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Council for Trade in Services

ARTICLE VI:4 OF THE GATS: DISCIPLINES ON DOMESTIC REGULATION APPLICABLE TO ALL SERVICES

Note by the Secretariat

I. INTRODUCTION

1. This Note provides an overview of some of the issues that Members may wish to consider in the process of developing disciplines on domestic regulation applicable to all services sectors, as required by Article VI:4. The analysis of the legal issues in this Note is not exhaustive and does not represent an authoritative interpretation of GATS provisions. Moreover, it does not prejudge in any manner the outcome of Members' work under Article VI:4.

2. Article VI paragraph 4 of the GATS requires the Council for Trade in Services, or appropriate bodies the Council might establish, to develop disciplines aimed at ensuring that qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services. It is noteworthy that the first draft of the GATS (MTN.GNS/35 of 23 July 1990) contained a binding discipline on domestic regulation in its Article VII. This reads as follows:

> "Parties may require that services or providers of services of other parties meet certain regulations, standards or qualifications. Such requirements shall be based upon objective criteria, such as competence and the ability to provide such services, and not be more burdensome than necessary to achieve the national policy objectives."

3. It might be worth considering why Article VI:4 contains a mandate for the development of disciplines rather than a simpler binding rule similar to that contained in the first draft of the GATS. Of course, the drafting above is very simple indeed but it seems to cover the essence of what is stated essentially in the form of an objective in Article VI:4. It appears that the simple transformation of the principles listed in VI:4 into binding rules would in itself bring domestic regulation within the GATS legal framework. Such a general rule, however, would probably have been insufficient to provide guidance for the settlement of disagreements or disputes about particular measures; the purpose of developing these general principles into "disciplines" could be seen as being to give them enough specificity to make them operationally useful.

4. Definitions of the categories of measures covered by Article VI:4 of the GATS are contained in the Secretariat's Background Note S/WPPS/W/9. They are: qualification requirements, that is to say substantive requirements which a professional service supplier is required to fulfil in order to obtain certification or a licence; qualification procedures, administrative or procedural rules relating to the administration of qualification requirements; licensing requirements, comprising substantive requirements other than qualification requirements, which a service supplier is required to comply with in order to obtain a formal permission to supply a service; licensing procedures, administrative procedures relating to the submission and processing of an application for a licence; and technical

standards, requirements which may apply both to the characteristics or definition of the service and to the manner in which it is performed.

5. The Decision on Professional Services adopted by the Council on 1 March 1995 (S/L/3) called upon Members to begin work under Article VI:4 in Professional Services, with priority given to the accountancy sector. This, however, does not represent a decision by WTO Members to carry out work under Article VI:4 on a sector-by-sector basis. At the 1996 Singapore Ministerial Meeting Members restated their commitment to pursue the Article VI:4 mandate in the Services Council for all services and in the Working Party on Professional Services (WPPS) for the accountancy sector. The broader Article VI:4 work programme was discussed by the Services Council after the Singapore Ministerial Conference and some Members suggested to conclude the WPPS work on accountancy, before beginning horizontal work on domestic regulation disciplines. The WPPS concluded its work on accountancy at the end of 1998 and the Council approved the text of the accountancy disciplines on 14 December 1998.

6. Although the work of the WPPS on accountancy does not pre-empt future work at the horizontal level and in other sectors, much of the discussion held in the WPPS on the accountancy disciplines constitutes helpful background for future work under Article VI:4 in general. Other relevant background information can be found in other WTO agreements, dealing with aspects of domestic regulations in goods sectors, and in the work of other international organizations, in particular regarding the issue of international standards.

II. ARTICLE VI:4

7. The GATS approaches the progressive liberalisation of trade in services through the elimination of restrictions to trade rather than through deregulation. In the Uruguay Round Members identified categories of restrictions, mainly of a quantitative and discriminatory nature, which were made subject to the disciplines of Articles XVI and XVII. In sectors where they have no specific commitments Members remain free to impose market access and national treatment restrictions. In sectors where specific commitments have been undertaken, all restriction falling within the scope of Articles XVI and XVII are prohibited, unless they have been inscribed in a Member's schedule.

