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ABSTRACT

In 2005, the World Trade Organization (WTO) Appellate Body presided over United States—Measures affecting the cross-border supply of gambling and betting services *(*U.S.-Gambling*), in which Antigua argued that U.S. criminal laws banning the provision of cross-border online gambling services violate U.S. commitments under the General Agreement on Trade in Services (GATS). For the first time, the WTO's dispute settlement process directly addressed the application of GATS to domestic regulatory barriers restricting cross-border trade in services. This Article examines GATS rules on domestic regulation as well as the WTO Appellate Body and Panel decisions in the case and asks if the WTO has improperly restricted members' ability to regulate domestic concerns. What*

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will be the broader impact of the WTO's rulings for cross-border trade in e-services? Highlighting the difficulties that members face in trying to resolve the conflict between liberalization and regulatory autonomy in the context of cross-border e-services, this Article argues that the scope of GATS rules on domestic regulation needs to be refined if GATS is to remain an instrumental force in liberalizing trade in e-services. The Article concludes with proposals to guide the negotiations on domestic regulation to ensure that such regulations are not unnecessarily burdensome to trade in e-services. Identifying certain unresolved issues of U.S.-Gambling *that characterize the tension between market access and domestic regulatory autonomy, it also argues that these issues must be addressed in the negotiations on domestic regulation if a desirable balance between regulatory autonomy and progressive liberalization of global e-services markets is to be achieved.*

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I. INTRODUCTION

Has the recent decision in *United States—Measures affecting the cross-border supply of gambling and betting services* (*U.S.-Gambling*)[1] significantly deprived World Trade Organization (WTO)[2] members of their domestic regulatory autonomy[3] under the General Agreement of Trade in Services (GATS)?[4] What are the implications of this decision for liberalization[5] of cross-border trade in electronic services (e-services) and the growth of electronic commerce (e-commerce)?[6]

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1. Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (Apr. 7, 2005) (*adopted* Apr. 20, 2005), *available at* http://www.wto.org/english/tratop_e/dispu_e/285abr_e.pdf [hereinafter Appellate Body Report]; Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (Nov. 10, 2004), *available at* http://www.wto.org/english/tratop_e/dispu_e/ 285r_e.pdf [hereinafter Panel Report].

2. The World Trade Organization (WTO) came into being on January 1, 1995, under the terms of the Marrakesh Agreement Establishing the World Trade Organization. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement]. The WTO has 151 members (as of July 27, 2007) and is the single largest multilateral body dealing with international trade policy and regulation. Understanding the WTO, Members and Observers, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Dec. 17, 2007).

3. The right of WTO members to regulate in order to meet national policy objectives is consistent with the international law principle recognizing a nation's sovereignty in the conduct of its national policies in its territory. Jan Wouters & Dominic Coppens, *Domestic Regulation Within the Framework of GATS* 5 (Inst. for Int'l Law, Working Paper No. 93, 2006), *available at* http://www.law.kuleuven.be/iir/nl/wp/WP/WP93e.pdf. Thus, the discussion of members' rights under GATS to exercise domestic regulatory autonomy with respect to e-services provided to residents of a member state directly involves issues of national sovereignty. In this Article, the term domestic regulation is defined broadly and consistently with the definition found in scholarship related to GATS. Domestic regulation is "a process or activity in which government requires or proscribes certain activities or behavior on the part of individuals or institutions, mostly private." *Id.* (quoting MICHAEL D. REAGAN, REGULATION: THE POLITICS OF POLICY 15 (1987)).

4. The General Agreement on Trade in Services was negotiated during the Uruguay Round of Multilateral Trade Negotiations as an Annex to the WTO Agreement and came into effect on January 1, 1995. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1167 (1994) [hereinafter GATS].

5. A key challenge for the drafters of GATS was to "strike a balance between trade liberalization and the regulatory autonomy of WTO Members." Wouters & Coppens, *supra* note 3, at 4. In principle, GATS incorporates a weighing scale for the balance between trade liberalization and regulatory autonomy; it aims to achieve progressive liberalization of services, while also recognizing the right of members to regulate services in order to meet national policy objectives. *Id.* at 5. In GATS, "'[l]iberalization' is mostly understood as the process of the removal of legal or other barriers to competition and/or market access." *Id.* Pursuant to this understanding,

In *U.S.-Gambling*, the WTO Appellate Body (and Panel) challenged conventional understanding of the market access obligation under GATS.[7] It did this by equating a U.S. ban[8] on the cross-border supply of gambling and betting services to a quota, prohibited under the market access obligation of GATS.[9] Critics were quick to condemn the ruling for its expansion of what they termed a "per se" prohibition of an exhaustively defined list of quantitative restrictions under the market access obligation in GATS.[10] Many said the ruling erroneously expanded a GATS prohibition on market access restrictions to include substantive qualitative restrictions based only on their quantitative effects,[11] which contradicted previous views that GATS distinguishes between quantitative

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liberalization may involve reducing or eliminating domestic laws and other regulations that operate as trade barriers to foreign supply of services. *Id.* This Article explores the implications of this balance in the context of cross-border trade in e-services.

6. The WTO Secretariat's definition of electronic supply of services encompasses "transactions in which services products are delivered to the customer in the form of digitized information flows." General Council, *WTO Agreements and Electronic Commerce*, ¶ 2, WT/GC/W/90 (July 14, 1998) [hereinafter *WTO Agreements and Electronic Commerce*]. The WTO Secretariat also noted that in addition to electronically delivered services, electronic commerce in relation to the services trade also includes "the provision of Internet access services themselves—meaning the provision of access to the Internet for business and consumers" and "the use of the Internet as a channel for distribution services by which goods and services are purchased over the net but delivered to the consumer subsequently in non-electronic form." *Id.* These latter aspects of trade in services that relate to e-commerce are not addressed in this Article. For a discussion of the issues within the general context of GATS and electronic commerce, see generally William J. Drake & Kalypso Nicolaïdis, *Global Electronic Commerce and GATS: The Millennium Round and Beyond*, *in* GATS 2000 NEW DIRECTIONS IN SERVICES TRADE LIBERALIZATION 399 (Pierre Sauvé & Robert Stern eds., 2000). *See also* SACHA WUNSCH-VINCENT, WTO, E-COMMERCE AND INFORMATION TECHNOLOGIES: FROM THE URUGUAY ROUND THROUGH THE DOHA DEVELOPMENT AGENDA (Joanna McIntosh ed., 2005), *available at* http://www.unicttaskforce.org/perl/documents.pl?id=1536 (discussing the WTO's role in Internet governance); MARC BACCHETTA ET AL., WORLD TRADE ORG., SPECIAL STUDIES 2: ELECTRONIC COMMERCE AND THE ROLE OF THE WTO (1998), *available at* http://www.wto.org/English/tratop_e/ecom_e/special_study_e.pdf (focusing on electronic commerce, its associated benefits and challenges, and their relation to international trade and the WTO).

7. *See* GATS, *supra* note 4, art. XVI (outlining Market Access). An overview of GATS as it relates to liberalization and domestic autonomy is provided in Part II of this Article.

8. *See infra* note 161 and accompanying text.

9. *See* Joost Pauwelyn, *WTO Condemnation of U.S. Ban on Internet Gambling Pits Free Trade Against Moral Values*, ASIL INSIGHT, Nov. 2004, http://www.asil.org/insights/2004/11/insight041117.html (noting that the WTO panel considered the fact "the U.S. seemed to prosecute foreigners more frequently than U.S.-based suppliers," and finding such actions to be a prohibited import restriction).

10. Joost Pauwelyn, *WTO Softens Earlier Condemnation of U.S. Ban on Internet Gambling but Confirms Broad Reach into Sensitive Domestic Regulations*, ASIL INSIGHT, Apr. 12, 2005, http://www.asil.org/insights/2005/04/insight050412.html.

11. *Id.*

restrictions prohibited under the terms of the market access rule and qualitative regulations permitted under the general rules on domestic regulation.[12] The WTO dispute settlement panels were accused of authorizing "WTO intrusion into the regulatory freedom of WTO Members far beyond what was originally agreed to in the WTO Treaty,"[13] and threatening "with the stroke of a pen, the validity of scores of domestic services regulations, including those that are non-discriminatory."[14] Responding to the initial Panel Report, the United States Trade Representative (USTR) called the Panel decision "deeply flawed," stating that "the Panel inappropriately found that our regulations on gambling services were a prohibited quota based on a faulty new legal theory that places unwarranted restrictions on the ability of all WTO Members to regulate their service sector."[15] Attorney Generals of twenty-nine U.S. states called the ruling "quite troubling."[16] In April 2006, the Governor of the state of Oregon asked the U.S. Trade Representative to exclude Oregon from the proposed expansion of U.S. commitments under GATS, including those that would cover gambling services.[17]

Although it may be argued that *U.S.-Gambling* undermines regulatory autonomy, it is less obvious that *U.S.-Gambling* deprives members of any *legitimate* rights to regulate services covered by

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12. *See generally* Joost Pauwelyn, *Rien ne Va Plus? Distinguishing Domestic Regulation from Market Access in GATT and GATS*, 4 WORLD TRADE REV. 131 (2005) (clarifying the distinction between market access restrictions and domestic regulations).

13. *Id.* at 133.

14. Pauwelyn, *supra* note 10, ¶ 11.

15. Richard Mills, Spokesman, Office of the U.S. Trade Representative [USTR], Statement from Richard Mills Regarding the WTO Gambling Dispute with Antigua and Barbuda (Nov. 10, 2004), *available at* http://www.unicttaskforce.org/perl/documents.pl?id=1536. Subsequently, marking the success of the U.S. appeal to the Appellate Body, Acting USTR Peter F. Allgeier stated:

> We are pleased that the Appellate Body has agreed with our position that the U.S. gambling laws at issue here protect public order and public morals. By reversing key aspects of a deeply flawed panel report, the Appellate Body has affirmed that WTO Members can protect the public from organized crime and other dangers associated with Internet gambling. This is also a victory for the federal and state law enforcement officers and regulators who protect the public from illegal gambling and its associated risks of money laundering and organized crime.

Press Release, USTR, U.S. Internet Gambling Restrictions Can Stand as U.S. Wins Key Issues in WTO Dispute (Apr. 7, 2005), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2005/April/US_Internet_Gambling_Restrictions_Can_St_as_US_Wins_Key_Issues_in_WTO_Dispute.html.

16. Joanne O'Connor, *US Attorney-Generals* [sic] *Gang Up On WTO Gambling Ruling*, THE LAWYER, June 13, 2005, at 7.

17. Edward Walsh, *Oregon Seeks Global Trade Pact Exclusion*, THE OREGONIAN, Apr. 3, 2006, at D1.

members' commitments under GATS. Concluding its report on the *U.S.-Gambling* dispute, the Panel categorically states:

> We also wish to emphasize what we have *not* decided in this case. We have not decided that WTO Members do not have a right to regulate, including a right to prohibit, gambling and betting activities. In this case, we came to the conclusion that the US measures at issue prohibit the crossborder supply of gambling and betting services in the United States in a manner inconsistent with the GATS. We so decided, not because the GATS denies Members such a right but, rather, because we found, *inter alia*, that, in the particular circumstances of this case, the measures at issue were inconsistent with the United States' scheduled commitments and the relevant provisions of the GATS.[18]

The *U.S.-Gambling* reports confirm that both the Panel and the Appellate Body are unequivocal in their rejection of a general "effects" doctrine from being incorporated into the interpretation of the market access obligation.[19] Critics condemned the Panel as having "already made up its mind that the U.S. laws are prohibited market access restrictions simply because they have the *effect* of a prohibition on certain cross-border supplies of gambling services."[20] However, it is not obvious that the decisions of the WTO dispute settlement panels extend the prohibition on market access restrictions beyond the quantitative restrictions already prohibited by GATS to include *all* domestic regulation that is quantitative in effect.[21] Moreover, as acknowledged by the Panel in *U.S.-Gambling*,[22] the architecture of GATS explicitly recognizes the sovereign right to regulate services, and provides flexibility for members to regulate in order to pursue public policy objectives such as consumer protection (for example, regulations that ensure the quality of services and the capacity of service suppliers to supply services).[23] Although *U.S.-Gambling* blurs the conventional boundaries of the market access obligation, it is not clear that it converts these types of consumer protection regulations

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18. Panel Report, *supra* note 1, ¶ 7.4.

19. Appellate Body Report, *supra* note 1, ¶ 232; Panel Report, *supra* note 1, ¶¶ 6.304-6.306, 6.327.

20. Pauwelyn, *supra* note 12, at 163.

21. As critics note, such a conclusion would effectively draw all domestic regulation under the purview of the GATS market access rule since "all regulation has the effect of limiting or restricting supply to some degree, and the 'effects' approach would negate restrictions whether slight or significant." Comment from the Advisory Board, *Gambling—with Regulation and Market Access in the GATS*, 32 L. ISSUES ECON. INTEGRATION 231, 233 (2005).

22. Panel Report, *supra* note 1, ¶ 6.316.

23. GATS recognizes "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." Panel Report, *supra* note 1, ¶ 6.314 (quoting GATS, *supra* note 4, pmbl). Articles VI and XIV of GATS provide specific rights to regulate services in order to achieve policy objectives. GATS, *supra* note 4, arts. VI, XIV. The right to regulate is discussed *infra* in Part IV of this Article.

into prohibited market access restrictions based purely on their quantitative effects.[24] Nevertheless, ambiguities in the *U.S.-Gambling* decision have prompted some to recommend a precautionary approach for members in terms of scheduling further liberalization commitments under GATS.[25] As one legal commentator views it:

> It would probably be prudent and cautious to assume that the coverage of Article XVI:2 [the GATS provision prohibiting a list of quantitative and quantitative type restrictions on market access] extends to measures having the same effect as those explicitly mentioned. Negotiators may therefore find it useful to schedule more conditions and limitations to a market access commitment than they deem necessary. Negotiators should generally be especially careful about scheduling commitments in sectors which remain strictly regulated. Indeed, it may be more appropriate not to schedule any commitments at all in such a sector.[26]

The outcome of the *U.S.-Gambling* litigation has significant implications for cross-border trade in e-services, which is a major component of e-commerce.[27] Indisputably, it broadens our understanding of the sphere of the market access obligation under GATS in a manner that significantly advances liberal trade in e-services.[28] This interpretation of *U.S.-Gambling* is based on a finding

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24. This point is implied by the Panel in maintaining the distinction between Article XVI, GATS on market access and Article VI, GATS on domestic regulation. *See* Panel Report, *supra* note 1, ¶¶ 6.302–6.308. *See also infra* Part IV.A (discussing this aspect of the Panel decision in detail).

25. *See* Joel P. Trachtman, *International Decisions: United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services WT/DS285/AB/R*, 99 AM. J. INT'L L. 861, 867 (2005) (cautioning that the interpretation of the market access obligation, GATS art. XVI, may make the current services negotiations more difficult as states determine whether measures that they thought were qualitative regulations outside the scope of Article XVI may be within its scope).

26. Markus Krajewski, *Playing by the Rules of the Game?*, 32 L. ISSUES ECON. INTEGRATION 417, 437 (2005).

27. GATS defines trade in services as the supply of a service according to four modes of supply. While these are described in detail in Part II of this Article, the cross-border supply of a service in the context of GATS is defined as the supply of a service "from the territory of one Member into the territory of any other member." GATS, *supra* note 4, art. 1, § 2(a).

28. *See* Sacha Wunsch-Vincent, *The Internet, Cross Border Trade in Services, and the GATS: Lessons from U.S.-Gambling*, 5 WORLD TRADE REV. 319, 323–24 (2006), *available at* http://www.iie.com/publications/papers/wunsch1205.pdf (discussing how *U.S.–Gambling* has advanced matters regarding the cross-border trade of electronic services). According to Wunsch-Vincent:

> The greatest progress of *US-Gambling* is the confirmation that WTO rules are indeed applicable to e-commerce and/or to electronically supplied services. Both rulings apply the GATS framework to the concerned electronic cross-border delivery of services without hesitation, finding that the specific sub-sector of the US GATS schedule includes specific commitments on Internet-delivered gambling services. . . .

in the case that the United States' commitment to liberalize cross-border trade in a services sector that included gambling services, although made at a time when gambling services were not offered online, also included a commitment to liberalize *online* gambling services.[29] This adoption of a technology-neutral interpretation of the relevant GATS rules by the WTO dispute settlement panels will make it difficult for members to commit to full market access and national treatment for cross-border services while simultaneously retaining a closed market for the same types of services provided online. Clearly, restrictions applicable to the electronic supply of such services will be treated as limitations on market access or national treatment under GATS.[30]

Also significantly, *U.S.-Gambling* is the first WTO dispute to directly address the application of GATS rules to regulatory barriers restricting the cross-border supply of e-services.[31] But while it

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> For the negotiations under the Doha Development Agenda, this means that the GATS rules and—existing and revised—specific GATS commitments fully apply to cross-border Internet-based service transactions.

Id.

29. Panel Report, *supra* note 1, ¶ 6.285. The Panel concluded, in line with the principle of technological neutrality, that a full commitment to apply the market access obligation to cross-border services (or mode 1) under GATS, "encompass[ed] all possible means of supplying services from the territory of one WTO member into the territory of another WTO member." *Id.* Accordingly, the Panel reasoned that a market access commitment under mode 1 "implies the right for other Members' suppliers to supply a service through all means of delivery, whether by mail, telephone, Internet, etc. unless otherwise specified in a Member's schedule." *Id.*

30. *Id.* ¶¶ 6.286–6.287; *see also* Council for Trade in Servs., *Work Programme on Electronic Commerce: Progress Report to the General Council*, ¶ 4, S/L/74 (July 27, 1999) [hereinafter *E-Commerce Progress Report*] (stating that the general view of WTO members is that the GATS is technologically neutral in that it does not contain provisions that distinguish between the different technological means by which a service may be supplied). In line with both of these approaches, and the decision in *U.S.-Gambling*, some countries make distinctions in their GATS Schedules of Specific Commitments based on a means of delivery. For example, in its commitment on cross-border retailing services, Australia maintains the following limitation on market access: "Unbound except for mail order." World Trade Organization, Schedule of Specific Commitments, http://tsdb.wto.org/wto/WTOHomepublic.htm (follow "Full-text search on pre-defined reports"; then search "Australia"); *see infra* notes 54-56 and accompanying text (discussing GATS Schedules of Specific Commitments).

31. *U.S.-Gambling* is also only the second WTO dispute to deal solely with the provisions of GATS. The first such dispute was the Panel Report on *Mexico—Measures Affecting Telecommunications Services* (*Mexico—Telecoms*). Panel Report, *Mexico—Measures Affecting Telecommunications Services*, WT/DS204/R (Apr. 2, 2004) (*adopted* June 1, 2004), *available at* http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds204_e.htm (dealing chiefly with Mexico's GATS commitments and obligations with respect to telecommunications services under the limited scope of Mexico's additional GATS commitments and incorporating the Reference Paper on Basic Telecommunications and the GATS Annex on Telecommunications); *see also* Björn Wellenius et al., *Telecommunications and the WTO: the Case of Mexico* (World Bank

resolves some of the general issues with regard to the scope of GATS rules to e-services,[32] *U.S.-Gambling* also reinforces the uncertainties of a relatively undeveloped GATS legal framework.[33] In *U.S.-Gambling*, both dispute settlement panels labored to establish that a U.S. ban on online gambling and betting services, which placed limitations on the cross-border supply of electronic gambling and betting services, was a prohibited quantitative restriction under specific U.S. commitments on market access.[34] Given that the present rules do not satisfactorily define the boundaries between measures that ought to be classified as market access restrictions and those that are subject to a more limited review under the general provisions in GATS on domestic regulations, the WTO Dispute Settlement Panels' interpretation of the regulatory reach of GATS rules in the dynamic context of cross-border e-services trade is

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Policy Research, Working Paper No. 3759, 2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=844849#PaperDownload (discussing the findings of the Mexico—Telecoms dispute).

32. *See* Wunsch-Vincent, *supra* note 28, at 323–27 (discussing the application of GATS rules and commitments to electronically delivered services and analyzing GATS mode 1 commitments relevant to cross-border electronic delivery of services).

33. Several Articles analyzing the implications of *U.S.-Gambling* from a general GATS perspective have been written by mostly European legal scholars who have also evaluated the distinction between Articles XVI and Article VI of GATS in the light of findings by the Panel and Appellate Body. *See, e.g.*, Krajewski, *supra* note 26, at 429–47 (outlining the aspects of *U.S.-Gambling* that may have impacted GATS negotiations and discussing the possible implications of the rulings on GATS negotiations); Federico Ortino, *Treaty Interpretation and the WTO Appellate Body Report in US -Gambling: A Critique*, 9 J. INT'L ECON. L. 117, 132–46 (2006) (reviewing the interpretative approach followed by the Appellate Body in reaching the *U.S.-Gambling* decision); Pauwelyn, *supra* note 12, at 148–68 (discussing government intervention and comparing "market access restriction" with "domestic regulation"). The *U.S.-Gambling* decision has also been examined by U.S. scholars from the perspective of domestic regulation of online gambling in the United States. *See, e.g.*, Christine Hurt, *Regulating Public Morals and Private Markets: Online Securities Trading, Internet Gambling, and the Speculation Paradox*, 86 B.U. L. REV. 371 (2006) (examining the similarities of certain gambling activities and investment activities and concluding that the United States government's stance against Internet gambling is misguided); Edward A. Morse, *Extraterritorial Internet Gambling: Legal Challenges and Policy Options*, 1 INT'L J. INTERCULTURAL INFO. MGMT. 33 (2006), *available at* http://law.creighton.edu/index.aspx?p=402&sp=20 (exploring legal concerns and policy options for internet gambling). However, less has been written about the implications of *U.S.-Gambling* and its impact on the interaction between the liberalization rules of GATS and the regulatory rights of WTO members from a cross-border e-services trade perspective. *See, e.g.*, Wunsch-Vincent, *supra* note 28, at 319–20 (stating that "hopes were high that the judgments would bring clarity to the thorniest issues concerning cross-border trade in services and thus maintain the relevance of the multilateral trade framework in a changing technological environment.").

34. *See* Panel Report, *supra* note 1, ¶ 6.320 (discussing the four elements of Article XVI:2(a) that had to be interpreted in order for the Panel to determine whether the challenged measures violated Article XVI).

inevitably controversial.[35] *U.S.-Gambling* reflects the prevailing uncertainty as to the dividing line between prohibited and permissible domestic regulation. It also indicates that GATS rules on domestic regulation may be less than effective in preventing the more pervasive and less transparent regulatory barriers from nullifying the liberalization gains obtained through negotiations. Accordingly, this Article argues that as long as GATS disciplines on domestic regulation remain undefined, there is little hope that these boundaries will be resolved with the degree of precision and certainty that is required to respond to the unique issues arising with regard to the domestic regulation of electronically delivered cross-border services.

Perhaps the clearest impact of *U.S.-Gambling* is that it confirms members' retention of considerable regulatory flexibility to override their GATS commitments under the policy exceptions recognized by the agreement. Notably, these exceptions permit members to maintain measures that achieve a range of policy objectives that are particularly relevant to cross-border e-services trade, and more generally, to global e-commerce.[36] This potentially broad flexibility in GATS will undoubtedly create future tension between the predictability and security of multilateral liberalization commitments and the autonomous regulatory rights of WTO members.[37]

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35. *See generally* Pauwelyn, *supra* note 12, at 152–65 (comparing the Article XVI market access provision with the Article VI domestic regulation provision).

36. The general exceptions clause in GATS permits members to, *inter alia*, maintain domestic measures necessary to protect public morals and public order, the privacy of individuals in relation to the processing of personal data and for the prevention of deceptive or fraudulent practices, provided certain conditions are met. GATS, *supra* note 4, art. XIV(a), (c). The relevance of the exceptions clause to cross-border e-services trade and e-commerce has been noted by WTO members in deliberations under the WTO Work Program on E-Commerce. *See* Council for Trade in Servs., *Note by the Secretariat: The Work Programme on Electronic Commerce*, WT/L/274 (Sept. 30 1998) [hereinafter *Work Programme on E-Commerce I*]. Divergent opinions have also been expressed in relation to the scope of the general exceptions as they apply to e-commerce concerns. While some members have argued that the general exceptions clause as an exceptional provision should be interpreted narrowly and not be expanded to cover regulatory objectives not listed in Article XIV, other members have proposed the development of criteria in the WTO for the policy objectives identified therein. Council for Trade in Servs., *Interim Report to the General Council: The Work Programme on Electronic Commerce*, at 10, S/C/8 (Mar. 31, 1999) [hereinafter *Work Programme on E-Commerce Interim Report*]; *see also* Council for Trade in Servs., *Note by the Secretariat: Work Programme on Electronic Commerce*, ¶ 26, S/C/W/68 (Nov. 16, 1998) [hereinafter *Work Programme on E-Commerce II*] (noting the relevance of the policy objectives for restrictions on electronically delivered services and stating that "[m]easures to curb obscenity or to prohibit internet gambling might well be justified" on the grounds of Article XIV).

37. *See, e.g.*, Heinz Hauser & Sacha Wunsch-Vincent, *A Call for a WTO E-Commerce Initiative*, INT'L J. COMM. L. & POL'Y, Winter 2000, at 22, *available at* http://www.ijclp.org/6_2001/index.html (noting that "a balanced relationship between

This Article evaluates the application of GATS rules to domestic regulation from the perspective of enhancing cross-border electronic trade in services and ultimately promoting growth in global e-commerce.[38] Part II presents an overview of the legal framework of GATS, focusing on provisions relating to the liberalization of services-trade and domestic regulatory autonomy. Part III reviews the *U.S.-Gambling* litigation and summarizes key findings that relate to the tension between the rights of members as sovereigns to regulate cross-border trade in services and the goal of GATS to liberalize trade. Part IV examines the extent of members' regulatory autonomy[39] under GATS, drawing on insights gleaned from *U.S.-Gambling* that further clarify the scope of domestic regulatory autonomy. Part V examines the role of the WTO and GATS in regulating e-services; it argues that the regulatory role of GATS is too important to remain so undefined, and proposes adopting precise disciplines on domestic regulation that are relevant to cross-border trade in e-services as a critical next step for WTO members under the current negotiations.[40] Only with such disciplines in place will there be sufficient clarity on the permissible scope of members' domestic regulatory autonomy to ensure that members have the ability to take full advantage of the tremendous potential for liberalization of trade

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regulatory aim and regulatory methods is hard to be found."); WUNSCH-VINCENT, *supra* note 6, at 82 (stating that "it is within the mandate of the services negotiations for WTO Members to develop further regulatory disciplines pursuant to Article VI that could specifically or generally address domestic regulations affecting electronically traded services."). *But c.f.* Jeremy C. Marwell, Note, *Trade and Morality: The WTO Public Morals Exceptions after Gambling*, 81 N.Y.U. L. REV. 802, 824–26 (2006) (arguing for a broader definition of public morals under Article XIV of GATS in that members ought to be permitted to define public morals unilaterally and be required to submit evidence supporting claims that an issue has moral significance subject only to the existing least trade restrictive and non-discriminatory tests in Article XIV).

38. This objective is shared by the Doha Round, which emphasizes "the importance of creating and maintaining an environment which is favorable to the future development of electronic commerce." World Trade Organization, Ministerial Declaration of 14 November 2001, ¶ 34, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) [hereinafter Doha Declaration].

39. *See* GATS, *supra* note 4, arts. VI, XIV (preserving the regulatory autonomy of members subject to certain conditions).

40. The term "disciplines" has acquired a specific meaning when used in the context of Article VI:4 of GATS. Essentially, "disciplines" are rules that are negotiated in the context of Article VI:4 and that clarify the application of GATS to domestic regulation of trade in services. The purpose of such rules is to ensure that measures relating to "qualification requirements and procedures, licensing requirements and technical standards do not constitute unnecessary barriers" to the services trade. GATS, *supra* note 4, art. VI:4. Article VI:4 provides a mandate for the Council for Trade in Services to develop such disciplines which will ensure that these domestic regulations are based, *inter alia*, on objective and transparent criteria, and not be more burdensome that necessary to ensure the quality of the service. *Id.*; *see* Council for Trade in Servs., *Note by the Secretariat: Article VI:4 of the GATS: Disciplines on Domestic Regulation Applicable to All Services*, ¶¶ 1–3, S/C/W/96 (Mar. 1, 1999) [hereinafter *Disciplines on Domestic Regulation*] (further explaining Article VI).

in global e-services.[41] Part VI explores the continuing ambiguity post-*U.S.-Gambling* in defining the precise boundary between the regulatory reach of GATS rules and the autonomous regulatory rights of WTO members. It identifies a number of weaknesses in GATS that may affect future guarantees for trade in cross-border e-services and deter growth of global e-commerce. This analysis of the remaining post-*U.S.-Gambling* ambiguities is offered as input for a much-needed discussion to advance the process of developing disciplines on domestic regulation under GATS.

II. GATS, TRADE LIBERALIZATION, AND DOMESTIC REGULATION

While GATS is reminiscent of the older and more established WTO framework for trade in goods, there are significant differences between the two.[42] GATS is a highly specialized legal framework with its own unique philosophy for promoting liberalization of the global services economy.[43] Essentially, GATS aims to address the subtle complexities of protectionism in international services trade. Unlike GATT, the predominant focus of GATS is not on reducing or eliminating external barriers to trade (such as import tariffs or other border-type measures).[44] As external barriers are relatively less common in the services trade, the principal objective of GATS is to

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41. *See* Aaditya Mattoo, World Bank, *Economics and Law of Trade in Services*, at 1 (Feb. 2005), *available at* http://siteresources.worldbank.org/INTRANETTRADE/Resources/Topics/Accession/Economics&LawOfTradeInServices_Mattoo.pdf (noting that "[s]ervices are the fastest growing sector of the global economy" and presenting research that greater liberalization in services is associated with more rapid growth); Aaditya Mattoo & Sacha Wunsch-Vincent, *Pre-empting Protectionism in Services: The GATS and Outsourcing*, 7 J. INT'L ECON. L. 765, 765–74 (2004) (stating that "[c]ross-border trade in business services, especially the so called 'IT-enabled services,' is today among the fastest growing areas of international trade" and detailing the dramatic growth of cross-border trade in business services, particularly: business process outsourcing services; the global gains across both OECD member countries and developing countries; and the possible impact of protectionism and trade barriers on such trade); *see also* COALITION OF SERV. INDUS., MAKING THE MOST OF THE DOHA OPPORTUNITY: BENEFITS FROM SERVICES LIBERALIZATION 17–18 (2006), *available at* http://www.uscsi.org/services_study (noting the substantial benefits of liberalized trade in cross-border business process outsourcing services to India, Malaysia, and Brazil).

42. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 (1999) [hereinafter GATT] (as amended and incorporated into the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex 1A, Apr. 15, 1994, 33 I.L.M. 1125 (1994)).

43. *See generally* Geza Feketekuty, *Assessing and Improving the Architecture of GATS*, *in* GATS 2000: NEW DIRECTIONS IN SERVICES TRADE LIBERALIZATION 85, 90–94 (discussing the influences of GATT on the design and architecture of GATS).

44. *See id.* at 90–91 ("The great difficulty in designing GATS was that barriers to trade in services are generally embedded in domestic regulations. Unlike barriers to trade in goods, they do not take the form of transparent barriers imposed at the border against foreign services. Cross-border flows of services are largely invisible.").

eliminate or reduce protectionist internal regulatory policies that restrict foreign competition in trade in services.[45] Thus, GATS is very much designed to address domestic laws that serve as barriers to global trade in services.

As a multilateral trade agreement, GATS is often viewed as imposing constraints on domestic regulatory autonomy that go beyond prohibiting discrimination against foreign suppliers. This view stems from the fact that GATS regulates both discriminatory and nondiscriminatory domestic regulation.[46] Specifically, GATS regulates domestic policies that restrict competition between domestic services or service suppliers as well as domestic policies that restrict competition for foreign services and service suppliers.[47] For example, the obligation under GATS to grant market access, if applied in full, prohibits the use of quantitative limitations on the number of service suppliers, as this practice tends to operate as a trade barrier by restricting competition in ways that limit both domestic and foreign suppliers from supplying services to the domestic market.[48] This prohibition against restricting the number of service suppliers applies even if a member's laws imposing quantitative limits on the number of service suppliers equally restrict

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45. According to Feketekuty, "where governments have tried to protect their local service suppliers from foreign competition, they have embedded the protective measures in domestic regulations focused on the local consumption of services or the local provision of services." *Id.* Further, Feketekuty says that another challenge in designing GATS was that:

> [D]omestic regulations frequently limit trade even if they do not explicitly discriminate against foreign providers. This was a crucial point because the regulatory involvement of governments in the provision of services has been much more intensive than their involvement in manufacturing. Regulations often limit the number of firms, the number of employees, the number of distribution outlets, the services that can be sold, prices, marketing practices, and distribution channels. These types of regulations protect existing firms from competition by new entrants, whether domestic or foreign.

Id. at 91.

46. In WTO agreements, different terms are used to describe regulations, such as "laws, decrees, regulations, procedures, requirements, administrative guidelines, administrative ruling of general applications, administrative proceedings, decisions, or actions." Keiya Iida & Julia Nielson, *Transparency in Domestic Regulation: Practices and Possibilities*, *in* DOMESTIC REGULATION AND SERVICE TRADE LIBERALIZATION 7, 8 (Aaditya Mattoo & Pierre Sauvé eds., 2003). Domestic regulation includes legislative measures that have been finally enacted by a member's legislative branch (i.e., statutes), subordinate measures established by regulatory authorities in the executive branch that are within the legislative mandate (i.e., administrative regulations), and administrative decisions by regulatory authorities within the executive branch (i.e., administrative decisions). *Id.* at 8–9. The term regulations may also encompass measures taken by nongovernmental entities. *Id.* at 9 (referring to the Reference Paper on Basic Telecommunications).

47. *See generally* GATS, *supra* note 4, art. XVI:2 (setting forth the "market access" provision).

48. *Id.* art. XVI:2(a).

competition between domestic suppliers and competition between domestic and foreign service suppliers.[49]

On the other hand, a key feature of GATS that is often overlooked is that member obligations under GATS are more flexible than under GATT.[50] This is because GATS imposes only a limited number of general obligations on WTO members. The two main general obligations imposed on WTO members are the obligations of Most Favored Nation (MFN) treatment and transparency.[51] These obligations are binding upon all members and apply, with limited exceptions, to all measures affecting trade in services covered under GATS.[52]

However, unlike GATT, GATS does not generally obligate members to grant market access and national treatment to other members.[53] Instead, market access and national treatment are termed "specific commitments" under GATS. Members only make specific commitments under GATS through trade negotiations.[54] Significantly, a member does not grant national treatment or market access to foreign services or service suppliers in a particular sector unless it specifically enters a commitment to do so in its "schedule of specific commitments" (Schedule).[55] The degree to which a member

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49. *See* Feketekuty, *supra* note 43, at 95 ("All quantitative limits on services or service providers are dealt with under the rubric of market access, whether such limits are being imposed on foreign services on a discriminatory basis or on both domestic and foreign services on a nondiscriminatory basis."). Feketekuty further states:

> The intermingling of commitments on discriminatory and nondiscriminatory barriers has the further effect of mixing two laudatory, but separate goals: trade liberalization and domestic regulatory reform. Removing discriminatory regulation, whether in quantitative or qualitative form, is all about trade liberalization. Removing nondiscriminatory restraints on services is frequently an exercise in domestic regulatory reform. The use of nondiscriminatory quantitative restraints more often than not reflects a country's approach to the regulation of activity in a services sector, and telling a country to eliminate such restraints is tantamount to saying it must reform its approach to the regulation of that sector.

