
**BALANCING DOMESTIC REGULATION AND TRADE LIBERALISATION UNDER THE
WORLD TRADE ORGANISATION'S MULTILATERAL RULES ON TRADE IN SERVICES:
A LOOK AT SOUTH AFRICA'S TELECOMMUNICATIONS SECTOR**

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DECLARATION

I, **Ivan Kairu Rugema**, declare that, *Balancing Domestic Regulation and Trade Liberalisation under the World Trade Organisation's Multilateral Rules on Trade in Services: A Look at South Africa's Telecommunications Sector* is my own work, that it has not been submitted before for any degree or examination at any other university, and that the sources I have used or quoted, have been indicated and acknowledged as complete references.



Student: Ivan Kairu Rugema

Signature:

Date:

ACKNOWLEDGEMENTS

I would like to offer my first-fruits of gratitude to my Heavenly Father who not only sustains my life but continually grants me the deepest desires of my heart. Thank you God for blessing me with the ability, the strength, and the resources to complete this work.

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DEDICATION

To my Parents:

Mike Ndayambaje Rugema

and

Lillian Naomi Rugema

UNIVERSITY of the
WESTERN CAPE

LIST OF ABBREVIATIONS

AB	Appellant Body
ACP	African Caribbean and Pacific
BEE	Black Economic Empowerment
CTS	Council for Trade in Services
DDA	Doha Development Agenda
DSB	Dispute Settlement Body
ECA	Electronic Communications Act
GATS	General Agreement on Trade in Services
GATT	General Agreement on Trade in Goods
GG	Government Gazette
ICASA	Independent Communications Authority of South Africa
ICJ	International Court of Justice
ICT	Information and Communication Technology
I-ECS	Individual Electronic Communications Service
I-ECNS	Individual Electronic Communications Network Services
ITU	International Telecommunications Union
LDCs	Least Developing Countries
MFN	Most Favored Nation treatment
MDGs	Millennium Development Goals
NT	National Treatment
NTF	National Telecommunications Forum
NGOs	Non-Governmental Organisations

RDP	Reconstruction and Development Program
SAPT	South African Post and Telecommunications
S&D	Special and Differential treatment
SNO	Second National Operator
SPS	Sanitary and Phytosanitary
TBT	Technical Barriers to Trade
TNCs	Transnational Corporations
USAASA	Universal Service Access and Agency of South Africa
USO	Universal Service Obligations
UA	Universal Access
UNCTAD	United Nations Conference on Trade and Development
US	Universal Service
USF	Universal Service Fund
VANS	Value Added Network Service
WTO	World Trade Organisation
WPDR	Working Party on Domestic Regulation
WPPS	Working Party on Professional Services
OECD	Organisation for Economic Co-operation and development



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ABSTRACT

The service sector has increasingly become the cornerstone of most economies in both the developed and developing world. The WTO through, *inter alia*, the General Agreement on Trade in Services (GATS) has attempted to liberalise, promote investment, and break down barriers to trade in this sector. The main barrier to trade in services has been the imposition of domestic regulations which are aimed at ensuring the affordability, availability, and efficiency of services. Such domestic regulations are important for services and the GATS consequently recognises the right of countries to regulate in order to achieve these goals. The GATS, however, also seeks to discipline such regulations to ensure that they do not hinder trade in services. In doing so, questions have been raised about the potential impact that future disciplines on domestic regulation might have on the freedom of WTO members to regulate in a way they deem appropriate. This study seeks to assess whether the need to regulate services to achieve important policy objectives will be affected by provisions of the GATS such as Article VI. In particular, the study looks at whether the achievement of important goals such as universal access in the telecommunications sector of South Africa will be affected by provisions of the GATS.

CHAPTER 1 INTRODUCTION AND BACKGROUND

1.1 Introduction

The service sector¹ has become the primary catalyst for growth in many economies in both the developed and developing worlds.² This can be attributed to the fact that services, though important in their own right, also play an important role in the production of most goods.³ In addition, the advent and subsequent sophistication of information and communication technology (ICT), coupled with the emergence of transnational corporations (TNCs), has not only made trade in services easier, but has also increased the demand for cross-border provision of such services.⁴ In 1995 the World Trade Organisation (WTO) established in the General Agreement on Trade in Services (GATS) a set of multilateral rules which were aimed at, *inter alia*, facilitating the liberalisation of services trade, promoting investment, and, breaking down national barriers to trade in this area.

Due to the invisible character of services, which have sometimes been defined as ‘anything you can buy and sell but cannot drop on your food’,⁵ the traditional barriers that affect

¹ The list of activities that can be considered as services is enormous. A list published by the World Trade Organisation (WTO) includes services that range from medical and dental services, engineering, advertising, postal and courier services, hotels and restaurants, to others as far ranging as voice telephone services, sound recording, and software implementation (see Annexure A for the full WTO services sectoral classification list). In addition (as will be discussed in paragraph 2.3.1.2 below), GATS defines trade in services to include four modes of supply, namely: cross-border supply, consumption abroad, commercial presence, and presence of natural persons.

² Karmakar S “Services Trade Liberalisation and Domestic Regulations: The Developing Country Conundrum” (2007) 7(1) *Global Economy Journal* 1. In 2002, it was estimated that ‘the total measurable trade in services as defined by the various “modes of supply” subject to multilateral disciplines under the World Trade Organization’s General Agreement on Trade in Services, stood at 2.3 trillion which represented 7.6 % of the world’s output and close to 1/5 of the total trade in good and services’ (OECD, *GATS: The case for open service markets*, (2002) 3).

³ WTO “Services Trade” <http://www.wto.org/english/tratop_e/serv_e/serv_e.htm> [accessed on 30 May 2007].

⁴ Karmakar S “Services Trade Liberalisation and Domestic Regulations: The Developing Country Conundrum” (2007) 7(1) *Global Economy Journal* 1.

⁵ Drake W and Nicolaidis K “Ideas Interests and Institutionalization: “Trade in Services” and the Uruguay Round” (1992) 46(1) *International Organisations* 43.

international trade in goods do not have the same impact on services.⁶ The primary barrier to international trade in services is the imposition of numerous domestic regulations. Such domestic regulations are particularly important in the services sector because they ensure the provision of efficient, effective and competitive services.⁷ They are also important because services, by their nature, can have an effect on the entire economy (for example, financial services) or have a direct impact on the well being of a population (for example, health services).⁸ Importantly, where markets have been opened up, domestic regulations are important in order to ensure that public policy objectives, such as, accessibility and affordability are achieved. This is because most services have a strong public policy dimension to them which cannot be ignored.

The importance for individual countries of this right to regulate services is explicitly recognised in the Preamble to the GATS which provides that:

'Members ...

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 the asymmetries existing with respect to the degree of development of services regulation in different countries, the particular need of developing countries to exercise this right; ...

*Herby agree ...'*⁹

Mattoo and Sauvé point out that 'despite such language and the deference to regulatory autonomy and national preferences embedded in it, the interface between domestic regulation and trade liberalisation has spawned a lively public policy debate, particularly in developed countries'.¹⁰ This debate relates to the balance that must be struck between the sovereign right of WTO Member countries to continue to regulate in accordance with their national policy

⁶ Karmakar S "Services Trade Liberalisation and Domestic Regulations: The Developing Country Conundrum" (2007) 7(1) *Global Economy Journal* 3.

⁷ *Ibid.*

⁸ Wouters J and Coppens D (2006) "*Domestic Regulation Within the Framework of the GATS*" Institute of International Law Working Paper 93 55.

⁹ WTO, *General Agreement on Trade in Services*, The Legal Texts of the Uruguay Round of Multilateral Trade Negotiations, (2002) 284.

¹⁰ Mattoo, A and Sauvé, P (2003) *Domestic Regulation and Services Trade Liberalisation* 1.

objectives, and the simultaneous need to ensure that this right does not become a barrier to market access¹¹ in services.¹²

Article VI (Domestic Regulation) of the GATS is the relevant provision that attempts to strike this delicate balance between the need for domestic regulation and the overarching system of international trade law under the auspices of the WTO. It has, however, been noted that Article VI, which has a powerful influence on international trade in services, is among one of the weakest provisions in the GATS Agreement.¹³ Mattoo attributes this weakness to the difficulty of developing effective multilateral disciplines in this area, without seeming to unduly interfere with the national sovereignty of a state and without appearing to limit its ability to regulate freely.¹⁴ It is important to note in this regard that the term “sovereignty”, as it is used in the context of this work, has the meaning attributed to it by the International Court of Justice (ICJ) in the *Lotus case* where the Court stated that ‘the sovereignty of a State is complete in the absence of specific legal constraints to the contrary and that one does not presume lightly that the sovereignty of a state is restricted’.¹⁵

Article VI as it stands is, however, provisional in nature. This is because Article VI:4 tasks the Council for Trade in Services (CTS)¹⁶ to develop disciplines that will ensure that ‘measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services’.¹⁷

¹¹ In the WTO framework market access is a term outlining the government imposed conditions under which a product may enter a country under non-discriminatory conditions. Market access in the WTO sense is expressed through border measures such as tariffs and non-tariff measures in the case of goods and regulations inside the market in the case of services (Goode, W (2003) *Dictionary of Trade Policy Terms* 222.)

¹² Karmakar, S “Services Trade Liberalisation and Domestic Regulations: The Developing Country Conundrum” (2007) 7(1) *Global Economy Journal* 3.

¹³ Mattoo A “Developing Countries in the New Round of GATS Negotiations: Toward a Pro-Active Role” (2000) 23(4) *The World Economy* 483.

¹⁴ Mattoo A “Developing Countries in the New Round of GATS Negotiations: Toward a Pro-Active Role” (2000) 23(4) *The World Economy* 484.

¹⁵ S.S “Lotus” Judgment 9, 1927, PCIJ Series A, No. 10, P p19.

¹⁶ The Council for Trade in Services is the body administering the GATS. All members of the WTO are automatically members of the Council. (Goode, W (2003) *Dictionary of Trade Policy Terms* 85).

¹⁷ Article VI: 4 states:

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

- (a) based on objective and transparent criteria, such as competence and the ability to supply the service;

Consequently, in 1999, the CTS established the Working Party on Domestic Regulation (WPDR) with the mandate to develop disciplines appropriate for all service sectors.¹⁸ Discussions on new disciplines have, however, proceeded slowly, which is an indication of the delicate and complex nature of the question of domestic regulations.¹⁹

In the context of the ongoing Doha Round of trade negotiations,²⁰ paragraph 7 of the Doha Ministerial Declaration²¹ affirms ‘the right of members under the GATS to regulate, and to introduce new regulations on the supply of services’. Furthermore, even though the work of the WPDR is formally different from trade liberalisation negotiations mandated by Article XIX²² of the GATS,²³ negotiations in these two areas complement each other and are taking place simultaneously.²⁴ WTO members have agreed that one of the central tasks in the ongoing negotiations on services is to develop rules that ensure that domestic regulations support the opening of markets for services to trade and investment.²⁵



-
- (b) not more burdensome than necessary to ensure the quality of the service;
 - (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.”

¹⁸ The Working Party on Domestic Regulations (WPDR) was preceded by Working Party on Professional Services (WPPS) which was entrusted with the mandate of GATS Article VI:4 in the field of professional services. This working group was successful in developing disciplines governing domestic regulation in the accounting sector. These disciplines have become important in the debate regarding the development of future disciplines (Majluf, A “Domestic Regulation and the GATS: Challenges for Developing Countries” <http://www.ictsd.org/dlogue/2006-02-28/Dom_Reg.pdf> [accessed on 23 May 2007].

¹⁹ OECD Policy Brief “Open Services Markets matter” <<http://www.oecd.org/dataoecd/10/0/2443075.pdf>> [accessed on 31 May 2007].

²⁰ ‘Round’ is another term for multilateral trade negotiations and, it refers to efforts aimed at strengthening the rules that ensure orderly and fair conduct of international trade, and to reach mutually beneficial agreements reducing barriers to world trade. The Doha Round is the unofficial name for the multilateral trade negotiations launched at Doha, Qatar, on 14 November 2001. The Doha Round was dubbed the ‘development round’ because of its agenda, which was to focus on improving the conditions of developing countries. During the writing of this work, negotiations on this Round seem to have collapsed, and the implications for domestic regulation and the services sector as a whole will be considered in chapter 5 below. (Goode, W (2003) *Dictionary of Trade Policy Terms* 238.)

²¹ The Doha Ministerial Declaration was adopted on 14 November 2001 - accessible at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm.

²² Article XIX mandates Members to enter into successive rounds of negotiations, beginning not later than five years from the date of entry into force of the GATS (the GATS entered into force in 1995). Such negotiations are to be aimed at achieving progressively higher levels of liberalisation.

²³ Wouters J and Coppens D (2006) “*Domestic Regulation within the framework of the GATS*” *Institute of International Law Working Paper* 93 18.

²⁴ Karmakar S “Services Trade Liberalisation and Domestic Regulations: The Developing Country Conundrum” (2007) 7(1) *Global Economy Journal* 7.

²⁵ Mattoo, A and Sauv e, P (2003) *Domestic Regulation and Services Trade Liberalisation* 1.

1.2 Statement of the Problem

Ensuring that services, especially public services²⁶ meet the needs and expectations of people, especially the poor and marginalised, depends on governments actively setting rules, policies, and procedures for these services.²⁷ Similarly, meeting international development targets such as the Millennium Development Goals (MDGs)²⁸ requires that governments' promulgate proper regulations for such services, and, it goes without saying, adequately implements them. For example, Target 8F of Goal 8 of the MDGs calls on governments, 'in cooperation with the private sector, to make available the benefits of new technologies, especially information and communication', a goal which can only be achieved through proper policy formulation.²⁹ Furthermore, the constitutions of some states recognise socio-economic rights as enforceable rights and states therefore have a duty to regulate to ensure the fulfilment of these rights. For example, section 27 of the South African Constitution,³⁰ which is the supreme law of the country, guarantees everyone the right to health and obliges the state to *take reasonable legislative and other measures* to ensure the progressive realisation of these rights.³¹ States therefore have specific policy objectives as well as obligations imposed on them by law when regulating services which they seek to achieve through 'legislative, administrative, budgetary, judicial and other measures'.³² This need to regulate to achieve specific policy objectives has been referred to above and is explicitly acknowledged by the GATS through, *inter alia*, its Preamble.

The GATS, however, also recognises the desire to establish principles and rules for trade in services with a view to their expansion and progressive liberalisation.³³ In this regard it is

²⁶ The question of whether public services are covered by the GATS will be considered below. This questions will be considered largely based on the views of authors who have published extensively on the GATS as the WTO dispute settlement bodies have not yet conclusively decided on whether the GATS covers public services.

²⁷ Mashayekhi, Julsaint and Tuerk (2006) "*International Trade in Health Services and the GATS: Current issues and debates*" 19.

²⁸ The MDGs are a set of goals agreed upon by all of the world's countries. They range from halving extreme poverty and halting the spread of HIV/AIDS to providing universal primary education by the year 2015.

²⁹ United Nations, *MDG 8: Develop a global partnership for development*, <<http://www.un.org/millenniumgoals/global.shtml>> [accessed on 18 October 2008].

³⁰ The Constitution of the Republic of South Africa Act 108 of 1996.

³¹ Own emphasis

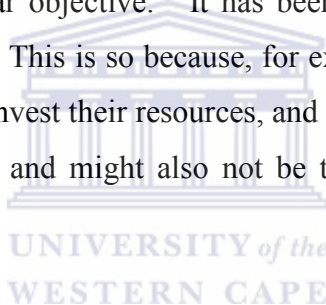
³² United Nations Economic and Social Council (2002) "*Liberalisation of trade in services and human rights: Report of the High Commissioner*" (2002) 10.

³³ Para 2 of the Preamble to the GATS provides in this regard that:

"*Wishing to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency*

important to clarify the point that the goal of the GATS is the progressive liberalisation of trade in services, and its essential concern is certainly not the deregulation of the service sector. These two terms are sometimes used interchangeably which, as Mattoo and Sauvé point out, is incorrect, because service liberalisation often requires regulation and re-regulation.³⁴ When considering the effect of the GATS on national sovereignty, the main concern of this work, therefore, is not the loss of the ability to regulate *per se*, but the possible inability of a country to regulate in a manner that it deems appropriate.³⁵

The need to balance the right to regulate in order to achieve public policy objectives, on the one hand, with those of economic efficiency and international competitiveness, on the other, raises a dilemma, particularly for developing countries.³⁶ One of the concerns raised in this regard includes the possible creation of a “necessity test” which would require Members to ensure that their regulations are not more burdensome than necessary to ensure the quality of services or to achieve a particular objective.³⁷ It has been noted that such a test would be problematic for many countries.³⁸ This is so because, for example, developing countries need to be able to determine where to invest their resources, and the less restrictive trade option can sometimes result in greater cost, and might also not be the best way of achieving desired social goals and objectives.³⁹



This study seeks to investigate whether in public services, and in particular, in the telecommunications (telecoms) sector of South Africa, the GATS could restrict national sovereignty in pursuing public policy objectives through licenses issued to telecoms operators. Put differently, in the context of the ongoing work to develop new disciplines regarding domestic regulation, how can a balance be struck between ensuring that domestic

and progressive liberalisation and as a means of promoting the economic growth of all trading partners and the development of developing countries.”

³⁴ Mattoo A and Sauvé P (2003) *Domestic Regulation and Services Trade Liberalisation* 1.

³⁵ Mattoo A and Sauvé P (2003) *Domestic Regulation and Services Trade Liberalisation* 2.

³⁶ Mashayekhi, Julsaint and Tuerk (2006) ‘*International Trade in Health Services and the GATS: Current issues and debates*’ 19.

³⁷ Mashayekhi, Julsaint and Tuerk (2006) ‘*International Trade in Health Services and the GATS: Current issues and debates*’ 55. Necessity tests typically require that covered measures which restrict trade do no go beyond what is “necessary” to achieve the Member’s policy objectives.

³⁸ *Ibid.*

³⁹ *Ibid.* Another cause for concern may lie in the fact that the necessity test has been raised by Members either as a justification or as a defence in numerous cases, and in every case except one, (*European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, Appellant Body Report, Wt/DS/135/AB/R*) the defence had been rejected. For a further discussion on this issue see paragraph 3.4.1 below.

regulations do not hinder international trade, and ensuring that the need to regulate important public services is not limited?

1.3 Key definitions

In order to adequately investigate this delicate balancing act, two key concepts that are central to the entire study must be defined. These concepts are ‘public services’ and ‘domestic regulation’.

1.3.1 What are ‘public services’?

‘Public services’ are often defined by citing examples of services that would be considered as such. For example, they can be defined by naming examples, such as, education, law enforcement, or health. It is, however, important to note that what constitutes public services differs in different contexts. What are considered as public services might differ from country to country or even among different members of a particular community.⁴⁰ This is partly due to the fact that what constitutes public services depends on factors, such as, social norms, concepts of the role of the state, the nature of a particular market, or the amount of resources available to government.⁴¹ Accordingly, a precise definition of ‘public services’ is difficult. This difficulty is further compounded by the fact that public services can also be defined by looking at what is being supplied, to whom it is being supplied, or who is supplying the services.⁴²

Several attempts have, however, been made at defining “public services.” Krajewski defines public services as a ‘special subset of services provided by or under the control of a public authority, because these services are considered special compared to other services’.⁴³ Cassim and Steuart observe that a common conception of a public service is one that is supplied by

⁴⁰ Cassim and Steuart “Public Services and the GATS” <http://www.ictsd.org/issarea/services/products/Cassim_Steuart_part3.pdf> [accessed on 11 June 2007]. For example, Europe has a strong tradition of public health systems whereas in the United States, health care is predominantly provided by the private sector (Krajewski, M ‘Public Services and the General Agreement on Trade in Services (GATS) 2001 Center for International Environmental Law Research Paper 4).

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ Krajewski M “Public Services and Trade Liberalisation: Mapping the legal framework” (2003) 6(2) *Journal of International Economics* 343.

any level of governmental agency, or public enterprise.⁴⁴ Grout and Stevens define these services as ‘services provided for large numbers of citizens, in which there is a potential significant market failure justifying government involvement whether in production, finance or regulation’.⁴⁵

Importantly, and as is evident from the definition preferred by Grout and Stevens, public services do not necessarily need to be provided by the public sector. For the purposes of this work, the definition preferred is a synthesis of the above definitions. In other words, in this work, ‘public services’ can be defined as a special subset of services which are provided for large numbers of people, and which, because of their nature, justify government involvement, whether in production, finance, or regulation.

As noted above, this study examines the telecoms sector as a case study of an area where the tension between trade liberalisation and domestic regulation might be visible. One of the key questions that arises in this regard is whether telecom services can be considered public services and whether the public policy element discussed above attaches to these services. Answering this question had until recently been fairly easy. Telecom services in most countries were provided by state owned operators and administered and regulated through various government departments.⁴⁶ This has however changed in the last few years with the privatisation of many state owned telecoms operators which has made their status as public services more uncertain.⁴⁷

This notwithstanding, governments in most countries continue to see telecoms as an essential service and continue to ‘ensure that these services are supplied in a manner consistent with national perceptions of public interest’.⁴⁸ This can be attributed, *inter alia*, to the potentially important role that telecoms can play in the development of any country. A United Nations Conference on Trade and Development (UNCTAD) secretariat document on universal access to essential services noted in relation to telecoms that, their ‘essential nature stems from their

⁴⁴ Cassim and Stuart “Public Services and the GATS” <http://www.ictsd.org/issarea/services/products/Cassim_Stuart_Part3.pdf> [accessed on 11 June 2007].

⁴⁵ Grout and Stevens “Financing and Managing Public Services: An Assessment” <<http://www.bristol.ac.uk/Depts/CMPO/workingpapers/wp76.pdf>> [accessed on 11 June 2007].

⁴⁶ Melody, H (1997) *Telecom Reform: Principles, Policies, and Regulatory Practices*, 1.

⁴⁷ Intven H and Tetrault M (eds) (2001) *Telecommunications Regulation Handbook*, 1-1.

⁴⁸ *Ibid.*

importance for economic growth' and from the wider benefits associated with ICT, such as, the ability to facilitate citizen participation and promote national cohesion by reducing disparities in urban and rural areas.⁴⁹ The report further notes that there is a growing trend in many countries to consider access to ICT as a basic right of all citizens.⁵⁰ Countries therefore regulate this sector to ensure that among other things these services are affordable and accessible to all citizens. In addition, many countries, particularly in the developing world, are just embarking on the liberalisation process, and therefore, truly open markets in this sector are yet to be realised.⁵¹ For these reasons, even though telecoms are increasingly not strictly classified as public services, they retain characteristics of such services which often warrants close government regulation especially for social objectives, such as, access and affordability. Such regulation can potentially be limited by WTO law in general, and, Article VI of the GATS in particular. It is because of this public interest element as well as the central role that telecommunications plays in the socio-economic development of all countries that it is considered in this discussion on the potential effect of the GATS on public services.⁵²

1.3.2 What is 'domestic regulation'?

Even though the GATS specifically utilises the term 'domestic regulation' in Article VI, no definition of what this concept entails is provided. A precise definition of the word 'regulation' is also difficult to come by because a wide variety of meanings of this word exist. It can have a distinct political, legal or economic meaning.⁵³ On a basic level, an Organisation for Economic Cooperation and Development (OECD) Report on Regulatory Reform states that, among OECD countries, the term 'regulation' is used to refer to a diverse set of instruments by which governments set requirements for enterprises and citizens.⁵⁴ The Report places regulation into three categories, namely, economic regulation which is aimed at intervening directly in market decisions, such as, pricing; social regulation which is aimed at

⁴⁹ UNCTAD Secretariat, *Universal Access to Services*, (2006) TD/B/COM.1/EM.30/2, para 12.

⁵⁰ *Ibid.*

⁵¹ Keck A and Djiofack-Zebaze C, 'Telecommunications services in Africa: The impact of multilateral commitments and unilateral reform on sector performance and economic growth', (2006) *WTO Staff Working Paper ERSD-2006-10 7*.

⁵² It is also worth noting that the working definition of 'public services' selected for this study envisions services that are provide for a large number of people and which because of their nature, warrant government regulation. Telecoms would undoubtedly be covered by such a definition.

⁵³ Krajewski M, (2003) *National Regulation and Trade Liberalisation in Services: The Legal impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy 1*.

⁵⁴ OECD, "The OECD Report on Regulatory Reform Synthesis" <<http://www.oecd.org/dataoecd/17/25/2391768.pdf>> [accessed on July 26, 2007].

protecting public interests, such as, health and the environment; and administrative regulation through which governments intervene in individual decisions.⁵⁵

Karmakar suggests that, in its widest sense, “regulation” can be used to refer to ‘all mechanisms of social control including those that are not necessarily related to state activity’, whereas in its narrowest sense it refers to a ‘specific form of governance through targeted authoritative rules that are often accompanied by some regulatory body to monitor and enforce compliance’.⁵⁶ This commentator suggests, with some merit, that, in the absence of a formal definition of “domestic regulation” in GATS, the concept of domestic regulation would seem closest to the narrow definition.

