Determining the Necessity of Domestic Regulations in Services

The Best is Yet to Come

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Abstract

A necessity test is a tool that reflects the balance between each country's prerogative to regulate in its own jurisdiction and the multilateral interest in progressive liberalization of services trade. Experience gained in goods trade indicates that the principle of necessity can be a useful proxy allowing the judiciary of the World Trade Organization (WTO) to draw the dividing line between legitimate regulation and protectionist abuse. This article explores the possibility of creating a necessity test that would be applicable to all services sectors. Such a horizontal test may yet emerge from the current negotiations within the Working Party on Domestic Regulation (WPDR), which aim to fulfil the legal mandate contained in Article VI(4) of the General Agreement on Trade in Services (GATS or the 'Agreement'). At the core of this mandate, as clarified by various negotiating documents, lies the requirement that Members ensure that domestic regulatory measures relating to licensing, qualifications, and technical standards do not constitute unnecessary barriers to trade in services.

1 Introduction

The growing significance of trade in services has led to rigorous multilateral efforts to realize the progressive abolition of barriers to trade in services.[1] The final text of the

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[1] G. Feketekuty, *International Trade in Services: An Overview and Blueprint for Negotiations* (1988), at 131; also Drake and Nicolaidis, 'Ideas, Interests, and Institutionalization: "Trade in Services" and the Uruguay Round', 46 *Int'l Org* (1992) 37, at 41.

GATS, while being unsatisfactory in terms of the 'teeth' of its general obligations or the level of the liberalization commitments undertaken,[2] provides the legal framework for the liberalization of trade in services. The breadth of the GATS coverage, the novelty of the issues at stake, the sectoral diversity, the specificities associated with services of which the state used to be the monopoly supplier or was involved in their supply, the regulatory intensity of several of the services sectors, and the inherent complexity of the GATS due to the multiple modes of supply are only some of the justifications for the deficiencies of the GATS.

This unique nature of the GATS has affected the overall balance of the provisions disciplining the Members' regulatory behaviour. Members concluded the drafting of Articles XVI and XVII,[3] but were unable to agree on the wording of a provision tackling origin-neutral domestic regulations. Such a provision is important for effective trade in services, because, in the case of services, border restrictions are limited and 'behind the border', usually non-discriminatory but still unduly burdensome, regulations can impede trade in services.[4] Therefore, the absence from the GATS of a clear-cut provision for coping with domestic regulations of this type undermined its value. At the end of the Uruguay Round (UR), Members agreed on the current (weak and provisional) wording of Article VI(4). Leaving this provision unfinished, along with the choice of making the national treatment obligation a negotiable commitment, has considerably weakened the potential 'bite' of the GATS.

Through Article VI(4) of GATS, Members explicitly conveyed their willingness to develop concrete disciplines on domestic regulation to ensure the betterment of regulations that, while non-discriminatory, are inequitable, excessively interventionist, and restrict trade more than is required to achieve the desired non-economic objectives.[5] The Council for Trade in Services (CTS) established two bodies in this respect: the first was the Working Party on Professional Services (WPPS) set up on 1 March 1995[6] and the second, the heir to the WPPS, was the Working Party on Domestic Regulation (WPDR) set up on 26 April 1999.[7] Thus, Article VI(4) does not incorporate a direct, horizontally (i.e., across services sectors) applicable necessity test; rather, it sets up a work programme which, *inter alia*, contains an obligation for Members to negotiate with a view to adopting a horizontal necessity test.

[2] Feketekuty, 'Assessing and Improving the Architecture of GATS', in P. Sauvé and R.M. Stern (eds), *GATS 2000: New Directions in Services Trade Liberalization* (2000), at 85; also Hoekman, 'Tentative First Steps: An Assessment of the Uruguay Round Agreement on Services', Policy Research Working Paper No. 1455, World Bank (1995), at 18; Adlung and Roy, 'Turning Hills into Mountains? Current Commitments under the GATS and Prospects for Change', 39 *J World Trade* (2005) 1161, at 1168.

[3] GATT, 'Note of the Meeting of 10–25 July 1991', MTN.GNS/44, 1991, at para. 46.

[4] B. Hoekman and M. Kostecki, *The Political Economy of the World Trading System: The WTO and Beyond* (2001), at 242.

[5] Such disciplines would be an important remedy for the Members' incentive to circumvent multilateral obligations, making the most of the WTO adjudicating bodies' propensity not to interfere with governmental preferences. See also Appellate Body Report, *US–Shrimp*, WT/DS58/AB/R, 1998:VII, 2755, at para. 121.

[6] WTO, 'Decision on Professional Services', S/L/3, 1995, at para. 1.

[7] WTO, 'Decision on Domestic Regulation', S/L/70, 1999, at para. 1.

This article aims to address the challenge that Members face in the fulfilment of the Article VI(4) legal mandate in the current negotiating round. An indispensable part of this mandate is the creation of a meaningful, coherent, and enforceable horizontal necessity test that would be flexible enough to cope with the extensive sectoral diversity in services. The function of such a test is to validate the GATS consistency of a measure relating to qualifications, licensing, and technical standards provided that it is not more trade-restrictive than necessary to fulfil a Member's objectives. The article is based on the premise that Members cannot completely fulfil the mandate of Article VI(4) unless they agree on a necessity test for such measures. Additionally, it is argued that any disciplines that may be developed under Article VI(4) will have no value without some kind of necessity test, since necessity is a key proxy for drawing the line between legitimate regulatory interference and protectionism.

Section 2 addresses the objective function of Article VI. Section 3 is dedicated to a review of the most significant necessity tests in the WTO Agreements and the corresponding case law to date. The role of necessity tests (or tests of similar content like the EC proportionality test) in Regional Integration Agreements (RIAs) will be discussed in Section 4. Drawing on the legal drafting dealing with necessity in other WTO Agreements, the germane WTO case law, and various elements of regional experience, Section 5 identifies elements and concepts that could be relevant in creating an effective horizontal necessity test. Section 6 examines the proposals advanced to date in the WPDR regarding the creation of a horizontal necessity test and identifies common elements and tendencies. Finally, various concerns that may prolong negotiations[8] or prevent Members from seeking stronger discipline in the area of domestic regulation for all services sectors are discussed in Section 7.

2 The Contours of Article VI(4)

More than any other GATS provision, Article VI touches on the interface of services trade liberalization and domestic policy autonomy. Article VI(4) is aimed at measures that do not discriminate (either *de jure* or *de facto*) against foreign services or foreign service suppliers, and hence are not captured by Article XVII GATS. Furthermore, such measures are of a *qualitative* nature, as they typically strive to ensure the quality of the service supplied, and thus avoid falling under the six categories of limitations in Article XVI(2) GATS. A further attribute of Article VI(4) measures is that they entail, for the most part, minimum requirements. For instance, domestic measures that lay down the minimum requirements that a service supplier must fulfil in order to be eligible, under domestic law, to obtain a licence come under this provision. Oddly enough, the aforementioned attributes of this provision are not drawn from the GATS text, but were spelled out for the first time in the *1993 Scheduling Guidelines*[9] and reiterated

[8] Of course, delays in the services negotiations can also be the result of Members' failure to reach agreement in other negotiations areas such as agriculture.

[9] GATT, 'Scheduling of Initial Commitments in Trade in Services: Explanatory Note', MTN.GNS/W/164, 1993, at para. 5.

in the *2001 Scheduling Guidelines.*[10] Importantly, as illustrated by the *US – Gambling* dispute, the knotty interplay between Articles VI, XVI, XVII, and XVIII GATS can be clarified only with reference to the *Guidelines.*[11] Hence, in the aftermath of this dispute, the *Guidelines* ended up as an indispensable interpretative instrument of the GATS and the obligations laid down therein.[12]

The *US – Gambling* ruling deserves further reference at this point because it shed some light on the distinction between quantitative and qualitative measures under GATS. Several scholars criticized the ruling on the basis that it failed to recognize the qualitative and legitimate nature of the measures at issue when it declared their inconsistency with Article XVI GATS.[13] Nevertheless, it is argued that measures establishing a total prohibition on the supply of a given service for which a full commitment was undertaken cannot be considered as ensuring the quality of this service. In this case, the prohibition on the supply of internet gambling did indeed aim to protect minors, prevent fraud, or maintain public order, etc., and these legitimate objectives were correctly addressed in the ruling under Article XIV GATS.[14] In sum, the *US – Gambling* ruling did not blur the distinction between qualitative and quantitative measures under GATS, but instead contributed to its elucidation.