Id. at 96.

50. *See id.* at 94 (stating that "GATS provides for the negotiation of a hierarchy of commitments").

51. GATS, *supra* note 4, arts. II–III.

52. *Id.*

53. *Id.* arts. XVI–XVII.

54. *See* Council for Trade in Servs., *Guidelines for the Scheduling of Specific Commitments Under the General Agreement on Trade in Services (GATS)*, ¶ 2, S/L/92 (Mar. 28, 2001) [hereinafter *Scheduling Guidelines*] (defining specific commitments as "negotiated undertakings particular to each GATS signatory").

55. The Schedule is a legal record of the specific commitments of each WTO member and is annexed to GATS. It is thus considered to be an integral part of GATS and binding on all WTO members. GATS, *supra* note 4, art. XX; *Scheduling Guidelines*, *supra* note 54, ¶ 3.

grants market access and national treatment to services or service suppliers in a particular sector is also negotiable.[56] However, a member undertaking specific commitments in relation to a particular service sector or subsector is prohibited from maintaining any measure that violates the market-access and national treatment obligations unless it specifies in its Schedule, with absolute clarity, the limitations and restrictions on market access and national treatment it wishes to retain.[57] Thus, a member's Schedule is *the* most significant outcome of negotiations under GATS—it is both a positive record of a country's liberalization commitments under GATS and a negative list of the remaining market-access and national treatment restrictions and limitations that still apply to its scheduled sectors.

The WTO provides administrative and dispute-settlement bodies related to the operation of GATS. The Council for Trade in Services

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56. *See Scheduling Guidelines*, *supra* note 54, ¶¶ 1, 8–18; *infra* notes 70–72 and accompanying text (discussing the technique of making specific commitments); *see also* Feketekuty, *supra* note 43, at 95–96 (discussing market access and national treatment).

57. *See generally* Michael Steinicke, *Trade in Services*, *in* WTO LAW—FROM A EUROPEAN PERSPECTIVE 279–317 (Birgitte Egelund Olsen et al. eds., 2006) (discussing, *inter alia*, GATS and associated issues including progressive liberalization, specific commitments, and institutional provisions). GATS defines the term "sector" of a service to mean "with reference to a specific commitment, one or more, or all, subsectors of that service, as specified in a Member's Schedule" or "otherwise, the whole of that service sector, including all of its subsectors." GATS, *supra* note 4, art. XXVIII(e). The Scheduling Guidelines encourage WTO members to use the Services Sectoral Classification List prepared by the Secretariat that classifies services into 12 sectors and more than 150 subsectors for the purposes of scheduling specific commitments. World Trade Org., *Note by the Secretariat: Services Sectoral Classification List*, MTN.GNS/W/120 (July 10, 1991) [hereinafter W/120]; *see Scheduling Guidelines*, *supra* note 54, ¶ 23 ("In general the classification of sectors and sub-sectors should be based on the Secretariat's Services Sectoral Classification List."). The W/120 also lists the corresponding number for the service sectors and subsectors under the United Nations Provisional Central Product Classification (CPC), a detailed classification of both goods and services. W/120, *supra*, at 35, Annex 2, Attachment 8; *see also* Dept. of Int'l Econ. & Soc. Affairs, Statistical Div. of the U.N., *Central Product Classification (CPC)*, Statistical Papers, Series M No. 77 Version 1.1. (2004) [hereinafter CPC] (providing the latest revised version of a complete product classification covering goods and services and setting forth a framework for international comparison and harmonization of various statistics pertaining to goods and services). Even though GATS defines "services" to include "any service in any sector except services supplied in the exercise of governmental authority," the scope of GATS is not limited to any list of covered sectors of services and the use of the CPC to define services is not mandatory. MITSUO MATSUSHITA ET AL., THE WORLD TRADE ORGANIZATION LAW, PRACTICE, AND POLICY 611–12 (2d ed. 2003); *see also infra* notes 131–32, 142–46 and accompanying text (discussing of the importance of precisely scheduling limitations and restrictions on market access and national treatment if full liberalization of a particular sector or subsector of a member's services market is not desired).

is the body responsible for administering GATS.[58] The WTO's dispute settlement mechanism[59] applies to disputes arising under GATS. Any dispute regarding a failure to observe the substantive obligations of GATS,[60] as well as complaints of nullification and impairment not involving a violation of a substantive GATS obligation,[61] may be referred to the WTO Dispute Settlement Body (DSB) for resolution.[62] The main text of GATS also contains a group of "final provisions" that regulate, among other things, the circumstances in which a member may deny the benefits of GATS to services supplied from the territories of non-members and even other WTO members to which it does not apply the WTO Agreement.[63] These final provisions also define key terminology,[64] and extend legal recognition to the Annexes

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58. The Council for Trade in Services was established under the WTO Agreement to oversee the functioning of GATS. WTO Agreement, *supra* note 2, art. IV:5. It carries out such functions as may be assigned to it in order to facilitate the operation of GATS and further its objectives. GATS, *supra* note 4, art. XXIV.

59. *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1226 (1994) [hereinafter DSU]. The WTO Agreements covered by the DSU consist of all multilateral agreements listed in the WTO Agreement Annexes 1 and 2, and all plurilateral agreements listed in Annex 4 of the WTO Agreement. *Id.* art. 1 (referencing Appendix 1 of the DSU).

60. GATS, *supra* note 4, art. XXIII:1.

61. Article XXIII:3 of GATS incorporates the concept of "non-violation nullification and impairment" into GATS as a basis for a complaint to the Dispute Settlement Body (DSB). *Id.* art. XXIII:3. Article XXIII:3 provides:

> If any Member considers that any benefit it could reasonably have expected to accrue to it under a specific commitment of another Member under Part II of this Agreement is being nullified or impaired as a result of the application of any measure which does not conflict with the provisions of this Agreement, it may have recourse to the DSU. If the measure is determined by the DSB to have nullified or impaired such a benefit, the Member affected shall be entitled to a mutually satisfactory adjustment on the basis of paragraph 2 of Article XXI, which may include the modification or withdrawal of the measure. In the event an agreement cannot be reached between the Members concerned, Article 22 of the DSU shall apply.

Id.

62. *Id.* art. XXIII. The DSB is established under Article 2 of DSU. DSU, *supra* note 59, art. 2.

63. *See* GATS, *supra* note 4, art. XXVII (dealing with the circumstances in which a member may deny the benefits of the Agreement to the supply of a service or service suppliers, "if it establishes that the service is supplied from or in the territory of a non-Member or of a Member to which the denying Member does not apply the WTO Agreement" or in the case of a service supplier that is a juridical person, "if it establishes that it is not a service supplier of another Member or that it is a service supplier of a Member to which the denying Member does not apply the WTO Agreement").

64. *Id.* art. XXVIII.

of GATS.[65] The eight Annexes[66] clarify the operation of certain provisions of GATS,[67] and also regulate its application to specific services.[68]

A. *Making Commitments to Liberalize Trade in Services*

The extent to which a member has liberalized trade in services under GATS is ascertained by reference to the text of GATS and by examining the member's Schedule.[69] Specific commitments

> refer to the degree of liberalization that each WTO Member deems optimal for its own market. WTO Members are free (subject of course, to negotiating pressure from their trading partners) to open their services market in the sectors where they wish to do so and with the caveats they deem appropriate. Specific commitments are, consequentially, sector specific.[70]

In reality, specific commitments are negotiated commitments that rely on the process of scheduling.[71] When a member enters a full market access and national treatment commitment to sectors specified in its Schedule, the member guarantees it will impose no limits on market access or national treatment in relation to services and service suppliers falling within the scope of those sectors.[72] Consequentially, if a member wants to limit market access or national treatment obligations for a scheduled services sector, it must specify the limits in its Schedule in relation to each sector in which it has made specific commitments.[73] However, scheduling specific

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65. *Id.* art. XXIX.

66. These eight annexes cover: Article II Exemptions, Movement of Natural Persons Supplying Services Under the Agreement, Air Transport Services, Financial Services (two annexes), Negotiations on Maritime Transport Services, Telecommunications, and Basic Telecommunications. *See id.* (setting forth the eight annexes).

67. *See, e.g., id.* art. XXIX, Annex on Article II Exemptions.

68. *See, e.g., id.* art. XXIX, Annex on Financial Services, Second Annex on Financial Services. For a concise overview of the sector specific Annexes, see Steinicke, *supra* note 57, at 311–17.

69. MATSUSHITA ET AL., *supra* note 57, at 611–17 (discussing the liberalization approach of GATS and explaining that WTO members are only required to liberalize a given services sector if they have undertaken to do so in their Schedule).

70. MITSUO MATSUSHITA ET AL., THE WORLD TRADE ORGANIZATION LAW, PRACTICE, AND POLICY 239 (1st ed. 2003).

71. Article XX of GATS stipulates that each Member sets out in a schedule the specific commitments it undertakes under Part III of the Agreement. GATS, *supra* note 4, art. XX:1. Guidance on the manner and technique of scheduling specific commitments is to be found in the Scheduling Guidelines. *Scheduling Guidelines*, *supra* note 54.

72. This is indicated in the member's Schedule by marking the word "NONE" under both the market access and national treatment columns of the Schedule in respect of each sector (or subsector) and mode of supply. *Id.* ¶ 42.

73. That is to say, a member must schedule the terms, limitations and conditions on market access and the conditions and limitations on national treatment that apply to each scheduled sector. GATS, *supra* note 4, art. XX:1(a)–(b); *Scheduling*

commitments for sectors listed in the member's Schedule does not imply that the member has totally lost the right to regulate those sectors. Members still retain their sovereign rights to regulate scheduled services as long as they do not violate either general obligations or specific commitments under GATS.[74]

The scope of the global services trade to be liberalized by GATS is highly ambitious. GATS applies to all "measures by Members affecting trade in services"[75] and to any service in any sector except services supplied in the exercise of governmental authority.[76] The

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Guidelines, *supra* note 54, ¶ 44. Schedules may also contain "additional commitments." GATS, *supra* note 4, art. XVIII. Such additional commitments relate to measures that are not subject to scheduling under either the market access or national treatment obligations but which affect trade in scheduled sectors. *Id.* Such measures may include qualification, standards or licensing measures. *Id.* In addition, members also schedule time frames for implementation of any commitments as well as the effective date for entry into operation for commitments. *Id.* art. XX:1(d)–(e).

74. *See, e.g.*, *Disciplines on Domestic Regulation*, *supra* note 40, ¶¶ 7–9 (commenting on the Members' right to regulate).

75. GATS, *supra* note 4, art. I:3(a). In *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, the Appellate Body affirmed the Panel's ruling that "no measures are excluded *a priori* from the scope of the GATS as defined by its provisions" and that "the scope of the GATS encompasses any measure of a member to the extent it affects the supply of a service regardless of whether such measure directly governs the supply of a service or whether it regulates other matters but nevertheless affects trade in services." Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, ¶ 217, WT/DS27/AB/R (Sept. 9, 1997) (*adopted* Sept. 25, 1997) [hereinafter *EC-Bananas III*]; *c.f.* Complaint of Ecuador, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, ¶ 7.285, WT/DS27/R/ECU (May 22, 1997); Complaint of Mexico, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, ¶ 7.285, WT/DS27/R/MEX (May 22, 1997); Complaint of the United States, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, ¶ 7.285, WT/DS27/R/USA (May 22, 1997). The Appellate Body also confirmed the broad scope of the GATS under Article I of GATS, ruling: "[t]he ordinary meaning of the word 'affecting' implies a measure that has 'an effect on,' which indicates a broad scope of application." *EC-Bananas III*, *supra*, ¶ 220. It also went on to state:

> This interpretation is further reinforced by the conclusions of previous panels that the term "affecting" in the context of Article III of the GATT is wider in scope than such terms as "regulating" or "governing." We also note that Article 1:3(b) of the GATS provides that "services" includes *any service* in *any sector* except services supplied in the exercise of governmental authority," and that Article XXVIII(b) of the GATS provides that the "supply of a service" includes the production, distribution, marketing, sale and delivery of a service." There is nothing at all in these provisions to suggest a limited scope of application for the GATS. . . . For these reasons, we uphold the Panel's finding that there is no legal basis for an *a priori* exclusion of measures within the EC banana import licensing regime from the scope of the GATS.

Id. (emphasis added).

76. GATS, *supra* note 4, art. I:3(b). Services supplied in the exercise of governmental authority exclude services supplied on a commercial basis as well as those supplied in competition with one or more service suppliers. *Id.* art. I:3(c).

term "measures by Members" is defined as measures taken by central, regional, or local governments and authorities,[77] and includes "any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form."[78] Thus, "measures" includes, for example, all forms of domestic laws in force in the United States including federal, state, and local laws, and laws established by legislation, court decisions, and administrative bodies.[79] Further, GATS defines "trade in services" as the supply of a service[80] in the following "modes of supply":

> (1) [F]rom the territory of one member into the territory of any other member [(cross-border supply or mode 1)];
>
> (2) in the territory of one member to the service consumer of any other member [(movement of the consumer or mode 2)];
>
> (3) by a service supplier of one member, through commercial presence in the territory of any other member [(commercial presence or mode 3)]; [and]
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> (4) by a service supplier of one member, through presence of natural persons of a member in the territory of any other member [(movement of natural persons or mode 4)].[81]

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77. *Id.* art. I:3(a). Measures by members also include measures taken by non-governmental bodies that exercise powers delegated by government. *Id.* art. I:3(a)(ii).

78. *Id.* art. XXVIII(a). In *U.S.-Gambling*, Antigua appealed the Panel's rejection of what Antigua termed a "'total prohibition' [by the United States] on the cross-border supply of gambling and betting services" as a measure "in and of itself," arguing, *inter alia*, that a prohibition was subsumed under the broad definition of the term "measure" under GATS. Appellate Body Report, *supra* note 1, ¶ 64; Panel Report, *supra* note 1, ¶¶ 6.171, 6.175. The Appellate Body, rejecting the Antiguan appeal on this point, held that the "total prohibition" referred to by Antigua was the "collective effect" of the underlying U.S. laws, and that a party "without demonstrating the source of the prohibition could not challenge a 'total prohibition' as a 'measure,' *per se* in dispute settlement proceedings under the GATS." Appellate Body Report, *supra* note 1, ¶¶ 124, 126. The Appellate Body went on to uphold the Panel's finding "that 'the alleged "total prohibition"' on cross-border supply of gambling and betting services describes the alleged effect of an imprecisely defined list of legislative provisions and other instruments and cannot constitute a single and autonomous 'measure' that can be challenged in and of itself." *Id.* ¶ 126. Addressing another point of appeal, this time by the United States, regarding whether "practice" alone could be considered as an autonomous measure that can be challenged in and of itself, the Appellate Body clarified that while this was not a "finding" of the Panel, but mere *obiter dictum*, it nevertheless disagreed with the Panel's understanding of previous Appellate Body decisions, clarifying that the Appellate Body had not pronounced upon the issue of whether practice may be challenged as such as a measure in dispute settlement. *Id.* ¶¶ 131–132.

79. *See supra* note 45 for a discussion of the types and sources of regulations covered by GATS.

80. The "supply of a service" includes the production, distribution, marketing, sale, and delivery of a service. GATS, *supra* note 4, art. XXVIII(b).

81. *Id.* art. I:2(a)–(d). The modes of supply are relevant to recording specific commitments. While commitments, or conversely, limitations on market access must be recorded in respect of each mode of supply, limitations on national treatment are also, in practice, listed in respect of each mode of supply. *See id.* arts. XVI:1, XVII:1,

The distinction between these different modes of supply is clarified by the Scheduling Guidelines, which state that "the modes are essentially defined on the basis of the origin of the service supplier and consumer and the degree and type of territorial presence which they have at the moment the service is delivered."[82] For instance, in cross-border services (mode 1), the supplier of the service remains outside the territory of the member, but the service is delivered to consumers within the territory of that member.[83] However, in consumption abroad (mode 2), the supplier is outside the territory of the member and delivers the service to consumers of that member outside the territory of that member.[84]

Finally, GATS incorporates the principle of progressive liberalization of trade in services,[85] which is the guiding principle of trade negotiations under GATS.[86] Consistent with the principle of progressive liberalization, WTO members must enter into successive

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XX; *see also Scheduling Guidelines*, *supra* note 54, ¶ 3. While the text of Article XVII does not specify whether limitations on national treatment ought to be listed separately in relation to each mode of supply, it is the Scheduling Guidelines that instruct members to do so. *Id.* ¶¶ 13, 39. A member that makes specific commitments only in relation to one mode of supply in a particular sector (or subsector) remains free to restrict market access or national treatment in respect of any of the modes of supply to which it does not apply the market access or national treatment obligations. This is indicated in a member's Schedule by marking the word "unbound" in regard to all other modes of supply to which it does not apply the market access or national treatment obligations under a particular sector. *Id.* ¶ 46.

82. *Id.* ¶ 26.

83. *Id.*

84. *Id.* ¶¶ 28–29. However, distinguishing between modes 1 and 2 and allocating specific transactions in the context of the electronic delivery of services has been problematic. *See Work Programme on E-Commerce Interim Report*, *supra* note 36, ¶ 5; *Work Programme on E-Commerce II*, *supra* note 36, ¶ 7 ("[T]he distinction between cross-border supply and consumption abroad hinges upon whether the service is delivered in the territory of the Member or outside. It is difficult to make this rule operational when electronic delivery makes a transaction possible without the movement of either the supplier or the consumer."); *see also* Comm. on Trade in Fin. Servs., *Informal Note by the Secretariat: The Distinction Between Modes 1 and 2, in Scheduling Guidelines*, *supra* note 54, at 19, ¶¶ 2–3 (addressing the ambiguities present in distinguishing between modes 1 and 2 in relation to electronically delivered financial services). The United States has posed the question as to why services delivered electronically and accessed from another member's economy cannot be considered as mode 2 "based on the fact that consumers can 'visit' foreign websites electronically and initiate transactions at those sites." Submission by the United States, *Work Programme on Electronic Commerce*, at 4, WT/GC/16, G/C/2, S/C/7, IP/C/16, WT/COMTD/17 (Feb. 12, 1999) [hereinafter U.S. Submission on E-Commerce]. The United States has also pointed out the obvious liberalization advantages in doing so as mode 2 specific commitments are usually far more comprehensive than mode 1. *Id.* *But see* Wunsch-Vincent, *supra* note 28, at 325–26 (suggesting that the *U.S.-Gambling* rulings may have contributed towards bringing legal certainty as to the application of mode 1 to cross-border e-services).

85. GATS, *supra* note 4, pt. IV.

86. *See id.* pmbl.

rounds of negotiations directed at reducing or eliminating the trade-restrictive effects of measures affecting services.[87] The objective of such negotiations is the achievement of progressively higher levels of liberalization in services.[88] Accordingly, GATS stipulates that the general level of specific commitments undertaken by members shall be advanced in each round through bilateral, plurilateral, or multilateral negotiations.[89] In practice, progressive liberalization translates into negotiations between members that are aimed at removing limitations and restrictions on market access and national treatment in scheduled sectors, as well as adding more specific commitments to a member's Schedule.

B. *Most Favored Nation, Transparency, and Other General Obligations of Members*

GATS contains general principles and rules that are, with a few exceptions,[90] applicable to all measures of WTO members affecting trade in services.[91] One such general obligation is the MFN obligation,[92] which prohibits a member from discriminating between "like" services and service suppliers of other WTO members.[93] The

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87. In pursuance of this goal, the first round of negotiations under GATS was to commence in 2000 (five years from the date of entry into force of the WTO Agreement), and to continue periodically thereafter. *Id.* art. XIX. With the failure of the WTO Ministerial Meeting in 1999 (in Seattle), the Council for Trade in Services adopted the Guidelines and Procedures for Negotiations on Trade in Services in 2001, setting out objectives for a new round of negotiations. *See* Council for Trade in Servs., *Guidelines and Procedures for the Negotiation on Trade in Services*, S/L/93 (Mar. 29, 2001) [hereinafter *Guidelines and Procedures*]. The Doha Round also provided much needed momentum for the services negotiations. *See* Doha Declaration, *supra* note 38, ¶ 15.

88. GATS, *supra* note 4, art. XIX:1.

89. *Id.* art. XIX:4.

90. For example, the procedural and interim substantive obligations on domestic regulation and obligations on payments and transfers apply only to sectors in which a member has made specific commitments under Part III of GATS. *See id.* arts.VI:1, VI:3, VI:5–6, XI:1.

91. In contrast, the provisions of Part III of GATS apply only to the extent that a member has negotiated a commitment to liberalize a particular service sector. Such specific commitments will be listed in the member's Schedule. *See supra* notes 54–56 and accompanying text.

92. GATS provides: "With respect to any measure covered by this agreement, each Member shall 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." GATS, *supra* note 4, art. II:1.

93. Under GATS, the question of how two services or service suppliers can be considered to be "like" for the purposes of the MFN obligation is not defined in the text of Article II and is yet to be clearly interpreted in dispute settlement proceedings. The concept of likeness has been evoked in a number of high profile cases brought under both the GATT and the GATS, in relation to both the MFN obligation and the national treatment obligation of GATS. *See, e.g.*, Panel Report, *Canada—Certain Measures Affecting the Automotive Industry*, ¶¶ 10.247–10.248, WT/DS139/R & WT/DS142/R

MFN obligation applies generally to all measures affecting trade in services and covers both *de jure* (formal) and *de facto* (origin neutral) discrimination in trade in services.[94] However, a caveat to the MFN obligation curtails its otherwise beneficial effects on the elimination of discrimination between WTO members. At the time GATS entered into force, provision was made to allow WTO members to reserve exemptions to the MFN.[95] As a result, several members, including a number of industrialized countries, reserved "MFN exemptions" that modified their obligations under the MFN rule.[96] These MFN exemptions are considered to be derogations from a general obligation; as such, they are time-bound and eventually expire.[97] Nevertheless, although MFN exemptions are subject to negotiations aimed at their removal, efforts to remove such exemptions during the current round of negotiations have yielded only limited success.[98]

(Feb. 11, 2000) (*adopted* June 19, 2000, as modified by the Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R) [hereinafter *Canada Autos*]; *EC-Bananas III*, *supra* note 75, ¶ 7.322. In both these disputes, the panels accepted that the services and the service suppliers in question were "like" without engaging in any in-depth discussion on the issue. Panel Report, *supra* note 1, ¶ 3.149. Following the experience of GATT, where the determination of "likeness" has taken place on a case by case basis in the context of trade in goods, the issue of "likeness" under MFN and national treatment in GATS is also likely to be assessed and resolved more or less through dispute settlement. Joel P. Trachtman, *Lessons for the GATS from Existing WTO Rules on Domestic Regulation*, *in* DOMESTIC REGULATION AND SERVICE TRADE LIBERALIZATION, *supra* note 45, at 57, 64. However, Trachtman also notes that "GATT/WTO dispute resolution has been unable to provide a predictable, consistent approach to determining when products are 'like'" and questions whether "this situation of case-by-case analysis by the dispute settlement mechanism is superior to a more discrete, ex ante specification that could be provided by treatymaking or other quasi-legislative process." *Id.*

94. *EC-Bananas III*, *supra* note 75, ¶¶ 233–234.

95. GATS, *supra* note 4, art. II:2. GATS Annex on Article II Exemptions. Measures inconsistent with Article II:1 of GATS must be listed in and meet the conditions of the GATS Annex on Article II Exemptions. *Id.*

96. *Id.*

97. In principle, MFN exemptions cannot exceed a period of ten years calculated from the date of GATS entry into force. GATS, *supra* note 4, art. XXIX, Annex on Article II Exemptions, ¶¶ 1, 6. However, since 1995, a member's application for a GATS Article II exemption is treated as a waiver under Article IX:3 of the WTO Agreement. *Id.* ¶ 2. Waivers under Article IX:3 of the WTO Agreement may only be granted by the Ministerial Conference of the WTO in "exceptional circumstances," and must be secured by a decision of three fourths of the WTO membership. *See* WTO Agreement, *supra* note 2, art. IX:3.

98. The Doha Declaration, consistent with the Guidelines and Procedures for the Negotiations on Trade in Services, reaffirms the need to continue with negotiations on the MFN Exemptions. *See* Doha Declaration, *supra* note 38, ¶ 15; *Guidelines and Procedures*, *supra* note 87, ¶ 6. Additionally, the Sixth Ministerial Meeting of the WTO (held in Hong Kong in 2005) affirmed that members should negotiate towards the (i) removal or substantial reduction of exemptions from MFN treatment, and (ii) clarification of remaining MFN exemptions in terms of scope of application. *See* World Trade Org., Hong Kong Ministerial Declaration on the Doha Work Program, Annex C,

Thus, a considerable number of these exemptions continue to exist and weaken the overall effectiveness of the MFN rule under the GATS framework.[99]

Another significant general obligation under GATS is the principle of transparency,[100] which requires members to publish basic information on measures of general application that affect trade in services.[101] Members must notify the Council for Trade in Services of any new laws or changes to existing laws, regulations, or administrative guidelines that affect trade in services covered by members' specific commitments, as listed in their Schedules.[102] Members are also required to respond to requests for specific information made by other members relating to measures of general application, and they must also establish national points of inquiry for such purposes.[103]

In addition to MFN and transparency, there are other general provisions under GATS that range from obligations commonly found in most multilateral trade liberalization agreements[104] to obligations addressing the special interests of developing countries,[105] as well as provisions that cover other specific issues that arise in trade in services.[106]

¶ 1(e), WT/MIN(05)/DEC (Dec. 22, 2005) [hereinafter Hong Kong Ministerial Declaration].

99. In the context of the Doha Round and the ongoing services negotiations, a recent Report by the Chairman of the Council for Trade in Services to the Trade Negotiations Committee states that "[w]ith respect to MFN exemptions, only 15 offers propose improvements; some 400 exemptions would remain." Council for Trade in Servs., *Report by the Chairman to the Trade Negotiations Committee*, ¶ 3, TN/S/20 (July 11, 2005).

100. GATS, *supra* note 4, art. III.

101. *See id.* Article III:1 of GATS provides:

> Each Member shall publish promptly and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application which pertain to or affect the operation of this Agreement. International agreements pertaining to or affecting trade in services to which a member is a signatory shall also be published.

Id. art. III:1.

102. *Id.* art. III:3.

103. *Id.* art. III:4. GATS does not, however, require members to disclose public or private confidential information which would be contrary to the public interest or legitimate commercial interests. *Id.* art. III *bis*.

104. *See id.* pt. II (including provisions on economic integration (Article V), labor market integration (Article V *bis*) and restrictions to safeguard balance of payments issues (Article XII)).

105. *See id.* art. IV (aiming to increase the participation of developing countries in services trade).

106. For example, see the GATS provisions aimed at preventing monopolistic and anti-competitive practices from adversely affecting the benefits of the Agreement (Article VIII dealing with monopolies and exclusive service suppliers and Article IX dealing with restrictive business practices), as well as the prohibition on restricting international transfers and payments for current transactions relating to the specific

C. *Limitations on Domestic Regulation that Restricts Trade: Balancing Liberalization with Regulatory Autonomy*

Key components of the obligations under GATS are provisions that govern members' imposition of domestic regulation restricting trade in services.[107] For example, while Article VI of GATS is perceived as preserving members' regulatory autonomy, paragraphs 4 and 5 of Article VI nevertheless subject domestic regulation to scrutiny on the basis of whether such measures are more burdensome than necessary to achieve legitimate objectives.[108] However, the most significant restrictions on members' regulatory autonomy come in the form of GATS specific commitments, or more precisely, the obligations on market access and national treatment (Articles XVI and XVII respectively).[109] These obligations curtail members' abilities to impose quantitative restrictions on the supply of services or services suppliers (Article XVI) or to impose regulations discriminating against foreign services or service suppliers (Article XVII) in scheduled sectors. The balance between these specific obligations, which focus on eliminating restrictive regulations to liberal trade in services and the sovereign powers of individual members to protect vital domestic interests, is achieved by providing broad public policy exceptions. The GATS exceptions clause (Article XIV) regulates the circumstances in which national interests may override the provisions of GATS.[110] It is this combination of GATS rules and general exceptions that defines the liberalization commitments of members and draws the parameters of regulatory autonomy under GATS.

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commitments made by members (Article XI). *Id.* pt. II. GATS provisions also provide for mutual recognition and harmonization of service standards relating to education, licensing, and certification (Article VII). The use of emergency safeguard measures (Article X), government procurement (Article XIII), and government subsidies (Article XV) are left as areas requiring further negotiations. *Id.*

107. *See* Exhibit A for a summary of GATS restrictions on regulatory autonomy.

108. *See Disciplines on Domestic Regulation*, *supra* note 40, ¶¶ 9–11; *see also infra* Part IV.B.

109. Consequently, it is the specific commitments that are most important to the liberalization of the services trade under GATS.

110. GATS, *supra* note 4, art. XIV; *Scheduling Guidelines*, *supra* note 54, ¶ 20; *see also* Kalypso Nicolaïdis & Joel P. Trachtman, *From Policed Regulation to Managed Recognition in GATS*, *in* GATS 2000: NEW DIRECTIONS IN SERVICES TRADE LIBERALIZATION, *supra* note 6, at 241, 256 (discussing when national interests may be found to override the GATS provisions).

Exhibit A
How GATS Imposes Limitations on Members' Domestic Regulatory Autonomy

Type of Limitation	GATS Textual Reference	Legal Tests to Analyze Member's Domestic Measures
Market Access Requires **opening domestic markets** to foreign services and suppliers to the extent promised in the member's Schedule of Commitments. Prohibits domestic regulation that imposes **quantitative** and **quantitative type** restrictions on market access.	**Art. XVI** Applies only and to the extent a member has scheduled a specific commitment to grant market access to a specific services sector. A member may grant full or partial market access for a sector or subsector. However, if any commitment is made, the member must list any limitations in respect of such sector and mode of supply to which they apply. In the absence of such limitations, it will be deemed to have made a commitment for full market access.	Does the regulation impose a quantitative or quantitative type restriction on the supply of services (or service providers)? Six categories of quantitative and quantitative type measures are prohibited unless listed in the member's Schedule.
National Treatment Requires treating foreign services and suppliers **no less favorably** than domestic **like** services and suppliers. Prohibits domestic regulation that **discriminates** against foreign services or foreign suppliers by providing less favorable treatment to such services or suppliers than that provided to **like** domestic services and service suppliers.	**Art. XVII** Applies only to the extent a Member has scheduled a specific commitment to grant national treatment. A member may list conditions or limitations in its Schedule that limit this obligation.	Does the regulation treat foreign services or services suppliers **less favorably** than it treats "**like**" domestic services or service suppliers? Less favorable treatment is treatment that modifies conditions of competition in favor of domestic services and suppliers in comparison to foreign like services or suppliers. Thus the obligation covers both *de jure* (formal) and *de facto* (origin-neutral) discriminatory regulations.
General Procedural Obligations on Domestic Regulation	**Art. VI:1-3** Articles 1-3 apply only to sectors in which a member has scheduled specific commitments of market access and/or national treatment.	Are measures of general application administered in a **reasonable, objective and impartial manner**? Are decisions relating to applications for the authorization of the supply of services covered under specific commitments given within a **reasonable time**? Is **due process** provided? Is there **judicial review** of administrative decisions, and where justified, remedies consistent with the member's legal system?

Type of Limitation	GATS Textual Reference	Legal Tests to Analyze Member's Domestic Measures
General Substantive Obligations on Domestic Regulation Limits the trade restrictiveness of non-discriminatory **qualitative** regulations relating to **qualification requirements and procedures, technical standards and licensing requirements.**	**Art. VI:4** In principle, applies whether or not the member has scheduled specific commitments of market access and/or national treatment. Requires the Council for Trade in Services to develop "**disciplines**" (rules) to regulate domestic regulation that may operate as unnecessary barriers to trade in services. Such disciplines have not yet been adopted except with respect to domestic regulation in the accountancy services sector.	Is the regulation **more burdensome than necessary** to achieve a legitimate goal, that is, to ensure the quality of the service provided? Are the regulations based on objective and transparent criteria such as competence and the ability to supply the service? In the case of licensing measures, are they in themselves a restriction on the supply of the service?
Interim Rule on Domestic Regulation	**Art. VI:5** Applies only to sectors in which a member has scheduled a specific commitment on market access and/or national treatment. Applies only until disciplines are adopted under Art VI:4.	Does the regulation **nullify or impair specific commitments** made in the member's Schedule in a manner that does not comply with the criteria outlines in Article VI:4? Is the regulation **nevertheless justified** because it could have reasonably been expected of that member at the time the specific commitments were made?
Measures Necessary to Protect Fundamental Policy Interests of a Member Exempts domestic regulation that is **necessary** to protect public morals, maintain public order, protect human, animal or plant life or health or to secure compliance with laws and regulations. Also exempts domestic regulation that is necessary to pursue essential security interests.	**Art. XIV** This exception shields domestic regulation necessary to achieve certain policy objectives even if the regulation is otherwise inconsistent with the members' obligations under GATS. Types of regulation shielded: To prevent deception or fraud. To deal with default on a contract. To protect privacy of individuals regarding processing of personal data. To protect public morals and maintain public order.	Is the regulation justified by overriding national interests? Two part test: Is the regulation **necessary** for the realization of the particular objectives listed under Article XIV? Is the regulation **applied** in a manner that is arbitrary or constitutes unjustifiable discrimination between countries where like conditions prevail or a disguised restriction on trade?

