



HARRISON INSTITUTE FOR PUBLIC LAW
GEORGETOWN LAW

Plain Language Guide:
GATS Negotiations on Domestic Regulation

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Discussion Draft of May 19, 2010

This paper is a preliminary effort to identify issues for discussion and further analysis. It presents the views of the authors and does not represent Georgetown University or our collaborators. We will revise this paper as we receive comments. To send comments or request subsequent versions of this paper, please contact Robert Stumberg at stumberg@law.georgetown.edu.

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Acknowledgements

The author would like to thank Ellen Gould for helpful comments on this draft and to acknowledge the valuable research assistance of Max Levin, Loukas Kozonis, Emily Sweeney-Samuelson and Luke Engan.

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Abstract

The World Trade Organization is negotiating “disciplines” on domestic regulation, which is essential for both development and environmental protection. Often ambiguous, some of the draft disciplines can be interpreted as a radical departure from the practice of most nations. They could change the course of regulation and development, particularly within federal systems and in small and vulnerable economies, where government systems are changing.

Three generally applicable disciplines are contained in one sentence that requires regulations to be “pre-established, based on objective and transparent criteria and relevant to the supply of the services to which they apply.” If these terms are interpreted according to their ordinary meaning, conflicts with domestic regulations are foreseeable:

- “*Pre-established*” limits change. It could mean that if governments change regulations, they could not apply them to established businesses or investments. If so, this discipline could constrain changes in climate policy, environmental regulation of existing extraction industries, or financial regulation of existing financial institutions, particularly if those regulations are (e.g., developmental lending mandates to serve businesses that are small or owned by women). Two companion papers expand upon this discipline:
 - “*Pre-established*” *regulations and development permits*, by Loukas Kozonis
 - “*Pre-established*” *regulations and financial services*, by Max Levin
- “*Objective*” could mean “not subjective.” It could overturn regulation based on a “public interest” standard or the subjective balancing required when there are multiple criteria for assessing the environmental, economic or community impact of a proposed oil drilling platform, power plant, mine, etc.
- “*Relevant*” could mean intrinsic to the service (e.g., quality to the consumer) and not what negotiators are calling “exogenous” impacts of a service on the environment, historic values, scenic vistas, etc.

The proposed discipline contains 47 other paragraphs that deserve careful attention. For example:

- *Transparency* - In addition to publishing and giving notice of regulations, a transparency discipline requires governments to publish additional information about 13 elements of all existing regulations. There is no precedent for this obligation, and there has been no estimate of its cost.
- *Procedures* – Licensing procedures must be as “simple as possible,” which calls into question licenses that require hearings or other forms of citizen participation.

Each of these disciplines has multiple interpretations. Some are benign best practices, but some are radical constraints on the policy space of most nations. This guide explains the multiple meanings and invites the negotiators to clarify which meaning they intend.

1. Introduction

Imagine if your national legislature prepared to adopt a law that would:

- limit regulation of services that are essential for economic development: banking, utilities (electricity, gas, water), health care, telecommunications, waste management, education, and distribution of goods, among over 100 service sectors;
- limit as well the authority of subnational states or provinces to regulate services;
- require governments at all levels (cities included) to publish detailed information about most existing laws that regulate services; and
- empower foreign governments (and perhaps even foreign investors) to challenge domestic regulations outside of domestic courts.

Such a law would spark intense public debate. But in the distant forum of World Trade Organization (WTO) negotiations, a complex proposal to achieve these results has received little notice.

a. GATS as a distant forum

After a decade of negotiations in Geneva, the WTO is debating a draft of “disciplines” (trade rules) to limit the way governments regulate services, which account for 50 to 70 percent of every nation’s economy.¹ This is one of several negotiations on domestic policy that are mandated by the WTO’s General Agreement on Trade in Services (GATS).² GATS “applies to measures by Members affecting trade in services.”³

Translation: GATS does not regulate trade; it regulates the regulators of services. In their distant forum, the trade negotiators have advanced proposals to “facilitate trade” by limiting domestic regulation. This guide aims to promote reflection on the questions that regulators think about. For example, would the disciplines being proposed:

- (1) Advance or retard domestic economic development?
- (2) Protect or threaten public interests that are affected by a service?
- (3) Preserve or alter the domestic balance of power as crafted in constitutional law?

b. GATS & non-discriminatory measures

When adopted in 1994, GATS included trade rules to prohibit quantitative limits on market access⁴ and prohibit discrimination.⁵ Negotiators could not agree on how to deal with *non-discriminatory* measures that affect trade in services. Hence, they called for negotiations in Article VI:4 to ensure that regulations are: “(a) based on objective and transparent criteria, such as competence and the ability to supply the service; (b) not more burdensome than necessary to ensure the quality of the service; and (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.”

¹ Development Data Group, The World Bank, *2008 World Development Indicators Online* (2008), available at <http://go.worldbank.org/U0FSM7AQ40>; for a user-friendly display of services GDP, see World Resources Institute, Economics, Business, and the Environment — GDP: Percent GDP from services, available at <http://earthtrends.wri.org/text/economics-business/variable-216.html> (viewed March 20, 2010).

² GATS: General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, 284 (1999), 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994), available at http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm (viewed February 10, 2010).

³ GATS art. I:1.

⁴ GATS art. XVI (Market Access).

⁵ GATS art. I (Most Favored Nation Treatment) and GATS art. XVII (National Treatment).

Article VI:4 provides that “the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines.” The question is, what kind of disciplines, if any, are necessary? The point to keep in mind is, these disciplines would prescribe the norms for domestic laws that do not discriminate against foreign service suppliers.⁶ The disciplines reach into domestic turf, literally and figuratively, more than any previous trade agreement. They create global administrative law, which has been the province of constitutions and legislatures.

c. Working Party on Domestic Regulation

The Working Party is divided. A group of nations (led by Hong Kong, Australia, New Zealand, Switzerland and others) has proposed stringent GATS disciplines to limit domestic regulation. Other nations (notably the United States) have challenged the wisdom and vagueness of disciplines that would limit domestic regulations. A number of developing countries, while relatively quiet in the debate, would prefer to be carved out of the proposed disciplines altogether.⁷

Under growing pressure to forge a consensus, the chair of negotiations (Peter Govindasamy of Singapore) presented a draft text in March of 2009.⁸ The current chair (Misako Takahashi of Japan) has polled delegations on their reaction to produce an “Annotated Text.”⁹ After framing points of disagreement, she offers a number of proposals for bridging the gap. Also, by focusing on proposed disciplines and stated objections, she makes it harder for countries that do not publicly voice their objections to later block a consensus. By the time a decision point comes (*e.g.*, at the conclusion of the Doha Round), the chair will have created multiple drafts with incremental accommodations. This creates the appearance of middle ground, even if that middle ground poses a threat to domestic regulation in many nations.

d. Verging into investment law

From the outset, the WTO has acknowledged that a purpose of GATS is to protect foreign investors: “The GATS is the first multilateral agreement containing obligations on the treatment of foreign investors. It does not cover investment policies per se *but*

⁶ See Panel Report, United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services, (WT/DS285/R) (November 10, 2004), ¶¶ 6.301-6.313 (GATS provides mutually exclusive coverage of measures under domestic regulation, market access and national treatment). With respect to market access, the panel observed: “Under Article VI and Article XVI, measures are either of the type covered by the disciplines of Article XVI or are domestic regulations relating to qualification requirements and procedures, technical standards and licensing requirements subject to the specific provisions of Article VI. Thus, Articles VI:4 and VI:5 on the one hand and XVI on the other hand are mutually exclusive.” *Id.* at ¶ 6.305. See also Joost Pauwelyn, *Rein ne Va Plus: Distinguishing domestic regulation from market access in GATT and GATS*, 4 World Trade Rev. 131, 136-139 (2005).