Article VI contains principally obligations of a procedural nature.[15] Its substantive obligation is to be found in paragraph (4), which provides the negotiating framework and the basic principles that Members have to transform into disciplines.[16] More precisely, the legal mandate contained in this provision seeks to guarantee that measures relating to licensing, qualifications, and technical standards are, *inter alia*, (a) based on objective and transparent criteria, such as competence and the ability to supply the service; (b) not more burdensome than necessary to ensure the quality of the service; and (c) with respect to licensing procedures not in themselves a restriction on the supply of the service. Thus, these criteria constitute an *indicative* list of *minimum* characteristics that the prospective regulatory disciplines should exhibit. Of course, Members are free to introduce additional features into the disciplines, e.g., the reasonableness of

[10] WTO, 'Guidelines for the Scheduling of Specific Commitments Under the General Agreement on Trade in Services (GATS)', S/L/92, 2001, at para. 11.

[11] For an analysis of the important issues raised in this dispute see Delimatsis, 'Don't Gamble with GATS – The Interaction between Articles VI, XVI, XVII and XVIII GATS in the Light of the *US – Gambling* Case', 40 *J World Trade* (2006) 1059.

[12] Panel Report, *US – Gambling*, WT/DS285/R, DSR 2005:XII, 5797, at para. 6.345 and Appellate Body Report, *US – Gambling*, WT/DS285/AB/R, DSR 2005:XII, 5663, at paras 237 and 249.

[13] See, *inter alia*, Pauwelyn, 'Rien ne Va Plus? Distinguishing Domestic Regulation from Market Access in GATT and GATS', 4 *World Trade Review* (2005) 131; and Ortino, 'Treaty Interpretation and the WTO Appellate Body Report in *US – Gambling*: A Critique', 1 *JIEL* (2006) 117; also Krajewski, 'Playing by the Rules of Game? Specific Commitments after *US – Gambling and Betting* and the Current GATS Negotiations', 32 *LIEI* (2005) 417. For a different approach see Mavroidis, 'Highway XVI Re-visited: the Road from Non-discrimination to Market Access in GATS', 6 *World Trade Review* (2007) 1.

[14] *In extenso* see Delimatsis, *supra* note 11 .

[15] See also Delimatsis, 'Due Process and "Good" Regulation Embedded in the GATS – Disciplining Regulatory Behaviour in Services through Article VI of the GATS', 1 *JIEL* (2007) 13, at 19.

[16] WTO (WPPS), 'Background Information on the Agreement on Technical Barriers to Trade and the Agreement on Import Licensing Procedures', S/WPPS/W/6, 1996, at para. 2.

licence fees or the independence of the supervisory authority. It follows that this provision provides for a positive-integration-type obligation to the extent that Members enter into multilateral negotiations with a view to agreeing on the minimum requirements that their own regulatory framework on qualifications, licensing, and technical standards must fulfil. In the medium to long run, such multilateral disciplines will bring about regulatory reform at the domestic level and induce regulatory co-operation. In all likelihood, minimum harmonization and mutual recognition of domestic regulations would follow.[17]

Until the work programme of Article VI(4) is brought to fruition, Article VI(5) provides for the application of the main principles laid down in paragraph (4) to licensing, qualification, and technical standards, so that no domestic regulatory measure leads to nullification or impairment of a Member's commitments in a manner not anticipated by its trading partners.[18] The substantive, 'standstill' obligation of paragraph (5) is transitory and applies only to sectors where specific commitments are made.[19] It follows that, while this paragraph includes a provisional necessity test, a successful invocation of this provision by a Member is made practically impossible through the use of concepts such as 'nullification or impairment' and 'reasonable expectations'.[20]

Article VI(4) takes in solely domestic regulatory measures relating to qualification requirements and procedures (QRP), licensing requirements and procedures (LRP), and technical standards (TS).[21] All the same, these categories of measures include a vast array of domestic regulations.[22] Qualification requirements include substantive requirements that a service supplier has to fulfil in order to obtain certification or a licence, such as examination, experience, or language requirements. Qualification procedures are administrative or procedural rules for administering the qualification requirements, such as the number and nature of documents to be filed or the fees to be paid. Licensing requirements include all substantive requirements that do not fall into the category of qualification requirements, compliance with which would allow a service supplier to obtain formal permission to supply a service. Any registration or establishment requirements are examples of this category of measures. As to the licensing procedures, these are administrative procedures dealing with the submission and

[17] Art. VI(4) is expected to level the playing field in the areas that it covers and hence facilitate recognition. This is also implied in Art. VII GATS, which is linked to Art. VI(4) and provides a means for recognition in the areas of licensing, authorization, and certification of service suppliers.

[18] WTO (WPDR), 'Report on the Meeting Held on 11 May 2001', S/WPDR/M/11, 2001, at para. 29.

[19] WTO (WPDR), 'Report on the Meeting Held on 3 December 2003', S/WPDR/M/24, 2004, at para. 7.

[20] For a thorough analysis of Art. VI(5) see Delimatsis, *supra* note 15, at 39–45.

[21] The draft provision included in the 'Dunkel Draft' was broader, but Members considered it too far-reaching: GATT, 'Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations', MTN.TNC/W/FA, 1991; see also WTO (CTS), 'Article VI:4 of the GATS: Disciplines on Domestic Regulation Applicable to All Services', S/C/W/96, 1999, at paras 2–3; Reyna, 'Services', in T. Stewart (ed.), *The GATT Uruguay Round: A Negotiating History (1986–1992)* (1993), ii, at 2429.

[22] WTO (WPDR), 'Report on the Meeting Held on 29 November 2001', S/WPDR/M/14, 2002, at para. 8; see also WTO (WPPS), 'The Relevance of the Disciplines of the Agreements on Technical Barriers to Trade (TBT) and on Import Licensing Procedures to Article VI.4 of the General Agreement on Trade in Services', S/WPPS/W/9, 1996, at para. 4.

processing of an application for a licence, such as the number and nature of documents required or time frames for licence processing. Finally, technical standards include requirements which can be related to the characteristics or the definition of the service itself, as well as to the manner in which the service is performed. For example, a code of conduct for lawyers would fall into this category. Arguably, voluntary standards (that is, standards compliance with which is optional) also come into this category.[23]

Furthermore, Article VI embraces not only QRP, LRP, and TS, but also measures *relating* thereto, implying a wide scope.[24] By the same token, the implications of the prospective disciplines for potential service suppliers through mode 4 can be substantial. The current ubiquity of non-discriminatory, but still onerous and vague requirements and procedures negatively affecting individuals when they attempt to supply their services acts as a deterrent to the potential suppliers. As the possibility of unilateral action in these areas is inherently limited, all Members, and especially those that are interested in effective liberalization under mode 4, should make every effort to ensure that these negotiations are a success.[25]

3 Necessity Tests in Other WTO Agreements

Necessity tests in WTO law are used as tools for assessing the compatibility with the WTO of otherwise trade-restrictive national measures. Such measures can be deemed WTO-consistent on condition that they are necessary to attain a legitimate objective or a given level of protection domestically. *De lege lata*, necessity can be referred to in a WTO provision that entails either an *obligation* or an *exception*.[26] It bears noting that necessity was conceptualized as part of substantive obligations relating to trade in goods (e.g., TBT, SPS) only after the creation of the WTO. Necessity existed in the GATT years only in the form of an affirmative defence in Article XX GATT mainly to allow the Contracting Parties to deviate from the overarching principle of non-discrimination in order to pursue legitimate objectives such as the protection of health or the preservation of natural resources. In the Uruguay Round, however, the participating countries identified the need for including in the TBT and SPS a substantive obligation which would ensure that market access gained through negotiations was not jeopardized by the existence of unnecessary obstacles to trade in goods.