1. The Article VI Mandate to Develop Disciplines on Qualitative Domestic Regulation

Article VI on domestic regulation contains both procedural and substantive obligations for members. Article VI:1 and Article VI:3 contain a number of procedural safeguards that relate to transparency and due process in the administration of domestic regulations.[111] In addition, Article VI:2 requires that members provide judicial review of administrative decisions affecting trade in services and, where justified, appropriate remedies for such administrative decisions.[112] However, the obligation to provide judicial review and remedies is limited in that it applies only to the extent such procedures are consistent with a member's constitutional structure and legal system.[113] Generally, these Article VI procedural obligations are broadly worded and apply primarily to service sectors in which members have already made specific commitments of market access and national treatment. In contrast, Article VI:4—which provides for the negotiation of substantive obligations with respect to qualification requirements and procedures, technical standards, and licensing requirements—applies independently of whether a member has scheduled specific commitments under GATS.[114] Basically, Article VI:4 provides a mandate for the Council for Trade in Services to develop "disciplines" that will ensure that such qualitative regulations referring to minimum requirements, such as the quality of the service supplied or the ability of the service supplier to supply the service, will not operate as unnecessary barriers to trade.[115] These disciplines will ensure that domestic regulations covered by Article VI:4 are "based on objective and transparent criteria, such as competence and the ability to supply the services," and are "not more burdensome than necessary to ensure

111. For example, Article VI:1 requires that all measures of general application affecting trade in scheduled sectors be administered in a reasonable, objective, and impartial manner. In *U.S.-Gambling*, the Panel did not consider whether there was violation of Articles VI:1 and VI:3 as alleged by Antigua because it ruled that Antigua had failed to make a prima facie demonstration that the U.S. measures were inconsistent with the said provisions. Panel Report, *supra* note 1, ¶ 6.437. However, the Panel did clarify that Article VI:1 "did not apply to measures of general application themselves but to the administration of these measures." *Id.* ¶ 6.432. It also confirmed that Article VI:3 "imposed transparency and due process obligations with respect to the processing of applications for authorization to supply in a sector where specific commitments have been undertaken." *Id.* Thus, paragraphs (1) and (3) of Article VI were confirmed to contain disciplines of a procedural nature. *Id.*

112. GATS, *supra* note 4, art. VI:2(a).

113. Therefore, Article VI:2, which applies generally to all services, does little to compel a member to actually alter its existing administrative procedures and judicial review mechanisms. *Id.* art. VI:2(b).

114. *Id.* art.VI:4.

115. *Id.*

the quality of the service."[116] Further, Article VI:4 requires the "disciplines" to ensure that licensing procedures do not operate to restrict the supply of services.[117]

Pending the development of the Article VI:4 "disciplines" that would apply horizontally across all sectors (horizontal disciplines), Article VI:5 provides an interim rule. This interim rule prohibits members from applying licensing and qualification requirements and technical standards that nullify or impair specific commitments in a manner that does not comply with the criteria that guide development of the "disciplines."[118] However, measures that could have reasonably been expected of members at the time the specific commitments were made (for example, prior to 1995) are exempt from scrutiny under Article VI:5.[119] Significantly, Article VI:5 only applies to services subject to specific commitments in a member's Schedule.[120] The sphere of application of Articles VI:4 and VI:5 is generally considered to be limited to domestic regulation "consistent" with the specific obligations of GATS.[121] Although Article VI:5

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116. *Id.* art.VI:4(a)–(b).

117. *Id.* art.VI:4(c). The Working Party on Domestic Regulation ("Working Party"), which is the successor of the Working Party on Professional Services, was established in April 1999 by the Council for Trade in Services. Council for Trade in Servs., *Decision on Domestic Regulation*, ¶ 1, S/L/70 (Apr. 28, 1999). Its mandate is to develop any necessary disciplines on domestic regulation under Article VI:4 for recommendation to the Council for Trade in Services. *Id.* ¶ 2. Under its mandate, it must develop generally applicable disciplines and may also develop disciplines for individual sectors or groups of sectors. *Id.* ¶ 3.

118. GATS, *supra* note 4, art. VI:5(a)(i) (referring to the criteria outlined in GATS art. VI:4(a)–(c)).

119. *Id.* art. VI:5(a)(ii). *See also Disciplines on Domestic Regulation*, *supra* note 40, ¶ 11 (noting that this would mean, at the very least, that all measures which were already in place in 1995 would be exempt under Article VI:5 of GATS).

120. GATS, *supra* note 4, art. VI:5(a).

121. *See Scheduling Guidelines*, *supra* note 54, ¶¶ 13–14 (discussing domestic regulation and the "limitations on national treatment"). The Discussions of the Working Party on Professional Services (WPPS) developed during the course of designing disciplines for the accountancy sector under Article VI:4 of GATS, notes that:

> [A]lthough it was not in the mandate of the WPPS to provide an interpretation of GATS provisions, the important relationship between the new disciplines and Articles XVI and XVII was noted. While these two Articles relate to the scheduling of specific commitments on measures falling within their scope, the disciplines developed under Article VI:4 aim at ensuring that other types of regulatory measures do not create unnecessary barriers to trade. It has been noted that Article XVI (Market Access) covers the categories of measures referred to in paragraph 2 (a) to (f), whether or not any discrimination is made in their application between domestic and foreign suppliers. Article XVII (National Treatment) captures within its scope any measure that discriminates—whether *de jure* or *de facto*—against foreign services or service suppliers in favour of like services or service suppliers of national origin. *A Member scheduling commitments under Articles XVI and XVII has the right to maintain limitations on market access and national treatment and inscribe*

obliges members to refrain from enacting domestic regulation that nullifies or impairs members' specific commitments, it does not oblige members to review or eliminate domestic regulation that existed prior to the time in which they made such commitments:

> Thus longstanding regulatory practices or circumstances are protected. This means that the domestic circumstances as they are form a background for all concessions; as a matter of negotiation strategy, members of the GATS must recognize this and bear the burden of negotiating an end to existing measures that reduce the benefits for which they negotiate. It is also clear . . . that Article VI.5 will not impose substantial discipline on domestic regulation, which will place a greater burden on Article VI.4 as a source of discipline.[122]

2. Article XIV Exceptions Permitting Regulations Necessary to Protect Fundamental Domestic Policy Interests

The concept of regulatory autonomy finds its strongest expression in GATS under the general and national security exceptions that are found in Articles XIV and XIV *bis*, respectively. In essence, Article XIV

> affirm[s] the right of Members to pursue objectives identified in the paragraphs of these provisions even if, in doing so, Members act inconsistently with obligations set out in other provisions of the respective agreements provided that all of the conditions set out therein are satisfied.[123]

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them in its schedule. On the other hand, the disciplines to be developed under Article VI:4 cover domestic regulatory measures which are not regarded as market access limitations as such, and which do not in principle discriminate against foreign suppliers. They are therefore not subject to scheduling under Articles XVI and XVII. However, it is also recognized that for some categories of measures the determination as to whether an individual measure falls under Article VI:4 disciplines or is subject to scheduling under Article XVII will require careful consideration.

Council on Trade in Servs., Working Party on Prof'l Servs., *Discussion on Matters relating to Article XVI and XVII of GATS in connection with the Disciplines on Domestic Regulation in the Accountancy Sector*, S/WPPS/4 (Dec. 10, 1998) (emphasis added). Accordingly, when adopting the Disciplines on Domestic Regulation in the Accountancy Sector, WTO members also clarified that the accountancy disciplines do not apply to measures that are subject to scheduling under the specific commitments of GATS. *See* Council for Trade in Servs., *Disciplines on Domestic Regulation in the Accountancy Sector*, ¶ 1, S/L/64 (Dec. 17, 1998) [hereinafter *Accountancy Sector Disciplines*].

122. Trachtman, *supra* note 93, at 67. For example, Pauwelyn argues that had the substantive aspects of the U.S. measures challenged in *U.S.-Gambling* been considered under Article VI, they would not have been found to violate Article VI:5 since "[a]ll US laws at issue pre-date the point in time where the United States made its GATS commitments" and, therefore, would be exempt under Article VI:5 (a)(ii). Pauwelyn, *supra* note 12, at 167.

123. Appellate Body Report, *supra* note 1, ¶ 291.

Article XIV allows members to adopt and enforce laws necessary to protect public morals; protect the life or health of humans, animals, or plants; maintain public order; or secure compliance with other GATS-consistent laws and regulations.[124] Such measures are justified as exceptions to GATS,[125] provided the measures are both considered *necessary* and designed to meet any one of the objectives listed in Article XIV.[126] In WTO jurisprudence, the necessity of a measure under the general exceptions clause is determined in terms of whether a reasonably available, WTO-consistent alternative exists to the measure at issue.[127] Additionally, the measure must satisfy the conditions of the opening paragraph of Article XIV (commonly referred to as the "chapeau"). The chapeau stipulates that measures falling within the scope of Article XIV must not be applied in a manner that constitutes arbitrary or unjustifiable discrimination between countries sharing the same conditions, nor amount to a disguised restriction on international trade.[128] Article XIV of GATS also provides considerable flexibility for action taken in the pursuance of essential security interests,[129] and does not require a member to divulge any information that is contrary to such

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124. The full list of Article XIV exceptions covers measures necessary for the protection of public morals, maintenance of public order, the protection of human, animal or plant life or health, and the securing of compliance with laws and regulations, which are themselves not inconsistent with GATS. GATS, *supra* note 4, art. XIV(a)–(c). This includes laws relating to the prevention of deceptive and fraudulent practices; dealing with the effects of a default on services contracts; the protection of privacy of individuals with regard to processing and dissemination of personal data and confidentiality of individual records and accounts; and safety. *Id.* It also covers measures that are inconsistent with the national treatment obligation of GATS, which aim at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other members and measures inconsistent with the MFN obligation, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the member is bound. *Id.* art. XIV(d)–(e).

125. *Id.* art. XIV(a)–(c).

126. As exceptions to GATS, measures falling under the scope of Article XIV are not subject to scheduling in a member's Schedule of commitments. *Scheduling Guidelines*, *supra* note 54, ¶ 20.

127. Report of the Panel, *United States—Section 337 of the Tariff Act of 1930*, ¶ 5.26, L/6439 (Nov. 7, 1989), GATT B.I.S.D. (36th Supp.) at 345 (1989) [hereinafter *U.S. Tariff Act of 1930*]. As Article XIV of GATS is largely modeled on Article XX of GATT (the general exception clause of GATT), the jurisprudence of Article XX is applied in interpreting the analogous provisions of Article XIV of GATS. This interpretation was specifically confirmed by both the Panel and Appellate Body in *U.S.-Gambling*. Panel Report, *supra* note 1, ¶¶ 6.448, 6.461; *see also EC-Bananas III*, *supra* note 75, ¶ 231 (confirming that jurisprudence under GATT is generally relevant for the interpretation of analogous provisions contained in GATS).

128. GATS, *supra* note 4, art. XIV.

129. *Id.* art. XIV *bis* (1)(b).

interests.[130] Finally, it does not prevent members from taking action in the pursuit of any obligation under the United Nations Charter concerning the maintenance of international peace and security.[131]

3. Articles XVI and XVII: Restrictions on Quantitative and Discriminatory Forms of Domestic Regulation

Articles XVI and XVII (the market access and national treatment obligations of GATS) are primarily designed to achieve progressive liberalization of trade in services, which essentially means minimizing or eliminating domestic regulations that restrict trade. Therefore, when a member makes market access and national treatment commitments under GATS, GATS restricts the right of that member to impose either trade-distorting *quantitative* limits on imported services (or service suppliers) or *qualitative* regulations that discriminate against foreign services or suppliers on the basis of the origin of the service or the nationality of the service supplier.[132]

i. Market Access Obligations Restrict Domestic Regulations that Place Quantitative Limits on Access to Services Markets

In general, the market access obligation under GATS (Article XVI) restricts the use of quantitative or quantitative-type measures limiting access to services markets.[133] A member is prohibited from maintaining measures in a scheduled sector that fall within any of the six categories and types of measures mentioned in Article XVI:2, unless the measure is listed as a limitation on market access in the relevant column of its Schedule.[134] An undertaking to grant market

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130. *Id.* art. XIV *bis* (1)(a).

131. *Id.* art. XIV *bis* (1)(c).

132. *Id.* art. XVI.

133. Its functional equivalent in GATT is Article XI, which prohibits the use of quantitative measures in the goods trade. GATT, *supra* note 42, art. XI.

134. Article XVI of GATS provides:

> (1) With respect to market access through the modes of supply identified in Article 1, each Member shall accord services and service suppliers of any other Member treatment no less favorable than that provided under the terms, limitations and conditions agreed and specified in its Schedule.
>
> (2) In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:
>
> (a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
>
> (b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;

access with respect to any services sector or subsector under GATS is an obligation to accord treatment "no less favorable than that provided for under the terms, limitations and conditions, agreed and specified" in the Schedule.[135] Thus, unconditional market access is granted if a member does not maintain any of the measures listed in Article XVI, but a member may grant "partial access" by listing any of the Article XVI:2 restrictions it still wishes to apply.[136] Article XVI also requires that such limitations be listed in respect of each sector and mode of supply to which they apply. A significant feature of the market access obligation is that it is worded broadly to cover both quantitative measures aimed specifically at restricting competition between foreign and domestic services or service suppliers (i.e., discriminatory quantitative measures), and quantitative measures that restrict competition for both domestic and foreign competitors alike (i.e., non-discriminatory quantitative measures).[137]

The measures prohibited by Article XVI range from quantitative restrictions (e.g., limits on the number of suppliers)[138] to quantitative-type limitations (e.g., limits on the types of legal entities permitted to supply a service[139] and maximum percentage limitations on foreign equity participation).[140] The list of prohibited quantitative

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> (c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;
>
> (d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;
>
> (e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and
>
> (f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

GATS, *supra* note 4, art. XVI.

135. *Id.* art. XVI:1; Panel Report, *supra* note 1, ¶ 6.263. In *U.S.-Gambling*, the Panel confirmed that: "[t]he standard of 'no less favorable' treatment in Article XVI is established by reference to the specific commitments inscribed in the market access column of a member's schedule." *Id.*

136. *See supra* text accompanying notes 54–55.

137. *Compare* GATS, *supra* note 4, art. XVI:2(a) (referring to limitations on the number of service suppliers), *with id.* art. XVI:2(f) (referring directly to limitations on the participation of foreign capital).

138. *See, e.g., id.* art. XVI:2 (a)–(d) (limiting the number of service suppliers, the total value of service transactions or service operations, or the total number of individuals who may be employed in a particular sector).

139. *See, e.g., id.* art. XVI:2(e) (limiting the provision of services to corporations or partnerships that have limited liability protections).

140. *See, e.g., id.* art. XVI:2(f) (placing an eighty percent ceiling on foreign ownership of banking companies).

measures contained in Article XVI:2 is exhaustive,[141] and determination of whether a particular domestic regulation falls within the scope of Article XVI necessarily turns on the interpretation of the measures listed in Article XVI:2.[142] From a trade liberalization perspective, determining whether a domestic regulation that affects the supply of services in a scheduled sector falls inside or outside the scope of the six categories of Article XVI:2 is a crucial issue. Domestic regulations falling outside the scope of any of the six categories of measures prohibited under Article XVI:2 may be imposed or maintained without violating Article XVI:1, even if such regulations have the effect of limiting the supply of the service.[143]

ii. National Treatment Obligations Restrict Discriminatory Domestic Regulation

The obligation to grant national treatment (Article XVII)[144] obliges members to treat the services and service suppliers of other WTO members no less favorably than they treat their own "like" services and service suppliers.[145] In practical terms, this obligation to extend "treatment no less favorable" than that accorded to domestic "like" services and service suppliers under Article XVII applies in relation to each mode of supply in a scheduled sector by virtue of the

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141. Panel Report, *supra* note 1, ¶ 6.318; *Scheduling Guidelines*, *supra* note 54, ¶ 8.

142. This was the principal issue in *U.S.-Gambling* discussed *infra* in Parts III and IV of this Article.

143. Panel Report, *supra* note 1, ¶¶ 6.256–6.257. For example, in *U.S.-Gambling*, Antigua argued that the U.S. "total prohibition" violated Article XVI:2 paragraphs (a) and (c), while the United States argued that the restrictions on online gambling and betting services were not covered by Article XVI as they referred to "the character of the activity involved" rather than limiting "the number of service suppliers or the total number of service operations or total quantity of service output." *Id.*

144. Article XVII of GATS provides:

> (1) In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favorable than that it accords to its own like services and service suppliers.
>
> (2) A Member may meet the requirements of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.
>
> (3) Formally identical or formally different treatment shall be considered to be less favorable if it modifies the conditions of competition in favor of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

GATS, *supra* note 4, art. XVII:1–3

145. *Id.* art. XVII:1.

scheduling mechanism for listing specific commitments.[146] A member may grant national treatment by providing formally identical treatment or formally different treatment,[147] as long as it does not modify the conditions of competition in favor of domestic services and service suppliers.[148] Article XVII covers both *de jure* (formal) discrimination as well as *de facto* (origin-neutral) discrimination in trade in services.[149] Like Article XVI, the obligation to grant national

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146. *Id.* art. XX:2. Note that measures inconsistent with both Articles XVI and XVII must be listed in the market access column of a member's Schedule. As this causes discrepancy between the text of Articles XVI, XVII, and the Schedule, and may confuse a member's understanding of the Schedule of another member, the Scheduling Guidelines caution:

> While there may be no limitation entered in the national treatment column, there may exist a discriminatory measure inconsistent with national treatment inscribed in the market access column. However, in accordance with Article XX:2, any discriminatory measure scheduled in the market access column is also to be regarded as scheduled under Article XVII and subject to the provisions of that Article.

Scheduling Guidelines, *supra* note 54, ¶ 18; *see also* Feketekuty, *supra* note 43, at 96–97 (noting the discrepancy this creates between specific commitments and members' Schedules and suggesting that Article XX should be reversed and measures that impose quantitative limitations on a discriminatory basis should be listed under national treatment rather than market access).

147. GATS, *supra* note 4, art. XVII:2.

148. *Id.* art. XVII:3.

149. *Scheduling Guidelines*, *supra* note 54, ¶ 13(a)–(b). The Guidelines provide the following examples of *de jure* and *de facto* discrimination that are inconsistent with national treatment:

> (a) Domestic suppliers of audiovisual services are given preference in the allocation of frequencies for transmission within the national territory. (Such a measure discriminates explicitly on the basis of the origin of the service supplier and thus constitutes formal or *de jure* denial of national treatment.)
>
> (b) A measure stipulates that prior residency is required for the issuing of a license to supply a service. (Although the measure does not formally distinguish service suppliers on the basis of national origin, it *de facto* offers less favorable treatment to foreign service suppliers because they are less likely to be able to meet a prior residency requirement than like service suppliers of national origin).

Id. Nevertheless, distinguishing between regulations that do not violate national treatment on the one hand and those that discriminate *de facto* is difficult when regulations are origin neutral (i.e., they do not explicitly distinguish between foreign and domestic services or services suppliers). Thus, for example, the Scheduling Guidelines also caution that the question of whether residency requirements constitute limitations on national treatment has to be determined on a case-by-case basis. *Id.* ¶ 14. Determining whether regulations that do not formally discriminate between foreign and domestic services or services providers constitute *de facto* discrimination also hinges on issues of domestic regulatory autonomy. Non-discriminatory regulatory measures that "indirectly result in negative effects on foreign-service suppliers" are "particularly problematic as these *de facto* discriminatory effects of a regulatory measure are hard to anticipate." AARON OSTROVKSY ET AL., GATS, WATER AND THE

treatment under GATS may be conditioned or limited by a member as long as such limitation or condition is specified in the member's Schedule.[150]

Whether a member's domestic regulation violates a specific commitment to grant national treatment hinges on two principle elements. First, the foreign service (or service supplier) and the domestic service (or service supplier) must be "like."[151] Second, the regulation must discriminate against the foreign service by according treatment that is "less favorable" than that given to the domestic service.[152] Under GATS, "less favorable treatment" is treatment that "modifies conditions of competition" in favor of domestic services and service suppliers when compared to foreign "like" services or service suppliers.[153]

Proving "likeness" between domestic and foreign services or foreign and domestic service suppliers is also a complex matter:[154]

> There is perhaps only one point on which everyone agrees: the application of the national treatment obligation and the determination of likeness give rise to a wider range of questions—and uncertainties—under the GATS than under the GATT. The intangibility of services, the difficulty to draw a line between product and production, the existence of four modes of supply, the combined reference to services and service suppliers, but also the lack of a detailed nomenclature and the "customized" nature of many transactions are some of the factors which complicate the task of establishing likeness in services trade.[155]

ENVIRONMENT: IMPLICATIONS OF THE GENERAL AGREEMENT ON TRADE IN SERVICES FOR WATER RESOURCES 43 (2003). This is so because "in many cases whether a measure exhibits such negative effects on foreigners depends on the nature of the foreign-service supplier, on practical market conditions or on consumer preferences." *Id.*

150. GATS, *supra* note 4, art. XVII:1 (indicating that unlike Article XVI, Article XVII does not provide a list of measures that would constitute violations of national treatment under GATS).

151. *EC-Bananas III*, *supra* note 75, ¶ 7.314. This case was cited as authority by the United States in the *U.S.-Gambling* dispute. The United States argued that Antigua had both failed to establish how its services and service suppliers were "like" U.S. services and service suppliers and how the specific U.S. measures accorded less favorable treatment to Antigua. Panel Report, *supra* note 1, ¶ 3.152.

152. *Id.*

153. GATS, *supra* note 4, art. XVII:3. The concept "modifies conditions of competition" borrows directly from GATT jurisprudence established under Article III, GATT. *See* Mireille Cossy, *Determining "likeness" under the GATS: Squaring the Circle?* 4 (World Trade Org., Econ. Research & Statistics Div., Working Paper ERSD-2006-08, 2006) (noting the concept "modify the conditions of competition" was first established in the *Italian Agricultural Machinery* case. It was subsequently endorsed by the *US—Section 337* panel, which found that "[t]he words 'treatment no less favorable' in paragraph 4 [of GATT Article III] call for effective equality of opportunities for imported products" and that the purpose of that provision was to protect "expectations on the competitive relationship between imported and domestic products"); *see also U.S. Tariff Act*, *supra* note 127.

154. Trachtman, *supra* note 93, at 62.

155. Cossy, *supra* note 153, at 2.

As GATS provides no definition of "like" services or service suppliers in the context of national treatment, the determination of "likeness" is left to be decided through the process of scheduling commitments, and ultimately through dispute settlement in the event of disagreement.[156]

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156. *Compare EC-Bananas III*, *supra* note 75, ¶ 7.314 (answering the question of whether the service suppliers concerned were alike, the Panel ruled that to the extent the services were alike, those providing them were like service suppliers), *and Canada Autos*, *supra* note 93, ¶¶ 10.289, 10.307 (finding that in the absence of like service suppliers there could not be a violation of national treatment under GATS. The Panel also addressed the relevance of the modes of supply in determining like services and stated, though only "for the purposes of this case," that "services supplied in Canada through modes 3 and 4 and those supplied from the territory of other Members through modes 1 and 2 are 'like' services."), *with* Cossey, *supra* note 153, at 14–15 (critiquing the *Canada Autos* decision and noting that interpreting likeness across modes of supply would limit the possibilities for regulatory distinctions between modes of supply and more generally between services supplied through different means); *see also* Panel Report, *supra* note 1, ¶ 6.426. In *U.S.-Gambling*, although Antigua initially alleged violation of the national treatment obligation by the United States, it subsequently submitted that a Panel finding under Article XVI of GATS obviated the need to assess whether there was also a violation of Article XVII of GATS. This led to the Panel exercising judicial economy over the Antiguan claim of a violation of national treatment. However, in arguments before the Panel, both parties raised a number of factors relevant to a determination of "likeness" in the services context. Such factors ranged from product characteristics, the differences in the modes of supply, regulatory distinctions, the intangibility and adaptability of services, the close nexus between the service and the service supplier, differences in the suppliers of such services, consumer perception, technological differences, and the differences in the risks (including regulatory risks). The parties also referred to the relevance of international classification systems and the criteria used to assess likeness in the context of national treatment under GATT. *See, e.g.*, Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶¶ 99–103, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter *EC—Asbestos*]. In the goods context, in the case of national treatment under Article III of GATT, the "like product analysis" continues to evolve through dispute settlement. In GATT, likeness has been said to be "fundamentally a determination about the nature and extent of a competitive relationship between and among products." *Id.* ¶ 99. The Appellate Body, using criteria developed in the famous *Border Tax Adjustment Report*, has stated that there are four categories of characteristics that are used to assess likeness of goods under GATT: (1) physical properties, (2) capability of serving the same or similar end-users, (3) consumer perception, and (4) international tariff classification. *Id.* ¶ 101. On the other hand, the Appellate Body also stated that such general criteria provide a framework for analyzing the "likeness" of particular products on a case-by-case basis and do not eliminate the need to examine all pertinent evidence "the kind of evidence to be examined in assessing the 'likeness' of products will, necessarily, depend upon the particular products and the legal provision at issue." *Id.* ¶ 103. Thus, for example, the Appellate Body ruled that "evidence relating to health risks may be relevant in assessing the competitive relationship in the market place between allegedly 'like' products." *Id.* ¶ 115; *see also* Robert E. Hudec, *Like Product: the Differences in Meaning in GATT Articles I and III*, *in* REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW 101 (Thomas Cottier & Petros C. Mavroidis eds., 2000) (presenting leading discussions on the evolution of the "like" products analysis under Article III of GATT); Robert E. Hudec, *GATT/WTO Constraints on National Regulation: Requiem for an "Aim and Effects" Test*, 32 INT'L

With this overview of GATS in place, the next section of the Article reviews key aspects of the *U.S.-Gambling* case that impact the balance struck in GATS between liberalizing trade in services and preserving members' autonomy as sovereigns to regulate within their borders.

III. THE *U.S.-GAMBLING* LITIGATION

In 2003, Antigua and Barbuda (Antigua)[157] brought a complaint to the WTO's DSB against the United States, claiming that a U.S. ban on online gambling violated GATS by imposing a "total prohibition" on the cross-border supply of gambling and betting services.[158] The basis for Antigua's complaint was grounded in the U.S. Schedule of specific commitments under GATS.[159] Antigua claimed that the U.S. Schedule made a full commitment to grant national treatment and market access to the cross-border supply of gambling and betting services.[160] By maintaining domestic laws prohibiting cross-border supply of gambling and betting services,[161] Antigua argued that the United States was violating its obligation to grant treatment "no less favorable that that provided for under the terms, limitations and conditions specified in its schedule."[162] The United States categorically denied that it had made a specific

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LAWYER 619 (1998) (same); Amelia Porges & Joel P. Trachtman, *Robert Hudec and Domestic Regulation: The Resurrection of Aim and Effects*, 37 J. WORLD TRADE 783, 784–86 (2003) (same).

157. *See* Report by the Secretariat, *Trade Policy Review—Antigua and Barbuda*, WT/TPR/S/85/ATG (May 7, 2001), *available at* http://www.wto.org/english/thewto_e/countries_e/antigua_and_barbuda_e.htm (providing an overview of the trade policies of Antigua and Barbuda).

158. *See* Krajewski, *supra* note 26, at 419–22 (providing an insightful account of the background to this dispute).

159. Appellate Body Report, *supra* note 1, Annex III.

160. Appellate Body Report, *supra* note 1, ¶ 46; Panel Report, *supra* note 1, ¶¶ 3.30, 3.48.

161. Antigua submitted an extensive list of U.S. federal and state laws that in its opinion constituted the "prohibition" of cross-border gambling and betting services. However, the Panel determined that the laws "sufficiently identified by Antigua" as constituting the "prohibition" were limited to three federal laws [mainly the Wire Act (18 U.S.C. § 1084), the Travel Act (18 U.S.C. § 1952) and the Illegal Gambling Business Act (18 U.S.C. § 1955)] as well as several states laws. Panel Report, *supra* note 1, ¶ 6.249. On appeal, the Appellate Body further narrowed down this list finding that only the three federal laws identified by Antigua were relevant to this dispute. Appellate Body Report, *supra* note 1, ¶¶ 153–155. The Appellate Body overruled the Panel's consideration of the state laws on the basis that Antigua had not made a prima facie case in respect of the inconsistency of these state laws with reference to U.S. obligations under GATS. *Id.*

162. Antigua also asked the Panel to find that the U.S. prohibition was in violation of GATS Article VI (domestic regulation) and Article XI (payments and transfers). Panel Report, *supra* note 1, ¶ 2.1.

commitment in its Schedule to grant market access or national treatment to cross-border gambling and betting services.[163] In support of its argument, the United States cited the severity of U.S. legal restrictions on gambling services in general, and the particular stringency with which U.S. laws apply to the remote supply of gambling services, irrespective of the nationality or location of the supplier.[164] The case generated as much interest in the United States[165] as it did in the international community,[166] reflecting the global significance of the U.S. market for online gambling services.[167]

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163. Appellate Body Report, *supra* note 1, ¶ 14; Panel Report, *supra* note 1, ¶ 3.44.

164. As the United States argued:

> Gambling in the United States is permitted only within particular locations and facilities designated by law, and only in forms that the United States believes can be effectively regulated. Where it exists, it operates under the most rigorous regulatory constraints. . . . The purpose of that regulatory scrutiny is to protect the public, not to protect domestic industry. Indeed, if its purpose were protectionist, it would have failed miserably, since numerous foreign suppliers of gambling services are already present in the US market. Regardless of foreign or domestic origin, all providers of gambling services in the United States operate under severe restrictions. And when it comes to remote supply of gambling, those restrictions are particularly stringent.

Panel Report, *supra* note 1, ¶ 3.20. The Panel distinguished the term "remote" supply from the "cross-border" supply of services under Article 1:2(a) of GATS in the following manner:

> "Cross-border" must be distinguished from "remote" supply, which is a term that has been used by the parties to this dispute. The Panel will use the latter term to refer to "any situation where the supplier, *whether domestic or foreign*, and the consumer of gambling and betting service are not physically together." In other words, in situations of remote supply, the consumer of a service does not have to go to any type of outlet where the supply is supervised, be it a retail facility, a casino, a vending machine, etc. Instead, the remote supplier offers the service directly to the consumer through some means of distance communication. Hence, cross-border supply is necessarily remote, but remote supply amounts to "cross-border" supply only when the service supplier and the consumer are located in territories of different Members. The Panel understands "non-remote" supply to refer to situations where the consumer presents himself or herself at a supplier's point of presence.

Id. ¶ 6.32 (emphasis added).

165. *See* Associated Press, *WTO Issues Mixed Ruling on U.S. Limits on Net Gambling*, SILICON VALLEY.COM, Apr. 7, 2005 (on file with authors) (discussing the ruling in the *U.S.-Gambling* case); Paul Blusterin, *U.S. Claims Victory on Web Betting Ban: Others See WTO Ruling as Murky*, WASH. POST, Apr. 8, 2005, *available at* http://www.washingtonpost.com/wp-dyn/articles/A35826-2005Apr7.html (same); Joanna Glasner, *Ruling Unlikely to Deter Gaming*, WIRED NEWS, Apr. 9, 2005, *available at* http://www.wired.com/news/business/0,1367,67170,00.html (same).

166. Third party members in *U.S.-Gambling* included Canada, the European Communities, Japan, Mexico, and Chinese Taipei. Panel Report, *supra* note 1, ¶ 1.5. Only the European Communities, Japan, and Chinese Taipei made submissions during the proceedings before the Appellate Body. Appellate Body Report, *supra* note 1,

A. *The Panel's Decision*

One of the first questions addressed in the dispute was whether the U.S. Schedule included specific commitments on gambling and betting services. The dispute centered on the scope of the commitment made by the United States in its Schedule granting full "market access" and "national treatment" to the cross-border supply of "other recreational services (except sporting)."[168] Antigua argued the term "recreational services" included gambling and betting services according to the classification list of services commonly used by WTO members when drafting specific commitments under GATS.[169] In rebuttal, the United States argued that gambling and betting services fell within the ordinary meaning of the term "sporting," which the United States has specifically excluded from the scope of its market access and national treatment commitments under "recreational services."[170] The Panel ruled in favor of Antigua that the U.S. Schedule included specific commitments for gambling and betting services under the service subsector titled "other recreational services."[171] Because the United States had inscribed

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¶¶ 98–113. The United Kingdom (a member of the European Communities) is now host to some of the largest companies in the online gaming industry. Mark Oliver, *Britain to Host Online Gambling Summit*, GUARDIAN UNLIMITED (London), Jan. 16, 2006 (on file with authors); Reuters, *U.K. to Host Global Online-Gambling Summit*, CNET NEWS.COM, Jan. 17, 2006 (on file with authors). The Commission which regulates gambling in the public interest will from September 2007 also regulate betting and online gambling. Oliver, *supra*; Reuters, *supra*.

167. According to estimates by the then U.S. General Accounting Office (GAO), half of the revenue from the global online casino industry, which amounted to five billion U.S. dollars in 2003, is derived from the pockets of U.S. consumers. U.S. GEN. ACCOUNTING OFFICE, INTERNET GAMBLING: AN OVERVIEW OF THE ISSUES 6 (2002), *available at* http://www.gao.gov/new.items/d0389.pdf; *see also* U.K. DEPT. OF CULTURE, MEDIA & SPORT, THE FUTURE REGULATION OF REMOTE GAMBLING: A DCMS POSITION PAPER ¶ 102 (2003), *available at* http://www.culture.gov.uk/Reference_library/Publications/archive_2003/gamb_position_paper.htm (noting that "despite the apparent illegality of cross border gambling, more [U.S.] citizens gamble online than anywhere else in the world.").

168. The relevant section of the U.S. Schedule titled "10 Recreational, cultural and sporting services" lists no market access restrictions or national treatment limitations for mode 1 under subsector 10D, which is titled "other recreational services (except sporting)." Panel Report, *supra* note 1, ¶ 6.43

169. *Id.* ¶ 3.31. Under the W/120, "sporting and recreational services" is listed under section 10D of the W/120, which corresponds to CPC group 964. W/120, *supra* note 57. CPC group 964 is further broken down into two classes, mainly sporting services (9641) and other recreational services (9649). CPC, *supra* note 57, at group 964. The CPC class of services titled "Other recreational services" (9649) includes the subclass for gambling and betting services (96492), while the CPC class of sporting services (9641) does not. *Id.*

170. Panel Report, *supra* note 1, ¶ 3.45.

171. *Id.* ¶ 6.93. In order to reach its decision, the Panel, in interpreting the U.S. Schedule, followed the customary rules of interpretation of public international law as required under the DSU, mainly Articles 31–33 of the Vienna Convention. DSU, *supra*

the term "none" with respect to "other recreational services" in the market access and national treatment columns of its Schedule, the Panel concluded that the United States had made specific commitments with respect to limitations on services falling within the scope of that subsector.[172]

A second issue in the dispute was whether U.S. federal and state laws prohibiting the supply of cross-border online gambling and betting services were maintained in violation of GATS Articles XVI (market access) and XVII (national treatment).[173] The Panel found that under the terms of the market access obligation of GATS, U.S laws prohibiting foreign businesses from supplying cross-border gambling and betting services violated the obligation to grant "treatment no less favorable than that provided for under the terms, limitations and conditions agreed and specified under its Schedule."[174] Although the Panel confirmed that the list of limitations covered in Article XVI:2(a) were exhaustive,[175] it ruled that the challenged U.S. laws, by limiting the means of cross-border delivery of gambling and betting services, also limited the number of service suppliers (and the total number of service operations in that sector) that could supply such services to zero. According to the Panel, this "limitation in the form of a numerical quota" (albeit a "zero quota") fell within the scope of the market access restrictions

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note 59, art. 3.2; Vienna Convention on the Law of Treaties, May 23, 1969, 8 I.L.M. 679, 1155 U.N.T.S. 331 (1969) [hereinafter Vienna Convention]; Panel Report, supra note 1, ¶ 6.45. Schedules of specific commitments by members are considered to be an integral part of the GATS. GATS, *supra* note 4, art. XX:3. Based on Article 31(1) of the Vienna Convention, the Panel consulted a number of dictionary definitions in order to determine whether the ordinary meaning of the term "sporting" included gambling and betting services as contended by the United States. Panel Report, *supra* note 1, ¶¶ 6.55–6.59. In general, the Panel found that dictionary definitions of the terms "entertainment," "recreational," and "sporting" did not offer any definitive answer with respect to whether the U.S. Schedule includes specific commitments on gambling and betting services. *Id.* Nevertheless, the Panel found that according to the dictionary definitions offered, the ordinary meaning of the term "sporting" did not include gambling and betting services. *Id.* ¶¶ 6.61, 6.67. Continuing its analysis under Article 31(2) of the Vienna Convention, the Panel then reasoned that the Scheduling Guidelines and the W/120 comprised the "context" for interpreting GATS Schedules within the meaning of Article 31(2) of the Vienna Convention. *Id.* ¶ 6.82; *Scheduling Guidelines*, *supra* note 54; W/120, *supra* note 57. Accordingly, the Panel concluded that in the light of the W/120 and the corresponding CPC numbers, the term "sporting" did not include gambling and betting services and the term "other recreational services" covered gambling and betting services. Panel Report, *supra* note 1, ¶ 6.93.

