WTO document WT/DS285/R, para. 6.136, p. 209.

2. Requirement that measures be pre-established (paragraph 11)

16. The draft disciplines do not define “pre-established” so it is not clear if regulatory measures have to be established before initial application, before final approval, or before renewals of a license. For example, due to the financial crisis increased capital requirements for banks are under consideration. However, because they are new regulations imposed after banks have already been licensed to operate, increased capital requirements might violate a “pre-established” rule and nothing in the draft disciplines or their negotiating history would preclude such an interpretation. A pre-established discipline could also conflict with regulatory approaches that permit regulators to relax requirements in some areas for enhanced public benefits in others.

3. Requirement that applicants need only approach one competent authority (paragraphs 19 and 32).

17. This discipline would conflict with regulatory systems where different levels of government share jurisdiction for regulatory approvals. This is often the case for land development applications where local governments are responsible for reviewing local land use compatibility and senior levels of government are responsible for reviewing environmental and other impacts of broader concern.

4. Requirement to take existing international standards into account in formulating technical standards (paragraph 41).

18. This discipline would tend to prescribe the particular regulatory approaches advocated by international standards setting bodies. Where “international standards”⁵ exist for certain sectors, they do not necessarily meet the criteria proposed in the disciplines. For example, a dispute panel might consider the regulatory guidelines developed by the Basel II committee to be international banking standards. But these standards have been criticized for not being objective or transparent as well as being overly complex.⁶ This could make countries that adopt them, in conformity with paragraph 41 of the disciplines, vulnerable to a challenge under other paragraphs. An illustration of this conflict is the reliance in Basel II standards on the assessments of ratings agencies, assessments that have been criticized for being biased.

5. Transparency and Prior Comment (paragraphs 13 and 15)

19. The requirements for transparency are extensive, and likely would entail changes for all countries, including those that already have high standards of transparency. The draft disciplines stipulate that it is insufficient for governments to make measures

⁵ Developing countries have limited representation and capacity to participate in the meetings of international standard setting bodies.

⁶ Daniel Tarullo. *Banking on Basel: The Future of International Financial Regulation*, 2008. pps. 266 and 267

relating to regulations publicly available, but "as well" they must provide "detailed information" about them (paragraph 13).

20. The information provided must minimally include the twenty distinct types that are listed. For example, publication of requirements to obtain a hotel license would have to be accompanied by "applicable technical standards", which could require detailing all regulations applicable to the hotel sector such as waste disposal regulations, food standards, employment standards, and building codes. The words "This information shall include, inter alia" that precede the twenty specified types of information required creates uncertainty because WTO Members would not necessarily fulfill their obligations by making publicly available all the information on the list.

21. Publication of "the normal timeframe for processing an application" is stated as an obligation under paragraph 13 (j)). This discipline will facilitate challenges that are provided for under paragraphs 20, 24, and 38 over delays in processing applications. Making publication of the normal timeframe for processing an application an obligation under paragraph 13 creates a conflict with paragraphs 24 and 38, which merely state that "Members *shall endeavour* to establish the normal timeframe for processing of an application" (emphasis added). It is not clear how a dispute panel would reconcile this conflict.

22. Members would have to endeavour to ensure that proposed measures are published in advance (paragraph 15). Reasonable opportunities for service suppliers to comment and have written responses to issues raised would need to be provided on a best endeavour basis. Prior comment tools are more likely to be used by developed countries given developing countries lack resources and as well are undertaking more regulatory reforms. In their submission to the WPDR, ACP countries pointed out that prior comment requirements could grant "foreign-service suppliers opportunities to exert undue pressure" and therefore should not be included in the disciplines either on a best endeavour or legally binding basis.⁷

III. CLARIFYING KEY DISCIPLINES TO SAFEGUARD THE RIGHT TO REGULATE

23. The chart provided below gives examples of apparent conflicts between actual developing country regulations in key sectors and the proposed disciplines. From this summary review of developing country regulations in key sectors, the potential for successful challenges appears extensive. The draft disciplines accord wide latitude to panels to interpret key disciplines since they have been left undefined. Negotiators might consider how defining these disciplines might help to safeguard the right to regulate recognized in paragraph 3.

⁷ WTO, "Working Party on Domestic Regulation - Communication from the ACP Group", WTO document JOB(06)/136/Rev.1, 19 June 2006.

A. Defining “pre-established” criteria

Question

24. Is there a definition of “pre-established” that would not conflict with the right to introduce new regulations, recognized in paragraph 3?

Issues for consideration

25. While a “pre-established” requirement is included in the Accounting Disciplines⁸, there is no negotiating history to explain its meaning either in minutes of negotiating meetings for the Accounting Disciplines or for the draft horizontal disciplines.⁹ If pre-established is interpreted to mean that all requirements must be established in advance of applications or renewals for licenses, that would appear to conflict with the recognition in the disciplines of the right to “introduce new regulations” (paragraph 3). It would particularly conflict with the ability of WTO Members to introduce new regulations to address a crisis. What definition of “pre-established”, for example, would allow Members to impose increased capital requirements for already established banks in the context of the current financial crisis? Would Members be expected to rely on exceptions clauses in the GATS?

26. In the financial services sector, Argentina has at times imposed significant changes to banking regulations for already established financial institutions, such as limits on withdrawals. Municipalities in the Philippines can change the zoning of established service suppliers when their operations pose problems for surrounding communities, resulting in these suppliers having to move their operations.

B. Defining “transparent” criteria

Question

27. Could “transparent” criteria be defined to mean that regulators are required to explain how the criteria they use bear a rational connection to a government’s objectives?

Issues for consideration

28. Transparent criteria have been contrasted at WTO compliance reviews with licensing requirements that “lack clarity”, are “open-ended”, create “uncertainty” for

⁸ WTO, “Disciplines on Domestic Regulation in the Accountancy Sector”, WTO document S/L/64, 17 December 1998.

⁹ When Japan was asked to elaborate on the meaning of the term “pre-established” in its proposal for the disciplines, its representative responded by saying “the wording was taken from the Accountancy Disciplines.” This statement is recorded in “WPDR – Report on the Meeting Held on 1 July 2003”, WTO document S/WPDR/M/22, 22 September 2003. A search of minutes of deliberations on the Accountancy Disciplines, however, does not shed any light on the meaning of “pre-established.”

foreign suppliers, and allow for “considerable bureaucratic discretion.”¹⁰ However, governments sometimes allow for regulatory discretion in order to ensure critical objectives are met in key sectors. For example, Kenya allows applications for university status to be rejected if they are not “in the interest of university education in Kenya.” South Africa maintains “honesty and integrity” qualification requirements for financial service providers that enable regulators to consider “any information in possession of the Registrar or brought to the Registrar's attention”.

C. Defining “objective” criteria

Question

29. In order to avoid a radical narrowing of the criteria on which WTO Members can base their requirements, could the examples of objective and transparent criteria in the disciplines be broadened? For example, could “contribution to development” and/or “environmental sustainability” be added to the illustrative examples of objective and transparent criteria? In terms of the definition of “objective”, could this be defined to mean that criteria are rationally related to governmental objectives?

Issues for consideration

30. “Objectivity” can have a range of meanings. In a 2007 memo reviewing legal interpretations, Robert Stumberg identified five potential meanings that WTO dispute panel could give for “objective criteria”.¹¹ These alternative meanings all conflict with existing developing country regulations, as discussed below.

i. Not arbitrary

31. The Appellate Body has interpreted the term “arbitrary” in the context of GATT Article XX. They ruled that to impose a “single, rigid, and unbending requirement” and to enforce it with “rigidity and inflexibility” constitute “arbitrary discrimination”.¹² The Philippines has set fixed rates of return for water concessions, which might be defined as a “rigid and unbending requirement.” The Philippines also requires private education institutions to allocate a fixed percentage of fee increases to staff salaries. These regulations may meet the transparency requirements of the disciplines because they are clear and provide certainty to service suppliers, but may be deemed to be arbitrary and therefore not objective.