8. Although it aims at minimising the trade restrictive effects of all regulatory barriers, including those not subject to the disciplines of Articles XVI and XVII, the GATS does not prejudice Members' right to regulate. The fourth recital to the introduction to the GATS reaffirms Member's regulatory autonomy in the services area:

> "*Recognizing* the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right."

9. Members' right to regulate did not prevent the inclusion in the GATS of rules allowing for the minimisation of the trade restrictive effects of domestic regulation which did not fall within the scope of Articles XVI and XVII. Such rules are to be found in Article VI of the GATS, which contains: (a) some binding provisions; (b) a mandate for the development of multilateral disciplines; and (c) a mechanism for the provisional application of the main principles underlying the future disciplines.

10. There are several rules in Article VI which already apply to domestic regulation in services. Paragraph 1 requires Members to administer all measures of general application affecting trade in services in a reasonable, objective and impartial manner in sectors where specific commitments have been undertaken. Paragraph 2 provides for the establishment of mechanisms for the review of administrative decisions affecting trade in services. For this purpose Members are required to

maintain or institute judicial, arbitral or administrative tribunals or procedures, which if not independent of the agency entrusted with the administrative decision concerned, shall at least provide for an objective and impartial review. According to paragraph 3, where an authorization is required for the supply of a services for which specific commitments have been undertaken, the competent authorities of Members shall inform an applicant of the decision concerning the application within a reasonable period of time after the submission of a complete application and shall keep the applicant informed about the status of the application upon request. Finally paragraph 6 requires the establishment of adequate procedures to verify the competence of foreign professionals in sectors where specific commitments regarding professional services have been undertaken. Paragraph 6, however, does not impose other obligations beyond the verification of competence, such as the establishing of equivalence between requirements fulfilled in the home country of the professional and host country requirements.

11. Pending the entry into force of the disciplines pursuant to paragraph 4, Article VI:5 provides for the application of the main principles contained in paragraph 4 to licensing and qualification requirements and procedures and technical standards, in sectors where specific commitments have been undertaken. However, paragraph 5 only applies where measures taken nullify or impair specific commitments, and this of course requires demonstration. In other words, Article VI:5 would provide the basis for complaint about a measure in the area of licensing, qualification and standards which was believed to nullify or impair a specific commitment. The impact of the discipline is further weakened by indent (ii) which exempts measures which could reasonably have been expected of a Member at the time the specific commitments in the relevant sectors were made. Indent (ii) would therefore seem to exempt from Article VI:5 at least all those measures which were already in place in 1995.

12. The Article VI:4 mandate was first taken up by the Working Party on Professional Services in the accountancy sector. The WPPS devoted a considerable amount of time to the discussion of the nature and scope of Article VI:4, before and during the negotiation of the disciplines. The outcome of the WPPS work only applies to the accountancy sector, but it is useful in this context to summarize the conclusions reached by the WPPS on the role and the scope of Article VI:4.

13. Although Members' submissions initially included proposals on discriminatory measures (XVII) and on measures listed as market access restrictions in Article XVI, the accountancy disciplines do not address measures falling within the scope of Articles XVI or XVII. In the discussions it was noted that there was a fundamental legal distinction in the GATS between those provisions: while Articles XVI and XVII belonged to Part III of the Agreement on Specific Commitments, Article VI belonged to Part II on General Obligations and Disciplines. As a consequence the elimination of restrictions on market access and national treatment is subject to the negotiation of specific commitments, whereas the obligation to minimise the trade-restrictive elements of domestic regulation is a general obligation which would be subject to the disciplines to be developed under Article VI:4. The legal status of these measures also naturally differs. Measures restricting market access and national treatment are prohibited, unless scheduled, in sectors where specific commitments have been undertaken, whereas they can be maintained in sectors which are not committed. The right to maintain domestic regulatory measures is however specifically recognized and will be subject to the disciplines to be developed under Article VI:4 with the aim of minimizing their negative impact on trade. These measures cannot be entered as limitations in a Member's schedule.