172. Panel Report, *supra* note 1, ¶¶ 6.134, 6.279.

173. *See supra* Part II.C (providing an overview of these provisions in GATS).

174. Panel Report, *supra* note 1, ¶¶ 6.365, 6.373, 6.380, 6.389, 6.395, 6.412, 6.418.

175. *Id.* ¶¶ 6.298, 6.325. The Panel also ruled that the six categories of measures under Article XVI:2 were exhaustive of the types of market access restrictions prohibited by Article XVI, GATS. *Id.* ¶ 6.298.

prohibited by paragraphs (a) and (c) of Article XVI(2).[176] Rejecting the United States' arguments that the federal laws prohibiting online gambling and betting services could not be in violation of Article XVI:2(a) as they did not take the "form of a quota," the Panel carefully explained why it considered a "zero quota" to fall within the definition of a "limitation in the form of a numerical quota" under Article XVI:2(a):

> It is true that the wording of Article XVI:2(a) covers numerical quotas other than zero. That is because the subparagraph is designed, in part, to indicate the limitations, short of total prohibition, that Members may specify in their schedules, on the number of service suppliers. The fact that the terminology embraces lesser limitations, in the form of quotas greater than zero, cannot warrant the conclusion that it does not embrace a greater limitation amounting to zero.[177]

The Panel went on to reason that "[a] measure that is not expressed in the form of a numerical quota . . . may still fall within the scope of Article XVI:2(a). To hold that only restrictions explicitly couched in numerical terms fall within Article XVI:2(a) would produce absurd results."[178]

As the U.S. Schedule contained an unconditional obligation to grant market access, the Panel found that three federal laws (mainly the Wire Act, the Travel Act, and the Illegal Gambling Business Act), when read together with the relevant state laws (of Louisiana,

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176. *Id.* ¶¶ 6.330, 6.355. The text of paragraphs (a) and (c) of Article XVI:2 are reproduced here:

> (a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
>
> . . . .
>
> (c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;

GATS, *supra* note 4, art. XVI:2(a), (c).

177. Panel Report, *supra* note 1, ¶ 6.331. The Panel went on to reason that:

> Paragraph (a) does not foresee a 'zero quota' because paragraph (a) was not drafted to cover situations where a Member wants to maintain full limitations. If a Member wants to maintain a full prohibition, it is assumed that such a Member would not have scheduled such a sector or sub-sector and, therefore, would not need to schedule any limitation or measures pursuant to Article XVI:2.

Id.

178. *Id.* ¶ 6.332. The Panel found support for this conclusion in the 1993 Scheduling Guidelines, which provided the following example of a limitation under Article XVI:2(a): "nationality requirements for suppliers of services (equivalent to zero quota)." *Id.* The Panel reasoned that "this suggests that a measure that is not expressed in the form of a numerical quota or economic needs test may still fall within the scope of Article XVI:2(a)." *Id.*

Massachusetts, South Dakota, and Utah), as well as the relevant state laws themselves, were all maintained in violation of Article XVI:2(a) and Article XVI:2(c) of GATS.[179]

The final issue in the dispute was whether the U.S. prohibition on the supply of cross-border gambling services was justified as a *policy exception* under the general exceptions of Article XIV of GATS.[180] Article XIV permits members to derogate from their GATS obligations to protect certain fundamental domestic policy interests, provided several conditions are met.[181] Because the policy exceptions under Article XIV of GATS are similar to the policy exceptions permitted by Article XX of the GATT, the Panel analyzed Article XIV by applying jurisprudence developed under Article XX of the GATT. It articulated a two-tiered analysis for policy exceptions under Article XIV.[182] Applying the first tier of that analysis, the "necessity" test, the Panel found that the challenged measures were designed to protect public morals, public order, and secure compliance with other WTO-consistent laws.[183] Specifically, it found that the U.S. laws prohibiting online gambling protected important societal interests that were "vital and important"[184] and "contribute[d], at least to some

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179. *Id.* ¶¶ 6.419–6.420. The Panel did not consider it necessary to examine Antigua's claim under the national treatment obligation (Article XVII) on grounds of judicial economy. *Id.* ¶ 6.426. In respect of its claims under the general obligation on domestic regulations (Article VI), the Panel also ruled that Antigua had failed to make a prima facie demonstration that the measures at issue were inconsistent with the provisions of Article VI. *Id.* ¶ 6.437. The Panel also chose to exercise judicial economy in respect of Antigua's claims under Article XI. *Id.* ¶ 6.441.

180. *See* Panel Report, *supra* note 1, ¶ 6.444 (noting that the United States argued that the three federal laws were necessary to "protect 'public morals' and 'public order' within the meaning of Article XIV(a) because, *inter alia*, remote gambling is particularly vulnerable to use by minors who are prohibited from gambling or can be used for laundering the proceeds of organized crime"); *see id.* ¶ 6.445 (noting that the United States also argued under Article XIV(c) of GATS, that the federal laws served "as law enforcement tools to secure compliance with other WTO-consistent U.S. laws, in particular, state gambling laws and criminal laws relating to organized crime").

181. *See generally* GATS, *supra* note 4, art. XIV (requiring satisfaction of the necessity test and the requirements of the chapeau under Article XIV). *See supra* Part II.C.

182. Panel Report, *supra* note 1, ¶ 6.449. Under the two-tiered analysis, a measure must:

> (a) fall within the scope of one of the recognized exceptions set out in paragraphs (a) to (e) of Article XIV in order to enjoy provisional justification; and
>
> (b) meet the requirements of the introductory provisions of Article XIV, the so-called "chapeau."

Id.; *see infra* Part IV.C (discussing, in detail, the two-tier analysis of Article XIV by the Panel).

183. Panel Report, *supra* note 1, ¶¶ 6.487, 6.557.

184. *Id.* ¶ 6.492.

extent, in addressing these concerns."[185] Nevertheless, the Panel also ruled that under the necessity test, the measures had a significantly restrictive trade impact.[186] Assessing the trade impact of the challenged measures, the Panel ruled that the United States had an obligation to first explore and exhaust all available WTO-compatible alternatives that would have provided the same level of protection before adopting its prohibition of online gambling and betting services.[187] It went on to interpret this requirement in terms of a U.S. obligation to engage in consultations with Antigua, with a view toward exhausting WTO-consistent alternatives that would have addressed its concerns.[188] Given the significant trade impact of the measures at issue, the Panel reasoned that by failing to engage in such consultations, the United States did not fulfill the requirements of Article XIV's "necessity test." Consequently, the Panel ruled that the measures could not be justified as "necessary" to protect public morals or public order under Article XIV.[189]

Having held that the United States failed to satisfy the first tier of the Article XIV analysis, the Panel proceeded to consider whether the U.S. measures also met the requirements of the second tier, which addresses requirements found in the chapeau of Article XIV.[190] In doing so, the Panel found that the measures at issue violated the chapeau of Article XIV as well.[191] It found that the United States had enforced its prohibition on online gambling and betting services (particularly the Wire Act) in a manner that discriminated against foreign service suppliers of online gambling and betting services, rendering its measures inconsistent with the requirements of the chapeau of Article XIV.[192] Although the United States produced statistical evidence that the Wire Act and the Illegal Gambling Business Act had been enforced against domestic suppliers of online gambling and betting services,[193] the Panel relied on evidence submitted by Antigua showing that the United States had not enforced the challenged federal measures against some domestic

185. *Id.* ¶ 6.494.
186. *Id.* ¶ 6.495.
187. *Id.* ¶ 6.528.
188. *Id.* ¶¶ 6.529–6.531.
189. *Id.* ¶¶ 6.533–6.535. Applying a similar analysis to the necessity of measures that the United States sought to provisionally justify under Article XIV(c), the Panel found that the United States had not demonstrated that the challenged measures were necessary within the meaning of Article XIV(c). *Id.* ¶ 6.565.
190. *Id.* ¶ 6.566. Strictly speaking, a Panel is not required to proceed to the second tier of the Article XIV analysis if it finds that a measure does not satisfy the requirements of the "necessity test" imposed under the first tier of the Article XIV analysis. In *U.S.-Gambling*, the Panel proceeded to the second tier of the analysis in order to "assist the parties in resolving the underlying dispute of this case." *Id.*
191. *Id.* ¶ 6.589.
192. *Id.*
193. *Id.* ¶ 6.586.

online gambling operators.[194] Accordingly, it found evidence introduced by the United States to dispute this claim to be "inconclusive," and ruled that the United States had failed to prove non-discriminatory enforcement against foreign suppliers of gambling and betting services. It also agreed with Antigua that a federal civil statute, the Interstate Horseracing Act (IHA),[195] appeared to permit interstate pari-mutuel wagering over the telephone and other modes of electronic communication (such as the Internet) within the territory of the United States.[196] It found that the IHA appeared to exempt domestic suppliers of covered betting services from the provisions of the Wire Act, the Travel Act, and the Illegal Gambling Business Act in a manner that was inconsistent with the requirements of the chapeau.[197] Thus, in light of U.S. non-enforcement of the prohibition against certain domestic suppliers of online betting services and the ambiguities present in the IHA, the Panel ruled that the United States had failed to demonstrate that its

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194. *Id.* ¶¶ 6.585–6.588. Antigua identified four U.S. firms that it claimed offered online gambling and betting services but had not been prosecuted by the United States under the federal Wire Act or the Illegal Gambling Business Act. *Id.* The firms were Youbet.com, TVG, Capital OTB, and Xpressbet.com. *Id.* ¶ 6.585. In contrast, Antigua cited the case of an Antiguan service supplier (United States v. Jay Cohen, 260 F.3d 68 (2d Cir. 2001)) who was prosecuted and convicted under the Wire Act. *Id.* In its defense, the United States introduced statistical evidence from the Organized Crime and Racketeering Section of the Department of Justice showing that it approved 90 racketeering prosecutions from 1992–2000 under the Wire Act, the Illegal Gambling Business Act, or both. *Id.* ¶¶ 6.586, 6.588. It also claimed that prosecution proceedings were pending against the domestic supplier Youbet.com. *Id.*

195. 15 U.S.C. §§ 3001–3007 (2006).

196. Panel Report, *supra* note 1, ¶¶ 6.595, 6.599. As evidence of alleged discrimination in the application of the Wire Act, the Travel Act, and the IGBA—contrary to the terms of the chapeau of Article XIV—Antigua argued that the federal laws prohibiting the use of remote communication to supply gambling and betting services did not apply to certain types of remote horse race betting within the United States because the revised IHA effectively exempted such betting from the application of the federal laws. *Id.* ¶ 6.595. Although the United States submitted that the IHA, as a civil statute, did not amend the pre-existing federal laws, the Panel agreed with Antigua that the text of the revised IHA could be understood, on its face, to permit interstate pari-mutuel wagering over the telephone or other modes of communication as long as such wagering was legal in both states. *Id.* ¶ 6.598.

197. Based on these findings the Panel found that:

> [T]he United States has not demonstrated that it applies its prohibition on the remote supply of these services in a consistent manner as between those supplied domestically and those that are supplied from other Members. Accordingly, we believe that the United States has not demonstrated that it does not apply its prohibition on the remote supply of wagering services for horse racing in a manner that does not constitute "arbitrary and unjustifiable discrimination between countries where like conditions prevail" and/or a "disguised restriction on trade" in accordance with the requirements of the chapeau of Article XIV.

Id. ¶ 6.607.

prohibition on the remote supply of wagering services for horse racing was applied in a manner that did not constitute arbitrary and unjustifiable discrimination between countries where like conditions prevail (i.e., that the prohibition was not a disguised restriction on trade).[198] Needless to say, the Panel's decision was unacceptable to the United States; it was viewed as a serious invasion of U.S. sovereignty in terms of its right to regulate and protect its populace—particularly minors—against harmful activity. As was expected, the United States appealed the Panel's decision to the WTO's Appellate Body.[199]

B. *The Appellate Body's Decision*

The Appellate Body employed a different methodology to interpret the U.S. Schedule,[200] but nevertheless upheld the Panel's findings that the United States had made a specific commitment to provide market access for the supply of cross-border gambling and betting services.[201] It also confirmed the Panel's analysis of the U.S. prohibition as a violation of the market access obligation,[202] though it confined its decision to the federal Wire Act, the Travel Act, and the Illegal Gambling Business Act. It did not address the impact of the state laws restricting online gambling.[203] Confirming the Panel's

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198. *Id.*

199. *See* Appellate Body Report, *supra* note 1, Annex 1, Notification of an Appeal by the United States under Paragraph 4 of Article 16 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (setting forth the United States' appeal to the Appellate Body).

200. The Appellate Body rejected the Panel's use of the W/120 and the Scheduling Guidelines as "context" and instead used them as "supplementary means of interpretation" under Article 32 of the Vienna Convention to confirm the Panel's interpretation of the U.S. Schedule, stating:

> [T]he application of the general rule of interpretation set out in Article 31 of the Vienna Convention leaves the meaning of "other recreational services (except sporting)" ambiguous and does not answer the question whether the commitment made by the United States in subsector 10.D of its Schedule includes a commitment in respect of gambling and betting services.

Id. ¶ 195.

In the Appellate Body's view, the United States used the W/120 and sought to comply with the Scheduling Guidelines in drafting its GATS Schedule. The term "other recreational services (except sporting)" had to be interpreted as excluding the corresponding CPC class 9641 or "sporting services" and including within the scope of its commitment, CPC 9649: "other recreational services" including subclass 96492 "gambling and betting services." *Id.* ¶ 208.

201. *Id.* ¶ 212.

202. *Id.* ¶¶ 238–39, 251–252.

203. The Appellate Body determined that Antigua had established a prima facie case only in respect of the federal Wire Act, the Travel Act and the Illegal Gambling Business Act. *Id.* ¶ 153. Finding that the Panel had erred in examining the eight state laws, it reversed the Panel's findings in respect of the four state laws. *Id.* ¶¶ 154–155.

expansive interpretation of the market access obligation of GATS, the Appellate Body interpreted the words "in the form of" in Article XVI:2(a) broadly,[204] opining that the "the four types of limitations [in Article XVI:2(a)] themselves, impart meaning to 'in the form of.'"[205] In particular, it ruled that according to dictionary definitions of the terms "numerical" and "quota," the term "numerical quotas" appeared "to mean a quantitative limit on the number of service suppliers"[206]:

> The fact that the word "numerical" encompasses things which "have the characteristics of a number" suggests that limitations "in the form of a numerical quota" would encompass limitations which, even if not in themselves a number, have the characteristics of a number. Because zero is *quantitative* in nature, it can, in our view, be deemed to have the "characteristics of" a number—that is, to be numerical.[207]

The Appellate Body went on to rule that

> when viewed as a whole, the text of sub-paragraph (a) supports the view that the words "in the form of" must be read in conjunction with the words that precede them—"limitations on the *number* of service suppliers"—as well as the words that follow them, including the words "*numerical* quotas". Read in this way, it is clear that the thrust of sub-paragraph (a) is not on the form of limitations, but on their numerical or quantitative nature.[208]

However, the Appellate Body modified the Panel's analysis and reversed its denial of the U.S. defense under the policy exceptions of GATS. Instead, it found that the United States had successfully justified the necessity of its prohibition of online gambling and betting services under the "necessity test" of Article XIV (the first part of the two prong analysis imposed under Article XIV).[209] Specifically, the Appellate Body found that the Panel had, in assessing the trade impact of the three federal laws under the necessity test, erred by imposing an obligation on the United States

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204. Although the United States urged that proper effect be given to the terms "in the form of," the Appellate Body noted that dictionary definitions of the term "form" advanced by the United States, "suggested a degree of ambiguity as to the scope of the word. For example, 'form' covers both the mode in which a thing 'exists,' as well as the mode in which it 'manifests itself.'" *Id.* ¶ 226.

205. *Id.* ¶ 227. In particular, the Appellate Body found that the definitions of the limitations themselves, mainly "numerical quotas," "monopolies," "exclusive service suppliers," and "economic needs tests" did not make clear whether such limitations needed to be in a particular "form." *Id.* ¶¶ 227–231.

206. *Id.* ¶ 227. Supporting its conclusion, the Appellate Body also cited examples under the Scheduling Guidelines of nationality requirements for service suppliers as limitations "equivalent to a zero quota" under Article XVI:2(a) and restrictions on broadcasting time as an example of a measure equivalent to a zero quota under Article XVI:2(c). *Id.* ¶¶ 237, 249

207. *Id.* ¶ 227.

208. *Id.* ¶ 232.

209. *Id.* ¶ 326.

to consult with Antigua as a part of its obligation to consider all reasonably available WTO–consistent measures before imposing a WTO inconsistent measure.[210] The Appellate Body ruled that not only was it not the responding (defending) party's burden to show in the first instance that there were no reasonably available alternatives to achieve its objective,[211] but also that the Panel's analysis was flawed because by requiring the United States to engage in consultations with Antigua "it did not focus on an alternative measure that was reasonably available" to the United States.[212] Consultations were, as the Appellate Body reasoned, "by definition a process, the results of which are uncertain and therefore not capable of comparison with the measures at issue."[213] It also reversed the Panel's finding that the United States had discriminated against foreign service suppliers in its enforcement of the federal Wire Act on the grounds that the Panel had relied on inadequate evidence in reaching this finding of discrimination.[214] However, the Appellate Body agreed with the Panel's analysis of the federal IHA. It ruled that the United States had failed to demonstrate that the IHA did not permit domestic suppliers from offering wagering for horse racing over the telephone or other modes of electronic commerce, including the Internet.[215] It upheld the Panel's finding that "the evidence provided by the United States was not sufficiently persuasive to conclude that, as regards wagering on horseracing, the remote supply of such services by *domestic* firms continues to be prohibited notwithstanding the plain language of the IHA."[216] Accordingly, the Appellate Body ruled that, contrary to the requirements of the chapeau of Article XIV, the U.S. prohibition on online wagering services was inconsistently applied between domestic and foreign service suppliers.[217]

Thus, there was no clear winner in the Appellate Body's report, and each party claimed a partial victory.[218] In light of *U.S.-Gambling*, the next section of the Article examines members' rights to adopt domestic laws that restrict trade in services and the tension between these rights and GATS' goal to liberalize trade.

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210. *Id.* ¶ 315; *cf.* Panel Report, *supra* note 1, ¶¶ 6.528–6.531 (relating to its determination under Article XIV(a)), *and* ¶ 6.562 (relating to its determination under Article XIV(c)).

211. Appellate Body Report, *supra* note 1, ¶ 309.

212. *Id.* ¶ 317.

213. *Id.*

214. *Id.* ¶¶ 354–355.

215. *Id.* ¶¶ 361, 364; Panel Report, *supra* note 1, ¶¶ 6.600, 6.607.

216. Appellate Body Report, *supra* note 1, ¶ 364.

217. *Id.* ¶ 369.

218. Krajewski, *supra* note 26, at 418.

IV. THE TENSION BETWEEN LIBERALIZATION AND REGULATORY AUTONOMY: INSIGHTS FROM *U.S.-GAMBLING*

The central question in the debate over liberalization of trade in services versus the sovereign rights of members to exercise regulatory autonomy is: when does a member have the right to impose domestic regulations that restrict foreign service providers from offering their services to residents of that member state, particularly when the member maintains specific commitments in the relevant service sectors? This section of the Article examines the extent of members' regulatory autonomy under GATS, drawing on insights gleaned from *U.S.-Gambling*. As will be shown, members retain significant regulatory autonomy that may operate to pose significant barriers to trade in sectors where specific liberalization commitments have been made.

A. U.S.-Gambling: *An Erosion of Domestic Regulatory Autonomy?*

An important question is how Articles VI and XVI work together to define the scope of members' rights to adopt and enforce domestic laws that restrict trade in services. Generally, the market access obligation (Article XVI) has been viewed as dealing with domestic regulation that is *quantitative* in nature, while Article VI is viewed as dealing with domestic regulation that is predominantly of a *qualitative* nature.[219] Yet, prior to *U.S.-Gambling*, litigation under GATS had not addressed the relationship between the two Articles, which left the precise scope of members' rights and obligations with regard to these two distinct provisions uncertain. The Panel in *U.S.-Gambling* resolved some of this uncertainty when it explained the distinction between Article VI and Article XVI:

> Measures that constitute market access limitations within the meaning of Article XVI and which, unless scheduled must be eliminated, are to be distinguished from measures that impose qualification requirements and procedures, technical standards and licensing requirements, which can be maintained so long as they do not constitute "unnecessary barriers to trade in services", pursuant to the criteria contained in Article VI:5 or pursuant to the criteria to be developed by the Council for Trade in Services pursuant to Article VI:4.[220]

Significantly, the Panel ruled that the provisions in paragraphs 4 and 5 of Article VI were in fact "mutually exclusive" of the provisions in Article XVI.[221] Thus, domestic regulation permitted under

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219. *See Scheduling Guidelines*, *supra* note 54 (discussing the quantitative nature of Article XVI and the qualitative nature of Article VI).

220. Panel Report, *supra* note 1, ¶ 6.303.

221. *Id.* ¶ 6.305. The Panel also went on to state:

paragraphs 4 and 5 of Article VI is deemed to be consistent with a member's commitments under Article XVI, and by implication, Article XVII.[222] Given that the legal effect of Article VI on domestic regulatory authority is significantly different from the legal effects of Articles XVI (market access) and XVII (national treatment), this finding of mutual exclusiveness between Article XVI and paragraphs 4 and 5 of Article VI is important:

> Measures restricting market access and national treatment are prohibited, unless scheduled, in sectors where specific commitments have been undertaken, whereas they can be maintained in sectors which are not committed. The right to maintain domestic regulatory measures is however specifically recognized and will be subject to the disciplines to be developed under Article VI:4 with the aim of minimizing their negative impact on trade. These measures cannot be entered as limitations in a Member's schedule.[223]

This distinct difference between Articles XVI and XVII, on the one hand, and paragraphs 4 and 5 of Article VI, on the other, was made

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> Qualification requirements and procedures, technical standards and licensing requirements covered by the disciplines of Article VI:4 and VI:5 could *not* be evidence that a member is providing less favorable treatment than that provided in its schedule contrary to Article XVI, even when "None" has been inscribed in the market access column of a member's schedule.

Id. ¶ 6.306

222. Paragraphs 4 and 5 of Article VI are also viewed as dealing with regulations that do not, in principle, discriminate on the basis of the origin of the service or service supplier (for example, a licensing requirement for all mode 3 insurance brokers that applies to insurance intermediaries irrespective of the nationality of the broker). Thus, the presumption is that regulations permitted under paragraphs 4 and 5 of Article VI are consistent with the national treatment obligation (Article XVII). *Scheduling Guidelines*, *supra* note 54, ¶ 10. The Panel, in defining the parameters of Article XVI and its relationship to Article VI, also referred to the discussion contained in the Scheduling Guidelines of the relationship between discriminatory measures falling within the scope of Article XVII and non-discriminatory measures falling within the scope of Article VI:4. Panel Report, *supra* note 1, ¶ 6.307. It noted that the Scheduling Guidelines contained a discussion on Articles XVI and XVII in the context of the Accountancy Disciplines under Article VI:4 (under Attachment 4 of the Scheduling Guidelines) and stated that "[i]t was observed that the new disciplines developed under Article VI:4 must not overlap with other provisions already existing in the GATS, including Articles XVI and XVII as this would create legal uncertainty." *Id.* ¶ 6.308. The Panel also noted that the Guidelines stated:

> [D]isciplines to be developed under Article VI:4 cover domestic regulatory measures which are not regarded as market access limitations as such, and which do not in principle discriminate against foreign suppliers. They are therefore not subject to scheduling under Articles XVI and XVII.

Id. The Panel did note, however, that Article XVIII could on the other hand include measures falling within the scope of paragraphs 4 and 5 of Article VI. *Id.* ¶ 6.309.

223. *Disciplines on Domestic Regulation*, *supra* note 40, ¶ 13; *see also* Pauwelyn, *supra* note 12, at 157 ("[T]he scope of application of Article XVI and the Accountancy Disciplines is mutually exclusive in the sense that if a measure is covered by Article XVI it cannot be covered also by the Accountancy Disciplines.").

explicit in *U.S.-Gambling* and sheds light on understanding the fundamental nature of members' obligations assumed under Articles XVI and VI of GATS. In contrast to the specific obligations of GATS, the inherent purpose of paragraphs 4 and 5 of Article VI is not to limit the regulatory rights of members, but to ensure (through the articulation of disciplines) that members' domestic regulations relating to qualification requirements and procedures, technical standards, and licensing requirements are *maintained* in compliance with the principles of Article VI:4.[224] The Panel affirmed that while members "undertak[ing] a full market access or a full national treatment commitment . . . must not apply any measure that would be inconsistent with the provisions of those articles,"[225] members nevertheless "maintain the sovereign right to regulate within the parameters of Article VI of the GATS."[226]

In *U.S.-Gambling*, the parties disputed whether the U.S. federal laws prohibiting online gambling and betting services were themselves prohibited as a market access limitation under GATS because they were a limitation on the number of service suppliers and service operations under Article XVI:2(a) and (c).[227] The United States argued that the federal laws prohibiting both domestic and foreign online gambling and betting services were not "ipso facto inconsistent with Article XVI,"[228] and that its restriction on online gambling and betting services referred to "the character of the activity involved" rather than "the number of service suppliers or the total number of service operations or total quantity of service output."[229] It identified correctly that the prohibition on market access was not a general prohibition of measures that impede market access, but a limited one restricting the use of only a defined set of market access restrictions that were listed in Article XVI:2.[230]

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224. GATS, *supra* note 4, art. VI:4.
225. Panel Report, *supra* note 1, ¶ 6.311.
226. *Id.* ¶ 6.316.
227. *Id.* ¶¶ 6.256–6.257.
228. *Id.* ¶ 6.257.
229. *Id.*
230. *Id.* ¶ 3.126. In its arguments before the Panel, the United States stated:

> Antigua asserts that the United States has made a full commitment applicable to gambling services, and that the United States "totally impedes cross-border market access" and therefore violates Article XVI:1 of the GATS. This argument appears to rest on the mistaken assumption that the existence of a commitment in the market access column of a member's schedule implies a generalized commitment not to impede "market access." In fact, Article XVI does not enshrine a general rule prohibiting measures that impede "market access" in whole or part. Instead, it prohibits only those measures falling within the specific categories listed in Article XVI:2. While Article XVI:1 makes clear that the Article addresses market access, it is the closed list in

The critical question in *U.S.-Gambling* was whether the U.S. prohibition, which had the effect of a quota even if not expressed in the form of a numerical ceiling, fell within the "form requirements" of paragraphs (a) and (c) of Article XVI:2,[231] or whether, as the United States argued, it was a qualitative regulation prohibiting the character of certain services and not a prohibition on the number of service suppliers or service operations.[232] The case raised the interpretative issue of whether the prohibition in Article XVI is confined to market access limitations that take the quantitative *forms* listed in Article XVI:2 or whether it extends to measures that have equivalent quantitative effects. The answer to this question focuses on the fundamental difference between measures prohibited as market access limitations under GATS, and those permitted as domestic regulations subject only to the requirements of paragraphs 4 and 5 of Article VI.[233]

Although the Panel in *U.S.-Gambling* affirmed that Article XVI:2(a) and (c) exhaustively defined the types of market access restrictions that were prohibited (unless scheduled) under the market access obligation,[234] it ruled that the U.S. prohibition was a quantitative restriction that limited the number of service suppliers to zero ("zero quota"), and that a "zero quota" was a "numerical quota" within the meaning and scope of Article XVI:2(a) and (c).[235] The Panel also ruled that not only was a prohibition that applies only on the supply of some services falling within the scope of a scheduled sector a limitation on market access,[236] but that a limitation on one or more means of delivery within a mode of supply was also a market access limitation within the scope of Article XVI:2.[237] Significantly,

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Article XVI:2 that defines the substance of the obligation that Article XVI imposes.

Id.

231. *Id.* ¶ 6.326.

232. *Id.* ¶ 6.328.

233. Appellate Body Report, *supra* note 1, ¶ 248.

234. Panel Report, *supra* note 1, ¶¶ 6.298, 6.318, 6.325.

235. *Id.* ¶¶ 6.330–6.332, 6.347.

236. *Id.* ¶¶ 6.335, 6.352.

237. *Id.* ¶¶ 6.338, 6.355. In the Panel's view, in the context of mode 1, prohibiting "one, several or all means of delivery" limited the opportunities for foreign suppliers using those means of delivery to gain access to foreign markets. *Id.* ¶ 6.338. Accordingly, the U.S. prohibition on online gambling and betting services was "a limitation on the number of service suppliers in the form of numerical quotas within the meaning of Article XVI:2(a) because it totally prevents the use by service suppliers of one, several or all means of delivery that are included in mode 1." *Id.* This latter aspect of the Panel ruling is important to cross-border services; it means that "a GATS mode 1 commitment automatically secures market access for 'like services' independently of the delivery technology." Wunsch-Vincent, *supra* note 28, at 334. The Panel noted that "[i]f a member desires to exclude market access with respect to the supply of a service through one, several, or all means of delivery included in mode 1, it should do so explicitly in its schedule." Panel Report, *supra* note 1, ¶ 6.286.

as these latter two findings were not disputed in appellate proceedings, they were also upheld by the Appellate Body.[238]

Although at first glance it appeared that the Panel and the Appellate Body in *U.S.-Gambling* had paved the way for complaining parties to challenge domestic regulation on the basis of the quantitative *effects* of a regulation[239] and not on its explicit quantitative form,[240] it is also true that

> this confusion of a *qualitative measure with a quantitative effect* and *a total prohibition* does not emanate from the Panel nor from the Appellate Body. Rather both organs of the DSB understood the US measures as limitations amounting to a zero quota (not a qualitative regulation!) and ruled that thus these measures are incompatible with specific commitments under GATS Article XVI.[241]

Both the Panel and Appellate Body decisions emphasize the conceptual limitations of the market access obligation and the implications of overstepping the boundaries of Articles XVI and VI of GATS.[242] The U.S. prohibition was determined to be a violation of Article XVI:2 not because it simply had the *effect* of a quota, but because it was deemed to be primarily quantitative in nature: by limiting the number of services and service suppliers to zero, it served as a numerical quota prohibited by Article XVI:2.[243] Set against the factual background of the dispute,[244] the Appellate Body's emphasis on the "quantitative or numerical nature" of the measure at issue[245] focused on unraveling the fundamental essence or inherent characteristics of a challenged measure as quantitative or numerical within the meaning of the four categories of quantitative restrictions prohibited by Article XVI:2. Accordingly, under the interpretation of

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238. Appellate Body Report, *supra* note 1, ¶ 239.

239. *See* Pauwelyn, *supra* note 12, at 163–64 (discussing the opinions of the Panel and the Appellate Body in *U.S.-Gambling*).

240. As correctly pointed out by many commentators, an interpretation of the market access obligation on such expansive terms would clearly broaden the scope of the market access obligation in a manner that would not only go beyond the intention of its framers but also prove to be counterproductive to services negotiations. Krajewski, *supra* note 26, at 437; Pauwelyn, *supra* note 12, at 133.

241. Wunsch-Vincent, *supra* note 28, at 342.

242. Appellate Body Report, *supra* note 1, ¶¶ 222–224. The Appellate Body expressly rejected importing an "effects" doctrine into the interpretation of Article XVI:2, stating: "[t]his is not to say that the words 'in the form of' [in Article XVI:2(a)] should be ignored or replaced by the words 'that have the effect of.' Yet at the same time they cannot be read in isolation." *Id.* ¶ 232.

243. *Id.* ¶¶ 225–227.

244. Particularly, the Appellate Body focused on whether the United States had made a full market access commitment in relation to a particular mode of supply under Article XVI on the one hand, and on the other hand, had in place domestic laws prohibiting online gambling that simultaneously foreclosed that entire mode of supply by prohibiting "one, several or all means of delivery" included therein. *Id.* ¶ 223.

245. *Id.* ¶ 232.

U.S.-Gambling, requirements as to "form" under Article XVI:2 would be viewed more as parameters within which a measure is judged to be a quantitative restriction, rather than as a "rigid formula."[246] However, the ambiguity of the relevant texts,[247] and a certain lack of clarity in the reasoning of the dispute settlement panels,[248] generates a "feeling from the report that some coherent expression regarding the legal structure of the GATS in regard to the domestic regulatory space is missing."[249] The approach advocated by the Appellate Body and its analytical dependence on the attributes of the terms "in the form of" and "numerical" in Articles XVI:2(a) and (c),[250] also place too much emphasis on the particular semantics that will be employed by dispute settlement panels to determine non-discriminatory measures as quantitative in nature (and thus falling within the scope of the prohibition in Article XVI) as opposed to being qualitative (and thus within the permitted scope of domestic regulation under Article VI).[251] However, it is doubtful that the criteria to distinguish between the scope of Articles XVI and VI can be established through dispute resolution in order to offer the necessary predictability and certainty for the smooth conduct of trade in services under GATS. Despite the Panel's statements on the mutual exclusiveness of Article XVI and VI:4, critics of *U.S.-Gambling* have also observed that "[t]he only clear message to negotiators and policy makers . . . is that the prohibition on the supply of a service in a (sub)-sector needs to be scheduled as an explicit limitation, where market access commitments have been made or are about to be made."[252]

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246. *Id.* ¶ 231.

247. See, for example, the arguments of the European Communities and Japan as third parties during appellate proceedings in *U.S.-Gambling*. The European Communities (while agreeing with the Panel that Article XVI:2, paragraphs (a) and (c) covered measures not expressly cast in the form of numerical ceilings) argued that the relevant provisions covered measures "affecting" trade in services. *Id.* ¶ 101. Thus, in the European Communities' view, prohibitions on the consumption of services, although directed at consumers, were also restrictions on the activities of suppliers and thus covered by Article XVI:2(a) and (c). *Id.* Japan, on the other hand, argued that measures having the effect, if not the form of a quota, may be prohibited under Article XVI:2(a) and (c), but that measures imposed on service consumers rather than service suppliers or service operations or output were not so covered. *Id.* ¶ 107.