⁷ See *The state of play in the GATS negotiations: Are developing countries benefiting?*, South Centre Policy Brief (November 2009) 6 (concern about erosion of right to regulate and opposition to necessity tests); see generally, Working Party on Domestic Regulation, Report of the Meeting Held on 1 April 2009, Note by the Secretariat, S/DPDR/M/40 (May 12, 2009), ¶¶ 12, 23, 25 (developing countries), and ¶ 37 (United States).

⁸ Working Party on Domestic Regulation, Disciplines on Domestic Regulation Pursuant to GATS Article VI:4, Informal Note by the Chairman, Room Document, 20 March 2009, available at <http://www.tradeobservatory.org/library.cfm?refID=101417> (last viewed February 10, 2010) (hereafter, “Chair’s 2009 Draft”).

⁹ Working Party on Domestic Regulation, Disciplines on Domestic Regulation Pursuant to GATS Article VI:4, Annotated Text, Informal Note by the Chairperson, Room Document (March 14, 2010). (hereafter, Chair’s Annotated Text)

does to the extent that they relate to the supply of services.”¹⁰ In the view of investment lawyers, that extent reaches far: “Foreign investors are often also traders. Approximately one-third of global trade takes place intra-firm, *i.e.*, between [corporations and their subsidiaries] in another country. When a government measure affects trade between such subsidiaries, it may very well upset the business of an ‘investment’ by a ‘foreign investor.’”¹¹ This view is reflected in the EU’s negotiating objectives: “The GATS is not just something that exists between Governments. It is first and foremost an instrument for the benefit of business.”¹² In explaining the significance of the GATS, the Japanese government stated: “from the standpoint of an investor, GATS guarantees certain treatment to foreign investors, which is absent in GATT.”¹³ This is the context for observing that GATS disciplines overlap with Bilateral Investment Treaties (BITS) in purpose, coverage and meaning of specific investor protections. The GATS-BIT connection is important because:

- BIT interpretations are likely to provide context for interpretation of GATS disciplines that have multiple meanings;¹⁴ and
- Investors might be able to incorporate GATS disciplines to strengthen their BIT claims for monetary damages. One approach would be to use GATS disciplines as evidence of the minimum standard of treatment, including “fair and equitable” treatment. Another would be to incorporate GATS disciplines directly into those BITS with most-favorable treatment clauses (not MFN) or open umbrella clauses.¹⁵

2. Interpretive context

The introduction to the Chair’s 2009 Draft provides a series of statements that are not “operational” disciplines, meaning that they are not enforceable rules. Their purpose is to provide a context for interpreting disciplines when the ordinary meaning a discipline is not clear.¹⁶ Briefly, the introductory statements include:

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- ¹⁰ The World Trade Organization: A Training Package. Services: GATS. (WTO, 1999), *excerpted in* Allison Burrows, WTO Agreements: GATS18, Australia Dept. of Foreign Affairs and Trade, *available at* <http://unstats.un.org/unsd/class/intercop/training/escap99/escap99-9.pdf>.
- ¹¹ Gaetan Verhoosel, *The Use of Investor-State Arbitration Under Bilateral Investment Treaties to Seek Relief for Breaches of WTO Law*, 6 J. Int’l Econ. L. 493, 494 (2003). Mr. Verhoosel is a BIT practitioner in the New York office of Debevoise & Plimpton and former staff member of the WTO’s Legal Affairs Division in Geneva.
- ¹² European Commission, Opening World Markets for Services - Towards GATS 2000, European Commission web site (no longer loaded); quoted in Corporate Europe Observatory (2001), GATS: Undermining Public Services Worldwide, CEO Observer, Issue 9 (June 2001), *available at* <http://www.corporateeurope.org/observer9/gats.html> (viewed March 20, 2010).
- ¹³ Communication from Japan, The relationship between the future multilateral investment rules and the GATS, Working Group on the Relationship between Trade and Investment, WT/WGTI/W/156 (April 8, 2003) ¶ 5.
- ¹⁴ See, e.g., Working papers on GATS and domestic regulation: Loukas Kozonis, “Pre-established” regulations and development permits, and Max Levin, “Pre-established regulations and financial services, Harrison Institute for Public Law (March 12, 2010).
- ¹⁵ There is also concern that the MFN provisions of trade agreements on services could obligate countries to make arbitration remedies available to foreign investors (investor-state dispute settlement), even in the absence of a BIT. *The European Union and United States’ Approach to International Investment Agreement with Developing Countries: Free Trade Agreements and Bilateral Investment Treaties*, South Centre Analytical Note, SC/TDP/AN/EPA/24 (April 2010) ¶ 41.
- ¹⁶ Chair’s Annotated Text, ¶ 3, *citing, e.g.*, Panel Report, *Chile – Price Band System*, para. 7.15; Appellate Body Report, *Chile – Price Band System*, paragraph 196; Note also that Article 31.2 of the *Vienna Convention on the*

a. Necessity

The text of GATS states that one aim of the disciplines would be to ensure that domestic regulations are “not more burdensome than necessary to ensure the quality of the service.”¹⁷ If adopted as a discipline, such a test would effectively reverse the deference that most domestic courts give to economic regulations.¹⁸ The Chair’s Draft does not include a proposal from Australia, Hong Kong and New Zealand to adopt this test verbatim. Nor does it include a subsequent proposal to include “necessity” in the statement of purpose.¹⁹ This is no doubt due to resistance from the United States,²⁰ as well as Brazil and other developing countries that view the necessity test as incompatible with domestic regulatory authority. The United States has taken this position after sustained pressure from state and local governments.

b. Disguised restrictions

As a compromise for not requiring “necessity,” the chair’s draft states that disciplines would aim to ensure that regulations “do not constitute disguised restrictions on trade in services.”²¹ The WTO has found disguised restrictions when countries have failed to consult and seek less-trade-restrictive alternatives in response to complaints that measures violate trade rules.²² In other words, avoiding “disguised barriers” has a meaning that incorporates some aspects of the necessity test. The chair acknowledges that in discussions of the proposed necessity test, “no delegation expressed support for the use of the term ‘disguised restrictions on trade in services,’ which many considered to be ambiguous and unclear.”²³

c. Right to regulate

The chair’s draft refers to countries’ “right to regulate” to meet “national policy objectives.” However, to those who see this statement as having interpretive influence, the chair cautions that “the various obligations contained in the GATS are not balanced by repeated reference to the right to regulate. On the contrary, each substantive obligation in the disciplines informs a Member’s right to regulate with regard to specific types of measures.” Translation: Quoting the “right to regulate” does not limit the impact of GATS disciplines. On the other hand, the statement could imply less deference to subnational governments by linking the right to regulation with *national* policy

Law of Treaties states “The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes”.