Krajewski, on the other hand, supports a definition of “regulation” which views regulation as a ‘process or activity in which government requires or proscribes certain activities or behavior on the part of individuals and institutions, mostly private, but sometimes public’.⁵⁷ Krajewski favours this approach because he considers it broad enough to encompass the concept of regulation in most countries. The learned author argues convincingly that “regulation” in its broadest sense should be understood as the use of governmental policies and measures in order to influence, control and guide economic or other private activities.⁵⁸

On a practical level Article VI of the GATS, which lists qualification requirements and procedures, technical standards, and licensing requirements as measures against which the new disciplines on domestic regulation are to be tested, might serve as an example of what the Agreement contemplates as domestic regulation.

1.4 Aims of the thesis

The aim of this work is to analyse the current provisions on domestic regulation contained in the GATS, as well as to examine the negotiations on future disciplines currently being worked on by WTO members. In particular it aims to see what impact these rules will have on the

⁵⁵ *Ibid.*

⁵⁶ Karmakar S “Services Trade Liberalisation and Domestic Regulations: The Developing Country Conundrum” (2007) 7(1) *Global Economy Journal* 6.

⁵⁷ Krajewski M (2003) *National Regulation and Trade Liberalisation in Services: The Legal impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* 4.

⁵⁸ *Ibid.*

licensing of telecoms services. In addition the study seeks to investigate whether, on a proper analysis and understanding of the legal texts on domestic regulation, the claims made by some civil society organisations and NGOs are valid.⁵⁹

1.5 Methodology

The research methods used for this study are largely library based. In other words, books, journal articles, WTO agreements, and case law on the subject provide the major part of the information used. Electronic sources accessed on the internet are also an important source of information because of the novelty of the services trade, and because up to date material on the ongoing negotiations on domestic regulation is often available there first.

1.6 Defined scope of the thesis

Even though domestic regulation has an important impact across all service sectors, this work concentrates on the telecoms sector. This is because of the importance of this sector in the economies of all countries, and in particular, because of the potentially significant role telecommunications can play in the development objectives of many countries. The study also limits itself to a discussion of domestic regulation in the context of the GATS. In assessing the potential impact of future disciplines on domestic regulation, the study focuses mainly on the position of Developing and Least Developing Countries (LDCs).⁶⁰ Furthermore, even though it might sometimes be necessary to consider certain economic arguments and reasons related to this work, the study will focus primarily on an analysis of the legal texts and arguments.

⁵⁹ Many NGOs and civil society organisations have heavily criticised the GATS, arguing that it has the potential to severely affect the delivery of essential services to the poor and vulnerable.

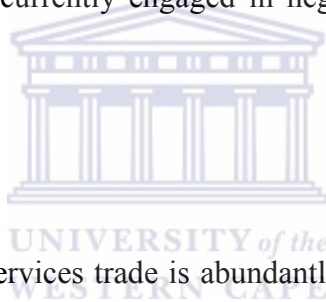
⁶⁰ A country is declared a LDC by the United Nations' Economic and Social Council based on criteria that include, among other things, per capita GNP, life expectancy, adult literacy, and the combined primary and secondary education enrolment ratio. The list of currently includes countries, such as, Angola, Benin, Eritrea, Ethiopia, Gambia, Haiti, Kiribati, Mali, Nepal, Samoa, Sudan, Togo, Tuvalu, Rwanda, Uganda, Yemen and Zambia just to name a few (Goode, W (2003) *Dictionary of Trade Policy Terms* 212).

1.7 Overview of the chapters

This study is structured as follows: Chapter 2 discusses the history and general framework of the GATS, as well as analyses the important issue of its scope. This discussion serves as a lens through which the remainder of the study is observed. Chapter 3 comprehensively examines the issues surrounding Article VI (Domestic Regulation) of the GATS. The chapter will also look at possible lessons regarding domestic regulation that can be drawn from other WTO agreements such as the General Agreement on Tariffs and Trade (GATT), Technical Barriers to Trade (TBT) and the Sanitary and Phytosanitary measures (SPS). In addition the section will look at the relationship between domestic regulation, market access and national treatment. Chapter 4 looks at the potential implications for the telecoms sector of future WTO rules on domestic regulation. Chapter 5 contains a summary of the conclusions drawn from the whole study and, importantly, contains recommendations for Members, especially developing countries, which are currently engaged in negotiations on future disciplines on domestic regulation.

1.8 Conclusion

The growing importance of the services trade is abundantly clear both in economic data and in the increasing focus being placed on this sector by many countries. As has been explained above, services by their nature require regulation by governments. In the context of the multilateral rules of the world trading system this need to regulate services can create a potential dilemma especially where public services are concerned. The next chapter discusses the evolution of the services trade, as well as the general structure of the GATS. In the discussion on the general structure of the GATS the important question of the scope of the Agreement will also be addressed. This question is important in understanding whether public services, which are the primary focus of this study, are covered by the provisions of the GATS.



CHAPTER 2

HISTORY AND GENERAL FRAMEWORK OF THE GATS

2.1 History of the trade in services

For hundreds of years services moved across borders but it was not until the 1970s that they began to be thought of as having the characteristic of being trade.⁶¹ There are various reasons which account for this belief. They include first, the view that services were generally not seen as being important in their own right. In other words, in terms of this view, services such as those provided by accountants, consultants, and advertisers, were seen as dependent on goods in that, without the production of goods, there would be little demand for these services.⁶² In addition, compared to physical objects, services were seen as insignificant because of their ‘invisibility and temporary existence’.⁶³

Drake and Nicolaidis⁶⁴ highlight three distinct stages in the development of the services trade which led to their status as trade commodities which they now occupy on the international trade law agenda.

2.1.1 First stage

The first stage started in the 1970’s when the topic of trade in services begun being mentioned as fit for inclusion on the trade negotiating agenda.⁶⁵ During this stage, a group of experts met under the auspices of the OECD⁶⁶ to consider the long-term outlook for trade in light of the multilateral round of trade negotiations which was scheduled to take place at the beginning of

⁶¹ Drake, W and Nicolaidis, K “Ideas, interests, and institutionalization: “trade in services” and the Uruguay Round” (1992) 46(1) *International Organisations* 41.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ Drake, W and Nicolaidis, K “Ideas, interests, and institutionalization: “trade in services” and the Uruguay Round” (1992) 46(1) *International Organisations* 37.

⁶⁵ OECD, *GATS: The case for open service markets*, (2002) 17.

⁶⁶ The OECD is an organisation made up of members who share a commitment to democratic government and the market economy. Its work covers economic and social issues, trade, education, development, and science innovation. Its members include Australia, Canada, Franca, Germany, Italy, Japan, Korea, Switzerland, United Kingdom and the United States. (www.oecd.org).

1973.⁶⁷ A Report resulting from the work of this group coined for the first time the phrase “trade in services”. In addition, the report also made several important observations about the services trade. For example, it noted that:

‘The Group has not made a detailed examination of questions concerning international trade in services. It considers however that, from the point of view of international economic relations, this sector poses problems similar in nature to those met with in merchandise trade. Given that services are a sector which seem likely to expand rapidly in countries’ economies, the main need is to avoid any tendencies to protectionism and to aim at achieving a more thorough liberalisation’.⁶⁸

Drake and Nicolaidis note that these views, which suggested that transactions in services could be considered trade and that principles for trade in goods could be applied, constituted a huge conceptual leap because, up to that time, services had never been viewed in this way by any of the institutions that oversaw them.⁶⁹

During this first stage the United States had also begun making strong diplomatic efforts to convince other countries to prepare for multilateral negotiations on trade in services.⁷⁰ The United States’ interest lay in the fact that it had some of the world’s largest services firms but barriers to other countries’ markets had made competitive entry for them more difficult in the services sector.⁷¹ The efforts of the United States centered around two related objectives, namely, achieving the liberalisation of national impediments to traded services, and devising new multilateral rules to govern international transactions in services.⁷²

⁶⁷ Drake, W and Nicolaidis, K “Ideas, interest,s and institutionalization: “trade in services” and the Uruguay Round” (1992) 46(1) *International Organisations* 45. The next multilateral round of negotiations was called the Tokyo Round. This was the seventh round of the GATT multilateral trade negotiations and it took place between 1973 and 1979 (Goode, W (2003) *Dictionary of Trade Policy Terms* 343.

⁶⁸ OECD *Report by the High Level Group on Trade and Related Problems* (Paris: OECD, 1973) quoted in Drake and Nicolaidis (1992) 45.

⁶⁹ Drake, W and Nicolaidis, K “Ideas, interests, and institutionalization: “trade in services” and the Uruguay Round” (1992) 46(1) *International Organisations* 45.

⁷⁰ Malmgren B.H. “Negotiating International Rules for Trade in Services,” (1985) 8 *World Economy* 11.

⁷¹ Drake, W and Nicolaidis, K “Ideas, interests, and institutionalization: “trade in services” and the Uruguay Round” (1992) 46(1) *International Organisations* 46.

⁷² Malmgren B.H. (1985) “Negotiating International Rules for Trade in Services,” (1985) 8 *World Economy* 11.

Furthermore, during this period the development of services was further influenced by the emergence of the ability to transmit information across borders through telecommunications.⁷³ This was significant because it highlighted new ways in which services could be moved, which had previously not been thought of. Drake and Nicolaidis explain the significance of this discovery when they say:

‘When analysts first thought of services flows as trade, they visualized movements of individuals or organisations that brought sellers and buyers into physical and temporal proximity. But now it appeared that there was another major means of supply: ‘electronic highways’ allowing sellers and buyers to remain apart while exchanging information-based services ... In short, advanced computer networks collapsed space and time’.⁷⁴

Despite these developments most countries, the United States being the exception, were not yet convinced by the new thinking on the trade character of services.⁷⁵ One of the reasons for this was that there were still several issues relating to trade in goods that remained outstanding from the Tokyo Round of trade negotiations and other countries saw the introduction of services as a distraction from some of the issues that were not complete.⁷⁶ Particularly opposed to this view were LDCs. They were opposed to the idea because they assumed that their services industries would not be competitive globally, and they viewed the US as interested only in services liberalisation because their large TNCs would benefit from the LCD’s markets.⁷⁷ Developing countries also feared the possibility of more industrialised countries taking over sensitive services sectors such as finance or telecommunications.⁷⁸

2.1.2 Second stage

The second stage in the development of services trade took place between 1982 and 1986. During this period GATT members began to assess what an agreement on the liberalisation of

⁷³ Drake, W and Nicolaidis, K “Ideas, interests, and institutionalization: “trade in services” and the Uruguay Round” (1992) 46(1) *International Organisations* 47.

⁷⁴ Drake, W and Nicolaidis, K “Ideas, interests, and institutionalization: “trade in services” and the Uruguay Round” (1992) 46(1) *International Organisations* 48.

⁷⁵ OECD, *GATS: The case for open service markets*, (2002) 19.

⁷⁶ Drake, W and Nicolaidis, K “Ideas, interests, and institutionalization: “trade in services” and the Uruguay Round” (1992) 46(1) *International Organisations* 51.

⁷⁷ Malmgren B.H. (1985) “Negotiating International Rules for Trade in Services,” (1985) 8 *World Economy* 12.

⁷⁸ OECD, *GATS: The case for open service markets*, (2002) 19.

services would mean for their national policies.⁷⁹ Among the issues they looked at were, for example: (i) what changes would be required if regulations were looked at as non-tariff barriers to trade (NTBs); (ii) the effect the free movement of professionals would have on quality and safety objectives; and (iii) whether monetary stability would be affected by the free provision of financial services.⁸⁰

This period was also significant because some consensus began to emerge regarding the productiveness, measurability, divisibility and mobility of services.⁸¹ This was significant because this consensus, which attributed trade-like properties to services, meant that rather than coming up with entirely new rules to govern trade in services, general trade rules such as the unconditional most favored nation (MFN) and national treatment (NT) rules could be used as a starting point to assess issues related to trade in services.⁸² There was, however, also recognition that, because services by their nature were different from goods, the traditional rules that had been applied to trade in goods could not be transposed to services.⁸³

This, therefore, led to the realisation that even though the GATT organisation was the appropriate venue for negotiations, the GATT rules did not suffice, and that what was required was a separate treaty.⁸⁴ Toward the end of 1985, the GATT contracting parties established a committee to lay the groundwork for a new round of negotiations. One of the big questions at the time of the formation of the group was whether services would be included as one of the issues.

⁷⁹ Drake, W and Nicolaidis, K “Ideas, interests, and institutionalization: “trade in services” and the Uruguay Round” (1992) 46(1) *International Organisations* 54.

⁸⁰ *Ibid.*

⁸¹ OECD, *GATS: The case for open service markets*, (2002) 17-18.

⁸² *Ibid.* The MFN rule requires that a country gives each of the trading partners with which it has concluded relevant agreements the best treatment it gives to any of them in a given product. The fundamental point of MFN is therefore equality of treatment of other countries. National treatment, on the other hand, requires that a country give others the same treatment as it gives its own nationals (Goode, W (2003) *Dictionary of Trade Policy Terms* 242).

⁸³ Some of the differences inherent to services that meant that not all goods trade rules could be applied to services include: (1) not all services transactions appeared to fit under the definition of trade, as products produced entirely in one country and purchased in another; (2) unlike the case with goods, tariffs were not the relevant impediments to trade, and a distinction therefore needed to be made between illegitimate NTBs and legitimate regulations. (3) There were some concerns regarding the extension of the MFN principle to services, such as, telecommunications and air transport (Drake, W and Nicolaidis, K “Ideas, interests, and institutionalization: “trade in services” and the Uruguay Round” (1992) 37 *International Organisations* 63-3).

⁸⁴ Drake, W and Nicolaidis, K “Ideas, interests, and institutionalization: “trade in services” and the Uruguay Round” (1992) 46(1) *International Organisations* 63.

2.1.3 Third stage

In September of 1986, members gathered in Uruguay where they reached unanimous agreement on a ministerial declaration launching the Uruguay Round.⁸⁵ This signified the third important stage in the development of the services. For services trade, this was significant because, the declaration provided that the first part of the round would cover trade in goods while the second would address trade in services.⁸⁶ The outcome of these negotiations was the General Agreement on Trade in Services (GATS) which provided for a set of binding rules and disciplines to promote orderly and transparent trade and investment liberalisation in services.⁸⁷ The content, scope, and strength of the provisions of this agreement are considered in the following sections.

2.2 General framework of the GATS

Since its coming into effect GATS has often been surrounded by a lot of debate and controversy especially with regards to its possible negative effects on public services. Various authors have, however, noted that these debates are often conducted without a proper understanding of the Agreement itself.⁸⁸ The purpose of the following sections is to provide an overview of the general framework of the GATS which is important for a proper analysis of the issues surrounding public services and domestic regulation.

2.3 Scope and definition of the GATS

The starting point in considering the GATS as an agreement is the scope of the Agreement. In other words, it is important to first understand specifically which aspects of services trade are covered by the Agreement. A consideration of the scope of the GATS is particularly

⁸⁵ Drake, W and Nicolaidis, K “Ideas, interests, and institutionalization: “trade in services” and the Uruguay Round” (1992) 46(1) *International Organisations* 68.

⁸⁶ *Ibid.*

⁸⁷ Chanda R “Social Services and the GATS: Key Issues and Concerns” (2003) 13(12) *World Development* 1997.

⁸⁸ For example, the WTO published a document entitled *GATS – Fact and Fiction* in which it sought to correct statements made about the GATS in various publications which it considered to be misleading and to be based on an incorrect understanding of the GATS. (accessible at http://www.wto.org/english/tratop_e/serv_e/gatsfacts1004_e.pdf). Similarly, authors, such as, Chanda have noted that ‘the debate on GATS lacks a proper analysis that is based on the various features of the agreement.’ (Chanda R “Social Services and the GATS: Key Issues and Concerns” (2003) 13(12) *World Development* 1998).

significant because any potential impact which the Agreement might have on public services depends fundamentally on its breadth and scope. The scope of the GATS can be examined in three different ways, namely, by looking at: (i) its regulatory scope; (ii) its institutional scope; and (iii) its sectoral scope.⁸⁹ The regulatory and institutional scopes of the GATS are determined by Articles I:(1)(2) and 3(a) respectively whereas the sectoral scope is determined by Article I:(3)(b)(c).⁹⁰

2.3.1 The regulatory and institutional scopes of the GATS

Article I(1) provides that the Agreement shall apply to ‘*measures by Members affecting trade in services*’. The importance of this Article in determining the scope of the GATS was highlighted by the Appellate Body in *Canada – Certain Measures Affecting the Automotive Industry* (“*Canada – Autos*”) where it was stated that a threshold question for a panel in any case involving claims under the GATS is whether the measure being considered falls within the scope of the GATS by examining whether it is a measure “affecting trade in services” within the meaning of Article I of the GATS.⁹¹

The wording of this article on its own is, however, insufficient to provide a clear picture of what exactly the regulatory and institutional scopes of the GATS entail. It is, therefore, important to examine the following key components of Article I:(1), ‘*measures by Members*’ and ‘*trade in services*’.⁹²

2.3.1.1 ‘Measures by Members’

The first part of Article I:(1) that must be looked at is the phrase “*measures by Members*.” An understanding of what exactly this phrase entails is not difficult because the Agreement, in Articles I:3(a) and XXVIII provides a precise definition of its meaning. Article XXVII, specifically defines the word “measures” to mean ‘any measure by a member, whether in the

⁸⁹ Krajewski M “Public Services and Trade Liberalisation: Mapping the legal framework” (2003) 6(2) *Journal of International Economic Law* 347.

⁹⁰ *Ibid.*

⁹¹ *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS142/AB/R para 152. Even though this quote refers specifically to Article I, it is equally applicable to Article I:3(a) because the latter provides a definition of the word “measure” which is central to an understanding of Article I.

⁹² UNCTAD “Dispute settlement: GATS” <http://www.unctad.org/en/docs/edmmisc232add31_en.pdf> [accessed on 17 April 2007].

form of a law, regulation, rule, procedure, decision, administrative action, or any other form'. Examples of the above would include: national legislation of members, municipal by-laws, rules adopted by professional bodies regarding professional qualifications and licensing, which can all potentially be covered by the GATS.⁹³ This Article, therefore, provides a picture of the regulations that the GATS can potentially influence.

Article I (3)(a), on the other, hand provides that:

‘For the purposes of this Agreement:

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

This Article, on the other hand, contains the scope that the GATS has in respect of actions taken by various institutions in a country. Read together, the Articles highlighted above set out both the regulatory and institutional scopes of the GATS.

2.3.1.2 ‘Trade in services’: Modes of supply

The second important component of Article I:(1) which requires definition is the phrase “*trade in services*”. An understanding of this phrase is important to know the breadth of activities which are considered as trade in services and which, as a result, are covered by the Agreement.

The definition of this phrase, which is set out in Article I:(2), is four pronged, depending on the territorial presence of the supplier and the consumer at the time of the transaction.⁹⁴ Accordingly, the Article provides that “trade in services” is defined as the supply of a service:

- "(a) from the territory of one member into the territory of any other member.
- (b) in the territory of one member to the service consumer of any other member.

⁹³ *Ibid.*

⁹⁴ WTO “GATS training module: Definition of Services trade and modes of supply <http://www.wto.org/english/tratop_e/serv_e/cbt_course_e/c1s3p1_e.htm> [accessed on 16 April 2007].

- (c) by a services supplier of one member, through commercial presence in the territory of any other member.
- (d) by a services supplier of one member, through presence of natural persons of a member in the territory of any other member’.

The above descriptions of trade in services are commonly referred to in WTO terminology as “modes of supply”.⁹⁵ In other words, the descriptions mentioned in (a) – (d) above would be referred to as modes 1 – 4 respectively. Mode 1 is also commonly referred to as ‘cross border supply,’ mode 2 as ‘consumption abroad’, mode 3 as ‘commercial presence’, and mode 4 as ‘presence of natural persons’.⁹⁶

The combined effect of the above definitions is that the GATS applies to a wide range of government regulatory actions as well as to all spheres of government and NGOs to whom power has been delegated by any of these spheres. In other words, they set out the types of regulations and government institutions that fall within the scope of the GATS.

2.3.2 The sectoral scope of the GATS

The sectoral scope of the GATS, which sets out the particular services covered by the Agreement, completes the picture of the GATS’ scope. Article I:(3)(b)(c) which governs the sectoral scope states that:

‘For the purpose of this Agreement ...

- (b) “services” includes any service in any sector *except* services supplied *in the exercise of governmental authority*;
- (c) “a service supplied in the exercise of governmental authority” means any service which is supplied neither on a *commercial basis*, nor *in competition with one or more service suppliers*’. (own emphasis)

⁹⁵ WTO “Understanding the WTO: GATS explained <http://www.wto.org/english/thewto_e/tif_e/understanding_e.pdf> [accessed on 17 April 2007].

⁹⁶ The following are practical examples of the four modes of supply:
 Mode 1: Services provided through telecommunication, such as, consulting, telemedicine and distance training.
 Mode 2: Includes hotel or restaurant services for non-residents, training programs for foreign students and health services provided to non-residents.
 Mode 3: Local offices of multinational services firms and offices for infrastructure projects.
 4: Includes independent services suppliers moving temporarily to another country to provide services.

In terms of this provision the crucial determinant for the non-applicability or exclusion of the GATS from a particular service sector is whether such a service is “*supplied in the exercise of governmental authority*”. Put differently, if a service is supplied⁹⁷ “in the exercise of governmental authority”, then such a service is excluded from the scope of the GATS.

Services supplied in the exercise of governmental authority are, in turn, defined by Article I:(3)(c) as services supplied ‘*neither on a commercial basis nor in competition with one or more supplier*’. The link between these provisions and the scope of the GATS lies in the fact that, if a broad definition of “commercial basis” and “in competition” is adopted, then the notion of governmental authority is narrow, and almost all services would be covered by the GATS.⁹⁸ Conversely, if a narrow interpretation of “commercial basis” and “in competition” is adopted, the scope of governmental authority is larger, and less services fall under the GATS.⁹⁹ A clear and coherent understanding of this provision is, therefore, necessary to determine if, in particular, public services are covered by the GATS.

Despite the importance of the meaning of these terms to the scope of the GATS, there remains great uncertainty about their meaning. Neither the Agreement itself nor any of the WTO’s dispute settlement bodies has provided any guidance as to the meaning of these provisions. To complicate matters further, the WTO Secretariat seems to have put forward contrasting views on the exact meaning of these phrases.

For example, in a background paper¹⁰⁰ published on health and social services, the WTO Secretariat observed that even though it was possible for institutional arrangements governing the provision of health, medical and social services to vary from complete government ownership, on the one extreme, to full private participation, on the other, the norm in most

⁹⁷ Article XXVIII (b) defines “supply a services” as including the production, distribution, marketing, sale, and delivery of a service.

⁹⁸ Krajewski, M ‘Public Services and the General Agreement on Trade in Services (GATS) 2001’ *Center for International Environmental Law Research Paper* 6.

⁹⁹ *Ibid.*

¹⁰⁰ Background papers on various services, including health and social service, were written as part of the information exchange program conducted by the CTS. Their purpose was to give an overview of recent economic and regulatory developments, including commitments under the GATS, in the medical, health and social services sectors.

countries was usually for government and private entities to provide these services side by side.¹⁰¹

Where there is this co-existence of public and private providers, the Secretariat acknowledged that this had the potential to raise questions about the competitive relationship between the two providers, and as a result, about the applicability of Article I:3.¹⁰² In other words, such a situation posed the specific question whether, given this co-existence, a conclusion could be drawn that the services being provided by government and private entities were being provided in competition with one another.¹⁰³ In the background paper the Secretariat answered this question by noting that, in such a situation, it would seem unrealistic to argue that no competitive relationship existed between the two groups of suppliers.¹⁰⁴ This conclusion would mean that, by virtue of article I:3(c), such services would be removed from services supplied in the exercise of governmental authority and the GATS would, therefore, be applicable.

In a different paper, entitled *Market Access: Unfinished Business Post-Uruguay Round Inventory and Issues*,¹⁰⁵ the Secretariat reached what seems to be a conclusion contradictory to the above mentioned position. In this document, it is noted:

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‘It is perfectly possible for governmental services to co-exist in the same jurisdiction with private services. In the health and education sectors this is so common as to be virtually the norm It seems clear that the existence of private health services, for example, in parallel with public services could not be held to invalidate the status of the latter as ‘governmental services’: this would void the exclusion of governmental services of most of its significance’.

This view is again reinforced by a former director of the Trade in Services Division of the WTO Secretariat, David Hartridge, when he noted that:

¹⁰¹ WTO Secretariat “Health and Social Services, Background Note by the Secretariat” <http://docsonline.wto.org/GEN_viewerwindow.asp?http://docsonline.wto.org:80/DDFDdocuments/t/S/C/W50.DOC> [accessed on 18 June 2007].

¹⁰² *Ibid* para 38.

¹⁰³ *Ibid*.

¹⁰⁴ *Ibid* para 39

¹⁰⁵ WTO Secretariat *Market Access: Unfinished Business Post-Uruguay Round Inventory and Issues* <http://www.wto.org/English/res_e/booksp_e/special_study_6_e.pdf> [accessed on 18 June 2007].