248. Comment from the Advisory Board, *supra* note 21, at 233–34.

249. *Id.* at 232; *see also* Ortino, *supra* note 33, at 137 ("It seems quite odd that in order to understand the nature and function of Article XVI (for the first time before the Appellate Body), no consideration is given to the Agreement's other general disciplines, in particular Articles VI and XVII.").

250. Ortino, *supra* note 33, at 133, 135.

251. *Id.* at 135.

252. Krajewski, *supra* note 26, at 437; *cf.* Wunsch-Vincent, *supra* note 28, at 342–43 (noting that "[h]ad the US—rather than banning remote supply altogether—established certain non-discriminatroy security, and/or qualification-related domestic regulations for online gambling service providers, it is unlikely that these measures would have been found to be incompatible with commitments under GATS Article XVI.").

At the same time, following *U.S.-Gambling*, it is not obvious that Article XVI:2 will be defined broadly in the future to cover non-discriminatory measures with quantitative effects.[253] Rather than "assume that the coverage of Article XVI:2 extends to measures having the same effect as those explicitly mentioned,"[254] the better approach is for members to determine the conceptual boundaries of Article VI:4 by crafting disciplines on domestic regulation. As noted by the Appellate Body, the issue in *U.S.-Gambling* was not "*whether* Article XVI covered quantitative measures,"[255] but "how to know where the line should be drawn between quantitative and qualitative measures."[256] Undoubtedly, clarifying the legal scope of Article VI:4 would resolve much of the current uncertainty that prevails in determining which measures ought to be correctly treated as quantitative limitations prohibited under Article XVI versus domestic regulations subject only to the disciplines of Article VI:4.

B. *The Role of Disciplines under Article VI:4 and the Accountancy Disciplines*

Given the obvious weakness of Article VI:5,[257] the reality is that the substantive aspects of trade-restrictive domestic regulatory

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253. Krajewski, *supra* note 26, at 437.

254. *Id.*

255. Appellate Body Report, *supra* note 1, ¶ 248.

256. *Id.*

257. Article VI:5, notwithstanding the various caveats that apply, is dependent on the interpretation given to the broadly articulated principles under Article VI:4. *See* Trachtman, *supra* note 93, at 67. As emphasized previously, the Article VI:4 principles are not in themselves a basis for constructing a specific obligation. *See* Working Party on Domestic Regulation, *"Necessity Tests" in the WTO*, ¶ 8, S/WPDR/W/27 (Dec. 2, 2003) [hereinafter *"Necessity Tests" in the WTO*]. Clearly, the principles articulated under Article VI:4 are designed only to inform the rule-making process of Article VI:4. Therefore, it is uncertain how domestic laws that are inconsistent with the Article VI:4 criteria would be judged in terms of dispute settlement under Article VI:5. *See* Trachtman, *supra* note 93, at 68 (analyzing the connotations of the necessity test incorporated under Article VI:4(b)). Article VI:5 also requires demonstration of "nullification and impairment" before a failure to comply with the Article VI:4 principles can be considered in dispute settlement body proceedings. This requirement serves to further weaken the disciplinary impact of Article VI:4 on restrictive regulations. *Disciplines on Domestic Regulation*, *supra* note 40, ¶ 11. Since non-violation nullification and impairment is an exceptional remedy, a complaining member must generally show that it had "legitimate expectations" of improved market access opportunities arising out of the relevant concession to prevail. Trachtman, *supra* note 93, at 67. In *Japan—Film*, the leading case on non-violation nullification and impairment under the WTO system, the Panel observed that the parties

> [h]ave confirmed that the non-violation nullification or impairment remedy should be approached with caution and treated as an exceptional concept. The reason for this caution is straightforward. Members negotiate the rules that

measures can only be properly and legally addressed under the mandate of Article VI:4. As Article VI:4 is only a preliminary provision that awaits the articulation of disciplines to be of any real value, the negotiation of such disciplines becomes vitally important. When adopted, such disciplines on domestic regulation will serve to further define the scope of members' regulatory autonomy under GATS by ensuring consistent domestic regulation that meets the requirements of Article VI:4. Development of such disciplines will also illuminate the scope of the market access obligation and remove prevailing uncertainties about the interplay between Articles XVI, XVII, and VI in members' negotiations to liberalize services under GATS.

Although Article VI:4 does not directly impose a "necessity test" in relation to such regulatory measures,[258] the disciplines on domestic regulation to be developed aim to ensure that regulatory measures relating to qualification requirements and procedures, technical standards, and licensing requirements adopted by members do not constitute "unnecessary" barriers to trade.[259] In WTO jurisprudence, "necessity" generally means that a measure imposed by a member must be the least trade-restrictive option available to achieve a

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> they agree to follow and only exceptionally would accept to be challenged for actions not in contravention of those rules.

Panel Report, *Japan—Measures Affecting Consumer Photographic Film and Paper*, ¶ 10.36, WT/DS44/R (Apr. 22, 1998) [hereinafter *Japan—Film*]; *see also* GATS, *supra* note 4, art. XXIII:3 (noting that nullfication or impairment of any benefit which could be reasonably expected to accrue to a member under a specific commitment can be alleged in the "[absence of a] conflict with the provisions of [GATS].") In *Japan—Film*, the Panel noted that "in all but one of the past GATT cases dealing with Article XXIII:1(b) claims the claimed benefit has been that of legitimate expectations of improved market access opportunities arising out the relevant tariff concessions." *Japan—Film*, *supra*, ¶ 10.61.

258. *See* GATS, *supra* note 4, art. VI:4 (attempting to ensure that "qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services"); *see also Disciplines on Domestic Regulation*, *supra* note 40, ¶¶ 2–3 (noting that although the first draft of the GATS contained a binding discipline on domestic regulation (*see* Draft Multilateral Framework for Trade in Services, art. VII, MTN.GNS/35, July 23, 1990 (1990)), Article VI:4 of the final draft contained only a mandate for the development of disciplines rather than a binding rule:

> [T]he simple transformation of the principles listed in VI:4 into binding rules would in itself bring domestic regulation within the GATS legal framework. Such a general rule, however would probably have been insufficient to provide guidance for the settlement of disagreements or disputes about particular measures; the purpose of developing these general principles into "disciplines" could be seen as being to give them enough specificity to make them operationally useful.

Disciplines on Domestic Regulation, *supra* note 40, ¶¶ 2–3).

259. *See, e.g.*, *"Necessity Tests" in the WTO*, *supra* note 257.

legitimate regulatory goal.[260] Yet, given that Article VI is designed to protect members' rights to regulate services, incorporating a requirement under Article VI that domestic regulation be the "least trade restrictive" may unduly restrict the choice of regulatory tools available to achieve members' legitimate policy objectives.[261] The European Communities, for example, emphasize the concept of proportionality in assessing the trade restrictiveness of regulations falling under the scope of Paragraph 4 of Article VI:

> A measure should be considered not more trade restrictive/not more burdensome than necessary if it is not disproportionate to the objectives pursued. This means that the degree of trade-restrictiveness meeting the requirement of necessity will depend on, and be assessed against, the specific objective[s] pursued, while the validity, or rationale, of the policy objective[s] must not be assessed. As to the wording of a definition of necessity, the European Communities and their Member States view "not more burdensome than necessary" and "not more trade restrictive than necessary" as meaning essentially the same, and are preferred over the concept of "least trade restrictive".[262]

This indicates that more discussion is needed on the definition, scope, and criteria of the necessity standard to be incorporated under any generally applicable Article VI:4 disciplines. More importantly, fundamental clarification of the degree of regulatory flexibility and regulatory choice permitted under Article VI:4 is required. It is noteworthy that the only disciplines that have so far been developed under the Article VI:4 mandate—the Disciplines on Domestic Regulation in the Accountancy Sector (Accountancy Disciplines, applicable only to the accountancy services sector)[263]—articulate a binding necessity test that requires non-discriminatory and non-quantitative measures to be "not more trade restrictive than necessary."[264] The necessity test adopted in the Accountancy

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260. *See Disciplines on Domestic Regulation*, *supra* note 40, ¶¶ 19–21 (noting that this meaning of necessity is found chiefly in Article XX of GATT, Article XIV of GATS and to some extent in the relevant provisions of the Agreements on Sanitary and Phytosanitary Measures (SPS) (e.g., Article 2.2) and Agreement on Technical Barriers to Trade (TBT) (e.g. Article 2.2)).

261. Working Party on Domestic Regulation, *Communication from the European Communities and their Member States*, ¶¶ 16–17, S/WPDR/W/14 (May 1, 2001) [hereinafter *Communication from the European Communities*] .

262. *Id.* ¶ 17.

263. *Accountancy Sector Disciplines*, *supra* note 121, ¶ 2.

264. *Id.* The Disciplines state that:

> Members shall ensure that measures not subject to scheduling under Articles XVI or XVII of the GATS, relating to licensing requirements and procedures, technical standards and qualification requirements and procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary barriers to trade in accountancy services. For this purpose, Members shall ensure that such measures are not more trade-restrictive than necessary to fulfill a legitimate objective. Legitimate objectives are, *inter alia*,

Disciplines provides a non-exhaustive list of objectives that can be used by members to justify the necessity of domestic regulation. These objectives include, inter alia, the protection of consumers, ensuring the quality of the service and professional competence, and maintaining the integrity of the profession.[265]

As sector-specific disciplines, the Accountancy Disciplines apply only to members that have entered specific commitments on accountancy services in their Schedules.[266] The Disciplines make clear that they do not address measures that should be scheduled under the market access (Article XVI) or national treatment (Article XVII) obligations of GATS.[267]

Under the Accountancy Disciplines, members are subject to disciplines relating to transparency that include an obligation to inform other Members "upon request, of the rationale behind domestic regulatory measures in the accountancy sector in relation to legitimate objectives referred to in paragraph 2 [of the Accountancy Disciplines]."[268] A member must also "endeavor" to provide the opportunity for other members to comment when that member proposes new measures that have a significant impact on accountancy services.[269] The Accountancy Disciplines also build on the general transparency obligations contained in Articles III and IV of GATS, obliging members to provide detailed information on licensing requirements and procedures and technical standards.[270]

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the protection of consumers (which includes all users of accounting services and the public generally), the quality of the service, professional competence, and the integrity of the profession.

Id. The necessity test articulated in the Accountancy Disciplines cannot be used to justify a violation of any of the substantive obligations of GATS. Likewise, a necessity test articulated under the disciplines of Article VI:4 cannot be used to justify violation of any of the substantive obligations of GATS, such as the specific commitments under Articles XVI and XVII. *See Disciplines on Domestic Regulation, supra* note 40, ¶ 22 (noting that the necessity test under Article VI:4 differs from the necessity test under the general exceptions to GATS; the latter justifies a violation of substantive GATS obligations). As Article VI:4 is an obligation provision as opposed to an exception provision (for example, Article XIV of GATS), the initial burden of proof in relation to the necessity test under Article VI:4 also rests on the complaining party. *"Necessity Tests" in the WTO, supra* note 257, ¶ 7.

265. *Accountancy Sector Disciplines, supra* note 121, ¶ 2.

266. Council for Trade in Servs., *Decision on Disciplines Relating to the Accountancy Sector*, ¶ 1, S/L/63 (Dec. 15, 1998) [hereinafter *Accountancy Sector Decision*]; GATS, *supra* note 4, art.VI:4; *see also Disciplines on Domestic Regulation, supra* note 40, ¶ 15. However, as there is nothing in the text of Article VI:4 that limits the application of disciplines to sectors subject to specific commitments, the choice made by the Working Party on Professional Services does not determine the scope of application of the disciplines to be developed under Article VI:4 of GATS. *Id.*

267. *Accountancy Sector Disciplines, supra* note 121, ¶ 1.

268. *Id.* ¶ 5.

269. *Id.* ¶ 6.

270. *Id.* ¶¶ 4–26.

Further, the disciplines relating to licensing requirements and procedures incorporate specific transparency obligations.[271] In addition to disciplines on transparency, the Accountancy Disciplines impose necessity requirements in relation to specific types of regulations.[272] For instance, where residency requirements not subject to scheduling under Article XVII exist, the disciplines require members to consider whether less trade-restrictive means could be employed to achieve the purposes for which the requirements were adopted.[273] Further, the disciplines require that licensing procedures shall be objective and should not constitute a restriction on the supply of a service in and of themselves.[274] The disciplines on licensing procedures also set recommendations on time limits for approval of licensing applications and require members to provide reasons for rejection.[275] The concept of equivalency of foreign qualifications is reflected in the disciplines on qualification requirements, although the obligation itself is a limited one that only requires members to ensure that their competent authorities take "account" of qualifications obtained abroad on the basis of equivalency of education, experience, examination requirements, or a combination thereof.[276] Also, members are obliged to apply technical standards only to fulfill legitimate objectives.[277] Internationally recognized standards applied by a member shall be taken into account when determining the conformity of such standards to the necessity test imposed under Paragraph 2 of the Accountancy Disciplines.[278]

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271. *E.g.*, *id.* ¶ 8 (obliging members to ensure that substantive licensing requirements shall be pre-established, publicly available, and objective).

272. *Id.* ¶¶ 9, 15 (relating to licensing requirements and procedures espectively).

273. *Id.* ¶ 9.

274. *Id.* ¶ 14.

275. *Id.* ¶¶ 16–17.

276. *Id.* ¶ 19. In line with the limited obligation with regard to recognition of education, experience, licensing, or qualifications obtained abroad under Article VII of GATS, the Accountancy Disciplines also place no obligation on members to extend mutual recognition to qualifications or education obtained in each others territory or to enter into mutual recognition agreements. *Id.* Thus, the obligation in paragraph 19 of the Accountancy Disciplines "only adds a procedural requirement and leaves the equivalence-awarding decision to the member." Wouters & Coppens, *supra* note 3, at 49.

277. *E.g.*, *Accountancy Sector Disciplines*, *supra* note 121, ¶ 25 (requiring domestic accounting standards for preparing and auditing financial statements be related to the objective of improving the quality of financial reporting).

278. *Id.* ¶ 26. The discipline follows Article VI:5(b) of GATS in that it accords the same but limited level of recognition to international standards. Thus, in contrast to the GATT Agreements on Sanitary and Phytosanitary Measures (SPS) and Technical Barriers to Trade (TBT), "GATS does not require Members to 'use' international standards or to 'base' their regulations on international standards. It also does not provide for a presumption in favor of international standards as do the TBT and SPS." Wouters & Coppens, *supra* note 3, at 50.

There has been some movement towards developing a set of generally applicable horizontal disciplines under Article VI:4, but substantial work remains to be done.[279] Further, it is not clear whether the current work is also to be used in developing sector-specific disciplines. A report submitted to the Council for Trade in Services on the development of the disciplines just weeks prior to the Hong Kong Ministerial Meeting in 2005 articulates a detailed list of elements for negotiation under Article VI:4 (although described as only "illustrative").[280] Though general in nature, these so-called elements provide invaluable guidance for the development of either general or sector-specific disciplines under Article VI:4. They list possible elements that should be considered for inclusion for the following: licensing requirements, licensing procedures, qualification procedures, technical standards, transparency, objectives, scope, application, definition, and development considerations.[281]

In terms of a timeframe, the Hong Kong Ministerial Declaration calls for the development of Article VI:4 disciplines before the end of the Doha Round of negotiations.[282] However, as the development of the Accountancy Disciplines has shown, whether such disciplines will be ready for adoption before the end of the Doha Round, and the degree to which they will offer precise binding obligations for WTO members, is largely dependent on the political will of the WTO membership as a whole. Significantly, the Accountancy Disciplines themselves have only the status of a decision of the Council for Trade in Services until integrated into GATS by members, which is likely to occur at the conclusion of the current round of negotiations.[283] Until these Disciplines are "integrated," members are obliged only "to the fullest extent consistent with their existing legislation, [to] not take measures which would be inconsistent with these disciplines."[284]

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279. *See* Working Party on Domestic Regulation, *Report of the Chairman of the Working Party on Domestic Regulation to the Special Session of the Council for Trade in Services*, at 3, JOB(05)/280 (Nov. 15, 2005) [hereinafter Report of the Chairman] (noting that although a list of possible elements for any disciplines under Article VI:4 has been compiled on the basis of proposals presented by Members and comments thereon, "there is no presumption that consensus has been reached on its elements.").

280. *Id.* (stating that while this list is merely illustrative, it does not indicate consensus nor can it predict the final negotiated outcome of the rules under Article VI:4). *But cf.* Hong Kong Ministerial Declaration, *supra* note 98, Annex C, ¶ 5 (indicating that the Declaration, however, does make reference to the list as proposals for consideration in developing the Article VI:4 disciplines).

281. Report of the Chairman, *supra* note 279, attachment 1.

282. Hong Kong Ministerial Declaration, *supra* note 98, Annex C, ¶ 5. Although there is uncertainty with regard to the date of completion of the round itself, it is worthwhile to note that a failure to complete the current round will only delay negotiations and not affect the original mandate to develop the disciplines under Article VI:4. *See infra* note 388.

283. *Accountancy Sector Decision*, *supra* note 266, ¶ 2.

284. *Id.* ¶ 3. Accordingly, the Accountancy Disciplines are not binding until fully integrated into GATS by the WTO membership.

C. *Article XIV Shields Domestic Regulation that Restricts Liberalization*

U.S.-Gambling confirms the overriding nature of Article XIV, which operates as an absolute defense to members that might otherwise be found to be in violation of their commitments and obligations under GATS.[285] In the first ever analysis of the general exceptions of GATS, the Appellate Body in *U.S.-Gambling* had little problem in finding that the U.S. regulations (with the single exception of the IHA) satisfied the conditions of Article XIV.[286] This confirms the significant flexibility members have under the policy exceptions of Article XIV.

A member asserting the Article XIV defense (in *U.S.-Gambling*, this was the United States) must satisfy a two-part test. First, the member must demonstrate that the challenged measure meets the requirements of the first tier of the Article XIV analysis—the "necessity test."[287] If the requirements of the necessity test are satisfied, the measure is considered as "provisionally justified" under Article XIV.[288] Next, a member asserting the Article XIV defense must demonstrate that the challenged measure satisfies the second tier of the test, the requirements of the chapeau, in order to successfully defend a measure as an exception under GATS.[289]

1. The First Tier of the Article XIV Analysis

In assessing the first tier of the United States' defense, the Panel articulated an objective standard of necessity that involves weighing and balancing various factors that determine whether a measure is "necessary" within the meaning of Article XIV.[290] This process requires determining "whether a WTO-consistent alternative measure which the member concerned could 'reasonably be expected to employ' is available or whether a less WTO-inconsistent measure is

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285. *See* Panel Report, *supra* note 1, ¶ 6.450 (stating that the burden of proof is on the member attempting to justify a measure under the Art. XIV defense. A member claiming the defense must justify both the necessity of a measure and satisfy the requirements of the chapeau in order to justify the maintenance of a GATS inconsistent measure.).

286. Appellate Body Report, *supra* note 1, ¶ 371.

287. Panel Report, *supra* note 1, ¶ 6.449.

288. *Id.*

289. *Id.*

290. *See* Appellate Body Report, *supra* note 1, ¶¶ 304–305 (confirming that "the standard of 'necessity' provided for in the general exceptions provision is an *objective* standard.").

'reasonably available.'"[291] The factors that are "weighed and balanced" in order to determine necessity of a particular measure are:

(a) the importance of interests or values that the challenged measure is intended to protect;
(b) the extent to which the challenged measure contributes to the realization of the end pursued by that measure; and
(c) the trade impact of the challenged measure. In applying this last requirement, the existence of reasonably available WTO-consistent alternative measures must also be taken into consideration.[292]

The Panel had little trouble establishing that the U.S. measures satisfied the first two elements of the necessity test.[293] However, it ran into difficulties in determining the trade impact of the challenged measure.[294] In the Appellate Body's words, the two crucial factors to consider, and upon which determination of necessity turns, are: "the contribution of the measure to the realization of the ends pursued by it" and "the restrictive impact of the measure on international commerce."[295] Further,

> [a] comparison between the challenged measure and possible alternatives should then be undertaken and the results of such comparison should be considered in the light of the importance of the interests at issue. It is on the basis of this "weighing and balancing" and comparison of measures, taking into account the interests or values at stake, that a panel determines whether a measure is "necessary" or alternatively, whether another, WTO consistent measure is "reasonably available".[296]

The Panel's analysis of the necessity of the measures imposed an obligation on the United States to first explore and exhaust *all* reasonably available WTO-consistent alternatives. Had this obligation been upheld, it would have severely curtailed members' regulatory flexibility under Article XIV and would have constituted a serious erosion of the sovereign autonomy of member states. However, the Appellate Body, by overturning this aspect of the

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291. *Id.* ¶ 305 (quoting Appellate Body Report, *Korea—Measures Affecting Imports of Freshly Chilled and Frozen Beef*, ¶ 166, WT/DS161/AB/R, WT/DS169/AB/R (Jan 10, 2001) [hereinafter *Korea—Beef*]).

292. Panel Report, *supra* note 1, ¶ 6.477 (citing *Korea–Beef*, *supra* note 291, ¶¶ 162–163, 166).

293. *See id.* ¶ 6.533 (noting that the "Wire Act, the Travel Act . . . and the Illegal Gambling Business Act . . . protect very important societal interests in the United States," and that these Acts, "contribute to the realization of the ends pursued by those laws in the United States").

294. *See id.* ¶ 6.564 (noting that while the interests protected are "important," the measures "have a significant impact on trade and the United States has not explored and exhausted WTO-consistent alternatives . . . .").

295. Appellate Body Report, *supra* note 1, ¶ 306.

296. *Id.* ¶ 307.

Panel's necessity analysis, rejected a requirement that a member explore and exhaust *all* reasonably available WTO compatible alternatives before imposing a WTO inconsistent measure,[297] thus restoring the scope of members' sovereign autonomy under Article XIV. As the Appellate Body emphatically stated:

> An alternative measure may be found not to be "reasonably available," however, where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties. Moreover, a "reasonably available" alternative measure must be a measure that would preserve for the responding Member its right to achieve its desired level of protection with respect to the objectives pursued under paragraph (a) of Article XIV".[298]

The evidentiary burden on the defending member is also a relevant factor in the necessity analysis. In *U.S.-Gambling*, the Appellate Body was careful to point out that although the responding party must make a *prima facie* case that the measure in question is necessary, it did not have to show there were no reasonably available alternatives to achieving its objective.[299] The Appellate Body also emphatically stated that in discharging its burden of proof under Article XIV, the responding party did not have to "identify the universe of less trade restrictive alternative measures and then show that none of these measures achieved the desired objectives. The WTO agreements do not contemplate such an impracticable and indeed, often impossible burden."[300]

However, if the complaining party raises a WTO-consistent alternative measure, the responding party must demonstrate the necessity of its own measure, mainly by demonstrating that the alternative measure is not one which is reasonably available.[301] In the Panel proceedings, Antigua did not submit evidence that there were any alternative measures that the United States could have considered.[302] In the Appellate Body's opinion, merely offering to engage in consultations with the United States was not an alternative measure because it was a "process" as opposed to a "measure."[303] The Appellate Body found the Panel's analysis of the necessity requirements of the first tier of Article XIV flawed because

> it did not focus on an alternative measure that was reasonably available to the United States to achieve the stated objective regarding

297. *Id.* ¶¶ 315, 317–318.
298. *Id.* ¶ 308.
299. *Id.* ¶ 309.
300. *Id.* ¶ 309.
301. *Id.* ¶ 311.
302. *Id.* ¶ 326.
303. *Id.* ¶ 317.

> the protection of public morals or the maintenance of public order. Engaging in consultations with Antigua with a view to arriving at a negotiated settlement that achieves the same objective as the challenged United States' measures was not an appropriate alternative for the Panel to consider because consultations are by definition a process, the results of which are uncertain and therefore not capable of comparison with the measures at issue in this case.[304]

In its necessity analysis, the Appellate Body also addressed the relevance of the specific commitments that the United States had made in its Schedule relating to cross-border trade of gambling and betting services. It ruled that the existence of specific commitments by a member did not affect the "necessity" of a measure in terms of the protection of public morals or the maintenance of public order:[305]

> [*B*]*ut for* the United States' alleged refusal to accept Antigua's invitation to negotiate, the Panel would have found that the United States had made its *prima facie* case that the Wire Act, the Travel Act, and the IGBA [Illegal Gambling Business Act] are "necessary" within the meaning of Article XIV(a).[306]

As Antigua failed to argue the existence of an alternative measure to that of the U.S. laws challenged in the dispute, the Appellate Body held that the United States had succeeded in making a *prima facie* case of necessity and had provisionally justified its measures under the first tier of the Article XIV analysis.[307]

2. The Second Tier of the Article XIV Analysis

The Appellate Body's analysis of the second tier reveals that a strict standard applies in determining whether a measure is applied in a manner that contravenes the requirements of the chapeau of Article XIV.[308] The chapeau is significant to the Article XIV analysis because,

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304. *Id.* Accordingly, it went on to reverse the Panel's finding that the United States had failed to provisionally justify its measures as necessary under Article XIV(a). *Id.* ¶ 321.

305. *Id.* ¶ 318.

306. *Id.* ¶ 325.

307. *Id.* ¶ 326. As the Panel's findings in respect of Article XIV(c) also rested on the same basis, the Appellate Body reversed the Panel findings on Article XIV(c) on the same grounds. *Id.* ¶ 336. However, as the Appellate Body had already found the three U.S. federal laws to be necessary under the Article XIV(a) analysis, it did not find it important to determine whether those measures were also provisionally justified under Article XIV(c). *Id.* ¶ 337.

308. The burden of demonstrating that a measure, provisionally justified as "necessary," also meets the requirements of the chapeau rests on the party evoking the Article XIV exception. *See* Panel Report, *supra* note 1, ¶ 6.573 (quoting Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, at 22, WT/DS2/AB/R (May 20, 1996) [hereinafter *US—Gasoline*]).

> [b]y requiring that the measure be *applied* in a manner that does not constitute "arbitrary" or "unjustifiable discrimination" or is a "disguised restriction on trade in services," the chapeau serves to ensure that Members' rights to avail themselves of exceptions are exercised reasonably, so as not to frustrate the rights accorded to other Members by the substantive rules of GATS.[309]

Under the requirements of the chapeau, the emphasis is on the *application* of the challenged measure,[310] as opposed to its substantive content, because the purpose of the chapeau is to prevent abuse of the Article XIV exceptions.[311] This means that a measure must not be applied in a manner that constitutes (a) arbitrary discrimination between countries where like conditions prevail, (b) unjustifiable discrimination between countries where like conditions prevail, or (c) a disguised restriction on international trade.[312]

Jurisprudence under the analogous provisions of Article XX of GATT provides guidance on the meaning of the terms "arbitrary or unjustifiable discrimination between countries where like conditions prevail" and "disguised restriction on international trade."[313] First, it is recognized that the two terms are not mutually exclusive; they

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309. Appellate Body Report, *supra* note 1, ¶ 339 (citing *US—Gasoline*, *supra* note 308, at 20–21).

310. *Id.* ¶ 339.

311. Panel Report, *supra* note 1, ¶ 6.574 (ruling under its analysis of the chapeau of Article XX, that:

> The chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the General Agreement. If those exceptions are not to be abused or misused, in other words, the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned.

(quoting *US—Gasoline*, *supra* note 308, at 22)).

312. *See* GATS, *supra* note 4, art. XIV (setting forth the chapeau).

313. *See* Panel Report, *supra* note 1, ¶¶ 6.578–6.580 (noting that three elements must exist in order for a measure to be applied in a manner that would constitute "arbitrary or unjustifiable discrimination between countries where like conditions prevail" (quoting Appellate Body Report, *United States—Import Prohibitions of Certain Shrimp and Shrimp Products*, at 2755, WT/DS58/AB/R (Nov. 6, 1998) [hereinafter *US—Shrimp*]). First, the application of the measure must result in discrimination (the nature of which is different from the non-discriminatory principle prevalent in the MFN and national treatment obligations of GATT). *Id.* Second, the discrimination has to be arbitrary or unjustifiable in character. Third, it must occur between countries where like conditions prevail. *Id.* Accordingly, such discrimination could occur between different exporting members or between the exporting and importing members. *Id.* A disguised restriction is not confined to concealed or unannounced restriction or discrimination in international trade and may also include restrictions amounting to arbitrary and unjustified discrimination. *Id.* ¶ 6.579.

overlap.[314] However, evidence of discrimination alone does not suffice to prove inconsistency with the requirements of the chapeau, as the discrimination must also be "arbitrary" or "unjustifiable" in character.[315] In *U.S.-Gambling,* the Panel applied a standard of consistency to determine whether the online gambling laws were applied in a manner that constituted arbitrary or unjustifiable discrimination.[316] The Appellate Body did not disagree with the Panel that a standard of consistency was required by the chapeau, but nevertheless reversed the Panel's finding that the United States had discriminated in its enforcement of the prohibition against foreign online gambling services. In the Appellate Body's opinion, the Panel's consideration of isolated instances of U.S. non-enforcement of the relevant laws (particularly the Wire Act) that arguably favored domestic online gambling businesses, was insufficient both to rebut the United States' defense under the chapeau and to support a finding of "inconclusiveness" with regard to whether the United States had discriminated against foreign services providers.[317] However, the Panel's finding on the IHA was affirmed by the Appellate Body because the Appellate Body agreed that the evidence adduced by the United States with regard to the relationship between the challenged measures and the IHA was "not sufficiently persuasive to conclude that as regards wagering on horseracing, the remote supply of such service by domestic firms continues to be prohibited notwithstanding the plain language of the IHA."[318] While a stricter standard appears to have been applied by the Appellate Body in relation to legislative discrimination, a more flexible approach seems to have prevailed in relation to the enforcement of the laws themselves. Nevertheless, United States' implementation of the Appellate Body's recommendations in *U.S.-Gambling* continues to be an issue in the WTO's dispute settlement system.[319] In 2006,

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314. *Id.* ¶ 6.580.

315. *Id.* ¶ 6.578.

316. *Id.* ¶ 6.584. Specifically, the Panel found that a number of factual arguments submitted by Antigua in response to the U.S. defense under the chapeau were:

> [R]elevant in determining whether or not the United States is consistent in prohibiting the remote supply of gambling and betting services. In our view, the absence of consistency in this regard may lead to a conclusion that the measures in question are applied in a manner that constitutes "arbitrary and unjustifiable discrimination between countries where like conditions prevail" and/or a "disguised restriction on trade."

Id.

317. Appellate Body Report, *supra* note 1, ¶¶ 354–357.

318. *Id.* ¶ 364.

319. Status Report by the United States, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/Add. (Apr. 11, 2006) (stating that compliance with the recommendations and rulings of the DSB in the

Antigua initiated implementation proceedings under Article 21:5 of the WTO's Dispute Settlement Understanding (DSU)[320] on the grounds that the United States had failed to implement the rulings and recommendations of the DSB and is not in compliance with U.S. obligations under GATS.[321] In March 2007, the implementation

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Gambling dispute relates exclusively to the sole point of whether the United States is able to show that relevant U.S. laws do not discriminate against foreign suppliers of remote gambling on horse racing). The report stated that the United States was in compliance with the DSB recommendations and rulings based on the following statement made by the representative of the United States Department of Justice to a subcommittee of the U.S. House of Representatives on April 5, 2006:

> The Department of Justice views the existing criminal statutes as prohibiting the interstate transmission of bets or wagers, including wagers on horse races. The Department is currently undertaking a civil investigation relating to a potential violation of law regarding this activity. We have previously stated that we do not believe that the Interstate Horseracing Act, 15 U.S.C. §§ 3001–3007, amended the existing criminal statutes.

Peter Allgeier, U.S. Representative to the WTO, Statements at the meeting of the WTO Dispute Settlement Body (DSB) (Apr. 21, 2006).

320. DSU, supra note 59, art. 21:5.

> Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations or rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, it shall inform the DSB in writing of its reasons for the delay together with an estimate of the period within which it will submit its report.

Id.

321. Request for the Establishment of a Panel by Antigua & Barbuda, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/18 (July 6, 2006). Antigua alleged that the U.S. Department of Justice statement that the United States relied on as evidence of compliance was not a measure for the purposes of the DSU. *Id.* at 3. Antigua also took the position that regardless of whether the statement constituted a measure under Article 21:5 of the DSU, it did not bring the United States into compliance with the recommendations and rulings of the DSB. *Id.* Interestingly, in an unexpected but related development, the United States Congress passed the Unlawful Internet Gambling Enforcement Act on September 30, 2006, which makes it illegal for banks, credit card companies, and online payment systems to process payment to online gambling companies. 31 U.S.C. §§ 5361–5366 (2006); *see* Nelson Rose, *Viewpoint: The Unlawful Internet Gambling Enforcement Act of 2006 Analyzed*, 10 GAMING L. REV. 537 (2006) (summarizing the salient features of this legislation); *see also* Bruce Zagaris, *U.S. Enacts Internet Gaming Law Barring Use of Credit Cards*, 22 INT'L ENFORCEMENT L. REP. 476 (2006) (discussing the Unlawful Internet Gambling Act); Peter Harrison, *More Gaming Firms Prepare to Flee U.S.*, REUTERS, Oct. 10, 2006 (on file with authors) (discussing the effect of the Unlawful Internet Gambling Act); Michael McCarthy & Jon Swartz, *New Legislation May Pull the Plug on Online Gambling*, USA TODAY, Oct. 3, 2006, *available at*: http://www.usatoday.com/tech/2006-10-02-internet-gambling-usat_x.htm (same); Chris Reiter, *Gamblers Adapt to Loss of U.S. Online Sites*, REUTERS, Oct. 3, 2006 (on file with authors) (same). This legislation is currently being challenged by the

Panel ruled that the United States had failed to comply with the DSB's recommendations and rulings.[322] In response to this second defeat, rather than amend its existing legislation to accord with the DSB rulings, the United States announced its intention to renegotiate its specific commitments in accordance with Article XXI of GATS in order to exclude online gambling services from the scope of its specific commitments under GATS.[323]

Interactive Media Entertainment & Gaming Association in the U.S. District Court in New Jersey. K.C. Jones, *Gaming Association Sues U.S. Over Internet Ban*, INFORMATION WEEK, June 7, 2007, *available at* http://www.informationweek.com/story/showArticle.jhtml?articleID=199902123.

322. Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Recourse to Article 21.5 of the DSU by Antigua and Barbuda*, ¶¶ 6.38, 6.85, WT/DS285/RW (Mar. 30, 2007) (adopted May 22, 2007). In these implementation proceedings, the United States argued that its "measures to comply" were essentially "the same measures that were at issue in the original proceedings," which the United States submitted, were consistent with WTO obligations. *Id.* ¶ 6.4. According to the United States, the only issue was that it had been found to have not met its burden of showing that the measures satisfied the requirements of the Article XIV defense. *Id.* It argued that its presentation of new evidence and arguments during compliance proceedings met this burden and accordingly, it was in compliance with the rulings and recommendations of the DSB. *Id.* The United States' argument was rejected by the implementation Panel, which stated that the "recommendation of the DSB was that the United Sates bring its *measures* into conformity, not bring the *assessment* of the conformity of those measures into conformity." *Id.* ¶ 6.15. "Therefore, the recommendations require a change that eliminates the inconsistency of those *measures* with the covered agreements." *Id.* Since the measures had not been changed, applied, or interpreted, they remained inconsistent with U.S obligations under GATS. *Id.* ¶ 6.27. Following the report of the implementation Panel, in June 2007 Antigua requested authorization from the DSB, pursuant to Article 22.2 of the DSU, to suspend the application to the United States of concessions and related obligations of Antigua and Barbuda under the GATS and the Agreement on Trade Related Aspects of Intellectual Property (TRIPS), in an annual amount of US$3.443 billion. *See* Recourse by Antigua and Barbuda to Article 22.2 of the DSU, *United States—Measures Affecting the Cross-border Supply of Gambling and Betting Services*, WT/DS285/22 (June 22, 2007); DSU, *supra* note 59, art. 22.2; Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 81 (1994). In July 2007, the United States objected to the level of suspension of concessions sought by Antigua and claimed that the Antiguan request did not follow the principles of Article 22:3 of the DSU. *See* Request by the United States for Arbitration under Article 22.6 of the DSU, *United States—Measures Affecting the Cross-border Supply of Gambling and Betting Services*, WT/DS285/23 (July 24, 2007); DSU, *supra* note 59, art. 22.6. The DSB at its meeting on July 24, 2007 referred the matter for arbitration under Article 22.6 of the DSU. *See* Recourse by the United States to Article 22.6 of the DSU, Constitution of the Arbitrator, Note by the Secretariat, *United States—Measures Affecting the Cross-border Supply of Gambling and Betting Services*, WT/DS285/24 (Aug. 6, 2007).

323. Press Release, John K. Veroneau, Deputy United States Trade Representative, Statement Regarding U.S. Actions under GATS Article XXI (May 4, 2007) *available at*: http://www.ustr.gov/Document_Library/Press_Releases/2007/May/Section_Index.html. Article XXI of GATS permits a member to withdraw a commitment in its Schedule in accordance with certain terms and conditions. GATS, *supra* note 4, art. XXI. In accordance with Article XXI:2, any WTO member affected by

As *U.S.-Gambling* demonstrates, members have significant regulatory autonomy under GATS, and gaps in the regulatory reach of GATS rules provide considerable room for policy maneuverability. In particular, Articles VI and XIV provide enough regulatory flexibility for members to maintain restrictive regulations with strong policy justifications. As the next section demonstrates, the imbalance between members' liberalization obligations under GATS and the scope of members' domestic regulatory autonomy may seriously restrict the continued expansion of cross-border trade in e-services.

V. ENCHANING THE REGULATORY ROLE OF GATS FOR CROSS-BORDER ROSS-TRADE IN E-SERVICES

There has been tremendous growth in e-commerce since GATS came into force in 1995 due to the fact that many services are now "easily traded electronically . . . creating an even greater interest among Members in further liberalizing services on . . . a cross-border . . . basis."[324] Economist and WTO expert Sacha Wunch-Vincent examined members' submissions for negotiations under GATS for evidence of this growth and discovered that

> development of e-commerce and the Internet has spurred growth, efficiency, and productivity in the services sectors . . . [and] in some cases IT [information technology] has made existing services tradable across borders (e.g., advertising) and created new services (e.g., some computer services). . . . Many WTO Members have requested new or improved services commitments that would facilitate e-commerce and

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the United States' withdrawal of its GATS commitment on cross-border gambling services may request negotiations with the United States to reach a compensatory adjustment, which may result in concessions in other sectors of a Member's Schedule. Article XXI provides that in such negotiations, "the members concerned shall endeavor to maintain a general level of mutually advantageous commitments not less favorable to trade than that provided for in Schedules of specific commitments prior to such negotiations." *Id.* art. XX1:2(a). Any compensatory adjustment under Article XXI must be made on an MFN basis. *Id.* art. XXI:2(a)–(b). Although Antigua expressed concern over this move by the United States at a meeting of the DSB, such protests are unlikely to garner support from the European Community, Brazil, and India, who generally support the right of the United States to modify its schedule in accordance with GATS. *See* Press Release, World Trade Org., DSB Adopts Compliance Review Reports on US Gambling and Chile's Price Band System (May 22, 2007), *available at* http://www.wto.org/english/news_e/news07_e/dsb_22may07_e.htm (discussing the arguments of Antigua, Brazil, India and the European Community); *see also* Doug Palmer, *EU presses U.S. to change Internet gambling law*, REUTERS, Nov. 8, 2007 (on file with the authors) (discussing EU compensation talks with the U.S.); ICTSD, *Antigua Gambling Dispute: Major Economies Demand Compensation from US*, BRIDGES WKLY. TRADE NEWS DIG., July 4, 2007, *available at* http://www.ictsd.org/weekly/07-07-04/story3.htm (discussing both the requests for compensation by WTO members and the Antiguan request for retaliation against the U.S.).

324. WUNSCH-VINCENT, *supra* note 6, at 71.

> some have requested the elimination of specific services-related barriers.[325]

The specific services-related barriers complained about by members include domestic laws that operate as trade barriers to cross-border trade in electronic services.[326] For example, in advertising services, one such identified barrier related to requirements for local participation in the production of advertising that was electronically transmitted.[327] Additionally, in professional services, qualification requirements that necessitated education in the importing country were identified as a barrier to electronically provided professional services.[328] New barriers to cross-border trade in educational services, such as restrictions on the electronic transmission of course materials, also appear to specifically target the electronic delivery of such services.[329] Clearly, the tension between regulatory autonomy and liberalization is evident in the context of e-commerce that involves cross-border trade in services.

A. *GATS and Developments in the WTO Work Program on E-Commerce*

Without dispute, GATS does not tell Internet users what web sites they can visit, tell service providers how they must protect the privacy and personal data of their online customers, or specify when Internet advertisers may send unsolicited email communications to promote their services ("spam").[330] Although the WTO does not directly regulate e-commerce, and GATS is not a treaty that directly regulates global e-commerce, the WTO has an important role to play in regulating electronic trade in services:[331]

> [T]he need for rules and principles facilitating e-commerce has become increasingly evident. . . . The WTO is the exclusive forum for negotiating and enforcing global rules governing cross-border trade in goods and services. The WTO does not aim to directly "regulate" e-commerce. But the application of its rules-based trading system to goods, services, and intellectual property facilitate and determine the physical, human, and *legal* infrastructure for e-commerce. . . . In this

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325. *Id.* at 72.

326. *Id.* at 74 (Table 15: Examples of Services-related Barriers to E-Commerce).

327. *Id.*; *see also* Council for Trade in Servs., *Communication from the United States: Advertising and Related Services*, ¶ 16, S/CSS/W100 (July 10, 2001) (describing the barriers faced by advertisers worldwide).

328. WUNSCH-VINCENT, *supra* note 6, at 74 (Table 15: Examples of Services-related Barriers to E-Commerce).

329. *Id.*; *see also* Council for Trade in Servs., *Communication from the United States: Higher (Tertiary) Education, Adult Education and Training*, ¶ 10, S/CSS/W/23 (Dec. 18, 2000) [hereinafter *U.S. Education Communication*] (providing a list of obstacles identified in reviewing the sector).

330. WUNSCH-VINCENT, *supra* note 6, at vii.

331. *Id.*

> sense, the WTO can be understood as indirectly regulating IT [Information Technology] by establishing a broad policy framework for its member states.[332]

Over the last decade, the WTO has played a role in regulating global e-commerce, including the electronic trade of services.[333] In 1998, WTO members issued a declaration on e-commerce calling for the establishment of a comprehensive work program to examine all of the trade-related issues concerning e-commerce ("Work Program on E-Commerce").[334] The declaration led to the preparation of a background note by the WTO Secretariat discussing how WTO agreements, including GATS, relate to e-commerce.[335] This was followed by the General Council's establishment of a framework for the Work Program on E-Commerce.[336] The term "electronic commerce" was defined in the Work Program on E-Commerce as "the production, distribution, marketing, sale or delivery of goods and services by electronic means."[337] One of the issues under GATS that the Work Program on E-Commerce identified was the scope of permissible domestic regulation applicable to cross-border e-commerce.[338] The e-commerce implications of Articles XVI and XVII covering members' specific commitments to provide market access and national treatment, and the implications of Article XIV regarding general exceptions for domestic policy regulations, were listed as specific questions that needed to be addressed in the Work Program on E-Commerce.[339]

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332. *Id.* at vii, ix (emphasis added).

333. *Id.* at 1.

334. *Id.* at 4; World Trade Org., Ministerial Declaration of 20 May 1998, WT/MIN(98)/DEC/2, 98-2148 (1998) [hereinafter E-Commerce Declaration]. The objective of the Work Program is to examine all trade-related issues relating to global electronic commerce, taking into account the economic, financial and development needs of developing countries. *Id.*; *see also* John Gero & Tom Oommen, *The Impact of Technological Change in the Canada/U.S. Context: Electronic Commerce and Trade Policy—The Government's Role*, 25 CAN-U.S. L.J. 323, 325 (1999) (discussing the Work Program and the two fundamental issues before it that are: classification of an electronic transmission as a good or service, and WTO disciplines on domestic regulation related to electronic commerce and its impact on trade). *See generally* Amelia H. Boss, *Electronic Commerce and the Symbiotic Relationship Between International and Domestic Law Reform*, 72. TUL. L. REV. 1931, 1933–34 (1998) (discussing the impact of the UNCITRAL Model Law on Electronic Commerce).

335. *WTO Agreements and Electronic Commerce*, *supra* note 6; WUNSCH-VINCENT, *supra* note 6, at 4.

336. *Work Programme on E-Commerce I*, *supra* note 36, ¶ 1.1; WUNSCH-VINCENT, *supra* note 6, at 4.

337. *Work Programme on E-Commerce I*, *supra* note 36, ¶ 1.3.

338. *Id.* ¶ 2.1.

339. *Id.*

To date, despite much discussion of the issues, no substantive action has resulted from the Work Program on E-Commerce.[340] At best, one could argue that the Work Program has lead to a general consensus, mainly through discussion, on preliminary points of clarification that deal with the general applicability of GATS rules to electronic commerce. One issue of substance on which there exists a "common understanding"—though by no means a final one—is the general applicability of the GATS framework to electronic services.[341] There appears to be consensus among members that all GATS provisions, whether relating to general obligations or specific commitments, apply to the supply of services through electronic means.[342] Another significant contribution from members' discussions under the Work Program has been the general affirmation of the technological neutrality of GATS.[343] In the GATS context, technological neutrality means that the electronic supply of a service is permitted by a member's specific commitments under GATS, unless the member's Schedule of commitments states otherwise.[344] The discussion also appears to have lead to a "general consensus, with few exceptions, that e-commerce falls within the scope of existing WTO agreements and that no new trade rules should be created for e-commerce when existing rules and obligations can address the issues at stake."[345] Specifically, a GATS Council report related to the Work Program on E-Commerce expressed the view that "provisions concerning domestic regulation in Article VI of GATS apply to the supply of services through electronic means."[346] However, this report did not specify how Article VI should be applied

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340. WUNSCH-VINCENT, *supra* note 6, at 15.

341. This understanding has been reached on the basis of the broad definition of the term "services" in GATS, which is defined to include "any services in any sector except services supplied in the exercise of governmental authority." GATS, *supra* note 4, art. I:3(b). The application of this definition to all services regardless of the means by which they are supplied has led Members to generally accept that the GATS applies to electronically supplied services under any one of the four modes of supply that define trade in services under GATS. Measures affecting trade in electronically supplied services are treated as "measures by Members affecting trade in services" within the meaning of Article I of GATS. *See* GATS, *supra* note 4, art. I (stating that GATS "applies to measures by Members affecting trade in services"); *Work Programme on E-Commerce I*, *supra* note 36, ¶ 4.1 (discussing "intellectual property issues arising in connection with electronic commerce").

342. *Work Programme on E-Commerce I*, *supra* note 36, ¶ 4.

343. *Id.*

344. *Id.*

345. WUNSCH-VINCENT, *supra* note 6, at 15 (noting some contributions to the Work Program on E-Commerce, including suggestions by other commentators who question whether the WTO should create a framework of general principles for electronic commerce, i.e., a "reference paper" that could operate, *inter alia*, as a regulatory discipline for e-commerce).

346. *E-Commerce Progress Report*, *supra* note 30, ¶ 11; WUNSCH-VINCENT, supra note 6, at 79.

to e-commerce. Nor did the report answer a number of other important questions such as: What is the desirable level of regulation affecting e-commerce? Should a specific Article VI discipline on regulations affecting e-commerce be adopted? What is the nature of the relationship between Article VI and Article XIV as it applies to e-commerce?[347] These important questions have yet to be addressed. As discussed in the next section, *U.S.-Gambling* demonstrates the impending need for a strengthened regulatory discipline addressing domestic regulations affecting cross-border e-services that will go beyond the present rules found under paragraphs 4 and 5 of GATS Article VI.

347. WUNSCH-VINCENT, *supra* note 6, at 80–81 (commenting that there was disagreement under the Work Program on E-Commerce on how to develop new disciplines on domestic regulation under Article VI to address e-commerce; some members argued that an e-commerce specific discipline should be developed, while others thought a general purpose GATS regulatory discipline would sufficiently address e-commerce considerations).

Exhibit B(1)
Examples of Policy Considerations in E-Services Contexts Demonstrating the Need for Balance between Domestic Regulatory Autonomy and Liberalizing Trade

Policy Concerns Associated with E-Services that *May Justify* Domestic Regulatory Autonomy

Domestic Policy Considerations Related to Regulating E-Services Trade	**Example of Business Practices that Raise a Conflict between E-trade Liberalization and Domestic Regulatory Autonomy**	**Effectively Restricts Liberalization of E-services Trade as Foreign Suppliers View Divergent Regulatory Provisions as a Trade Barrier**	**Other Impacts on Global E-Commerce Flowing from Domestic Regulations that Promote Identified Domestic Policies**
Protecting Public Health and Safety	Online medical or pharmaceutical services that may harm consumers by providing medically unsound diagnosis and treatment recommendations and/or inappropriately prescribing drugs or herbal remedies.	Yes, especially for smaller e-services suppliers.	Promotes consumer confidence in e-services trade.
Preventing Consumer Fraud	Online fraud involving failure to deliver services purchased. Fraudulent use of consumer's credit or debit cards, etc. to purchase online services not authorized by the consumer or for the consumer's benefit.	Yes, especially for smaller e-services suppliers.	Promotes consumer confidence in e-services trade.
Protecting Consumer Privacy and Personal Data	E-services providers that collect consumers' personal data without the consumers' knowledge and/or consent (whether opt-in or opt-out) in order to engage in identity theft, send consumers unsolicited commercial advertisements (spam) or install adware or spyware on consumers' computers.	Yes, especially for e-services suppliers located in countries that have little domestic privacy and/or personal data regulation.	Promotes consumer confidence in e-services trade.
Ensuring Security of Transactions	Online services that fail to protect consumers' personal data, thus enabling third parties to wrongfully obtain and/or use the data. For example, security risks arise from storage or transfer of consumers' personal data in unencrypted form and other security lapses that permit hacking and other forms of data theft or unauthorized use.	Yes, especially for e-services suppliers located in countries that have little regulation of security of transactions with private businesses and/or privacy and personal data regulation.	Promotes consumer confidence in e-services trade. Reduces the risk of identity theft and other forms of fraud.

Exhibit B(2)

Examples of Policy Considerations in E-Services Contexts Demonstrating the Need for Balance between Domestic Regulatory Autonomy and Liberalizing Trade

Policy Justifications for Regulating E-Services that *May Not Support* Domestic Regulatory Autonomy

Domestic Policy Considerations Related to Regulating E-Services Trade	Example of Domestic Regulations that Raise a Conflict between E-trade Liberaliza-tion and Domestic Regulatory Autonomy	Effectively Restricts Liberalization of E-Services Trade because Foreign Suppliers May View Divergent Regulatory Provisions as Trade Barriers	Other Impacts on Global E-Commerce Flowing from Domestic Regulations that Further Identified Domestic Policies
Administrative Ease of Regulating E-services Providers Including Jurisdiction to Pursue Criminal or Civil Enforcement Actions	Regulations that require foreign online service providers to register locally to do business in member states rather than have domestic postal or other addresses in order to provide e-services in member states and accept service of legal documents.	Yes, costly for foreign suppliers to comply with local registration requirements.	Furthers consumer trust and confidence by enhancing the ability of enforcing consumer protection laws.
Protecting Consumers from Content Offered by E-Services Providers that is Offensive but not Illegal	Regulations that limit access by adults to Internet services that offer access to online chat rooms featuring adult content, but not access to telephone chat services that feature similar content. Online access to Internet sites featuring adult pornography, although there are no restrictions on access to videos and DVDs featuring similar content.	Yes, costly for foreign suppliers on a cross-border basis.	May further consumer trust and confidence in e-commerce by removing access to objectionable material that is easily accessible to minors. However may also deter exercise of free speech rights const-itutionally protected in some countries. *See, e.g.*, U.S. CONST. amend. I
Protecting Minor Consumers from Content Offered by E-Services Providers that is Dangerous, Offensive or Illegal (U.S. perspective)	Regulating the online collection of personally identifying information about children under age 13 without parental consent (*see* Childrens' Online Privacy Protection Act (COPPA), 15 U.S.C. Section 6501 *et seq.*).	Yes, it is likely that personal data collection regulations requiring parental consent will be viewed as trade barriers by foreign firms includ-ing suppliers from countries that have very protective privacy and data protection laws, but do not have special age-based regulations (*see* E.U. Data Protection Directive).	May further consumer trust and confidence by parents/children in e-commerce. But multiple approaches to privacy and data protection creates inconsistencies in global regulation that likely operate as a trade barrier to e-commerce.

B. *The Need for a Strengthened Discipline on Domestic Regulation*

U.S.-Gambling is significant because it is the first dispute over the boundaries of multilateral liberalization obligations and domestic regulatory rights in the context of globally traded e-services to reach the WTO dispute settlement system. However, in other contexts, there have been unilateral attempts by members to regulate cross-border e-services on the grounds of offensive content,[348] the protection of privacy,[349] and public morals[350] that also raise legitimate concerns of overregulation and the resulting unnecessary restriction of trade in e-services. As domestic policymakers grapple with balancing the vast commercial potential of the Internet with regulatory sovereignty, there is concern that benefits associated with advances in electronic communications technology and the development of global and efficient markets are being undermined by overlapping and sometimes conflicting national approaches of regulating Internet-based trade.[351] Yet, "[a]t the same time it is unrealistic to hope that

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348. See the much publicized Yahoo dispute where a French court ordered Yahoo France and Yahoo! Inc. to block access by French residents to Yahoo auction sites selling Nazi memorabilia. *LICRA et UEJF v. Yahoo!Inc and Yahoo France*, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, May 22, 2000, obs. J. Gomez (Fr.); *see also* Caroline Penfold, *Nazis, Porn and Politics: Asserting Control over the Internet*, 2 J. INFO. L. & TECH. 2001, § 4.1 (2001), *available at* http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2001_2/penfold (discussing the Yahoo case).

349. Parliament & Council Directive 95/46/EC, 1995 O.J. (L281) 25 (EC) (setting out the principle that EU Members shall only allow a transfer of personal data from the EU to a third county if that country ensures an adequate level of personal data protection).

350. *See* Gunnar Bender, *Bavaria v. Felix Somm: The Pornography Conviction of the Former CompuServe Manager*, INT'L. J. COMM. L. & POL'Y, Aug. 3, 1998, *available at* http://www.ijclp.org/1_1998/ijclp_webdoc_14_1_1998.html (summarizing the Felix Somm decision). The Felix Somm decision is available in English at http://www.cyber-rights.org/isps/somm-dec.htm.

351. CATHERINE MANN ET AL., PETERSON INST. FOR INT'L ECON., GLOBAL ELECTRONIC COMMERCE: A POLICY PRIMER 3 (2000). The International Chamber of Commerce released a policy statement on the extraterritorial application of domestic laws and regulations to business occurring outside national borders. Int'l Chamber of Commerce, *Policy Statement: Extraterritoriality and Business*, at 4 (July 13, 2006), *available at* http://iccwbo.org/uploadedFiles/ICC/policy/trade/Statements/103-33%205%20Final.pdf. The policy statement urges national legislators to "foster the convergence and harmonization of divergent national laws and policies and to accept the mutual recognition of equivalent standards." *Id.* It also noted that

> [b]y imposing a considerable burden on international business, extraterritoriality has a significant negative impact on economic growth and development. It increases international transaction costs for companies and may result in steep compliance and regulatory costs. Extraterritoriality also creates considerable commercial and legal uncertainty. . . . Extraterritoriality may encourage forum shopping, duplicative legal proceedings, and potentially divergent outcomes. Extraterritoriality also increases tensions among

all countries will agree on a single policy strategy" for such regulation.[352]

Extending regulations to the online world that have previously only been applicable to traditional services may create unnecessary barriers to trade in e-services.[353] The borderless nature of the Internet and the global availability of e-services have led to more cross-border conflicts of domestic regulatory approaches governing trade in services.[354] For example, the divergent approaches adopted by the United States and the European Union towards the protection of personal data illustrate such a difference in regulatory approaches to cross-border trade in e-services.[355] The largely "market driven" and self- regulatory approach of the United States with respect to personal data protection, which is also followed in countries like Australia and Japan, is contrasted with the more interventionist approach of the European Union and countries like Canada.[356] Further, diverse approaches to regulating Internet content are also being applied to cross-border e-services.[357] "The same technologies that allow parents to filter information also allow government officials to embargo sensitive or subversive information."[358] Nevertheless:

> governments, stemming both from disagreements by states on the means of regulating activity or the policies underlying extraterritorial measures and from discord in addressing such conflicts. In some instances, governments have enacted blocking statutes to prevent the application of another state's laws from having extraterritorial effect, which can leave companies in an impossible quandary where compliance with one state's laws constitutes a violation of another's.

Id. at 2–3.

352. MANN ET AL., *supra* note 351, at 3.

353. Sacha Wunsch-Vincent, *Electronic Services: Its Regulatory Barriers and the Role of the WTO* 9 (2001), http://www.cid.harvard.edu/cidtrade/Papers/wunsch.pdf (last visited Oct. 13, 2007).

354. *Id.* at 7; *see also* Gero & Oommen, *supra* note 334, at 328–29 (discussing some domestic regulatory approaches in the European Union and the United States).

355. MANN ET AL., *supra* note 351, at 127 .

356. *Id.*

357. Attempts to control electronic content have ranged from the more mundane restrictions on electronic advertising services through the regulation of spam to more direct forms of censorship through prohibitions and filtering technology. *See id.* at 140–41 (describing various domestic restrictions on Internet content advocated by the governments of Syria, Malaysia, and Zimbabwe).

358. *Id.* at 140; *see also* Joel R. Reidenberg, *Technology and Internet Jurisdiction*, 153 U. PA. L. REV. 1951, 1951, 1953, 1960 (2005) (arguing

> [although] current Internet technology creates ambiguity for sovereign territory because network boundaries intersect and transcend national borders . . . innovations in information technology will also undermine the technological assault on state jurisdiction. [Such] sophisticated information processing and information technologies provide states with greater contact that justify personal jurisdiction and a stronger claim to prescriptive

> As it is still an impossible task to control or supervise content and information flows on the net, the current regulatory methods are less than well tuned. Hence a balanced relationship between regulatory aim and regulatory methods is hard to be found. This has negative consequences for E-Commerce and the regulatory responsibilities of the state.[359]

U.S.-Gambling demonstrates how the application of traditional regulatory schemes to the electronic world may create trade barriers. Ironically, long before the online gambling dispute arose, it was the United States that argued that attempts to encompass electronic commerce and cross-border e-services in traditional regulatory categories would impose restrictions that were more burdensome than necessary or would undermine the innovative nature of the e-services concerned.[360] While GATS affirms the right of members "to regulate, and to introduce regulations, on the supply of services within their territories to meet national policy objectives,"[361] the concern is that this right will be construed to broadly enable national authorities to impose regulatory restrictions on e-services trade on the basis that such restrictions are necessary to meet a range of domestic policy objectives even when such regulations further protectionist strategies:[362]

> [i]t will also be increasingly difficult to recognize which domestic regulations follow legitimate policy objectives with well-balanced means and which regulations aim at protecting local markets from global competition. Especially the general exception paragraphs such as Article XIV GATS, which allows exceptions from trade commitments to protect public morals, maintain public order, protect life or health or protect privacy etc., allow a wide range of interpretation to evade trade openness.[363]

Pressure to define the scope of such regulatory autonomy in the e-services context within the various WTO institutional forums and mechanisms (including dispute settlement) is unavoidable.[364] Given

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jurisdiction. At the same time these technologies offer states important means to enforce their decisions.).

Cf. Associated Press, *Google Bends to China's Will*, WIRED NEWS, Jan. 25, 2006, *available at* http://www.wired.com/news/technology/0,70082-0.html (discussing Google's release of their service in China that censors information the government deems to be sensitive); Associated Press, *A Censorship Solution... Sort of*, WIRE NEWS, Feb. 1, 2006, *available at* http://www.wired.com/news/politics/0,70134-0.html (discussing Microsoft's shutting down of blogs at the request of the Chinese government).

359. Hauser & Wunsch-Vincent, *supra* note 37, at 22.

360. U.S. Submission on E-Commerce, *supra* note 84, at 6.

361. GATS, *supra* note 4, pmbl (fourth recital).

362. *See supra* Exhibit B (illustrating various policy considerations in e-services contexts and demonstrates the need for balance between the liberalization of cross-border e-services trade and domestic regulatory autonomy).

363. Hauser & Wunsch-Vincent, *supra* note 37, at 22.

364. For example, under the Work Program on Electronic Commerce, one member has proposed that a list of policy objectives be drawn up in the context of

that global e-services trade customarily faces fewer quantitative restrictions than qualitative regulations compared to trade in goods,[365] much of the debate is inevitably focused upon defining the precise scope of Article VI of GATS: "The interpretation of Art. VI will therefore deserve particular attention and enforcement. Only time will show whether Art. VI will suffice on its own to avoid a protectionist abuse of justified regulatory policies."[366]

As *U.S.-Gambling* confirms, domestic regulation of cross-border e-services with significant policy justification is exceedingly difficult to address within the confines of the market access obligation. If, as in the exceptional case of the *U.S.-Gambling* litigation, such a measure is found to violate market access, it may nevertheless be justified as an exception to GATS if its regulatory objectives coincide with the policy exemptions recognized under Article XIV.[367] However, a more precise definition of members' regulatory autonomy under Article VI will minimize the need for members to seek regulatory flexibility for legitimate domestic policies under Article XIV (except in a limited number of truly exceptional cases). Thus, the most significant issue in relation to the disciplinary scope of GATS rules is the current weakness of the regulatory discipline of Article VI. In fact, the absence of disciplines under Article VI has already elicited concern by the business community, which views Article VI as giving members' regulatory authorities too much license to regulate the Internet.[368] Therefore:

> [A]s unpalatable as it may seem to some parties, there probably is a need to establish at least some intergovernmental guidelines on what is permissible

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Article VI:4 that may justify domestic regulatory measures with restrictive effects in the area of electronic commerce. *Work Programme on E-Commerce Interim Report*, *supra* note 36, at 10; *see also* Submission by the United States, *Work Programme on Electronic Commerce*, ¶ 17, WT/GC/W/493 (Apr. 16, 2003) (emphasizing that although the United States believes that each member has the right to regulate, regulations should not act as a barrier to trade and should be transparent, non-discriminatory and follow existing WTO agreements for such measures).

365. Wunsch-Vincent, *supra* note 353, at 6.

366. Hauser & Wunsch-Vincent, *supra* note 37, at 22. David Luff discusses the issues under Article VI from a sector specific perspective. David Luff, *International Regulation of Audio-Visual Services: Networks, Allocation of Scarce Resources and Terminal Equipment*, *in* THE WTO AND GLOBAL CONVERGENCE IN TELECOMMUNICATIONS AND AUDIO-VISUAL SERVICES 243, 251–52 (Damien Geradin & David Luff eds., 2004).

367. *See infra* Exhibit B1 (illustrating the policy concerns relating to e-services that may justify domestic regulatory autonomy); *see also* Ivan Bernier, *Content Regulation in the Audio-Visual Sector and the WTO*, *in* THE WTO AND GLOBAL CONVERGENCE IN TELECOMMUNICATIONS AND AUDIO-VISUAL SERVICES, *supra* note 366, at 215, 228 (discussing the possibility of challenging content restrictions that apply to illicit or questionable content in the context of audio-visual services under Article XVI and the implications of an Article XIV defense).

368. Drake & Nicolaïdis, *supra* note 6, at 422.

> regulation of GEC [global electronic commerce] content services. After all, government regulations protecting basic public interests such as public health and safety, consumer rights, and the security of transactions ought to apply equally in both the virtual and physical worlds. There is nothing sacred about the Internet that should or will preclude governments from, for example, attempting to regulate the on-line supply of medical or educational services to their citizens. And if they are going to establish such regulations, there should be some level of multilateral agreement about what kinds of regulations are legal under GATS. Moreover, shared principles could mitigate the growing threats to the Internet of governments unilaterally regulating cyberspace or subjecting service providers and transactions to multiple and totally incompatible national regulations.[369]

In this context, it is critical that a balance be struck in adopting disciplines under Article VI:4. Article VI:4 provides an opportunity to implement principles for domestic regulation that will ensure that qualification requirements and procedures, technical standards, and licensing requirements that apply to e-services will not constitute unnecessary barriers to trade. On the one hand, developing precise disciplines under Article VI:4 will provide members with the much-needed legal certainty of knowing that domestic laws that adhere to criteria developed in the form of disciplines will not be judged as unnecessary barriers to trade. On the other hand, the process of defining criteria under each of the categories of measures recognized under Article VI:4 for purposes of adopting disciplines will also promote greater understanding of the scope of Article VI:4. This will, in turn, encourage members to take preemptive action by reviewing and revising domestic regulations to avoid inconsistencies with GATS rules and minimize the need to seek protection under the broad exemptions of Article XIV.[370] This will be important from a domestic policy perspective as it is not so much the need for regulation that is contested by members in multilateral forums, but rather the nature, design and administration of such regulations.[371]

However, certain general issues require resolution in relation to e-services trade if the disciplines are to achieve their objective of ensuring that legitimate domestic measures under Article VI do not create unnecessary impediments to trade. The most controversial of these issues relates to the precise nature of the necessity test under Article VI:4.[372] It will be important to clarify whether domestic measures will be judged according to the narrower criteria of the "least trade-restrictive measure reasonably available to achieve the

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369. *Id.* at 423.

370. *See infra* Exhibit B2 (illustrating how legitimate policy concerns translate into regulatory approaches that may require restrictions on regulatory autonomy).

371. BACCHETTA ET AL., *supra* note 6, at 64–68.

372. *See "Necessity Tests" in the WTO*, *supra* note 257, ¶ 11 (noting that the similarity in wording between provisions in WTO agreements containing necessity tests cannot be assumed to transpose interpretations developed in the context of a specific case or specific provision, automatically, to other provisions).

regulatory goal,"[373] or the more flexible "not more burdensome than necessary" criteria specifically mentioned in relation to the quality of the service under Article VI:4(b).[374] The European Communities have already stated that a definition of necessity encompassing the concept of the "least trade restrictive alternative" would be unduly restrictive of the choice of the regulatory tools available.[375] For instance, it is not difficult to see the implications of applying a least trade-restrictive principle to the regulation of personal data protection collected in cross-border e-commerce. The European approach to data protection currently provides a very high level of legal protection for consumers with respect to collection and processing of personally identifying information by businesses, which is applicable to trade in services as well as goods.[376] In contrast, the United States has

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373. Nicolaïdis & Trachtman, *supra* note 110, at 259. *Cf. Accountancy Sector Disciplines*, *supra* note 121, ¶ 2 ("Members shall ensure that such measures are not more trade-restrictive than necessary to fulfil a legitimate objective.").

374. *See Communication from the European Communities*, *supra* note 261, ¶ 17 (arguing against a "least trade restrictive" standard and introducing the concept of proportionality into the necessity analysis under Article VI:4, which would mean that a measure would be consistent with Article VI:4 if it is not disproportionate to the objectives pursued). *Cf. Accountancy Sector Disciplines*, *supra* note 121, ¶ 2 ("Members shall ensure that such measures are not more trade-restrictive than necessary to fulfill a legitimate objective.").

375. *Communication from the European Communities*, *supra* note 261, ¶ 17.

376. Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) provides: "Everyone has the right to respect for his private and family life, his home and his correspondence." European Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, ¶ 1, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]. The Treaty of the European Union recognizes the ECHR and requires Members of the European Union to respect the fundamental rights guaranteed by the Convention. Treaty Establishing the European Community, Feb. 7, 1992, 1992 O.J. (C 224). More recently, the Charter of Fundamental Rights of the European Union provides: "Everyone has the right to the protection of personal data concerning him or her." Charter of Fundamental Rights of the European Union art. 8, Dec. 7, 2000, 2000 O.J. (C 364/1) 1 [hereinafter Charter]. The Data Protection Directive (95/46/EC) requires EU Member States to adopt data protection legislation regulating the processing of personal data and the free movement of such data. Council Directive 95/46/EC, 1995 O.J. (L 281) (EC) [hereinafter Data Protection Directive]. The Data Protection Directive expressly refers to the fundamental rights of privacy that are contained in the above mentioned conventions and treaties and states the intention to regulate the processing of personal data consistent with these fundamental rights. *Id.* at pmbl.

> Whereas the object of the national laws on the processing of personal data is to protect fundamental rights and freedoms, notably the right to privacy, which is recognized both in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the general principles of Community law.

The Data Protection Directive defines personal data as information relating to an identified or identifiable natural person. *Id.* art. 2(a). Privacy as a fundamental right is recognized in international law, but there is no specific recognition of data protection

largely left consumer data protection to industry self-regulation and imposes little government regulation on businesses in this regard.[377] Under a "least trade restrictive alternative," it is likely that the European approach to data protection could be challenged as unnecessary given that alternatives and less trade-restrictive approaches are in place, as evidenced by the regulatory approach taken in the United States. This result would be unacceptable to the European Communities and other nations that view personal data protection as a fundamental human right, and accordingly, have more advanced consumer data protection laws consistent with this policy perspective.[378]

In the e-services context, a second issue that needs to be resolved relates to the regulatory objectives that should be recognized as legitimate under Article VI:4. The scope of the Article VI:4 regulatory objectives, as well as their relationship to the policy objectives recognized as overriding under Article XIV, will also require clarification. According to Trachtman,

> [i]n the context of Article VI:4(b), the reference is to measures "not more burdensome than necessary to ensure the quality of the service." The last clause could be very interventionist. It could restrict not just the means to attain a given regulatory goal but even the types of regulatory goals that might be achieved, as when the regulatory goal is

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as a fundamental right similar to that found in the European Union. *See, e.g.*, International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966) [hereinafter ICCPR] (covering privacy in Article 17); Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966) [hereinafter Optional Protocol to ICCPR] (same). Also, Article 11 of the American Convention on Human Rights (ACHR) includes a right to privacy. Org. of Am. States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, *available at* http://www.oas.org/juridico/english/Treaties/b-32.htm (covering privacy at Article 11). The United States is a signatory to the ACHR, but Congress has not ratified it.