¹⁰ WTO, “Council for Trade in Services – Report of the Meeting Held on 19 March 2002”, S/C/M/59, 14 May 2002, para. 58, and “Council for Trade in Services – Report of the Meeting Held on 17 July 2002”, S/C/M/61, 23 September 2002, para. 23.

¹¹ Professor Robert Stumberg, “Memorandum - GATS proposal that domestic regulations must be ‘objective’”, to Intergovernmental Policy Advisory Committee, 1 March 2007, available at: <http://www.tradeobservatory.org/library.cfm?refID=97673>

¹² WTO, “United States – Import Prohibition of Certain Shrimp and Shrimp Products”, WTO document WT/DS58/AB/R, 12 October 2008, para. 177.

ii. Not biased

32. The Appellate Body has ruled that an “objective” investigation requires an “unbiased” one, meaning that the “interests of any interested party, or group of interested parties” cannot be favoured.¹³ This definition of objective would conflict with affirmative action measures designed to redress historical injustices. South Africa’s Broad-Based Black Empowerment Act could violate an objectivity requirement defined in this way because it establishes preferences in hiring and investment decisions.

iii. Relevant to the ability to perform or supply the service

33. Objectivity may be interpreted to exclude considerations considered “external” to the satisfaction of consumers of the service. The only examples cited in the disciplines of objective criteria are “competence and ability to provide the service.” Approvals for electricity licenses in Kenya include consideration of their impacts on the “social, cultural or recreational life of the community”, criteria that may be deemed to be irrelevant to the supply of electricity services.

iv. Not subjective

34. GATT dispute panels have contrasted “objective criteria” with “subjective” opinion¹⁴ and the exercise of “judgment”.¹⁵ The disciplines’ transparency requirements, however, appear to allow for the subjective opinions of the public to be considered in licensing decisions. Kenya’s utility regulations allow rejection of rate increases that are not “just and reasonable”, requiring subjective judgments on the part of regulators. South Africa’s national building standards authorize regulators to turn down development that is “unsightly and objectionable”, terms that require subjective interpretation.

v. Least trade restrictive

35. The WTO Secretariat has stated that international standards have a “perceived objectivity” since when Members apply them, they are presumed to have used the “least trade restrictive measure”.¹⁶ The Secretariat also said GATS Article VI.5(b) establishes international standards as a “benchmark for determining the objectivity of regulatory requirements.” However, Argentina’s adoption of Basel I standards has been criticized

¹³ WTO, “United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan – Report of the Appellate Body,” WTO document WT/DS184/AB/R, 23 August 2001. Cited in Stumberg, “Memorandum - GATS proposal that domestic regulations must be ‘objective’”. Op.cit.

¹⁴ GATT, “Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages – Report of the Panel”, GATT document L/6216 - 34S/83, 13 October 1987, para. 5.7.

¹⁵ GATT, “Canada – Imposition of Countervailing Duties on Imports of Manufacturing Beef from the EEC – Report of the Panel”, GATT document SCM/85, 13 October 1987, para. 5.8.

¹⁶ WTO, “Working Party on Domestic Regulation - Report on the Meeting Held on 22 November 2004”, WTO Document, S/WPDR/M/28, 25 Jan. 2005. Cited in Stumberg, “Memorandum - GATS proposal that domestic regulations must be ‘objective’”.

for creating a bias in bank lending. Basel II standards have been criticized as not objective, and are currently being revised. Given the problems in international banking, it would seem ill-advised to allow “objective” criteria to be equated with international standards or the least trade restrictive standards.

D. Defining “relevant” criteria

Question

36. Could “relevant” be defined to mean that the criteria were imposed in order to contribute to governmental policy objectives?

Issues for consideration

37. Broadening of the illustrative examples of regulatory criteria beyond “competence and ability to provide the service” would help to avoid narrowing “relevant” regulatory criteria to only those strictly related to supply of the service. However, a requirement that regulatory measures be relevant to the supply of the service could be used to challenge measures that are considered outdated given technological or other developments. The dispute panel ruling in US – Hot Rolled Steel referred to information potentially being “no longer relevant” given changed economic circumstances.¹⁷ Argentina has been criticized by private education interests for maintaining regulations in the education sector that are outdated, and these could be deemed by a panel to be no longer relevant to modern education systems. Given their weaker capacity to undertake periodic regulatory reviews, developing countries could be particularly vulnerable to challenges that their regulations are no longer relevant.

E. Clarifying transparency

Question

38. Could a model be provided of a published regulatory measure that conforms with all the requirements of paragraph 13? Could this model be used to narrow the potential for excessively onerous interpretations of the transparency requirements?

Issues for consideration

39. The requirements for transparency included in the illustrative list in paragraph 13 of the disciplines appear to conflict with standard practices in most countries. All applicable technical standards are not appended to the publication of every measure related to licensing requirements and procedures, qualification requirements and procedures, and technical standards. To do so would appear to impose an excessive administrative burden, particularly for subnational governments. In addition, it is not

¹⁷ WTO, “United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan – Report of the Panel”, WTO document WT/DS184/R, 28 February 2001, 7.233.

clear what it means to have to publish all “technical standards” that are applicable to technical standards.

IV. SCOPE OF THE DISCIPLINES

40. The proposed disciplines cover both regulatory substance and procedures. Their scope is broad, applying not only to regulations but also to "measures relating to" regulations, and not only to measures directly related to services but also to measures “affecting” services. For example, a government’s decision to temporarily suspend an accounting regulation during a financial crisis, while not a regulation in itself, would still be covered by the disciplines as “measure relating to” regulations that affects services.¹⁸ Standards set for the construction of pipelines, although primarily about goods, would be covered by the disciplines because they affect the supply of construction services.

41. The disciplines would apply to measures relating to "licensing requirements and procedures, qualification requirements and procedures, and technical standards". The broad definitions provided for these terms appear to encompass all types of regulations. Licensing requirements are defined as all requirements that either individuals or companies need to comply with to obtain, amend, or renew authorization to provide a service. Use of the term "authorization" means the disciplines could apply to permits, concessions, and other types of authorizations as well as those that are formally called "licenses". Technical standards are defined broadly as "measures that lay down the characteristics of a service or the manner in which it is supplied." There is no clarity at this point in the negotiations about how the disciplines might apply differently to mandatory as opposed to voluntary standards.

42. In terms of the disciplines’ restrictions on licensing fees, there is no agreement on whether these apply only to administrative fees charged for the processing of licenses or all fees charged as a condition of obtaining a license.

43. The disciplines may apply to government procurement. The provisions dealing with procurement under Article XIII exempt certain GATS articles, but not Article VI. The “unintended consequences” the disciplines may have on government procurement have been raised as a concern in the WPDR.¹⁹ For example, application of the disciplines to procurement would conflict with the procurement preferences established in South Africa’s Broad-based Black Empowerment Act.

¹⁸ GATS **Article XVIII** defines “measure” with an illustrative list: “a law, regulation, rule, procedure, decision, administrative action, or any other form...”

¹⁹ WTO, “Working Party on Domestic Regulation – Report on the Meeting Held on 7 and 18 February 2005”, WTO document S/WPDR/M/29, 11 July 2005.

V. EXAMPLES OF REGULATORY CONFLICTS WITH THE DISCIPLINES

44. The chart below provides some examples of developing country regulations that could conflict with the proposed disciplines, and are for illustrative purposes only. The inclusion or absence of examples in any category does not indicate that one country is likely to conform with the disciplines better than another. The next part of this Analytical Note give explanations and references for the potential conflicts listed in the chart.