Necessity in obligation provisions is to be found in Articles VI(4), and (5), and XII(2)(d) GATS; 2(2), (3), and (5) TBT; 2(2) and 5(6) SPS; and 8(1) TRIPs. Paragraph (2) of the draft accountancy disciplines also falls into this category. Provisions that comprise necessity as part of an *exception* include: Article XIV GATS and paragraph

[23] *Ibid.*, at para. 6.

[24] Again, a wide range of regulatory measures fall outside the scope of Art. VI(4), such as the independence of the regulatory authority or universal service provisions, business advertising, and marketing, access to networks and essential facilities.

[25] Hoekman and Messerlin, 'Liberalizing Trade in Services: Reciprocal Negotiations and Regulatory Reform', in P. Sauvé and R.M. Stern (eds), *GATS 2000: New Directions in Services Trade Liberalization* (2000), at 487, 493.

[26] See also WTO (WPDR), '"Necessity Tests" in the WTO', S/WPDR/W/27, 2003, at para. 6.

(5)(e) of the Annex on Telecommunications; Articles XI(2)(b) and (c), and XX GATT; Articles 3(2) and 27(2) TRIPs; and Article 23(2) GPA. The provisions entailing an exception could be further refined into provisions that are part of an exception to the provisions where they belong (e.g., Article XI(2)(b) GATT or paragraph (5)(e) of the GATS Annex on Telecommunications), and provisions that constitute a general exception (e.g., Article XX GATT or XIV GATS).

In provisions containing an obligation, necessity is usually coupled with an *indicative* list of objectives, whereas the exception provisions embody an *exhaustive* list of policy objectives. The issue whether the necessity standard is part of a provision containing an exception or, rather, an obligation is decisive for the allocation of the burden of proof. Thus, the *responding* party has to establish that a measure is necessary when it invokes an *exception* provision. In contrast, in the case of an *obligation* provision, it is the *complaining* party that has to adduce evidence that a measure does not meet the necessity standard. Since this article's intention is to draw lessons from the application and interpretation of necessity in other WTO Agreements, the analysis that follows will be confined to necessity tests embodied in WTO provisions that the WTO judiciary has ruled on, i.e., Article XX GATT; Article XIV GATS, and paragraph (5)(e) of the Annex on Telecommunications; Article 2(2) TBT; and Article 5(6) SPS.

A *Article XX GATT*

Article XX GATT was the first provision under which the Panels and the Appellate Body (AB) interpreted necessity. This provision embodies an exhaustive list of general exceptions to GATT substantive obligations and establishes a two-tier test[27] in which it is necessary to determine whether the challenged measure comes within the scope of one of subparagraphs (a) to (j) of Article XX before examining whether the measure satisfies the requirements of the Article XX *chapeau*.[28] The responding party has to demonstrate that this measure addresses (or is designed to address[29]) the particular interest identified in the relevant paragraph, and that there is a sufficient nexus between the measure and the interest protected.[30] Once it has demonstrated that the measure is provisionally justified, the responding party should additionally show that, when applied, the challenged measure is not an abuse of an exception under the *chapeau*.[31]

As early as in the GATT era it was made clear that the legitimacy of the ends sought is not a matter for WTO scrutiny. Rather, the Panels were charged with examining whether the means chosen to achieve one of the objectives laid down

[27] Appellate Body Report, *US – Gasoline*, WT/DS2/AB/R, DSR 1996:I, at 3, 22; also Appellate Body Report, *US – Shrimp*, *supra* note 5, at paras 119–120, and 147; and Appellate Body Report, *US – Gambling*, *supra* note 12, at para. 292.

[28] Appellate Body Report, *US – Shrimp*, *supra* note 5, at paras 157 and 119.

[29] Appellate Body Report, *Mexico – Soft Drinks*, WT/DS308/AB/R, at para. 72.

[30] Appellate Body Report, *US – Gasoline*, *supra* note 27, at 17–18; also Appellate Body Report, *US – Gambling*, *supra* note 12, at para. 292.

[31] Appellate Body Report, *US – Gasoline*, *supra* note 27, at 22–23. The requirements of the *chapeau* fall outside the scope of this study.

in Article XX were 'necessary'.[32] Neither is the level of attainment (or protection) something in which the WTO has a say.[33] Unilaterally defined measures can be WTO-consistent and, therefore, Article XX cannot be deemed to curtail regulatory diversity.[34] The *US – Section 337* Panel was the first to clarify the standard of review when necessity comes into play:[35]

> a contracting party cannot justify a measure inconsistent with another GATT provision as *'necessary'* in terms of Article XX(d) *if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it*. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the *least degree of inconsistency with other GATT provisions*. [emphasis added]

The willingness of the adjudicating bodies to interpret necessity in a uniform manner was apparent in the GATT years. The *Thailand – Cigarettes* Panel, for instance, ruled that the term 'necessary' should be regarded as having the same meaning in paragraphs (b) and (d) of Article XX.[36] Another proposition that appears valid after examining the GATT case law is that a WTO Member is not obliged to use GATT-consistent measures for achieving its policy objectives unless there is a reasonably available GATT-consistent measure that could attain the same objective.

Korea – Beef is the leading case dealing with the interpretation of the concept of necessity in the WTO years so far. In interpreting necessity in Article XX(d), the AB acknowledged that it implies a 'range of degrees of necessity'.[37] On the one hand, this means that, if a measure is indispensable, its necessity cannot be challenged. On the other hand, if other measures are reasonably available and thus the challenged measure is not indispensable, the latter can still be deemed 'necessary'.[38] To determine this, the WTO judiciary will apply a necessity test which amounts to a process of 'weighing and balancing a series of factors':[39]

> which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue [the greater the contribution, the more easily a measure might be considered to be 'necessary'], the importance of the common interests or values protected by that law or regulation [the more vital or important these common interests or

[32] For instance, GATT Panel Report, *Japan – Alcoholic Beverages I*, BISD 34S/83, at para. 5.13; GATT Panel Report, *Thailand – Cigarettes*, BISD 37S/200, at para. 73; Appellate Body Report, *US – Gasoline*, *supra* note 27, at 30–31.

[33] Appellate Body Report, *Korea – Beef*, WT/DS161/AB/R, WT/DS169/AB/R, DSR 2001:I, 5, at para. 176; and Appellate Body Report, *EC – Asbestos*, WT/DS135/AB/R, DSR 2001:VII, 3243, at para. 168.

[34] Appellate Body Report, *US – Shrimp*, *supra* note 5, at para. 121.

[35] GATT Panel Report, *US – Section 337*, BISD 36S/345, at para. 5.26.

[36] GATT Panel Report, *Thailand – Cigarettes*, *supra* note 32, at para. 74.

[37] Appellate Body Report, *Korea – Beef*, *supra* note 33, at para. 161.

[38] See also Appellate Body Report, *Brazil – Retreaded Tyres*, WT/DS332/AB/R, at para. 210.

[39] Appellate Body Report, *Korea – Beef*, *supra* note 33, at paras 162–164; see also Marceau and Trachtman, 'The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and The General Agreement on Tariffs and Trade: A Map of the World Trade Organization Law of Domestic Regulation of Goods', 36 *J World Trade* (2002) 811, at 850.