‘We ... have to be clear that public sector services, in health and education for example, can and almost invariably do coexist in the same jurisdiction with private suppliers without being in competition with them and therefore without losing the status of governmental services. Police services don't ‘compete’ with the private security firms working alongside them. I doubt if there is a single WTO Member where public and private services do not coexist in this way, and where the public sector would not be seen as governmental services excluded from GATS coverage’.¹⁰⁶

Given this ambiguity and the lack of WTO jurisprudence on the sectoral scope of the GATS, various authors have sought to decipher the meaning of Article I:3 by using the generally accepted rules of treaty interpretation encapsulated in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*.¹⁰⁷

In terms of Article 31:1 of the Vienna Convention the most important rule in treaty interpretation is that a ‘treaty should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its objective and purpose’. Article 31:2 provides that the context includes, in addition to the text, the treaty’s preamble and annexes. Article 32, on the other hand, provides that supplementary means of interpretation, such as, the preparatory texts of the treaty, can be used to confirm what is deciphered by means of Article 31, or where Article 31 does not provide a satisfactory conclusion.

2.3.2.1 ‘Commercial basis’

When considering the meaning of the words ‘commercial basis’ it is important to remember that the GATS Article 1(3)(c) states that ‘a *services supplied* in the exercise of governmental authority means any service supplied neither on a commercial basis nor in competition with

¹⁰⁶ WTO News “WTO Secretariat hits false attacks against GATS: Speech by David Hartridge, Director of Trade in Services Division, WTO Secretariat” <http://www.wto.org/english/news_e/news00_e/gats2000neg_hartridge_e.htm> [accessed on 19 June 2007].

¹⁰⁷ Vienna Convention on the Law of Treaties, United Nations, Treaty Series, vol.1155, 331. It is widely accepted that that these rules represent customary international law and can, therefore, be used for the interpretation of any treaty. These rules have been applied by WTO dispute settlement bodies in various cases.

one or more service suppliers'.¹⁰⁸ The GATS defines the term "supply of service" as including the production, distribution, marketing, sale and delivery of a service.¹⁰⁹ This is significant because it means that the nature or identity of the services supplier is not relevant per se.¹¹⁰ In other words, what must be considered is not whether government is behind, for example, the supply of health or education services, but rather, whether the means of supplying such services is commercial or not.

In relation to the meaning of '*commercial basis*', Krajewski begins by looking at the text of Article I:3(c) and, in accordance with article 31 of the *Vienna Convention*, attributing to the word '*commercial*' its ordinary meaning. Based on a dictionary reading, he concludes that the ordinary dictionary definition of the word '*commercial*' can have two possible meanings. First, '*commercial*' can be understood as referring to an act of buying and selling or the exchanging of goods without the expectation of making profit.¹¹¹ The key feature of this definition is that profit is not a key characteristic of the word. Krajewski notes that, in terms of this definition, the supply of water at a very low, subsidised rates could, for example, be considered as an act of buying and selling, and only services provided for free would be excluded from the sectoral scope of the GATS.¹¹² A second possible definition of '*commercial*' views commerce as being specifically related to profit seeking activities.¹¹³ As opposed to the earlier definition, under this definition profit is an important characteristic of the term.

In order to determine which of the two definitions of '*commercial*' should be applied to Article I:3(c), Krajewski examines the context of the provision itself, as well as the use of the word '*commercial*' in the rest of the Agreement. In this regard Article XXVIII:(d) of the GATS is of particular importance.¹¹⁴ It provides a definition of the term '*commercial presence*', which, as was explained above,¹¹⁵ is one of the modes of supply of services. The Article provides in part that:

¹⁰⁸ Own emphasis

¹⁰⁹ Article XXVIII (b)

¹¹⁰ Leroux E "What is a 'Service Supplied in the Exercise of Governmental Authority' under Article 1(3)(b) and (c) of the General Agreement on the Trade in Services?" (2006) 40(3) *Journal of World Trade* 348.

¹¹¹ Krajewski M "Public Services and Trade Liberalisation: Mapping the legal framework" (2003) 6(2) *Journal of International Economic Law* 351.

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ Article XXVIII contains key definitions of important concepts found in the agreement.

¹¹⁵ See paragraph 2.3.1.2

- (d) “commercial presence” means, any type of business or professional establishment, including through
- (i) The constitution, acquisition or maintenance of a juridical person, or
 - (ii) the creation or maintenance of a branch or a representative office, within the territory of a Member for the purpose of supplying a service;

Based on this wording, Krajewski suggests that “commercial” in the context of the GATS implies a ‘notion of profitability because business or professional establishments are usually set up to make a profit’.¹¹⁶ The conclusion, therefore, drawn from the text and the context is that services supplied on a commercial basis as provided by Article I:3(c) are services supplied on a profit seeking basis.¹¹⁷

A similar conclusion is drawn by Van Duzer¹¹⁸ who, like Krajewski, concludes, based on readings of various dictionary definitions of the word commercial, that ‘it is arguably implicit in these definitions that services supplied on a commercial basis must be sold on a for-profit basis’.¹¹⁹ He, however, goes further than Krajewski by noting that the *actual* making of profit cannot be held as necessary to the meaning of the word.¹²⁰ In other words, he argues that as long as a supplier has a *bona fide* intention to make profits the supply would be commercial even if profits were not made in fact.¹²¹

The conclusions drawn by Krajewski and Van Duzer are however challenged by Aldung.¹²² Aldung argues convincingly that Krajewski draws his conclusion from the definition of “*commercial presence*” provided in Article XXVIII:(d) without considering the examples that

¹¹⁶ Krajewski M “Public Services and Trade Liberalisation: Mapping the legal framework” (2003) 6(2) *Journal of International Economic Law* 351.

¹¹⁷ *Ibid.*

¹¹⁸ VanDuzer J “Health, Education and Social Services in Canada: The Impact of the GATS”, in John M. Curtis and Dan Ciuriak (eds), *Trade Policy Research (2004)*, 287-518.

¹¹⁹ *Ibid.* The author suggests the following definition for the word ‘profit’: exchanging services for revenues that exceed the cost of producing and supplying the service.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² Aldung R “Public Services and the GATS” (2006) 9 *Journal of International Economic Law* 462.

complement this definition.¹²³ These examples include ‘the constitution, acquisition or maintenance of a juridical person ...’. “Juridical person” is in turn defined in paragraph (l) of the same Article as : ‘... any legal entity duly constituted or otherwise organised under applicable law, whether for profit *or otherwise*, and whether privately-owned or governmentally-owned ...’.¹²⁴ Aldung argues that the insertion of the phrase “or otherwise” in the definition of ‘judicial person’, indicates that public utilities and other non-profit organisations are not *per se* excluded from the scope of the definition of ‘commercial presence’, that is, mode 3 of supply of services, and, consequently, from the GATS.¹²⁵

Aldung further challenges the views expressed by Krajewski by questioning why, if the drafters of the GATS intended to focus solely on activities that were profit oriented, they did not explicitly state that in the Agreement.¹²⁶

The implication of the definitions favoured by Krajewski and VanDuzer for ‘public services’ is that they would not be considered as being provided on a commercial basis because in many countries the manner in which public services are supplied is not commercial in nature as defined above.¹²⁷ With that said, it is, however, extremely important to note that many governments are increasingly commercializing the manner in which they supply public services. For example, public higher education institutions attempt to make a profit by, for example, charging foreign students higher fees.¹²⁸ This could potentially bring public services under the scope of the GATS when they would otherwise have been excluded.

2.3.2.2 ‘In competition’

The meaning of the phrase ‘in competition’ is equally contentious, and it has also been the subject of varying interpretations. As was the case with the term “commercial basis”, various authors have also employed the *Vienna Convention’s* interpretive rules in order to obtain an understanding of the meaning attributable to the phrase. It is also important to note, as was

¹²³ *Ibid.*

¹²⁴ Emphasis added

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ The manner in which public services, such as, health and education, are supplied in various countries will be considered in chapter 4 which examines case studies of selected countries.

¹²⁸ *Ibid.* see also Aldung R, “Public Services and the GATS” (2006) 9 *Journal of International Economic Law* 463

done when considering the meaning of ‘in competition,’ that the nature or identity of the services supplier is not of importance. In the context of the words ‘in competition,’ what is relevant is what is occurring in the market place in order to determine whether or not there is competition.¹²⁹ The fact that a government service is supplying a particular service cannot warrant a conclusion that a service is not being supplied in competition with one or more services.¹³⁰

Krajewski suggests the following definition of ‘competition’: ‘competition exists where one producer targets the same market as at least one other producer’.¹³¹ This definition, however, raises more questions than answers. For example, Krajewski notes the following questions raised by the definition:

‘Which is the relevant market? When are producers targeting the same market? It should be obvious that a situation of competition exists if two suppliers provide the same service for the same group of consumers. ... [W]hat if the services are not exactly the same? For example, do two companies covering different parts of the rail network compete with each other? ...Do public and private schools provide the same services, i.e. ‘education’? Even if they do not provide the same service, do they nevertheless compete with each other?’¹³²

Van Duzer conducts a review of various dictionary definitions of ‘competition’ and suggests that for competition to exist ‘customers must be able to choose the supplier whose service they want to acquire and services must seek to attract customers from other suppliers’.¹³³ He further suggests that for competition to exist, service suppliers must, in some sense, be substitutes for each other from the customer’s point of view.¹³⁴ As was the case relative to Krajewski’s definition, important questions also arise from this definition. The key question that this definition raises is, when services should be considered substitutes for each other.

¹²⁹ Leroux E “What is a ‘service supplied in the exercise of governmental authority’ under article 1(3)(b) and (c) of the General Agreement on the Trade in Services?” (2006) 40(3) *Journal of World Trade* 361.

¹³⁰ *Ibid.*

¹³¹ Krajewski M “Public Services and Trade Liberalisation: Mapping the legal framework” (2003) 6(2) *Journal of International Economic Law* 352.

¹³² *Ibid.*

¹³³ VanDuzer J “Health, Education and Social Services in Canada: The Impact of the GATS”, in John M. Curtis and Dan Ciuriak (eds), *Trade Policy Research (2004)*, 388.

¹³⁴ VanDuzer J “Health, Education and Social Services in Canada: The Impact of the GATS”, in John M. Curtis and Dan Ciuriak (eds), *Trade Policy Research (2004)*, 389.

Marchetti and Mavroidis also suggest that because the GATS is a commercial agreement, a commercial definition of the word competition must be used.¹³⁵ Consequently they suggest the following definition: competition is ‘the effort of two or more parties, acting independently, to secure the business of a third party by the offer of the most favorable terms’.¹³⁶ Like with the above definitions, the authors consider the question of what the relevant market is as a fundamental question. In other words, what are the boundaries within which the competition takes place?¹³⁷

In an attempt to find answers to the important questions raised above, various solutions have been proposed. Krajewski suggests that guidance can be sought from examining the manner in which similar provisions in the GATT have been interpreted.¹³⁸ This position is criticised by Aldung who questions the relevance of the GATT jurisprudence to an agreement such as the GATS which covers more than just cross border trade.¹³⁹

Marchetti and Mavroidis argue that the expression ‘in competition with’ should be understood as competition between ‘directly competitive or substitutable’ services and service suppliers, based on the determination of the relevant product and geographic market.¹⁴⁰

VanDuzer, supported by Aldung, proposes a manner in which “in competition” can be understood. Their proposal is based firstly, on criticism which they level against the above mentioned definitions. They criticise the above definitions as solely hinging on the availability of alternative suppliers.¹⁴¹ The alternative provided by the two authors is described by them as “one-way” competition.¹⁴² In terms of this approach inferences on the existence of competition

¹³⁵ Marchetti J and Mavroidis P “What are the main challenges for the GATS framework? Don’t talk about revolution” (2004) *European Business Organisation Law Review* 531.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ In particular, he suggest that the manner in which article III:2 of the GATT which regulates taxation in the context of national treatment between ‘taxed products on the one hand and directly competitive or substitutable products on the other. He suggests that the meaning given to these word by the Appellant Body in the *Korea – Taxes on Alcoholic Beverages* be applied to the GATS Article I:3:(c).

¹³⁹ Aldung R, “Public Services and the GATS” (2006) 9 *Journal of International Economic Law* 464.

¹⁴⁰ Marchetti J and Mavroidis P “What are the main challenges for the GATS framework? Don’t talk about revolution” (2004) *European Business Organisation Law Review* 534.

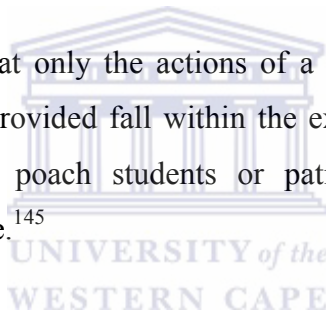
¹⁴¹ Aldung R, “Public Services and the GATS” (2006) 9 *Journal of International Economic Law* 465.

¹⁴² See VanDuzer J “Health, Education and Social Services in Canada: The Impact of the GATS”, in John M. Curtis and Dan Ciuriak (eds), *Trade Policy Research (2004)* at pg 395; and Aldung R, “Public Services and the GATS” (2006) 445 *Journal of International Economic Law* 465.

would depend on the behaviour of the respective supplier.¹⁴³ VanDuzer describes the implications of this approach as follows:

‘This could mean that a service supplier must not operate with a view to competing with others for the supplier’s service to fall within the exclusion. So, for example, where a supplier supplies a service pursuant to an obligation to provide services to all eligible consumers and not because it seeks to increase its revenues by attracting more consumers, such as is the case with public schools, the service would not be supplied in competition with one or more service suppliers. Under this interpretation, it would be irrelevant if there were other suppliers, such as for profit private schools, who compete for students and the revenues they represent with each other and with public schools. For the services of public schools to be not in competition for the purposes of the governmental authority exclusion, all that would matter is whether the public schools themselves engage in competition’.¹⁴⁴

In practical terms, this means that only the actions of a supplier of public services would determine whether the services provided fall within the exclusion. For example, if a public university or hospital seeks to poach students or patients, then their actions can be characterised as being competitive.¹⁴⁵



2.3.2.3 Summary: Are public services covered

Given the above interpretations, it can be seen clearly that no precise answer exists as to whether ‘public services’ fall under the GATS. This is not entirely due to the wording of Articles I:1(3)(b) and (c) but also because, as was pointed out earlier, what constitutes public services varies widely. Even if it is generally accepted that public services are usually supplied not for profit and not in competition with other services suppliers, government actions are increasingly changing, and these might bring these services within the scope of the GATS. This is especially true of the telecoms sector which has seen the privatisation of entities that were previously wholly under government control. Many governments have realised the importance of inviting investment in public services. This has led to a situation

¹⁴³ Aldung R “Public Services and the GATS” (2006) 9 *Journal of International Economic Law* 465.

¹⁴⁴ VanDuzer J “Health, Education and Social Services in Canada: The Impact of the GATS”, in John M. Curtis and Dan Ciuriak (eds), *Trade Policy Research 2004* 395.

¹⁴⁵ Aldung R “Public Services and the GATS” (2006) 9 *Journal of International Economic Law* 465.

where these services are being provided in a similar manner to commercial enterprises, because investors oftentimes seek returns on their investments.¹⁴⁶ It is also important to note that GATS Article XIX calls for the progressive liberalisation of services, which could mean that in the future these services might be brought within the scope of the Agreement.

2.4 General obligations

Once it is determined that particular services fall within the scope of the GATS, Part II of the Agreement contains general obligations and disciplines that are universally applicable to all measures within its scope.¹⁴⁷ In other words, these provisions apply to all measures of WTO members affecting trade in services across all service sectors.¹⁴⁸ There are several of these obligations that apply across all sectors but two are of particular importance.¹⁴⁹

First, Article II of the GATS sets out the important MFN treatment provisions.¹⁵⁰ This provision, which is similar to Article I of the GATT, requires members to ‘accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favorable than that it accords to like services and service suppliers of any other country’.¹⁵¹ Unlike the GATT, Article II:2 allows the GATS members to maintain exceptions to the MFN principle.

A second important general obligation relates to transparency. This obligation is particularly important because, as was noted in the introduction to this study, services trade is primarily affected by the imposition of numerous domestic regulations. Article III accordingly requires members to promptly publish measures which pertain to or affect trade in services, to notify of regulatory changes in sectors where commitments have been made, to maintain enquiry

¹⁴⁶ Hodge J, *Liberalisation of Trade in Services in Developing Countries*, in Mattoo and Englis (eds) (2002) *Development, Trade and the WTO: A Handbook* 221.

¹⁴⁷ Fidler, D et al, “Legal Review of the General Agreement on Trade in Service (GATS) from a health policy perspective” <http://whqlibdoc.who.int/gats/GATS_Legal_Review_eng.pdf> [accessed on 28 June 2007] 61.

¹⁴⁸ *Ibid.*

¹⁴⁹ General obligations and disciplines include MFN (Article II), transparency (Article III), disclosure of confidential information (Article III bis), economic integration (Article V), domestic regulation (Article VI), recognition (Article VII), security exceptions (Article XIV bis), and subsidies (Article XV).

¹⁵⁰ The MFN concept is considered a fundamental cornerstone of the world trading system.

¹⁵¹ Article II:1 GATS

points which provide members with specific information, and to respond promptly to any queries posed to them.¹⁵²

In considering the horizontal obligations and disciplines of the GATS, it is extremely important to note that domestic regulation, which forms a central part of this thesis, is also listed among the general obligations. Even though this is the case, the wording of Article VI shows that not all of its provisions apply across all services.¹⁵³ Many of its disciplines apply to domestic regulation where specific commitments have been made by members.¹⁵⁴

2.5 Specific commitments

One of the most unique aspects of the GATS is the process by which Members assume specific liberalisation commitments through a process called scheduling.¹⁵⁵ Schedules are documents in which individual countries identify sectors in respect of which they are prepared to agree to apply market access and NT obligations as well as exceptions from obligations which they would like to maintain.¹⁵⁶ In making commitments countries do so for each of the four modes of supply discussed above.¹⁵⁷

There are several important observations that can be made regarding the GATS process of scheduling commitments. First, it is critical to note that countries are free to decide which service sectors they wish to subject to market access and NT.¹⁵⁸ This means that if a country does not wish to, or is not ready to, open up a particular service sector, no obligation exists under the GATS for it to do so.¹⁵⁹ This is a very important option available to countries who

¹⁵² UNCTAD/WTO (ITC) (2000) *Business Guide to the General Agreement on Trade in Services* 35.

¹⁵³ Wouters J and Coppens D (2006) “Domestic Regulation within the framework of the GATS” (2006) *Institute of International Law Working Paper no 93 9*.

¹⁵⁴ *Ibid.* For example, Article VI:1 provides: ‘In sectors where specific commitments are undertaken each member shall ensure ...’; Article VI:3 provides: ‘Where authorization is required for the supply of a service on which a specific commitment has been made ...’; or Article VI:6: ‘In sectors where specific commitments regarding professional services are undertaken ...’ (my emphasis).

¹⁵⁵ UNCTAD/WTO (ITC) (2000) *Business Guide to the General Agreement on Trade in Services* 48.

¹⁵⁶ WTO Secretariat “Guide to reading the GATS schedules of commitments and the list of Article II (MFN) exemptions” <http://www.wto.org/english/tratop_e/serv_e/guide1_e.htm> [accessed on 26 June 2007]. Annexure C below contains the schedule of commitments that South Africa has made in the telecommunications sector.

¹⁵⁷ See para 2.3.1.2 above and fn 96.

¹⁵⁸ Chanda R “Social Services and the GATS: Key Issues and Concerns” (2003) 13(12) *World Development* 1999.

¹⁵⁹ *Ibid.*

do not want to make commitments in sensitive and heavily government regulated service sectors.¹⁶⁰

Secondly, unlike under the GATT, there is no general obligation on member countries to extend either market access or NT to other members.¹⁶¹ Countries can, in their schedules, specify the limitations and exceptions they wish to maintain on market access and national treatment.¹⁶² The kinds of limitations that can be imposed by Members are listed in Article XVI GATS. They include: limitations on the number of service suppliers, limitations on the total value of service transactions or assets, limitations on the total number of service operations, limitations on the total number of natural persons that may be employed in a particular service sector, and limitations on the participation of foreign capital.

In summary, the most critical observation that can be made about the GATS commitment mechanism is that it is highly voluntary and flexible.¹⁶³ Members are not forced to open up any service sector, which means that, if a particular sector has sensitive concerns, members are free not to make any commitments in that sector. It can, therefore, be said that the GATS scheduling mechanism tries to strike a balance between commercial interests, on the one hand, and regulatory concerns and public policy objectives, on the other.¹⁶⁴

2.6 Conclusion

It is now indisputable that services are trade commodities which play a significant part in the economies of many countries around the world. This is evident in the need that the WTO saw to develop rules to oversee trade in this sector. What is however less clear is whether public services are covered by the GATS. Irrespective of the interpretation one takes on the scope of the GATS, what is clear is that many governments' actions in relation to public services are increasingly making these services subject to the provision of the GATS.

¹⁶⁰ *Ibid.*

¹⁶¹ UNCTAD/WTO (ITC) (2000) *Business Guide to the General Agreement on Trade in Services* 48.

¹⁶² Chanda R "Social Services and the GATS: Key Issues and Concerns" (2003) 13(12) *World Development* 1999.

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

The following chapter focuses primarily on Article VI GATS which was meant to oversee domestic regulation as it relates to the trade in services. In particular the chapter will consider the work that is currently being done to develop disciplines on domestic regulation which are acceptable to all members of the WTO.



CHAPTER 3 DOMESTIC REGULATION – ARTICLE VI GATS

3.1 Why the need for domestic regulation?

In the introduction to this study it was noted that the international trade in services is particularly affected by the imposition of numerous domestic regulations.¹⁶⁵ The possible meaning of the term “regulation” as it is used in the context of the GATS was also considered. This chapter seeks to explore, first, the general reasons for regulation, and secondly, the various tools and instruments used by countries to regulate, and which the disciplines on domestic regulation seek to address. This chapter also examines in some detail the structure and debates surrounding Article VI of the GATS.

With regard to the reasons for regulation, two broad categories have been identified: economic reasons and political reasons. It is, however, important to note that the above categories are not mutually exclusive. Both categories can justify regulation, and oftentimes regulations are based on both reasons. In addition to the above rationale for regulation, other means of explaining the basis for regulation have been identified. For example, regulations are often imposed in the public interest.¹⁶⁶ Countries employ regulatory policies to promote certain public interests in situations where, for example, an unregulated market would not necessarily deliver desirable social results.¹⁶⁷ Also, regulatory policies can be developed to serve private rather than public interests.¹⁶⁸

3.1.1 Economic reasons for regulation

The primary economic reason for regulation that has been identified by various authors is regulation to prevent “market failure”. Market failure is an economic term that refers to a

¹⁶⁵ See paragraph 1.1 above

¹⁶⁶ Krajewski M, (2003) *National Regulation and Trade Liberalisation in Services: The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* 12.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

situation where an unregulated market does not deliver desired social results.¹⁶⁹ Three kinds of problems, namely, natural monopolies, externalities, and information deficiencies, have in turn been identified as being the cause of market failure.¹⁷⁰

The first factor that can cause market failure, that is, natural monopolies, refers to a situation where goods or services require ‘relatively high fixed production costs compared to their demand’.¹⁷¹ This usually occurs in sectors where the supply of a good or service requires large networks in order to supply such goods or services effectively.¹⁷² These sectors require complex infrastructure, such as, rails for land transport, cables and satellites for communication, and pipes for water supply and sanitation.¹⁷³ Examples of services which would require such large networks are water and energy services, rail transportation, and telecommunications. In such situations multiple firms providing services in a particular sector would be less efficient, that is, more costly to a nation or economy, than would be the case if fewer firms provided the services.¹⁷⁴ In other words, the duplication of the networks required for these services is regarded as being inefficient because of, for example, the amount of physical space that is required to lay network cables or set-up reception towers for telecommunications. In addition, natural monopolies develop in these industries because of the large initial investments required to enter these sectors.¹⁷⁵

The result of a situation where natural monopolies exist is that competition is regarded as not being desirable or practical.¹⁷⁶ The result of this is that services that require large distribution networks have been seen as sectors which require government regulation if they are to be provided efficiently.¹⁷⁷ This is so because a natural monopoly might, for example, charge

¹⁶⁹ Krajewski M, (2003) *National Regulation and Trade Liberalisation in Services: The Legal impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* 12.

¹⁷⁰ Krajewski M, (2003) *National Regulation and Trade Liberalisation in Services: The Legal impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* 13.

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*

¹⁷³ Gamberale, C and Mattoo, A *Domestic Regulation and Liberalisation in Services*, in Hoekman, Mattoo and Englis (eds) (2002) *Development, Trade and the WTO: A Handbook* 290.

¹⁷⁴ Wikipedia “Natural Monopoly” <http://en.wikipedia.org/wiki/Natural_monopoly> [accessed on 17 July 2007].

¹⁷⁵ Gamberale, C and Mattoo A, *Domestic Regulation and Liberalisation in services*, in Hoekman, Mattoo and Englis (eds) (2002) *Development, Trade and the WTO: A Handbook* 291.

¹⁷⁶ Krajewski M, (2003) *National Regulation and Trade Liberalisation in Services: The Legal impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* 13.