Table 1: Examples of Measures in Potential Conflict with Domestic Regulation

Disciplines	Financial	Education	Utilities	Land Development
Objectivity, Transparency and Relevance	<p>Argentina</p> <ul style="list-style-type: none"> - Prudential regulations, based on Basel I standards, criticized for creating pro-government lending bias - "Pesoization" of dollar accounts below market rates, differential rates set for saving versus loan accounts <p>South Africa</p> <ul style="list-style-type: none"> - Financial Services Charter created under Broad-based Black Empowerment Act promotes preferences in procurement, investment and hiring decisions - Financial Services Board bases assessment of financial suppliers' "honesty and integrity" on criteria not always specified - Foreign insurance 	<p>Argentina</p> <ul style="list-style-type: none"> - Regulations criticized by private education providers as being outdated, arbitrarily enforced <p>Kenya</p> <ul style="list-style-type: none"> - Commission for Higher Education can reject proposal for university on basis it is not "in the interest of university education in Kenya." <p>The Philippines</p> <ul style="list-style-type: none"> - Requires fee increases to be allocated to salary increases at fixed percentage - Proposals to limit fee increases to ensure affordability that 	<p>Kenya</p> <ul style="list-style-type: none"> - The Electricity Regulatory Commission can reject license applications in consideration of "the impact of the undertaking on the social, cultural or recreational life of the community..." - Commission can reject tariff rates if they are not "just and reasonable" <p>The Philippines</p> <ul style="list-style-type: none"> - Rates of return on investments limited for private water concessions. 	<p>South Africa</p> <ul style="list-style-type: none"> - Under National Building Regulations Standards Act 103 of 1977 local authorities reject development proposals if they could "disfigure" the surrounding area; would be "unsightly or objectionable", or "derogate from the value of adjoining or neighbouring properties."

Disciplines	Financial	Education	Utilities	Land Development
	<p>suppliers are not allowed to advertise unless they are licensed in South Africa</p> <p>Kenya - Proposals for regulating telecom services as financial services when they enable money transfers</p>	<p>could make operations nonviable for foreign for-profit suppliers .</p>		
<p>Pre-established</p>	<p>Argentina - Limits imposed on bank withdrawals for already licensed institutions - Extension of maturity length of deposits</p>	<p>The Philippines - Limits on fee increases could be imposed when these were not pre-established conditions for obtaining licenses</p>	<p>Kenya - Electricity Regulatory Commission can “at its discretion” suspend tariff increases</p>	<p>South Africa - Municipal regulators can weigh different factors, determine if certain requirements can be waived, and require additional mitigation measures from developers.</p> <p>The Philippines - Moratoria have been imposed on developments despite their conformity with land use plans. - City governments have rezoned property, making previously accepted land uses nonconforming and forcing operations to relocate.</p>

Disciplines	Financial	Education	Utilities	Land Development
Transparency (Note: None of the regulatory systems examined complied in all respects with the transparency requirements stipulated in paragraph 13 of the draft disciplines)	Argentina - Limits on bank withdrawals imposed for indeterminate period South Africa - Financial Services Board has discretion to make “fit and proper” assessments of the qualifications of bank personnel based on factors it chooses			
Prior Comment	Argentina - Emergency Economic Law enabling executive to issue economic decrees on an emergency basis - Government takeover of pension system without enabling input and giving response to input from foreign pension providers			
Single authority, procedures as simple as possible				South Africa - Multiple approvals can be required from local government authorities as well as the Department of Environmental Affairs and Tourism and/or South Africa National Parks The Philippines

Disciplines	Financial	Education	Utilities	Land Development
				- Building permits have to be obtained from local government authorities but may also require approvals from national government agencies, such as an Environmental Compliance Certificate from the Department of Environment and Natural Resources
Licensing fees limited to administrative costs			The Philippines - Water concessions have been granted with amounts paid far in excess of regulatory costs.	South Africa - - Municipalities can impose payments for infrastructure development as a condition for approval of developments.

VI: SECTORAL IMPLICATIONS OF THE DOMESTIC REGULATION DISCIPLINES

A. Application of the Disciplines to the financial sector

a. General

45. If the disciplines are applied to financial measures, governments will be put in a difficult situation. They will have to ensure their financial regulations conform with the disciplines at a time when they are under pressure to regulate to restore financial stability.

46. Crafting regulations that are generally accepted to be “objective and transparent” has proven to be an elusive goal even for those who are considered the world’s leading experts on financial regulations. The most recent attempt to draft international banking

standards – called Basel II - has been faulted for not being objective²⁰ or transparent. It has even been criticized by the International Chamber of Commerce for constituting a barrier to trade.²¹

47. The Basel Committee on Banking Supervision is a group of senior banking officials from ten OECD countries that recommends supervisory guidelines for banks. In response to perceived inadequacies in its previous standards, in 2004 the committee published the Basel II Accord that recommends a new approach to regulate the capital requirements for banks. But the regulatory approach they recommended has been criticized for being “arbitrary” and “opaque.”²²

48. The dilemma governments could face if the disciplines are applied to financial regulation is whether they should 1) adopt the international standards in the hope that most other countries will and there will less likely be challenges, even though these standards seem to fail the objective and transparent test, or 2) attempt to develop their own objective and transparent standards even though the disciplines require that international standards be taken into account (para. 41).

49. The fact however remains that Basel II is deeply flawed and the financial crisis has highlighted many of its problems. A key one is that private ratings agencies like Moody's are relied on to determine the safety and liquidity for banks' capital reserves. Yet these ratings agencies have been severely criticized for not being objective, since they are paid by the firms whose financial products they rate. Another major problem is that Basel II is extremely complicated, and it is questionable whether it would add anything to prudential supervision that could not be achieved through much simpler standards. The disciplines nevertheless push countries to adopt international standards.

50. The potential impacts of the disciplines on the GATS prudential carve out for financial services have been raised by WTO Members as a particular area of concern. The African Group, ACP countries, Brazil, Indonesia and the Philippines included protection for the carve-out²³ that appeared in an earlier version of the disciplines, but this wording was deleted in the Chairperson's latest draft.

²⁰ One Basel II proposal is that the ratings of commercial rating agencies should be used to classify the riskiness of a bank's holdings. But these rating agencies have been criticized for having contributed to the current financial crisis and being biased, as they derive their income from the company's they rate.

²¹ International Chamber of Commerce, press release “ICC calls on G20 to address impact of Basel II on trade finance”, 27 March 2009.

²² Daniel Tarullo. *Banking on Basel: The Future of International Financial Regulation*, 2008. pps. 266 and 267

²³ Paragraph 2 (a) of the GATS Annex on Financial Services. The carve-out states: “Notwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement.”

51. The prudential carve-out would not be a defence if the disciplines were used to challenge regulatory measures established for reasons other than ensuring financial stability. For example, regulations can be designed to make credit easier to obtain by agricultural, small business, or other specific groups.

b. Examples of country-specific potential conflicts

i. Argentina

52. Argentina's commitments for the financial sector, made in 1994, are higher than those of other developing Latin American countries. According to a case study on how Argentina's GATS commitments were determined, "the evidence seems to suggest that the financial services offer was used as a 'lock-in' device for autonomously taken policy reforms."²⁴ With these extensive commitments, and since the disciplines would apply where commitments have been made, Argentina would be more vulnerable to challenges than most other countries.

53. Although Argentina adopted Basel I banking standards in the 1990's, IMF economists have suggested these standards might have created a "pro-government bias in prudential regulation".²⁵ They identified a regulation-induced preference for lending to government as a significant contributor to the banking crisis Argentina subsequently experienced. This provides an example of how even though a country may have adopted international standards its regulatory criteria still might not be considered objective.

54. In 2001, as a response to an unprecedented economic crisis, Argentina implemented a number of measures described by some analysts as "extreme."²⁶ These included:

- temporary limits on bank withdrawals to US\$250 per week²⁷
- extension of the maturity of time deposits²⁸
- "pesoization" of US dollar accounts, with banks being required to convert US dollar deposits and loans into pesos.²⁹ By the end of the 1990's, almost two thirds of loans and deposits in Argentina were in US dollars³⁰

²⁴ Roberto Bouzas and Hernán Soltz, "Argentina and GATS: A Study on the Domestic Determinants of GATS Commitments" posted on the WTO site at:

http://www.wto.org/english/res_e/booksp_e/casestudies_e/case2_e.htm

²⁵ Adolfo Barajas, Emiliano Basco, V. Hugo Juan-Ramón, and Carlos Quarracino, "Banks During the Argentine Crisis: Were They All Hurt Equally? Did They All Behave Equally?", IMF Working Paper WP/06/42, February 2006, p. 16

²⁶ Ibid, p. 5.