14. The WPPS came to the conclusion that, in order to ensure legal certainty and the conformity of the disciplines with the structure of the GATS, there should not be any overlap between Articles XVI and XVII on the one hand and Article VI on the other hand. It agreed that the accountancy disciplines "would not address measures subject to scheduling under Articles XVI and XVII of the GATS, which restrict access to the domestic market or limit the application of national treatment to foreign suppliers." Some typical market access and national treatment restrictions in

accountancy were listed in a separate Informal Note by the Chairman, where it was indicated that the elimination of such restrictions would be subject to negotiations on specific commitments and not to rules under Article VI:4.

15. The WPPS also discussed at length whether the Article VI.4 disciplines on accountancy should constitute unconditional or conditional obligations, that is to say whether they should apply regardless of the existence of specific commitments or only where specific commitments in the sector had been undertaken. Nothing in Article VI:4 suggests that its disciplines were to be limited to services on which specific commitments are undertaken. Indeed, the fact that four other paragraphs in this Article are specifically stated to apply only where there are commitments strongly suggests that the absence of any such limitation in Article VI:4 was intentional. Article VI:5 provides for the temporary application of the principles listed in VI:4 only in sectors in which a Member has undertaken specific commitments, but that is so in order that, pending the entry into force of the VI:4 disciplines, specific commitments should not be undermined by their absence. However, the Decision on Disciplines Relating to the Accountancy Sector states that the "disciplines are to be applicable to Members who have entered specific commitments in accountancy in their schedules." The choice of the WPPS for accountancy, however, does not prejudge the scope of application of the disciplines to be developed under Article VI.4.

16. The experience of the WPPS is important not only for the nature and the scope of future Article VI:4 disciplines, but also for the definition of their content. Similarly domestic regulation disciplines in other WTO areas can help to identify the content of provisions applicable to services. On the basis of the text of Article VI:4, of the accountancy disciplines and of other WTO Agreements on regulation in goods (TBT and SPS), it is possible to identify the following policy areas, where domestic regulation disciplines in services could be developed: necessity, transparency, equivalence and international standards. The first two areas, necessity and transparency could help to develop rules on domestic regulation applicable to all types of measures listed in Article VI:4: qualification and licensing requirements and procedures and technical standards. The last two areas, equivalence and international standards could instead help to develop rules limited to some of the measures listed in Article VI:4: qualification and licensing requirements and technical standards.

III. THE NECESSITY TEST

17. Article VI:4 adopts "necessity" as the central rule to assess the compatibility with the GATS of trade restrictive domestic regulatory measures. The chapeau of Article VI:4 identifies the main objective of the disciplines on domestic regulation, which the Services Council is called upon to develop: to ensure that "measures relating to qualification requirements and procedures, technical standards and licensing procedures do not constitute unnecessary barriers to trade in services."

18. The disciplines for the accountancy sector developed by the WPPS contain a binding necessity test, which only applies to non-discriminatory and non-quantitative measures. Section I, paragraph 2 (*General Provisions*) states that:

> "Members shall ensure that measures not subject to scheduling under Articles XVI or XVII of the GATS, relating to licensing requirements and procedures, technical standards and qualification requirements and procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary barriers to trade in accountancy services. For this purpose, Members shall ensure that such measures 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."

19. The concept of necessity exists also in other WTO Agreements. Article XX of the GATT, the General Exceptions, require that some measures adopted by Members as exceptions to the agreement be "necessary" to achieve certain policy objectives. A similar necessity test is also contained in Article XIV of the GATS (General Exceptions):

> "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
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> (a) necessary to protect public morals or to maintain public order;
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> (b) necessary to protect human, animal or plant life or health;
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> (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement …"

20. Article 2.2 of the Agreement on Technical Barriers to Trade (TBT) contains a necessity test for technical regulations and standards:

> "Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia:* national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia:* available scientific and technical information, related processing technology or intended end-uses of products."

21. Article 2.2 of the SPS Agreement contains also a necessity test for sanitary and phytosanitary measures:

> "Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5."

22. It is important to distinguish the necessity test of the exception provisions (and to a certain extent of the SPS) from the necessity test contained in the TBT Agreement and in Article VI:4 of the GATS. The first intervenes in the context of a general exception and is aimed at containing Members' actions, which can be in violation of obligations under an agreement, within the boundaries of necessity. Measures taken under a general exception can also be discriminatory, provided that they do not arbitrarily or unjustifiably discriminate nor constitute a disguised restriction on international trade. In contrast, the TBT and VI:4 necessity test only applies to trade restrictive measures which are non-discriminatory and which can be objectively justifiable if they are necessary to achieve a legitimate policy objective. Moreover, the necessity test in the TBT and in VI:4 cannot be used to justify any violation of an obligation under other provisions of the Agreement.