> values are, the easier it would be to accept as 'necessary' a measure designed as an enforcement instrument], and the accompanying impact of the law or regulation on imports or exports. [a measure with a relatively slight impact on imported products might more easily be considered as 'necessary' than a measure with intense or broader restrictive effects]

This weighing and balancing process was regarded as being[40] 'comprehended in the determination of 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 "reasonably available"'.

The significance of the *Korea – Beef* jurisprudence lies in the following elements and clarifications:

(a) The AB gave effect to the GATT case law by identifying precise criteria which could assist in determining the necessity of a given measure;
(b) Although this list of criteria is not exhaustive, subsequent case law suggests that these criteria dominate in the WTO judiciary's examination of necessity.[41]
(c) Necessity cannot be determined *in abstracto*; instead, a comparison between the challenged measure and alternative options that may achieve the *same* level of protection must be undertaken.[42] Only thus can the adjudicating bodies evaluate the reasonable availability of an alternative measure, based on the 'weighing and balancing' process.
(d) Depending on the importance of the interests at issue, the WTO adjudicating bodies will apply differing levels of scrutiny.[43] Indeed, in cases where the objective is of vital importance, the standard of review is very deferential, as the values at stake weigh more in the eyes of the AB.[44]
(e) When seeking to identify alternative measures *vis-à-vis* a WTO-incompatible measure, the adjudicating bodies will scrutinize that Member's behaviour in like or similar situations. If a Member has adopted a WTO-consistent measure in similar situations, this may be an indicator that a reasonably available alternative measure that is WTO-consistent exists. Again, this does not mean that a 'consistency test' is introduced, meaning that Members are obliged to act consistently in like situations.[45]

[40] Appellate Body Report, *Korea – Beef*, *supra* note 33, at para. 166.

[41] Appellate Body Report, *US – Gambling*, *supra* note 12, at para. 306; see also Appellate Body Report, *Dominican Republic – Cigarettes*, WT/DS302/AB/R, DSR 2005:XV, 7367, at paras 71–72.

[42] See also the AB's reasoning in the recent Appellate Body Report, *Brazil – Retreaded Tyres*, *supra* note 38, at paras 156ff, 178.

[43] Appellate Body Report, *EC – Asbestos*, *supra* note 33, at para. 172; also 'WTO, GATT/WTO Dispute Settlement Practice Relating to GATT Article XX, paras (b), (d), and (g)', WT/CTE/W/203, 2002, at 16. In the same direction see Sykes, 'The Least Restrictive Means', 70 *U Chicago L Rev* (2003) 403, at 416; and P. Mavroidis, *The General Agreement on Tariffs and Trade: A Commentary* (2005), at 213. Expressing an opposite view see Regan, 'The Meaning of "Necessary" in GATT Article XX and GATS Article XIV: The Myth of Cost–Benefit Balancing', 6 *World Trade Review* (2007) 347, who argues that no such implicit ranking of legitimate objectives exists.

[44] See also Appellate Body Report, *US – Gambling*, *supra* note 12, at para. 307; and Appellate Body Report, *Brazil – Retreaded Tyres*, *supra* note 38, at para. 178.

[45] Appellate Body Report, *Korea – Beef*, *supra* note 33, at paras 170–172. *But* see Marceau and Trachtman, *supra* note 39, at 847.

(f) Finally, in *Korea – Beef*, the AB refined the *least*-trade-restrictiveness element which originated in *US – Section 337* through the adoption of an approach that seeks the identification of a *less* trade-restrictive measure through a sort of proportionality, means–ends (or 'weighing and balancing') test.[46] Arguably, there has been a shift in the post-UR jurisprudence *vis-à-vis* the GATT era towards favouring regulatory diversity and unilaterally defined policy choice more than was the case in the pre-UR years,[47] especially when comparing the *US – Shrimp* case law with the *Tuna/Dolphin* GATT jurisprudence. Then, depending on the circumstances and the interests at stake, in the WTO jurisprudence a second-best measure can still satisfy the Article XX necessity test, something that would not have been warranted under the earlier *US – Section 337* GATT jurisprudence.

In *Mexico – Soft Drinks*, the AB adopted an even less intrusive approach by stating that the necessity requirement under Article XX(d) can be satisfied even if the *design* of a measure contributes to securing compliance with domestic laws or regulations, but its efficacy remains *uncertain*.[48] Thus, a measure that is *capable* or *suitable* for the achievement of the objective sought without any guaranteed results can meet the necessity standard.

More recently, in *Brazil – Retreaded Tyres*, this regulator-friendly approach was called into question. In this case, the AB was called upon to clarify the process of 'weighing and balancing' the relevant factors. The AB was more systematic in its reasoning than in previous cases. It suggested that this process entails two stages: in the first stage, a Panel has to examine the contribution of the measure at issue to the achievement of the objective sought against its trade restrictiveness and in the light of the interests at stake; in the second stage, the Panel must compare the measure at issue with any possible alternatives identified by the complaining Member.[49] From the factors that need to be 'weighed and balanced', the AB shed light in this dispute on the requirement that a measure contribute to the achievement of the objective pursued. The AB emphasized that this requirement is fulfilled when there is a 'genuine relationship' of means and ends between the goal sought and the challenged measure. However, according to the AB, the standard of review should be more stringent when the chosen measure is the most trade-restrictive possible. In this case, a total prohibition on imports cannot satisfy the necessity standard unless its contribution to the achievement of the goal sought is 'material', rather than marginal or insignificant. Whether this is the case will be judged on a case-by-case basis, depending on many elements such as the nature of the risk, the objective sought, the level of protection, as well as the evidence before the

[46] The AB never excluded the possibility of using in its Art. XX judicial review elements contained in a proportionality test: Appellate Body Report, *US – Shrimp*, *supra* note 5, at para. 141.

[47] *But* see Neumann and Türk, 'Necessity Revisited: Proportionality in World Trade Organization Law After *Korea – Beef*, *EC – Asbestos* and *EC – Sardines*', 37 *J World Trade* (2003) 199, at 214.

[48] Appellate Body Report, *Mexico – Soft Drinks*, *supra* note 29, at para. 74.

[49] Appellate Body Report, *Brazil – Retreaded Tyres*, *supra* note 38, at para. 182.

Panel.[50] The extent of the contribution by the challenged measure to the goal sought can be assessed either quantitatively or qualitatively.[51]

Accordingly, the AB pointed again to the importance of balancing and suggested that the more trade-restrictive a measure is, the more difficult it is for it to be regarded as 'necessary'. Indeed, in an amplification of its statement in paragraph 163 of the *Korea – Beef* dispute, the AB implied that a marginal or insignificant contribution to the objective pursued by a measure that is as trade-restrictive as an import prohibition, e.g., a marginal reduction of the risks carried, can result in a failure to meet the necessity standard even in the absence of reasonable alternatives to the challenged measure.[52] Finally, the AB's stance *vis-à-vis* the Panel's analysis confirms the considerable margin of appreciation that Panels enjoy when they review such measures against the requirements of Article XX GATT. The AB made this clear by underscoring that '[t]he weighing and balancing is a holistic operation that involves putting all the variables of the equation together and evaluating them in relation to each other after having examined them individually, in order to reach an overall judgement'.[53]

The WTO adjudicating bodies also spelled out the concept of *reasonable* availability. First the *US – Gasoline* Panel indicated that an alternative measure can still be deemed reasonably available even in the presence of administrative difficulties.[54] The AB tackled the issue in *EC – Asbestos* and clarified that the difficulty of implementation, as well as other factors associated with administrative burden, such as cost, technical difficulties, and lack of expertise, can render a measure reasonably *unavailable*.[55] Recently, in *Dominican Republic – Cigarettes*, the AB widened the list of factors that make a measure reasonably unavailable. In so doing, the AB deemed relevant to the goods context similar findings made in the services realm, and hence stated that a measure is to be regarded as *not* being reasonably available[56]

> 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…

In *Brazil – Retreaded Tyres*, the AB confirmed this case law[57] and elaborated on the reasonable availability of an alternative measure by noting that a total ban on imports may be preferable under certain circumstances. Notably, this can be the case when

[50] *Ibid.*, at paras 145, 151, and 210.