¹⁷ GATS art. VI:4(b).

¹⁸ See WTO - US-Internet Gambling, 2005; WTO - Korea-Beef, 2000; see, e.g., *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985) (“When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.”)

¹⁹ Chair’s Annotated Text, ¶ 9.

²⁰ Chair’s Annotated Text, ¶ 17. See United States, Outline of the U.S. Position on a Draft Consolidated Text in the GATS Working Party on Domestic Regulation, undated (posted on March 27, 2007), available at http://www.ustr.gov/Trade_Sectors/Services/Section_Index.html (viewed May 10, 2007).

²¹ Chair’s 2009 Draft, ¶ 2; Chair’s Annotated Text, ¶ 11.

²² See, e.g., United States - Standards for Reformulated and Conventional Gasoline, adopted 20 May 1996, WT/DS2/AB/R, p. 25.

²³ Chair’s Annotated Text, ¶ 11.

objectives.²⁴ However, the chair reports, “There appears to be agreement among delegations that the term ‘national policy objectives’ in the first sentence comprises policy objectives at either national or sub-national levels.”²⁵ There is no agreement, however, on whether this understanding should be included as a footnote, a definition, a chairman’s note, or not at all.²⁶

d. Needs of developing countries

The chair’s draft recognizes asymmetries of regulation, for example, when a sophisticated service supplier is being regulated by a developing country that has only begun to develop its system of domestic regulation.²⁷ It also recognizes the difficulties of service suppliers from developing countries when they face regulatory systems away from home.²⁸ However, these “recognitions” would not impart any WTO deference to developing countries in the event of a dispute.²⁹

3. Scope of proposed disciplines

The WPDR delegates seem to agree that proposed disciplines should to those regulations that affect sectors where countries have made GATS commitments. But after a decade of negotiations, they still do not agree two big questions: First, how broad are the categories of domestic regulations (*e.g.*, licensing requirement versus a technical standard) that a particular discipline governs? As of now, the categories seem to overlap, so you cannot tell whether a discipline applies to a particular regulation. Second, do the disciplines apply to regulations that members have already carved out of their GATS commitments? While highly technical, these distinctions are crucial; they are the switches that turn the disciplines “on” or “off.” As emphasized by the chair, “a clear and shared understanding of the definitions chapter is of paramount importance, as it critically informs the individual obligations.”³⁰

a. Generally, coverage under GATS commitments

The Chair’s 2009 Draft applies 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.”³¹ (emphasis added)

²⁴ In a previous draft dated April 2007, the previous chair defined the right to regulate in terms of “domestic policy,” which included subnational as well as national policy objectives. The April 2007 draft was an untitled and undated document, available at <http://www.tradeobservatory.org/library.cfm?refid=97441> (viewed first on February 21, 2007).

²⁵ Chair’s Annotated Text, ¶ 22.

²⁶ *Id.* and ¶¶ 23-23.

²⁷ Chair’s 2009 Draft, ¶ 3.

²⁸ Chair’s 2009 Draft, ¶ 4.

²⁹ In *Mexico – Telecommunications*, Mexico was not successful in arguing that its status as a developing nation should influence interpretation of its obligations under GATS regarding domestic regulation of telephone rates. The dispute panel ruled that under section 5(g) of the GATS Telecom Annex (developing country conditions), Mexico may impose reasonable limits on its GATS commitments, but it must do so in its schedule of commitments, as could any member nation. *Mexico – Measures Affecting Telecommunications Services*, WT/DS204/R, 2 April 2004, ¶¶ 7.386–7.388 (hereafter, *Mexico – Telecommunications*).

³⁰ Chair’s Annotated Text, ¶ 57.

³¹ Chair’s 2009 Draft, ¶ 10.

- (1) *Relating to* – This phrase means that the disciplines would apply not only to measures that are licensing requirements, *etc.*, but also to a broader class of measures that relate to licensing requirements, *etc.*
- (2) *Affecting* – This phrase means that the disciplines would apply not only to measures that directly regulate services in a committed sector, but also measures that affect services in committed sectors.
- (3) *Sectors where specific commitments are undertaken* – This phrase means that the disciplines do not apply to all service sectors; they apply only to those where a country undertakes specific commitments to follow GATS rules. However, countries not only commit to sectors, they commit to “modes” of trade within sectors: for example, cross-border trade is mode 1 and commercial presence is mode 3. According to the new chair of the WPDR, “where” commitments are undertaken means that “the disciplines would only apply to a respective sub-sector as specified in a Member’s schedule, and only to the modes of supply for which commitments are made.”³² Translation: For the text to be clear, it could clearly say that only committed modes of trade are covered.

b. Covered domestic regulations

Only the disciplines in paragraph 11 cover all disciplines. The remaining paragraphs focus on specific categories that are defined terms: qualification requirements and procedures, licensing requirements and procedures, and technical standards (which apply to ongoing service operations). The problem is that these categories overlap in practice, and they question on the table is, how does the WPDR want to clarify the definitions so that the categories do not overlap. The potential overlaps and choices include these:

- (1) *Qualification and licensing requirements.* Requirements of competency pertain to both natural persons and corporations. Should the competency of a corporation be judged as a qualification requirement or as a licensing requirement? Should qualification requirements pertain only to natural persons?³³
- (2) *Licensing requirements and technical standards.* Once a license is granted, the license holder is expected to “maintain” compliance with the standards by which the license was granted. Should those operational standards be classified as licensing requirements (the initial authorization to supply a service) or technical standards (which govern ongoing operations)?³⁴ This distinction is especially relevant for essential services such as banking, utilities, pipelines, shopping centers, mining and drilling operations, etc.
- (3) *Scope of technical standards.* The delegations are still debating whether technical standards include both mandatory government standards and voluntary government standards.³⁵

c. Coverage of limits on GATS commitments

According to the chair, there “appears to be a sense” that delegations agree that the disciplines should only apply to non-quantitative, non-discriminatory measures.³⁶ If so,

³² WPDR, Annotated Agenda, ¶ 8.

³³ Compare Chair’s 2009 Draft, ¶¶ 5 and 7; see Chair’s Annotated Text, ¶¶ 39-41 and 68-70.

³⁴ See Chair’s Annotated Text, ¶¶ 61-67.

³⁵ See Chair’s 2009 Draft, ¶¶ 5 and 7; see Chair’s Annotated Text, ¶¶ 45-54.