²⁷ Gobierno de Argentina, "Decreto 1570/2001- Entidades Financieras", 12 December 2001, available at: <http://infoleg.mecon.gov.ar/infolegInternet/anexos/70000-74999/70355/texact.htm>

²⁸ WTO, "Trade Policy Review - Argentina - Revision", WTO document WT/TPR/S/176/Rev.1, 23 April 2007, paragraph 12.

²⁹ Gobierno de Argentina, "Decreto N° 214/2002, Reordenamiento del Sistema Financiero", available at: <http://infoleg.mecon.gov.ar/infolegInternet/anexos/70000-74999/72017/norma.htm>

55. These interventions would be covered by the disciplines since they fit the definition of technical standards. Imposition of extensions on term deposits and limits on bank withdrawals relate to the manner in which banks provide their services. As measures introduced after banks received their authorizations to operate in Argentina, they could violate the disciplines' pre-established rule (para. 11).

56. The rates of conversion mandated for pesoization of US dollar counts could violate the disciplines objective rule (para. 11), since: 1) they were substantially lower than the exchange rate determined by the market, and 2) a lower exchange rate was given for loans than deposits, a measure that could be deemed to be arbitrary. According to bank estimates, government compensation for banking losses due to pesoization fell far short of actual losses, so bank compensation measures could be considered to be non-objective as well.

57. The measures taken by the Argentine government were not related to competence or ensuring the quality of banking services. Foreign banks withdrew capital from Argentina before the measures were introduced, resulting in a shortage of cash to handle transactions and negatively affecting the quality of banking services they could offer.

58. Although Argentina was acting in response to a banking sector emergency, this could not be used as a defence under the GATS, which does not have an emergency safeguard mechanism. The Economic Emergency Law of 2002³¹ granted the Argentine government's Executive branch the authority to issue economic policy decrees that had the force of laws. Because some of the measures such as limits on bank withdrawals were imposed for an indeterminate period, they could violate the disciplines' requirement to be transparent (paras. 11 and 13).

59. A law, passed as an emergency measure, by its very nature would appear to violate the discipline that governments must endeavour to publish proposed measures in advance and that they should provide opportunities for comment and provide responses in writing to comments (para. 15).

60. New transparency disciplines could also provide grounds for a challenge to the Argentine government's recent decision to renationalize the country's pension system. Under GATS market access rules, Argentina could be challenged for creating a monopoly in an area - "pension fund management" - where it has made unlimited market access commitments. Such a complaint might additionally challenge Argentina for not endeavouring to create opportunities to comment for companies such as the British firm HSBC and Spanish firm BBVA that operated funds in Argentina's private pension system.³²

³⁰ Luis Catao and Marco Terrones, "Determinants of Dollarization, the Banking Side", IMF Working Paper WP/00/46, p. 4

³¹ Emergencia Publica y Reforma del Regimen Cambiario
<http://infoleg.mecon.gov.ar/infolegInternet/anexos/70000-74999/71477/norma.htm>

³² The Economist. "Cristina's Looking Glass World", 23 October 2008.

ii. South Africa

61. South Africa made extensive commitments for banking and other financial services when it submitted its revised commitments for this sector in 1998. In 2004, the Financial Services Charter was created pursuant to Article 12 of the Broad-Based Black Empowerment Act of 2003.³³ This Act says that generally, every public entity must take into account the codes of good practice established to achieve the objectives of the Act when “determining qualification criteria for the issuing of licences, concessions or other authorizations in terms of any law...” The codes of good practice therefore are measures related to licenses and would be covered by the disciplines.

62. The Financial Services Charter established targets and mechanisms for achieving black economic empowerment, including targeted hiring and investment and preferential procurement from black-owned businesses. These measures relate to the manner in which financial services are provided in South Africa, and so could be defined as technical standards under the disciplines. Since the objectives of the Charter and the Act are unquestionably to create a bias towards black empowerment, measures taken could be seen as not objective and not relevant to the supply of financial services (para. 11).

63. Along with most countries, South Africa maintains “fit and proper” requirements for financial service providers. These requirements mean supervisory authorities are granted a certain degree of discretion in a way that may violate the disciplines’ requirements for objectivity and transparency (para. 11).

64. The South Africa Financial Services Board in October 15, 2008 issued a board notice entitled “Determination of Fit and Proper Requirements for Financial Services Providers, 2008”.³⁴ The notice established that “An FSP [Financial Services Provider], key individual or representative must be a person who is honest and has integrity.” The Registrar for financial services providers is authorized to determine a person’s honesty and integrity by referring to “to any information in possession of the Registrar or brought to the Registrar’s attention.” A list of six factors that would automatically disqualify an applicant is given, but a Registrar is empowered to consider other factors not on the list at his/her discretion. Candidates are required to provide all information relevant to the Registrar’s determination of their honesty and integrity without being informed of what the full scope of this information may be.

65. The regulatory discretion provided for in these regulations could violate the disciplines requirement for measures to be pre-established and transparent (paras. 11

³³ Republic of South Africa, “Broad-Based Black Economic Empowerment Act, 2003”, 9 January 2004, available at: <http://www.info.gov.za/view/DownloadFileAction?id=68031>

³⁴ South Africa Financial Services Board, “Determination of Fit and Proper Requirements for Financial Services Providers, 2008”, Board Notice 106 of 2008, Government Gazette 15 October 2008, available at: http://www.ibcsa.org.za/legislation/legislation/BOARD_NOTICE_106_OF_2008.pdf

and 13). In addition, certain of the factors listed that automatically disqualify candidates could be considered not objective (para. 11). For example, candidates are automatically considered as not having sufficient honesty and integrity if they have ever been prohibited by any court of law anywhere from taking part in the management of a company or other regulated body, even if this disqualification has subsequently been lifted.

66. In the insurance sector, South Africa has made an unlimited commitment for a range of insurance services under the “consumption abroad” mode of trade. The Financial Advisory and Intermediary Services Act of 2002 prohibits “canvassing for or marketing or advertising (whether within or outside the Republic) of any business relating to the rendering of financial services by any person who is not an authorised financial services provider or a representative of such a provider.”

67. A requirement for foreign based insurance suppliers not to be allowed to advertise in South Africa unless they were licensed in South Africa could be considered as a disguised barrier to trade (para. 2) and not an objective (para. 11) way to protect consumers because of its bias against foreign suppliers.

iii. Kenya

68. Recently, the Kenyan government has been considering implementing new regulations for a service that straddles financial and telecom services, both sectors where Kenya has made GATS commitments. Two mobile phone companies are enabling customers to use their cell phones to transfer money to the accounts either of other mobile phone clients or of designated agents who then pay out cash to intended recipients.³⁵ Kenya has made financial services commitments for “All payments and money transmission services” as well as telecom commitments for mobile phone services.

69. One of the firms involved is 40% owned by UK-based Vodafone. Vodafone is recommending that financial regulations be adapted so that the customer data held by mobile phone companies would be considered sufficient to meet anti-money laundering and know-your-customer regulatory requirements.³⁶

70. Kenyan officials have proposed bringing the service under the supervision of a financial regulator. They have been accused, however, of having been prompted to do this by Kenyan banks which fear the competition.³⁷

71. If new regulations are imposed on mobile phone money transfers, these could be defined under the disciplines as relating to the licensing requirements of the mobile phone companies and/or to technical standards. Although the Kenyan government

³⁵ The East African, “Kenya: Banks Warn On Mobile Money Transfers”, 12 October 2008.

³⁶ Ibid.

³⁷ Nairobi Star, “Kenya: Big Banks in Plot to Kill M-Pesa”, 23 December 2008.

might provide prudential reasons for the new regulations, it could be deemed to have created a disguised barrier to trade contrary to one of the disciplines purposed (para. 2).