¹⁷⁷ *Ibid.*

users of its services in an unfair way because of the absence of a rival competitor. Regulation in these sectors is important to, for example, introduce competition.

The second area that can lead to market failure and which would, therefore, require regulation is where externalities are present. In economics externalities are defined as a situation where a cost or benefit resulting from an economic transaction is borne by parties not directly involved in the transaction.¹⁷⁸ Defined in another way, externalities occur when ‘the economic well-being of one person is directly affected by actions of another person and where market mechanism cannot internalise these effects’.¹⁷⁹ The effects of an action of a third party can be positive or negative.¹⁸⁰ An often cited example of a negative external effect is environmental pollution by a factory. The hazardous substances emitted from such a factory would negatively affect the wellbeing of people living in the vicinity of the factory.¹⁸¹ Even though this is the case, the cost to the lives of these people would not be reflected in the price of the products produced.¹⁸² In other words, the social cost of production is not reflected in price of the product. In such a case regulation can help by internalizing the negative effects by, for example, imposing specific taxes, charges or fees or by applying mandatory standards prohibiting pollution.¹⁸³

Thirdly, market failure can occur where there is an information deficit.¹⁸⁴ An information deficit occurs in a situation when ‘buyers are not adequately informed about the true attributes of sellers’.¹⁸⁵ This usually occurs largely in services, such as, financial services, professional services, or knowledge based services.¹⁸⁶ Gamberale and Mattoo describe the problem posed by an information deficit and the importance of regulation in remedying this deficit as follows:

¹⁷⁸ Wikipedia encyclopedia “Externality” <<http://en.wikipedia.org/wiki/Externality>> [accessed on 17 July 2007].

¹⁷⁹ Krajewski M, (2003) *National Regulation and Trade Liberalisation in Services: The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* 14.

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

¹⁸⁴ Gamberale, C and Mattoo A, *Domestic Regulation and Liberalisation of Trade in Services*, in Hoekman, Mattoo and Englis (eds) (2002) *Development, Trade and the WTO: A Handbook* 291

¹⁸⁵ Gamberale, C and Mattoo A, *Domestic Regulation and Liberalisation of Trade in Services*, in Hoekman, Mattoo and Englis (eds) (2002) *Development, Trade and the WTO: A Handbook* 291.

¹⁸⁶ *Ibid.*

‘ ... [C]onsumers cannot easily assess the competence of professionals such as doctors or lawyers, the safety of transport services, or the soundness of banks and insurance companies. In principle, the adequate dissemination of information can remedy the problem, but it may be too expensive to communicate the necessary information to individual buyers. In such a situation, it may be easier to regulate suppliers than educate consumers. The imposition of minimum regulatory conditions on suppliers reflects a certain uniformity of preferences among consumers about the quality of services. Thus regulators ensure that all banks meet a certain threshold of financial soundness and professionals a certain threshold of competence’.¹⁸⁷

3.1.2 Non-economic reasons for regulation

In considering the reasons why governments regulate, non-economic reasons for regulation are particularly important because they are at the centre of much of the controversy that has surrounded Article VI of the GATS. Many of those who have voiced concerns about the potential negative effects of the GATS have done so in relation to the perceived effect that the GATS will have on members’ ability to regulate for non-economic reasons. Non-economic reasons are also especially important for developing countries because regulation in these countries is often aimed at achieving a wider range of objectives than purely economic ones.¹⁸⁸

The non-economic reasons why countries regulate are based on the assumption that certain goals cannot be achieved through a properly functioning market process.¹⁸⁹ Krajewski identifies two such goals, namely, distributional or social justice and community or ethical values.¹⁹⁰ Regulation to achieve distributional justice stems from the fact that there is general consensus that market processes do not always result in a fair distribution of wealth and power.¹⁹¹ This, therefore, means that some degree of wealth and power distribution is seen as a valuable social goal.¹⁹²

¹⁸⁷ *Ibid.*

¹⁸⁸ Majluf, A “Domestic Regulation and the GATS: Challenges for Developing Countries <http://www.ictsd.org/dlogue/2006-02-28/Dom_Reg.pdf> [accessed on 23 May 2007] 6.

¹⁸⁹ Krajewski M, (2003) *National Regulation and Trade Liberalisation in Services: The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* 18.

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*

The main way in which countries try to evenly distribute the wealth and power disequilibrium created by the market is through fiscal regulatory measures.¹⁹³ Examples of distributional tools include compulsory social security systems, or universal service obligations which require that services be supplied throughout an entire territory in a certain quality and at affordable prices.¹⁹⁴ Universal Service Obligations' (USO) are particularly important for developing countries because they can be an important tool in ensuring the attainment of various developmental objectives. USOs impose requirements that seek to ensure that either every individual member in a particular community can utilise a particular service (universal service), or that members of a particular community have access to a particular service through a common point, such as, for example, a public telephone (universal access).¹⁹⁵

With regard to the second group identified by Krajewski, that is, regulation for ethical values, the case between the *United States and Antigua* considered by the AB of the WTO¹⁹⁶ provides an illustration of such regulations and the potential impact they can have on international trade. In this case Antigua challenged certain US Federal and State laws whose impact, according to Antigua, was to make the cross border supply of gambling and betting illegal, contrary to provisions of the GATS and to commitments undertaken by the United States under that Agreement. In responding to these challenges the United States argued that the challenged measures were necessary to protect "public morals" and "public order" within the meaning of Article XIV(a) of the GATS.¹⁹⁷ In particular, they argued that the measures they had in place were there to protect minors from gambling, which was made easier by the forms of gambling services that Antigua, wanted to provide as well as to prevent the laundering of money garnered from organised crime. In assessing this defence, the Panel looked at the meaning of the terms "public morals" and "public order" and attributed to them their ordinary meaning when read in their context and in light of other WTO agreements. The panel noted

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*

¹⁹⁵ A more detailed discussion of these obligations as they apply to the telecommunications sector in South Africa will be carried out in chapter 4 below.

¹⁹⁶ United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US – Gambling), WT/DS285/AB/R.

¹⁹⁷ *US-Gambling* paragraph 6.443. Article XIV(a) provides:

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

- (a) necessary to protect public morals or to maintain public order;

the sensitivities associated with interpreting these terms and remarked that their content could vary depending on a range of factors such as prevailing social, cultural, ethical, and religious values.¹⁹⁸ In spite of this, the panel stated that “public morals” could be taken to mean ‘standards of right and wrong conduct maintained by or on behalf of a community or nation’.¹⁹⁹ With regard to the meaning of “public order” they found that the term can be taken to mean ‘the preservation of the fundamental interest of society, as reflected in public policy and law’.²⁰⁰ The panel found that the measures in question were measures geared toward the protection of “public morals” and the maintenance of “public order” order in the United States but that they were not “necessary” to achieve their goals because other WTO-consistent alternatives had not been considered by the United States despite invitations to do so by Antigua.²⁰¹

3.2 Types of regulatory instruments employed by countries

It is important to note at the outset that the types of instruments which governments utilise to regulate are numerous. The choice of instrument depends on the context of a particular country. What this section endeavors to do, is to highlight some common types of instruments that are used in regulation. Some of the instruments that will be considered include standards, price controls, and entry controls, such as, qualitative and quantitative measures.²⁰²

3.2.1 Standards

One of the most common forms of regulation employed by countries is the use of standards. Standards can be defined as ‘measures that lay down the characteristics of a service or the manner in which it is supplied’.²⁰³ They can also be defined as norms or requirements that establish uniform methods, processes or practices.²⁰⁴ Standards as an instrument of regulation can be employed in different ways and for various activities. For examples, standard can

¹⁹⁸ *US Gambling (Panel)* paragraph 6.4.61

¹⁹⁹ *US Gambling (Panel)* paragraph 6.465

²⁰⁰ *US Gambling (Panel)* paragraph 6.467

²⁰¹ *US Gambling (Panel)* paragraph 6.534

²⁰² Krajewski M, (2003) *National Regulation and Trade Liberalisation in Services: The Legal impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* 22.

²⁰³ Working Party on Domestic Regulations, Revised Draft, *Disciplines on Domestic Regulation Pursuant to GATS Article VI:4*, 23 January 2008.

²⁰⁴ Wikipedia, *Standards* <<http://en.wikipedia.org/wiki/Standards>> [accessed on November 19, 2008].

prescribe a certain target which a producer must achieve while leaving the exact manner in which that target is achieved to the producer.²⁰⁵ A standard can also set performance requirements which would require a producer to fulfill certain defined quality conditions.²⁰⁶ An example of a performance standard can be a requirement that responses to inquiries about services being provided be delivered in a timely manner.²⁰⁷ Such a requirement can specifically be enforced by requiring that at least a certain number of persons requesting responses must receive a final response from the first time they contact a service provider.²⁰⁸ A third type of standard, which can be considered a little bit more stringent, is one which prescribes specific production methods and materials which must or must not be used in the production of a product.²⁰⁹

3.2.2 Price controls

A second type of regulatory instrument used by governments is price controls. Price controls can be defined as government dictated maximum or minimum prices of goods and services which are aimed at achieving diverse goals.²¹⁰ Price controls can be applied in two ways. First, a specific price for a good or service can be prescribed to producers.²¹¹ For example, certain fixed fees that lawyers can charge can be prescribed or, as is the case in some countries, a maximum amount which landlords can charge their clients can also be prescribed.²¹² This type of price control is an important regulatory tool because it can ensure that there is income redistribution or an evening out of bargaining power.²¹³ A second type of price control aims at limiting price increases either throughout the economy or within a particular sector. Krajewski notes that this form of regulation was an important regulatory tool

²⁰⁵ Krajewski M, (2003) *National Regulation and Trade Liberalisation in Services: The Legal impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* 23.

²⁰⁶ *Ibid.*

²⁰⁷ <http://www.acqnet.gov/comp/seven_steps/library/DODguide-appxC.pdf> [accessed on November 20, 2008]

²⁰⁸ *Ibid.*

²⁰⁹ Krajewski M, (2003) *National Regulation and Trade Liberalisation in Services: The Legal impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* 24.

²¹⁰ Price Controls, <<http://www.businessdictionary.com/definition/price-control.html>> [accessed on November 19, 2008]

²¹¹ Krajewski M, (2003) *National Regulation and Trade Liberalisation in Services: The Legal impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* 25.

²¹² *Ibid.*

²¹³ Krajewski M, (2003) *National Regulation and Trade Liberalisation in Services: The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* 26.

in Europe after the privatisation of government monopolies that provided services such as water, gas, electricity, and telecommunication services.²¹⁴

In the context of trade liberalisation of public services the importance of price control as a regulatory instrument cannot be overstated. Where countries schedule specific commitments in relation to these services, the ability of governments to set minimum prices for these essential services can ensure that essential policy objectives, such as, universal access, are achieved.

3.2.3 Entry controls

A third and important regulatory instrument is the use of entry controls. Entry controls require individuals and business to obtain authorisation before pursuing a certain activity.²¹⁵ There are two general types of entry controls, namely, qualitative entry controls and quantitative entry controls. Qualitative requirements, which are especially important in the service sector are for example defined in current negotiating documents of the WPDR as, ‘substantive requirements relating to the competence of a natural person to supply a service’.²¹⁶ Quantitative requirements, on the other hand, allow individuals or business to do business only if a certain number of persons or activities are not exceeded.²¹⁷

3.2.4 Regulatory tools specifically mentioned in Article VI

The current Article VI of the GATS explicitly mentions certain measures that the provisions on domestic regulation apply to. They include measures relating to qualification requirements and procedures, technical standards, and licensing requirements and procedures. The latest negotiating draft of the Working Party on Domestic Regulation provides the following definitions of the abovementioned regulatory tools.²¹⁸

²¹⁴ *Ibid.*

²¹⁵ Krajewski M, (2003) *National Regulation and Trade Liberalisation in Services: The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* 27.

²¹⁶ Working Party on Domestic Regulations, Revised Draft, *Disciplines on Domestic Regulation Pursuant to GATS Article VI:4*, 23 January 2008.

²¹⁷ *Ibid.*

²¹⁸ Working Party on Domestic Regulations, Revised Draft, *Disciplines on Domestic Regulation Pursuant to GATS Article VI:4*, 23 January 2008. See Annexure B for complete text of this latest draft.

"*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 authorisation to supply a service.

"*Licensing procedures*" are administrative or procedural rules that a natural or a juridical person, seeking authorisation to supply a service, including the amendment or renewal of a license, must adhere to in order to demonstrate compliance with licensing requirements.

"*Qualification requirements*" are substantive requirements relating to the competence of a natural person to supply a service, and which are required to be demonstrated for the purpose of obtaining authorisation 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 authorisation 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.

These measures, as opposed to those mentioned in paragraph 3.2.1 – 3.2.4 above seem to be the primary target of future disciplines on domestic regulation. A document published by the WTO titled *Examples of Regulatory Requirements Affecting Market Access for Professional Service Providers* provides practical examples of domestic regulations that can affect various service sectors.²¹⁹ The examples provided are helpful in further understanding the types of regulations that can impede services trade. Among the examples cited are: licensing requirements which, for example, require a minimum number of vessels for a provider of maritime services, or licensing procedures which require certification of papers necessary to establish a business but which take a long time to process, with no available alternative. Other examples provided include qualification requirements, which require fluency in the language

²¹⁹ WTO Secretariat, Annexure 1 of JOB(02)/20/REV.7 dated 22 September 2003: *Examples of Measures To Be Addressed Under GATS Article VI:4*, Informal Note by the WTO Secretariat.

of the host country which in some cases is not relevant to ensure the quality of the service being delivered.²²⁰

3.3 Article VI of the GATS – Domestic Regulation

Having considered why and how governments regulate, an analysis of Article VI of the GATS which deals with domestic regulation can now be carried out. This Article is extremely important because it is the one where the delicate balance between the expansion of services trade liberalisation, on the one hand, and the preservation of regulatory autonomy, on the other, becomes visible.²²¹ The primary goal behind this Article is to ensure that ‘trade-restrictive measures that are not essential for the achievement of domestic regulatory objectives’ are identified.²²²

Article VI can best be examined by dividing it into three broad categories. The first category covers subparagraphs 1-3. This category deals with measures of general application affecting trade in services where specific commitments have been made. The second category, subparagraph 5, sets out the manner in which issues relating to domestic regulation are to be dealt with pending the entry into force of disciplines on domestic regulation. The final category, subparagraph 4, sets out the mandate as well as guiding criteria for the development of new disciplines on domestic regulation. These three categories will be discussed in turn.

3.3.1 Article VI: 1-3

Article VI: 1-3 of the GATS provide that:

1. In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.

²²⁰ See Annexure 1 for a complete list of examples provided in the above document.

²²¹ Delimatsis P, “Due process and ‘Good’ regulation embedded in the GATS – Disciplining regulatory behavior in services through article VI of the GATS” (2006) 10(1) *Journal of Economic Law* 15.

²²² Delimatsis P, “Due process and ‘Good’ regulation embedded in the GATS – Disciplining regulatory behavior in services through article VI of the GATS” (2006) 10(1) *Journal of Economic Law* 17.

2. (a) Each Member shall 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. Where such procedures are not independent of the agency entrusted with the administrative decision concerned, the Member shall ensure that the procedures in fact provide for an objective and impartial review.
(b) The provisions of subparagraph (a) shall not be construed to require a Member to institute such tribunals or procedures where this would be inconsistent with its constitutional structure or the nature of its legal system.
3. Where authorisation is required for the supply of a service on which a specific commitment has been made, the competent authorities of a Member shall, within a reasonable period of time after the submission of an application considered complete under domestic laws and regulations, inform the applicant of the decision concerning the application. At the request of the applicant, the competent authorities of the Member shall provide, without undue delay, information concerning the status of the application.

The first observation that can be made about the wording of the above provisions is that they deal mainly with the procedural aspects of domestic regulation and not with their actual substance. The provisions require that, where specific commitments have been undertaken by a country, such country has an obligation to ensure that all ‘measures of general application’ are *administered* in a reasonable, objective, and impartial manner.²²³ This was confirmed in the DSB Panel Report in *United States – Measures Affecting Cross-Border Supply of Gambling and Betting Services (US – Gambling)*,²²⁴ where the Panel had the opportunity to consider whether the United States was in violation of Articles VI: 1 and 3 of the GATS, as was alleged by the complainant Antigua. The Panel noted, importantly, that Article VI: 1 did not apply to the substantive content of measures of general application but rather to their administration.²²⁵ The Panel also highlighted the fact that Article VI: 3 dealt with ‘transparency and due process obligations with respect to the processing of applications for authorisation to supply services in a sector where specific commitments have been

²²³ Own emphasis

²²⁴ Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US – Gambling)*, WT/DS285/R, 10 November 2004, adopted 20 April 2005.

²²⁵ *US Gambling* para 6.432.

undertaken²²⁶ therefore underscoring the fact that the provisions of Articles VI: 1 and 3 dealt with procedural matters.

Delimatsis makes insightful observations about the significance of the abovementioned provisions. He notes that, taken together, the first three paragraphs of Article VI introduce into the GATS the concept of due process with principles, such as, *nemo iudex in causa sua* and *audi alteram partem*, which, though present in the public law of most countries, are now introduced at the multilateral level.²²⁷ He further notes that:

‘...what the GATS does is to create multilaterally established private rights against national public administrators and regulators and to add a multilateral level of scrutiny as regards the adherence of national regulatory and administration authorities to the rule of law and due process in an origin-neutral manner’.²²⁸

On a more specific note, the WTO’s adjudicating bodies have had the opportunity on several occasions to interpret the meaning of the term ‘measure of general application’ as used in Article VI: 1 but in the context of the GATT. These interpretations can provide an indication of the meaning of the phrase in the context of Article VI. In the *US – Underwear*²²⁹ case the Appellant Body (AB) found that, to the extent that a restraint affects an unidentified number of economic operators, including domestic and foreign producers, such a measure would be a ‘measure of general application’. Furthermore, in the *Japan – Film* case the Panel, in interpreting the same term, noted that the term ‘general application’ could also cover administrative rulings in individual cases where such rulings establish or reverse principles or criteria applicable in future cases.²³⁰ It is worth mentioning that in the context of the GATS, the word ‘measure’ is specifically defined as was discussed in paragraph 2.3.1.1 above.

A final important observation regarding Articles VI:1-3 is that the due process obligations imposed by these sections only apply where specific commitments have been undertaken by a

²²⁶ *Ibid.*

²²⁷ Delimatsis P, “Due process and ‘Good’ regulation embedded in the GATS – Disciplining regulatory behavior in services through article VI of the GATS” (2006) 10(1) *Journal of Economic Law* 34.

²²⁸ *Ibid.*

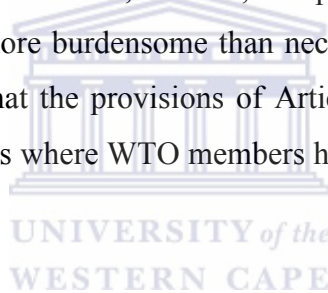
²²⁹ *Unites States – Restrictions on Imports of Cotton and Man-made Fibre Underwear (US – Underwear)*, WT/DS24/R, para 7.65; and Appellant Body Report, *US – Underwear*, WT/DS24/R, 1997, at 21.

²³⁰ *Japan – Measures Affecting Consumers Photographic Film and Paper (Japan – Film)*, WT/DS44/R, adopted 22 April 1998, para 10.388.

Member. This distinction sets Article VI apart from similar provisions, such as, Article III (Transparency), contained in the GATS.²³¹ It is also important to note that the WTO adjudicating bodies have also interpreted the specific content of the standards set in these provisions for the administration of measures of general application, that is, reasonableness, objectivity, and impartiality.²³²

3.3.2 Article VI: 5 – Provisional arrangements on domestic regulation

It was noted earlier that the provisions of Article VI are provisional in nature. In the period leading up to the creation of new disciplines on domestic regulation, Article VI: 5 governs issues regarding licensing, qualifications, and technical standards. This Article provides in part that, pending the entry into force of new disciplines, members are not to apply licensing and qualification requirements and technical standards, *inter alia*, in a manner that is not based on objective and transparent criteria, such as, competence and the ability to supply a service in a manner that is not more burdensome than necessary to ensure the quality of the service. It is important to note that the provisions of Article VI: 5, like other provisions of Article VI, apply to service sectors where WTO members have made specific commitments in those sectors.



Importantly, Article VI:5 (a) (ii) provides that the application of these provisional disciplines should not be applied in a manner which ‘could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made’. This paragraph has a significant effect on licensing procedures and technical standards in that it retains in place already existing measures which members might reasonably have expected at the time of making their GATS commitments.²³³ Delimatsis notes that such measures would include measures already in existence at the time GATS came into force, which has the effect of grandfathering pre-existing domestic regulations.²³⁴ The provisional arrangements are also significant because they provide in paragraphs (b) that, ‘in determining whether a Member is

²³¹ Delimatsis P, “Due process and ‘Good’ regulation embedded in the GATS – Disciplining regulatory behavior in services through article VI of the GATS” (2006) 10(1) *Journal of Economic Law* 19.

²³² See *Panel Report, Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather (Argentina – Hides and Leather)*, WT/DS155/R, adopted 16 February 2001.

²³³ Delimatsis P, “Due process and ‘Good’ regulation embedded in the GATS – Disciplining regulatory behavior in services through article VI of the GATS” (2006) 10(1) *Journal of Economic Law* 40.

²³⁴ *Ibid.*

in conformity with the obligations under paragraph 5(a), account shall be taken of international standards of relevant international organisations applied by that Member'. The significance of this provision will be considered below.

3.3.3 Article VI: 4 – Mandate for future disciplines

Perhaps the most important provision of Article VI is paragraph 4. This paragraph is significant because it sets the mandate for the creation of new disciplines that will ensure that domestic regulations, such as, qualification requirements and procedures, technical standards, and licensing requirements, do not constitute unnecessary barriers to trade. The wording of Article VI:4 specifically provides that:

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

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

In order to fulfil the mandate to establish disciplines “through appropriate bodies”, as set out in Article VI:4, the CTS began by first focusing on regulatory measures for trade in professional services. To do this the CTS created the Working Party on Professional Services (WPPS). The decision to create this group was taken in a Ministerial Decision²³⁵ that was adopted at the same time that the GATS came into effect. This decision recognised the particular impact that regulatory measures had on professional services and decided that, as a matter of priority, the WPPS should develop multilateral disciplines in the accountancy

²³⁵ Marrakech ‘Decision on Professional Services’ of 15 April 1994, <http://www.wto.org/english/docs_e/legal_e/51-dsprf.pdf> [accessed on August 12, 2008].

sector to give effect to commitments that had already been made in this sector.²³⁶ These were the first steps that were taken toward fulfilling the mandate set out in Article VI:4. The accountancy disciplines are important to consider because even though they dealt specifically with the accounting sector, they stand as a model for future disciplines that are to be negotiated for all service sectors where members have made commitments.

The WPPS completed its work on accountancy disciplines in April 1999. These disciplines, which describe their purpose as ‘to facilitate trade in accountancy services by ensuring that domestic regulations affecting trade in accountancy services meet the requirements of article VI:4’,²³⁷ have several main elements. These elements include, first, the inclusion of a necessity test. Paragraph II:2 of these disciplines requires Members to ensure that measures, such as, licensing requirements and technical standards, ‘are not more restrictive than necessary to fulfil a legitimate objective’.²³⁸ Examples of legitimate objectives provided in the disciplines include: protecting consumers, ensuring quality service, ensuring that the persons providing the service are adequately qualified, and ensuring the integrity of the profession.²³⁹ The inclusion of such a test is obviously significant because it acts as a tool with which a balance between preserving the freedom of members to set and achieve regulatory goals and checking the use of measures that unduly restrict international trade.²⁴⁰

A second important element contained in the accountancy disciplines was a transparency requirement which obliges members to explain, upon request, ‘the specific objectives and rationale intended by their regulations’.²⁴¹ As was noted earlier, this transparency provision is different from those contained in Article III of the GATS which apply to all measure of general application pertaining to the GATS. The disciplines also require Members to make all information regarding licensing requirements and procedures public, to provide interested parties with an opportunity to comment on proposed regulations, and to consider comments

²³⁶ *Ibid* para 1.

²³⁷ WTO, *Disciplines on Domestic Regulation in the Accountancy Sector*, S/L/64 17 December 1998 paragraph I.

²³⁸ WTO, *Disciplines on Domestic Regulation in the Accountancy Sector*, S/L/64, 17 December 1998 paragraph II:2.

²³⁹ Industry Canada, GATS 2000 and Rules Governing Domestic Regulations: GATS Article VI:4 in Context, [accessed, <http://www.international.gc.ca/assets/trade-agreements-accords-commerciaux/pdfs/domestic_e.pdf> [accessed on 19 August 2008].

²⁴⁰ WTO Secretariat, “*Necessity test*” in the WTO, S/WPDR/W/27, 2 December 2003.

²⁴¹ *Ibid*.

made by interested parties.²⁴² The final significant element provided by the accountancy disciplines was the requirement placed on Members to ensure that due process in processing applications is followed.

