Markus Krajewski

TRADING AWAY PUBLIC POLICY SPACE?

Assessing the risk of enhanced domestic regulation disciplines in trade and investment agreements for public interest regulation

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Assessing the risk of enhanced domestic regulation disciplines in trade and investment agreements for public interest regulation

A study commissioned by EPSU and the
Chamber of Labour Vienna

By Markus Krajewski*

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Executive summary

The potential threat of the obligations of trade and investment agreements on domestic regulations of services continues to be a contentious aspect of the trade agenda. A group of Members of the World Trade Organisation (WTO) have recently agreed on a set of disciplines for domestic regulations to be included in the WTO's services agreement, the General Agreement on Trade in Services (GATS). This so-called Reference Paper is part of a larger trend in the development of such disciplines and the liberalization of services markets through multilateral, plurilateral and bilateral trade agreements including the Trade in Services Agreement (TiSA) and the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada.

This present study assesses the impact of attempts to develop disciplines for domestic regulation in the context of the WTO and other fora on the protection of public interest regulations. It develops a framework which enables regulators, policy makers, trade unions, civil society organisations and other stakeholders to assess the impact of existing and potential sets of disciplines on domestic regulations in trade and investment agreements. The paper also suggests policy recommendations which would enable governments to reduce the negative impact of such disciplines on domestic regulatory autonomy and policy space to adopt regulations in the public interest. The key instrument to protect this space would be a clause which exempts public interest regulation from the disciplines of a trade and investment agreement. Such a clause could be included in the main text of an agreement, which would provide the widest possible protection, or in specific annexes which would at least offer some protection.

I. Introduction

Trade agreements are no longer agreements about tariffs and import restrictions. Even though recently there has been a re-emergence of classic trade disputes between the US, the EU and China[1], trade measures applied at the border are not the key aspects of trade agreements. Instead, modern trade and investment agreements, including the agreements of the World Trade Organisation (WTO) address regulatory measures in a variety of different domestic policy fields and cut deeply into national regulatory autonomy. One area in which this is particularly apparent is the field of trade in services. Agreements covering services trade affect regulations aimed at securing the public interest, such as obligations to provide public services in the entire country on equal terms (Universal Service Obligations), measures restricting the number of service suppliers for economic, social or environmental reasons, or standards ensuring the quality of a service or service supplier to protect workers or consumers. The impact of service agreements on public interest regulation has been at the heart of debates and conflicts on trade agreements and national policy space since more than twenty years. Originally part of the GATS 2000-negotiations and the Doha Development Agenda at the WTO, attempts to further liberalize services trade and reduce regulatory space moved to bilateral and regional free trade and investment agreements and the negotiations on a Trade in Services Agreement (TiSA) in more recent years.[2] While the general agenda of these attempts – liberalizing services markets and limiting public interest regulation – remains similar, the fora in which this agenda is pursued by states and the global services industry shift between multilateral, plurilateral and bilateral settings.

The most recent development in this field occurred again in the WTO context: In late September 2021, a group of 65 Members of the World Trade Organisation (WTO), including mostly developed countries and OECD members published a Reference Paper on Services Domestic Regulation.[3] The Reference Paper is the result of three years of negotiations in a group established at the Ministerial Conference in Buenos Aires as the Joint Initiative on Services Domestic Regulation.[4] While these negotiations have triggered some interest by trade specialists[5], they have gone largely unnoticed by many commentators despite the contentiousness of disciplines for domestic regulation in trade in services in the past two decades.[6] After its publication, the Reference Paper led to contrasting reactions: In a blog post

[1] Yukon Huang, The U.S.-China Trade War Has Become a Cold War, Carnegie Endowment for International Peacse, 16 September 12021, https://carnegieendowment.org/2021/09/16/u.s.-china-trade-war-has-become-cold-war-pub-85352; EU-US ties: Undoing Donald Trump's trade war, https://www.dw.com/en/eu-us-ties-undoing-donald-trumps-trade-war/a-57855158

[2] Werner Raza, Bernhard Tröster and Rudi von Arnim, ASSESS_TiSA: Assessing the claimed benefits of the Trade in Services Agreement (TiSA), Österreichische Forschungsstiftung für Internationale Entwicklung (ÖFSE) February 2018, https://www.oefse.at/fileadmin/content/Downloads/Publikationen/Studien/6_Assess_TiSA.pdf

[3] Joint Initiative on Services Domestic Regulation, Reference Paper on Services Domestic Regulation – Note by the Chairperson, INF/SDR/1, 27 September 2021.

[4] WTO, Ministerial Conference, Joint Ministerial Statement on Services Dmestic Regulation, WT/MIN(17)/61, 13 December 2017.

[5] IISD, WTO Member Group Negotiating Disciplines on Domestic Regulation in Services Examines Lessons from Trade Deals, 29 March 2021; https://sdg.iisd.org/news/wto-member-group-negotiating-disciplines-on-domestic-regulation-in-services-examines-lessons-from-trade-deals/; IISD, Participants in Services Domestic Regulation Talks Agree Text Ahead of MC12, https://sdg.iisd.org/news/participants-in-services-domestic-regulation-talks-agree-text-ahead-of-mc12/, 5 October 2021.

[6] Wolfgang Weiß, WTO law and domestic regulation, 2020; Aik Hoe Lim and Bart de Meester (eds), World Trade Organization - WTO domestic regulation and services trade: putting principles into practice, 2014; Panagiotis Delimatsis, Concluding the WTO services negotiations on domestic regulation, World Trade Review 2010, 643; Erich Vranes, The WTO and regulatory freedom - WTO disciplines on market access, non-discrimination and domestic regulation relating to trade in goods and services, Journal of international economic

WTO Deputy Director General (DDG) *Anabel González* praised the Joint Initiative as its members were "ready to cut red tape" and to "reduce trade costs".[7] While acknowledging that such initiatives were evidence of the WTO becoming a "club of clubs"[8], the DDG referred to OECD studies suggesting major economic gains from reducing services domestic regulation. In a similar vein, a recent WTO Staff Working Paper claimed that the disciplines of the Reference Paper aim at "locking in good regulatory practice".[9] Contrary to this, Professor *Jane Kelsey* of the University of Auckland called the Reference Paper a "corporate lobbyists' charter" arguing that it locked in "the neoliberal model of services" and required "a light-handed, market-driven approach to their regulation".[10]

Against the background of these different views on the most recent outcome on services regulation disciplines this paper seeks to assess the impact of such disciplines on domestic regulatory and policy space and the potential risk they pose for public interest regulation. The paper will not only analyse the Reference Paper on Services Domestic Regulation but provides a framework of analysis which can be applied to similar disciplines in bilateral and regional trade and investment agreements. Such a framework should enable researchers, regulators and trade negotiators, political actors, civil society organisations and other observers of trade policy to assess domestic regulation disciplines developed in contexts they are interested in. The analysis presented in this study should also be seen in the context of other settings in which the impact of market liberalization on regulation plays a key role. These include regulatory simplification, a policy promoted by the OECD and by the European Commission's Better Regulation Agenda and Regulatory Fitness and Performance Programme (REFIT) that aims to reduce administrative regulations considered excessively burdensome to business.[11]

This study is organised as follows: Section II briefly contextualises the contentious relationship between domestic regulations and the respective disciplines in trade agreements by assessing the double function of regulation in the context of trade liberalisation and by explaining how domestic regulations are covered by trade agreements in general. The subsequent section III illustrates the approaches towards disciplines on domestic regulation in different trade agreement settings. This will highlight how negotiations started at the multilateral level, then moved to bilateral and regional settings before coming back to the multilateral arena, even if not formally following the WTO approach in this context. Section IV exemplifies the potential impact of disciplines on domestic regulation in trade agreements on specific regulatory instruments with three illustrative fictitious case scenarios. Subsequently, the study develops and applies an analytical framework to assess the risk of domestic regulation disciplines on public interest regulation (Section IV). Based on this assessment, the final section of the study provides some proposals for reform which can be implemented in the current WTO negotiations, but also in bilateral and regional trade agreements (Section V).

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law 2009, 953; Margareta Djordjevic, Domestic regulation and free trade in services - A balancing act, Legal issues of economic integration 2002, 305.

[7] "Slash services trade red tape. At the WTO", Trade Thoughts, from Geneva, by DDG Anabel González, https://www.wto.org/english/blogs_e/ddg_anabel_gonzalez_e/blog_ag_red_tape_e.htm

[8] Robert Z. Lawrence, Rulemaking Amidst Growing Diversity: A Club-of-Clubs Approach to WTO Reform and New Issue Selection, Journal of International Economic Law 2006, pp. 823–835.

[9] Laura Baiker, Elena Betola and Markus Jelitto, Services Domestic Regulation – Locking in Good Regulatory Practices, WTO Staff Working Paper ERSD-2021-14.

[10] Jane Kelsey, GATS Reference Paper on Domestic Regulation – A Corporate Lobbyists' Charter, 13 October 2021, on file with author.

[11] Raza/Tröster/von Arnim, above note 2, p. 33.

II. Domestic regulation disciplines in agreements on trade in services: A contentious relationship

1. The bifunctionality of domestic regulation in the context of services liberalisation

The relationship between services trade liberalisation and domestic regulation is complex and remains politically and academically contentious. The complexity and contentiousness rest on an apparent paradox: On the one side, regulations are needed to facilitate the supply of services in open market societies. In other words, without regulations the supply of services and hence also trade in services would be difficult, if not impossible. It is by now generally accepted that services liberalisation requires re-regulation or sometimes original regulation.[12] As stated in a Note by the WTO Secretariat on "Regulatory Issues in Sectors and Modes of Supply" in 2012:

> "Effective regulation – or re-regulation – is often needed for liberalization to produce the expected efficiency gains without compromising on quality and other policy objectives. Often, addressing regulatory capacity constraints and weak institutional frameworks is part of the process of liberalization. The opening of a hitherto restricted market may also need to be accompanied by the introduction of licensing mechanisms and public service obligations for social policy reasons. Since many services contracts involve customized products (medical intervention, legal advice, financial products etc.), the need for regulatory protection is particularly evident. (…) It is thus widely understood that regulatory measures are necessary to increase welfare by correcting market distortions, minimising externalities, ensuring appropriate supply and access to services, or addressing income-related inequalities." [13]

On the other side, domestic regulations can also become obstacles to the supply of services and hence also barriers to trade in services. Trade in services faces impediments if domestic regulatory regimes are discriminatory, prohibit market entry or are unduly burdensome for the service supplier.[14] Again, in the words of the WTO Secretariat:

> "Domestic regulations in the form of cumbersome, and/or opaque licensing and qualification procedures, non-transparent criteria, excessively burdensome and redundant requirements, and administrative "red-tape" can obstruct trade in services, even if this was not their intention. (…) The sheer diversity of regulatory systems and standards in markets internationally can also significantly raise the costs of compliance for the service supplier and hamper trade, even in situations where there are no market access restrictions or discriminatory measures in force. Long and complex procedures for assessing an application for authorization to supply a service may also discourage suppliers from seeking access to a host member. Procedural complexity might also serve to hide protectionist intentions and give rise to good governance issues. Questions may also arise as to whether a regulation serves to

[12] WTO, Trade in Services Division, Disciplines on Domestic Regulation pursuant to GATS Article VI.4, Background and Current State of Play, June 2011, para 8, available at https://www.wto.org/english/tratop_e/serv_e/dom_reg_negs_bckgddoc_e.doc, accessed 4 May 2015.
[13] Working Party on Domestic Regulation – Regulatory Issues in Sectors and Modes of Supply - Note by the Secretariat, S/WPDR/W/48, 13 June 2012, paras 9 and 11.
[14] WTO, The future of services trade, World Trade Report 2019, p. 92.

protect public or private interest, or whether there may be more effective and efficient means of achieving a particular policy objective."[15]

The drafters of the GATS were aware of the inherent tension between domestic regulatory space and trade liberalisation when they recognised "the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives". However, the GATS itself does not support WTO Members in exercising this right. Instead, the binding obligations of the agreement contain restrictions on regulatory instruments and require Members to design their regulations in a neoliberal framework aimed at market opening and the elimination of certain regulatory measures. The preamble contains language regarding the right to regulate but this only pays lip service to this right and cannot counterbalance the core liberalization obligations of the GATS.