23. The list of policy objectives in the general exceptions is an exhaustive one, while the list of policy objectives in the TBT and in the VI:4 accountancy disciplines is a non-exhaustive one. This is due to the fact that the scope of application of the general exceptions is more limited than that of domestic regulation provisions. Measures taken under a general exception are in violation of an

agreement and therefore should be confined to some fundamental and limited policy objectives (public morality, public health, public security, etc.), while TBT and VI:4 measures fall within WTO Members' broad "regulatory autonomy" and are not in violation of an agreement if they are necessary to achieve a wider range of legitimate policy objectives.

B. LEGITIMATE OBJECTIVES

24. The necessity test links the measure with a legitimate policy objective. The 1994 Panel Report on "United States – Taxes on Automobiles" found that the first step in the analysis under Article XX(g) of the GATT was to determine:

> "… whether the *policy* in respect of which these provisions were invoked fell within the range of policies to conserve exhaustible natural resources."[1]

25. The 1990 Panel Report on "Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes" focused on the legitimacy of policy objective invoked by the Member, before testing the necessity of the measure to achieve that objective:

> "The Panel … defined the issues which arose under [Article XX(b)]. In agreement with the parties to the dispute and the expert from the WHO, the Panel accepted that smoking constituted a serious risk to human health and that consequently measures designed to reduce the consumption of cigarettes fell within the scope of Article XX(b). The Panel noted that this provision clearly allowed contracting parties to give priority to human health over trade liberalization; however, for a measure to be covered by Article XX(b) it had to be 'necessary'"[2]

26. The determination of whether a policy objective qualifies as a legitimate one is probably simpler in the case of an exception as the policy objectives listed in Article XX of the GATT (and XIV of the GATS) are a closed group. The policy objectives in Article VI:4 disciplines might not be a closed group, but they would have to be related to the broad objective of ensuring the quality of the service, which is stated in indent (b) of VI:4. For instance objectives such as consumer protection and ensuring professional competence would qualify as legitimate objectives.

C. NECESSITY

27. Once the legitimacy of the policy objective invoked to justify a measure has been established, the next step consists in establishing whether that measure is "necessary" to achieve that objective. A measure cannot be deemed necessary if satisfactory and effective alternative means to achieve the same objective are reasonably available to the Member enacting it. In this respect the 1983 Panel Report on "United States - Imports of Certain Automotive spring Assemblies" conducted the following analysis:

> "The Panel considered whether the ITC action, in making the exclusion order, was 'necessary' in the sense of paragraph (d) of Article XX to secure compliance with United States patent law. In this connection the Panel examined whether a satisfactory and effective alternative existed under civil court procedures which would have provided the patent holder Kuhlman with a sufficiently effective remedy against the violation of its patent by foreign producers including the Canadian producer Wallbank Manufacturing Co. Ltd (Wallbank)."[3]

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[1] DS31/R, (unadopted) 11 October 1994, para. 5.56.
[2] DS10/R, adopted on 7 November 1990.
[3] L/5333, adopted on 26 May 1983, para. 37.

28. If it is established that equally satisfactory and effective alternative means exist, the necessity test requires the Member whose measure is at issue to use, among the measures reasonably available to it, that which entails the least degree of trade restrictiveness. An analysis of the meaning of "reasonably available least restrictive of trade means" was conducted by the 1989 Panel Report on "United States - Section 337 of the Tariff Act of 1930":

> "It was clear to the Panel that a contracting party cannot justify a measure inconsistent with other GATT provisions as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions. The Panel wished to make it clear that this does not mean that a contracting party could be asked to change its substantive patent law or its desired level of enforcement of that law, provided that such law and such level of enforcement are the same for imported and domestically-produced products. However, it does mean that, if a contracting party could reasonably secure that level of enforcement in a manner that is not inconsistent with other GATT provisions, it would be required to do so."[4]