After developing the accountancy disciplines the WPPS was abolished and another body, the WPDR, with an expanded mandate, was created.²⁴³ The WPDR was tasked with developing generally applicable disciplines as well as disciplines that would be applicable to individual sectors or groups.²⁴⁴

3.4 WPDR and progress on Article VI:4 Mandate

The WPDR performs its work as a subsidiary of the CTS, which is the main body responsible for the functioning of the GATS. It is overseen by a chairman whose primary task is to attempt to reach consensus among countries divergent views on proposed new disciplines.²⁴⁵ Since the establishment of the WPDR in 1999, no agreement has yet been reached on future disciplines. There have, however, been four draft proposals which have been circulated and discussed by Members, without consensus being achieved. These proposals are circulated by the chairman of the WPDR and they contain a reflection of progress of the negotiations. The latest draft was circulated on 23 January 2008.

The lack of consensus on futures disciplines stems from the conflicting views held by Members with regard to the various issues that surround domestic regulation. These views range from those of Members who want ambitious disciplines which would see domestic regulation used only when 'necessary', to others which see such a test as having the potential to undermine legitimate regulatory authority.²⁴⁶ Proponents of the former view include Australia, Hong Kong, New Zealand and Switzerland, while those who hold the latter view include Brazil, the Philippines and the Africa Group.²⁴⁷

²⁴² *Ibid.*

²⁴³ See *Decision on Domestic Regulation*, S/L/70, 28 April 1999. This decision replaced the WPPS with the WPDR.

²⁴⁴ *Ibid.*

²⁴⁵ Robert Stumberg, *WPDR Chairman's fourth draft on Domestic Regulation*, dated 23 January 2008, 1 *Memorandum Harrison Institute for Public Law George Town University*, February 12 2008, 5.

²⁴⁶ *Ibid.*

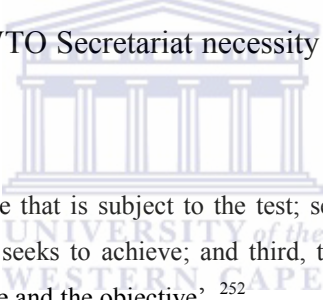
²⁴⁷ *Ibid.*

Concerted effort was put into reaching agreement after the third draft of the WPDR. Members held extensive discussions between June and December 2007 but were unable to reach consensus.²⁴⁸ In the text of the Fourth Draft the chairman of the WPDR noted the persistent differing views that prevented consensus during discussions of the third text and indicated the need for further negotiations on these issues, based on the Fourth Draft proposal.²⁴⁹

One of the issues that has caused persistent problems during the negotiation process has been whether a necessity test should form part of future disciplines.

3.4.1 A “necessity” test as a stumbling block to future disciplines

In general, necessity tests²⁵⁰ are used to establish the consistency of a particular measure with WTO law ‘based on whether the measure is “necessary” to achieve certain policy objectives’.²⁵¹ According to the WTO Secretariat necessity tests can be viewed as containing three elements:



‘...first, the measure that is subject to the test; second, the objective which the measure seeks to achieve; and third, the link of necessity between the measure and the objective’.²⁵²

As noted above, necessity tests strive to strike a balance between preserving the freedom of Members to achieve regulation through measures of their choosing and discouraging Members from maintaining measures that unduly restrict international trade.²⁵³ Despite the potential usefulness of this tool, it has generated a lot of controversy primarily because those who oppose its use view it as being unable to sufficiently guarantee a country’s right to regulate. Those who hold this view justify their concerns by pointing to the manner in which this test has been received by WTO dispute resolution bodies in various cases considered by

²⁴⁸ Robert Stumberg, *WPDR Chairman’s fourth draft on Domestic Regulation*, dated 23 January 2008, 1 *Memorandum Harrison Institute for Public Law George Town University*, February 12 2008, 6.

²⁴⁹ Working Party on Domestic Regulations, *Revised Draft, Disciplines on Domestic Regulation Pursuant to GATS Article VI:4*, 23 January 2008.

²⁵⁰ It is important to note that necessity tests are contained in various agreements of the WTO such as the GATT, the GATS, the Annex on Telecommunication, the TBT, the SPS, and the TRIPS.

²⁵¹ WTO Secretariat, “*Necessity test*” in the *WTO*, S/WPDR/W/27, 2 December 2003 paragraph 4.

²⁵² WTO Secretariat, “*Necessity test*” in the *WTO*, S/WPDR/W/27, 2 December 2003 paragraph 5.

²⁵³ WTO Secretariat, “*Necessity test*” in the *WTO*, S/WPDR/W/27, 2 December 2003 paragraph 4.

them. In the overwhelming majority of cases, with the exception of one,²⁵⁴ considered by them where a party had sought to rely on the necessity test, WTO dispute settlement bodies have rejected the application of the test. This, according to detractors of the test, suggests that under WTO jurisprudence it is virtually impossible for a country to justify a challenged measure as ‘necessary’, even when such measures concerns health or the environment which are legitimate objectives under several WTO agreements.²⁵⁵ Accordingly, they view the necessity test as a ‘wholly deficient and discredited defense’.²⁵⁶ Those who support the use of a necessity test argue that it is important in preventing the use of regulations to avoid trade obligations.

The stumbling block that this test has caused for negotiations can be seen in the positions that have been articulated by various members during the course of negotiations. The United States, for example, has made it clear in a document outlining its position on a draft text circulated by the chairman, that it does not support any type of operational necessity test or standard in any new disciplines on domestic regulation.²⁵⁷ The African, Caribbean and Pacific countries (ACP)²⁵⁸ hold the view that the adoption of a necessity test would not guarantee enough flexibility to safeguard national policy objectives and the different ways available to achieve them.²⁵⁹ As a result they are of the view that, in order to ensure developing countries the full right to regulate, they should not be subject to a necessity test in future Article VI disciplines.

Those opposed to the use of a necessity test for future disciplines seem to have the upper hand in the ongoing negotiations. The current draft text omits a necessity test which earlier

²⁵⁴ *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Appellant Body Report, *Wt/DS/135/AB/R*.

²⁵⁵ Michelle Swenarchuck, *General Agreement on Trade in Services: Negotiations Concerning Domestic Regulations under GATS Article VI(4)*, 1 Canadian Environmental Law Association, November 2000, 5.

²⁵⁶ Michelle Swenarchuck, *General Agreement on Trade in Services: Negotiations Concerning Domestic Regulations under GATS Article VI(4)*, 1 Canadian Environmental Law Association, November 2000, 1.

²⁵⁷ United States Trade Representative, ‘Outline of the U.S Position on a Draft Consolidated Text in the WPDR’ Job (06)/223 (July 11 2006), B.3, <<http://www.tradeobservatory.org/library.cfm?refID=88410>> [accessed August 29, 2008].

²⁵⁸ The African, Caribbean and Pacific states are states which were associated with the European Community through the ACP-EC Partnership Agreement which gave them preferential access to the European Community markets and other benefits (Goode, W (2003) *Dictionary of Trade Policy Terms* 3.) This Agreement has subsequently been replaced by a new regime where blocks of countries are to negotiate Economic Partnership Agreements (EPA) with the European Union.

²⁵⁹ Communication from ACP Group, *Pro Development Principles for GATS Article VI:4 Negotiations*, JOB(06)/136/Rev.1,19 June 2006, C.10, <<http://www.tradeobservatory.org/library.cfm?refID=88212>> [accessed on 29 August 2008].

drafts contained. In place of such a test negotiating Members have introduced a different measure that can serve to assuage the concerns of proponents of a necessity test. The new measure, outlined in the purpose section of the agreement, states that regulations should not constitute disguised restrictions to trade in services. Paragraph I:2 of the 2008 draft proposals provides.²⁶⁰

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

This wording is not an innovation of the WPDR as it has actually been used in various other WTO agreements.²⁶¹ In fact, the AB has had the opportunity in the *US – Gasoline* case to interpret the meaning of this phrase in the context of the GATT.²⁶² The AB found that ‘disguised restrictions’ include disguised discrimination in international trade and that the term also embraced restrictions amounting to ‘arbitrary and unjustifiable discrimination’.²⁶³ The inclusion of this phrase in the purpose section of the draft text is significant in that that phrase does not impose an obligation which Members are required to fulfil, but rather provides an interpretive guideline which could influence future disciplines.²⁶⁴

3.4.2 Issues of particular relevance for developing countries

Like other WTO agreements, issues relating to special and differential treatment (S&D)²⁶⁵ for developing countries (DCs) and least developed countries (LDCs) have called for particular attention during negotiations on future disciplines. In the context of domestic

²⁶⁰ Working Party on Domestic Regulations, *Revised Draft, Disciplines on Domestic Regulation pursuant to GATS Article VI:4*, 23 January 2008.

²⁶¹ See *inter alia* GATS Art. VII:3 (Recognition), GATT Art. XX (Conditions for Evoking General Exceptions) and GATS Art. XIV (General Exceptions).

²⁶² *United States – Standards for Reformulated and Conventional Gasoline (US-Gasoline)*, Appellant Body Report, WT/DS/2/AB/R pg 28.

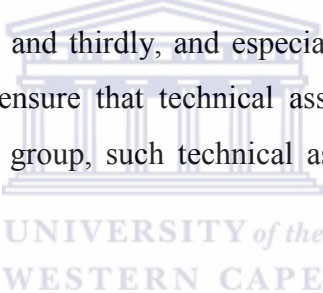
²⁶³ *US Gasoline* paragraph 10

²⁶⁴ Michelle Swenarchuck, *General Agreement on Trade in Services: Negotiations Concerning Domestic Regulations under GATS Article VI(4)*, 1 Canadian Environmental Law Association, November 2000, 7.

²⁶⁵ This is a term used in WTO parlance to describe preferential treatment in favour of developing and least developed countries.

regulation, the particular concerns that give rise to the need for S&D treatment stem from realities, such as, ‘weak regulatory infrastructures, low government resources (financial, technical, and human), and small size service providers striving to upgrade their services’.²⁶⁶ These realities are highlighted in the Preamble of the GATS which recognises ‘asymmetries existing with respect to the degree of development of services regulations in different countries, and the particular need this creates for developing countries to exercise the right to regulate’.²⁶⁷

As a result of these weak regulatory capacities DCs and LDCs have proposed measures which they think can allow them the necessary flexibility to pursue their development objectives, as well as ensure that they can serve their export markets and, therefore, benefit from service trade.²⁶⁸ These proposals include:²⁶⁹ first, the complete exemption of LDCs from any future disciplines; secondly, future disciplines should include specific and operational S&D provisions which should include the extent and timing of DCs obligations’ to comply with the disciplines;²⁷⁰ and thirdly, and especially important for these countries, the inclusion of provisions that ensure that technical assistance and capacity building is granted. According to the Africa group, such technical assistance should be aimed at the following.²⁷¹

- 
- (a) to assist developing country regulators to build the regulatory and institutional framework in their countries
 - (b) to assist service suppliers and regulators in developing countries to comply with these disciplines and to apply them

²⁶⁶ Communication by the African Group on Domestic Regulation, *Pro Development Principles for GATS Article VI:4 Negotiations* <<http://www.iatp.org/tradeobservatory/library.cfm?refID=80780>> [accessed on 30 August 2008] May 2006 paragraph I(1).

²⁶⁷ World Trade Organisation, *General Agreement on Trade in Services*, Apr. 15, 1994.

²⁶⁸ Communication by the African Group on Domestic Regulation, *Pro Development Principles for GATS Article VI:4 Negotiations* <<http://www.iatp.org/tradeobservatory/library.cfm?refID=80780>> [accessed on 30 August 2008] May 2006 paragraph I(1).

²⁶⁹ It is important to note that these proposals are taken from a document of the ACP group. Even though the list of LDCs and DCs includes countries that are not in this group, countries from this group make up a large percentage of the group and the document is, therefore, used as a reflection of the position of the LDCs in particular.

²⁷⁰ Communication by the African Group on Domestic Regulation, *Pro Development Principles for GATS Article VI:4 Negotiations* <<http://www.iatp.org/tradeobservatory/library.cfm?refID=80780>> [accessed on 30 August 2008] May 2006 paragraph 20.

²⁷¹ Communication by the African Group on Domestic Regulation, *Pro Development Principles for GATS Article VI:4 Negotiations* <<http://www.iatp.org/tradeobservatory/library.cfm?refID=80780>> [accessed on 30 August 2008] May 2006 paragraph 22.

- (c) to assist services suppliers in upgrading their services (including their quality and competitiveness, as well as their qualifications) to effectively compete in an ever more demanding global services market
- (d) to assist policy makers and service suppliers in developing countries to effectively participate in international standard setting processes in an informed and sustained manner

In addition to this it has also been proposed that in preparing and applying measures covered by future disciplines, developed countries should take into account the special developmental, financial, and trade needs of developing Members.²⁷² Practically this would entail, for example, phased introduction of new measures, granting of longer time frames for compliance by DCs Members, and granting of concessional fees to DC service exporters.²⁷³

The current negotiating draft recognises the particular difficulties associated with DCs and LDCs compliance with future disciplines and it, therefore, devotes a specific section to addressing these issues. The draft text contains provisions that exempt DCs from applying future disciplines for a particular period of time to be determined once the final text is agreed upon. Provision is made for the possibility of extending such exemption period. Furthermore, reduced administrative fees, long phase in periods, and technical assistance are all provided for. Commitment to S&D measures for future disciplines also seems to have the support of some of the major world powers. The US, for example, in a paper outlining its position on the draft consolidated text, supports a realistic and practical approach to recognising the different levels of development among Members.²⁷⁴ Similarly, China and Pakistan have also voiced support for provisions like those contained in the current draft text.

3.4.3 Other key issues for future disciplines

Besides the issue of a necessity test and the specific issues facing DCs and LDCs, there are several other issues surrounding domestic regulation that Members continue to negotiate

²⁷² Communication by the African Group on Domestic Regulation, *Pro Development Principles for GATS Article VI:4 Negotiations* <<http://www.iatp.org/tradeobservatory/library.cfm?refID=80780>> [accessed on 30 August 2008] May 2006 paragraph 23.

²⁷³ Ibid

²⁷⁴ United States Trade Representative, *Outline of the U.S Position on a Draft Consolidated Text in the WPDR–Job (06)/223 (July 11 2006)*, B.3, <<http://www.tradeobservatory.org/library.cfm?refID=88410>> [accessed August 29, 2008].

over. Some of these issues, which will be discussed briefly, include: international standards, equivalence or mutual recognition, and transparency requirements.

3.4.3.1 International Standards

One of the measures to which future disciplines on domestic regulation will be targeted is technical standards. An important issue regarding the disciplining of technical standards that has been debated by the WPDR is the role and use of international standards for future disciplines.²⁷⁵ It is important to note at the outset that the WTO has ‘no direct role either in promoting the creation of technical standards or in specifying their content’.²⁷⁶ Despite this, international standards have been used in various ways in various WTO agreements. The use of international standards is contentious primarily because of their potential impact on national regulatory freedom. The impact that international standards have on regulatory freedom depends on the manner in which such standards are used. One of the ways in which these standards can be used is by establishing a presumption in favour of such standards, an example of which is Article 3.2 of the SPS.²⁷⁷ A second way in which international standards have been used in WTO agreements is by requiring Members to use international standards for national regulations or requiring them to base regulations on international standards.²⁷⁸ For example, both Articles 3.1 and 2.4 of the SPS and TBT, respectively, use the peremptory word ‘shall’ when referring to the use of international standards.²⁷⁹ Where standards are used

²⁷⁵ Krajewski, M (2003) *National Regulation and Trade Liberalisation in Services: The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* 146.

²⁷⁶ Dale Honeck, *The WTO and Technical Standards in Services*, <www.iso.org/iso/livelinkgetfile?llNodeId=21793&llVolId=-2000> [accessed on 3 September 2008] September 2005.

²⁷⁷ Krajewski M (2003) *National Regulation and Trade Liberalisation in Services: The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* 146. Article 3.2 of the SPS provides that:

‘Sanitary and phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994.’

²⁷⁸ *Ibid.*

²⁷⁹ Article 3.1 of the SPS provides: ‘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...’ Article 2.4 of the TBT, on the other hand, provides: ‘Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or relevant parts of them, as a basis for their technical regulations...’

in the abovementioned ways regulatory freedom is greatly reduced, and it can be extremely difficult for Members to defend any deviation from an international standard.²⁸⁰

A final way in which international standards can be used is by establishing an obligation to take international standards into account.²⁸¹ As opposed to the two examples mentioned above, this type of obligation has a less intrusive effect on national regulatory autonomy. Article VII of the Accountancy disciplines employs this type of obligation in dealing with technical standards.

In the context of the current work of the WPDR, the WTO Secretariat has previously expressed a view that supports the use of a presumption in favour of international standards in future domestic regulation disciplines.²⁸² In its view the application of such a test can ‘facilitate the application of the necessity test and would also constitute a strong incentive for the use of international standards’.²⁸³ This view is also supported by various WTO Members, such as, Switzerland who have submitted a detailed proposal on the issue, and by authors who have written on the issues of future disciplines.²⁸⁴ From the perspective of DCs and LDCs this position creates difficulties. For example, even though these countries are sometimes members of international standard setting institutions, they are unable to adequately participate in these institutions because of lack of capacity, which effectively means that they do not participate in developing the standards to which they will be held.²⁸⁵ Furthermore, the standards developed at the international level are often unattainable for many DCs and LDCs. The latest draft negotiation of the WPDR seems to have opted for a minimally intrusive reference to international standards. It uses the word ‘should’ as opposed to ‘shall’ that was used in previous drafts.

²⁸⁰ Krajewski M (2003) *National Regulation and Trade Liberalisation in Services: The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* 147.

²⁸¹ Krajewski M (2003) *National Regulation and Trade Liberalisation in Services: The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* 146.

²⁸² WTO, Council for Trade in Services, note by the Secretariat, *Article VI:4 of the GATS: Disciplines on Domestic Regulation applicable to all services*, para 35 – 42.

²⁸³ Ibid.

²⁸⁴ See WTO, Working Party on Domestic Regulation, Communication from Switzerland, “Proposal for Disciplines on Technical Standards in Services”, 1 February 2005, S/WPDR/W/32, para. 20 and also Mattoo, A and Sauvé, P (2003) *Domestic Regulation and Services Trade Liberalisation* 228.

²⁸⁵ Krajewski M (2003) *National Regulation and Trade Liberalisation in Services: The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* 147.

3.4.3.2 Equivalence or Mutual Recognition

One of the critical areas that Article VI:4 disciplines will address relates to qualification requirements and procedures. In particular, future disciplines will have to address the issue of recognition as it relates to qualification requirements and procedures.²⁸⁶ Recognition can have a considerable impact on trade in services especially where professional services are being traded. Despite the potential impact that recognition (or lack thereof) can have on trade in services, the GATS does not contain any explicit requirements on recognition.²⁸⁷ This is understandable due to the regulatory diversity that exists among GATS members which can make mutual recognition extremely hard to achieve.²⁸⁸ The GATS, however, authorises and regulates plurilateral recognition agreements among its members, which are sometimes referred to as mutual recognition arrangements.²⁸⁹ Such mutual recognition agreements are based on the concept of equivalence. Equivalence can be defined as the requirement that ‘where a host country’s regulatory goals are addressed by home country regulation, the host country should accept the home country’s regulation as equivalent’.²⁹⁰ Put differently, a service supplier who has already met certain criteria in his home country should not be asked to meet the same criteria again.²⁹¹ It is important to note that equivalence should not be confused with harmonisation which involves the adoption of a single standard or qualification requirement by two or more countries.²⁹²

Similar obligations are used in other WTO agreements, such as, Articles 2.7 and 4.1 of the TBT and the SPS respectively. Importantly, the Accountancy Disciplines, which, as

²⁸⁶ ‘Recognition’ refers to the act of acknowledgement by one country of the qualifications, standards, licence requirements or testing methods of another country (Goode, W (2003) *Dictionary of Trade Policy Terms* 290.)

²⁸⁷ Joel P. Trachtman, *Lessons for the GATS from existing WTO Rules on Domestic Regulation*, in A. Mattoo and P. Save (eds) *Domestic Regulation and Services Trade Liberalisation* 75.

²⁸⁸ Wouters J and Coppens D (2006) “*Domestic Regulation within the Framework of the GATS*” *Institute of International Law Working Paper No 93* 49.

²⁸⁹ Article VII provides: ‘...a Member may recognize the education or experience obtained, requirements met, or licenses or certifications granted in a particular country. Such recognition, which may be achieved through harmonization or otherwise, may be based upon arrangement with the country concerned or may be accorded autonomously.’

²⁹⁰ Julia Nielson, *Short Cut or Long Road? Equivalence, International Standards and the GATS*, <[http://www.wto.org/english/tratop_e/serv_e/workshop_march04_e/sess2_nielson_oecd1_e.ppt#256.1,Short cut or long road? Equivalence, international standards and the GATS](http://www.wto.org/english/tratop_e/serv_e/workshop_march04_e/sess2_nielson_oecd1_e.ppt#256.1,Short_cut_or_long_road?_Equivalence,_international_standards_and_the_GATS)> [accessed 4 September 2008].

²⁹¹ Krajewski M (2003) *National Regulation and Trade Liberalisation in Services: The Legal impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* 147.

²⁹² Goode, W (2003) *Dictionary of Trade Policy Terms* 166.

mentioned, earlier serve as a blueprint for future disciplines, make provision for recognition. Paragraph 19 of these Disciplines provides that:

‘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 requirement’.

This obligation stems from the recognition by Members of the ‘the role which mutual recognition agreements can play in facilitating the process of verification of qualifications and/or in establishing equivalency of education’.²⁹³

Krajewski notes that, in the context of future disciplines for domestic regulations, the concept of equivalence may play an important note in facilitating trade in services, without restricting regulatory autonomy.²⁹⁴ He, however, argues that this will depend on who decides the question of equivalence. In his opinion, if equivalence is determined solely by national authorities without a WTO dispute settlement organ questioning this decision, then regulatory autonomy would largely remain intact whereas regulatory autonomy would be affected in the WTO’s dispute settlement bodies could question these decisions.²⁹⁵

3.4.3.3 Transparency requirements

Transparency refers to the ‘degree to which trade policies and practices, and the process by which they are established, are open and predictable’.²⁹⁶ In the context of trade in services transparency is extremely important because of the high regulatory nature of services, the opaqueness sometimes attached to the regulatory process, and the regulatory discretion involved in adopting, implementing, and administering standards, procedures and regulations.²⁹⁷ It is important to note at the outset that the issue of Transparency is dealt with under a separate heading of the Agreement. Article III GATS, titled transparency, deals with all measures of general application which pertain to or affect the operation of the GATS. It is

²⁹³ *WTO Disciplines on Domestic Regulation in the Accountancy Sector*, S/L/64, 17 December 1998 para. 21.

²⁹⁴ Krajewski M (2003) *National Regulation and Trade Liberalisation in Services: The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* 147.

²⁹⁵ *Ibid.*

²⁹⁶ Goode, W (2003) *Dictionary of Trade Policy Terms* 363.

²⁹⁷ Industry Canada, ‘GATS 2000 and Rules Governing Domestic Regulations: GATS Article VI:4 in Context,’ [accessed, <http://www.international.gc.ca/assets/trade-agreements-accords-commerciaux/pdfs/domestic_e.pdf> [accessed on 19 August 2008].

important to differentiate these provisions from those that Article VI: 4 disciplines will cover. The disciplines being negotiated under the WPDR will cover all measures of general application relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards affecting the trade in services sector *where specific commitments have been undertaken*. This distinction is not always apparent because Article VI and Article III dealing with Transparency are both part of Part II of the GATS which contains rules that are applicable across all sectors.

A significant issue related to transparency obligations that has been debated in the WPDR concerns the ability of other Members to comment on proposed measures affecting licensing and qualification requirements as well as technical standards. In a proposal on transparency put forward by the US, it suggested that Members should publish all relevant measures that relate to the scope of Article VI, and give all interested parties a reasonable opportunity to comment.²⁹⁸ The proposal also suggests that Members should address in writing substantive issue raised in these comments.²⁹⁹

This proposal has been resisted particularly by DCs who argue that it is too intrusive of their regulatory decision making process.³⁰⁰ In particular, the ACP Group has noted that such requirements may be:

‘... contrary to constitutional structures and legal systems in many developing countries as well as result in granting foreign-service suppliers opportunities to exert undue pressure on domestic decision making process, which is the core of sovereignty’.³⁰¹

In addition to concerns relating to sovereignty, objections to such transparency requirements also stem from issues related to cost. It has been noted that the most costly aspect of the GATS for DCs relate to transparency obligations. Proposal such as that of the US can only add to the burden of DCs in this regard. They have, therefore, proposed transparency

²⁹⁸ WTO Document Code JOB (06) /182, *Horizontal Transparency Disciplines in Domestic Regulation*, June 9 2006 paragraph B.3.

²⁹⁹ Ibid.

³⁰⁰ South Center, *The Development Dimension of the GATS Domestic Regulation Negotiations*, SC/AN/TPD/SV/11, August 2006.