The design of the GATS and free trade agreements covering services trade follows a three-fold approach to reducing trade-distorting regulations.[16] The first is based on the fundamental principle of non-discrimination, one of the cornerstones of the world trading system. Discriminatory regulations are out of line with the very idea of trade liberalisation. The second element concerns actual access to the market. Domestic regulations which reduce the number of service suppliers or make access to a market contingent on certain legal forms are also considered problematic in principle. In addition to these two principles, the GATS drafters also recognised that domestic regulations can be a barrier to trade even if they are neither discriminatory nor formal barriers to market access. For these, Article VI:4 GATS envisaged disciplines aimed at reducing the trade-distorting effect of domestic regulations. Similar approaches towards domestic regulation can be found in free trade agreements covering trade in services. These approaches and the relevant disciplines on domestic regulation will be the focus of this paper.

2. Types of domestic regulation addressed by trade in services agreements

Based on the three types of provisions in the GATS and in services chapters in free trade agreements mentioned above, it should be recalled that discriminatory regulations are addressed by the national treatment principle whereas market restrictions are covered by the obligation to provide market access. Market access restrictions are not just monopolies or other quantitative restrictions, but also so-called Economic Needs Tests (ENTs), i.e. measures which limit the number of service supplies or services supplied based on the perceived economic need.[17] Examples would be restrictions on the number or legal form of hospitals or health services providers, in order to control health care spending or ensure not-for-profit provision, or caps on licences for taxis, in order to ensure decent wages for drivers and safe, reliable service for customers. ENTs would not be covered by the domestic regulation disciplines in services trade agreements. The same is true for other forms of market access restrictions, including investment screening instruments which typically only apply to foreign service suppliers. ENTs fall within the scope of market access restrictions and are therefore prohibited by Article XVI GATS or respective obligations in bilateral trade agreements. This

[15] Working Party on Domestic Regulation – Regulatory Issues in Sectors and Modes of Supply - Note by the Secretariat, S/WPDR/W/48, 13 June 2012, paras 11 and 12.
[16] Aik Hoe Lim and Bart de Meester, 'An Introduction to Domestic Regulation and GATS', in Aik Hoe Lim and Bart de Meester (eds), WTO Domestic Regulation and Services Trade – Putting Principles into Practice (CUP 2014) 1, 2.
[17] For a detailed discussion see Markus Krajewski, National Regulation and Trade Liberalization in Services, 2003, pp. 88-89

shows that not all domestic regulatory instruments are subject to disciplines on domestic regulation. Instead, market access and national treatment obligations also limit domestic regulatory autonomy and policy space.

Domestic regulation disciplines in trade agreements address certain non-discriminatory measures that fall outside the scope of the national treatment and non-market-restricting instruments. They are designed to respond to global service corporations' long-standing demand that market-opening commitments must be supported by the right to challenge trade-impeding regulation. On the basis of Article VI:4 GATS and similar provisions in free trade agreement there is a general consensus that measures covered by domestic regulation disciplines extend to five types of measures[18]: licensing requirements and procedures, qualification requirements and procedures, and technical standards. These types are defined as follows:[19] "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 an authorization to supply a service. These would include not only professional licensing, but also project approvals, for example, authorizing a new power plant or pipeline. "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. "Qualification requirements" are substantive requirements relating to the competence of a natural person in relation to the supply of a service, and which are required to be demonstrated for the purpose of obtaining authorization to supply a service. "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. "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. The definition of technical standards not only covers the specificities of the service itself, but also quality, social and environmental standards which must be followed when supplying the service.

While the GATS and many trade agreements maintain this terminology, it seems that more recent approaches do not distinguish strictly between these measures. Instead, the term "authorization" seems to become the general term encompassing the above-mentioned instruments and possibly even reaching beyond the scope of the instruments mentioned in the GAST context.[20] An authorization is defined as the permission to supply a service resulting from a procedure to which an applicant must adhere in order to demonstrate compliance with licensing requirements, qualification requirements or technical standards.[21]

3. From disciplining regulatory instruments to "locking in good regulatory practice"

The focus of the discourse on domestic regulation disciplines in services trade agreements as well as the actual disciplines underwent some changes in recent years: In the GATS context with its specific commitments covering national treatment (non-discrimination) and market

[18] See also Reference Paper, Section II.
[19] See e.g. Second Revision, Draft Disciplines on Domestic Regulation Pursuant to GATS Article VI.4, Informal Note by the Chairman, Room Document, 20 March 2009, paragraph 5-9.
[20] Kinda Mohamadieh, Reference Paper on Services Domestic Regulations: Overview of Main Content and Regulatory Implications, Draft Briefing Paper, Third World Network, pp. 5-7.
[21] Reference Paper, Section II, para 3.

access, the emphasis was on allegedly burdensome regulations which could be addressed by a so-called necessity test, i.e. the requirement that domestic regulations should not be more burdensome or more trade-restrictive than necessary to ensure the quality of the service or to achieve other public interest goals. The necessity test has been subject to intense debates and criticism which prevented WTO Members from reaching a consensus on this issue. The central problem of a necessity test is that it can be difficult to prove that there are not less-burdensome or less trade-restrictive measures that could also achieve the public policy objective. Since the test would be assessed by the dispute settlement institutions of the WTO or other trade and investment agreements, it is clear that the necessity test would often be applied with a liberalization bias as the members of trade and investment tribunals usually approach a dispute from the perspective of trade liberalization.

In recent years, the attention shifted away from strict disciplines such as a necessity and moved towards the field of good governance regulation including rules on transparency, procedural fairness and institutional issues. [22]

The fundamental question in this context is, however, how and by whom "good regulatory practice" is defined. The answer will often depend on which regulatory model is seen as a good model. For example, is the obligation to publish draft regulations and allow service suppliers to comment on these drafts evidence of a transparent and open regulatory process, or does this model enable corporate lobbyists to make their voices heard even more loudly? Traditionally, trade agreements have been neutral towards regulatory models and typically did not favour a particular model. However, since trade agreements are aimed at increasing the liberalisation of trade and enabling competitive markets, regulation is viewed through the lens of open markets and competition. Contrary to this, public interest regulation is seen as a justifiable deviation from the ultimate goal of trade liberalisation. Hence, while trade agreements do not prohibit public interest regulation in general, it is clear that enabling such regulation is not the objective of these agreements.

This assessment can be exemplified with the so-called Telecommunications Reference Paper, which contains a set of additional commitments in the telecommunications sector aiming at ensuring competitive markets. The only public interest regulation instrument in this context is the Universal Services Obligation which is, however, drafted as a general exception from the rules of market access and trade liberalisation. Contrary to this approach, the GATS Annex on Financial Services contains a prudential carve-out which leaves full regulatory discretion, including discretion not to regulate financial services, to Members.[23] Hence, the Annex on Financial Services does not promote any regulatory model at all.

III. Twenty-five years of negotiations on domestic regulation disciplines: Moving in small(er) circles?

Attempts to develop rules on domestic regulation in the international trade regime date back to the establishment of the WTO where negotiations based on Article VI:4 GATS began in 1995. Since then, the issue was taken up in different multilateral, plurilateral, regional and bilateral trade negotiations with varying outcomes. However, in spite of different fora and

[22] Federico Ortino and Emily Lydgate, Addressing Domestic Regulation Affecting Trade in Services in CETA, CPTPP, and USMCA: Revolution or Timid Steps?, The Journal of World Investment & Trade 2019, 680.
[23] Thomas Cottier and Markus Krajewski, What Role for Non-Discrimination and Prudential Standards in International Financial Law?, Journal of International Economic Law 2010, 817.

negotiations results, the topics and focus of the negotiations have not changed significantly in the last 25 years.

1. Trying to finish the unfinished agenda: Negotiations in the WTO

As mentioned above, Article VI:4 GATS mandates the Council for Trade in Services through subsidiary bodies to develop disciplines for domestic regulation to ensure that measures relating to qualification requirements and procedures, technical standards, as well as licensing requirements and procedures "do not constitute unnecessary barriers to trade in services". Work on disciplines for domestic regulations has been part of the WTO agenda since its foundation in 1995. The WTO began its work on disciplines for domestic regulations in the field of accountancy services with the Working Party on Professional Services (WPPS) drafting Disciplines on Domestic Regulation in the Accountancy Sector (Accountancy Disciplines) which were adopted by the WTO Members in 1998.[24] These disciplines contain principles and obligations for regulations of accountancy services. While Accountancy Disciplines have not become a formal part of WTO law yet, they an important reference point for work on domestic regulation disciplines as they are the first international set of such rules in the context of the global regime on trade in services.

A key element of the Accountancy Disciplines is a general necessity test. It requires that Members ensure that licensing requirements and procedures, technical standards and qualification requirements and procedures in the accountancy sector "are not more trade-restrictive than necessary to fulfil a legitimate objective." Legitimate objectives are "*inter alia*, the protection of consumers (which includes all users of accounting services and the public generally), the quality of the service, professional competence, and the integrity of the profession."[25] The necessity test submits every regulatory measure in the accountancy sector to the scrutiny of necessity.[26] It is noteworthy that the Accountancy Disciplines link necessity to a legitimate objective and include a non-exhaustive, illustrative list of legitimate objectives.[27]

After the conclusion of the Accountancy Disciplines, the Council for Trade in Services replaced the WPPS with the Working Party of Domestic Regulation (WPDR) and entrusted it with the task to develop general disciplines applicable to all sectors of the services economy.[28] The WPDR has been active since 1999 but has not yet produced a final result. Work in the WPDR has been following the general trend of progress in the WTO.[29] In 2011 the WPDR Chairman produced a Progress Report which contained a compilation of text

[24] Council for Trade in Services, Disciplines on Domestic Regulation in the Accountancy Sector, S/L/63, 15 December 1998 (Accountancy Disciplines). For an assessment see Claude Trolliet and John Hegarty, Regulatory Reform and Trade Liberalization in Accountancy services, in Aaditya Mattoo and Pierre Sauvé (eds), Domestic Regulation and Service Trade Liberalization 2003, 147.
[25] Accountancy Disciplines, para 2.
[26] Claude Trolliet and John Hegarty, Regulatory Reform and Trade Liberalization in Accountancy services, in: Aaditya Mattoo and Pierre Sauvé (eds), Domestic Regulation and Service Trade Liberalization, 2003, 147, 152.
[27] Panagiotis Delimatsis, Towards a Horizontal Necessity Test for Services: Completing the GATS Article VI:4 Mandate, in Pierre Sauvé, Mario Panizzon and Nicole Pohl (eds), International Trade in Services: New Perspectives on Liberalization, Regulation, and Development, 2008, 370, 375.
[28] Council for Trade in Services, Decision on Domestic Regulation, S/L/70, 26 April 1999.
[29] See also WTO, The future of services trade, World Trade Report 2019, p. 176.

elements of possible future disciplines.[30] This report suggests a large degree of consensus among WPDR members but also highlights some considerable disagreement.[31]

Negotiations slowed down again between 2012 and 2015 partly due to the absence of concrete general negotiations on services in the Doha Agenda and the overall uncertainty about the future of negotiations in the WTO.[32] After the Ministerial Conference in Nairobi in December 2015, Members of the WPDR restarted exchanging their views on an earlier draft text. These discussions led to draft text circulated during the eleventh Ministerial Conference in Buenos Aires in December 2017.[33] This proposal included disciplines for the administration of measures, the independence of institutions, transparency, standards for the development of measures, and a necessity test. It was supported by most developed countries with the exception of the U.S., China and some middle-income developing countries. However, many developing countries opposed the proposal.[34] Consequently, the text was not adopted at the Ministerial Conference in 2017. This led a group of WTO Members to start a new initiative (Joint Initiative on Services Domestic Regulation) which was formally not part of the WPDR's agenda.[35]

In 2018 the WPDR discussed a proposal by India on disciplines for the supply of a service through the presence of natural persons (Mode 4) on which Members could not reach a consensus.[36] The proposal followed the logic and contents of previous proposals but was limited to domestic regulation for the supply of a service through Mode 4.[37] However, it contained mainly specific licensing and qualification requirements, but not technical standards. It can hence be assumed that the implications of this proposal on labour and social standards would have been minimal.