72. Kenya would be particularly vulnerable to this kind of challenge because officials from the Central Bank of Kenya have said imposing financial regulations on the service would be anti-competitive.³⁸ Regulations imposed after the licensing of the telecom operators could violate the pre-established rule (para. 11). Imposition on telecom companies of some of the same regulations that constrain banks could be deemed not relevant (para. 2) to the supply of what a dispute panel might define as a telecom rather than a financial service.

B. Application of the Disciplines to the education sector

a. General

73. In 2008, the World Bank published a paper entitled “The Evolving Regulatory Context for Private Education in Emerging Economies”. The paper characterizes a range of regulations as barriers to private involvement in the education sector, and recommends regulatory changes to create an enabling environment that would promote private education.³⁹ The paper bears strong similarities to the proposed GATS disciplines, which means the disciplines could be used to bring about changes actively sought by the private sector in education. Regulations the paper identifies as problems include:

- “Cumbersome and complex school and HEI [Higher Education Institutions’] registration processes that are less transparent and explicit than they should be”, eg. requiring a report from a public health inspector. Some of the disciplines that could be used to challenge registration procedures are: measures must be transparent, objective and not a disguised barrier to trade (para. 2), the twenty specific requirements listed under the section on transparency (para. 13) , licensing procedures must be as simple as possible (para. 17), only one authority need be approached (para. 19).
- “Unclear and subjective criteria and standards to qualify for registration” eg. leaving the final decision in the hands of the Minister of Education. This could be challenged under the article stating that measures must not be a disguised barrier to trade (para. 2) and that measures must be transparent, objective, and relevant (para. 11).
- “Outdated criteria for accreditation”, e.g. requirements for books in hard copy. This could be challenged under the condition that measures must be relevant (para. 11) and that international standards should be taken into account (para. 41).

³⁸ The East African, “Kenya: Banks Warn On Mobile Money Transfers”, 12 October 2008.

³⁹ John Fielden and Norman LaRocque, “The Evolving Regulatory Context for Private Education in Emerging Economies - Discussion Paper”, The World Bank Group, May 2008, p. 4.

- “Limits on the ability of private education institutions to set tuition fees at market rates and their ability to operate as for-profit entities”. Limits on the ability to operate as a for-profit entity would be market access violations, but limits on tuition fees could be challenged under the article stating that measures must be objective and relevant (para. 11) and not a disguised barrier to trade (para. 2). Limits on tuition fees could be challenged as a disguised barrier to trade (para 2) and, if governments intervened to regulate sudden extreme increases in fees, this could be challenged under the requirement that measures have to be pre-established (para. 11).
- “Involving the private sector (or its representative bodies) in debates and discussions about future education policies.” Lack of opportunity to influence the regulatory process could be challenged under Members should endeavour to provide opportunities for comment (para. 15).

74. The WTO Secretariat has also identified regulations as posing barriers to trade in education services. In its background note on educational services,⁴⁰ the WTO Secretariat stated that an example of a trade barrier is if foreign education providers are denied licences to grant degrees or certificates.

75. Education International has reviewed the disciplines in terms of their application to post-secondary education, and concluded that where commitments are made the disciplines would apply to all educational rules and procedures designed to ensure quality, protect students, and meet other objectives. They give the following specific examples of higher education quality assurance criteria that would fall within the disciplines’ scope: administrative capacity; qualifications of faculty and staff; academic freedom, integrity and ethical conduct; learning resources; and proof of financial stability.⁴¹

76. Since determinations of quality in some instances entail what could be considered subjective judgments on the part of regulators, these may fall foul of the objectivity requirements in the disciplines (para. 11). Requirements that educators have an understanding of local culture or broader knowledge than expertise in the specific subject they are teaching could also be considered as not relevant to the supply of the service (para. 11) and a disguised barrier to trade (para. 2). Accreditation procedures may not be as simple as possible (para. 17) and/or may involve undue delays (paras. 20 and 25).

⁴⁰ WTO, “Education Services – Background Note by the Secretariat”, WTO document S/C/W/49, 23 September 1998

⁴¹ Education International, “Note on GATS Domestic Regulation Disciplines and Education Services”, 2006. Available at: [http://www.ei-ie.org/gats/file/\(2006\)%20EI%20GATS%20Information%20Kit%20-%20Note%20on%20Domestic%20Regulations%20en.pdf](http://www.ei-ie.org/gats/file/(2006)%20EI%20GATS%20Information%20Kit%20-%20Note%20on%20Domestic%20Regulations%20en.pdf)

b. Examples of country-specific potential conflicts

i. Argentina

77. Argentina has not made education commitments to date, although it has an extensive private education sector. The plurilateral request for education services submitted by New Zealand and other countries⁴² attempts to allay concerns about possible impacts on regulatory authority in relation to curriculum and accreditation standards. The request's sponsors express the opinion that these are not market access and national treatment issues.

78. Curriculum and accreditation standards would, however, be affected if commitments are made since they are measures relating to educational qualifications, standards and licensing and are therefore covered by the disciplines. Negotiating requests for market access and national treatment in this round of GATS negotiations by implication encompass requests for application of regulatory disciplines.

79. If Argentina agrees to requests to make commitments in the education sector, it may be particularly vulnerable to challenges based on the regulatory disciplines because of its substantial private education sector. Both its curriculum and accreditation requirements have been criticized as impeding competition.⁴³ EdInvest, a World Bank project devoted to private sector involvement in education, has given the following harsh assessment of Argentina's regulatory environment for private education: "Private education is subject to such numerous and stringent regulations as to threaten to undermine autonomy and to discourage investment. Most of the regulations are not followed strictly, but private schools have to survive in an environment that includes periodic reviews by inspectors who have the power to invoke the letter of the law and regulations that can be activated according to bureaucratic discretion."⁴⁴

80. The report states that Argentina maintains regulations that are outdated. Under the disciplines, these regulations could be challenged as not relevant to the supply of modern education services (para. 11). A challenge to Argentina's education regulations as not relevant could be one part of a domestic regulation complaint that also challenged Argentina for not administering its measures in a "reasonable, objective and impartial manner", as required by Article VI.1. EdInvest accuses Argentina of enforcing its regulations in a way that is "arbitrary".⁴⁵

ii. Kenya

81. The plurilateral request for education commitments asks for countries that already permit private education to reflect that in their GATS schedules. Kenya's

⁴² New Zealand Ministry of Foreign Affairs and Trade, "Private Education Services", 14 March 2006, available at: <http://www.tradeobservatory.org/library.cfm?refID=78798>. The recipients of the request are not disclosed.

⁴³ James Tooley, "The Private Education Industry: Lessons from Private Education in Developing Countries", Institute of Economic Affairs, 2001, pps. 139 and 140.

⁴⁴ EdInvest, "Investment Opportunities In Private Education In Argentina", 2000, p. 1.

⁴⁵ Ibid, pps. 9 and 17.

regulations on universities⁴⁶ allows for the establishment of private universities. A Commission for Higher Education is empowered to grant an institution interim authority to operate if it can meet certain conditions, such as submitting an academic programme and demonstrating adequate human, physical, and financial resources. But the Commission also needs to be satisfied that the proposed university is “in the interest of university education in Kenya.” This requirement could violate the discipline that measures must be objective and transparent (para. 11).

82. If interim authority is refused or withdrawn for an institution, another application cannot be submitted for another two years. This delay could violate the discipline that says rejected applicants should be allowed to reapply within a “reasonable” time frame (para. 23).

83. Concerns about the impact of the GATS in relation to African countries’ capacity to regulate have been raised. In 2004 the Association of African Universities organized a workshop with UNESCO for senior education officials entitled: Implications of WTO/GATS for Higher Education in Africa. A declaration was issued regarding GATS impacts on regulatory authority, noting “the fact that regulatory regimes for the licensing/registration, quality assurance and accreditation of higher education institutions and programmes are undeveloped in many African countries or in early stages of development accompanied by problems of poor resourcing and capacity.”