³⁰¹ Communication from *ACP Group, Pro Development Principles for GATS Article VI:4 Negotiations*, JOB(06)/136/Rev.1,19 June 2006, C.10, <<http://www.tradeobservatory.org/library.cfm?refID=88212>> [accessed on 29 August 2008].

obligation which are general in nature and which are in line with their capacity.³⁰² The current WPDR draft does not incorporate the proposals of the US but rather contains provisions which would be closer to the position advocated for by DCs.

3.5 Relationship between Article VI, market access, and national treatment

In addition to domestic regulation, two other provisions of the GATS aim to ensure that international trade in services is not hindered by countries' protectionist measures. These provisions, namely, market access and national treatment, are considered fundamental principles of the international trading system and can also be found in almost all WTO agreements. Broadly defined, 'market access' in the WTO framework is a term outlining government imposed conditions under which a product may enter a country under non-discriminatory conditions, whereas national treatment requires that a country give others' goods and services the same treatment that it gives its own, once they are within its territory.³⁰³ The interaction between these three provisions, and, in particular, the interaction between market access (Article XVI) and domestic regulation (Article VI), has remained extremely unclear and controversial. One author has referred to this interaction as the 'thorniest systemic issue in the GATS today'.³⁰⁴ This issue is contentious because a particular regulatory measure can be considered as either a market access restriction or a domestic regulation with different legal consequences flowing from the classification. For example, if the scope of market access restrictions under Article XVI of the GATS were defined too broadly, many domestic regulations would be prohibited and ongoing negotiations would lose much of their purpose.³⁰⁵ Furthermore, a broad definition of market access provisions can lead to a situation where violations of WTO provisions are found where broad regulatory autonomy was envisioned.³⁰⁶ A detailed analysis of this issue is beyond the main scope of this work but the general issues surrounding this debate are considered below.

³⁰² South Center, *The Development Dimension of the GATS Domestic Regulation Negotiations*, SC/AN/TPD/SV/11, August 2006.

³⁰³ Goode, W (2003) *Dictionary of Trade Policy Terms* 222 and 242.

³⁰⁴ Delimatsis, P 'Don't Gamble with the GATS – The Interaction between Article VI, XVI, XVII, and XVIII GATS in Light of the US-Gambling Case, (2006) *Journal of World Trade Law*, 1061.

³⁰⁵ Pauwelyn, J, 'Rien ne Vas Plus? Distinguishing Domestic Regulation from Market Access in GATT and GATS, (2005) 4(2) *World Trade Review*, 133.

³⁰⁶ Ibid.

The WTO dispute settlement body had the opportunity in the *US-Gambling* case to determine the scope of market access provisions.³⁰⁷ Both the Panel and AB had to decide whether certain provisions imposed by US Federal and State law prohibiting the remote supply of gambling and betting services (mode I) were contrary to specific commitments made by the US granting unlimited market access to foreign suppliers in this sector. The laws in question were intended to address concerns, such as, money laundering, fraud, organised crime, and compulsive and under age gambling.

Both dispute settlement bodies confirmed certain important distinguishing features of Article XVI (market access) and Article VI (domestic regulation). One of the key distinguishing features that was highlighted is that ‘market access obligations set forth in Article XVI were intended to be obligations in respect of quantitative, or “quantitative-type measures”’.³⁰⁸ The AB came to this view by looking at, among other things, the guidelines for scheduling commitments, which provides in relevant part that:

‘The quantitative restrictions [in Article XVI] can be expressed numerically, or through the criteria specified in subparagraphs (a) to (d); these criteria do not relate to the quality of the service supplied, or to the ability of the supplier to supply the service (i.e. technical standards or qualification of the supplier)’.³⁰⁹

After conducting a lengthy analysis of Article XVI of the GATS dealing with market access, both the Panel and AB decided that the total ban imposed by the US provisions could be expressed numerically as a ‘zero quota’, and as such was a measure restricting market access. This decision has been severely criticised by Pauwelyn who argues that the dispute settlement bodies’ focus was placed on the effect of the measures in question. He argues that:

‘...[if] Article XVI were to include domestic regulation simply because it also has the effect of quantitatively restricting the number of services or suppliers that can enter the market, then most domestic regulation would

³⁰⁷ United States – *Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US – Gambling)*, WT/DS285/AB/R.

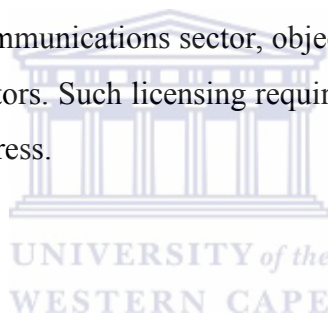
³⁰⁸ Ibid para 248.

³⁰⁹ *1993 Scheduling Guidelines*, supra note 30, at para. 4. Repeated also in *Guidelines for the Scheduling of Specific Commitments Under the GATS*, adopted by the Council for Trade in Services on 23 March 2001, S/L/92 (hereafter ‘Revised Scheduling Guidelines of 2001’) 4.

already be prohibited by Article XVI, unless it can be justified under the limited exceptions of Articles XIV and XIVbis. If so, why bother negotiating further disciplines under Article VI:4?³¹⁰

3.6 Conclusion

One of the observations that can be made with regard to much of the discussion on Article VI is that it is still a work in progress. Many of the issues surrounding domestic regulation remain under negotiation and the impact that future disciplines will have is yet to be seen. It is encouraging to note that the negotiations have now reached a stage where draft texts are being formulated. Provisions on domestic regulation are extremely important and the utmost effort should be made to ensure that negotiations are completed timeously. In light of the collapse of the DOHA round of negotiations it is with concern that one awaits the outcome of current negotiations. The next chapter endeavors to look at some of the policy objectives that South Africa has set in the telecommunications sector, objectives which are achieved through licences issued to telecoms operators. Such licensing requirements are among the regulations that future disciplines seek to address.



³¹⁰ Pauwelyn J, 'Rien ne Vas Plus? Distinguishing Domestic Regulation from Market Access in GATT and GATS', (2005) *World Trade Review*, 161.

CHAPTER 4 TELECOMMUNICATIONS AND SOUTH AFRICA'S DOMESTIC POLICY OBJECTIVES

4.1 Overview of telecommunications sector

Much like the service sector as a whole, telecom services are an essential part of any economy because of the dual role they play, both as 'a source of economic growth and an enabler of growth in other sectors'.³¹¹ Access to telecoms is absolutely essential to achieving both the economic and social goals of any country. One author has described telecoms networks as a country's nervous system, in the absence of which no country can develop and progress.³¹² As noted in the introduction to this work, telecom services had until recently been provided largely through government owned operators.³¹³ The last few decades, however, saw a shift toward the liberalisation and privatisation of these services. The reasons for this shift include: increasing evidence that liberalised telecoms markets innovate faster and serve the consumer better; the need to attract capital to expand and upgrade telecoms networks; and the development of international trade in telecoms.³¹⁴ Liberalisation has been accompanied by new laws and policies as well as by new regulatory agencies to implement them.³¹⁵

South Africa has not been an exception to this move toward liberalised telecoms markets. A White Paper³¹⁶ on telecoms policy in South Africa published in 1996 noted the need for a new market structure which would orientate the sector toward "accelerated development"

³¹¹ Republic of South Africa, *The White Paper on Telecommunications Policy*, GG No. 16995 of 13 March 1996 26 para 1.5.

³¹² Haroon, Y, *Regulation and Diplomacy in Telecommunications* (2004), ICT Working Paper No. ICT-TM-2004, 5 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=727203> [accessed on 3 November 2008].

³¹³ See paragraph 1.3.1 above. The reason these services were provided largely through government lay partly in the thinking that these services were considered as being able to deliver strong social gains that could be realized mainly through government involvement. (Hodge J, 'Liberalising Communication Services in South Africa', <<http://siteresources.worldbank.org/INTRANETTRADE/Resources/SAfrTelecom.pdf>> [accessed on October 7, 2008].

³¹⁴ Intven H, Tetrault M, 'Overview of telecommunication regulation', in Intven H, Oliver J, and Sepulveda E, *Telecommunications Regulation Handbook*, (2000) 1-1.

³¹⁵ Melody, H (1997) *Telecom Reform: Principles, Policies, and Regulatory Practices*, 2.

³¹⁶ The White Paper has its history in the British parliamentary system and it basically contains governments thinking on a particular issue that it is to be legislated.

and which would take into account “technological and international trends”.³¹⁷ To achieve this, the South African government developed a policy widely referred to as “managed liberalisation” which was aimed at opening up the sector in a phased process.³¹⁸ Before examining this policy and the current telecoms market structure, it is important to briefly examine the history of telecoms in South Africa. Such a discussion is important in understanding some of the current policy objectives of the sector, policies which can potentially be affected by WTO law.

4.2 History of telecoms in South Africa

Telecoms services in South Africa were previously provided by South African Post and Telecommunications (SAPT).³¹⁹ Like many telecoms providers at that time, SAPT was a government monopoly controlled by the Minister of Transport and Communication. In the case of South Africa this meant that the political ideology of apartheid that prevailed at the time influenced the provision of SAPT’s services which were skewed largely along racial lines.³²⁰ Horwitz notes that at the time South Africa began its political transition in 1990, the approximately 3 million lines that were available were provided primarily to whites and to business.³²¹ He further notes that figures from 1989 showed the level of telephone penetration per 100 blacks at 2,4 whereas that for whites was at 25.³²²

As different factors during the late eighties and early nineties forced a shift in the economic and ideological policies of the government of the time, privatisation was put forward as part of the government’s long term economic strategy.³²³ This included the privatisation of parastatals, such as, SAPT which were inefficient and heavily in debt.³²⁴ In 1991, postal and

³¹⁷ Republic of South Africa, *The White Paper on Telecommunications Policy*, GG No. 16995 of 13 March 1996 26 para 2.1.

³¹⁸ Gillwald A, ‘Good intentions poor outcomes: Telecommunications reform in South Africa’, (2005) 29 *Telecommunications Policy* 470.

³¹⁹ Cohen T, *Domestic policy and South Africa’s commitments under the WTO’s Basic Telecommunications Agreement: Explaining the apparent inertia*, (2001) 4(4) *Journal of International Economic Law* 730.

³²⁰ Horwitz, Robert B, ‘Telecommunications policy in the new South Africa: participatory politics and sectoral reform’, (1997) 23 *Communicatio* 64.

³²¹ Ibid.

³²² Ibid.

³²³ Horwitz, Robert B, ‘Telecommunications policy in the new South Africa: participatory politics and sectoral reform’, (1997) 23(2) *Communicatio* 66.

³²⁴ Cohen T, *Domestic policy and South Africa’s commitments under the WTO’s Basic Telecommunications Agreement: Explaining the apparent inertia*, (2001) 4(4) *Journal of International Economic Law* 730.

telecoms services were separated and removed from direct ministerial control.³²⁵ A new telecommunications company, named Telkom, was created to provide and oversee the provision of telecommunications. It is important to note that even though *Telkom* was no longer under direct ministerial control, it had not been privatised *per se*.³²⁶ The government opted to begin by first commercialising Telkom as a way for first preparing it for privatisation.³²⁷ This meant that Telkom still remained state owned, with the difference between it and SAPT being that *Telkom* paid dividends and taxes, and was largely responsible for rising its own funding.³²⁸ On a different front, the government decided to issue two cellular phone licences in 1994, a move which further opened up the telecommunications sector.³²⁹

After elections in 1994 and the coming into power of a new government, steps were initiated to develop a new telecommunications policy for South Africa. Horwitz identifies three events which helped shape this new policy. They include, first, the creation of a National Telecommunications Forum (NTF) which brought together government, business, labour, user groups, and civic groups; secondly, the development of the governments' Reconstruction and Development Program (RDP)³³⁰ which set the goal that telephones should be provided to every school and health clinic; and finally, the development of a White Paper on policy for the sector.³³¹ The result of these processes, and especially the formulation of the White Paper, is South Africa's "managed liberalisation" policy, a policy which has largely determined the telecoms market structure of South Africa today.

³²⁵ Ibid.

³²⁶ Cohen T, *Domestic policy and South Africa's commitments under the WTO's Basic Telecommunications Agreement: Explaining the apparent inertia*, (2001) 4(4) *Journal of International Economic Law* 730. According to Horwitz, there was initial resistance to privatisation by the incoming African National Congress government because they saw privatisation as a strategy of the former regime to transfer government held entities to the private sector where they would continue to exercise control over them. (Horwitz, Robert B, 'Telecommunications policy in the new South Africa: participatory politics and sectoral reform', (1997) 23 *Communicatio*, 66.)

³²⁷ Ibid.

³²⁸ Ibid.

³²⁹ Hodge J, 'Liberalising Communication Services in South Africa', <<http://siteresources.worldbank.org/INTRANETTRADE/Resources/SAfrTelecom.pdf>> [accessed on October 7, 2008.]

³³⁰ RDP was a "integrated and coherent socio-economic policy framework" that was developed in 1994 by the new South African government with goals for "the final eradication of the results of apartheid" (RDP White Paper, Discussion Document, September 1994, < <http://www.anc.org.za/ancdocs/policy/white.html#1.3>> [accessed on 7 October 2008.]

³³¹ Horwitz, Robert B, 'Telecommunications policy in the new South Africa: participatory politics and sectoral reform', (1997) 23 *Communicatio*, 69.

4.3 Managed liberalisation and current market structure

4.3.1 Managed liberalisation

According to the White Paper on telecoms policy, at the centre of government's liberalisation policy would be a five year period where *Telkom* would exclusively be authorised to provide certain specific services.³³² This period of exclusivity was extended to the provision of services, such as, national long distance, international and local access telecoms services, public payphone services, and the provision of facilities that would enable the provision of Value Added Network Services (VANS).³³³ This period of exclusivity was granted to *Telkom* to achieve certain goals which included:

‘...the expansion of the telecommunications infrastructure and attainment of universal service, the promotion of growth within the sector as an enabling infrastructure for economic growth in other areas, the adoption of strong customer focus, and the enhancement of South Africa's telecoms capacity internationally.’³³⁴

It is significant to note here that South Africa's strategy for liberalising the telecoms sector serves as an example on a broad scale of the balance that must be struck between liberalisation and specific national policy objectives. This tension is captured in the following excerpt from the telecoms White Paper:

‘The challenge is to articulate a vision that balances the provision of basic universal service to disadvantaged rural and urban communities with the delivery of high-level services capable of meeting the needs of a growing South African economy.’³³⁵

As can be seen from the above excerpt, South Africa's liberalisation strategy was particularly influenced by policy considerations, such as universal service. South Africa's

³³² Republic of South Africa, *The White Paper on Telecommunications Policy*, GG No. 16995 of 13 March 1996 26 para 2.6.

³³³ Msimang M, ‘Universal Service and Universal Access’, in Thorton L, Carrim Y, Mtshaulana P, Reburn P (eds), *Telecommunications Law in South Africa*, (2006) 231.

³³⁴ Republic of South Africa, Government Gazette No. 16995, *The White Paper on Telecommunications Policy*, 13 March 1996 26 para 2.6.

³³⁵ Republic of South Africa, Government Gazette No. 16995, *The White Paper on Telecommunications Policy*, 13 March 1996 26 para 1.2.

government acknowledged telecoms infrastructure and universal service as the most important priorities for Telkom during this period of exclusivity, and, therefore saw it fit to stagger the pace of liberalisation to ensure these priorities were met.³³⁶ These objectives were enforced through the license issued to Telkom as well as licences issued to other operators.

In terms of this policy, after the expiry of the five year period of exclusivity that had been granted to Telkom, it was envisioned that a Second National Operator (SNO) would be licensed to introduce more competition into the sector.³³⁷ Two other important aspects of South Africa's managed liberalisation policy were, the eventual licensing of a further mobile phone operator, as well as the introduction of an independent regulator responsible for overseeing the sector. It is important to note that even though mobile phone operators and providers of Value Added Services (VAS) were liberalised, they were somewhat constrained by the requirement of having to use *Telkom's* networks.³³⁸

4.3.2 Current market structure

The current telecommunications market structure in South Africa reflects the abovementioned policy. The market structure can best be looked at by considering three major areas of the telecoms sector. These areas are: fixed-line operators, mobile phone operators, and VAS providers.³³⁹ It is also important in this regard to briefly consider the regulatory body tasked with overseeing this sector.

4.3.2.1 Fixed-line operators

There are currently two fixed-line service providers in South Africa. As noted above, South Africa's telecommunications policy envisioned the granting of a monopoly for a period of five years to Telkom after which a SNO would be licensed. The Telecommunications

³³⁶ Republic of South Africa, *The White Paper on Telecommunications Policy*, GG No. 16995 of 13 March 1996 26 para 2.11. A detailed discussion on Universal Service in the context of South Africa will be conducted below.

³³⁷ Republic of South Africa, *The White Paper on Telecommunications Policy*, GG No. 16995 of 13 March 1996 26 para 2.22.

³³⁸ Gillwald A, 'Good intentions poor outcomes: Telecommunications reform in South Africa', (2005) 29 *Telecommunications Policy* 470.

³³⁹ Bowman Gilfillan Attorneys, 'Broadcasting and Telecommunications', in *Doing Business in South Africa 2006*, <http://www.lexmundi.com/images/lexmundi/PDF/guide_southafrica.pdf> [accessed on 3 November 2008].

Amendment of Act of 2001³⁴⁰ introduced a SNO whose licence was issued in 2005. The SNO, Neotel, was officially launched in August 2006.³⁴¹ Having only recently started its operations, the true impact of the SNO is yet to be realised in South Africa. It is, however, widely hoped that the introduction of Neotel will improve competition in the entire telecoms sector.

4.3.2.2 Mobile phone operators

The mobile phone sector in South Africa has been slightly more open for competition and for a longer period than the fixed-line sector. As noted above, the first two mobile phone licences were issued as early as 1993. These licenses were awarded to two companies named Mobile Telecommunications Network MTN (Pty) Ltd. and Vodacom (Pty) Ltd. The Telecommunications Act (Telecoms Act) which was the result of the White Paper discussed above recognised the licenses of these two mobile phone operators which had been issued before its coming into force, but required the concerned authority to conduct an enquiry into the economic feasibility of the provision of two more cellular telecoms services.³⁴² The licence for a third mobile phone operator was issued in June 2001 to Cell C (Pty) Ltd. Until the addition of the third mobile phone operator, MTN (Pty) Ltd and Vodacom (Pty) Ltd dominated the mobile phone sector, and to a large extent continue to enjoy the largest market share in the mobile services sector.³⁴³ A fourth mobile phone operator licence was issued on June 2006 to Virgin Mobile (Pty) Ltd.³⁴⁴

4.3.2.3 VANS providers

VANS have been defined as:

‘...a telecommunication service provided by a person over a telecommunication facility, which facility has been obtained by that person in

³⁴⁰ s1(d) Telecommunications Amendment Act 64 of 2001.

³⁴¹ Neotel, ‘SNO Launches services as NEOTEL,’ 31 August 2006 <<http://www.neotel.co.za/neotel/view/neotel/en/page65?oid=1314&sn=Detail>> [accessed 10 October 2008].

³⁴² Section 37(2)(b) Telecommunications Act No 103 of 1996.

³⁴³ In 2006, it was estimated that Vodacom had approximately 55% market share, MTN 35% and Cell C 10 % (www.econex.co.za).

³⁴⁴ Virgin Mobile Press office, <<http://www.virginmobile.co.za/virgin-portal-customer/Press6.do>> [30 October 2008].

accordance with the provisions of section 40(2) of the Act to one or more customers of that person concurrently, during which value is added for the benefit of the customers, which may consist of:

- any kind of technological intervention that would act on the content, format or protocol or similar aspects of the signals transmitted or received by the customer in order to provide those customers with additional, different or restructured information;
- the provision of authorised access to, and interaction with, processes for storing and retrieval of text and data;
- managed data network services.³⁴⁵

This definition is better understood by considering examples of VANS. Examples include, the provision of e-mail services, access to databases, voicemail, video conferencing, internet service provision, web hosting, and telecoms related publishing and advertising.³⁴⁶ South Africa's telecoms policy opened up the provision of VANS services for competition with the important proviso that VANS operators provide their facilities through Telkom networks.³⁴⁷ Specifically, section 40(2) of the Telecoms Act provided that VANS licence should contain a provision requiring that their services be provided by facilities provided by Telkom until May 2002, after which time they can be provided both Telkom and the SNO until another date is fixed, when VANS operators can provide their services using their own networks. This, for a long time, caused major concerns for VANS operators because it meant that they remained at the mercy of Telkom, both as regards the price they paid to use Telkom's networks as well as in the delays that they experienced in being connected to the facilities provided by Telkom.³⁴⁸ This in turn also obviously had an impact on the cost and quality of the VANS services to consumers.

A recent decision by the High Court of South Africa has, however, significantly shaken the telecoms sector, especially as it relates to VANS and the manner in which they provide their services. In the case between *Altech Autopage Cellular (Pty) Ltd v The Chairman of the*

³⁴⁵ Yacoob S, and Pillay K, 'Licensing', in Thornton L, Carrim Y, Mtshaulana P, Reburn P (eds), *Telecommunications Law in South Africa*, (2006) 156.

³⁴⁶ Section 40(2) Telecommunications Act 103 of 1996.

³⁴⁷ Gillwald A, 'Good intentions poor outcomes: Telecommunications reform in South Africa', (2005) 29 *Telecommunications Policy* 469.

³⁴⁸ Gillwald A, 'Good intentions poor outcomes: Telecommunications reform in South Africa', (2005) 29 *Telecommunications Policy* 471.

Council of the Independent Communications Authority of South Africa and Others,³⁴⁹ the applicant, a holder of a VANS licence issued under the Telecoms Act (which has now been replaced by the Electronic Communications Act 36 of 2005 Act [ECA]), contended that it had a right in terms of the ECA to have its licence converted into one that would allow it to provide its services through its own network, rather than that of Telkom or the SNO.

In terms of the ECA two classes of licences, namely, the Electronic Communications Network Service (ECNS) licence and the Electronic Communications Service (ECS) licence can be issued.³⁵⁰ The former are issued to entities that own infrastructure, such as, fibre optic cables, satellite systems or other fixed systems,³⁵¹ used to provided telecoms services by themselves and by others.³⁵² The latter are issued to entities providing services under networks provided by others.³⁵³ These licences can further be divided into additional categories depending on the ‘feature and importance of the network or service in question’.³⁵⁴ Services that are important for socio-economic development receive individual licences while those which are not important for socio-economic development receive class licences.³⁵⁵ The effect of this is that four different types of licences can be granted, namely, Individual Electronic Communications Network Service licence (I-ECNS), an Individual Electronic Communications Services licence (I-ECS), a Class Electronic Communications Network Service licence (C-ECNS), and a Class Electronic Communications Services licence (C-ECS).³⁵⁶

³⁴⁹ *Altech Autopage Cellular (Pty) Ltd v The Chairman of the Council of the Independent Communications Authority of South Africa and Other, Transvaal Provincial Division*, Case No 20002/8, yet to be reported.

³⁵⁰ Section 5(2) ECA.

³⁵¹ Section 1 of the ECA defines “electronic communications networks” as:

‘any system of electronic communication facilities (excluding subscriber equipment), including without limitation –

- (a) satellite systems;
- (b) fixed systems (circuit-and packet-switched);
- (c) mobile systems;
- (d) fiber optic cables (under sea and land-based)
- (e) electricity cable systems (to the extent used for electronic communications services); and
- (f) other transmission systems, used for conveyance of electronic communications’

³⁵² Nicci Ferguson Inc, ‘A plain, easy-to-follow guide to the licensing regime created by the Electronic Communications Act’, (2006) 3.

³⁵³ *Ibid.*

³⁵⁴ *Ibid.*

³⁵⁵ *Ibid.*

³⁵⁶ Nicci Ferguson Inc, ‘A plain, easy-to-follow guide to the licensing regime created by the Electronic Communications Act’, (2006) 4.

Altech argued that, in terms of certain regulations published by the Minister of Communications in the Government Gazette (GG), they were entitled to provide their services through telecommunication facilities other than those provided by Telkom and the SNO.³⁵⁷ Regulation 4(a) provided in part that ‘...1 February 2005 shall be the date from when value added network services may be provided by telecommunications facilities other than those provided by Telkom or the SNO or any of them’.³⁵⁸ Despite this, the Minister of Communications subsequently refused to approve the above regulations’ and instead published new regulations which were silent on the issue of VANS operators being able to provide services using their own networks.³⁵⁹ A license issued to the applicant after these regulations allowed them to provide their services only through the facilities of others licensed to provide such facilities, and not through their own networks.

The applicant had received its original licence under the Telecoms Act, and, in terms of the ECA, licences issued under the former Act had to be converted to fit the categories provided for in the ECA. It was during this conversion process that the applicant expressed an intention to build its own network to be used in the provision of its services. During this process, the second respondent, the Independent Communications Authority of South Africa (ICASA), the body responsible for regulating the telecoms industry, identified certain VANS operators who were being considered for licences that would allow them to provide their services through their own networks. The applicant was not among the five, which did not matter, because ICASA had indicated that all VANS operators would first receive their regular licences, after which ICASA would consider those to whom licences to provide services through their own networks would be granted, that is, those who would receive I-ECNS licences.