Further progress in the WPDR was not achieved. Instead, negotiations in the WPDR seemed to be paralysed after the established of the Joint Initiative. In 2019 and 2020 the WPDR held only one meeting each year without any further substantial discussions on a potential outcome of the WPDR's work. WTO Members not part of the Joint Initiative criticised the initiative while WTO Members active in the Joint Initiative defended its work. [38] In light of these most recent developments, it seems safe to conclude that the WPDR became largely dysfunctional.

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[30] WPDR, Disciplines on domestic regulation pursuant to GATS article VI:4 - Chairman's progress report, S/WPDR/W/45, 14 April 2011.
[31] Bregt Natens, The Doha Round and the Future Architecture of the Multilateral Regulation of Trade in Services (KU Leuven - Leuven Centre for Global Governance Studies Working Paper 110), March 2013, p. 14.
[32] See the statements made in the WPDR Meeting on 17 September 2014, Working Party on Domestic Regulation - Report of the meeting held on 17 September 2014 - Note by the Secretariat, S/WPDR/M/62, paras 3.2-3.14.
[33] Ministerial Conference - Eleventh session - Buenos Aires, 10 - 13 December 2017 - Communication from Albania; Argentina; Australia; Canada; Chile; China [...], domestic regulation – Revision, WT/MIN(17)/7/Rev.2, 13 December 2017.
[34] See Gabriel Gari, Recent Developments on Disciplines on Domestic Regulations Affecting Trade in Services: Convergence or Divergence? in Rhea Hoffmann and Markus Krajewski, Coherence and Divergence in Agreements on Trade in Services, 2020, 59, 66-67.
[35] See below 4.
[36] Working Party on Domestic Regulation - Annual report of the Working Party on Domestic Regulation to the Council for Trade in Services – 2019, S/WPDR/23, 21 November 2019.
[37] Working Party on Domestic Regulation – Communication from India – GATS Article VI:4-Disciplines for Supply of a Service through the Presence of a Natural Person of a Member in the Territory of Another Member, S/WPDR/W/61/Rev.1, 8 March 2019.
[38] See the most recent Annual Report of the WPDR: Working Party on Domestic Regulation - Annual report of the Working Party on Domestic Regulation to the Council for Trade in Services – 2021, S/WPDR/25, 26 October 2021.

2. Disciplines beyond the GATS: Going bilateral and regional

Even before the first general breakdown of the negotiations in the Doha Development Agenda in 2006 countries ~~have~~ turned to bilateral and regional free trade agreements as alternatives to results at the multilateral system. In recent years, this move towards bilateral and regional agreements accelerated. Most of these agreements are so-called "next generation trade and investment", i.e., agreements at a bilateral, regional and mega-regional level which go significantly beyond the scope of the GATS.

As of October 2021, a total of 188 free trade agreements covering trade in (goods and) services notified to the WTO were in force.[39] Most of these agreements were concluded after the establishment of the WTO. Hence, it can be assumed that most of these agreements would go further than the GATS.[40] While most countries would go beyond their GATS market access and national treatment commitments in free trade agreements, the picture is less clear concerning domestic regulation disciplines. Most bilateral free trade agreements covering services concluded until the early 2010s do not go beyond the GATS standard and often contain clauses that require the parties of the agreement to come back to the issue of domestic regulation disciplines, often in light of results reached at the WTO.[41]

Some of the more recent free trade agreements have, however, employed disciplines which can be considered "GATS plus", i.e. embodying obligations which go beyond the GATS status quo.[42] For example, the Protocol on Trade in Services of the African Continental Free Trade Agreement (AfCFTA) requires its parties inter alia to decide on the application for an authorisation to supply services within a reasonable period of time, and to provide the applicant without undue delay information concerning the status of the application. This is, however, only a minimal step beyond the GATS approach. [43]

The Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada[44] contains a special chapter – Chapter 12 - on domestic regulation which goes further beyond the content of the articles on domestic regulation reviewed above. The Chapter applies to licensing requirements and procedures and qualification requirements and procedures, but not to technical standards. Many of the disciplines contained in Chapter 12 CETA have also been discussed in the WPDR and seem to be part of the consensus reached there. However, the absence of a necessity test and of requirements for technical standards also show that the EU

[39] The figure includes the EC enlargement agreements and the notifications of agreements predating the entry into force of the GATS. Data taken from the WTO's database available at http://rtais.wto.org/UI/PublicSearchByCrResult.aspx (last visited 31 October 2021).
[40] Rudolf Adlung and Hamid Mamdoudh, How to Design Trade Agreements in Services: Top Down or Bottom-Up?, (2014) Journal of World Trade, 191, 206; Pierre Latrille and Juneyoung Lee, Services Rules in Regional Trade Agreements – How Diverse and How Creative as Compared to the GATS Multilateral Rules (WTO Staff Working Paper ERSD-2012-19), para 117.
[41] Pierre Latrille and Juneyoung Lee, Services Rules in Regional Trade Agreements – How Diverse and How Creative as Compared to the GATS Multilateral Rules (WTO Staff Working Paper ERSD-2012-19), paras. 115-122; Federico Ortino and Emily Lydgate, Addressing Domestic Regulation Affecting Trade in Services in CETA, CPTPP, and USMCA: Revolution or Timid Steps?, The Journal of World Investment & Trade 2019, 680.
[42] WTO, The future of services trade, World Trade Report 2019, p. 179.
[43] Article 9.3 Protocol on Trade in Services, Agreement Establishing the African Continental Free Trade Area, available at https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf
[44] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, OJ L 11, 14.1.2017, p. 23.

and Canada were only willing to go beyond the GATS status quo if there was already a consensus on the issues in the WTO membership. A similar picture emerges from a closer look at Articles 8.29 to 8.35 of the EU-Japan Economic Partnership Agreement[45] and Articles 146-156 of the Trade and Cooperation Agreement between the EU and the United Kingdom.[46]

The EU-Mercosur Association Agreement seems to go beyond this approach. The Draft Chapter on Trade in Services and Investment of this agreement includes the CETA and EU-Japan standards but also contains the requirement that measures relating to licensing and qualification requirements shall be proportionate to a public policy objective.[47] A similar obligation with regards to licensing requirements can be found in Article 104 para 2 lit. a) of the EU-Ukraine Association Agreement.[48] While "proportionality" is a term which is more common in the EU internal law context, it is comparable to the concept of "necessity" in the context of GATS and other free trade agreements. Necessity and proportionality both aim at assessing whether domestic regulations are not more burdensome than necessary to achieve certain public policy goals.

Other GATS Plus-obligations, however without a full-fledged necessity or proportionality test, can be found in Art. 15.3 USMCA[49] or Article 10.8 CPTPP[50]. It should be noted that these agreements also contain general chapters on good regulatory practices and or coherence (Chapters 28 USMCA and Chapter 25 CPTPP) as well as rules on the publication of regulations and transparency (Chapter 29 USCMA). These obligations include provisions concerning regulatory impact assessments, publication and information standards. Some of these provisions go significantly beyond the scope of the disciplines developed in the GATS context as they require the annual publication of the details of regulations a Party expects to propose or adopt in the following 12 months (Article 28.6 USMCA) or the publication of all relevant information through a single, free, publicly available website (Article 28.7 USMCA). In agreements which contain chapters on regulatory standards or cooperation, any analysis of the impact of that agreement on domestic regulations needs to take those provisions into account.

This brief overview of provisions on domestic regulation in free trade agreements shows a partial deviation from earlier assessments. While the parties of such agreements concluded before 2005 seemed to be reluctant to include obligations which went significantly beyond the obligations of Article VI GATS[51], more recent agreements contain obligations for domestic regulations which have been discussed in the WTO'S WPDR but could not generate

[45] Agreement between the European Union and Japan for an Economic Partnership, OJ L 330, 27.12.2018, p. 3, https://trade.ec.europa.eu/doclib/press/index.cfm?id=1684

[46] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, OJ L 149, 30.4.2021, p. 10.

[47] Article 14.1 and 16.1., EU-Mercosur trade agreement: The Agreement in Principle and its texts, https://trade.ec.europa.eu/doclib/press/index.cfm?id=2048

[48] Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, OJ L 161, 29.5.2014, p. 3, https://trade.ec.europa.eu/doclib/html/155103.htm

[49] Agreement between the United States of America, the United Mexican States, and Canada, December 13, 2019 Text, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between

[50] Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/toc-tdm.aspx?lang=eng

[51] Laura Baiker, Elena Betola and Markus Jelitto, Services Domestic Regulation – Locking in Good Regulatory Practices, WTO Staff Working Paper ERSD-2021-14, p. 14

consensus in the multilateral setting. Many of these obligations have now found their way back into the WTO as a result of the Joint Initiative on Trade in Services to be discussed in section 4. As noted in the WTO Trade Report 2019: "It is noteworthy that the multilateral process seems to have paved the way for outcomes in many RTAs (regional trade agreements) up until 2009, by incorporating text elements of WTO Chairman's drafts into a number of RTAs. Following the impasse in services negotiations after 2011, the reverse trend is now observable: draft texts proposed by members in the WTO as of 2016 are strongly influenced by language developed in regional negotiations and gaining acceptance for text developed outside the multilateral structure of the WTO has proven to be difficult for proponents."[52]

3. The plurilateral experiment: Trade in Services Agreement (TiSA)

In March 2013, a group of 23 WTO Members[53] began negotiating a plurilateral agreement on trade in services (Trade in Services Agreement – TiSA) under the leadership of the EU, the US and Australia. The objective of these negotiations was to move the services liberalisation agenda further in light of a practical standstill of services liberalisation negotiations in the WTO.[54] The negotiations aimed at further market access and non-discrimination commitments, but also included disciplines for domestic regulation. While the negotiations were welcomed by proponents of further trade liberalization in services, critical academic observers and civil society organisations considered this approach as an attempt to secretly agree on further liberalisation and market opening without public debate.[55] WTO Members not involved in the TiSA negotiations also saw them as a dangerous deviation from the multilateral trade agenda and the logic of an inclusive WTO-system built on the consensus of its members. It has also been questioned if and how such an approach could be compatible with WTO law. Observers agreed that the TiSA would have only been in conformity with WTO law if it would have met the conditions laid down in Article V GATS.[56]

Apart from further liberalisation commitments, the EU Commission also sought to develop domestic disciplines further through the TiSA initiative. In 2015, then EU Trade Commissioner Margot Malmström explained in the European Parliament: "For the Commission, it is important that TiSA contains a set of clear horizontal provisions that make sure that licencing and authorisation systems are not used as an obstacle to trade in services."[57] In the last TiSA negotiating round in November 2016 chaired by the EU negotiators an Annex on Domestic Regulation was discussed. [58]

[52] WTO World Trade Report 2019, p. 192.
[53] Australia, Canada, Chile, Chinese Taipei, Colombia, Costa Rica, European Union, Hong Kong, Iceland, Israel, Japan, Liechtenstein, Mauritius, Mexico, New Zealand, Norway, Pakistan, Panama, Peru, South Korea, Switzerland, Turkey and the USA.
[54] Billy A. Melo Araujo, The Trade in Services Agreement (TiSA): Assessing the state of play and potential pitfalls, European Yearbook of International Economic Law 2016, 627.
[55] Jane Kelsey, From GATS to TiSA: Pushing the trade in services regime beyond the limits, European Yearbook of International Economic Law 2016, 119.
[56] Rudolf Adlung, The Trade in Services Agreement (TISA) and its compatibility with GATS, World Trade Review 2015, 617.
[57] European Parliament, Answer given by Ms Malmström on behalf of the Commission, E-012905/2015(ASW), 5 November 2015 to a question by Jude Kirton-Darling, MEP concerning TiSA negotiations and the right to regulate. Available at, https://www.europarl.europa.eu/doceo/document/E-8-2015-012905-ASW_EN.html
[58] European Commission, Report of the 21st TiSA negotiation round 2 – 10 November 2016, 17 November 2016, https://trade.ec.europa.eu/doclib/docs/2016/november/tradoc_155095.pdf

While no official draft of this Annex is available, a document dated 15 November 2016 was leaked to the website bilaterals.org and indicates the state of the play.[59] This document shows that TiSA negotiators held significantly deviating views on the scope and contents of such an Annex. However, the document also showed that the TiSA group considered similar elements for domestic regulation disciplines as were discussed in the WPDR. Yet, most participants of the TiSA negotiations opposed the inclusion of any necessity test or test relating to trade-restrictiveness. Only Hong Kong and New Zealand supported such a test.