[51] *Ibid.*, at paras 146 and 151.

[52] *Ibid.*, at para. 150. However, the AB qualified this statement in para. 151 of the Report. Furthermore, the AB appears to weaken its approach even further later on by insinuating that it would suffice if the measure at issue were *likely* to bring a material contribution: *ibid.*, at para. 155.

[53] *Ibid.*, at para. 182; also para. 145 (highlighting that this margin of appreciation has its limits).

[54] Panel Report, *US – Gasoline*, WT/DS2/R, DSR 1996:I, 29, at paras 6.26 and 6.28.

[55] Cf. Panel Report, *EC – Asbestos*, WT/DS135/R and Add.1, DSR 2001:VIII, 3305, at para. 8.207. The AB endorsed the Panel's reasoning regarding the application of the term 'reasonably available': Appellate Body Report, *EC – Asbestos*, *supra* note 33, at para. 174; and Panel Report, *EC – Asbestos*, at paras 8.208–8.216.

[56] Appellate Body Report, *Dominican Republic – Cigarettes*, *supra* note 41, at para. 70; also Appellate Body Report, *US – Gambling*, *supra* note 12, at para. 308.

[57] Appellate Body Report, *Brazil – Retreaded Tyres*, *supra* note 38, at para. 156.

the proposed alternatives are particularly costly and/or require advanced technologies and know-how that may not be available to the regulating Member.[58] In such cases an import ban would have the advantage that it is easy to implement and does not require any substantial costs for its implementation.[59] The reasonable availability of a proposed alternative can also be compromised by the fact that its implementation carries considerable risks.[60]

Thus, alternative measures associated with considerable administrative burden and excessive costs will be deemed reasonably *unavailable*, even if they achieve the Member's desired level of protection at *lesser* trade cost. However, the mere fact that an alternative measure is more difficult or more expensive to implement does not render it *ipso facto* reasonably unavailable.[61] Rather, the reasonable availability of a measure will be determined on a case-by-case basis, the ultimate standard of review being whether the alternative measure can achieve the desired objectives equally as effectively as the challenged measure.

B *Article XIV GATS and paragraph 5(e) of the Annex on Telecommunications*

The general exception clause of the GATS largely replicates its GATT counterpart, Article XX.[62] Article XIV allows a deviation from any GATS provision and hence Members are free to adopt WTO-inconsistent measures for predefined purposes and subject to the specific requirements of Article XIV. In addition, Article XIV(d) and (e) allows for a deviation from *specific* GATS provisions. Furthermore, Article XIV establishes three necessity tests the objectives of which are identical to those embodied in Article XX GATT.[63] Because of the analogies between the two provisions, the case law under Article XX GATT can be instructive in any analysis under Article XIV GATS.[64]

The *US – Gambling* case was not only the first in which the AB addressed Article XIV, but also the first under any of the WTO Agreements where the AB was called upon to interpret the public morals exception.[65] The AB started its analysis by emphasizing

[58] Or, even if this know-how is available, the cost of implementation on a large scale is prohibitive: *ibid.*, at paras 175 and 211.

[59] *Ibid.*, at para. 171.

[60] *Ibid.*, at para. 174; also Appellate Body Report, *EC – Asbestos*, *supra* note 33, at para. 174.

[61] See, for instance, Appellate Body Report, *Korea – Beef*, *supra* note 33, at paras 180–181.

[62] Also Cottier, Delimatsis, and Diebold, 'Article XIV GATS', in R. Wolfrum, P.-T. Stoll, and C. Feinäugle (eds), *Max Planck Commentaries on World Trade Law – Volume 6: Trade in Services* (2008), at 287.

[63] These necessity tests reflect 'the shared understanding of Members that substantive GATS obligations should not be deviated from lightly': Appellate Body Report, *US – Gambling*, *supra* note 12, at para. 308.

[64] *Ibid.*, at para. 291; see also Appellate Body Report, *EC – Bananas III*, WT/DS27/AB/R, DSR 1997:II, 591, at para. 231 (where the AB encouraged Panels that deal with the interpretation of GATS provisions to refer to the GATT only where the obligations are essentially of the same type). See also Appellate Body Report, *EC – Sardines*, WT/DS231/AB/R, DSR 2002:VIII, 3359, at para. 275 (where the AB criticizes the Panel because it failed to deploy a principle articulated under the SPS Agreement on the burden of proof in the TBT context, although there were conceptual similarities between the provisions in the two Agreements).

[65] Since Art. XIV(a), contrary to Art. XX(a) GATT, allows derogations from the GATS obligations for reasons related to the maintenance of *public order*, the GATS list of exceptions has wider scope than the Art. XX list.

that necessity entails an objective standard. Consequently, the task of the Panels, when interpreting a measure, is, based on the evidence proffered, 'independently and objectively [to] assess the "necessity" of the measure before it'.[66] Based on *Korea – Beef* and *EC – Asbestos*, the AB clarified that 'a comparison between the challenged measure and possible alternatives should be undertaken, and the results of such comparison should be considered in the light of the importance of the interests at issue'.[67]

In this respect, the AB made an important contribution regarding the burden of proof. More specifically, while it is well-known that the responding party bears the burden of proving that the challenged measure falls within the ambit of Article XIV, the AB pointed out that the respondent should not be expected to identify the 'universe of less trade-restrictive alternative measures', and hence to establish that the objective sought can be attained only through the challenged measure. Such a task would be an 'impracticable and often impossible burden', according to the AB.[68] Rather, Article XIV requires that the responding party establish a presumption that the measure is necessary, in accordance with various factors, including the 'relative importance' of the interests furthered by the challenged measure, the contribution of the measure to the realization of the ends pursued by it, and the restrictive impact of the measure on international commerce, as identified in the *Korea – Beef* case. Then, it is incumbent upon the *complainant* to demonstrate that concrete, reasonably available, WTO-compatible (or less WTO-incompatible) alternative measures exist.[69] In this case, the responding party's task is to show that the challenged measure is still necessary, or that the proposed alternative measure is not reasonably available, or that it cannot achieve the same level of protection or attain the objective pursued.[70]

In *US – Gambling*, the AB reversed the Panel's finding that engaging in consultations with Antigua in order to resolve their differences was a reasonably available alternative measure for the United States. Such a measure would not stand comparison with the challenged measure, as it entails a process with uncertain results.[71] Importantly, the *Mexico – Soft Drinks* Panel, when interpreting Article XX(d) GATT, attempted to transpose this interpretation made under Article XIV(a) GATS to the GATT context, and accordingly ruled that[72]

> measures that are of uncertain outcome do not qualify as reasonably available alternatives when considering whether a measure is necessary to secure compliance with a law or regulation. Following a similar rationale, in order to qualify as a measure 'to secure compliance', it would seem that there should be a degree of certainty in the results that may be achieved through the measure.

66 Appellate Body Report, *US – Gambling*, *supra* note 12, at para. 304.

67 *Ibid.*, at para. 307.

68 *Ibid.*, at para. 309. Cf. Appellate Body Report, *Japan – Agricultural Products II*, WT/DS76/AB/R, DSR 1999:I, 277, at para. 137.

69 *Ibid.*, at para. 126.

70 Appellate Body Report, *US – Gambling*, *supra* note 12, at paras 309–311.

71 *Ibid.*, at para. 317.