84. Kenya has experienced unaccredited universities appearing each year and charging local students tuition based on claims that they can provide university credentials up to and including PhD’s.⁴⁷ The head of one company responded to criticisms that he was operating an unaccredited institute in contravention of Kenyan law by stating that the company was providing a distance learning programme. In his view, there was no need for local accreditation, since this kind of education is unregulated in Kenya.⁴⁸ If Kenya moved to regulate the operations of these types of corporations, this could be deemed to be a disguised restriction on trade (para. 2) and violate the discipline that measures related to licensing and standards must be pre-established (para. 11).

iii. The Philippines

85. The Philippines has an extensive private education sector, particularly in higher education where 82% of students are enrolled in private institutions and some institutions are listed on the Philippine stock market.⁴⁹ This dominance of the sector by private institutions posed problems recently when the Philippine government attempted

⁴⁶ Universities (Establishment Universities) (Standardization, Accreditation and Supervision) Rules, 1989

⁴⁷ Nairobi Business Daily, “Kenya: Queries Over Quality of Degrees Awarded By Spanish College”, 13 April 2008

⁴⁸ Ibid

⁴⁹ Kevin Kinser and Daniel C. Levy, “The For-Profit Sector: U.S. Patterns and International Echoes in Higher Education”, Program for Research on Private Higher Education, University of Albany, February 2005.

to influence the affordability of higher education. State run colleges and universities were required in 2008 to impose a tuition freeze. The Philippines' president appealed to private institutions to implement a freeze as well, but under existing legislation could not stop them from going ahead with fee increases.⁵⁰

86. A member of the Philippine Commission on Higher Education has advocated regulatory changes to permit government control of private institutions' fees.⁵¹ On the other hand, an existing government regulation stipulating how the money from fee increases has to be allocated – 70% must go towards salary increases – has already been criticized as “highly restrictive”.⁵²

87. If the Philippines made commitments in private higher education and the disciplines were applied, a change in regulation of private education institutions to enable government control of fee increases could violate the pre-established rule (para. 11). It could also be deemed to be a disguised restriction on trade (para. 2) since operating in the Philippines might not be viable for foreign, for-profit education providers. Existing regulations on how private higher institutions allocate income from fee increases could also be challenged as a disguised restriction on trade since profits are constrained (para. 2). These regulations could violate the disciplines that measures must be relevant to the supply of the service (para. 11).

C. Application of the Disciplines to the utility sector

a. General

88. The disciplines would apply where commitments have been made for the supply of water, sewage and energy services. Government procurement of these services appears to be covered by the disciplines. The GATS article on government procurement (Article XIII(1)) exempts procurement from the application of most-favoured nation, market access, and national treatment obligations but not obligations under Article VI – Domestic Regulation.

89. One of the proposed disciplines (paragraph 26) restricts what governments can charge for licensing fees to the costs incurred by the competent authorities. A footnote excludes the following from the definition of licensing fees: “fees for the use of natural resources, payments for auction, tendering or other non-discriminatory means of awarding concessions, or mandated contributions to universal service provision.”

90. The regulation of utilities is perhaps the area where governments will need to make the most changes to their regulatory systems if the disciplines are approved. Regulatory approvals for these services are often needed from local governments as well as national and/or state governments. Where multi-jurisdictional approval processes

⁵⁰ Cebu Daily News, “Tuition hike to continue”, 28 May 2008.

⁵¹ Ibid

⁵² Adriano Arcelo, “In Pursuit of Continuing Higher Education Quality through Accreditation: the Philippine Experience”, UNESCO, 2003, p. 50.

exist, they would have to be changed to comply with the discipline that applicants shall not be required in principle to apply to more than one authority for a license (para. 19).

91. A 2005 World Bank report on water services in Latin America stated that: “municipal control of the sector has made it difficult to subsequently drive regulation and PSP [Private Sector Participation] from the center. For political reasons, municipalities may be unwilling to relinquish their recently regained control of service provision to the private sector or to accept tariff rulings from a national regulator.”⁵³

92. The requirement that licensing procedures be as simple as possible (para. 17) would place a responsibility on governments that could be very difficult to meet. It is theoretically possible to further simplify any procedure if other considerations – diverse regulatory objectives, expense to government, constitutional division of powers – are made secondary. In practice, however, governments could encounter significant opposition if they made regulatory simplification their paramount goal.

93. In reviewing the potential impacts of the GATS on US electricity policy, Professor Robert Stumberg has raised the question of whether the objectivity test imposed by the disciplines would conflict with a public interest approach that requires regulators to balance competing interests. Stumberg stated that while the quality of the service may be one concern, other interests regulators have to consider can include “environmental protection, financial stability of the utility, affordability of rates for most consumers, or economic development of the community at large.”⁵⁴ These interests also might not be considered relevant (para. 11) to the supply of the service.

94. Stumberg has also discussed possible meanings of the disciplines “pre-established” requirement. In terms of utility regulation, the pre-established discipline could require all standards and licensing requirements to be established before the application for a license, before the approval of a license, or before a license is renewed, but the term has not been defined in the disciplines.

b. Examples of country-specific potential conflicts

i. Kenya

95. Kenya has not made commitments in the energy sector and it is not known whether it is being asked to do so in bilateral GATS negotiations. Kenya has allowed private entrants into its electricity market since the mid-1990’s⁵⁵. In 1996, electricity began to be contracted from private power producers in competition with the state power generator, and all bids for power generations subsequently were open to both

⁵³ Vivien Foster, “Ten Years of Water Service Reform in Latin America: Towards an Anglo-French Model”, World Bank, January 2005, p. 25.

⁵⁴ Robert Stumberg, “GATS and Electricity – Interim Report”, National Conference of State Legislatures: Working Group on Energy and Trade Policy, 15 April 2005, p. 26.

⁵⁵ A. Eberhard and K. Gratwick, “The Kenyan IPP experience”, Journal of Energy in Southern Africa, Vol. 16 No. 4, November 2005

public and private sector companies. The partially government-owned Kenya Power & Lighting Company has a monopoly on distribution and transmission. The Kenya Generating Company is also partially government-owned and competes with private providers for generation contracts.

96. In 2006 an Energy Act⁵⁶ was passed replacing the existing regulator with an Electricity Regulatory Commission that was granted the authority to regulate all aspects of the electricity sector. Licenses have to be obtained from the Commission for “generation, importation or exportation, transmission or distribution of electrical energy”. In determining whether it should grant a license, the Commission can consider among other things “the impact of the undertaking on the social, cultural or recreational life of the community...” These are areas where it would be difficult to meet the objective and transparent requirements of the disciplines, and they could be considered not relevant to the supply of the service (para. 11). No government legislation is referenced where national objectives legitimize these concerns.

97. Public comment on applications for licenses is provided for and can be one factor in the rejection of a license. Since such input cannot be known in advance of an application, it establishes criteria for licensing that could be deemed not transparent and not pre-established (para. 11).

98. The Commission is also empowered to exercise discretion and may take into account in its licensing decision “any other matter that the Commission may consider likely to have a bearing on the undertaking”, imposing licensing criteria that are not transparent and not pre-established (para. 11).

99. Electricity tariffs have to be submitted for review by the Commission before they are implemented and have to be “just and reasonable”, criteria that could be judged not objective and transparent (para. 11). The Commission can “at its discretion” suspend tariff rates for as long as five months.

ii. The Philippines

100. The Philippines has not committed water but it has been asked to do so in the current round of GATS negotiations.⁵⁷ The European Commission, for example, has requested commitments for water services under the category of “Water collection, purification and distribution services through mains.” In relation to electrical utilities, it is not known whether the Philippines has received requests for commitments for the retail distribution of energy in bilateral GATS negotiations.

101. The Philippines has a daunting challenge to provide safe drinking water to its citizens at affordable prices, and failures of the public water service in Manila led to its privatization in 1997. However, Manila’s privatized water service has been plagued with litigation, including both government and corporate complaints filed with

⁵⁶ Government of Kenya, “The Energy Act, 2006.”