TiSA negotiations have been on hold since December 2016, in particular in light of the change in the trade policy agenda of the US under President Donald Trump. However, the negotiations have not formally been terminated and may resume if the overall political context changes. Yet, there are currently no indications that the election of President Joe Biden and the return to a multilateral trade agenda by the US will revive the TiSA negotiations. In light of the developments in the context of the Joint Initiative to be discussed in the next section, it can also be assumed that even if TiSA negotiations would be continued on the basis of the progress achieved so far, domestic regulation would probably not feature prominently on that agenda. States negotiating TiSA were also part of the Joint Initiative and seem to have achieved their goals already in that setting. It is thus likely that TiSA would lock in the Joint Initiative's approach. However, it is also possible that a new TiSA initiative could go beyond the 2013 agenda which could also lead to attempts to develop domestic regulations disciplines going further than the Joint Initiative's Reference Paper.

4. Returning to the multilateral table? The Joint Initiative and the Reference Paper on Services Domestic regulation

a) From Buenos Aires to Geneva: The road towards the Reference Paper

As already mentioned, a group of WTO Members which were dissatisfied with the lack of progress in the WPDR decided to advance discussions on domestic regulation outside of the WPDR at the 11th Ministerial Conference in Buenos Aires in 2017. These Members formed the Joint Initiative on Services Domestic Regulation towards the end of the Ministerial Conference.[60] While acknowledging "the valuable work" of the WPDR, they reaffirmed their commitment to advancing negotiations on domestic regulation disciplines and called upon all Members to conclude the negotiations based on Article VI:4 GATS in advance of the next Ministerial Conference. The original group of 59 WTO Members grew to 65 WTO Members with the United States joining in August 2021 as the latest addition to the group.[61] The Joint Initiative continued negotiations on the basis of proposals made in the WPDR with the aim to develop a Reference Paper on Domestic Regulation. While participation in the Joint Initiative

[59] TiSA - draft annex on domestic regulation (15 Nov 2016), https://www.bilaterals.org/?tisa-draft-annex-on-domestic-32464&lang=en

[60] WTO Ministerial Conference Eleventh Session, Joint Ministerial Statement on Services Domestic Regulation, WT/MIN(17)/61, 13 December 2017.

[61] WTO members participating in the Joint Initiative are Albania, Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Croatia, Cyprus, the Czech Republic, Denmark, El Salvador, Estonia, the EU, Finland, France, Germany, Greece, Hong Kong, China, Hungary, Iceland, Ireland, Israel, Italy, Japan, Kazakhstan, the Republic of Korea, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mauritius, Mexico, Moldova, Montenegro, the Netherlands, New Zealand, Nigeria, North Macedonia, Norway, Paraguay, Peru, Poland, Portugal, Romania, the Russian Federation, Saudi Arabia, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Taiwan, Turkey, Ukraine, the UK, the US, and Uruguay.

was formally open to all WTO members, it was clear that the Members of the Joint Initiative deliberately chose not to seek a consensus among WTO Members, but to advance their own agenda.

A pointed out above these negotiations were opposed by a number of other WTO Members. In the meeting of the WPDR in December 2019, India, South Africa and a number of other countries criticised the approach of the Joint Initiative. In particular, it was argued that the Joint Initiative's text and proposals were not within the mandate of Article VI:4 GATS and that they endangered the multilateral process.[62] It can be assumed that the Joint Initiative basically led to a standstill in the negotiations in the WPDR.

Unlike TiSA, the negotiations on the Joint Initiative were conducted under the auspices of the WTO and with the support of the WTO secretariat. It should be noted that most documents of the Joint Initiative including draft papers and proposals remained restricted and could not be assessed by external observers including civil society and academics. While some documents were leaked, an independent and objective assessment of the negotiations and the development of the Joint Initiative was impossible between 2018 and 2021. On 27 September 2021, the Chairperson of the Joint Initiative on Services Domestic Regulation published a Reference Paper on Services Domestic Regulation that is now available on the WTO website[63] and can be analysed.

Members of the Joint Initiative drafted and exchanged draft Schedules of commitments on the basis of the Reference Paper in the second half of 2021. The aim was for all Schedules to be exchanged by 29 October. So far, 37 draft and pre-finalised Schedules have been produced, but none of them are available to the public.[64] Leaked draft Schedules indicate that Members typically include language indicating that they undertake as additional commitments the disciplines in Section II of the Reference Paper[65] for all sectors included in the Schedule. In some cases, Members also commit to apply the disciplines to additional sectors not included in the Schedule.[66] In at least one case, the respective Member excluded certain paragraphs, but indicated that information on those paragraphs would be provided at a later date.[67] It is unclear whether such partial commitments to the Reference Paper will also be included in the final versions of the Schedules.

The members of the Joint Initiative plan to issue a statement on the occasion of the 12th Ministerial Conference declaring the conclusion of negotiations, noting the pre-finalised schedules exchanged between the parties, and giving guidance on the way forward with respect to the procedure to be followed for the formal modification and certification of the schedules. The declaration would not have any legal significance as the reference paper's obligations would need to be implemented in the schedules of the WTO Members in accordance with Article XX:3 GATS to become legally binding.

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[62] Working Party on Domestic Regulation - Report of the meeting held on 3 December 2019 - Note by the Secretariat, S/WPDR/M/76. 13 December 2019.
[63] WTO, Joint Initiative on Services Domestic Regulation – Reference Paper on Services Domestic Regulation – Note by the Chairman, INF/SDR/1, 27 September 2021.
[64] Based on a search for INF/SDR/IDS documents on https://docs.wto.org/.
[65] See below b).
[66] See the Indicative Draft Schedules posted at the website "Bilaterals.org", https://www.bilaterals.org/?wto-plurilateral-services-domestic-43658&lang=en ; https://www.bilaterals.org/IMG/pdf/wto_plurilateral_services_domestic_regulation_disciplines_draft_schedules.pdf
[67] Joint Initiative on Services Domestic Regulation - Communication from Albania - Indicative Draft Schedule of Specific Commitments, 4 November 2019, INF/SDR/IDS/ALB.

b) Contents of the Reference Paper

The Reference Paper consists of three sections: Section I covers general issues; Section II contains disciplines on services domestic regulation applying to all sectors whereas Section III establishes disciplines on services domestic regulation for financial services.

Section I begins with general language of a preambular character. This includes a reference to the mandate of Article VI:4 GATS and to the right to regulate which is, however, just a repetition of the preamble of the GATS. By basing the Reference Paper clearly on Article VI:4 GATS, the drafters of the Reference Paper confirm that they perceive it as a fulfilment of that mandate. Section I also clarifies that the Reference Paper shall be included in the Schedules of Specific Commitments of WTO Members as additional commitments pursuant to Article XVIII GATS and that the disciplines would thus only apply to sectors with specific commitments. Members will therefore need to inscribe the Reference Paper in their Schedules if they want to adopt it. In this regard, the Reference Paper on Domestic Regulation follows a similar approach as the Reference Paper on Telecommunications. However, unlike the Telecommunications Reference Paper, which allowed WTO Members to adopt only parts of it as additional commitments, the drafters of the Reference Paper on Domestic Regulation seem to be of the opinion that Members can only inscribe the entire Reference Paper with the exception of the specific prohibition of the discrimination between men and women (Paragraph 9).

The last part of Section I addresses development-related issues. This includes the option of a transitional period for developing countries of seven years and the encouragement of WTO Members to provide technical assistance and capacity building. Furthermore, the disciplines would not apply to least-developed countries until their graduation from that status. Least-developed countries are nevertheless "encouraged" to apply the disciplines even before their graduation. Paragraph 12 of Section I stipulates that the disciplines should also apply to preferences notified for the benefit of least developed country Members under the so-called "Least-developed country waiver". This clause is, however, still in brackets, as there is no consensus yet on its inclusion in the final text given that there are still no least developed country Members in the Joint Initiative.

Section II of the Reference Paper constitutes the heart of the Joint Initiative's project. The disciplines contained in this section apply to qualification requirements and procedures, technical standards, as well as licensing requirements and procedures. The first sets of disciplines concern the procedures of an application for an authorization to supply a service including the obligation to avoid requiring more than one authorisation, to allow applications throughout the year, to allow for electronic applications, and to accept copies of required documents. Regarding the processing of the application, the Reference Paper requires WTO Members to provide an indicative timeframe for the processing of the application, to inform the applicant about the status of the application, and to determine the completeness of the application without undue delay. If the application is rejected the applicant should be informed about the reasons; if it is accepted the authorization shall enter into force without undue delay.

Section II also requires WTO Members to ensure that authorization fees are "reasonable, transparent (…) and not in themselves restrict the supply of the relevant service".[68] It should be noted that this provision does not explicitly limit the fee for the costs of the procedure, as

[68] Reference Paper, Section II, Para. 9

was proposed in earlier submissions and drafts.[69] Yet, the requirement that the fee charged must not to become a restriction to the supply of the service could be interpreted as going in this direction, which would make it difficult to use fees as an additional source of revenue for the competent public authority. The Reference Paper also obliges Member States to ensure the independence of the competent authority from the service suppliers.[70]

A significant part of Section II of the Reference Paper contains transparency, information and prior comment obligations. While Paragraph 13 of Section II refers to publication of information on the requirements which service suppliers must comply with, Sections 14 to 19 contain the obligation to publish draft laws and regulations as well as the opportunity to comment before regulations enter into force. Members would be required to publish in advance proposals of laws, regulations and to the extent possible also administrative rules of general application falling into scope of the Reference Paper or at least documents which would provide sufficient details about possible new laws and regulations. Furthermore, Members are obliged to "provide interested persons and other Members a reasonable opportunity to comment on such proposed measures and documents"[71] and to consider such comments.[72] A footnote explains that such a consideration is without prejudice to the final decision of the Member. Furthermore, Members are encouraged to explain the purpose and rationale of a proposed measure and to allow reasonable time between publication of the measure and its first application.

The last two paragraphs of Section II address the development of domestic regulation. Technical standards should be developed in an open and transparent process.[73] Measures relating to the authorization for the supply of a service shall be based on "objective and transparent criteria" and not discriminate between men and women.[74] Relevant procedures must be impartial and not in themselves unjustifiably prevent the fulfilment of requirements.[75] The prohibition of discrimination between men and women is surprising and raises more questions than it answers. It is unclear how other forms of discrimination, i.e. based on ethnicity, nationality, language, religion, political conviction or sexual orientation and gender identity should be treated in this context: Would Members be allowed to impose such discriminations? It also unclear why the prohibition of the discrimination between men and women is the only discipline which Members may explicitly omit from their commitment to the Reference Paper.[76]

Section III of the Reference Paper contains disciplines for domestic regulation for financial services as defined in the GATS Annex on Financial Services. The disciplines of Part III are largely identical with the disciplines of Part II. Only the obligation to avoid requiring the applicant for an authorisation to approach more than one competent authority and the duty to support dialogues between competent bodies on issues relating to the recognition of professional qualifications, licensing and registration which are contained in paragraphs 4 and 11 respectively of Part II, were not included in Part III.

[69] See e.g. WPDR, Disciplines on domestic regulation pursuant to GATS article VI:4 - Chairman's progress report, S/WPDR/W/45, 14 April 2011, para. 41.
[70] Reference Paper, Section II, Para 12.
[71] Reference Paper, Section II, para 16.
[72] Reference Paper, Section II, para. 17
[73] Reference Paper, Section II, para. 21.
[74] Reference Paper, Section II, para. 22 (a) and (d)
[75] Reference Paper, Section II, para. 22 (b) and (c).
[76] Reference Paper, Section 1, para 9.

c) Preliminary assessment

As already indicated above, the work of the Joint Initiative and its outcome has so far been met with both praise and critique.[77] While the Members of the Joint Initiative themselves, WTO staff, some academic commentators and journalists welcomed the Reference Paper, other WTO Members, but also critical observers from civil society and academia, have voiced strong criticism.