The applicants contended that the primary respondent in the case changed its stance several times, first conceding the right to self-provide VANS services through personal networks, then denying such right. It further contended that it was its right in terms of provisions that were to oversee the transition from the old telecoms Act to the ECA, to have its licence converted into both an I-ECS and I-ECNS licence. The respondent disputed the right of the

³⁵⁷ See, Republic of South Africa, Government Gazette No. 26763, *Determinations of dates in terms of the Telecommunications Act (Act 103 of 1996)*, 03 September 2004.

³⁵⁸ Ibid.

³⁵⁹ See, Republic of South Africa, Government Gazette No. 27608, *Regulations for value added network services*, 20 May 2005.

applicant to an I-ECNS licence through conversion and further argued that not all VANS licencees would be entitled to a I-ECSN licence. After considering arguments for both sides, the Court found that ministerial policy directions issued by the Minister of Communication were *ultra vires* the enabling legislation for various reasons, including the fact that the Minister had encroached on ICASA's independence, which is guaranteed by statute. This ministerial directive had directed ICASA on how they were to deal with the conversion of VANS licences', this was contrary to the Act and had influenced ICASA to change its earlier position which seemed to favour VANS operators providing services through their own networks. The Court set aside the various decisions of the Minister and of ICASA, and ruled that the applicant was entitled to self provide its own telecommunications facilities as from 1 February 2005. It further found that the portions of the applicant's licence that deprived it of the entitlement to self provide were of no force or effect.

This judgment has been hailed as a "landmark", and also as having far reaching implications for competition in South Africa's telecoms sector where tariffs are among the highest in the world.³⁶⁰ The ability to self-provide will obviously affect cost and technological innovation, as well as increase competition for Telkom and the SNO Neotel. It is, however, important to note that the Minister of Communications has indicated her intention to appeal the decision, on the grounds that 'if VANS licencees are allowed to obtain I-ECSN licenses...governments managed liberalisation policy will be seriously undermined to the detriment of the Information and Communications Technology industry'.³⁶¹ The real impact of the decision, is therefore, yet to be realised.

4.3.2.4 South Africa's telecoms regulatory body

In the discussion on the *Altech* case South Africa's main telecoms regulatory body featured heavily. It is, however, important to note that telecoms in South Africa are regulated by several different parties. These parties include the Minister responsible for Communications, ICASA, and, to the extent that issues related to competition become relevant, the

³⁶⁰ Erasmus G, *Comments on major breakthrough in Telecoms*, TRALAC Newsletter 2008-09-10, <http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=1694&news_id=52797&cat_id=1030> [accessed 16 October 2008].

³⁶¹ Department of Communication, *Minister to appeal Altech judgment*, <http://www.doc.gov.za/index.php?option=com_content&task=view&id=280&Itemid=457> [accessed October 16, 2008] 19 September 2008.

Competition Commission.³⁶² These parties to a certain extent have different influences over telecoms in South Africa. In terms of the ECA, the Minister has the power to ‘make policies on matters of national policy applicable to the ICT sector’, which must be consistent with the objectives of the ECA and other legislation.³⁶³ The Act also sets out several other powers of the Minister in relation to invitations for the issuing of new licences, her relationship with ICASA, and also with regard to the promotion of universal service obligations (USOs).

The ICASA Act, which established the body that oversees both telecommunications and broadcasting in South Africa, states the objectives of the regulator as being to regulate broadcasting in the public interest, to ensure fairness and diversity broadly representing South African society as required by the Constitution, as well as to regulate telecommunications in the public interest.³⁶⁴ The main powers of ICASA are exercised in the implementation of policy that has been developed by the Minister.³⁶⁵ For example, it plays an active part in the issuing of licences based on criteria established by the minister.³⁶⁶ In addition, ICASA is also responsible for the adjudication of disputes between providers of telecoms services as well as between consumers and such providers.³⁶⁷

4.4 South Africa’s policy objectives in the telecoms sector as enforced through licencing

Having considered South Africa’s telecoms market structure, it is important to understand some of the policy objectives that the government has set for this sector, and to consider how, if at all, WTO provisions on domestic regulation affect the development and implementation of these objectives. Provisions of the GATS such as Article VI and future disciplines on domestic regulation have a reach on government policy objectives because these objectives are achieved through licences issued to operators in this sector. It is important to note that as was discussed in chapter three, licencing requirements are among the domestic regulations which future disciplines will oversee. In this regard it is important to

³⁶² Mokgosi, L, ‘The telecommunications regulators’, in Thorton L, Carrim Y, Mtshaulana P, Reburn P (eds), *Telecommunications Law in South Africa*, (2006) 101.

³⁶³ Section 3(1) ECA 36 of 2005.

³⁶⁴ Section 2(a)(b) Independent Communication Authority of South Africa Act 13 of 2000 (as amended)

³⁶⁵ Mokgosi, L, ‘The telecommunications regulators’, in Thorton L, Carrim Y, Mtshaulana P, Reburn P (eds), *Telecommunications Law in South Africa*, (2006) 111.

³⁶⁶ *Ibid.*

³⁶⁷ *Ibid.*

juxtapose these policies with general WTO law, as well as with those provisions specifically dealing with the telecoms sector. These laws will briefly be discussed in the next section, before considering the specific policies that the South African government has adopted for the telecoms sector. The main policy that will be looked at aims to ensure that every citizen in South Africa has access to telecoms services, while at the same time correcting the imbalances of South Africa's past history of racial inequality.

4.5 WTO law on telecommunications

In the discussion on the framework of the GATS it was noted that, at the end of the Uruguay Round, there were certain issues on which members could not agree, and on which it was decided that further negotiations were needed. Negotiations on these issues, one of which was telecommunications, continued after the Uruguay Round, and, as agreement was reached, the documents reflecting members' consensus were incorporated into the GATS as annexures and protocols. The provisions of GATS that specifically deal with telecommunications were, therefore, incorporated into GATS after the conclusion of the Uruguay Round. These documents include, *inter alia*, the *Annex on Telecommunications* (the Annex) and the *Reference Paper on Regulatory Principles* (Reference Paper) of 24 April 1996. The Annex aims at ensuring that commitments made by WTO members in other sectors are not frustrated by lack of access to telecoms services.³⁶⁸ As a result the Annex guarantees service suppliers 'access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions'.³⁶⁹

The *Reference Paper* on the other hand, is aimed at ensuring that the market power of former monopolies 'is not used to the detriment of new market entrants'.³⁷⁰ Among the issues that the *Reference Paper* seeks to ensure is the prevention of anti-competitive behaviour through, for example, requiring members to ensure that major suppliers³⁷¹ do not engage in anti-

³⁶⁸ Krajewski M, (2003) *National Regulation and Trade Liberalisation in Services: The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* 167.

³⁶⁹ Article 5(a) Annex on Telecommunications.

³⁷⁰ Krajewski M, (2003) *National Regulation and Trade Liberalisation in Services: The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* 166.

³⁷¹ 'Major supplier' is defined in the reference paper as: 'a supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of: (a) control over essential facilities; or (b) use of its position in the market'.

competitive practices, requiring members to ensure interconnection with major suppliers in a non-discriminatory way, ensuring that USOs do not hinder international trade, and finally, requiring members to establish an independent regulator.³⁷²

The WTO recently celebrated 10 years of the coming into force of these agreements with an acknowledgment of the contribution they have made to in the liberalisation of the telecoms sector.³⁷³ It is these agreements as well as other the WTO law already discussed whose effect on domestic regulation to achieve policy objectives in the telecoms sector must be considered. It is also import to keep in mind the specific commitments made by South Africa in the telecoms sector. South Africa's schedule of commitments for the telecommunications sector is contained in Annexure C of this study.

4.6 Universal service obligation (USO)

It is widely acknowledged that there exists a “digital divide” between developed and developing countries especially those located in Africa. This digital divide refers to the ‘gap between those with effective access to digital and information technology and those without’.³⁷⁴ The digital divide does not only manifest itself at the global level but exists also within individual countries such as South Africa.

One of the mechanisms that has been used globally to bridge the divide that exists within an individual country is the imposition of universal service (US) and universal access (UA) obligations. US can be defined as a policy which focuses on promoting universal availability of connections by each individual household to public telecommunications networks.³⁷⁵ Defined another way, US is a policy that endeavours to see the availability of a telephone in individual homes. US policies can be difficult to achieve, and are usually employed by developed countries because of the economic muscle they have which can help them bring such goals to fruition. For example, the European Union's directive on US provides that, ‘Member States shall ensure that the services set out in this chapter are made available at the

³⁷² See *Reference Paper* Article 1-6.

³⁷³ WTO News, WTO DG celebrates benefits of opening trade in telecoms, <http://www.wto.org/english/news_e/sppl_e/sppl86_e.htm> [accessed 3 November 2008].

³⁷⁴ Wikipedia, *Digital Divide*, <http://en.wikipedia.org/wiki/Digital_divide> [accessed on 18 October 2008].

³⁷⁵ Intven H and Tetrault M, ‘Overview of telecommunication regulation’, in Intven H, Oliver J, and Sepulveda E, *Telecommunications Regulation Handbook*, (2000) 6-1.

quality specified *to all end-users* in their territory, independently of geographical location, and, in light of specific national conditions, at an affordable price'.³⁷⁶

UA on the other hand refers to a policy that seeks to ensure that every person has reasonable means of access to publicly available telecoms facilities.³⁷⁷ This differs from US in that, rather than providing services to each individual, common access points where people can access these services are provided. UA is obviously a more realistic objective for developing countries, given that it would be easier to achieve than US.

UA to key services such as telecommunications is a critical developmental objective in most countries.³⁷⁸ Tuthill describes these goals as policy objectives that fall within a country's "right to regulate" as set out in the preamble to the GATS.³⁷⁹ He further notes that these requirements are not market access restrictions but rather domestic regulations as set out in Article VI of the GATS.³⁸⁰

Even though they are defined differently, they are essentially aimed at ensuring the availability and affordability of telecoms services to the public, goals which would not easily be achieved where markets have been opened up for competition.³⁸¹ The precise manner in which US and UA are achieved usually varies from country to country. This is so because factors, such as, the level of technology advancement, socio-economic background, and history within a particular country, require that US goals be adopted to take these factors into account. Furthermore, both developed and developing countries also have to adjust their US goals to take into account 'advancing user demands and market developments' at different

³⁷⁶ Chapter II Article 3:1, European Union, *Directive of the European parliament and of the Council on universal access and user' rights relating to electronic communications networks and services (universal service directive)*, 2000/0183.

³⁷⁷ Intven H and Tetrault M, 'Universal Service', in Intven H and Tetrault M (eds) *Telecommunications Regulation Handbook*, (2000) 6-1.

³⁷⁸ South Center, *The Development Dimension of the GATS Domestic Regulation Negotiations*, SC/AN/TPD/SV/11, August 2006 23.

³⁷⁹ Tuthill L, *Universal Service in Telecom: How did the telecom sector adopt GATS to universal service in a competitive environment*, UNCTAD Expert Meeting <http://www.unctad.org/sections/wemu/docs/c1em30p025_en.pdf> [accessed on 3 November 2008].

³⁸⁰ *Ibid.*

³⁸¹ Garnham, N, *Universal Service*, in Melody, H (1997) *Telecom Reform: Principles, Policies, and Regulatory Practices* 200.

times.³⁸² There are, however, certain core strategies that countries employ to achieve these objectives. These include, the establishment of a universal services funds (USF), contributions to which are sourced from operators who have received licences to provide telecoms services, the granting of special licenses to operators to provide services in rural and remote areas, and in the case of South Africa, the granting of a period of exclusivity to a particular operator with specific obligations to ensure UA.³⁸³

These obligations are applied in the telecoms sectors of almost all countries of the world. USOs, therefore, serve as an example of policy considerations in the telecoms sector for which countries need the leeway to plan, taking into account their individual contexts. It is important to note that the WTO has sought to ensure that where US and UA policies are developed, they are developed in a manner that does not hinder international trade. This is done not in the context of Article VI of the GATS but, as was noted earlier, in terms of section 3 of the *Reference Paper*. This section acknowledges the right of a WTO member to define the kind of USOs they wishes to maintain, and notes that such obligations would not be considered anti-competitive *per se*, provided that they are administered in a transparent, non-discriminatory, and competitively neutral manner, and are not more burdensome than necessary to achieve the kind of USO defined by individual members.³⁸⁴ Krajewski observes that the language contained in the *Reference Paper* draws on elements of Article VI by making USOs subject to a necessity test.³⁸⁵ Even though it is the *Reference Paper* that specifically discusses USOs, it is submitted that these obligations are often not substantive requirements for setting up telecoms services, and as such, would also fall to be considered under Article VI.

The next section aims to look at how South Africa has specifically sought to achieve UA and whether its mechanism will stand up to the scrutiny of future disciplines on domestic regulation, or even to the requirements of the *Reference Paper*.

³⁸² European Union, *Directive of the European parliament and of the Council on universal access and user' rights relating to electronic communications networks and services (universal service directive)*, 2000/0183, 2.

³⁸³ Msimang, M, 'Universal Service and Universal Access', in Thornton L, Carrim Y, Mtshaulana P, Reburn P (eds), *Telecommunications Law in South Africa*, (2006) 218.

³⁸⁴ WTO, Reference Paper on basic telecommunication services, 24 April 1996, para 3.

³⁸⁵ Krajewski M, *Nationa Regulation and Trade Liberalisation in Services: The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* (2003) 169.

4.6.1 South Africa's universal access policy

It has been noted that even though USOs have at their core the same objectives, the modalities of achieving these goals vary from country to country. In the context of South Africa, it widely acknowledged that the central goal of its USOs is 'to reverse the damage caused by decades of policies that promoted racial discrimination and denied certain individuals access to telecommunication services'.³⁸⁶ This can be seen in the White Paper on telecommunications which sets affordable communication for all at the core of the government's vision, and the goal of its policy, as well as in the objectives of the ECA. For example, the White Paper in its introductory paragraphs notes that:

'In designing the universal service agency, and incorporating it into the Telecommunications Act, it will be important to keep in mind the concern ...that classic approaches to managing the implementation of telecommunications policy would not be sufficient to keep the focus on the goal of universal service long enough to redress the existing imbalances. The apartheid system left the vast majority of black South Africans, particularly in rural communities, without access to basic communications services. Liberalisation trends associated with the spread of the global information highway and the legitimate needs of South African business and urban areas for advanced services could easily combine to draw interest and resources away from the delivery of service to rural and disadvantaged areas. The potential development impact of telecommunications would be limited; the opportunity would be lost for South Africa to leapfrog traditional stages of development through the use of telecommunications to foster the application of new information technologies.'³⁸⁷

From the above it can also be seen that in South Africa there exists an inseparable link between race, accessibility, and affordability of telecoms services which makes South Africa's approach to universal access entirely unique. Any USOs that South Africa adopts have to take into account the effects of decades of racial discrimination left over by the

³⁸⁶ Msimang, M, *Universal Service and Universal Access*, in Thorton L, Carrim Y, Mtshaulana P, Reburn P (eds), *Telecommunications Law in South Africa*, (2006) 218. See also, Cohen T, *Domestic policy and South Africa's commitments under the WTO's Basic Telecommunications Agreement: Explaining the apparent inertia*, (2001) 4 *Journal of International Economic Law* 743.

³⁸⁷ Republic of South Africa, *The White Paper on Telecommunications Policy*, GG No. 16995 of 13 March 1996 26 para 1.13.

former apartheid policy. This requires both adequate policy space as well as creativity in the development of USOs. With this characteristic that makes South Africa's UA objectives different from those of other countries, South Africa has sought to achieve UA through first, on a legislative level, stating clearly in the ECA that one of the objectives of the Act is to 'promote universal provision of electronic communications networks and electronic communications services and connectivity for all'.³⁸⁸ On a more practical level, the government has tasked two particular bodies with the responsibility of ensuring that the goal of UA is achieved. These bodies are the Universal Services and Access Agency (USAASA) and ICASA.

The USAASA was originally established by the Telecoms Act under the name Universal Service Agency (USA), and tasked with the following goals: striving to promote universal access; encouraging, facilitating and offering guidance in respect of schemes to provide universal access; fostering the adoption and use of new methods of attaining universal access and service; and stimulating public awareness on the benefits of telecommunications services.³⁸⁹

In addition to these goals, the Act also sets for the USAASA the important goal of determining the specific content of US and UA in South Africa. As was noted earlier, these concepts are dynamic and, therefore, require constant re-definition. Section 82(3) of the ECA requires the USAASA to 'from time to time, with due regard to the circumstances and attitudes prevailing in the Republic and after obtaining public participation to the greatest degree practicable', make determinations to the Minister regarding what constitutes US and UA. In August 2008 the Agency published in the Government Gazette (GG) a notice seeking the public's views on the exact content of these two concepts.³⁹⁰ There is, therefore, currently no specific definition of what exactly constitutes UA and US in South Africa. The current proposed definitions for UA and US, respectively, are:

³⁸⁸ Section 2)(c) ECA.

³⁸⁹ Section 82(1)-(4) ECA. These goals are a verbatim replication of those that were originally set out in the Telecoms Act. It is also important to note that s 80(1) of the ECA provides that despite the repeal of the Telecoms Act by the ECA, the USA will continue to exist as a juristic person, but under the name USAASA.

³⁹⁰ Republic of South Africa, Government Gazette No 31333, *Notice in terms of section 82(3) and section 88(2), 3 and 4, of the Electronic Communication Act, 2005 (Act 36 of 2005) inviting written representations in respect of definitions of universal services, universal access, and underserved areas and determinations in respect of needy persons*, 15 August 2008.

“Universal access means that every person, within their area, has reasonable (in terms of distance and affordable access to publicly available electronic communications network services, electronic communication services, and broadcasting services on non-discriminatory basis.”

‘Universal services means a reliable connection from any part of the country, to a defined minimum set of electronic communications services and broadcasting services, at an affordable rate regardless of geographic location including no less than voice, data and broadcasting.’³⁹¹

Coupled with the above objectives, the USAASA is also responsible for administering a Universal Service Fund (USF) which was also initially created by the Telecoms Act and continues to exist in terms of the ECA.³⁹² This Fund, which receives money from every holder of a telecoms licence issued in terms of the ECA, seeks to provide subsidies that encourage telecoms operators to provide their services to ‘uneconomic places and persons’.³⁹³ In terms of section 88 of the ECA, some of the ways in which the money from the USF is used in South Africa include, providing subsidies to public schools and institutions of higher learning for procurement of electronic communication services, establishment of telecenters and multi-purpose community centres, setting up public information terminals, and facilitating the provision of multimedia services. It is important to note that it is all licenced telecoms operators that are required to contribute to the Fund, which complies with the requirements set out in the *Reference Paper* that USOs should be non-discriminatory.

4.6.2 Under-serviced area licences

Another way that South Africa has sought to achieve US and UA in the telecommunication sector is through the granting of Under-Serviced Area licences (USAL). USALs are also not a uniquely South African invention, but the manner in which they are utilised takes into account the realities on the ground. USALs were introduced by the Telecommunications

³⁹¹ Republic of South Africa, Government Gazette No 31333, *Notice in terms of section 82(3) and section 88(2), 3 and 4, of the Electronic Communication Act, 2005 (Act 36 of 2005) inviting written representations in respect of definitions of universal services, universal access, and underserviced areas and determinations in respect of needy persons*, 15 August 2008 13, 16.

³⁹² Section 65(1) of the Act

³⁹³ Msimang, M, *Universal Service and Universal Access*, in Thorton L, Carrim Y, Mtshaulana P, Reburn P (eds), *Telecommunications Law in South Africa*, (2006) 224.

Amendment Act of 2001. Section 40A of this Act provided ICASA with the power to issue USALs to small businesses that are preferably made up of persons from groups that were historically disadvantaged, in particular women, for the provision of telecom services to areas with less than 5% fixed line teledensity.³⁹⁴ It is important to note that these licences are not issued to operators using a particular type of technology. Operators granted USAL can use any technology that is effective and efficient in putting up the infrastructure and providing services to the community to which his licence applies.³⁹⁵

A significant observation that can be made regarding USAL is that it could be argued that the criteria for selecting those who are eligible for such licences can be challenged under WTO law as being discriminatory, in that preference is given to persons from historically disadvantaged backgrounds. The invitation to apply for an USAL published by the Minister in the GG provides that of the criteria used to consider applications, those related to ownership, control and empowerment will be given preference.³⁹⁶ Such claims can be made if for example the clause of the latest negotiating text on future disciplines that specifically deals with universal service obligations remains as it is. This clause provides that ‘nothing in these disciplines prevents Members from exercising the right to introduce or maintain regulations in order to ensure provision of universal service, in a manner consistent with their obligations and commitments under the GATS’.³⁹⁷ Even though this clause for the most part is not too burdensome, it has been noted that the freedom given to countries to regulate to achieve universal service is somewhat constrained by the requirement that it has to be consistent with the other obligations of the GATS and commitments made by members.³⁹⁸ It has been argued that similar provisions that try to ensure that persons from historically disadvantaged backgrounds in South Africa violate WTO principles such as market access and national treatment and it would therefore not be farfetched to envision a challenge on USALs on these grounds.³⁹⁹ That such a policy choice which is obviously important if South

³⁹⁴ S 40A(1)Telecommunications Amendment Act.

³⁹⁵ S 40A(3) Telecommunications Amendment Act.

³⁹⁶ Republic of South Africa, Notice in terms of section 34(2) GN 3458/200 in GG 24204, para 21.1.

³⁹⁷ Working Party on Domestic Regulations, Revised Draft, *Disciplines on Domestic Regulation Pursuant to GATS Article VI:4*, 23 January 2008.

³⁹⁸ South Center, *The Development Dimension of the GATS Domestic Regulation Negotiations*, SC/AN/TPD/SV/11, August 2006 27.

³⁹⁹ See Mortensen J, *WTO Vs. BEE: Why trade liberalisation may block South Africa's access to wealth, prosperity, of just a white collar job*, DIIS Working Paper no 2006/30. It is important to note in this regard that there remains no definitive answer from the WTO regarding whether South Africa's laws that seek to redress past inequalities are WTO compliant or not.

Africa is to ensure access for those who were previously denied access to telecom services under apartheid can potentially be challenged on such grounds illustrates the potential threat that Article VI disciplines pose if not carefully crafted.

Because of South Africa's unique past, the manner in which it deals with UA and US requires flexibility, as well as a different framework to that normally utilised by countries around the world. In doing this, South Africa as a signatory to the GATS, has to balance the Agreements which require that such policy objectives that are transferred into licencing requirements do not form unnecessary barriers to trade. With the exception of USAL, it appears that South Africa's USOs are designed in a manner that does not hinder trade. As these obligations continue to be defined and re-defined, as is currently happening, South Africa needs the policy space to be able to determine what provisions to impose in licences issued to telecoms operators in order for US to be achieved.

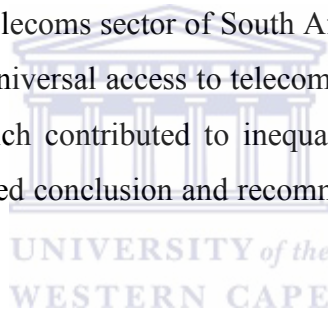
4.7 Conclusion

The January 2008 draft of future disciplines on domestic regulation envisions prohibiting licencing requirements 'other than qualifications requirements with which a natural or judicial person is required to comply in order to obtain, amend, or renew authorisation to supply a service'. This Chapter has suggested that South Africa's USOs which are intertwined with the goal of correcting its history of racial inequality as it manifested itself in access to telecoms services, are such requirements. This is a central objective of any economic activity of South Africa's government, and it will have to continually adapt its specific strategies to accord with the circumstances on the ground. This requires flexibility and creativity that provisions such as Article VI of GATS might not provide.

CHAPTER 5 CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This study at the outset, sought to analyse the potential competing interests of international trade liberalization and domestic regulation in the context of international trade in services. This analysis was carried out against the backdrop of the GATS which explicitly acknowledges the right of countries to regulate in order to achieve important national policy objectives but which also, through future disciplines to be developed by WTO members, seeks to ensure that such regulations do not hinder trade in services. This question was considered in the context of the telecoms sector of South Africa where the government has set the important goal of achieving universal access to telecom services while taking special note of past racial discrimination which contributed to inequalities in access to communication services. What follows is a detailed conclusion and recommendations based on the finding of the study.



5.2 Conclusions and Recommendations

One of the overarching conclusions that can be made regarding the question of domestic regulation is that there is a lot of uncertainty as to the exact effect the GATS will have on domestic regulation. This uncertainty stems from the fact that disciplines on this issue envisioned by Article VI:4 of the GATS remain unfinished. It is important in this regard to note that the Doha negotiations to liberalise services trade consist of two tracks, one of which is negotiations on domestic regulation.⁴⁰⁰ This fact was highlighted in a recent report of the WPDR where it was noted that negotiations on future disciplines were not taking place in a vacuum but rather in relation to other areas of the Doha Development Agenda (DDA).⁴⁰¹

⁴⁰⁰ UNCTAD Secretariat, *Universal Access to Services*, (2006) TD/B/COM.1/EM.30/2, para 64.

⁴⁰¹ WTO Secretariat, Working Party on Domestic Regulation, *Report of meeting held on 16 June 2008*, S/WPDR/M/38.