377. In the United States, protection of consumers' personal data has been left to the marketplace, industry self-regulation, the application of existing legislation and common law doctrines, and the adoption of new legislation to address specific data privacy concerns. PAUL M. SCHWARTZ & JOEL R. REIDENBERG, DATA PRIVACY LAW 7–8 (1996) (stating that the United States "approaches fair information practices through attention to discrete sectoral and subsectoral processing activity," and often a form of regulation applies to the public or the private sphere, but not both); Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1609, 1680–82 (1999) (explaining that the market approach found in the United States relies on "interactions between individuals and data processors to generate and maintain appropriate norms for information privacy," and concluding a failure exists in the privacy market).

378. *See supra* note 376 (discussing legal recognition of data protection and privacy as a fundamental human right); *see also* Jan Dhont & Maria Verónica Pérez Asinari, *New Physics and the Law: A Comparative Approach to the EU and US Privacy and Data Protection Regulation*, *in* L'UTILISATION DE LA MÉTHODE COMPARATIVE EN DROIT EUROPÉEN 80 (François R. van der Mensbrugghe ed., Presses Universitaires de Namur 2003) ("In Europe, privacy as well as the right to personal data protection are considered to have human rights status.").

> not to maintain the quality of the service but to avoid some other externalization or regulatory harm by the service provider.[379]

But, provided these regulatory goals are at least "related to the broad objective of ensuring the quality of the service,"[380] it is unlikely that Article VI:4(b) will serve to unduly restrict members' choice of legitimate policy objectives. It has been noted, for example, that "objectives such as consumer protection and ensuring professional competence would qualify as legitimate objectives."[381]

In relation to e-services, the types of measures covered under Article VI:4 that stand out as requiring particular attention include licensing requirements and technical standards. "[R]elaxing licensing requirements is especially important in the context of e-commerce and cross-border provision of professional services."[382] For example, provision of online professional legal and dispute resolution services will certainly raise arguments that licensing requirements should be relaxed to permit cross-border provision of such services by international law firms and private practitioners, despite all the consumer protection issues that arise in this context.[383] It would seem that similar issues relating to licensing and technical standards will arise in the field of cross-border medical services, or more particularly, in the emerging area of telemedicine.[384] In relation to technical standards, it will be crucial for the disciplines to clarify how restrictions on the technical means of delivery should be treated according to the necessity and objectivity criteria of Article VI:4. For

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379. Trachtman, *supra* note 93, at 67–68.

380. *Disciplines on Domestic Regulation*, *supra* note 40, ¶ 26; *see also Accountancy Sector Disciplines*, *supra* note 121, ¶ 2 (providing a list of non-exhaustive, legitimate policy objectives that include consumer protection, the quality of the service, professional competence, and the integrity of the profession). *C.f. Communication from the European Communities*, *supra* note 261, ¶¶ 19–22 (discussing the non-exhaustive list of legitimate objectives).

381. *Disciplines on Domestic Regulation*, *supra* note 40, ¶ 26.

382. Drake & Nicolaïdis, *supra* note 6, at 263.

383. Louise Ellen Teitz, *Providing Legal Services for the Middle Class in Cyberspace: The Promise and Challenge of Online Dispute Resolution*, 70 FORDHAM L. REV. 985, 990 (2001). *See generally* Anne L. MacNaughton & Garry A. Munneke, *Practicing Law Across Geographic and Professional Borders: What Does the Future Hold?*, 47 LOY. L. REV. 665 (2001) (discussing emerging issues in the practice and regulation of law on a global scale); Laurel S. Terry, *GATS Applicability to Transnational Lawyering and its Potential Impact on U.S. State Regulation of Lawyers*, 34 VAND. J. TRANSNAT'L. L. 989 (2001) (discussing GATS' impact on the domestic regulation of legal services and its effect on U.S. legal ethics).

384. *See* Thomas R. McLean, *International Law, Telemedicine and Health Insurance: China as a Case Study*, 32 AM. J. L. & MED. 7, 40–41 (2006) (noting that regulations that impose obligations on providers to accept all patients, place limits on fees to ensure universal access to health care and discipline providers with licensure revocation rather than with fines and other methods of publicity may be regarded as more burdensome than necessary to ensure the quality of the service under Article VI:4 of GATS).

example, domestic legal restrictions on the electronic delivery of course materials for online training programs have been identified as a restriction on the technical means of delivery that arguably constitutes an unnecessary trade barrier.[385] However, the disciplines should also be flexible enough to apply to even newer forms of e-commerce, such as the use of mobile phones by consumers to make commercial transactions, as well as laws that are likely to be adopted to address consumer protection, data protection, privacy, and other policy concerns associated with mobile commerce.[386]

It is within the mandate of the services negotiations under GATS for members to develop regulatory disciplines under Article VI:4 that address domestic regulations affecting electronically traded services.[387] Resolution of these issues in the course of developing the Article VI:4 disciplines will clarify the permissible scope of members' domestic regulatory autonomy under GATS, and also ensure each members' ability to take full advantage of the tremendous potential for liberalization of trade in e-services. Clearly, an intensified effort on the negotiations of disciplines by members under Article VI:4 is needed.[388]

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385. *See U.S. Education Communication*, *supra* note 329, ¶ 10 (stating that "restrictions on electronic transmission of course materials" has been identified as an obstacle in the private sector).

386. Mobile commerce (m-commerce) is an extension of e-commerce. It can be defined as "all activities related to a (potential) commercial transaction conducted through communications networks that interface with wireless (or mobile) devices." Peter Tarasewich et al., *Issues in Mobile E-commerce*, *in* 8 COMM. OF THE ASS'N FOR INFO. SYS. 41, 42 (2002), *available at* http://www.ccs.neu.edu/home/tarase/CAIS8_3.pdf (noting that mobile commerce can also be conducted on personal digital assistants and laptops). For example, a text message to advertise a product that is sent by an advertiser to a consumer on the consumer's cellular (mobile) phone is an example of m-commerce. *See id.* (discussing advertising through m-commerce); *see also* Int'l Working Group on Data Protection in Telecommunications, *Common Position on Privacy and Data Protection Regarding Location Data in Mobile Phones*, 675.29.8 (Nov. 19, 2004), *available at* http://www.datenschutz-berlin.de/doc/int/iwgdpt/local_neu_en.pdf (discussing the privacy concerns associated with mobile device location information); Mary Baker, *Guest Editor's Introduction: Pervasive Computing for Emerging Economies*, 5 IEEE PERVASIVE COMPUTING 12, 12–14 (2006) (discussing current issues related to information technology).

387. *See* WUNSCH-VINCENT, *supra* note 6, at 82 (noting that regulatory disciplines under Article VI:4 could either specifically or generally address domestic regulations affecting electronically traded services).

388. The strategic and political advantages in pursuing this particular course of action are clear. Negotiations on rulemaking under Article VI:4 are built into the text of GATS. GATS, *supra* note 4, art. VI:4. Thus, although the Hong Kong Ministerial Declaration sets a date for the completion of negotiations under Article VI:4, which is tied to the end of the current round of services negotiations (i.e., 2008), the mandate to negotiate the Article VI:4 disciplines will not expire if members fail to complete the services negotiations on time. Hong Kong Ministerial Declaration, *supra* note 98, Annex C, ¶ 5.

Exhibit C
Drafting Suggestions for Article VI:4 Disciplines on Domestic Regulations that Focus on Cross-Border Trade in E-Services

Drafting Suggestion	Promotes Necessity of Domestic Regulations	Transparency
1. The disciplines should focus on rulemaking related to the textual requirements found in Art. VI:4.	Domestic regulations meet the necessity requirement if they are not more burdensome than necessary to achieve the member's policy objective.	Domestic regulations must meet transparency requirements specific to licensing and qualification requirements and procedures and technical standards.
2. The disciplines should be drafted in light of common objectives of GATS to liberalize trade in services and provide a trade-friendly regulatory environment.	The requirement that domestic regulations be necessary puts a substantive limit on use of domestic regulation as trade barriers to e-services, thus promoting liberalization of trade in e-services.	Transparency has increased importance in the context of e-commerce because e-commerce increasingly enables suppliers to provide services from abroad and enhances suppliers' needs to know which regulations apply to their cross-border activities. Transparency may itself reduce trade-restrictiveness of domestic regulations because it may increase legal certainty and help suppliers identify potential regulatory barriers and ways to overcome them.
3. The disciplines should provide relevant definitional clarification.	Although *U.S.-Gambling* provided a two-part test to analyze necessity under Art. XIV, there is no consensus between members on the requirements of the necessity analysis under Article VI:4. A definition of necessity is needed that is coherent across all services sectors while also being flexible enough to allow for sectoral specific interpretation.	While Article III, GATS contains significant obligations on transparency, the disciplines under Article VI:4 will add clarity to concept of "necessity" under Article VI:4 by providing more information and clarification on the nature and design of regulations of domestic regulations. Such information will be relevant to establishing the necessity of measures and their relationship to legitimate objectives under the necessity test of Article VI:4.

Drafting Suggestion	Promotes Necessity of Domestic Regulations	Transparency
4. The disciplines should embrace the concept of proportionality	Proportionality means that domestic laws should not be disproportionate to the policy objectives pursued by the laws. This does not necessarily require the reviewer (e.g., DSB) to assess the validity of the rationale for the policy objective (a matter of domestic autonomy). It is appropriate to consider international standards adopted by international organizations in assessing proportionality.	The concept of proportionality also applies to the level of notice and other transparency mechanisms to be required by the disciplines to be adopted. Making proposed and existing domestic regulations transparent for e-commerce is furthered by use of the Internet Web postings for this purpose.
5. The disciplines should articulate legitimate policy objectives relating to the concept of necessity and minimum transparency mechanisms to facilitate the growth of cross-border trade in the form of e-services.	The disciplines should include a non-exhaustive list of legitimate policy objectives to help clarify the concept of necessity. Lists of legitimate policy objectives are found in other WTO instruments. An illustrative list of legitimate policy objectives is found in the Accountancy Disciplines. Such a list for domestic regulation under Art. VI:4 should necessarily be broader than found in the above examples because they will apply to the broad scope of cross-border trade in services. Cross border trade in e-services is similarly a broad context encompassing many services sectors. Further the evolving nature of e-commerce and the impact of communications technology support a broad conception of legitimate policy objectives that will be flexible enough to encompass future developments in e-commerce like mobile commerce.	The disciplines should include a list of required mechanisms to ensure transparency for domestic regulation of e-services. Such required mechanisms to ensure and encourage transparency are found in the Accountancy Disciplines: A requirement to make regulations publicly available and include inquiry and contact points. A requirement to inform another member (on request) of the rationale for a particular domestic regulatory measure. A requirement to make public the procedures for review of administrative decisions and any prescribed time limits related to requesting review. These types of transparency mechanisms would be very useful in the context of e-commerce because they would help reduce legal uncertainties related to engaging in cross-border e-services trade and thus enhance the development of global e-commerce.

C. *Going Forward Pragmatically—A Modest Proposal for Drafting Disciplines to Support E-Services*

Several proposals have been offered to address the liberalization objectives of GATS and members' regulatory autonomy within the broader context of e-commerce.[389] A striking feature of these proposals is that they differ significantly in relation to the level of legal commitment that would be required of members. One option is negotiation of a reference paper on e-commerce (similar to the Reference Paper on Basic Telecommunications) that would allow members to choose whether to be bound by a set of regulatory principles and rules covering e-commerce.[390] Another option would be to add a new global electronic commerce instrument to GATS in the form of a separate annex to the main agreement that would be binding on all members.[391] However, given the lack of political interest displayed by WTO members in pursuing either of these proposals, and the current lack of progress on the Work Program on Electronic Commerce,[392] it seems unlikely that such ambitious

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389. *See, e.g.*, Judson O. Berkey, *A Framework Agreement for Electronic Commerce Regulation under the GATS* (2002), http://www.cid.harvard.edu/cidtrade/Papers/eserv_frame.pdf (last visited Nov. 7, 2007) (suggesting principles for a framework agreement that aim at providing guidelines for the development of e-commerce legal regimes that do not inhibit commitments under GATS).

390. *Work Programme on E-Commerce Interim Report*, *supra* note 36, at 7; Drake & Nicolaïdis, *supra* note 6, at 406. The Reference Paper on Basic Telecommunications allows members to negotiate additional commitments on regulatory principles that relate to basic telecommunications. It has legal status only to the extent WTO members have incorporated it in their schedules of specific commitments. Daniel Roseman, *Domestic Regulation and Trade in Telecommunications Services: Experience and Prospects under the GATS*, *in* DOMESTIC REGULATION AND SERVICE TRADE LIBERALIZATION, *supra* note 46, at 83, 88; World Trade Org., Negotiating Group on Basic Telecommunications, *Reference Paper*, (Apr. 24, 1996), http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm (providing a set of regulatory principles participants can make binding in their telecommunications commitments).

391. Drake & Nicolaïdis, *supra* note 6, at 405. Presumably, the purpose of such an annex would be to add binding obligations relating to e-commerce that would at least compare with the more dynamic free trade agreements concluded at a bilateral level that incorporate separate chapters on e-commerce. For example, the U.S. free trade agreements (FTAs) with Chile and Singapore contain separate chapters on e-commerce that, *inter alia*, recognize that the supply of a service using electronic means falls within the scope of obligations assumed under cross-border trade in services and other sector specific obligations and accord non-discriminatory treatment to digital products. Free Trade Agreement, U.S.-Chile, art. 15:2, :4, June 6, 2003, 117 Stat. 909; Free Trade Agreement, U.S.-Sing., art. 14:2, May 6, 2003, 117 Stat. 948.

392. WUNSCH-VINCENT, *supra* note 6, at 15, 18 (noting that the issue of classifying digital products under the GATT or GATS and the related procedural questions on how to structure the work program has resulted in a deadlock preventing members from making any progress on other important topics, and it does not appear that members are interesting in moving beyond negotiating market access

proposals will be realized within the context of the present negotiations or even in the next negotiating round.

Pragmatic considerations suggest a more viable and general approach to support the growth of e-services trade through GATS. Although the negotiation of sector-specific disciplines that would apply only to e-services has been proposed,[393] given the protracted nature of the ongoing negotiations under Article VI:4, it is unlikely that members will be willing to invest the time and resources necessary to negotiate separately, on a distinct set of disciplines, for e-services. Indeed, it appears unrealistic that members will be able to agree on *any* sector-specific disciplines under Article VI:4 before the close of the present round of negotiations. However the current negotiations have attained progress in identifying a list of "elements" that also address trade barriers arising in the context of cross-border e-services.[394] These elements, the fruits of discussions between WTO members under the auspices of the Working Party, have been grouped around "themes agreed for these rounds of discussions."[395] The elements are listed for each category of measures covered under Article VI:4 (licensing requirements and procedures; qualification requirements and procedures; and technical standards). The elements also address the more general themes for Article VI:4 disciplines, including objectives, scope, application, and definitions. Regulatory transparency and development considerations are also included as elements for negotiation by members under Article VI:4.[396] These themes and elements form the nucleus for a set of horizontally applicable draft disciplines that are currently under negotiation in the Working Party (Draft Disciplines).[397] Although the substance of these Draft Disciplines are subject to change in the ongoing negotiation process, they offer a viable basis for addressing

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commitments to negotiations on new obligations for e-commerce or on understanding how existing obligations apply to e-commerce in the Doha Round). Evidence supporting this conclusion is found in the summaries of the issues raised by members in the Sixth Dedicated Discussion on Electronic Commerce under the Auspices of the General Council on 7 and 21 November 2005, WT/GC/W/556 (Nov. 30, 2005), and the Fifth Dedicated Discussion on Electronic Commerce under the Auspices of the General Council on 16 May and 11 July 2003, WT/GC/W/509 (July 31, 2003).

393. Council for Trade in Servs., *Work Program on Electronic Commerce, Communication from the European Communities and Their Member States*, S/C/W/98 (Feb. 23, 1999).

394. Report of the Chairman, *supra* note 279, attachment 1.

395. *Id.* ¶ 3.

396. *Id.*

397. *See* Working Party on Domestic Regulation, *Disciplines on Domestic Regulation Pursuant to GATS Article VI:4: Consolidated Working Paper*, JOB (06)/225 (July 2006) [hereinafter *Consolidated Working Paper*] (setting forth proposals submitted by Members); Working Party on Domestic Regulation, *Draft Disciplines on Domestic Regulation Pursuant to GATS Article VI:4*, Room Document (Apr. 18, 2007) [hereinafter Draft Disciplines] (setting forth a draft of proposals).

the concerns identified in this Article and for crafting the following proposals.

An obvious point of reference for drafting the Article VI:4 disciplines is the Accountancy Disciplines; however, the horizontal nature of the task has lead to significant differences, as evidenced in this recent text of Draft Disciplines. Like the Accountancy Disciplines, the Draft Disciplines propose both general disciplines on regulatory transparency[398] and specific disciplines on several aspects of procedural transparency in relation to the sub-categories of Article VI:4 regulations.[399] In contrast, however, the Draft Disciplines are considerably less clear on the extent to which they apply to the substantive aspects of transparency covering the regulatory content of licensing, qualification, and technical measures.[400] While there is considerable attention to drafting precise disciplines on licensing and qualification procedures, the Draft Disciplines are noticeably more limited in their application to licensing and qualification requirements, and importantly, to technical standards, which are arguably more relevant to cross-border e-services trade.[401] Further,

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398. Draft Disciplines, *supra* note 397, ¶¶ 13–14 (applying to measures of general application relating to licensing and qualification requirements and procedures, and to technical standards, and obliging members to promptly "publish such measures through printed or electronic means" unless publication is not practicable, in which case requiring members to make such measures "publicly available in a manner that enables any interested persons to become acquainted with them"). The Draft Disciplines also provide for measures relating to licensing and qualification requirements and procedures and technical standards to be pre-established, based on objective criteria and relevant to the supply of the services to which they apply. *Id.* ¶ 11. Additionally, the disciplines require mechanisms to respond to inquiries, an obligation to endeavor to provide for advance publication of proposed general measures and opportunities for comment on those measures (including an obligation to respond collectively in writing to substantive issues raised in comments on proposed measures). *Id.* ¶ 16.

399. For example, the disciplines for licensing and qualification procedures require that the rejection of a license/qualification assessment or verification application should be given in writing, without undue delay and, in principle, the applicant should be informed upon request of the reasons for such rejection. *Id.* ¶ 23. The applicant should also be informed of timeframes for appeal of such decisions. *Id.* ¶¶ 23, 37. The Draft Disciplines on technical standards also impose the vague obligation encouraging members "to ensure maximum transparency of relevant processes relating to the development and application of domestic and international standards by non-governmental bodies." *Id.* ¶ 40.

400. Although there is a general requirement in the Draft Disciplines that measures be based on objective criteria, there is little indication as to what objectivity may mean in the context of licensing and qualification procedures and requirements and technical standards. *Id.* ¶ 11. In contrast, the Accountancy Disciplines not only require such measures be "not more trade-restrictive than necessary to fulfil a legitimate objective" but also go on to articulate what those objectives might be. *Accountancy Sector Disciplines*, *supra* note 121, ¶¶ 2, 8, 14, 25.

401. For example, the only draft discipline on licensing requirements relates to residency requirements and the Draft Disciplines on qualification requirements relate

when compared to earlier articulations by the Working Party,[402] the concepts of recognition or equivalency of domestic standards in relation to qualification requirements have been largely omitted from the Draft Disciplines.[403] Such omission is disappointing because cooperation between members' regulatory authorities could be significantly enhanced by imposing a procedural obligation on members to recognize the principle of equivalency in relation to qualification requirements. In the context of cross-border e-services trade, such cooperation between members' regulatory authorities would also serve to minimize the burden on service suppliers who would otherwise have to comply with multiple qualification requirements in the global e-services market. In addition, while preliminary elements of the disciplines proposed a greater role for international technical standards by including a presumption of consistency with the disciplines for domestic regulations in compliance with relevant international standards,[404] the Draft Disciplines significantly limit such obligation, requiring members to only take "into account" such international standards when developing their own domestic standards.[405]

However, the most serious omission in this recent text of Draft Disciplines is the absence of a clearly articulated concept of necessity as a means of assessing the trade restrictiveness of measures falling within the scope of Article VI:4. Although initial proposals incorporated concepts of necessity, objectivity, and reasonableness applying to various aspects of licensing and qualification requirements, procedures, and technical standards,[406] there is a deliberate lack of specific language relating to a review of the necessity of domestic regulation in the Draft Disciplines.[407] However, an exception to the lack of specificity is found in relation to residency requirements for licensing. The relevant draft discipline obliges members "to consider whether alternative less trade restrictive means could be employed to achieve the purposes for which these

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to the due consideration of professional experience as a complement to educational qualifications and residency requirements. Draft Disciplines, *supra* note 397, ¶¶ 17, 27–28. *C.f. Accountancy Sector Disciplines*, *supra* note 121, §§ IV, VI, VIII (setting forth "Licensing Requirements," "Qualification Requirements," and "Technical Standards").

402. *Consolidated Working Paper*, *supra* note 397, ¶ H(3).

403. *See* Draft Disciplines, *supra* note 397, § VII (discussing the propsed qualification requirements). There are indirect references to such concepts in paragraph 27, but the obligations themselves are limited. *Id.* § VII, ¶ 27.

404. Report of the Chairman, *supra* note 279, attachment 1, at 4.

405. Except when such standards "would be an ineffective or inappropriate means for the fulfillment of national policy objectives." Draft Disciplines, *supra* note 397, ¶ 41.

406. *Consolidated Working Paper*, *supra* note 397, ¶¶ F(2), G(3), H(2), I(2), J(4).

407. There is no mention of a necessity test in the stated objectives or the general provisions of the disciplines. Draft Disciplines, *supra* note 397, ¶¶ 2, 11.

requirements were established."[408] More limited exceptions are found in relation to licensing and qualification procedures that reflect the criteria found in GATS Article VI:4(c) (mainly, that such procedures are not in themselves a restriction on the supply of the service).[409]

Whether, and to what extent, should these Draft Disciplines specifically address the liberalization challenges related to cross-border e-services? An examination of the Draft Disciplines reveals that the substantive reach of the disciplines has been significantly watered down, which has implications for trade in e-services. A primary concern from an e-services perspective is the lack of disciplines relating to the concept of necessity under Article VI:4.[410] Although some part of this reluctance to negotiate such disciplines may be attributed to the dynamics of the current round of trade negotiations,[411] it is also reflective of persistent political concerns among members about the potential erosion of domestic regulatory sovereignty.[412] The United States, for example, has indicated its reluctance to negotiate disciplines that would obligate it to justify the necessity of domestic regulation, and has instead advocated a narrower path of regulatory transparency.[413] A number of developing

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408. *Id.* ¶ 17.

409. *Id.* ¶¶ 18, 30.

410. *See supra* notes 399–400 and accompanying text.

411. The underlying reasons for such objections in the Working Group may extend far beyond the services negotiations and be necessarily linked to a lack of movement in other key areas of the Doha Agenda, such as market access in the agriculture and manufactured goods sectors. Members may be reluctant to agree on what is perceived as the most crucial aspect of the Article VI:4 disciplines before securing other trade-offs in the major areas of trade in goods.

412. For example, the references to the concept of necessity in the *Consolidated Working Paper* were accompanied by the following caveat in the form of a recurring footnote: "Many delegations have made no proposals on the concept of necessity and have expressed their opposition to its inclusion in the disciplines." *Consolidated Working Paper*, *supra* note 397, ¶ A(3) n.1. Opposition of this nature is not uncommon as there is fear that a strict horizontal discipline under Article VI:4 may limit members' discretion to regulate services, particularly in sectors where limited or no specific commitments exist. *See* Working Party on Domestic Regulation, *Summary of the Informal Meeting Held on 2 May 2006*, ¶¶ 4–9, JOB(06)/157 (May 2006) [hereinafter Summary of the Informal Meeting] (discussing proposals relating to the ongoing negotiations on the necessity test under Article VI:4).

413. The latest U.S. submission to the Working Group is restricted to a proposal for a horizontal discipline on transparency in domestic regulation (applicable across all services sectors). Working Party on Domestic Regulation, Communication from the United States, *Horizontal Transparency Disciplines in Domestic Regulation*, JOB(06)/182 (June 9, 2006) [hereinafter U.S.—Horizontal Transparency Disciplines]. More recently, the United States issued a communication to the Working Party on Domestic Regulation, stating that

> [the U.S] do[es] not support any type of operational necessity test or standard in any new disciplines for domestic regulation. However we share the concerns

countries are also reluctant to negotiate a stringent, horizontally applicable necessity test (one that would apply across all services sectors) and instead emphasize the need to balance meaningful disciplines with preserving regulatory autonomy.[414]

Such a balance is not obvious in the emerging outcome of the negotiations under Article VI:4. The Draft Disciplines on licensing and qualification procedures are distinctly prescriptive when compared to the Draft Disciplines on licensing requirements and technical standards, and are perhaps disproportionately focused on measures that have more relevance to some modes of supply (for example mode 4) over others.[415] In addition, the value and benefit of the proposed disciplines is severely limited by permitting delayed implementation for *all* developing countries.[416] This is ironic since several of the larger developing countries are at the forefront for developing precise disciplines on qualification requirements and procedures.[417] Adherence to such disciplines by these larger developing countries (along with developed countries) should be emphasized as the ensuing benefits will extend to *all* trading

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raised by many Members that the right to regulate should not be used in practice to avoid trade obligations. In that regard, we are open to discussing non-operational language in the preamble, expressing that Members' objective in developing any new disciplines is to establish that principle.

Working Party on Domestic Regulation, Communication from the United States, *Outline of US Position on a Draft Consolidated Text in the WPDR*, ¶ B(3), JOB(06)/223 (July 11, 2006) [hereinafter *Outline of US Position*]; *see also* Sacha Wunsch-Vincent, *The Digital Trade Agenda of the U.S.: Parallel Tracks of Bilateral, Regional and Multilateral Liberalization*, 58 AUSSENWIRTSCHAFT 7, 17 (2003) (noting that the United States Trade Representative has so far rejected a "least-trade restrictive approach" in negotiations on a horizontal discipline under Article VI:4).

414. Summary of the Informal Meeting, *supra* note 412, ¶¶ 3–8 (noting, in particular, the proposals by Brazil and the Philippines). At the same time, some of the larger developing countries (Chile, India, Mexico, Pakistan, and Thailand) have expressed support for inclusion of a horizontally applicable necessity test in relation to qualification requirements and procedures. *Id.* ¶ 23; *see also* Aaditya Mattoo, *Developing Countries in the New Round of GATS Negotiations: Towards a Pro-Active Role*, 23 WORLD ECON. 471, 484 (2000) (noting the difficulties in negotiating horizontally applicable disciplines on domestic regulation but opining that "although services sectors differ greatly, the underlying economic and social reasons for regulatory intervention do not" and that "focusing on these reasons provides the basis for the creation of meaningful horizontal disciplines").

415. There are detailed provisions for qualification requirements and procedures that arguably apply more to individuals supplying services under Mode 4 (movement of natural persons). Draft Disciplines, *supra* note 397, ¶¶ 27, 32–33.

416. *Id.* ¶ 42.

417. *See generally* Communication from Chile, India, Mexico, Pakistan, Peru, and Thailand, *Proposed Disciplines on Qualification Requirements and Procedures*, JOB(06)/*** (May 29, 2006).

partners, including the smaller developing country members of the WTO.[418]

Admittedly, the Draft Disciplines make vague attempts to review the trade restrictiveness of the substantive aspects of domestic regulation. For example, the preamble to the Draft Disciplines introduces the novel requirement that licensing and qualification requirements and procedures and technical standards do not constitute "disguised restrictions on trade in services."[419] The use of such terminology, which has been specifically interpreted in the exceptional context of Article XIV, is confusing in the context of Article VI:4, given that the latter clearly applies to non-discriminatory regulations.[420] As such, the meaning, purpose, or, indeed, legal effect of this new terminology is unclear. The Draft Disciplines also generally require that licensing requirements, and qualification requirements and procedures, and technical standards be, amongst other things, "relevant to the supply of the services to which they apply."[421] The latter standard appears to be unduly restrictive of the regulatory goals that may be pursued by domestic regulators because it purports to limit the relevance of such regulations to only the supply of the service. There is also a lack of coherency and uniformity in the use of criteria linked to the concept of necessity under Article VI:4.[422] In addition, although the trade restrictiveness of residency requirements in relation to licensing is prescribed for review by members, there is no specific assessment of the trade restrictiveness of measures falling within other categories of domestic regulation covered by Article VI:4 (e.g., technical standards or qualification requirements).

While acknowledging the negotiating realities at play in the Working Party, a compromise solution should not be achieved at the expense of the principal objective of Article VI:4, which clearly "adopts 'necessity' as the central rule to assess the compatibility with the GATS of trade restrictive domestic regulatory measures."[423]

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418. *See* Communication from the ACP Group, *Pro Development Principles for GATS Article VI:4 Negotiations, Revision*, ¶¶ 2–3, JOB(06)/136/Rev.1 (June 19, 2006) [hereinafter ACP Group Communication].

419. Draft Disciplines, *supra* note 397, ¶ 2.

420. *See supra* Part IV (discussing the standards of review for Articles XIV and VI of GATS).

421. Draft Disciplines, *supra* note 397, ¶ 11.

422. For example, the disciplines under licensing and qualification procedures require that such procedures be "as simple as possible," but do not indicate what this new standard of simplicity requires. *Id.* ¶¶ 18, 30. This standard is to be contrasted with the standard of "less trade restrictive means" used in relation to licensing requirements. *Id.* ¶ 17.

423. *Disciplines on Domestic Regulation*, *supra* note 40, ¶ 17; *see also* Summary of the Informal Meeting, *supra* note 412, ¶ 8 (noting that some delegations argued that "the necessity test . . . was a central part of Article VI:4 and of any future disciplines").

Although there are legitimate concerns that a horizontally applicable necessity test may impose too broad a constraint on domestic regulatory rights, particularly from the perspective of a developing country,[424] arguably these concerns may be overstated since it is settled that the proposed horizontal disciplines will only apply to sectors where specific commitments have already been scheduled by members (i.e., sectors in which the exercise of regulatory autonomy is already restricted by GATS rules).[425] Further, the proposed disciplines, which already contain elements of a necessity analysis, rely on vague terminology and varying standards that can only diminish legal certainty and predictability under Article VI:4 for both services exporters and implementing regulatory authorities. Rather than pursue the current fragmented approach, this Article proposes a well-defined but flexible concept of necessity that is relevant to all sectors, including e-services,[426] as an alternative and more effective means of addressing the trade restrictiveness of domestic regulation.

Undoubtedly, developing a test for "necessity" under Article VI:4 requires careful consideration in the specific context of regulating global e-commerce.[427] It is reasonably clear that a necessity test under Article VI:4 will have to be articulated by reference to an open-ended list of legitimate objectives.[428] The difficulty will be in defining such objectives to broadly capture the regulatory concerns that are most prevalent in cross-border e-services trade, while maintaining adequate flexibility to avoid encumbering governments from responding to future developments in cross-border e-commerce.[429] A compromise, therefore, would be to follow the European proposal that emphasizes "[a]n approach to the concept of necessity, which is coherent across all sectors, but allows for sectoral interpretation."[430] Such an approach would not "restrict the regulatory freedom of Members *in order to meet national policy objectives*, as stipulated by

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424. *See* ACP Group Communication, *supra* note 418, ¶ 10 (discussing the argument of developing countries).

425. Draft Disciplines, *supra* note 397, ¶ 10.

426. *See supra* Exhibit C (summarizing of the characteristics of a proposed necessity test).

427. *See, e.g.*, Gero & Oommen, *supra* note 334, at 330 (noting that Article VI neither recognizes the policy areas requiring intervention in the electronic context, nor provides criteria against which policy measures in those sectors could be assessed to be "not more burdensome that necessary").

428. As reflected in the Note by the Chairman that refers to "specific national policy objectives including to ensure the quality of the service." *Consolidated Working Paper*, *supra* note 397, § A(3).

429. *See supra* Exhibit C (providing drafting suggestions for Article VI:4 Disciplines that focus on cross-border e-services). This is also an issue that continues to be discussed under the Work Program on Electronic Commerce; *see also Work Programme on E-Commerce Interim Report*, *supra* note 36, at 7 (questioning the desirability of agreeing to a list of regulatory policy objectives under Article VI, which would justify the imposition of regulatory restrictions in electronic commerce).

430. *Communication from the European Communities*, *supra* note 261, ¶ 16.

the preamble but should rather serve to assess the level of trade-restrictiveness of a measure."[431] Incorporating the concept of proportionality as a means of assessing the trade restrictiveness of a measure would not require assessing the validity of the rationale or objective behind the measures, but would only use such rationale to assess the trade impact of implementing measures.[432] Measures that are not disproportionate to the objectives pursued, even if restrictive of trade, would be, accordingly, regarded as necessary to achieve a legitimate objective under Article VI:4.[433]

This Article's proposal for a flexible horizontal necessity test is not without support in the accumulated work of the Working Party. Earlier articulations of the disciplines carry formulations of a general necessity test based on relatively open-ended policy objectives.[434] Further, earlier proposals of the Working Party regarding licensing and qualification requirements and procedures frequently refer to the reasonableness and burdensomeness of both the substantive and procedural aspects of these regulations, although the stringency of the necessity standard varies substantially between them.[435] Some of these proposals also cover issues pertinent to the cross-border supply of e-services. For example, the elements on necessity under qualification requirements emphasize the need to ensure that qualification requirements "are not adopted or applied with a view to creating obstacles to trade in services," in addition to being "based on objective criteria, such as competence and the ability to supply the service."[436] With regard to obtaining additional qualifications in order to supply services, the proposals go so far as to note that "[e]ach member shall provide the opportunity to service suppliers to fulfill such additional requirements in the home country, host country or third country, wherever possible. Each member shall provide justification in case such additional requirements can be met only in the host country."[437]

A review of the "necessity" of technical standards is also crucial from the perspective of cross-border trade in e-services. Again, there is support to be found for incorporating such a concept in the relevant paragraph under "technical standards" in an earlier proposal of the Working Party. That proposal states:

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431. *Id.*
432. *Id.* ¶¶ 16–17.
433. *Id.* ¶ 22 (summarizing the elements of a concept of necessity that embraces the concept of proportionality).
434. *Consolidated Working Paper*, *supra* note 397, § A(3).
435. *Id.* §§ F(2), G(3)–(5), H(2), I(2), J(2), J(4).
436. *Id.* § H(2).
437. *Id.* § H(5).