A preliminary assessment of the Reference Paper should address its contents including a comparison with domestic regulation disciplines in free trade agreements and its relationship with WTO law, in particular the mandate of Article VI:4 GATS.

With regards to the contents of the Reference Paper, two aspects seem noteworthy at the outset. First, it should be noted that even if most paragraphs contain language indicating legal bindingness ("shall"), some obligations use less stringent wording ("is/are encouraged"[78] or "should"[79]). Furthermore, many disciplines are subject to qualifications which allow deviations even if they are construed in a binding manner (e. g. "to the extent practicable"; "in a manner consistent with its legal system"). *Prima facie* these qualifications seem to reduce the impact of the disciplines on domestic regulatory autonomy and policy space as they would allow a Member to claim that fulfilling a particular discipline would not be "practicable" or "consistent with its domestic legal system". However, the object and purpose of the Reference Paper as well as the context of the relevant disciplines as "additional commitments" suggest that the discretion of Members not to fulfil a particular obligation is considered an exception which must be justified. For example, a Member arguing that allowing interested parties to comment on a draft regulation would not be "practicable" would face questions and challenges from other WTO Members or even the interested parties regarding which practical considerations impede the possibility of prior comment. Thus, despite a number of qualifications and the partial use of hortatory language the disciplines in the Reference Paper are by-and-large legally binding obligations on WTO Members.

The second important observation concerns the absence of a strict necessity test in the Reference Paper. As mentioned, the necessity test was and still is the most contentious element of domestic regulation disciplines as it would have a significant impact on domestic regulatory autonomy and policy space. However, in light of the lacking consensus on this matter among the Members of the Joint Initiative – with the EU as a strong proponent and the US as an opponent of a necessity test in the context of the domestic regulation disciplines – the current outcome should not be too surprising. While the Reference Paper does not contain an explicit necessity test, some of its disciplines could have implicitly a similar effect, such as the requirement to base measures on objective criteria as these are defined in the Reference Paper to include inter alia "competence and the ability to supply a service, including to do so in a manner consistent with a Member's regulatory requirements, such as health and environmental requirements".[80]

In general, the disciplines of the Reference Paper are predominantly of a procedural nature and focus less on the contents of regulations. Their direct impact on domestic regulatory and policy space may therefore be more limited than the impact of disciplines to be found in some

[77] David Henning, Perspectives: WTO plurilateral agreements should be welcomed, 06/10/2021, https://borderlex.net/2021/10/06/perspectives-wto-plurilateral-agreements-should-be-welcomed/
[78] Reference Paper, Section II, paras 10, 15 and 17
[79] Reference Paper, Section II, para. 11.
[80] Reference Paper, Section II, para. 22, footnote 17.

bilateral or regional free trade agreements. However, procedural requirements can lead to increased administrative burdens and render certain regulatory instruments more difficult to implement.[81] For example, if an authority requires additional capacity to provide reasons for the rejection of an application, it may feel incentivized to accept applications rather than reject them, because granting an authorization does not require providing reasons.

In a communication to the General Council dated 18 February 2021, India and South Africa articulated a general and fundamental critique of the three current "Joint Statement Initiatives" in the WTO, including the Joint Initiative on Services Domestic Regulation.[82] In particular, the statement argues that such initiatives would be contrary to the multilateral underpinnings of the WTO, the consensus-based decision-making of the WTO and the procedures for amendments to the WTO agreements. With respect to the Joint Initiative on Domestic Services Regulation, the statement additionally claims that it cannot legitimately be based on the mandate of Article VI:4 GATS and that the Members of the Joint Initiative have "subverted" the mandate of the WPDR.[83] The strong language of that statement indicates a serious rupture in the WTO Membership. Assessing the political implications of this for the future of the WTO and the global trading system is beyond the scope of this study. Instead, the study will assess the claim of the lack of legitimacy from the legal perspective.

It is clear that the mandate of Article VI:4 GATS envisages the development of domestic regulation disciplines in the institutional setting of the WTO as the provision directly addresses the Council for Trade in Services and refers to "bodies it may establish". Hence, the mandate can only be fulfilled in the context of a body set up by the Council for Trade in Services. This body has been the WPDR since 1999. This is not altered by the fact that the WPDR has not reached a consensus on domestic disciplines regulations yet. If WTO bodies cannot reach consensus there is no subsidiary competence of informal groups of WTO Members to fulfil a mandate explicitly given to a WTO body. It is thus safe to conclude that the Joint Initiative's Reference Paper cannot be based on the mandate of Article VI:4 GATS despite its own claim that the disciplines have been developed "pursuant to paragraph 4 of Article VI of the Agreement".[84] As a consequence, this also means that parties to free trade agreements with a rendez-vous clause linked to the outcome of the negotiations on the basis of Article VI:4 GATS[85] are not legally obliged to activate that clause and consider the Joint Initiative's Reference Paper.

While the Joint Initiative on Services Domestic Regulation cannot claim Article VI:4 GATS as legal basis for its work, the inclusion of additional disciplines in the Schedules of Commitments of WTO Members does not depend on a result of negotiations in the WPDR. Article XVIII GATS allows Members to "negotiate commitments (…) including those regarding qualifications, standards or licensing matters" and only requires that "[s]uch commitments shall be inscribed in a Member's Schedule". Article XXI GATS in turn allows the modification of Schedules at any time subject to a specific notification procedure which may include compensatory adjustment for a WTO Member whose benefits under the GATS may have been affected through the modification of the Schedules as stipulated in Article

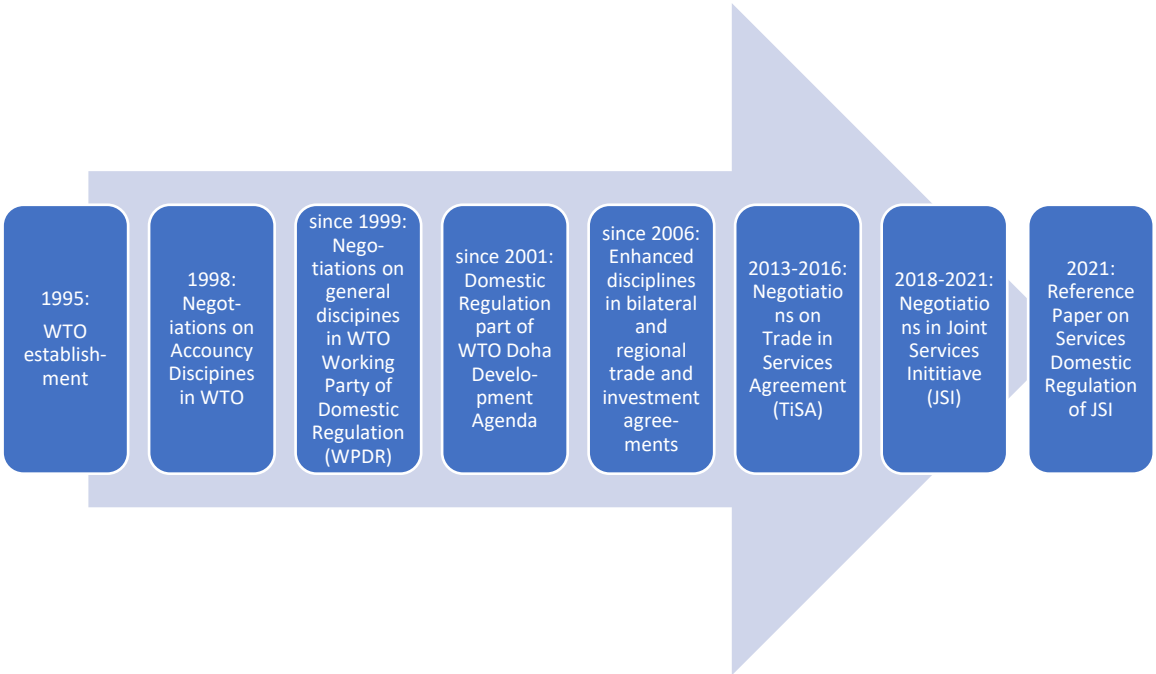
[81] See below V. 2.
[82] WTO, General Council, The legal status of 'Joint statement initiatives' and their negotiated outcomes, 19 February 2021, WT/GC/W/819. Namibia later joined that communication.
[83] WT/GC/W/819, p. 7-8.
[84] Reference Paper, Section I, para. 1. The members of the Joint Initiative seem to be aware of the dilemma by including footnote 1 which states "Members recognize that further disciplines may be developed pursuant to paragraph 4 of Article VI of the Agreement".
[85] See above III.2. for examples of such clauses.

XXI:2 GATS. It is unclear if a WTO Member which is not part of the Joint Initiative in Services Domestic Regulation could claim that its benefits were modified by the inclusion of the Reference Paper in a Schedule of Commitments of another Member, because the Reference Paper would apply on a MFN basis. South Africa and India suggest that additional commitments on domestic regulation disciplines not negotiated within the WPDR would affect "the integrity of the originally negotiated outcomes"[86] and seem to indicate that this could give raise to claims for compensation. However, in light of the substantive and procedural requirements for compensation on the basis of Article XXI GATS as well as the relevant WTO practice it seems difficult to clearly determine which benefits countries such as India or South Africa may lose through additional commitments on domestic services regulation by other WTO Members.

To conclude: The Joint Initiative's negotiations and its Reference Paper on Domestic Services Regulation cannot be based on Article VI:4 GATS and do not fulfil the mandate of that Article.[87] It can also be argued that the Members of the Joint Initiative endangered the fulfilment of that mandate as their activities have paralysed the WPDR and made it more difficult, if not impossible, for the WPDR to fulfil its mandate. However, Members of the Joint Initiative are not precluded from including the results of their negotiations as additional commitments in their Schedules of Commitments pursuant to the rules on modifying Schedules in Article XXI GATS.

Figure 1

Timeline of negotiations on domestic regulation disciplines in services agreements



[86] WT/GC/W/819, para 9.
[87] For a similar view see INF/SDR/W/4, para 1.4.

IV. Potential risks of domestic regulation disciplines: Illustrative examples

As pointed out in the previous section, there are no binding disciplines on domestic regulation at the WTO level yet. Consequently, cases adjudicated by the WTO dispute settlement institutions or examples in which states have avoided adopting regulations in light of such disciplines do not exist. Those bilateral trade and investment agreements which contain enhanced disciplines on domestic regulations are still quite new and hence there is also no relevant practice. In addition, the parties to bilateral trade and investment agreements hardly ever use the applicable state-to-state dispute settlement proceedings to implement these agreements. It is hence difficult to point to any cases or examples in which disciplines on domestic regulation have already been applied. Nevertheless, previous studies on domestic regulation disciplines and WTO documents give an indication of the broad range of measures which could potentially be covered by such disciplines.[88]

Most of the measures discussed in this context relate to a necessity test. For example, an authorisation for the supply of energy services with the obligation to gradually reduce carbon-based energy production could be challenged as a technical standard which employs an obligation which is more trade-restrictive than necessary if the regulating state cannot show why other measures, such as subsidies, have not been used. Similarly, environmental impact assessments which require companies to provide for ecological compensation areas for the use of environmental resources in the context of large infrastructure projects (such as airports or hydroelectric dams) could be seen as too burdensome if they are not strictly limited to the necessary minimum. It should also be noted that environmental impact assessments often require sufficient time to include views from all stakeholders. This could result in a challenge under the requirement that licenses should be issued without undue delay.

Another example could be public service obligations requiring providers of utilities to provide services at the same cost and quality throughout an entire territory. It could be argued that such obligations are more burdensome than necessary as the state could also subsidize the supply of the service to achieve this public service obligation. Such an obligation could also exist in health and social services, for example when hospitals are required to secure access to their services in a particular region.