³⁶ Chair’s Annotated Text, ¶ 81.

then the disciplines should not cover or undermine the limitations that countries have placed on their commitments under Market Access (Article XVI) and National Treatment (Article XVII). To avoid overlap with limits on these commitments, the Chair's 2009 Draft states that the disciplines "do not apply to measures to the extent that measures constitute limits subject to scheduling under Articles XVI and XVII."³⁷ However, this sentence is fraught with vagueness.

(1) *Problems with covering limits on commitments*

- (a) The first problem is that it is difficult to know whether a measure is "subject to" scheduling in the absence of a dispute panel ruling. For example, some measures may have discriminatory effects even when there is no intent to discriminate.
- (b) A challenger of a domestic measure could argue that some parts of a scheduled measure might be discriminatory, but other parts are not. The challenger could then argue that the non-discriminatory parts violate disciplines on domestic regulation.
- (c) Perhaps an even greater problem is that the chair is asserting that unless implementing regulations for measures have been specifically scheduled as limitations on commitments, they violate those commitments.³⁸ However, the GATS scheduling guidelines (either in their 1993 or 2001 versions) make no mention of the need to schedule implementing regulations in scheduled limitations, and Members generally have not done so. That leaves Members with the prospect that measures they thought they had protected through scheduling limitations could nonetheless be challenged under the GATS.
- (d) In addition, the chair is stating that the disciplines would apply "to relevant implementing or administrating regulation of substantive limitations."³⁹ If so, the limits on commitments would again be undermined. For example, Brazil has scheduled a limitation on all of its commitments so that when managers and directors of foreign companies are transferred to Brazil, the government can require these transfers to be related to "the provision of new technology." But even though Brazil scheduled this limitation, it could be challenged under the disciplines for imposing requirements that are not "objective" or "relevant".

(2) *Alternatives.* WPDR delegations are proposing alternative language on GATS commitments, including the following:

- (a) *Simply exclude coverage of scheduled measures.* One delegation proposed that disciplines not apply to "measures scheduled in accordance with" Market Access or National Treatment.⁴⁰ This would make clear that scheduled measures are excluded, regardless of whether it is certain that they were "subject to" scheduling.
- (b) *Explicitly exclude coverage of measures that impose quantitative limits on market access or that discriminate.* This approach would make explicit that the disciplines are intended to cover measures that are not governed by Market Access or National Treatment, regardless of whether they are scheduled. The

³⁷ Chair's 2009 Draft, ¶ 10.

³⁸ Chair's Annotated Text, ¶ 81.

³⁹ *Ibid.*

⁴⁰ Chair's Annotated Text, ¶ 75.

references to scheduling are confusing, and according to the chair, there “appears to be a sense” that delegations agree that the disciplines should apply to non-discriminatory, non-quantitative measures.⁴¹

- (c) *Drop the reference to scheduling altogether.* The chair notes that this option has been discussed.⁴² While deleting the “scheduling” sentence would avoid the confusing jargon, it would leave open the question of whether the disciplines cover measures that are prohibited under Market Access or National Treatment.

4. General disciplines

In one sentence, the Chair’s 2009 Draft proposes several disciplines that would apply to all domestic regulations that are covered by a country’s specific commitments: licensing requirements and procedures, qualification requirements and procedures, and technical standards. The sentence requires these domestic regulations to be “pre-established, based on objective and transparent criteria and relevant to the supply of the services to which they apply.”⁴³ Despite its broad reach, no countries have proposed modifying this sentence in the past two years. However, the chair has reported the growing internal debate, and she has offered interpretations that moderate the literal meaning of these disciplines.⁴⁴

For each general discipline, we present choices facing WPDR delegates. Broadly speaking, these include:

- (1) *Change nothing in the Chair’s 2009 Draft.* Keep the current language, which is either vague or fundamentally ambiguous. Given the drafting history, ambiguous terms could well lead to a strict interpretation.
- (2) *Opt for a moderate approach.* This could reflect the practice of nations with fundamentally fair legal systems. Many of the chair’s suggestions go in this direction.
- (3) *Support the strict interpretations.* These are synonymous with the expectations of foreign investors as argued in BIT disputes.

a. Pre-established

“Pre-established” is a one-word discipline that regulates the pace of change. It has been used only once before, but without definition, in the WTO’s 1998 Accountancy Standards that have yet to be implemented.⁴⁵

(1) *The basic ambiguity*

The dictionary definition of “pre-established” is to establish beforehand.⁴⁶ The

⁴¹ Chair’s Annotated Text, ¶ 81.

⁴² Chair’s Annotated Text, ¶ 82.

⁴³ Chair’s 2009 Draft, ¶ 11.

⁴⁴ Chair’s Annotated Text, ¶¶ 84-98.

⁴⁵ Council on Trade in Services, Disciplines on Domestic Regulation in the Accountancy Sector, S/L/64, 17December 1998, ¶ 8.

⁴⁶ *The New Shorter Oxford English Dictionary* 334 (2nd ed. 1993). The Merriam-Webster Dictionary defines “established” as “to institute (as a law) permanently by enactment or agreement. *Merriam-Webster Online Dictionary* (Merriam-Webster Online, January 26, 2010) <http://www.merriam-webster.com/dictionary/established>.

question becomes, before what? The practice of most nations is before regulating. The basic alternative is before investing.

(2) *Choice of meanings*

The basic question is whether the WPDR will clearly choose any (or exclude any) of the alternate meanings of “before what.”

(a) ***Before government applies a change in regulations.*** This meaning would be consistent with the practice of many countries, which is that laws must not be applied retroactively. The more strict interpretations below (options c and d) would be a major change in most countries.⁴⁷ The chair acknowledged this impact when she noted that there is “no widely acknowledged principle ... that measures cannot be changed ... [A] strict interpretation to the word “pre-established” might ... impose a significant limitation on the right of Members to modify their regulations.”⁴⁸

(b) ***Before government applies a change in regulations, with opportunity to adapt.*** In light of the adverse impact of a strict interpretation, the chair suggested a modification of the first meaning: “in case of modification of regulations, applicants must be offered a reasonable opportunity to adapt their application to the new conditions.”⁴⁹

(c) ***Before service suppliers rely on pre-existing licensing standards and procedures.*** The chair proposed this meaning prior to suggesting option (b). It would apply to “applicants who are faced with changes to substantive requirements, and possibly procedures, while their application is being processed.”⁵⁰ This meaning would limit the scope of “pre-established” so that the discipline would not affect changes in post-licensing regulations (*i.e.*, technical regulations that govern on-going service operations). However, since making this proposal, the chair noted its potential adverse impact (quoted above), and she did not include it in her Annotated Text.