IV. TRANSPARENCY

29. New domestic regulation disciplines should take account of and build on Article III of the GATS. It is therefore necessary to consider whether it would desirable to develop rules on transparency specific to licensing and qualification requirements and procedures and technical standards, which would add value to the existing obligations contained in Article III and namely: (i) publishing promptly all relevant measures of general application which pertain to or affect the operation of the GATS; (ii) informing the Council for Trade in Services of the introduction of any new, or any changes to existing, laws, regulations or administrative guidelines which significantly affect trade in services covered by its specific commitments under the GATS; and (iii) responding promptly to all requests by any other Member for specific information on any measures of general application and establishing enquiry points.

30. Some of the rules on transparency contained in the Accountancy Disciplines clarify the application of Article III to the accountancy sector, rather than add obligations to Article III. This appears to be the case for paragraphs 3, 4 and 7 requiring Members to make publicly available specific information concerning the requirements in the accountancy sector.

> "Members shall make publicly available, including through the enquiry and contact points established under Articles III and IV of the GATS, the names and addresses of competent authorities (i.e. governmental or non-governmental entities responsible for the licensing of professionals or firms, or accounting regulations)." (§3)

> "Members shall make publicly available, or shall ensure that their competent authorities make publicly available, including through the enquiry and contact points: (a) where applicable, information describing the activities and professional titles which are regulated or which must comply with specific technical standards; (b) requirements and procedures to obtain, renew or retain any licences or professional qualifications and the competent authorities' monitoring arrangements for ensuring compliance; (c) information on technical standards; and (d) upon request, confirmation that a particular professional or firm is licensed to practise within their jurisdiction." (§4)

[4] L/6439, adopted on 7 November 1989, para. 5.26.

…

"Details of procedures for the review of administrative decisions, as provided for by Article VI:2 of the GATS, shall be made public, including the prescribed time-limits, if any, for requesting such a review." (§7)

31. If on the one hand this might serve a useful purpose in the context of sector-specific disciplines, it is less clear whether it would be necessary to do the same at the horizontal level, considering the scope of application of Article III of the GATS. There are, however, some transparency provisions, which would add value to Article III and which might be worth considering in the development of horizontal disciplines on domestic regulation. For example, (i) providing the rationale for the requirements which a Member deems necessary to achieve a certain policy objective and (ii) providing the opportunity for comments before the adoption of measures which significantly affect trade in services. The first provision is contained in paragraph 5 of the Accountancy Disciplines and in Article 2.5 of the TBT Agreement:

"Members shall inform another Member, upon request, of the rationale behind domestic regulatory measures in the accountancy sector, in relation to legitimate objectives as referred to in paragraph 2." (Accountancy Disciplines, §5)

"A Member preparing, adopting or applying a technical regulation which may have a significant effect on trade of other Members shall, upon the request of another Member, explain the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4." (TBT, 2.5)

32. This type of provision could add an important element of transparency to the administration of domestic regulation by Members. It would also strengthen the necessity test for domestic regulatory measures, by requiring Members to explain the link between domestic regulatory measures and the policy objectives listed in the necessity provision.

33. Paragraph 6 of the Accountancy Disciplines also contain a provision on the opportunity for comments on legislation significantly affecting trade in services, which might be relevant to horizontally applicable disciplines:

"When introducing measures which significantly affect trade in accountancy services, Members shall endeavour to provide opportunity for comment, and give consideration to such comments, before adoption."

V. EQUIVALENCE

34. In order to ensure that foreign service suppliers meet the qualification and other standards imposed on suppliers of national origin, regulators are often called upon to assess the equivalence of domestic and foreign qualifications. In many cases they may require foreign applicants for licences or other authority to provide a service to undergo tests or to fulfill conditions to demonstrate equivalence. Since such tests are imposed in order to ensure that a domestic standard is met, they may be regarded as domestic regulations. Article VI.4 disciplines, when they have been developed, would therefore require that such requirements should be no more burdensome than necessary to ensure the quality of the service. Regulators in these situations could be obliged to take account of qualifications already earned in the home country of the foreign service supplier and to modify accordingly any additional requirements imposed upon them. This concept of equivalence has already been used in the qualification requirements section of the accountancy disciplines, in Article 2.7 of the TBT Agreement and in Article 4.11 of the SPS Agreement:

> "A Member shall ensure that its competent authorities take account of qualifications acquired in the territory of another Member, on the basis of equivalency of education, experience and/or examination requirements" (Accountancy Disciplines, para 19).
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> "Members shall give positive consideration to accepting as equivalent technical regulations of other Members, even if these regulations differ from their own, provided they are satisfied that these regulations adequately fulfil the objectives of their own regulations." (TBT, Art. 2.7)
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> "Members shall accept the sanitary or phytosantiary measures of other Members as equivalent, even if these measures differ from their own or from those used by other Members trading in the same product, if the exporting Member objectively demonstrates to the importing Member that its measures achieve the importing Member's appropriate level of sanitary or phytosanitary protection. For this purpose, reasonable access shall be given, upon request, to the importing Member for inspection, testing and other relevant procedures." (SPS, Art. 4.1)

VI. INTERNATIONAL STANDARDS

35. GATS Article VI:5(b) says that in determining whether the requirements are compatible with the principles of necessity, transparency and objectivity, account shall be taken of international standards of relevant international organizations applied by Members. The term "relevant international organizations" refers to international bodies whose membership is open to the relevant bodies of at least all Members of the WTO. This provision falls short of creating a presumption of "necessity" in favor of requirements based on international standards.[5] A presumption in favor of international standards could facilitate the application of the necessity test and would also constitute a strong incentive for the use of international standards.

36. A strong presumption in favour of international standards within the necessity test is contained in Articles 2.5 of the TBT Agreement and 3.2 of the SPS:

> "… Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade." (TBT 2.5)
>
> "Sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994." (SPS 3.2)

37. The TBT and the SPS Agreements also contain important rules requiring Members to use international standards as a basis for their technical regulations:

> "Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems." (TBT 2.4)

[5] A similar provision has been repeated in the section on technical standards of the Accountancy Disciplines.

> "To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3." (SPS 3.1)

38. Articles 2.6 of the TBT and 3.4 of the SPS require WTO Members to become involved in the work of international standardizing bodies:

> "With a view to harmonizing technical regulations on as wide a basis as possible, Members shall play a full part, within the limits of their resources, in the preparation by appropriate international standardizing bodies of international standards for products for which they either have adopted, or expect to adopt, technical regulations." (TBT 2.6)

> "Members shall play a full part, within the limits of their resources, in the relevant international organizations and their subsidiary bodies, in particular the Codex Alimentarius Commission, the International Office of Epizootics, and the international and regional organizations operating within the framework of the International Plant Protection Convention, to promote within these organizations the development and periodic review of standards, guidelines and recommendations with respect to all aspects of sanitary and phytosanitary measures." (SPS 3.4)

39. Article 3.5 of the SPS Agreement involves WTO Members even further in the work of international bodies on harmonization:

> "The Committee on Sanitary and Phytosanitary Measures provided for in paragraphs 1 and 4 of Article 12 (referred to in this Agreement as the "Committee") shall develop a procedure to monitor the process of international harmonization and coordinate efforts in this regard with the relevant international organizations."

40. The Decision on Professional Services mandating work on multilateral disciplines in the accountancy sector asked Members to make recommendations on the use of international standards and encouraged cooperation with the relevant international standards organizations.

41. Reference to the work of international standard setting bodies and to Members' involvement in the adoption of international standards is also contained in GATS Article VII:5 (Recognition):

> "Wherever appropriate, recognition should be based on multilaterally agreed criteria. In appropriate cases, Members shall work in cooperation with relevant intergovernmental and non-governmental organizations towards the establishment and adoption of common international standards and criteria for recognition and common international standards for the practice of relevant services trades and professions."

42. The presumption in favour of domestic regulatory measures based on international standards which exists in the TBT and SPS Agreements creates an important benchmark for the necessity test by pointing at the least trade-restrictive measures which are adequate to secure the policy objective in view. In this respect, the TBT and SPS rules appear to be more focused than the existing reference to international standards in Article VI:5(b). Other rules such as a requirement to use international standards or Members' further involvement in the work of standard setting bodies would go even further, but would probably need to take account of the characteristics of the various services sectors.

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