Another example concerns measures imposing regulations on the collection, management and storage of personal data. In many jurisdictions, companies are required to physically store citizens' data within the country of origin. It could be asked if this is necessary to achieve the respective public policy – data protection – or if the same level of data protection could also be achieved in another country. It is also unclear if regulations requiring companies to disclose the ultimate beneficial owner, which may be relevant in the context of combatting money laundering, would be considered necessary or if other less-restrictive measures could be found.

With regards to the standard of objectivity, some studies point out that this could challenge decision-making regulations which allow the regulator to take factors into considerations which are difficult to objectify. For example, in an investor-state arbitration case a tribunal objected to the fact that regulators considered "community core values".[89] While the investment tribunal did not base its assessment on standards similar to the standards discussed

[88] See e. g. South Centre, p. 17 et seq.
[89] Clayton and Bilcon v. Canada, UNCITRAL, Permanent Court of Arbitration (PCA) Case No. 2009-04, Award available at https://www.italaw.com/sites/default/files/case-documents/italaw4212.pdf

in the context of domestic regulation disciplines, it seems possible that a trade tribunal might have reached a similar conclusion on the standard of objectivity. Similarly, it is unclear if regulatory standards as "known and reliable" which are incorporated in some systems as aspects of trustworthiness of the applicant and to be considered when granting a licence would meet the standard of objectivity.

Other standards of domestic regulation disciplines can also have a significant impact. There are many examples of lowering environmental standards in domestic regulation due to corporate lobbying activities. The impact of such activities is enlarged through the duty to consider prior comments. For example, it has been claimed that the weakening of the EU Fuel Quality Directive in 2014 was a result of intense lobbying efforts by Canada and large oil companies.[90] While lobbying activities would also exist without obligations to provide for prior comment, such obligations increase the pressure on domestic regulators and legitimise lobbying activities.

V. Analytical framework to assess the risk of domestic regulation disciplines on public interest regulation

Based on the above discussion of the domestic regulation disciplines in the WTO context and various bilateral, regional and plurilateral settings this section develops an analytical framework to assess the impact of such disciplines on public interest regulation. The framework should be applicable to all settings and enable a comprehensive risk assessment for public interest regulations of a variety of provisions in different trade contexts

1. Scope

The first element of the scope of proposed or actual disciplines on domestic regulation concerns their respective place in a trade agreement. While it is clear that domestic regulation disciplines in the GATS context apply to trade in services, they may go beyond this scope in free trade and investment agreements if these agreements contain combined obligations for trade in services through commercial presence (Mode 3) and investment liberalisation. The combination of trade and investment liberalisation leads to a blurring of the two regimes. Disciplines may therefore not be limited to services alone but could apply to other sectors of the economy as well. It is therefore important to assess in such a case if the chapter on or provisions on domestic regulation also applies to investment liberalisation or is limited to services liberalisation as in the case of Article 12.2 CETA and Article 15.8 USMCA.

In addition, some free trade agreements also include rules on domestic regulation in the chapters on specific sectors, such as financial services, communication services including electronic communication, e-commerce or transportation. In these cases, the respective disciplines apply specifically to those sectors. For example, many free trade and investment agreements of the EU contain chapters on telecommunications or postal services with regulatory disciplines specific to those sectors.

[90] Nusa Urbancic, European Parliament adopts a weakened fuel quality law after 8 years of fierce lobbying by Canada and Big Oil, December 17, 2014, https://www.transportenvironment.org/discover/european-parliament-adopts-weakened-fuel-quality-law-after-8-years-fierce-lobbying-canada-and/

A related aspect is whether proposed or actual disciplines on domestic regulation – contained in the GATS or the general trade in services chapter of a free trade agreement – apply horizontally or on a sectoral basis. Horizontal (or general) disciplines apply to all services sectors, whereas sectoral disciplines such as the Accountancy Disciplines of the WTO's WPDR or Section III of the Joint Initiative's Reference Paper applying to financial services only apply to one specific sector. Sectoral disciplines can address the specific regulatory needs and circumstances in a particular sector. For example, membership in professional organizations may be of greater importance in some sectors than in others. Sectoral disciplines could specify the necessity and conditions of such membership in more detail than horizontal disciplines. However, some economic and policy rationales for regulation (i.e. monopolies, asymmetric information, externalities) can be found in all sectors, which supports the case for horizontal disciplines.

Another aspect of the scope of domestic regulation disciplines concerns whether they apply to all sectors or only to sectors with specific commitments. The Accountancy Disciplines and the Joint Initiative's Reference Paper apply only to sectors with specific commitments. The limitation of disciplines to sectors with specific commitments has been criticized in the literature as contrary to the text of Art. VI:4.[91] However, the structure of the GATS implies that Members are only bound by those liberalization requirements which they explicitly agreed to. This would suggest that future disciplines under Art. VI:4 should only apply to sectors with specific commitments.[92] It should also be recalled that the *raison d'être* of future disciplines on domestic regulation is to secure market access and national treatment commitments and to ensure that domestic regulations do not render commitments effectively meaningless.[93] This objective only requires that the disciplines apply to sectors with specific commitments.

However, the limitation of domestic regulation disciplines to specific commitments is only relevant in agreements with a so-called positive-list approach as the GATS and some free trade agreements. In the case of a negative list approach, domestic regulation disciplines typically apply to all sectors unless a state specifically excluded a measure or sector from their application. This may have also implications on new services or new forms of service provision through digitalisation and electronic communications. If technological developments lead to "new" services not listed in the annexes excluding the application of market access and national treatment, domestic regulation disciplines may also apply to such new services.

2. Degree of legal bindingness

Another generally relevant aspect concerns the terminology used to describe the level of bindingness. The strongest formulation is the use of the word "shall" as it indicates a legally binding obligation on Members to follow the respective discipline without any limitation of qualification. However, some disciplines may also employ less strict language such as the words "should" or "encourage to". Technically, disciplines which rely on such terms would not be considered legally binding, but rather suggestions or examples of good practice. A

[91] Delimatsis, Panagiotis, Towards a Horizontal Necessity Test for Services: Completing the GATS Article VI:4 Mandate, in Pierre Sauvé, Mario Panizzon and Nicole Pohl (eds), International Trade in Services: New Perspectives on Liberalization, Regulation, and Development 2008,
[92] Djordjevic, above not 6, 309.
[93] Aaditya Mattoo and Pierre Sauvé, Domestic Regulation and Trade in Services: Looking Ahead, in: ibid (eds), Domestic Regulation and Service Trade Liberalization, 2003, at 3

Member not following disciplines which refer to these terms would not violate its legal obligations. Sometimes, obligations refer to the best endeavour of Members ("shall endeavour to" or "shall aim to ensure").[94] In such cases, the discipline is technically legally binding, but only obliges the Member to try to achieve a particular result or outcome, but not to actually achieve it.

Apart from using different terms to indicate varying degrees of bindingness, disciplines can also include qualifying terminology. An example would be Article VI:2 GATS which obliges Members to establish procedures of administrative review "as soon as practicable". Similarly, the Reference Paper of the Joint Initiative subjects some of its disciplines to the condition that their fulfilment is possible ("to the extent practicable") or consistent with its legal system. Such qualifications do not change the legally binding character of the respective discipline if it is formulated in such a way. However, they significantly limit the impact of this discipline on the regulatory autonomy of the Member, because the Member would only be legally obliged to fulfil the requirement if the condition is met. Since many of these qualifications are very broad ("to the extent practicable"), Members will often be in the position to claim that the fulfilment was simply not practicable.

The actual impact of a particular discipline will therefore depend on the level of bindingness. If a provision encourages Members to ensure that domestic regulations are not more burdensome than necessary ("necessity test") to the extent practicable in a manner consistent with their domestic law, the impact of that provision on the regulatory autonomy of states will be less than the impact of a provision requiring Members to ensure that their regulations meet the necessity test.

3. Types of obligations

The different obligations contained in chapters on domestic regulation, additional commitments in the form of reference papers or other parts of trade agreements contain a variety of disciplines, which may have different effects on public interest regulation. In order to assess this impact, it seems useful to categorise the disciplines in different groups and establish a typology of obligations. In this respect, *Gabriel Gari*[95] distinguished disciplines on transparency, disciplines on development and disciplines on the administration of regulations. *Baiker, Bertola* and *Jelitto* classified the disciplines of the Joint Initiative's proposal into disciplines on transparency, on legal certainty and predictability and on regulatory quality and facilitation.[96] For the purposes of the present study, Gari's approach seems more suitable as it was developed in light of a large number of different approaches in various FTAs while *Baiker* and her co-authors only addressed the Joint Initiative's set of disciplines.

[94] Gabriel Gari, Recent Preferential Trade Agreements' Disciplines for Tackling Regulatory Divergence in Services: How Far beyond GATS? World Trade Review 2020, 1, 14.
[95] Gabriel Gari, Recent Developments on Disciplines on Domestic Regulations Affecting Trade in Services: Convergence or Divergence? in Rhea Hoffmann and Markus Krajewski, Coherence and Divergence in Agreements on Trade in Services, 2020, pp. 59-94.
[96] WTO Staff Working Paper ERSD-2021-14, p. 8

a) Administration of domestic regulations

The first category consists of disciplines on the administration of domestic regulations typically relating to the application, administration, and review of domestic regulations.[97] These obligations are built on and follow the model of Article VI:3 GATS requiring the relevant authorities to inform the applicant of the decision concerning the application within a reasonable period of time after the submission of an application and to inform the applicant of the status of the application. Because of their close connection to Article VI:3 GATS it remains controversial whether such obligations would be covered by the negotiating mandate of Article VI:4 GATS.[98] Nevertheless, as they can be found in some RTAs and in the Joint Initiative's Reference Paper they need to be assessed in the context of this study as a category of domestic regulation disciplines.

Disciplines on the administration of domestic regulations consist of procedural standards applicable to the submission and to the processing of applications.[99] Submission standards include the obligation to avoid more than one competent authority and to allow the submission of the application at any time of the year – within official working hours and days – as well as in an electronic format.[100] Standards relating to the processing of applications are the requirement of a timeframe in which the application is processed and of an ascertainment of the completeness of the application as well as to consider the application within a reasonable period of time, to provide information on the status of the application and reasons for a rejection and to allow an authorisation to take effect without undue delay.[101]

In addition, disciplines on domestic regulation can include the obligation to establish and maintain administrative review processes.[102] These standards find a basis in Article VI:2 GATS[103] which requires Members to "maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services." Since these obligations are contained in paragraph 2 of Article VI GATS, they are not covered by the mandate of Article VI:4 GATS. Nevertheless, some free trade agreements incorporate such a requirement without the qualification "as soon as practicable". However, the Joint Initiative's Reference Paper does not contain any discipline in this regard.

b) Regulatory transparency

The second group of domestic regulation disciplines relate to regulatory transparency.[104] They include the duty to publish measures, in particular laws and regulations, and the duty to inform others about existing and new measures, and the duty to consult which requires information about and opportunities to comment on proposed laws and regulations. Whereas the duty to publish and the duty to inform find their basis in Article III.1 and III:3 GATS, the

[97] Gari, above note 95, 84.
[98] Gari, above note 95, 84.
[99] Gari above note 95, 85. The other procedural requirements referred to by Gari are considered as part of the standards relating to the institutional setting and the development of standards.
[100] Gari, above note 95, 85.
[101] Gari, above note 95, 87.
[102] Gari, above note 94, 21.
[103] Article VI:2 GATS follows the model of Article X:3 (b) GATT.
[104] Gari, above note 94, 7.

duty to consult is a novel element which cannot be found in the GATS. However, it should be noted that domestic regulation disciplines in FTAs, but also in the Reference Paper of the Joint Initiative go beyond the scope of the respective GATS obligations and can therefore be considered "GATS Plus".[105] For example, while Art. III:1 GATS only refers to the publication of "all relevant measures of general application which pertain to or affect the operation of this Agreement", Part II, No. 13 of the Reference Paper requires the publication of "the information necessary for service suppliers or persons seeking to supply a service to comply with the requirements and procedures for obtaining, maintaining, amending and renewing such authorization". This includes not only the relevant laws and general regulations, but also *inter alia* fees, opportunities for public involvement through hearings or comments; and indicative timeframes for processing of an application.