(d) ***Before service suppliers rely on pre-existing law.*** This “strict” meaning derives from numerous investment disputes in which the arbitrators concluded that government must establish regulations before a service supplier makes an investment in reliance on pre-existing law. This meaning could limit the ability

**Sectors sensitive to
“pre-established”**

Licensing / permits for:

- Mining
- Land development
- LNG terminals
- Waste facilities
- Power plants
- Utility mergers
- Park concessions

Change of regulations:

- Financial services
- Competition policy
- Historic preservation
- Climate / sea level rise

⁴⁷ See generally John Prebble, Rebecca Prebble, Catherine Vidler Smith, Retrospective Legislation: Reliance, the Public Interest, Principles of Interpretation and the Special Case of Anti-Avoidance Legislation, 22 N.Z.U. L. Rev. 271 (2006); Ellen Gould and Andrew Pask, *New WTO Rules Could Threaten City Planning*, PLANETIZEN. July 10, 2008 at <http://www.planetizen.com/node/33910>.

⁴⁸ Chair’s Annotated Text, ¶ 93.

⁴⁹ *Id.* at , ¶ 94.

⁵⁰ Working Party on Domestic Regulation, Informal Meeting of the Working Party on Domestic Regulation on 14 December 2009, Annotated Agenda by Chairperson, Room Document, ¶¶ 11-13 (December 8, 2009).

of government to apply changes in regulations after a service supplier invests, at least as applied to that investment. If adopted, this meaning would be a major change in the practice of most nations. There are two versions of this meaning:

- i. *Stable and predictable regulations*. This version would effectively grandfather an investment from changes in regulation, and it could prompt a race to invest by service suppliers who see a change in the law coming. If adopted, this meaning would be a major change in the practice of most nations.⁵¹
- ii. *Foreseeable regulations*. This is a more restrained version of “before investing.” Also derived from investment disputes, it provides that reliance must be reasonable; the test is whether a change in regulations or their interpretation is foreseeable.⁵² There is a GATS precedent for this version in Article VI:5, which applies until such time as the WTO adopts disciplines under Article VI:4.

b. Based on objective and transparent criteria

This discipline is not defined or explained in the Chair’s 2009 Draft. As the chair explains in her Annotated Text, “regulators are at times granted discretion to take subjective decisions. It would appear that in such a case, a constraining element that such decisions are at least based on underlying objective criteria would be all the more valuable.”⁵³ Thus the chair implies her support for this discipline as currently worded. But there are two complications. First, the WTO law that interprets “based on” is more exacting than the chair’s interpretation. Second, there are important regulatory objectives that are inherently subjective such as preserving historic, cultural, aesthetic or scenic values. There is no hint in the WPDR’s record that delegates have considered these values, which feature prominently in development of land, mining operations, infrastructure, power lines, pipelines, port facilities, etc.

(1) Based on

The Appellate Body has interpreted “based on” to mean founded or built upon. This meaning is more flexible than conformity or compliance,⁵⁴ but it is less flexible than

⁵¹ See Leila Bruton, Constantine Partasides and Elizabeth Snodgrass, *Recent Developments in Investment Treaty Arbitration*, THE EUROPEAN & MIDDLE EASTERN ARBITRATION REVIEW, (2008), available at <http://www.globalarbitrationreview.com/reviews/3/sections/5/chapters/69/recent-developments-investment-treaty-arbitration/>. See also *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, Para. 35-38, (Oct. 3, 2006) <http://ita.law.uvic.ca/documents/LGEArgentinaLiability.pdf>; and *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, Para. 77 (May 12, 2005), available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC687_En&caseId=C4. Cf., *PSEG Global Inc. v. Republic of Turkey*, Award, Case No. ARB/02/5, par. 13 (ICSID (W. Bank) 2007); *MTD Equity Sdn. Bhd. v. Chile*, Case No. ARB/01/7 (ICSID (W. Bank) 2004), par. 1 & 80, available at <http://www.asil.org/ilib/MTDvChile.pdf>.

⁵² See *Saluka Investments BV v. Czech Republic*, UNCITRAL, Permanent Court of Arbitration, Award (Mar. 17, 2006), 348-360, available at <http://ita.law.uvic.ca/documents/Saluka-PartialawardFinal.pdf> (viewed May 11, 2009).

⁵³ Chair’s Annotated Text, ¶ 91.

⁵⁴ “A measure that ‘conforms to’ and incorporates a Codex standard is, of course, ‘based on’ that standard. A measure, however, based on the same standard might not conform to that standard, as where only some, not all, of the elements of the standard are incorporated into the measure.” *EC Measures Concerning Meat and Meat Products (Hormones)*, 16 January 1998, WT/DS26/AB/R, WT/DS48/AB/R, ¶ 163, referring to L. Brown (ed.),

“taking into account,” which is too subjective.⁵⁵ In other words, “based on” requires more than subjectively taking criteria into account (and perhaps rejecting them); it requires an observable relationship between a regulatory measure and some objective criterion that is external to the regulation.⁵⁶ This formulation makes sense when a regulatory measure is “based on” a scientific body of knowledge (*e.g.*, a risk assessment) or standard-setting (*e.g.*, safety standards for electric power). However, unless clarified, “based on” is likely to conflict with regulations that *require* regulators to balance multiple criteria or use inherently subjective criteria.

(2) *Objective criteria – Choice of meanings*

Several delegations insist that objectivity is a “tested concept” in WTO law. It would be more accurate to say that the term has been used many times in schedules of GATS commitments,⁵⁷ WTO dispute settlement,⁵⁸ previous proposals by WPDR participants,⁵⁹ and notes by the WTO Secretariat.⁶⁰ The result of this “testing” is that the term “objective” has at least five different meanings, four of which could significantly constrain regulatory authority under domestic law. As with “pre-established,” the basic question is whether the WPDR will clearly choose any (or exclude any) of the alternate meanings of “objective,” which include the following:⁶¹

(a) *Not arbitrary* – This is a common standard of review in domestic courts, including

Sectors sensitive to “objective criteria”

Licensing / permits for:

- Mining
- Land development
- LNG terminals
- Waste facilities
- Power plants
- Utility mergers

Technical standards:

- Utility operations
- Mining operations
- Fuel distribution

The New Shorter Oxford English Dictionary on Historical Principles (Clarendon Press), Vol. I, p. 187. *See also* Mexico – Telecommunications, ¶¶ 7.167–7.168.

⁵⁵ *Id.* at ¶ 189.

⁵⁶ *Id.*

⁵⁷ European Communities and Their Member States, *Schedule of Specific Commitments, Supplement 3*, GATS/SC/31/Suppl.3, at 8 n.7 (Apr. 11, 1997); (Iceland, *Schedule of Specific Commitments, Supplement 1*, GATS/SC/41/Suppl.1, at 4 n.2 (Apr. 11, 1997); Norway, *Schedule of Specific Commitments, Supplement 3*, GATS/SC/66/Suppl.3, at 4 n.2 (Apr. 11, 1997); Liechtenstein, *Revised Offer*, TN/S/O/LIE/Rev.1, at 35 n.7 (Jul. 20, 2005); Uganda, *Schedule of Specific Commitments, Supplement 1*, GATS/SC/89/Suppl.1, at 8 (Jan. 29, 1999); Colombia, *Schedule of Specific Commitments, Supplement 2*, GATS/SC/20/Suppl.2, at 9 n.4 (Apr. 11, 1997).