72 Panel Report, *Mexico – Soft Drinks*, WT/DS308/R, at para. 8.188.

The AB, however, reversed this finding by stating that, first, it was improper to apply to the case at stake an interpretation made in another context which was irrelevant to the terms 'to secure compliance', and, secondly, the measure at issue need *not* be designed to guarantee the achievement of the objective pursued (*in casu*, securing compliance with domestic laws and regulations) 'with *absolute* certainty'.[73]

The *Mexico – Telecoms* Panel was also given the opportunity to pronounce on the interpretation of the necessity requirement laid down in paragraph (5)(e) of the GATS Annex on Telecommunications. Pursuant to this provision, Members are required to ensure that the only conditions imposed on access to and use of public telecommunications transport networks and services are those necessary to attain the policy objectives identified in paragraph (5)(e).[74] The Panel took issue with the AB's finding in *Korea – Beef,* and hence ruled that, in the case at hand, the necessity standard could not be regarded as being closer to the 'pole of indispensable'. On the contrary, the Panel asserted that, for the purposes of the case at issue, the meaning of the term 'necessary' should be deemed to be closer to the meaning of 'making a contribution to' the achievement of one of the objectives listed in paragraph (5)(e).[75] This deviation from the AB jurisprudence is not justified. In this case, the Panel misconstrued the *Korea – Beef* ruling and the wording of paragraph (5)(e). It read into the provision words that are not there and imported a concept, i.e., that 'necessary' is equal to 'making a contribution to', that, apparently, was not intended.[76]

C *Article 2(2) TBT*

Article 2(2) TBT provides for a positive obligation where the *complaining* party bears the burden of providing evidence of the responding Member's failure to adopt a 'necessary' measure.[77] There are at least two important elements worth discussing in the TBT necessity test: first, the test covers not only measures of trade-restrictive *intent*, but also measures that have the *effect* of so operating. Secondly, the necessity standard set out therein is qualified, in that the measure chosen should be the least trade-restrictive *taking into account the risks that the measure addresses and the importance of attaining the objective at issue*. Thus, the WTO judiciary is called upon to juxtapose the challenged technical regulations[78] with the types of risks that would be created in the *absence* of such regulations.[79] In other words, a variety of cost–benefit analysis appears

[73] *Supra* note 48.

[74] Panel Report, *Mexico – Telecoms*, WT/DS204/R, DSR 2004:IV, 1537, at para. 7.306.

[75] *Ibid.*, at paras 7.337–7.343.

[76] See also Appellate Body Report, *India – Patents (US)*, WT/DS50/AB/R, DSR 1998:I, 9, at para. 45.

[77] Also Howse and Türk, 'The WTO Impact on Internal Regulations – A Case Study of the *Canada-EC Asbestos* Dispute', in G. de Búrca and J. Scott (eds), *The EU and the WTO: Legal and Constitutional Issues* (2001), at 283, 310.

[78] For a definition see Annex 1.1 TBT; see also Appellate Body Report, *EC – Sardines*, *supra* note 64, at para. 176.

[79] The risk of non-fulfilment can be deemed part of the balancing test or cost-benefit analysis suggested by *Korea – Beef, supra* note 33, and *EC – Asbestos, supra* note 33: Marceau and Trachtman, *supra* note 39, at 831. *But* see Desmedt, 'Proportionality in WTO Law', 4 *JIEL* (2001) 441, at 459–460; Ortino, 'From "Non-discrimination" to "Reasonableness": a Paradigm Shift in International Economic Law?', Jean Monnet Working Paper 01/05 (2005), at 44–45.

to be implied in Article 2(2) TBT. Viewed from another angle, this provision appears to allow for a considerable margin of appreciation when domestic authorities regulate.

In *EC – Sardines*, although only Article 2(4) TBT was at issue, there were some indirect references to Article 2(2), notably as regards the 'legitimate objectives' concept. More specifically, it was stated that Article 2(2) entails an illustrative list of objectives that Members expressly deemed legitimate. In turn, legitimate objectives in Article 2(2) and (4) should be construed to mean one and the same thing.[80] As regards the burden of proof associated with Article 2(4) TBT, the AB took issue with the Panel's view and ruled that it is for the *complaining* party to prove that a relevant international standard had not been used as a basis for the contested measures, although this standard would be an effective and appropriate means to achieve the desired legitimate objectives.[81] Oddly, the AB went on to express its agreement with the Panel's finding that 'the second part of Article 2.4 implies that there must be an examination and a *determination on the legitimacy* of the objectives of the measure'.[82]

This leads me to the following *advocatus diaboli* interpretation: In *EC – Sardines*, both parties to the dispute agreed that the objectives sought by the EC were legitimate (that is, market transparency, consumer protection, and fair competition) and, therefore, the Panel ended its analysis at that point.[83] Furthermore, a Panel would not challenge the legitimacy of an objective that is already in the Article 2(2) TBT (indicative) list. But what about the other objectives that this list potentially encompasses, as it is an indicative one? According to the *EC – Sardines* case law, these objectives will be deemed legitimate *only after* the WTO adjudicating bodies have examined and determined their legitimacy. Then, such an interpretation appears to distinguish between two categories of objectives: the first category covers those objectives that are expressly referred to in Article 2(2) TBT and, *a fortiori*, escape the 'legitimacy determination' test. These objectives will be subject to a means–ends test scrutinizing the 'degree of connection' between the measure and the objective. The second category comprises objectives that are implied only in Article 2(2).[84] If the parties to a dispute disagree as to their legitimacy, these objectives must be 'legitimized' by the adjudicating bodies. Such an interpretation appears to be fairly sweeping at the present stage of integration in the WTO.

[80] Panel Report, *EC – Sardines*, WT/DS231/R and Corr.1, DSR 2002:VIII, 3451, at para. 7.118; and Appellate Body Report, *EC – Sardines*, *supra* note 64, at para. 286.

[81] In reality, this requires an amount of information that will be available normally to the *responding* party that deviated from the standard. See also M. Matsushita, T.J. Schoenbaum, and P. Mavroidis, *The World Trade Organization – Law, Practice and Policy* (2006), at 495.

[82] Appellate Body Report, *EC – Sardines*, *supra* note 64, at para. 286 (emphasis added), and Panel Report, *EC – Sardines*, *supra* note 80, at para. 7.121.

[83] *Ibid.*, at para. 7.122.

[84] Potential additional legitimate objectives for domestic regulations mentioned in TBT notifications in 2004 include: consumer information and labelling; quality requirements; harmonization; lowering or removal of trade barriers and trade facilitation; and cost saving and increasing productivity: WTO, 'Tenth Annual Review of the Implementation and Operation of the TBT Agreement', G/TBT/15, 4 Mar. 2005, at para. 10.

D *Article 5(6) SPS*

Article 5(6) SPS contains the most important necessity test laid down in the SPS Agreement. This necessity test is subject to a 'reasonable availability' qualification,[85] which summarizes the GATT/WTO jurisprudence on necessity while adding to it SPS-specific elements, such as a *de minimis* requirement that the alternative SPS measure be *significantly* less trade-inhibitory. The SPS Agreement is the first to include in its text some guidance regarding the SPS measures that can be deemed 'more trade-restrictive than required'.

In the *Australia – Salmon* dispute, the issue at stake was whether Australia's import ban on fresh, chilled, or frozen salmon was more trade-restrictive than required to attain Australia's appropriate level of protection.[86] The AB endorsed the Panel's finding that a three-pronged test is established in Article 5(6) SPS, which comprises three elements that apply cumulatively.[87] Hence, in order for an alternative SPS measure to be considered as less trade-restrictive than the contested measure, it must: (a) be reasonably available taking into account technical and economic feasibility; *and* (b) achieve the level of sanitary and phytosanitary protection appropriate to the Member; and (c) be *significantly* less trade-restrictive than the SPS measure contested.