> Members shall ensure that technical standards are not prepared, adopted or applied with a view to creating unnecessary obstacles to trade and shall not be maintained if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a less trade restrictive manner. Requirements should be based on objective and transparent criteria.[438]

The latter is extremely relevant to the e-services trade as technical standards applied for protectionist reasons could be used to deny access to network infrastructure (such as technology restrictions on access to telecommunication networks) and complementary infrastructure services (such as restrictions on payment facilities).[439] Such technical standards could also be used to restrict technology and information transfers.[440]

Given the regulatory uncertainty that surrounds cross-border e-commerce, the incorporation of extensive obligations on regulatory transparency will also be useful in ensuring that members' regulations remain no more restrictive than necessary.[441] For instance, requiring participatory mechanisms in the process of regulatory decision-making would encourage more regulatory cooperation between countries in the design and enforcement of regulations with foreseeable trade impact than would result from a limited transparency obligation that focuses strictly on the provision of information.[442] In this respect, it is noteworthy that the Draft

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438. *Id.* § J(4).

439. Hauser & Wunsch-Vincent, *supra* note 37, at 20.

440. For example, the Background Note prepared by the Secretariat on Accountancy Services notes

> [a]s much accountancy firm know-how is proprietary, and is frequently materialized in documentary or software form, firms may be reluctant to transfer such know-how to jurisdictions without adequate copyright and other intellectual property protection provisions. Restrictions on information transfer, which often rise from data protection and personal privacy provisions, may require processing of information to take place locally, even when it could be done more efficiently elsewhere. Some countries even prohibit the removal of audit and other working papers from their national jurisdiction, which constitutes an obligation to establish a permanent presence, even when cross-border activity may be the preferred means of service delivery.

Council for Trade in Servs., *Accountancy Services: Background Note by the Secretariat*, at 20, S/C/W/73 (Dec. 4, 1998) (Table 4: Impediments to Trade in Accountancy Services).

441. *See supra* Exhibit C (summarizing such enhanced transparency obligations).

442. *See, e.g.*, Agreement on the Application of Sanitary and Phytosanitary Measures, Annex B, ¶ 5(b), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) (offering more extensive transparency provisions); Agreement on Technical Barriers to Trade art.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) (same). However the administrative burden

Disciplines incorporate proposals that require members to publish measures of general application in advance of their proposed adoption, provide reasonable opportunities to comment on the content of such measures, and respond collectively to substantive issues raised in comments on such measures.[443] Even if the level of obligation in these proposals is limited to only a procedural obligation that requires members to "endeavor" to publish measures in advance and provide reasonable opportunities for comment, the inclusion of these disciplines alone is a positive development towards enhancing regulatory transparency.[444] Although the administrative burden of providing such extensive transparency mechanisms may lead some to favor the adoption of disciplines akin to the more moderate (but less effective) transparency obligations and participatory mechanisms of the Accountancy Disciplines, the benefits of negotiating a strengthened procedural discipline on transparency are convincing:

> The ability of individuals and firms to comment on regulatory measures before implementation offers a number of benefits, including increased efficiency and credibility of the proposed measure. Prior comment also reduces uncertainty and discriminatory treatment in a given market as all parties are better informed through the ability to participate in the development of regulations.[445]

Thus, while a narrower transparency obligation may eliminate the "need to consider and respond to comments on the proposed measures on the grounds of burdensome costs," it will also "deprive countries of the benefits such procedures provide."[446]

However, this Article proposes that the disciplines on regulatory transparency be further strengthened by providing for more precise disciplines on the substantive aspects of regulatory transparency. Such disciplines should aim to provide enhanced information and clarification on the nature and design of the regulations themselves *and* be relevant to establishing the necessity of such measures and assessing proportionality between the measures and their underlying policy objectives. For example, akin to the Accountancy Disciplines, the disciplines should provide a mechanism for information sharing of members' regulations and their underlying objectives by including a procedural obligation to inform any other member (upon request) of

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of such extensive obligations on developing countries is substantial. Wouters & Coppens, *supra* note 3, at 40.

443. Draft Disciplines, *supra* note 397, ¶ 16.

444. Deviating slightly, a U.S. proposal obliges members to carry out these obligations "to the extent practicable." U.S.—Horizontal Transparency Disciplines, *supra* note 413, § B(2)–(3).

445. Council for Trade in Sers., Communication from the United States, *Transparency in Domestic Regulation*, ¶ 6, S/CSS/W/102 (July 13, 2001).

446. *Id.*

the rationale behind domestic regulatory measures.[447] This would address the shortcomings of adopting a "best endeavors" approach to the "notice and comment" procedures that would, in any case, apply only at the national level. Such a mechanism would also enhance multilateral cooperation without imposing too great an administrative burden on individual members. There is also room for further improvement of the procedural disciplines on transparency, which should include requirements for reasonable time periods and information sharing with respect to time periods on the processing of applications, the provision of notice, and administrative decisionmaking.[448]

Lastly, the role of international standards in relation to the requirements of necessity under Article VI:4 should be acknowledged in the disciplines. As due recognition of the role of international regulatory standards in the disciplines would help achieve parity across diverse regulatory systems, a rebuttable presumption in favor of international standards should be incorporated as a part of the necessity analysis under Article VI:4. This would encourage countries (especially developing countries) to follow international standards where applicable, and incorporate these standards as a part of their regulatory frameworks in order to benefit from a presumed consistency with their WTO obligations.

Finally, it is important to ensure that political considerations do not lead to the adoption of an Article VI:4 discipline on the necessity of domestic regulation that is so generalized that it leads to legal uncertainty or ineffectiveness. If domestic pressure prevents members from negotiating general disciplines on the substantive aspects of domestic regulation under Article VI:4 during the present round of negotiations, a sensible (if not optimum) course of action is to pursue the development of a set of broadly applicable general disciplines that focus on strengthening regulatory transparency. This is particularly desirable in the context of disciplines that address the *procedural* aspects of domestic regulation, even if it foregoes adoption of precise disciplines on the *substantive* elements of domestic regulation that relate to the *necessity* of qualification and licensing requirements and technical standards as elements for negotiation on a sectoral basis. This approach would allow members to both address the specific regulatory issues and burdens in a particular sector, and minimize the risk of inappropriate general disciplines that might unreasonably limit members' regulatory rights in specific sectors.[449] Unfortunately, the current proposals, which do not fit into either of these approaches, create imbalance by incorporating numerous

447. *Accountancy Sector Disciplines*, *supra* note 121, ¶ 5.

448. *See* U.S—Horizontal Transparency Disciplines, *supra* note 413 (offering proposals on transparency in Communication).

449. Wouters & Coppens, *supra* note 3, at 38.

caveats and exceptions and selectively emphasizing the governing principles of Article VI:4. The current proposals will also complicate the future process of developing Article VI:4 disciplines on a sectoral basis in a principled and systematic manner.

VI. LIBERALIZING E-SERVICES: THE CONTINUING DEBATE OVER THE BOUNDARIES OF DOMESTIC REGULATORY AUTONOMY AFTER *U.S.-GAMBLING*

As trade in e-services continues to grow, WTO members are likely to rely more on the legal security of the GATS framework,[450] particularly the multilateral rules guaranteeing market access and nondiscriminatory treatment. This is so for many reasons, including the desire to gain favorable access to foreign services markets and to have recourse to the WTO's dispute settlement process to resolve disputes about restrictive trade barriers. But accompanying the expansion of trade in e-services is the reality that importing states may impose restrictive and protectionist regulatory barriers along the lines of the laws challenged in *U.S.-Gambling*. In addition, given the regulatory diversity of the services field, there is concern that friction between competing regulatory jurisdictions, and a corresponding fear of losing regulatory authority over cross-border electronic transactions, may lead to the establishment of overly restrictive, if not prohibitory, regulatory barriers to trade in e-services.[451]

Absent a coherent WTO policy on the regulation of global e-commerce, the concern is that unilateral attempts to regulate cross-border trade will lead to excessive regulatory burdens on e-services suppliers.[452] To achieve a stable, rule-based, multilateral trading system, it is critical for GATS to offer a framework that ensures secure and predictable access to domestic markets by foreign suppliers of globally traded e-services. But while GATS is an obvious platform for negotiating reciprocal concessions for trade in e-services, deficiencies in the current approach of disciplining regulatory barriers in the context of e-services raise several concerns. Given the experience of the *U.S.-Gambling* litigation, it is clear that prevailing

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450. *See WTO Agreements and Electronic Commerce*, *supra* note 6, ¶ 1 (discussing the extensive use of electronic means to conduct international trade services).

451. *See supra* notes 348–59 and accompanying text (discussing the potential for overregulation).

452. *See* Wunsch-Vincent, *supra* note 353, at 18 (noting that the "absence of international commitment to regulatory disciplines on e-commerce regulation has led to very active single-handed national regulatory approaches").

ambiguities and legal uncertainties present potential loopholes that could be exploited for protectionist purposes.

This section of the Article identifies and discusses three complex issues in *U.S.-Gambling* that must be addressed for GATS to be used as an effective tool to liberalize cross-border e-services trade. Although the litigation in *U.S.-Gambling* extends members' understanding on the scope of market access under GATS, it does not resolve with any certainty the broader issue of restrictions on e-services that ought to be scheduled as limitations on market access or to be permitted as legitimate domestic regulation. However, it is not the role of the dispute settlement system to resolve such precise boundaries between GATS "consistent" domestic regulation and market access restrictions except on a case by case basis; the ongoing negotiations on domestic regulation under Article VI:4 of GATS provide a more appropriate forum for such clarification. Therefore, it is important that these issues be addressed in the current Article VI:4 negotiations if a desirable balance between regulatory autonomy and the progressive liberalization of global e-services markets is to be achieved.

A. *Determining the Boundaries of the Market Access Obligation*

Part of the difficulty in resolving the ambiguity of the GATS approach to liberalization is the inherent flexibility with which the liberalization obligation is defined. Although it is clear that the main purpose of GATS is to achieve progressive liberalization of trade in services,[453] entrenched language on the right to regulate, accompanied by weak disciplines on domestic regulation, blur the boundaries between the liberalization obligation and regulatory autonomy.[454] In *U.S.-Gambling*, the Panel attempted to reconcile its interpretation of the liberalization obligation under GATS with members' rights to regulate in terms of the overall objective of GATS—progressive liberalization.[455] For example, it stated: "[p]rogressive liberalization entails including more sectors in Members' schedules and reduction or elimination of limitations, terms, conditions and qualifications on market access and national treatment through successive rounds of negotiations."[456] Thus, while progressive liberalization entails the "progressive elimination of various restrictions [that] would occur, including those restrictions covered under Article XVI:2," members making market access commitments under Article XVI are only entitled to maintain such

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453. *See* GATS, *supra* note 4, pmbl. (second and third recitals); *see also* Panel Report, *supra* note 1, ¶¶ 6.315, 6.317.

454. *See* GATS, *supra* note 4, pmbl. (fourth recital).

455. Panel Report, *supra* note 1, ¶¶ 6.310–6.313.

456. *Id.* ¶ 6.313.

restrictions if they are "explicitly" and "transparently" scheduled:[457] "[m]embers' regulatory sovereignty is an essential pillar of the progressive liberalization of trade in services but this sovereignty ends whenever rights of other Members under the GATS are impaired."[458]

Although the conceptual framework of GATS is relatively straightforward, the implementation of its constituent elements has been less than satisfactory. In GATS, the boundary between multilateral liberalization and regulatory autonomy is more easily conceived in the abstract than in practice. The distinction often comes down to distinguishing, on the one hand, between quantitative and discriminatory qualitative measures that must be eliminated unless scheduled under Articles XVI and XVII, and on the other hand, nondiscriminatory, qualitative measures that are generally permitted under Article VI. The distinction is crucial because "[d]epending solely on how a government measure is categorized, the measure may therefore be permitted or prohibited under WTO law."[459]

That GATS does not prohibit the use of *all* nondiscriminatory regulatory barriers (the issue at the heart of the controversy in *U.S.-Gambling)* is a frequent assertion in GATS discourse.[460] As the United States was quick to point out in *U.S.-Gambling*, the obligation to grant market access represents "a precisely defined constraint on certain problematic limitations specifically identified by Members."[461] It is limited to the specific measures listed in Article XVI:2, and more precisely, as the United States argued, limited to the measures identified by their particular "form," such as "in the form of numerical quotas."[462] Significantly, the fact that Article XVI:2 does not prohibit all quantitative restrictions on market access is frequently argued as favoring a strict, literal interpretation of the market access obligation that is consistent with the concept of regulatory autonomy under GATS.[463]

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457. *Id.* ¶ 6.315.

458. *Id.* ¶ 6.316.

459. Pauwelyn, *supra* note 12, at 133.

460. *See* Drake & Nicolaïdis, *supra* note 6, at 243.

461. Appellate Body Report, *supra* note 1, ¶ 22 (quoting the United States' submissions on the scope of Article XVI).

462. Panel Report, *supra* note 1, ¶ 3.132.

463. According to Pauwelyn:

> The risk is that the *per se* prohibition on market access restrictions under Article XVI encroaches on the regulatory autonomy of WTO Members to set domestic regulation. . . . However to mitigate this risk, and to give effect to the preamble of GATS (which explicitly reserves "the right of Members to regulate, and to introduce new regulation, on the supply of services within their territories, in order to meet national policy objectives") the types of market

The argument for a literal interpretation of the market access obligation under GATS cannot be easily dismissed. It is undoubtedly true that Article XVI is limited in normative terms, i.e., the emphasis is mainly on regulating quantitative or numerical barriers to trade. The so called per se prohibition under Article XVI:2 is exhaustively defined by reference to a closed list of quantitative restrictions. Moreover, the list of quantitative limitations under the individual paragraphs of Article XVI:2 also appears to be exhaustive based on the explicit ruling of the Panel (and Appellate Body) in relation to Article XVI:2(a) and (c).[464] Thus, according to *U.S.-Gambling*, domestic regulatory barriers falling outside the scope of Article XVI:2 are not subject to its per se prohibition even if such measures do, *de facto,* restrict the supply (or suppliers) of services in a particular domestic service market.[465] Accordingly, barring a violation of the national treatment rule, a measure that escapes the per se prohibition under Article XVI:2 will only be subject to limited review under Article VI:5 of GATS.

B. *The Ambiguities of Classifying Regulations as Qualitative or Quantitative*

There are obvious strategic advantages for members in categorizing measures as subject to Article VI rather than Article XVI. Measures falling within the scope of Article XVI of GATS form the subject matter for multilateral negotiations on market access and must be eliminated unless scheduled in accordance with Article XVI:2 of GATS. While domestic measures relating to qualification and technical requirements and licensing procedures are still subject to the criteria referred to in Article VI:5, until Article VI:4 "disciplines" are developed, members retain the sovereign right to maintain such regulations or introduce new regulations within the parameters of Article VI.[466] These parameters are so broadly defined that commentators have often referred to the Article VI:5 "discipline" on domestic regulation as being virtually non-existent.[467] Further, domestic regulations that could reasonably have been expected at the

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> access restrictions *per se* prohibited under Article XVI were narrowly drafted and must continue to be, narrowly defined. Put differently, a contextual interpretation of Article XVI, in the light of Article VI and the GATS preamble, should only apply Article XVI when the measure in question is clearly and explicitly covered as prohibited under Article XVI.

Pauwelyn, *supra* note 12, at 158–59.

464. Panel Report, *supra* note 1, ¶¶ 6.325, 6.341.

465. "A measure which cannot be subsumed under one of the categories mentioned in Article XVI:2 is not prohibited by Article XVI, even if it effectively restricts market access ("*de facto* market access restriction")." MARKUS KRAJEWSKI, NATIONAL REGULATION AND TRADE LIBERALIZATION IN SERVICES: THE LEGAL IMPACT OF THE GATS ON NATIONAL REGULATORY AUTONOMY 84 (2003).

time the specific commitments under Article XVI and XVII were made are exempt from any review under Article VI:5, though they remain subject to the procedural obligations under paragraphs 1 through 3 of Article VI.[468]

The dividing line between Article XVI and Article VI often hinges on the difference between quantitative and qualitative regulations and between maximum limitations and minimum requirements. The distinction is important from the perspective of members' regulatory autonomy because market access restrictions—in contrast with qualitative nondiscriminatory regulations—must be eliminated.[469] Qualitative nondiscriminatory regulations may be maintained as long as they do not constitute unnecessary burdens to trade in services.[470] The distinction has been explored previously[471] and in great detail through various discourses both within and outside the WTO.[472] While these distinctions are easily conceived in the abstract, they are more problematic to apply in practice given the complexity of regulations that apply to services. Clarification of these distinctions is obviously needed in light of contemporary developments in modern cross-border trade in services and in consideration of the impact of Internet technologies on global trade in services.

As noted earlier, Article VI takes a generally permissive view of domestic regulation, permitting WTO members to regulate services as long as such regulations are administered in a "reasonable, objective manner" and are, broadly speaking, "not more burdensome than necessary."[473] *U.S.-Gambling* establishes that such qualitative regulations are not subject to review under Article XVI, which remains focused on quantitative-type restrictions on market access.[474] Articles XVI and VI:4-5 were also ruled to be mutually exclusive by the Panel.[475] Although there is some doubt over the correctness of the latter ruling,[476] this aspect of the Panel report was not appealed by either of the parties and does not have the benefit of

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466. Panel Report, *supra* note 1, ¶ 6.316.

467. Rudolf Adlung, *The GATS Turns Ten: A Preliminary Stocktaking* 18 (World Trade Org., Econ. Research & Statistics Div., Staff Working Paper ERSD-2004-5, Aug. 2004).

468. *See supra* Part II.C (providing an overview of Article VI of GATS).

469. Panel Report, *supra* note 1, ¶ 6.303.

470. *Id.*

471. *See supra* Part IV.A.

472. *See Scheduling Guidelines*, *supra* note 54, ¶ 11 (discussing the distinction); Pauwelyn, *supra* note 12, at 152–53 (same).

473. *See supra* notes 108, 113 and accompanying text.

474. Appellate Body Report, *supra* note 1, ¶ 248.

475. Panel Report, *supra* note 1, ¶ 6.305.

476. *See* Pauwelyn, *supra* note 12, at 156 ("[N]o textual support exists for the mutual exclusiveness finding. . . .").

appellate review. Nevertheless, a ruling of mutual exclusiveness between Article XVI and Article VI is only helpful to the extent that it clarifies that there cannot be overlap between a measure being subject to Article XVI (and by implication Article XVII), on the one hand, and being subject to paragraphs 4 and 5 of Article VI, on the other hand.[477] *U.S.-Gambling* does not provide explicit guidance as to the measures that ought to be scheduled under Article XVI as quantitative measures or, alternatively, left to be regulated, if at all, under paragraphs 4 and 5 of Article VI as nondiscriminatory qualitative measures.[478] As the Scheduling Guidelines state, qualification requirements and procedures, technical standards, and licensing requirements (the predominant focus of paragraphs 4 and 5 of Article VI) may still fall within the scope of Article XVI if they contain any of the limitations specified in Article XVI.[479]

To refer back to the facts of the *U.S.-Gambling* case, a mechanical application of the quantitative/qualitative, maximum/minimum criteria in determining the distinction between Article XVI "quantitative measures" and the qualititative measures of paragraphs 4 and 5 of Article VI is reasonably clear in the abstract. It is less helpful when determining whether a measure prohibiting the electronic supply of services that has the effect of precluding *any* supply of the service within a fully committed mode of supply is a *minimum qualitative* requirement (governing, as the United States submitted, the "character of the activity involved")[480] and thus a domestic regulation under Article VI. A blanket prohibition of a means of supply of the service under the relevant mode of supply is unequivocal in its quantitative effects. Whether it is a *quantitative restriction* that imposes a zero quota (i.e., a numerical quota) on the number of service suppliers or quantity of service output—and is consequently a *maximum limitation* within the scope of Article XVI—will not always be obvious when the policy objectives justifying such restrictions are not blatantly protectionist.[481] However, in the context of a full market access commitment, justifying such a

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477. As Pauwelyn notes:

> If, on the one hand, Article XVI always applies to the exclusion of Article VI:4/5, then a measure scheduled as a reserved market access restriction under Article XVI is home free and cannot be scrutinized under any additional Article VI:4/5 disciplines. If on the other hand, Articles XVI and VI:4/5 can, in certain cases, overlap, then even a measure scheduled as reserved under Article XVI could, in theory, still be found to violate GATS because it is, for example, more burdensome than necessary under Article VI:4/5 disciplines.

Id. at 157.

478. *See* Appellate Body Report, *supra* note 1, ¶ 248.

479 *Scheduling Guidelines*, *supra* note 54, ¶ 10.

480. Panel Report, *supra* note 1, ¶ 6.257.

481. *See Scheduling Guidelines*, *supra* note 54, ¶¶ 10–11.

measure under Article VI:4 as a qualitative restriction and a minimum requirement relating to the quality of a service or the ability of a service supplier to provide a service under a particular mode will require at least some evidence that there exist other *feasible* means of supply (i.e., by telephone or mail) that can be used to supply the service under the mode of supply for which the commitment is listed.

Critics of the decision in *U.S.-Gambling* characterize the U.S. laws prohibiting operation of online gambling services as a "technical standard," consistent with the WTO Secretariat's definition of technical standards as encompassing "requirements which may apply both to the characteristics or definition of the service and to the manner in which it is performed."[482] Yet such definitions (which are not authoritative or binding on members) only exist as general guidance.[483] They may yield unreasonable results in the particular case if applied too mechanically without due consideration to the dynamics of the particular mode of supply under which a domestic measure is assessed (as in the case of cross-border services that are solely dependent on electronic means of delivery). Thus, for example, a requirement to supply a service "face to face" may be more easily viewed as a technical standard under mode 3 and a minimum requirement when the supplier is physically present in the importing territory, but has very different consequences when applied to the supply of services under the definition of cross-border services where the supplier and consumer are physically located in different territories.[484] The argument that a prohibition on the electronic means of supplying a service that can only be provided electronically on a cross-border basis (if it is to be supplied at all) is somehow a

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482. *Disciplines on Domestic Regulation*, *supra* note 40, ¶ 4. The Working Party on Domestic Regulation defines technical standards as: "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." *Consolidated Working Paper*, *supra* note 397, § D(5). However, the United States, in its most recent communication to the Working Party on Domestic Regulation, has noted with concern that: "The concept of technical standards is not well-developed in the services sector, few countries have regulations in this area, and so far the proposed definitions for technical standards are very vague." *Outline of US Position*, *supra* note 413, ¶ G(14). The Draft Disciplines propose that technical standards be defined as "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." Draft Disciplines, *supra* note 397, ¶ 9.

483. *Communication from the European Communities*, *supra* note 261, ¶ 11.

484. This is one reason that members display a tendency to schedule a requirement to establish some sort of commercial presence under mode 1 commitments in their GATS Schedules under the market access column. *See* Rudolf Adlung & Martin Roy, *Turning Hills into Mountains? Current Commitments Under the General Agreement on Trade in Services and Prospects of Change*, 39 J. WORLD TRADE 1161, 1174 (2005).

minimum requirement because it leaves other means of supply open (for example, supply of the service through ordinary mail or face to face) is also equally disingenuous and simplistic. Such analysis is undertaken in complete isolation of the defining characteristics of a major proportion of cross-border trade in services today, which is wholly reliant on electronic communications for delivery. As Wunsch-Vincent observes, under the principle of technological neutrality in GATS:

> Once a member has made a commitment on gambling under GATS mode 1, it has agreed to postal, electronic, or other "remote" ways of delivering the service. Given the logic of the underlying WTO ruling on intra-modal technological neutrality . . ., a total prohibition of the electronic delivery of a service is identical to a significant market access limitation. A government cannot make an open commitment to cross-border supply, then disallow or ban on-line supply (even if other ways of cross-border service delivery like regular postal mail remain allowed).[485]

In *U.S.-Gambling*, the Panel ruled that a market access commitment for mode 1 implied the right to supply a service through all means of delivery unless otherwise specified in a member's Schedule.[486] It specifically ruled that "where a full market access commitment has been made for mode 1, a prohibition on one, several or all means of delivery included in this mode 1 would be a limitation on market access for the mode."[487] Although this "ruling" by the Panel was initially appealed by the United States, the United States subsequently decided to limit its appeal only to the Panel's interpretation of Article XVI:2(a) and (c). This decision by the United States permitted the Appellate Body to limit its review to the issue of whether a prohibition or a "zero quota" on the supply of a service was a quantitative restriction under the provisions of Article XVI:2(a) and

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485. Wunsch-Vincent, *supra* note 28, at 341. This position can be contrasted with a Secretariat view expressed in 1998 that the types of restrictive measures prohibited unless scheduled under Article XVI do not "include restrictions on the technical means by which a service may be delivered—for example, on supply by electronic means." *Work Programme on E-Commerce I*, *supra* note 36, ¶ 32. The Secretariat has clarified this statement by stating:

> This means two things: first, that no such restrictions could be scheduled and second, that such a measure, if taken, would not be in direct violation of specific commitments under Article XVI. However, it seems clear that if a member were to prohibit or restrict the electronic supply of a scheduled service, the measure would be challenged under Article XXIII:3 as nullifying or impairing the benefits which other Members could reasonably have expected to accrue from the market access commitment. In other words it would probably become the subject of a "non-violation" complaint.

Id.

486. Panel Report, *supra* note 1, ¶ 6.285.

487. *Id.*

(c).[488] Having affirmed that a zero quota was within the scope of Article XVI:2, the Appellate Body nevertheless confirmed the Panel's overall finding that a prohibition on one, several, or all means of delivery cross-border is a "limitation on the number of service suppliers in the form of numerical quotas within the meaning of Article XVI:2(a) because it totally prevents the use by service suppliers of one, several or all means of delivery that are included in mode 1."[489] Thus, notwithstanding speculation as to whether the Appellate Body maintained any misgivings over the Panel's reasoning in relation to restrictions on the means of supply,[490] the overall finding is clear: a prohibition on the supply of a service is caught within the scope of the market access obligation in GATS and accordingly should be scheduled if it is to be maintained.

C. *Whether Legitimate Policy Objectives Support Greater Regulatory Autonomy for Qualitative as Opposed to Quantitative Measures*

The difference between domestic regulations falling within the scope of Article XVI and Article VI is often justified by reference to the underlying policy objectives of the measures themselves. The policy objectives for measures falling within the scope of Article XVI are often said to be protectionist, while the policy objectives underlying measures falling within the scope of Article VI are said to be legitimate.[491] The legitimacy of the policy objectives underlying domestic regulatory measures within the scope of Article VI is also used to establish the dividing line between multilateral liberalization obligations and regulatory autonomy under GATS:

> This dividing line between quantity/maximum limitations (Article XVI) and quality/minimum requirements (Article VI:4/5) goes back to the . . . rationale for the basic distinction in both GATT and GATS between market access and domestic regulation. The former can be presumed to be protectionist since they are only applied to imports . . . or impose a purely numerical ceiling on whether (more) services can be supplied in the first place . . . . Domestic regulation in contrast is presumed to serve a legitimate, non protectionist purpose, be it consumer protection, safety or public order.[492]

While helpful in delineating the distinction between Article XVI on the one hand and Article VI in the abstract, this approach also has its limitations. Under Article VI, the legitimacy or necessity of the policy objective, mainly the quality of service (Article VI:4(b)), does

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488. Appellate Body Report, *supra* note 1, ¶¶ 219–220.

489. *Id.* ¶ 239.

490. *See* Pauwelyn, *supra* note 12, at 163 ("[T]he Appellate Body wisely sidestepped this panel finding.").

491. *See* Ortino, *supra* note 33, at 142.

492. Pauwelyn, *supra* note 12, at 154–55.

not alone determine the consistency of a measure contested under the provisions of paragraphs 4 and 5 of Article VI. Rather, it is the particular *means* that are employed to ensure achievement of the regulatory objective that is subject to evaluation under the "more burdensome than necessary" criteria of Article VI:4.[493] The legitimacy of the underlying policy objective (the quality of the service) gives rise to a difference in the rigidity with which the normative content of the rule is applied.[494] That is, the contrast between the per se prohibition that is explicit in Article XVI and the more flexible and permissive provisions of Article VI "may lie in the *presumed* absence of a legitimate public policy justifying" measures falling within the former provision.[495] Yet, a disproportionate means of achieving a legitimate policy goal may also be more likely to be motivated by quantitative considerations than qualitative objectives, such as a case of total prohibition on a means of supply of a service that remains permitted through other means of supply.[496]

It is also prudent to note that prohibitive restrictions on the supply of a service are frequently imposed not just for reasons relating directly to the quality of a service, but also for overriding public policy concerns that make such restrictions more amenable to review as an exception under the provisions of Article XIV. In this respect, Article XIV reserves considerable regulatory autonomy for members in situations where sovereign considerations take precedence over trade liberalization objectives. Although the general exception clauses of WTO Agreements have been narrowly interpreted in the WTO dispute settlement process,[497] Article XIV is nevertheless a significant preservation of regulatory autonomy. A substantial degree of policy flexibility is preserved for measures taken in pursuit of the objectives specified by Article XIV, which has undoubtedly been confirmed by the Appellate Body's decision in *U.S.-Gambling*.[498]

The above issues, which characterize the underlying tension between Article XVI on the one hand and Article VI on the other hand, are highly relevant to the ongoing negotiations under Article VI:4. They demonstrate the difficulties that members face in determining the dividing line between market access restrictions and GATS-consistent domestic regulation in dynamic contexts such as global e-services trade. Undoubtedly, resolving the parameters

493. GATS, *supra* note 4, art. VI:4.

494. Ortino, *supra* note 33, at 142.

495. *Id.*

496 This problem was highlighted in discussions of the Working Party on Professional Services. *Scheduling Guidelines*, *supra* note 54, attachment 4, ¶ 2 (*Discussion on Matters Relating to Article XVI and XVII of GATS in Connection with the Disciplines on Domestic Regulation in the Accountancy Sector*).

497. *See* Krajewski, *supra* note 26, at 444–45.

498. *Id.* at 446.

between quantitative and qualitative restrictions in the context of cross-border e-commerce involve sensitive issues of domestic regulatory autonomy. However, given the trade impact of these restrictions, members must aim at shaping disciplines on domestic regulation that achieve an optimal balance between domestic regulatory concerns and liberal trading conditions. The role of the necessity test and disciplines on regulatory transparency aimed at ensuring the proportionality and objectivity of such domestic restrictions, as proposed in this Article, will be particularly important in guiding members to meet their obligations under GATS while ensuring that their rights to regulate on legitimate policy grounds remain relatively unencumbered.

VII. CONCLUSION

As GATS continues to evolve in the face of increased flows of cross-border trade in services and changing technology, a key challenge is to clarify how GATS applies to the newer and more dynamic aspects of trade in cross-border e-services.[499] Just as national governments are striving to adapt national regulatory policies to the challenges posed by electronic commerce, the Internet, the World Wide Web, and other emerging technologies, these developments also test the WTO's institutional and legal mechanisms and must be resolved within the parameters of its trade liberalization objectives.[500] Nevertheless, the precise applicability of GATS rules to cross-border e-services remains a matter of much uncertainty.

The failure by the WTO Dispute Settlement Body in *U.S.-Gambling* to fully examine and clarify the application of GATS rules to cross-border e-services means that prevailing uncertainties will

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499. According to Drake and Nicolaïdis:

> There is nothing about electronic commerce that requires a fundamental rethinking of these cardinal principles; rather the challenge is to clarify their application, especially since discriminatory measures may be magnified in a network world where a national point of entry can give access to a global service market.

Drake and Nicolaïdis, *supra* note 6, at 420.

500. It would also appear that while political procrastination holds back the WTO in the area of cross-border e-commerce, the newer regional initiatives are making more progress. *See* Wunsch-Vincent, *supra* note 28 n.4 (referring to the U.S.-Singapore Free Trade Agreement as being one of the first agreements on this front). *See generally* Sacha Wunsch-Vincent, *supra* note 413, at 8 (noting that the central innovation of the U.S. fast track authority to conclude trade agreements is its instruction to the U.S. Trade Representative to conclude trade agreements that anticipate and prevent creation of new trade barriers in the digital trade environment). *See supra* note 391 and accompanying text referring to the U.S.-Singapore Free Trade Agreement.

continue to hamper GATS negotiations and threaten the security of existing commitments. As *U.S.-Gambling* demonstrates, the interaction between the market access disciplines of GATS and the regulatory autonomy of WTO members is already an identifiable source of contention that may threaten to destabilize the multilateral framework for trade in services in the future. The physical absence of the service supplier in the importing territory in cross-border e-services trade presents multifaceted regulatory challenges for domestic regulators. The issues are wide-ranging and go beyond the compliance and enforcement concerns typically associated with global electronic commerce. While these concerns did not pose a serious problem under GATS before the commercial potential of the Internet was discovered, recent technological innovation and increased flows of cross-border e-services trade have elicited a corresponding shift in the regulatory focus of importing states. Obviously, such challenges to the e-services trade will put more pressure on exporting members to seek both relief and redress under the GATS disciplines on domestic regulation. Future review of the scope of Article VI is thus inevitable.[501]

However, the effectiveness of GATS as an instrument for liberalizing the global services market and for disciplining, if not eliminating, domestic protectionist policies remains elusive. A detailed examination of the relevant GATS provisions has revealed that although the principle of liberalization enjoys conceptual dominance, members' rights to regulate domestically are staunchly entrenched within its framework. Conceptual and textual ambiguities characterize the major GATS rules, further blurring the demarcation between what may be regarded as GATS-consistent domestic regulation and what may not. The appropriate balance is generally left to be decided by members in the process of "market access" negotiations and on a case by case basis through dispute settlement. Yet, for the very reasons outlined above, defining the precise scope of a liberalization commitment under GATS is often a difficult task for both negotiators and dispute settlement panels. WTO members that seek to establish these boundaries within the context of a complex case will find that the text of GATS offers only limited guidance on the manner in which a conflict between the domestic policy interests of a member and the market access rights of other members ought to be resolved.

U.S.-Gambling confirms that the list of quantitative limitations prohibited under the market access obligation (i.e. Article XVI:2) is finite, yet it expands conventional understanding of the market access obligation through its flexible interpretation as to the

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501. Drake & Nicolaïdis, *supra* note 6, at 422; Hauser & Wunsch-Vincent, *supra* note 37, at 22.

particular "form" of those quantitative limitations. However, even if broadly interpreted, the Panel and Appellate Body reports do not go so far as to extend the prohibition on market access restrictions beyond the quantitative limitations explicitly listed in Article XVI:2 to include all domestic regulation with quantitative effects. Regardless, the Panel and Appellate Body's failure to fully examine the border between market access restrictions and domestic regulation, particularly in dynamic contexts such as cross-border e-services trade, exacerbates, rather than resolves, the tension and ambiguity that prevails over the regulatory reach of GATS rules and the autonomous regulatory rights of WTO members.

U.S.-Gambling also explicitly recognizes members' rights to regulate their services industries in order to pursue policy objectives under the general exceptions of GATS. However, to achieve the degree of conceptual clarity needed to advance members' understanding of the extent of their obligations and rights under GATS, as well as to avoid over-reliance on the policy exemptions of Article XIV as a means of preserving regulatory flexibility, WTO members must negotiate precise disciplines on domestic regulation that are relevant to cross-border trade in e-services. This is crucial to achieving a desirable balance between members' regulatory autonomy and progressive liberalization of global e-services markets, and for GATS to remain an instrumental force in liberalizing cross-border trade in e-services.

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