⁵⁸ *See, e.g.*, Appellate Body Report, *United States – Import Prohibition on Certain Shrimp and Shrimp Products*, ¶¶ 142–44, WT/DS58/AB/RW (Oct. 22, 2001) [hereinafter Appellate Body Report, *U.S. – Shrimp*]; Appellate Body Report, *Mexico – Definitive AntiDumping Measures on Beef and Rice*, ¶ 180; WT/DS295/AB/R (Nov. 29, 2005) [hereinafter Appellate Body Report, *Mexico – Beef*].

⁵⁹ *See, e.g.*, WPDR Chairman, *Disciplines on Domestic Regulation Pursuant to GATS Article VI:4 Consolidated Working Paper*, at Part H ¶ 2, JOB(06)/225 (July 2006); WPDR Proposal, *Communication from Australia et al.*, ¶ 24, JOB(06)193 (June 19, 2006).

⁶⁰ WPDR Secretariat, *Report on the Meeting Held on 22 November 2004*, S/WPDR/M/28, at ¶ 25 (Jan. 25, 2005).

⁶¹ For analysis of how the term “objective” could be defined, we have prepared a companion memorandum: Jonathan Allen and Robert Stumberg, *GATS proposal that domestic regulations must be “objective,”* Harrison Institute for Public Law (March 1, 2007), available at <http://www.forumdemocracy.net/>, under news archives, viewed January 29, 2008.

administrative law in the United States.⁶² This approach would be consistent with the GATS scheduling practices of the European Union.⁶³ The “not arbitrary” meaning of “objective” appears to meet the chair’s goal that there is (a) a rational “constraining element” between a decision and the criteria upon which it is based, yet not so much of a constraint that it would prohibit regulators from subjectively balancing multiple criteria.⁶⁴

- (b) **Not subjective** – This ordinary dictionary definition⁶⁵ would conflict with delegation of plenary authority to utility regulators to set “just and reasonable” rates or to approve utility mergers based on balancing diverse or competing criteria such as interests of the consumer, interests of the utility company and impact on the environment.⁶⁶
- (c) **Not biased** – This definition could conflict with any number of measures that are designed to express a preference in qualification requirements or preferences. Examples include small or medium-sized enterprises (SMEs), indigenous peoples, women-owned businesses, etc.
- (d) **Relevant to ability to perform the service** – This definition could be drawn from the GATS article VI:4(a), which states that one purpose of disciplines would be to ensure that domestic regulations are based on objective criteria “... such as competence and ability to provide the service.” If this inference is correct, the canon of interpretation, *ejusdem generis*,⁶⁷ could be used to limit the definition of “objective” to measures “of the same class” of competence and ability. This class would exclude external regulatory criteria such as environmental, cultural or visual impact.⁶⁸

⁶² Administrative Procedure Act, 5 U.S.C. § 706(2)(a) (Scope of review includes whether an agency action is: “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).

⁶³ See Allen and Stumberg, GATS proposal that domestic regulations must be “objective,” 4-5.

⁶⁴ See Chair’s Annotated Text, ¶ 91.

⁶⁵ BLACK’S LAW DICTIONARY (8th ed. 2004); see also MERRIAM WEBSTER (“Of, relating to, or being an object, phenomenon, or condition in the realm of sensible experience independent of individual thought and perceptible by all observers : having reality independent of the mind.”); MERRIAM WEBSTER (“Limited to choices of fixed alternatives and reducing subjective factors to a minimum.”).

⁶⁶ See, e.g., CAL. PUB. UTIL. CODE § 854.

⁶⁷ This canon of statutory interpretation means “of the same kind, class, or nature.” See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about how Statutes are to be Construed*, 3 VAND. L. REV. 395, 405 (1950) (“It is a general rule of construction that where general words follow an enumeration they are to be held as applying only to persons and things of the same general kind or class specifically mentioned.”)

⁶⁸ The United States has itself advocated this interpretation in WTO cases. See Report of the Panel, *United States -- Measures Affecting Imports of Softwood Lumber From Canada*, para. 199, SCM/162 (Feb. 19, 1993) (summarizing U.S. argument that “[j]ust as the doctrine of *ejusdem generis* applied as an aid to statutory construction, so this doctrine was equally applicable when interpreting an international agreement, such as the General Agreement or the Agreement . . . Application of the maxim of *ejusdem generis*, therefore, supported the conclusion that the export log restrictions in British Columbia constituted another type or kind of illustrative “domestic subsidy” within the meaning of the Agreement”).

- (e) **Based on international standards** – The WTO Secretariat has described international standards as “objective” in the sense that (a) they require a measure to be the least-trade-restrictive alternative, and (b) such an interpretation would be in line with the purpose of GATS.⁶⁹

c. Relevant to supply of the service

(1) Basic ambiguity

The chair highlighted the basic ambiguity of this discipline in her summary of comments from WPDR delegations. One delegation asserted that “this obligation was meant to ensure that only issues related to service quality and consumer protection should inform regulations ... and that other exogenous factors should be excluded.”⁷⁰ Yet “exogenous” factors are the heart of many domestic regulations, for example, protecting the environment from operation of utilities, pipelines or mining operations, preserving historic communities, preserving local culture and character of neighborhoods, promoting development through financial services, assuring universal access to energy services, *etc.* The chair notes that some delegations have begun to think about the impact of a strict “relevance” test: one delegation feared that strict “relevance” would exclude cultural factors, and another anticipated that a “relevance” test would cover “[v]ast areas of regulatory discretion.”⁷¹

Sectors sensitive to “relevant”

Licensing / permits for:

- LNG terminals
- Power plants
- Utility mergers

Technical standards:

- Utility operations
- Mining operations
- Fuel distribution

(2) Choice of meanings

As with the prior general disciplines, the question is whether the WPDR will clearly choose either (or exclude either) of the alternate meanings of “relevant”:

- (a) **Intrinsic to supply** – The ordinary meaning of “relevant to supply” connotes a close connection to intrinsic qualities of the service. As noted above, GATS art. VI:4 provides interpretive guidance on the scope of relevant qualifications: ability to perform and ensuring the quality of a service.⁷² In WTO cases, the United States has used the canon of interpretation to argue that such a list of

⁶⁹ Discussing technical standards in a WPDR meeting, a member of the Secretariat staff stated, “There was also the element of the perceived objectivity of international standards, as found in the rebuttable presumption in GATS Article VI:5(b) that when a Member applied internationally recognized standards, the Member was presumed to have applied the least trade restrictive measure.” WPDR Secretariat, *Report on the Meeting Held on 22 November 2004*, S/WPDR/M/28, at ¶ 25 (Jan. 25, 2005). The Secretariat continued, “There was no mandatory requirement to use international standards, but Article VI:5(b) did provide a benchmark for determining the objectivity of regulatory requirements.” *Id.* It is unclear from this statement whether the Secretariat is using “objective” to mean “least trade-restrictive” or to mean “consistent with internally recognized standards.” It seems that the rationale is that international standards are “objective” because they are the least trade-restrictive; thus, “objectivity” requires the least-trade-restrictive alternative. Nonetheless, this statement could be interpreted to require consistency with international standards, which is a nuanced difference in the definition.