The AB offered numerous crucial interpretations in this case, especially as regards the 'appropriate level of protection' standard and rejected the Panel's findings in this respect. At the outset, the AB emphasized that the determination of the appropriate level of protection is a prerogative reserved to Members. The 'appropriate level of protection' is an *objective* the determination of which (made by the *Member* concerned)[88] precedes the adoption of the SPS measure, which is an *instrument* that aims to achieve that objective.[89] Thus, Members are implicitly required to determine their level of protection in an unequivocal manner. It is only when a Member fails to determine the level of protection it deems appropriate (or when there is vagueness as to the appropriate level) that the WTO adjudicating bodies should be allowed to second-guess the appropriate level of protection based on the level of protection as reflected in the SPS measure actually applied.[90] In examining a Member's determination of the appropriate level of protection, the adjudicating bodies will identify the underlying objective behind the contested measure and then examine whether the actual level of protection as reflected in the contested measure corresponds to the level of protection that the responding Member deems appropriate.[91] As regards the burden of proof in

[85] Footnote 3 to Art. 5(6) SPS; see also Trachtman, 'Lessons for the GATS from Existing WTO Rules on Domestic Regulation', in A. Mattoo and P. Sauvé (eds), *Domestic Regulation and Service Trade Liberalization* (2003), at 57, 65.

[86] See also Marceau and Trachtman, *supra* note 39, at 834.

[87] Appellate Body Report, *Australia – Salmon*, DSR 1998:VIII, 3327, at para. 194; and Appellate Body Report, *Japan – Agricultural Products II*, *supra* note 68, at para. 95.

[88] Also para. 5 of Annex A to the SPS Agreement.

[89] Appellate Body Report, *Australia – Salmon*, *supra* note 87, at paras 200–204.

[90] *Ibid.*, at paras 206–207. See, for instance, Appellate Body Report, *Korea – Beef*, *supra* note 33, at para. 178, where the AB *presumed* the appropriate level of protection.

[91] See also Appellate Body Report, *Australia – Salmon*, *supra* note 87, at para. 197.

Article 5(6) SPS, the AB confirmed in *Japan – Agricultural Products* that it is incumbent upon the *complainant* to establish a *prima facie* case that: first, a violation of this provision has occurred; and, secondly, there are specific alternative, technically and economically feasible measures that are reasonably available and significantly less trade-restrictive.[92]

4 The Necessity Requirement as Reflected in RIAs[93]

A proliferation of RIAs has occurred in recent years. Such agreements strive for deeper and wider integration of services markets of the participating Members. The interaction between regional initiatives and the multilateral efforts under the aegis of the GATS appears to be mutually advantageous. Indeed, these two concurrent layers of liberalization efforts have proven, and will most likely continue to be, complementary.[94] On the one hand, RIAs have benefited from the GATS legal drafting, and hence many RIAs echo in their texts, and build on, several GATS provisions. For example, Article VI in general (and paragraph (4) in particular) appears – with some alteration to the wording – in manifold RIAs. Thus, numerous RIAs display a certain degree of standardization. On the other hand, RIAs can be indispensable 'laboratories' from which useful lessons can be learnt, thus empowering the negotiating capacity of the countries that participate in the multilateral arena, and enriching as well as expediting multilateral negotiations on services.[95]

The most comprehensive necessity tests at the regional level regarding trade in services are to be found in MERCOSUR and the Trans-Pacific Strategic Economic Partnership (Brunei, Chile, New Zealand, and Singapore). Article X(4) of the MERCOSUR Protocol of Montevideo)[96] establishes a clear-cut GATS-type horizontal necessity test with respect to measures relating to qualifications, licensing, and technical standards. Likewise, paragraph (2) of Article 12.10 of the Trans-Pacific Strategic Economic Partnership, which entered into force on 28 May 2006, embodies a strong horizontal necessity test which reflects the criteria established under Article VI(4) GATS.[97] The application of this necessity test will generate further liberalization of services trade and regulatory reform in the participating Members' markets and is likely to affect negotiations at the multilateral level.

Recently, the United States has signed bilateral trade agreements with Chile, Singapore, and Australia. These arrangements also entail a binding necessity test which

[92] Appellate Body Report, *Japan – Agricultural Products II*, *supra* note 68, at para. 126.

[93] See also Table 1.

[94] Stephenson, 'Regional versus Multilateral Liberalization of Services', 1 *World Trade Review* (2002) 187.

[95] Sauvé, 'Adding Value at the Periphery: Aiming for GATS+ Advances in Regional Agreements on Services', NCCR Working Paper, World Trade Institute, Berne, available at: www.nccr-trade.org/ip-8/adding-value-at-the-periphery.html (accessed 5 Mar. 2007).

[96] Signed in Dec. 1997 and entered formally into effect on 7 Dec. 2005. See also WTO (Committee on Trade and Development), 'Protocol of Montevideo on Trade in Services in the MERCOSUR', Communication from Brazil on Behalf of the MERCOSUR, WT/COMTD/60, 2007.

[97] The Chapter of the Agreement on Services will apply to Brunei 2 years after its entry into force.

is applicable across services sectors when it comes to measures relating to licensing, qualifications, and technical standards. There are, nevertheless, two important caveats: first, the language that the respective provisions use is hortatory, simply requesting that participants 'endeavour to ensure' the objectivity, transparency, and necessity of the Article VI(4)-like measures; and, secondly, Members are bound to endorse the results of the WPDR negotiations on Article VI(4) when they enter into effect.[98]

An approach similar to that of the GATS is adopted in Article 64 of the Japan–Singapore Free Trade Agreement. While Article 64(5) entails a necessity test with respect to licensing, qualifications, and technical standards, there are many qualifications like those found under Article VI(5) GATS which make it almost impossible to bring a case based on this provision.[99] There is also a variant of this type of regional arrangement where participating Members agree 'jointly [to] review' the results of the WPDR negotiations. In the meantime, these Members are required to abide by an obligation which is identical to that in Article VI(5) GATS, that is that, pending the WPDR negotiations, they apply the Article VI(4)(a), (b), and (c) criteria in sectors where specific commitments were undertaken. This is notably the case with the RIAs that Singapore concluded separately with EFTA, Australia, and New Zealand.

In addition to RIAs which espouse a GATS-type approach, there are other RIAs that are modelled on NAFTA, notably in the Western Hemisphere.[100] Such arrangements do not encompass a provision similar to Article VI, but, instead, they contain more narrowly drawn disciplines regarding the licensing and certification of professionals originating in the territories of the participating Members.[101] In addition, these disciplines use 'best-efforts' language. In general, NAFTA-type agreements incorporate a provision similar to Article 1210 NAFTA, which requires that licensing or certification measures be based on objective and transparent criteria, and that these be neither more burdensome than necessary to ensure the quality of the service, nor constitute a disguised restriction on the cross-border supply of the service at issue. However, unlike the GATS, NAFTA-type agreements call for comprehensive mutual recognition of foreign education credentials and professional qualifications in several professions. Work in these areas, though, has made little progress.

While there is a set of RIAs that embody a horizontally applicable necessity test using 'best-efforts' language, many RIAs simply declare their determination to respect Article VI(5) GATS and to incorporate the disciplines on domestic regulation with respect to licensing, qualifications, and technical standards that will emerge from the WPDR negotiations. There are other RIAs the coverage of which is fairly narrow and includes only the licensing and certification of professionals. Such RIAs add nothing to the concept of necessity and how this should be interpreted, but they borrow the wording of Article VI(4)/(5) GATS and simply adapt it to their needs, preferences, and

[98] Arts. 11(8) of the US–Chile FTA, 8(8) of the US–Singapore FTA, and 10(7) of the US–Australia FTA.

[99] The same wording is to be found in Art. 28 of the EFTA–Singapore FTA.

[100] For instance, Art. H-10 of the Canada–Chile FTA or Art. 10-12 of the Chile–Mexico FTA.