Given this, and in light of the fact that the Doha negotiations recently collapsed, it seems likely that future disciplines on domestic regulation will be delayed further.

This can only continue the uncertainty and anxiety experienced by Members, especially those from DCs who have to prioritise important objectives such as ensuring universal access to important services like health, education, water, and telecommunications. In South Africa, such delays can potentially affect proper planning of policies that are aimed at rectifying past discrimination which affected all areas of its economy. Such anxiety can also result in a reluctance to make new commitments in the negotiations to increase market access in services. It can also heighten the suspicion of some civil society groups and NGOs who continue to view the WTO as an organisation that wants to turn the focus of governments away from their core responsibilities toward their citizens and focus them on the interests of big business. Because of the importance of domestic regulation to services such as telecommunications, health, and educations, it is important for the legitimacy of the multilateral trading system that the negotiations of future disciplines be completed in a timely manner. Without ignoring the intricacies of these negotiations, **it is recommended that, as opposed to the “jogging pace” suggested by the chairman of the WPDR, there be an increased pace and sense of urgency in the current talks.**⁴⁰²

This urgency has to be balanced with ensuring that future disciplines do in fact provide countries with the necessary flexibility to ensure that important domestic objectives are met. One of the key issues in this regard concerns the necessity test as discussed in chapter 3 above. Requiring that national regulation be necessary to achieve particular goals has the potential to severely limit the flexibility that countries need to deal with the situations in their own countries. It is submitted that in the context of South Africa, a strict application of the necessity test as it has been applied by the dispute settlement bodies of the WTO in the past will cast doubt on some of policies that South Africa has put into place to deal with her past of racial discrimination. Many countries have rejected such a test and the current negotiating text omits such a test. **It is recommended that much like the current text, there be no necessity test in the future disciplines on domestic regulation and if one is included, that it be used as an interpretive tool.**

⁴⁰² In a recent meeting held by the WPDR, the chairman of the body said in relation to the talks that ‘it was suitable neither to sprint, nor to walk, but to maintain a steady “jogging” pace’ WTO Secretariat, Working Party on Domestic Regulation, *Report of meeting held on 16 June 2008*, S/WPDR/M/38.

The South Centre has highlighted the weak regulatory institutions and capacities of DCs and LDCs.⁴⁰³ They have noted the head start that developing nations have had in building their regulatory capacities and institutions and the effect that this has had over the years in the development of highly competitive services in those countries. This fact is an important factor as it calls for extra attention for the position of countries in these groups. Once again, the position adopted in the current negotiating text is supported as it grants added time to developing countries to implement the provisions of the agreement as well as specifically calling for technical assistance to these countries. **It is recommended that those provisions be included in the final agreement on future disciplines with special emphasis being placed on technical assistance for DCs and LDCs.**

One of the issues also highlighted by this study is the uncertainty that exists as far as the scope of the GATS is concerned. Different interpretations have been offered as to the meaning of “in competition” and “on a commercial basis” as set out in Article I of the GATS. Even though, as was noted earlier, government actions are increasingly making these distinctions irrelevant, **it is recommended that guidance be provided on the question regarding whether or not public services are covered by the GATS.**

Another significant issue that this study sought to consider at the outset was whether the claims made by NGOs and civil society organisations regarding the effect of the GATS on essential services were valid. This study concluded first that, given the structure of the GATS, particularly the flexibility that is allowed to countries in scheduling their commitments, some of the fears voiced by these groups might be somewhat misplaced. This is because, as was highlighted in chapter 2, the mandatory obligations imposed by the GATS mainly relate to the MFN principle as well as to transparency. Most of the other GATS obligations, including those on domestic regulation, only apply depending on the specific commitments undertaken by individual member countries. As such there is great flexibility for individual country members because they can control the services and the type of commitments which they wish to make subject to the GATS. **It is therefore recommended, especially to DCs and LDCs, that considerable attention be paid to the type of services scheduled and to the specific commitments undertaken. These countries should use their schedules of commitments to**

⁴⁰³ South Center, *The Development Dimension of the GATS Domestic Regulation Negotiations*, SC/AN/TPD/SV/11, August 2006.

secure for themselves the necessary policy space to achieve important national objectives.

In summary, it appears that much is yet to be determined because of the ongoing nature of negotiations in this area. The latest negotiating draft has some cause for optimism even though many questions still remain regarding issues such as its stance on USO. It must be borne in mind that these negotiations are important for millions of citizens in DCs and LDCs who rely on governments to ensure that key services such as health, education, and telecommunications are delivered in an efficient and affordable manner and that they are widely available to all. It is submitted that the inclusion of the above recommendations will allow countries the necessary space to develop and implement policies which will assist them in achieving these goals.



ANNEXURE A

**WORLD TRADE
ORGANISATION**

RESTRICTED
MTN.GNS/W/120
10 July 1991
(98-0000)

Special Distribution

SERVICES SECTORAL CLASSIFICATION LIST

<u>SECTORS AND SUB-SECTORS</u>	<u>CORRESPONDING CPC</u>
1. <u>BUSINESS SERVICES</u>	<u>Section B</u>
A. <u>Professional Services</u>	
a. Legal Services	
b. Accounting, auditing and bookkeeping services	
c. Taxation Services	863
d. Architectural services	8671
e. Engineering services	8672
f. Integrated engineering services	8673
g. Urban planning and landscape architectural services	8674
h. Medical and dental services	9312
i. Veterinary services	932
j. Services provided by midwives, nurses, physiotherapists and para-medical personnel	93191
k. Other	
B. <u>Computer and Related Services</u>	
a. Consultancy services related to the installation of computer hardware	841
b. Software implementation services	842
c. Data processing services	843
d. Data base services	844
e. Other	
C. <u>Research and Development Services</u>	
a. R&D services on natural sciences	851
b. R&D services on social sciences and humanities	
c. Interdisciplinary R&D services	853

D.	<u>Real Estate Services</u>	
a.	Involving own or leased property	821
b.	On a fee or contract basis	822
E.	<u>Rental/Leasing Services without Operators</u>	
a.	Relating to ships	83103
b.	Relating to aircraft	83104
c.	Relating to other transport equipment	83101+83102+
d.	Relating to other machinery and equipment	83106-83109
e.	Other	
F.	<u>Other Business Services</u>	
a.	Advertising services	871
b.	Market research and public opinion polling services	864
c.	Management consulting service	865
d.	Services related to man. consulting	866
e.	Technical testing and analysis serv.	8676
f.	Services incidental to agriculture, hunting and forestry	
g.	Services incidental to fishing	882
h.	Services incidental to mining	883+5115
i.	Services incidental to manufacturing	884+885
j.	Services incidental to energy distribution	887
k.	Placement and supply services of Personnel	872
l.	Investigation and security	873
m.	Related scientific and technical consulting services	8675
n.	Maintenance and repair of equipment (not including maritime vessels, aircraft or other transport equipment)	8861-8866
o.	Building-cleaning services	874
p.	Photographic services	875
q.	Packaging services	876
r.	Printing, publishing	88442
s.	Convention services	87909*
t.	Other	
2.	<u>COMMUNICATION SERVICES</u>	
A.	<u>Postal services</u>	7511
B.	<u>Courier services</u>	7512
C.	<u>Telecommunication services</u>	

The () indicates that the service specified is a component of a more aggregated CPC item specified elsewhere in this classification list.

a.	Voice telephone services	7521
b.	Packet-switched data transmission services	7523**
c.	Circuit-switched data transmission services	7523**
d.	Telex services	7523**
e.	Telegraph services	7522
f.	Facsimile services	7521**+7529**
g.	Private leased circuit services	7522**+7523**
h.	Electronic mail	7523**
i.	Voice mail	7523**
j.	On-line information and data base retrieval	7523**
k.	electronic data interchange (EDI)	7523**
l.	enhanced/value-added facsimile services, incl. store and forward, store and retrieve	
m.	code and protocol conversion	n.a.
n.	on-line information and/or data processing (incl.transaction processing)	843**
o.	other	

D.	<u>Audiovisual services</u>	
a.	Motion picture and video tape production and distribution services	9611
b.	Motion picture projection service	9612
c.	Radio and television services	9613
d.	Radio and television transmission services	7524
e.	Sound recording	n.a.
f.	Other	
E.	<u>Other</u>	

3. CONSTRUCTION AND RELATED ENGINEERING SERVICES

A.	<u>General construction work for buildings</u>	512
B.	<u>General construction work for civil engineering</u>	
C.	<u>Installation and assembly work</u>	514+516
D.	<u>Building completion and finishing work</u>	517
E.	<u>Other</u>	

4. DISTRIBUTION SERVICES

** The (**) indicates that the service specified constitutes only a part of the total range of activities covered by the CPC concordance (e.g. voice mail is only a component of CPC item 7523).

A.	<u>Commission agents' services</u>	621
B.	<u>Wholesale trade services</u>	622
C.	<u>Retailing services</u>	631+632
D.	<u>Franchising</u>	8929
E.	<u>Other</u>	
5.	<u>EDUCATIONAL SERVICES</u>	
A.	<u>Primary education services</u>	921
B.	<u>Secondary education services</u>	922
C.	<u>Higher education services</u>	923
D.	<u>Adult education</u>	924
E.	<u>Other education services</u>	929
6.	<u>ENVIRONMENTAL SERVICES</u>	
A.	<u>Sewage services</u>	9401
B.	<u>Refuse disposal services</u>	9402
C.	<u>Sanitation and similar services</u>	9403
D.	<u>Other</u>	
7.	<u>FINANCIAL SERVICES</u>	
A.	<u>All insurance and insurance-related services</u>	812**
a.	Life, accident and health insurance services	8121
b.	Non-life insurance services	8129
c.	Reinsurance and retrocession	81299*
d.	Services auxiliary to insurance (including broking and agency services)	8140
B.	<u>Banking and other financial services</u> (excl. insurance)	
a.	Acceptance of deposits and other repayable funds from the public	
b.	Lending of all types, incl., inter alia, consumer	



	credit, mortgage credit, factoring and financing of commercial transaction	
c.	Financial leasing	8112
d.	All payment and money transmission services	
e.	Guarantees and commitments	81199**
f.	Trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise, the following:	
	- money market instruments (cheques, bills, certificate of deposits, etc.)	81339**
	- foreign exchange	81333
	- derivative products incl., but not limited to, futures and options	81339**
	- exchange rate and interest rate instruments, inclu. products such as swaps, forward rate agreements, etc.	81339**
	- transferable securities	81321*
	- other negotiable instruments and financial assets, incl. bullion	81339**
g.	Participation in issues of all kinds of securities, incl. under-writing and placement as agent (whether publicly or privately) and provision of service related to such issues	8132
h.	Money broking	81339**
i.	Asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial depository and trust services	8119+** 81323*
j.	Settlement and clearing services for financial assets, incl. securities, derivative products, and other negotiable instruments	81339** or 81319**
k.	Advisory and other auxiliary financial services on all the activities listed in Article 1B of MTN.TNC/W/50, incl. credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy	8131 or 8133
l.	Provision and transfer of financial information, and financial data processing and related software by providers of other financial services	
C.	<u>Other</u>	
8.	<u>HEALTH RELATED AND SOCIAL SERVICES</u> (other than those listed under 1.A.h-j.)	
A.	<u>Hospital services</u>	9311
B.	<u>Other Human Health Services</u>	9319

(other than 93191)

C.	<u>Social Services</u>	933
D.	<u>Other</u>	
9.	<u>TOURISM AND TRAVEL RELATED SERVICES</u>	
A.	<u>Hotels and restaurants (incl. catering)</u>	641-643
B.	<u>Travel agencies and tour operators services</u>	7471
C.	<u>Tourist guides services</u>	7472
D.	<u>Other</u>	
10.	<u>RECREATIONAL, CULTURAL AND SPORTING SERVICES</u> (other than audiovisual services)	
A.	<u>Entertainment services (including theatre, live bands and circus services)</u>	9619
B.	<u>News agency services</u>	962
C.	<u>Libraries, archives, museums and other cultural services</u>	963
D.	<u>Sporting and other recreational services</u>	964
E.	<u>Other</u>	
11.	<u>TRANSPORT SERVICES</u>	
A.	<u>Maritime Transport Services</u>	
a.	Passenger transportation	7211
b.	Freight transportation	7212
c.	Rental of vessels with crew	7213
d.	Maintenance and repair of vessels	8868**
e.	Pushing and towing services	7214
f.	Supporting services for maritime transport	745**
B.	<u>Internal Waterways Transport</u>	
a.	Passenger transportation	7221
b.	Freight transportation	7222
c.	Rental of vessels with crew	7223
d.	Maintenance and repair of vessels	8868**
e.	Pushing and towing services	7224

f.	Supporting services for internal waterway transport	745**
C.	<u>Air Transport Services</u>	
a.	Passenger transportation	731
b.	Freight transportation	732
c.	Rental of aircraft with crew	734
d.	Maintenance and repair of aircraft	8868**
e.	Supporting services for air transport	746
D.	<u>Space Transport</u>	733
E.	<u>Rail Transport Services</u>	
a.	Passenger transportation	7111
b.	Freight transportation	7112
c.	Pushing and towing services	7113
d.	Maintenance and repair of rail transport equipment	
e.	Supporting services for rail transport services	743
F.	<u>Road Transport Services</u>	
a.	Passenger transportation	7121+7122
b.	Freight transportation	7123
c.	Rental of commercial vehicles with operator	7124
d.	Maintenance and repair of road transport equipment	6112+8867
e.	Supporting services for road transport services	
G.	<u>Pipeline Transport</u>	
a.	Transportation of fuels	7131
b.	Transportation of other goods	7139
H.	<u>Services auxiliary to all modes of transport</u>	
a.	Cargo-handling services	741
b.	Storage and warehouse services	742
c.	Freight transport agency services	748
d.	Other	
I.	<u>Other Transport Services</u>	
12.	<u>OTHER SERVICES NOT INCLUDED ELSEWHERE</u>	

ANNEXURE B
LATEST NEGOTIATING DRAFT

474.08

Room Document

23 January 2008

Working Party on Domestic Regulation

- REVISED DRAFT -

DISCIPLINES ON DOMESTIC REGULATION PURSUANT TO GATS ARTICLE VI:4

Informal Note by the Chairman

This revised draft of possible regulatory disciplines pursuant to Article VI:4 of the GATS is based on the extensive discussions of the 18 April 2007 draft that have taken place between June and December 2007.

Guided by these discussions, I have attempted to close gaps and suggest compromises on a number of paragraphs where I felt that progress could be made. However, on several issues where persisting divergences were apparent in our discussions, I have not seen myself in a position to propose new language, and I believe that further negotiation on the basis of this revised draft is needed.



- DRAFT -

DISCIPLINES ON DOMESTIC REGULATION

I. INTRODUCTION

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

II. DEFINITIONS

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

III. GENERAL PROVISIONS

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

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

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

IV. TRANSPARENCY

13. Each Member shall ensure that measures of general application relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards, as well as detailed information regarding these measures, are promptly published through printed or electronic means, or otherwise. Where publication is not practicable, such information shall be made publicly available. This information shall include, *inter alia*:

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

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

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

V. LICENSING REQUIREMENTS

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

VI. LICENSING PROCEDURES

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

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

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

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

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

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

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

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

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

26. Each Member shall ensure that any licensing fees¹ are commensurate with the costs incurred by the competent authorities and do not in themselves restrict the supply of the service.

VII. QUALIFICATION REQUIREMENTS

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

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

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

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

VIII. QUALIFICATION PROCEDURES

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

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

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

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

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

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

37. If an application for verification and assessment of qualification is rejected by the competent authority, the applicant shall be informed in writing and without undue delay. In principle, the applicant shall, upon request, also be informed of the reasons for rejection of the application and of

¹ Licensing fees do not include payments for auction, tendering or other non-discriminatory means of awarding concessions, or mandated contributions to universal service provision.

the timeframe for an appeal against the decision. An applicant should be permitted, within reasonable time limits, to resubmit an application.

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

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

IX. TECHNICAL STANDARDS

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

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

X. DEVELOPMENT

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

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

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

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

- (a) developing and strengthening institutional and regulatory capacities to regulate the supply of services and to implement these disciplines;
- (b) assisting developing country and in particular LDC service suppliers to meet the relevant requirements and procedures in export markets;
- (c) facilitating the establishment of technical standards and participation of developing country Members and in particular LDCs facing resource constraints in the relevant international organizations;
- (d) assisting, through public or private bodies and relevant international organizations, service suppliers of developing country Members in building their supply capacity

and in complying with domestic regulation in their markets. Such assistance may also be provided directly to the respective service suppliers.

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

XI. INSTITUTIONAL PROVISIONS

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

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



ANNEXURE C

South Africa Schedule of Specific Commitments – Telecommunications

WORLD TRADE

GATS/SC/78/Suppl.2

11 April 1997

ORGANISATION

(97-1401)

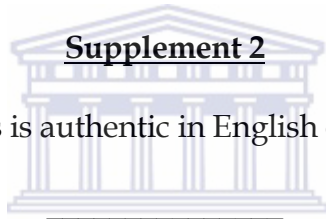
Trade in Services

SOUTH AFRICA

Schedule of Specific Commitments

Supplement 2

(This is authentic in English only)




UNIVERSITY of the
WESTERN CAPE

This text supplements the entries relating to the Telecommunication services section contained on page 14 of document GATS/SC/78.

SOUTH AFRICA - SCHEDULE OF SPECIFIC COMMITMENTS

Modes of supply: 1) Cross-border supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons

Sector or Sub-sector	Limitations on Market Access	Limitations on National Treatment	Additional Commitments
<p>Telecommunications</p> <p>Facilities based and public switched telecommunication services:</p> <p>(a) Voice services, except over value-added network</p> <p>(b) Packet-switched data transmission services</p> <p>(c) Circuit-switched data transmission services</p> <p>(d) Telex services</p> <p>(f) Facsimile services</p> <p>(g) Private leased circuit services</p> <p>(o) Other</p>	<p>(1) Only through the network of Telkom monopoly or subsequent duopoly on international traffic. Telkom monopoly to terminate not later than 31.12.2003; thereafter duopoly.</p> <p>(2) None</p> <p>(3) Telkom monopoly to terminate not later than 31.12.2003; thereafter duopoly.</p> <p>Foreign investment in suppliers permitted up to a cumulative maximum of 30 per cent.</p> <p>(4) Unbound, except as indicated in the horizontal section.</p> <p>(1) Only through the network of Telkom monopoly or</p>	<p>(1) None</p>  <p>(2) None</p> <p>(3) None</p> <p>(4) Unbound, except as indicated in the horizontal section.</p> <p>(1) None</p>	<p>South Africa undertakes the attached additional commitments on regulatory principles.</p> <p>Authorities to consider by 31/12/2003 the feasibility of suppliers additional to the duopoly.</p> <p>Liberalisation of resale services to take place between 2000 and 2003 with authorities to define terms and conditions as well as the maximum limit for foreign investment.</p>

Modes of supply: 1) Cross-border supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons

Sector or Sub-sector	Limitations on Market Access	Limitations on National Treatment	Additional Commitments
<p>-Paging services</p> <p>-Personal radio communication services</p> <p>-Trunked radio system services</p>	<p>subsequent duopoly on international traffic. Telkom monopoly to terminate not later than 31.12.2003; thereafter duopoly.</p> <p>(2)None</p> <p>(3)None except that foreign investment in suppliers permitted up to a cumulative maximum of 30 per cent.</p> <p>(4)Unbound, except as indicated in the horizontal section.</p>	<p>(2)None</p> <p>(3)None</p> <p>(4)Unbound, except as indicated in the horizontal section.</p>	
<p>-Mobile Cellular, including mobile data</p>	<p>(1)Only through the network of Telkom monopoly or subsequent duopoly on international traffic. Telkom monopoly to terminate not later than 31.12.2003; thereafter duopoly.</p> <p>(2)None</p> <p>(3)Services supplied on a duopoly</p>	<p>(1)None</p> <p>(2)None</p> <p>(3)None</p>	<p>Authorities to examine feasibility of additional suppliers by 31/12/1998.</p>

Modes of supply: 1) Cross-border supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons

Sector or Sub-sector	Limitations on Market Access	Limitations on National Treatment	Additional Commitments
-Satellite-based services	<p>basis. One additional mobile cellular licence will be granted within two years.</p> <p>Foreign investment in suppliers permitted up to a cumulative maximum of 30 per cent.</p> <p>(4)Unbound, except as indicated in the horizontal section.</p> <p>(1)Only through the network of Telkom monopoly or subsequent duopoly on international traffic. Telkom monopoly to terminate not later than 31.12.2003; thereafter duopoly.</p> <p>(2)None</p> <p>(3)Supplied only by Telkom monopoly until 31.12.2003; thereafter duopoly.</p> <p>Foreign investment in suppliers permitted up to a cumulative</p>	<p>(4)Unbound, except as indicated in the horizontal section.</p> <p>(1)None</p> <p>(2)None</p> <p>(3)None</p> <p>(4)Unbound, except as indicated in</p>	<p>Authorities to examine feasibility of additional suppliers by 31/12/2003.</p>

Modes of supply: 1) Cross-border supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons

Sector or Sub-sector	Limitations on Market Access	Limitations on National Treatment	Additional Commitments
	maximum of 30 per cent. (4) Unbound, except as indicated in the horizontal section.	the horizontal section	



ADDITIONAL COMMITMENTS BY SOUTH AFRICA

REFERENCE PAPER

Scope

The following are definitions and principles on the regulatory framework for the basic telecommunications services.

Definitions

Users mean service consumers and service suppliers.

Essential facilities mean facilities of a public telecommunications transport network or service that

(a) are exclusively or predominantly provided by a single or limited number of suppliers; and

(b) cannot feasibly be economically or technically substituted in order to provide a service.

A major supplier is a supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of:

- (a) control over essential facilities; or
- (b) use of its position in the market.

1. Competitive safeguards

1.1 Prevention of anti-competitive practices in telecommunications

Appropriate measures shall be maintained for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices.

1.2 Safeguards

The anti-competitive practices referred to above shall include in particular:

(a) engaging in anti-competitive cross-subsidization;

- (b) using information obtained from competitors with anti-competitive results; and
- (c) not making available to other services suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services.

2. Interconnection

2.1 This section applies to linking with suppliers providing public telecommunications transport networks or services in order to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier, where specific commitments are undertaken.

2.2 Interconnection to be ensured

Interconnection with a major supplier will be ensured at any technically feasible point in the network. Such interconnection is provided.

- (a) under non-discriminatory terms, conditions (including technical standards and specifications) and rates⁴⁰⁴ and of a quality no less favourable than that provided for its own like services or for like services of non-affiliated service suppliers or for its subsidiaries or other affiliates;
- (b) in a timely fashion, on terms, conditions (including technical standards and specifications) and cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided;
- (c) upon request, at points in addition to the network termination points offered to the majority of users, subject to charges that reflect the cost of construction of necessary additional facilities; and

2.3 Public availability of the procedures for interconnection negotiations

⁴⁰⁴The authorities may determine different rates in respect of different services rendered in different areas under different circumstances or may determine rates which may be higher or lower than the normal rates providing that the determination of such rates is done on a non-discriminatory basis.

The procedures applicable for interconnection to a major supplier will be made publicly available.

2.4 Transparency of interconnection arrangements

It is ensured that a major supplier will make publicly available either its interconnection agreements or a reference interconnection offer.

2.5 Interconnection: dispute settlement

A service supplier requesting interconnection with a major supplier will have recourse, either:

- (a) at any time or
- (b) after a reasonable period of time which has been made publicly known

to an independent domestic body, which may be a regulatory body as referred to in paragraph 5 below, to resolve disputes regarding appropriate terms, conditions and rates for interconnection within a reasonable period of time, to the extent that these have not been established previously.

3. Universal service

Any Member has the right to define the kind of universal service obligation it wishes to maintain. Such obligations will not be regarded as anti-competitive *per se*, provided they are administered in a transparent, non-discriminatory and competitively neutral manner and are not more burdensome than necessary for the kind of universal service defined by the Member.

4. Public availability of licensing criteria

Where a licence is required, all the licensing criteria and the terms and conditions of individual licences will be made publicly available.

The reasons for the denial of a licence will be made known to the applicant upon request.

5. 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.

6. Allocation and use of scarce resources

Any procedures for the allocation and use of scarce resources, including frequencies, numbers and rights of way, will be carried out in an objective, timely, transparent and non-discriminatory manner. The current state of allocated frequency bands will be made publicly available, but detailed identification of frequencies allocated for specific government uses is not required.



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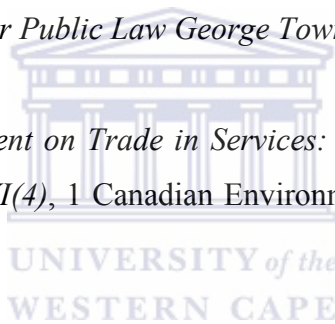
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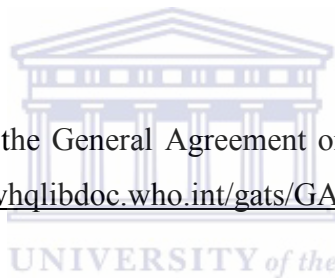
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