⁷⁰ Chair’s Annotated Text, ¶ 90.

⁷¹ Chair’s Annotated Text, ¶ 89.

⁷² GATS art. VI:4 (a) and (b).

examples (e.g., competence to perform) excludes criteria of a different kind.⁷³ If that logic applies to a “relevant” discipline, it would conflict with regulation of services based on their impact on the environment, community land uses, or historic, cultural or aesthetic values.

- (b) *Intrinsic to qualification requirements* – The chair recalled that one “intrinsic” version of relevance would avoid covering vast areas of regulation by applying the discipline only to qualification criteria.⁷⁴ This would be consistent with the GATS reference to competence.
- (c) *Intrinsic and extrinsic to supply* – The chair also presented a way to define relevance in terms of extrinsic impacts of a service. In this meaning, relevance would require “a link between the measure and the supply of the service. ... If relevance was to be understood to allow for a wide range of regulatory objectives to be pursued, then only measures that would not make any contribution to such regulatory objectives would be filtered out as ‘not relevant’.” most likely, a “link with the objective behind the requirement, in the sense that [regulations that are not relevant] are not making any contribution to the fulfillment of these objectives.”⁷⁵

d. Universal service

The Chair’s 2009 Draft provides: “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.”⁷⁶ Without the double negatives, this article says that countries may ensure universal service only so long as they comply with GATS, including the disciplines on domestic regulation.

In her Annotated Text, the chair observed that this provision is “clearly marked as an exception,” but as worded, “would appear to not add to any other element of the disciplines, and might even be read to qualify the general reference to the right to regulate in paragraph 3.”⁷⁷ Translation: The universal service provision appears to be an exception, but it is not.

5. Transparency disciplines

a. Publishing measures

The Chair’s 2009 Draft requires countries to publish “through printed or electronic means, measures of general application relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards ...”⁷⁸ This is consistent with the practice of most nations.

⁷³ See Report of the Panel, United States – Softwood Lumber, *supra*.

⁷⁴ Chair’s Annotated Text, ¶ 96.

⁷⁵ Chair’s Annotated Text, ¶ 97-98.

⁷⁶ Chair’s 2009 Draft, ¶ 12.

⁷⁷ Chair’s Annotated Text, ¶¶ 97-98.

⁷⁸ Chair’s 2009 Draft, ¶ 13.

b. Notice and opportunity to comment

The Chair's 2009 Draft also creates a "soft law" obligation ("shall endeavor to ensure") for countries to publish their measures in advance, give service suppliers an opportunity to comment, and collectively respond in writing to those comments.⁷⁹ As part of her 2010 work plan, the chair has asked the WTO Secretariat to analyze the meaning of an "endeavor to ensure" obligation.⁸⁰ It is not clear, for example, whether this language is equivalent to "should," or more likely, it creates an obligation to do something short of strict compliance.

c. Publishing detailed information

- (1) **Mandate to publish.** The chair's draft requires governments to publish "... detailed information ... that enables any interested persons to become acquainted with them."⁸¹ It states that "detailed information ... shall include" a list of 10 items that includes 20 kinds of specific information. Drawn from a June 2006 proposal by Australia and other nations, the list includes items of substance:⁸²
- (a) "licensing requirements and criteria, terms and conditions of licenses, and licensing procedures including fees;
 - (b) qualification requirements, criteria and procedures for verification and assessment of qualifications including fees;
 - (c) technical standards;
 - (d) procedures relating to appeals or reviews of applications;
 - (e) monitoring, compliance or enforcement procedures including notification procedures for non-compliance;
 - (f) where applicable, how public involvement in the licensing process, such as hearings and opportunity for comment, is provided for;
 - (g) exceptions, derogations or changes to measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards; and
 - (h) the normal timeframe for processing of an application."
- (2) **Potential impacts.** The chair reports that a majority of delegations welcomed the illustrative list, while a few questioned its usefulness.⁸³ Apparently, the WPDR has not discussed several potential impacts. First and most obvious, the obligation to publish detailed information covers the range of existing law (not just proposed regulations) within the scope of proposed disciplines. This would be an unfunded mandate for allocation of staff time. Second, if governments publish "detailed information" about various domestic regulations, they may bear some legal risk that foreign investors will rely on those statements. For example, some BIT claims have

⁷⁹ Specifically, the Chair's 2009 Draft, ¶ 15 states: "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."

⁸⁰ WPDR, Annotated Agenda, cite needed.

⁸¹ WPDR chair's 2009 draft, ¶ 13.

⁸² Communication from Australia; Chile; Hong Kong, China; Korea, New Zealand and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, Article VI:4 Disciplines – Proposal for Draft Text, Job 06/193 (19 June 2006), ¶ 12, available at <http://www.tradeobservatory.org/library.cfm?refID=88253> (viewed January 28, 2008).

⁸³ Chair's Annotated Text, ¶ 111.

been decided against governments based upon what national officials told investors about municipal law.⁸⁴ We have looked for a precedent or model upon which to estimate costs or legal risks but have not found any, even among highly developed national or municipal governments.⁸⁵

(3) **Alternatives.** The chair notes the following alternatives in her Annotated Text:

- (a) *Retain the mandate to publish.* The chair notes that a number of delegations want to keep the mandate but clarify the specifics of various items on the list of details to publish.⁸⁶
- (b) *Convert the mandate to a recommendation.* At least one delegation proposes converting “shall publish” to “should publish” detailed information.⁸⁷

6. Other selected disciplines

a. Procedures as simple as possible

(1) **Chair’s Draft.** The Chair’s 2009 Draft requires that both licensing and qualification procedures “shall be as simple as possible.”⁸⁸ This discipline is vague; it will require a dispute panel to interpret “simple as possible” in settings where complex decisions require complex procedures. Examples of likely conflict include procedures that require expensive environmental impact statements, scientific testing, or periods for public hearings or other forms of participation. For example, an international partnership seeking a permit to build an LNG (liquefied natural gas) terminal at Long Beach, California has complained that the process was complex and burdensome.⁸⁹

⁸⁴ See, e.g., *MTD Equity Sdn. Bhd. v. Chile*, Case No. ARB/01/7 (ICSID (W. Bank) 2004), ¶¶ 1 & 80, available at <http://www.asil.org/ilib/MTDvChile.pdf> (viewed March 1, 2010); see also Chris Yost, *A Case Review and Analyses of Legitimate Expectations Principle as it Applies within the Fair and Equitable Treatment Standard*, ANU College of Law Research Paper No. 09-01, available at <http://ssrn.com/abstractid=1364996> (viewed March 1, 2010).