The duty to consult consists of two separate, but interrelated obligations: A duty to publish draft laws and proposed measures and a duty to provide opportunities to comment on such draft laws and proposed measures by interested parties.[106] This obligation goes significantly beyond the GATS obligations and follows a regulatory model which exists in some domestic legal systems, such as the US.[107] Prior consultation or prior comment requirements "internationalize" domestic decision-making processes, because the views of other WTO Members and – more importantly - their service industries can become an important factor in the national regulatory process. The duty to consult including a right to comment for foreign service suppliers, may have a significant effect on domestic law-making as these obligations increase the "voices" to be heard in such a process, predominantly to the benefit of interests of powerful economic actors. Prior consultation and comment requirements may therefore lead to or increase "corporate capture" of services regulation authorities. Furthermore, such requirements may be burdensome on countries with limited administrative resources and capacity, in particular developing countries.[108] It has therefore been argued for a long time that the duty to consult should not be fully imposed on developing countries.[109] The Joint Initiative's Reference Paper, however, does not provide for such an exception.

c) Institutional setting

The third group of disciplines are provisions relating to the entities which adopt and apply regulations and their institutional context. Some domestic regulation disciplines include the requirement to ensure that the authority deciding on authorizations and other regulatory questions should be independent from the service suppliers. This obligation can also be found in the GATS Telecommunications Reference Paper.[110] The background of such an obligation are problems of regulatory capture, but also the situation in sectors which were dominated by a public monopoly supplier – often a state agency – and which became subject to market

[105] Gari, above note 94, 7.
[106] Gari, above note 94, 9.
[107] See the requirement to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments" after the publication of a draft regulation as laid down in the Administrative Procedure Act (5 U.S. Code § 553 (c)).
[108] Jan Wouters and Dominic Coppens, GATS and Domestic Regulation: Balancing the Right to Regulate and Trade Liberalization, in: Kern Alexander and Mads Andenas (eds), The World Trade Organization and Trade in Services, 2006, 244.
[109] See also Keiya Iida and Julia Nielson, Transparency in Domestic Regulation: Practices and Possibilities, in Aaditya Mattoo and Pierre Sauvé (eds), Domestic Regulation and Service Trade Liberalization 2003, 7, 17-18.
[110] Section 5 of the Reference Paper on basic telecommunications services: „Independent regulators - The regulatory body is separate from, and not accountable to, any supplier of basic telecommunications services. The decisions of and the procedures used by regulators shall be impartial with respect to all market participants."

liberalization, such as in telecommunications, postal services or transportation. In these situations, the former public monopoly supplier – now a competitor on the market – should not remain the regulatory agency. The requirement to ensure the independence of the regulator may require significant institutional changes in some countries which could require additional staff and regulatory capacity. The Joint Initiative's Reference Paper contains such an obligation both in its general section and in its section applicable to financial services.

Another aspect with an impact on the institutional setting are obligations of international regulatory cooperation which may require domestic agencies to cooperate with agencies from other countries when developing regulatory standards. Some more recent bilateral free trade agreements contain such obligations including the establishment of an institutional framework for such regulatory cooperation.[111] Requirements of international regulatory cooperation are more frequent in free trade agreements. The Joint Initiative's Reference Paper as well as earlier proposals in the WPDR do not contain such an obligation.

d) Substantive elements and development of standards

The last and usually largest group of disciplines concern the development of regulatory standards and hence their contents. This category of disciplines may have a significant impact on regulatory autonomy and policy space as they aim at the substance of domestic regulations and not on how they are applied (administration) or how they are developed (transparency).[112] The respective disciplines include the necessity test, the standard of objective and transparent criteria and the use of international standards in developing domestic regulation.[113] In addition, disciplines on the nature and calculation methods of administrative fees as well as concerning mutual recognition can also be considered as substantive standards, because they determine the contents of the relevant domestic regulation. Out of these, the Joint Initiative's Reference Paper only contains the requirement of objective and transparent basis for regulations, fees and a very vague reference to mutual recognition.

The most well-known substantive discipline is the requirement that domestic regulations are not more burdensome than necessary (necessity test). This would mean that domestic regulations which place a burden on the supply of a service would only be compatible with the GATS or the respective free trade agreement if the objective could not be achieved with a less burdensome instrument.[114] The inclusion of a necessity test has been one of the most contentious issues in the debate on domestic regulation disciplines.[115] While many commentators favour of the inclusion of a necessity test[116], others fear that such a test would

[111] Gari, above note 94, 25.
[112] On the difference between substantive and procedural obligations see also Markus Krajewski, Article VI GATS, in: Rüdiger Wolfrum, Peter-Tobias Stoll, und Clemens Feinäugle (eds), WTO - Trade in Services, Max Planck Commentaries on World Trade Law, 2006, 167.
[113] Gari, above note 94, 15.
[114] On the different elements of a necessity test see Markus Krajewski, Domestic regulation and services trade: Lessons from regional and bilateral free trade agreements, in: Pierre Sauvé and Martin Roy (eds), Research Handbook on Trade in Services 2016, 216.
[115] Working Party on Domestic Regulation, Communication from Brazil, Canada and the United States, Views on the Issue of the Necessity Test in the Disciplines on Domestic Regulation, S/WPDR/W/44, 22 March 2011
[116] Panagiotis Delimatsis, Concluding the WTO services negotiations om domestic regulation – hopes and fears, World Trade Review 2010, 643, 663 et seq.; Suparna Karmakar, Disciplining Domestic Regulations Under GATS and its Implications for Developing Countries: An Indian Case Study, Journal of World Trade 2007, 127, 137.

subject domestic regulations to strict scrutiny.[117] Yet others hold the view that a necessity test should currently not be included in future disciplines due to the contentiousness of the issue.[118]

A similar function as a necessity test would be the requirement that domestic regulatory measures are proportionate, as the principle of proportionality also requires the assessment of whether there are less trade-restrictive measures. Even though necessity in the context of trade agreements and the principle of proportionality in EU internal market law or domestic constitutional law are not the same, they have similar functions if the notion of proportionality is used in the context of domestic regulation disciplines in trade and investment agreements, as the proportionality test would aim at balancing the level of trade-restiveness with the relevant policy objective. Necessity is a key element of the proportionality test.[119] In other words, a measure will not be proportionate if it already fails the necessity test.

A second element of substantive disciplines concerns the use of international standards. However, it should be noted that international standardisation of services is generally less advanced than that of goods. Furthermore, there is a high degree of variation between sectors: In some sectors, such as financial services, business or tourism services, there are a number of standard-setting bodies and institutions, which play an important practical role.[120] Other sectors, such as education and social services, are subject to international standardisation efforts to a much lesser degree.

Domestic regulation disciplines can also address (mutual) recognition of equivalence based on the idea that a service supplier who already meets certain conditions in his or her home country is not required to meet the same conditions again.[121] The Accountancy Disciplines apply a "soft" equivalence requirement similar to Art. 2.7 TBT, which merely requires Members to give positive consideration to equivalent qualifications acquired in another country or to take those qualifications into account. A stronger requirement would be the obligation to accept equivalent qualifications and licences even if they differ from host country regulations (see e. g. Art. 4.1 SPS). However, the emerging consensus in the WPDR seems to be that future disciplines should not contain such a strong requirement. Rather, the use of recognition may be encouraged, but left to the discretion of the Members.[122]

As fees required by authorization agencies can sometimes become an impediment for the supply of a service, domestic regulation disciplines can also include conditions and limitations for the imposition of such fees and their calculation methods. In some cases, disciplines state

[117] Robert Howse and Elisabeth Türk, The WTO negotiations on services – the regulatory state up for grabs, Canada Watch 2002, No. 1-2, 4-5.
[118] Aadity Matoo, Services in a Development Round: Three Goals and Three Proposals, Journal of World Trade 2005, 1223, 1231.
[119] Wolf Sauter, Proportionality in EU Law: A Balancing Act? Cambridge Yearbook of European Legal Studies 2013, 439-466.
[120] Joel Trachtman, Lessons for the GATS from Existing WTO Rules on Domestic Regulation, in Aaditya Mattoo and Pierre Sauvé (eds), Domestic Regulation and Service Trade Liberalization, 2003, 32; Working Party on Domestic Regulation - Technical standards in services - Note by the Secretariat, 13 September 2012, S/WPDR/W/49, para 34.
[121] Kalypso Nicolaïdis and Joel Trachtman, From Policed Regulation to Managed Recognition in GATS, in: Pierre Sauvé and Robert M. Stern (eds), GATS 2000 - New Directions in Services Trade Liberalization 2000, 241, 263 et seq.; Joel Trachtman, Mutual recognition of services regulation at the WTO, in Aik Hoe Lim and Bart de Meester (eds), WTO Domestic Regulation and Services Trade – Putting Principles into Practice, 2014, 110.
[122] Chairman's progress report, S/WPDR/W/45, State of Play, p. 40.

that fees shall not exceed the actual administrative costs. This would exclude the possibility to use fees as an instrument to regulate the supply of services through incentives (lower fees) or disincentives (higher fess) or as source of revenue for the regulating state.[123] An example could be utilities where higher fees for authorisations might be charged in lucrative regions in order to cross-subsidise services to poorer areas.

Finally, disciplines on domestic regulation can require Members to base the development of measures on objective and transparent criteria. Such criteria can include the competence and ability of the service supplier to supply the service in a manner consistent with the laws and regulations of the Member. The standard of "objectivity" is not defined in WTO law, but it has been interpreted as being the contrary of "arbitrary", "biased" or "subjective" assessments.[124] The assessment of whether a measure is objective would be determined by the WTO dispute settlement institutions which might consider recognising the special needs of indigenous or marginalised groups as "biased" or "subjective".[125]

4. Assessment of disciplines vis-à-vis public interest regulation

When assessing the impact of domestic regulation disciplines and the potential risk they may pose on public interest regulation, it is important to note that such an assessment will depend on the exact scope, wording and contents of the disciplines on the one hand and the respective domestic regulatory system including its constitutional, political, economic and social context on the other. For example, a general necessity test for domestic regulation will have a more limited effect on a regulatory system which already incorporates such a test or the principle of proportionality as part of its constitutional law. In such a case, including necessity in domestic regulation disciplines will have a locking-in effect but may not pose any immediate pressure on the regulatory system. Similarly, a regulatory regime which is not used to accommodating views from the general public and interested stakeholders may have to adjust more to prior comment and information requirements than a regime in which such procedures are standard.

Domestic regulation disciplines may have an impact on domestic regulatory autonomy and the ability to regulate services in the public interest in three broad areas: First, disciplines can increase the level of institutional and procedural activities and place a burden on the administration.[126] This may be especially the case for smaller and less developed countries with limited institutional capacity. While an increased administrative burden will not in itself and not necessarily directly also have an effect on the contents of regulations, it is clear that administrations which need to invest time and capacities into the administration of regulations will not have enough capacities to focus on other, substantive issues.

Second, disciplines on domestic regulation can have effects on the institutional design of regulatory systems, in particular if they require the independence of the regulator from service suppliers, but also when they concern the establishment of administrative review or oblige

[123] Mohamadieh, above note 20, 7-9.
[124] South Centre, The Draft GATS Domestic Regulation Disciplines – Potential Conflicts with Developing Countries Regulations, Analytical Note, SC/AN/TDP/SV/12, October 2009, p. 8. Available at https://www.southcentre.int/wp-content/uploads/2013/08/AN_SV12_The-Draft-GATS-Domestic-Regulation-Disciplines_EN.pdf
[125] Mohamadieh, above note 20, 10.
[126] J. Kelsey, GATS Reference Paper on Domestic Regulation – A Corporate Lobbyists' Charter, 13 October 2021.

Member states' regulatory agencies to cooperate with each other with a view of exchanging views on mutual recognition of qualifications.

Finally, and most importantly, disciplines on domestic regulation, can have a direct impact on the contents of a particular regulation. This is most clearly the case with regards to the so-called necessity test, but also relates to the use of international standards, rules on fees or the requirement to base regulations on objective and transparent criteria. Even though domestic regulation disciplines do not impose or prohibit a particular content, their effect may be that certain measures and instruments can no longer be used.