⁵⁷ European Commission, “Environmental Services - EC Request to the Philippines”, February 2003.

international tribunals.⁵⁸ Critics of the privatization cite steep rate hikes, lack of water pressure, leakages, and contamination problems.⁵⁹

102. It is not clear how the proposed disciplines would apply to concessions, particularly ones following the regulatory model used for Manila's water and sewage system. A separate agency, the Metropolitan Waterworks and Sewerage System Regulatory Office, was created as part of the concession agreement and has authority to monitor and enforce standards of service as well as to review rate increases. This model has been called "regulation by contract".⁶⁰

103. Concession agreements provide authorization to supply a service. They would therefore fit under the disciplines' definition of a license. These agreements can define the characteristics of a service and the manner in which it is supplied so their terms would fit the definition of technical standards. The disciplines' requirements in areas like transparency, objectivity, and relevance could, therefore, affect concession agreements. For example, rates of return on investment are limited under concession agreements,⁶¹ but these limits could be considered not objective and not relevant to the supply of the service (para. 11).

104. Manila's privatized water concessions have created conflicts both between the government and the service providers⁶² and the government and the regulator.⁶³ Application of GATS disciplines could create another layer of problems for the government of the Philippines in an already difficult area, with challenges from foreign governments on behalf of the foreign-based companies that have stakes in the water concessions.

105. Application of the disciplines to electrical utilities in the Philippines could conflict with the way privatized utilities are regulated. The Energy Regulatory Commission is granted broad authority to act "in the public interest" over rates charged by electrical utilities, allowing for "reasonable" rates of return but also ensuring a "reasonable" price of electricity,⁶⁴ criteria that could violate the disciplines' requirements to be objective and transparent (para. 11). The Commission has exercised this authority, ordering the main private retail electricity distributor, Meralco, to lower its rates.⁶⁵ The Commission has also had one of its orders nullified by the Supreme Court of the Philippines on the

⁵⁸ GMA TV News, "Maynilad may file 2nd arbitration case vs. MWSS", 15 January 2009.

⁵⁹ Friends of the Earth France, "Water - at what cost?"

⁶⁰ CUTS International, "Comparative Study of Regulatory Framework in Infrastructure Sector: Lessons for India", January 2008.

⁶¹ ADB, "Sharing Best Practices in Water Supply and Wastewater Management", proceedings of conference held in Manila, 15 - 19 September 2008, available at:

<http://www.adb.org/documents/events/2008/Sharing-Best-Practices/Proceedings.pdf>

⁶² "Manila Standard, "Maynilad gives up water concession", 10 December 2002.

⁶³ GMA News TV, "Palace threatens to oust MWSS chief over water-rate hike", 7 February 2009.

⁶⁴ SEC. 43. Functions of the ERC, Electric Power Industry Reform Act of 2001, Republic of the Philippines.

⁶⁵ GMA News TV, "Meralco to start refunding P3.9B to its customers", 25 February 2009.

grounds of “grave abuse of discretion”⁶⁶ for non-disclosure of its rate setting methodology, suggesting the Commission could be vulnerable under the disciplines to transparency complaints.

D. Application of the Disciplines to land development

a. General

106. GATS commitments of construction, hotel and restaurant, and distribution services will have significant implications for land use planning if the disciplines as drafted are applied. Construction permits for housing of all types, for commercial and industrial buildings, and for tourist development would be covered by the disciplines. Zoning regulations setting limits on, and requirements for, development projects would be covered as well.

107. The WTO Secretariat in its analysis of the GATS and the construction sector has observed that land use, building permits, and other regulations on the industry “are applied not only at the national level, but also very frequently at the sub-federal or local government level. These types of regulations are normally the responsibility of local government authorities.”⁶⁷ The disciplines’ right to regulate for national policy objectives does not extend to local government regulations.

108. Decisions about whether or not to approve a construction project can involve a range of considerations not related to the quality of the construction services being provided. Approval may not be granted unless developers can address concerns over the impacts on the surrounding neighborhood and environment. Where a proposed development might negatively impact on the attractiveness of an area for industries like tourism, it may be rejected or design changes may be required. Yet the objectivity of planning rules could be challenged under the disciplines if they are based on hard-to-quantify criteria such as aesthetics or historic value.

109. The disciplines’ requirement that regulatory procedures must be as simple as possible (para. 17) could impact efforts local governments make to get community input on proposed development or to apply a sustainability screen. Since not all local governments do this, their development approval processes might be held up as the standard of how the application procedures can be made as simple as possible.

110. A pre-established discipline imposed on the development application process could rule out give and take negotiations between developers and planning authorities. Flexibility can allow developers to exceed otherwise fixed limits such as maximum building height in exchange for providing social housing or other community benefits. If all requirements have to be established prior to a developer submitting an application,

⁶⁶ Supreme Court, Republic of the Philippines, “Decision: National Association of Electricity Consumers for Reforms vs ERC and Meralco”, G.R. No. 163935, 2 February 2006.

⁶⁷ WTO, “Construction and Related Engineering Services – Background Note by the Secretariat”, WTO document S/C/W/38, 8 June 1998.

both developers and local communities could stand to lose from the resulting rigidity in the regulatory process.

b. Examples of country-specific potential conflicts

i. South Africa

111. In South Africa, the jurisdiction for reviewing construction and retail proposals is shared by local, provincial, and national levels of government. Developers have to meet local government zoning requirements, but they may also have to get approval from other levels of government. For example, development in environmentally sensitive areas may have to be approved by the Department of Environmental Affairs and Tourism or South Africa National Parks. Backers of large projects have complained that even when they have obtained zoning approval, they still experience expensive holdups due to the regulatory process,⁶⁸ suggesting the potential for challenges under the disciplines' requirement (para. 24) that applications be processed in a reasonable timeframe.

112. Procedures that require applications to multiple government agencies would violate the requirement in the disciplines that only one competent authority should have to be approached (para. 19) and could be deemed not to be as simple as possible (para. 17).

113. The National Building Regulations Standards Act 103 of 1977 contains what would be defined as technical standards under the disciplines. This Act authorizes local authorities to refuse to approve proposed construction if it could "disfigure" the surrounding area; would be "unsightly or objectionable", or "derogate from the value of adjoining or neighbouring properties." These are criteria that could be challenged under the disciplines as not objective or transparent (para. 11).

114. Aesthetic judgments involved in maintaining scenic views and safeguarding the tourism potential of an urban area are not regulatory criteria that easily fit an objectivity requirement. The City of Cape Town, for example, maintains building height restrictions to protect views of the city's key scenic resources, setting exact height limits that could be considered arbitrary.

115. Cape Town's application process for construction of tall buildings requires wind tunnel studies; assessments of impacts on traffic; heritage properties and the environment; and proposals for mitigation of impacts.⁶⁹ Planning officials can weigh these different factors and determine if some requirements can be waived and if the mitigation proposals are adequate or if developers need to do more. Such regulatory flexibility could violate the requirement that regulations must be pre-established (para. 11).

⁶⁸ Independent Online, "Land claim delays 'have cost KZN R10bn'", 6 August 2008

⁶⁹ Independent Online, "High priority for city's amazing sights", 14 August 2008.

116. The limitation of payment of licensing fees to costs incurred by regulatory authorities (para. 26) would have a significant impact on municipal finances if development charges are covered by this discipline. For example, Johannesburg in its explanation of its planning regulations, states that “if a development application is approved, it may involve the payment of monetary contributions to the Council for additional services such as sewers, electricity and water supply road improvements etc.”⁷⁰ Infrastructure charges are a common way local governments pay their costs resulting from new development, but these charges are vulnerable to challenge under the disciplines.

117. South Africa has made extensive commitments for construction and distribution services, so if the disciplines are implemented, they will apply automatically to these existing commitments.

ii. The Philippines

118. Development projects in the Philippines must conform with local government and provincial land use plans⁷¹ as well as meet requirements set by the national government. For example, some projects may require obtaining building permits from local governments as well as an Environmental Compliance Certificate from the Department of Environment and Natural Resources (DENR).⁷²

119. Application of the disciplines to Filipino regulations governing development could have particular impacts in the tourist sector, where the Philippines has made GATS commitments. Rapid resort expansion may be putting at risk natural attractions like coral reefs that tourism depends on. In the case of development on the island of Boracay, DENR stepped in to attempt to stop construction of a large scale hotel/convention centre project that local authorities had approved.⁷³ This would violate the discipline’s requirement that developers need only approach one authority for approvals (para. 19).