⁸⁵ Compare, e.g., Australia, Legislative Instruments Act of 2003, §§ 4, 6, 25, 26, available at <http://www.frli.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/411BD649F40D9867CA2573AD007D869D?OpenDocument> (viewed March 1, 2008). Nor did we find comparable publication mandates in a sample of U.S. cities. See, e.g., Los Angeles Charter, 251 (publication or posting of ordinances); Los Angeles Administrative Code, 2.13 (publication of ordinances); New York Charter § 1045 (compilation of city rules); San Francisco Sunshine Ordinance (Added by Ord. 265-93, App. 8/18/93, amended by Proposition G, November 2, 1999, available at http://www.sfgov.org/site/sunshine_page.asp?id=34495 (viewed Feb. 10, 2008); Burlington, VT see <http://www.municode.com/resources/gateway.asp?pid=13987&sid=45> (viewed Feb. 10, 2008); Portland, ME, Sec. 1-13, Distribution of Code (code available at office of city clerk), available at <http://www.portlandmaine.gov/citycode.htm> (viewed Feb. 10, 2008); Seattle, SMC 3.02.070, Public information (code available for public inspection), available at <http://clerk.ci.seattle.wa.us/~scripts/nph-brs.exe?d=CODE&s1=3.02.070.snum.&Sect5=CODE1&Sect6=HITOFF&l=20&p=1&u=/~public/code1.htm&r=1&f=G> (viewed Feb. 10, 2008).

⁸⁶ Chair’s Annotated Text, ¶¶ 105-106, 112-119.

⁸⁷ Chair’s Annotated Text, ¶ 105.

⁸⁸ Chair’s 2009 Draft, ¶ 18.

⁸⁹ See Christopher Hanson, “Sound Energy Solutions decries decision to kill LNG report as bad precedent,” *Press-Telegram*, February 9, 2007 (“... Sound Energy indicated it has spent \$20 million on the abandoned EIR and \$8 million for required harbor development seismic, engineering, safety and environmental studies, among other things.”). Apart from environmental studies, the California Coastal Act provides for meetings and hearings for voicing public questions and concerns about proposed projects. See, e.g. Cal. Pub. Res. Code § 30621. In some states, a negotiation process may give the public an opportunity to participate through voting in which the public

- (2) **Alternatives.** Among the alternatives to the Chair’s Draft, which requires that regulations “shall be as simple as possible,” are:
- (a) *Should.* Several delegations remarked that simplicity is not an absolute; it is relative to complex circumstances.⁹⁰ An alternative to avoiding the vagueness of this discipline would be to convert its command from “shall” to “should” or “best endeavor.”
 - (b) *Relative to development.* One delegation proposed softening the existing language by adding, as simple as possible “with regard to the level of development, services regulation, and institutional capacities.”⁹¹
 - (c) *Simple.* One delegation proposed that procedures be “simple, reasonable and clear.”⁹²
 - (d) *Necessary.* Switzerland proposed changing this to a necessity test, which ensures that “no procedures are imposed other than necessary to verify the compliance with the licensing requirements.”⁹³ Some delegations said that this proposal “took the negotiations backward,” given the divisiveness of necessity tests.⁹⁴

b. Licensing fees

- (1) **Chair’s Draft.** The Chair’s 2009 Draft requires that nations “shall ensure that *licensing* fees 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 ...”.⁹⁵ “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.”⁹⁶ The Chair’s Draft also requires that nations “shall ensure that any fees relating to *qualification* procedures are commensurate with the costs ...”.⁹⁷

In her Annotated Text, the chair reports a debate on several points where delegations differ:

- (a) Should the cost basis for qualification fees (processing of initial applicants) be treated separately from licensing fees (ongoing supervision and regulation)? Some delegations think the two should be combined into one fee. At issue is

considers short-term and long-term impacts on town safety, property values, economic impacts on nearby residential properties, and social impact on public properties such as schools. *See* NARUC, The Need for Effective and Forthright Communication Planning for LNG Facility Siting: A Checklist for State Public Utility Commissions 7 (2005), <http://www.naruc.org/displaycommon.cfm?an=1&subarticlenbr=313>.

⁹⁰ Chair’s Annotated Text, ¶¶ 155, 156, 158.

⁹¹ Chair’s Annotated Text, ¶ 152.

⁹² Chair’s Annotated Text, ¶ 151.

⁹³ Chair’s Annotated Text, ¶ 153.

⁹⁴ Chair’s Annotated Text, ¶ 161.

⁹⁵ Chair’s 2009 Draft, ¶ 26.

⁹⁶ *Id.*

⁹⁷ Chair’s 2009 Draft, ¶ 39.

whether unsuccessful applicants should bear the cost of post-licensing supervision.⁹⁸

- (b) What should be the “stringency” of the disciplines? The Chair’s draft limits qualification fees to “commensurate” costs and licensing fees to “reasonable costs,” which is less stringent. One delegation urged that both fees should be “commensurate” with costs.⁹⁹

(2) *Alternatives.* The Chair reports two competing alternatives:

- (a) *Retain the chair’s version.* This would preserve a higher level of stringency for qualification fees compared to licensing fees.
- (b) *Apply the stringent standard to both.* The alternate approach requires that nations “shall ensure that application and processing fees related to licensing and qualification procedures are commensurate with the costs.” This approach “strengthens the permissible relationship between costs and fees.”¹⁰⁰ Translation: It would benefit license holders at the expense of governments.

7. Treatment of developing countries

The Chair’s 2009 Draft provides that the disciplines would not apply to least developed countries (LDCs).¹⁰¹ For developing countries, the draft would delay obligations to comply for an unspecified number of years.¹⁰² The draft encourages developed countries to provide technical assistance and to give more favorable treatment to service suppliers who hail from developing countries and LDCs.¹⁰³ There is no comment on how such treatment would affect a nation’s MFN obligations. Presumably, it would trigger a MFN duty to provide that treatment across the board.¹⁰⁴

In her Annotated Text, the chair reports comments from delegations about phasing in disciplines of interest to service suppliers from developing countries,¹⁰⁵ as well as experience with providing technical assistance to implement WTO obligations.¹⁰⁶ However, the chair makes no comment on proposals made prior to 2009 to provide developing countries with a broader carve-out from the proposed disciplines. Nor does she propose any alternatives to the Chair’s 2009 draft with respect to treatment of developing countries.

⁹⁸ Chair’s Annotated Text, ¶ 254.

⁹⁹ Chair’s Annotated Text, ¶ 248.

¹⁰⁰ Chair’s Annotated Text, ¶¶ 246, 248.

¹⁰¹ Chair’s 2009 Draft, ¶ 46.

¹⁰² Chair’s 2009 Draft, ¶ 42.

¹⁰³ Chair’s 2009 Draft, ¶ 43-46.

¹⁰⁴ See GATS art. II.

¹⁰⁵ Chair’s Annotated Text, ¶¶ 324-332.

¹⁰⁶ Chair’s Annotated Text, ¶¶ 333-344.