Based on the preceding and taking into account that actual impact of domestic regulation disciplines will depend on their scope, language and contents as well as the regulatory regime, the following general framework of assessment can be developed.

Disciplines concerning the administration of decisions generally have a lower impact on public interest regulation than regulatory transparency disciplines, obligations concerning the institutional setting and substantive requirements. However, obligations concerning the submission of applications may require some additional administrative capacity and could therefore increase the administrative burden. Disciplines on the processing of applications may increase the burden of the administration even further as they may require intermediate assessments of completeness or information on the time frame. Furthermore, the requirement to avoid requiring more than one competent authority could have an impact on the institutional setting. In many contexts, national, regional and local administrations may each have to issue an authorization subject to their relevant competence.[127] For example, the establishment of a large retail warehouse may require a business licence by a national or regional authority as well as a local construction permit. It is unclear if this division of competences would be compatible with the requirement to avoid more than one competent authority. Hence, such a requirement could require changes in the competences of regulatory institutions. Nevertheless, it seems unlikely that these requirements will significantly change the contents of the regulatory requirements.

Transparency disciplines can increase the impact on administrative burdens even further, in particular the duty to inform requiring specific forms of information and publication of laws and regulations. When it comes to the duty to consult which includes the requirement to publish draft norms and regulations and to allow for prior comment the administrative burden is highest. This requirement may even have a significant impact on the contents of regulations as it can be assumed that most agencies will react to the comments and change proposed laws in reaction to such comments.

Domestic regulation disciplines addressing the institutional setting such as the requirement of independence of the regulator or regulatory cooperation have an impact on administrative capacity which may be significant in particular with regards to cooperation requirements. In addition, such disciplines can require changes in the institutional structure of a Member including the establishment of new institutions and therefore affect the institutional setting greatly.

Finally, disciplines on the development of regulations and substantive standards have the largest impact on domestic regulatory autonomy and public interest regulation. Requirements

[127] See also South Centre, above note 124, p. 5.

on the use of objective and transparent criteria, fees, mutual recognition and the use of international standards will increase the administrative burden and may also influence the contents of the regulation in certain circumstances. Lastly, the requirement of a necessity or proportionality increases the administrative burden and has the greatest impact on the actual contents of the regulations.

The above descriptions and assessments are illustrated in Table 1 below. In this table, the impact in the three regulatory areas is weighted: The impact on the regulatory content is considered the most significant one and therefore allocated a relative importance of 60%. This is based on the assumption that for most states and regulatory regimes, the actual content is most relevant. The impact on administrative burden is considered to be less relevant, but still not insignificant. It is therefore allocated an importance of 30%. Lastly, the impact on the institutional framing and design is considered to be the least important and therefore only given 10%. These percentages may of course be adjusted and changed depending on the regulatory objectives and specific requirements of each system. For example, it might be that the impact on the institutional framework could be seen as more relevant in federal systems while the impact on administrative burden is less relevant in states with an already elaborated administrative system with significant resources.

The impact of the actual disciplines is then assessed as none, i.e. hardly any recognisable impact, or low, medium or high impact. These assessments are numerically represented with the values of 0 to 3. The resulting numerical value of the overall impact is of course only a very rough approximation. It does not suggest that regulatory impact can be fully and scientifically reliable quantified. However, Table 1 aims at giving a first general indication of the relative impact of specific domestic regulation disciplines in trade and investment agreements. Such an assessment needs to be adjusted to the specificities of each country and regulatory system. The table aims at showing how this can be done.

Table 1: Quantifying the impact of domestic regulation disciplines

Category	Discipline	Impact on administrative burden (30%)	Impact on institutional framework (10%)	Impact on substantive content (60%)	Overall impact
Administration	**Submission of applications**	Low (1)	Low (1)	None (0)	Very Low (0,4)
	Processing of applications	Medium (2)	Low (1)	None (0)	Low (0,7)
	Administrative review	Low (1)	Medium (2)	Low (1)	Low (1,1)
Transparency	**Duty to publish**	Low (1)	None (0)	None (0)	Very Low (0,3)
	Duty to inform	Medium (2)	None (0)	None (0)	Low (0,6)
	Duty to consult (publish drafts/prior comment)	High (3)	None (0)	Medium (2)	Medium (2,1)
Institutional setting	**Independence**	Medium (2)	High (3)	Low (1)	Medium (1,5)
	Regulatory cooperation	High (3)	Medium (2)	Medium (2)	Medium (2,3)
Development / Substantive standards	**Objective and transparent criteria**	Medium (2)	None (0)	Medium (2)	Medium (1,8)
	Fees	Medium (2)	None (0)	Medium (2)	Medium (1,8)
	Mutual recognition	Medium (2)	Low (1)	Medium (2)	Medium (1,9)
	Use of international standards	Medium (2)	None (0)	High (3)	High (2,5)
	Necessity / Proportionality	High (3)	None (0)	High (3)	High (2,7)

5. Applying the framework to the Reference Paper on Services Domestic Regulation

In light of the framework developed above, it can be concluded that the Reference Paper on Services Domestic Regulation of the Joint Initiative has an overall medium impact on domestic regulatory autonomy. As it excludes the necessity test and the requirement to establish regulations on the basis of international standards it omits the two types of disciplines which would have the most significant impact on the contents of the regulations. However, the Reference Paper contains disciplines which may have a medium to high impact on administrative burden and on the institutional setting of Members. Some of the procedural obligations may also influence the contents of the regulations.

The Reference Paper is therefore clearly not as problematic from the perspective of domestic regulatory autonomy as some of the earlier drafts discussed in the WPDR and as the sets of domestic regulation disciplines in some free trade agreements which go significantly beyond the scope of the Reference Paper. It can therefore be questioned whether the Reference Paper is a continuance of these developments and in fact an attempt to lock-in the neoliberal trade agenda. However, the Reference Paper also clearly goes beyond "cutting red-tape" by including certain administrative, institutional and transparency requirements which would not only have an impact on administrative capacity and the institutional framework but could potentially also influence the actual contents of regulations.

VI. Policy recommendations

Assuming that policy makers or trade negotiators reach the conclusion that the risks domestic regulation disciplines of the type suggested in the Joint Initiative's Reference Paper or disciplines to be found in free trade agreements for public interest regulation outweigh the potential benefits, they may want to try to limit the scope of these disciplines or include a general public interest regulation exception clause.

1. Limiting the scope of domestic regulation disciplines

The scope of domestic regulation disciplines can be limited in different ways. First, WTO Members or parties to a trade agreement can avoid specific types of disciplines which they consider problematic from the perspective of regulatory autonomy, such as a necessity test or obligations to publish draft regulations and allow for prior comments. However, if the disciplines are drafted in the same way as the Reference Paper of the Joint Initiative such an option may not be available as the Paper states that Members can only exclude one obligation (the prohibition of the discrimination between men and women) which indicates that other obligations cannot be excluded. In other words, the Reference Paper requires an "(almost) all or nothing"- approach which reduces the flexibility for adhering Members.

A second approach – which may also be available to WTO Members using the Reference Paper – would limit the obligations to certain sectors. For example, a Member could decide to limit the application of the disciplines of the Reference Paper to those sectors which it does not consider as problematic from the perspective of public interest regulation. An example could be certain professional services.

Thirdly, Members could negotiate less stringent language into sets of disciplines. As mentioned above, qualifications of the obligations such as "to the extent practicable" or

"consistent with its domestic legal system" significantly reduce the restrictive impact of the disciplines on domestic regulatory autonomy and public interest regulation. However, this option is only available during the negotiations of domestic regulation disciplines and only if and to the extent the respective Member succeeds in convincing other Members of the desirability of such an approach.

2. Including a general public interest exception clause

The three options mentioned above would only apply to the extent a Member adopts domestic regulation disciplines. They would not be able to increase the regulatory space vis-à-vis other obligations, in particular market access and non-discrimination. However, as shown above, these obligations may also pose a risk for public interest regulation. As a consequence, Members could negotiate a general exception clause for public interest regulation. Such a clause would need to fulfil the following objectives[128]: First, it would need to give sufficient space for a variety of different concepts of public interest, without, however, leaving the concretisation of the term completely to the discretion of a Member state. This could be achieved by referring to key legal and policy documents of the Member state which establish the public interest. Second the clause would need to contain a clear definition of the concept of public interest to give relevant dispute settlement institutions clear guidance in how to apply the clause. Thirdly, the clause would need to be sufficiently legally binding. The clause would therefore need to be part of the relevant agreement, chapter or binding commitments. The clause should not be a mere interpretative guideline and therefore leave the determination of the scope of the agreement or its chapters in the hands of trade or investment tribunals deciding a specific dispute

Based on the above, a general public interest exception clause could be worded as follows:

> "Nothing in this [Agreement, Chapter] / these [Disciplines, Additional Commitments] shall prevent a Member from developing, adopting, maintaining and implementing non-discriminatory measures regulating services in the public interest as defined by that Member."

A footnote could be added worded as follows: "A Member shall define the public interest in the meaning of this provision through legal instruments and policy documents adopted by the competent domestic authorities and bodies in a non-discriminatory manner".

Such a clause could be applied to an entire agreement or chapter on trade in services and/or investment. However, such a clause could also be included only in a set of regulatory disciplines and only apply to such specific additional commitments. In bilateral free trade agreements which adopt a negative-list approach the clause could be included in the horizontal section of the schedules or annexes on specific reservations of the respective country. Depending on the intended scope of the clause it could either protect all measures regulating services in the public interest or be limited to measures which are necessary to regulate such services. The necessity test in the latter alternative would be different from the general necessity test in disciplines on domestic regulation: Necessity in an exception clause is only applicable to regulations if they need to be justified as a deviation from an obligation

[128] For similar requirements see Markus Krajewski, Model clauses for the exclusion of public services from trade and investment agreements, Study commissioned by the Chamber of Labour Vienna and the European Federation of Public Service Unions, February 2016, 7.

of the trade agreement whereas necessity in disciplines on domestic regulation would be an obligation applicable to all regulatory instruments.

VII. Conclusion and Outlook

This study showed that the current agenda on trade in services which includes enhanced disciplines for domestic regulation continues to be a potential threat for certain regulatory instruments and standards. The obligations discussed in this context can limit domestic regulatory autonomy and therefore reduce the space for public interest regulation. This is the case even though the most contentious instrument – the so-called necessity test – is not part of the most recent outcome of negotiations on domestic regulation disciplines reached, the Reference Paper on Services Domestic Regulation of the Joint Services Initiative. While the impact of the disciplines in the Reference Paper on the contents of domestic regulation may be more limited than that of earlier proposals in the WTO or of disciplines in certain bilateral trade and investment agreements, the Reference Paper may nevertheless increase administrative burdens, open domestic regulatory processes even further to lobbying activities and corporate capture, as well as limiting the use of fees as regulatory instruments or the reference to subjective standards such as “community values” or “reliability” of an applicant.

WTO Members may exclude the impact of the Reference Paper by not including its disciplines in their GATS Schedules of Specific Commitments. However, other elements of WTO law or of disciplines in trade and investment agreements may continue to limit the space for public interest regulation. This study therefore suggests that WTO Members and states negotiating trade and investment agreements include a general public interest exemption clause which preserve regulatory space to some extent. Such a clause can be seen in the larger context of other proposals to limit the impact of trade agreements on public services or the public interest.[129]

However, it should be noted that the proposals of this study and similar suggestions aimed at limiting the impact of trade and investment agreements on domestic regulations do not only defend policy space against threats from a neoliberal trade agenda. They need to seen as first steps towards an alternative trade agenda which would be built on a different paradigm. For more than seventy years the multilateral trading system incorporated the agenda of market opening and trade liberalization. Attempts to regulate global trade in the public interest, for example through commodity agreements have not been able to fundamentally challenge this paradigm. In light of the existential threat of the climate crisis and considering the increasing economic disparities and inequalities which were exacerbated in the ongoing COVID-19 pandemic it seems high time to fundamentally challenge the existing paradigm of the global trading system.

[129] Raza/Tröster/von Arnim, above note 2, 51.

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