120. In response to a request from DENR, the local government on Boracay passed Resolution No. 042 imposing a moratorium on new construction.⁷⁴ Such measures could violate the discipline that, once a permit has been approved, an authorisation should enter into effect without undue delay (para. 25). Moratoria could also violate the pre-established rule (para. 11), since the local government’s land use plan allowed development on the site.

⁷⁰ City of Johannesburg, “Development Planning - Landuse Management”, available at: <http://www.joburg.org.za/content/view/552/9/>

⁷¹ Government of the Republic of the Philippines, Sec. 447, Powers, Duties, Functions and Compensation Local Government Code of 1999.

⁷² Government of the Republic of the Philippines, Philippine Environmental Policy and Republic Act. 4846, as amended by P.D. 374.

⁷³ The Manila Times, “Atienza Insists Constructions in Boracay Should Stop”, 16 April 2008.

⁷⁴ Press Release – Ombudsman, “Charges filed against Mayor, other officials of Malay, Aklan for illegal construction of hotel resort in Boraca”, 2 December 2008.

121. The ability of local government authorities to rezone property would also appear to be in jeopardy under the disciplines' pre-established rule. While local governments may be acting in the interest of the majority in their communities, their decisions to rezone can be costly to affected parties. For example, the City of General Santos in the Philippines has rezoned a district from industrial to commercial. As a result, in 2008 and 2009 three oil companies were required to move their oil distribution depots out of the district.⁷⁵ Under some legal systems, property owners can sue for compensation if they are negatively affected by a change in zoning. But if the disciplines are implemented as drafted, the pre-established rule would appear to provide a means for preventing rezoning altogether.

⁷⁵ Sunstar Network, "Shell, Chevron close fuel depots", 18 January 2009

Annex 1

Room Document

20 March 2009

Working Party on Domestic Regulation

- DRAFT -

**DISCIPLINES ON DOMESTIC REGULATION PURSUANT TO GATS ARTICLE
VI:4**

Second Revision

Informal Note by the Chairman

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

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

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

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

- DRAFT -

DISCIPLINES ON DOMESTIC REGULATION

I) INTRODUCTION

1. Pursuant to Article VI:4 of the GATS, Members have agreed to the following disciplines on domestic regulation.

2. The purpose of these disciplines is to facilitate trade in services by ensuring that measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards are based on objective and transparent criteria, such as competence and the ability to supply the service, and do not constitute disguised restrictions on trade in services.

3. Members recognize the right to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right. These disciplines should not be construed to prescribe or impose particular regulatory approaches or any particular regulatory provisions in domestic regulation.

4. Members recognize the difficulties which may be faced by individual developing country Members in implementing disciplines on domestic regulation, particularly difficulties relating to level 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.

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

III) GENERAL PROVISIONS

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

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

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

IV) TRANSPARENCY

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

- a. whether any authorization, including application and/or renewal where applicable, is required for the supply of services;
- b. the official titles, addresses and contact information of relevant competent authorities;
- c. applicable licensing requirements and criteria, terms and conditions of 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.

14. 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.

15. 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

16. 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

17. Each Member shall ensure that licensing procedures, including application procedures and, where applicable, renewal procedures, are as simple as possible and do not in themselves constitute a restriction on the supply of services.

18. Each Member shall ensure that 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.

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

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

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

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

23. If an application for a 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.

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

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

26. Each Member shall ensure that licensing fees⁷⁶ are reasonable in terms of the costs incurred by the competent authority, including those for activities related to regulation and supervision of the relevant service, and do not in themselves restrict the supply of the service.

VII) QUALIFICATION REQUIREMENTS

27. Where a Member imposes qualification requirements for the supply of a service, it shall ensure that adequate procedures exist for the verification and assessment of

⁷⁶ Licensing fees do not include fees for the use of natural resources, payments for auction, tendering or other non-discriminatory means of awarding concessions, or mandated contributions to universal service provision.

qualifications held by service suppliers of other Members. In verifying and assessing qualifications, where the competent authority finds it relevant, it shall give due consideration to relevant professional experience of the applicant as a complement to educational qualifications. Where the competent authority considers that membership in a relevant professional association in the territory of another Member is indicative of the level of competence or extent of experience of the applicant, such membership shall also be given due consideration.

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

29. Residency requirements, other than those subject to scheduling under Article XVII of the GATS, shall not be a pre-requisite for assessing and verifying the competence of a service supplier of another Member.

30. Once qualification requirements and any applicable licensing requirements have been fulfilled, each Member shall ensure that a service supplier is allowed to supply the service without undue delay.

VIII) QUALIFICATION PROCEDURES

31. Each Member shall ensure that qualification procedures are as simple as possible and do not in themselves constitute a restriction on the supply of services.

32. An applicant shall, in principle, not be required to approach more than one competent authority for qualification procedures.

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

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

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

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

37. If an application for verification and assessment of qualification is rejected by the competent authority, the applicant shall be informed in writing and without undue

delay. In principle, the applicant shall, upon request, also be informed of the reasons for rejection of the application and of the timeframe for an appeal against the decision. An applicant should be permitted, within reasonable time limits, to resubmit an application.

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

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

IX) TECHNICAL STANDARDS

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

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

X) DEVELOPMENT

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

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

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

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

- a. developing and strengthening institutional and regulatory capacities to regulate the supply of services and to implement these disciplines;
- b. assisting developing country and in particular LDC service suppliers to meet the relevant requirements and procedures in export markets;
- c. facilitating the establishment of technical standards and participation of developing country Members and in particular LDCs facing resource constraints in the relevant international organizations;
- d. assisting, through public or private bodies and relevant international organizations, service suppliers of developing country Members in building their supply capacity and in complying with domestic regulation in their markets. Such assistance may also be provided directly to the respective service suppliers.

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

XI) INSTITUTIONAL PROVISIONS

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

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

READERSHIP SURVEY QUESTIONNAIRE
South Centre Analytical Note

THE DRAFT GATS DOMESTIC REGULATION DISCIPLINES – POTENTIAL CONFLICTS WITH DEVELOPING
COUNTRY REGULATIONS

An important objective of the South Centre is to provide concise and timely analytical inputs on selected key issues under ongoing negotiation in the WTO and other related multilateral fora such as WIPO. Our publications are among the ways through which we try to achieve this objective.

In order to improve the quality and usefulness of South Centre publications, we would like to know your views, comments, and suggestions regarding this publication.

Your name and address (optional): _____

What is your main area of work?

- | | |
|---|--|
| <input type="checkbox"/> Academic or research | <input type="checkbox"/> Media |
| <input type="checkbox"/> Government | <input type="checkbox"/> Non-governmental organization |
| <input type="checkbox"/> International organization | <input type="checkbox"/> Other (please specify) |

How useful was this publication for you? [Check one]

- Very useful Of some use Little use Not useful

Why? _____

What is your assessment of the contents of this publication? [Check one]

- Excellent Very Good Adequate Poor

Other comments: _____

Would you like to be on our electronic and/or hardcopy mailing lists? Yes No

If yes, please indicate:

- Electronic** – please indicate your name and email address:
 Hardcopy – please indicate your name and mailing address:

Personal Information Privacy Notice: Your personal contact details will be kept confidential and will not be disseminated to third parties. The South Centre will use the contact details you provide solely for the purpose of sending you copies of our electronic and/or hardcopy publications should you wish us to do so. You may unsubscribe from our electronic and/or hardcopy mailing lists at anytime.

Please return this form by e-mail, fax or post to:

South Centre Feedback
Chemin du Champ d'Anier 17
1211 Geneva 19
Switzerland

E-mail: south@southcentre.org

Fax: +41 22 798 8531



Chemin du Champ d'Anier 17
Case postale 228, 1211 Geneva 19
Switzerland

Telephone: (41 22) 791 8050
Fax: (41 22) 798 8531
Email: south@southcentre.org

Website:
<http://www.southcentre.org>