[101] Of course, the provisions regulating trade in services in the NAFTA are dispersed. See also Krajewski, 'Services Liberalization in Regional Trade Agreements: Lessons for GATS "Unfinished Business"?', in L. Bartels and F. Ortino (eds), *Regional Trade Agreements and the WTO System* (2007), at 175, 186–187.

the level of homogeneity between the participating Members. In fact, such RTA provisions usually appear to be *less* far-reaching than the GATS, as participating Members are reluctant to expand on Article VI(4) or include more categories of measures than this provision currently covers.[102] The sluggish progress at the regional level runs counter to the idea of encouraging the creation of optimum harmonization areas as an optimal first step of further multilateral liberalization.[103] At least with respect to non-discriminatory non-quantitative domestic regulations, the regional lessons that can be learnt are, at best, poor and add nothing to the prospective multilateral Article VI(4) disciplines. Nevertheless, several RIAs have made important contributions to developing the transparency provisions that should accompany any efforts to liberalize domestic regulations pertaining to licensing, qualifications, or technical standards. Indeed, in this case one could speak of GATS+ outcomes at a regional level.

Among RIAs, the experience within the EU is the exception. In the EU context, however, the political determination to move to deeper and wider forms of integration already existed. This process has been facilitated by an integration-promoting supranational judiciary, which has made its presence felt through far-reaching interpretations to which the EU Member States assented. One such concept, fashioned by the ECJ, is the principle of proportionality.[104] While proportionality goes back to German law,[105] the ECJ recognizes it as a general principle of EC law.[106] Article 5(3) ECT embodies one part of the three-pronged proportionality test, i.e., the necessity requirement, and there is also a Protocol clarifying the meaning of the principle.[107] Nevertheless, the ECJ does not search for a legal basis to justify its decision to use proportionality, but merely notes that it is a general principle of EC law.

According to established case law, a measure is proportionate if it is: (a) suitable or appropriate to achieve the objective pursued; (b) necessary, i.e., the least onerous among several appropriate measures (proportionality *lato sensu*); and (c) *stricto sensu* proportionate, that is, the disadvantages (these are usually damage to individual interests) are not disproportionate to the objectives (these usually serve the public or the Community interest).[108] *Stricto sensu* proportionality entails a cost–benefit analysis, the

[102] See also Stephenson, '"Deeper" Integration in Services Trade in the Western Hemisphere: Domestic Regulation and Mutual Recognition', in OECD, *Trade and Regulatory Reform – Insights from Country Experience* (2001), at 79, 90.

[103] Mattoo and Fink, 'Regional Agreements and Trade in Services – Policy Issues', Policy Research Working Paper No 2852, World Bank (2002).

[104] For a thorough analysis of proportionality under a comparative perspective see Andenas and Zleptnig, 'Proportionality: WTO Law: In Comparative Perspective', 42 *Texas Int'l LJ* (2007) 371, at 382ff.

[105] J. Schwarze, *European Administrative Law* (1992), at 685.

[106] Case 331/88, *The Queen v. Minister for Agriculture, Fisheries and Food and Secretary of State for Health, ex parte Fedesa and Others* [1990] ECR I–4023, para. 13, and Case C–180/96, *United Kingdom v. Commission (BSE)* [1998] ECR I–2265, para. 96.

[107] Protocol No. 30, attached to the Amsterdam Treaty, on the application of the principles of subsidiarity and proportionality (1997).

[108] Joined Cases T–125/96 and 152/96, *Boehringer Ingelheim Vetmedica GmbH and C.H. Boehringer Sohn v. Council Hand Commission* [1999] ECR II–3427, para. 73ff; see also Trachtman, 'Trade and… Problems, Cost-Benefit Analysis and Subsidiarity', 9 *EJIL* (1998) 32, at 35.

only difference being that the ECJ will not necessarily invalidate an act solely for the reason that the costs exceed the benefits. Notably, the ECJ applies the third sub-set of the proportionality test in areas where EC law clearly establishes a common level of protection of the legitimate objective at issue, e.g., consumer protection.[109]

Generally, the application of proportionality has been fairly flexible to protect different interests and thus the degree of judicial review has varied considerably.[110] It is, however, safe to argue that 'the more intensive the [ECJ] scrutiny of national restrictions in the light of the proportionality principle, the greater the shift in powers from the national legislatures to the European judiciary'.[111] Again, in numerous cases, the ECJ, conscious of the complex assessments of a political, economic, and social nature that the Community organs or the authorities of a Member State may be called upon to undertake, confined its judicial review in an assessment of whether the challenged measure was *manifestly* inappropriate in the light of the objective pursued by the competent institutions.[112] In other cases the ECJ, *au lieu* of expressly scrutinizing whether the measure at stake was *stricto sensu* proportionate, favoured the undertaking of a 'marginal review' of costs and benefits of the contested measure under the guise of the necessity requirement. Nevertheless, this should not be taken as suggesting that the judicial review focuses on the existence of alternatives, since the quintessence of proportionality seems to be a balancing test weighing the objective of a given measure against its adverse effects.[113]

5 Essential Elements of a Horizontal Necessity Test – The Paradigm of the Accountancy Disciplines

It would certainly be imprudent automatically to transpose the interpretations of necessity in the other WTO Agreements or in a regional or sub-regional agreement to Article VI(4) GATS. Nonetheless, it is argued here that drawing on accumulated GATT/WTO

[109] In the *Estée Lauder* case, for instance, the ECJ suggested that the level of protection that Member States seek when they adopt measures that affect intra-EU trade to protect consumers must reflect 'the presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect'. See Case C–220/98, *Estée Lauder* [2000] ECR I–117, para. 27.

[110] De Búrca, 'The Principle of Proportionality and its Application in EC Law', 13 *Ybk of European L* (1993) 105, at 111; see also Jacobs, 'Recent Developments in the Principle of Proportionality in European Community Law', in E. Ellis (ed.), *The Principle of Proportionality in the Laws of Europe* (1999), at 1, 20; Case C–124/97, *Markku Juhani Läärä Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v. Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State)* [1999] ECR I–6067, para. 36; Case C–384/93, *Alpine Investments BV v. Minister van Financiën* [1995] ECR I–1141, para. 51. The US Supreme Court appears to endorse a similar approach when adjudicating on regulatory measures under the Dormant Commerce Clause: Hilf and Puth, 'The Principle of Proportionality on its Way into WTO/GATT Law', in A. von Bogdandy, P.C. Mavroidis, and Y. Mény (eds), *European Integration and International Coordination – Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann* (2002), at 199, 208.

[111] Jans, 'Proportionality Revisited', 27 *LIEI* (2000) 239, at 242.

[112] See Case C–380/03, *Germany v. Parliament and Council* [2006] ECR I–11573, para. 145.

[113] Case C–169/91, *Council of the City of Stoke-on-Trent and Norwich City Council v. B & Q plc.I* [1992] ECR I–6635, para. 15.

as well as regional experience can assist in creating an effective horizontal necessity test through the WPDR negotiations. This section will start with the necessity test created for the accountancy services under the auspices of the WPPS and then consider the elements that can form part of a horizontal necessity test, drawing on the accountancy disciplines, the analysis of the case law under GATT, TBT, and SPS, and on regional lessons.

A *The Necessity Test in Paragraph (2) of the Accountancy Disciplines*

The WPPS first assumed the difficult task of operationalizing the Article VI(4) legal mandate with respect to accountancy services[114] and concluded its work on 14 December 1998 with the adoption by the CTS of the *Disciplines on Domestic Regulation in the Accountancy Sector*, alias the 'draft accountancy disciplines'.[115] These apply only to Members that undertook specific commitments in the accountancy sector and should become part of the GATS, i.e., legally binding, no later than the end of the current round of services negotiations.[116] The salient feature of these disciplines is the inclusion of a binding, sector-specific necessity test in paragraph (2) of the disciplines.

Paragraph (2) makes it clear that measures falling under Article XVI or XVII are not covered by this necessity test. Arguably, the administrative aspects of the Article XVI or XVII measures relating to accountancy would still fall within the ambit of the accountancy disciplines and be covered by the necessity test. Furthermore, paragraph (2) requires that trade-restrictiveness should be neither the objective nor the result of the application of the regulatory measure at stake, thereby establishing a purpose and effect test. In this respect, paragraph (2) borrows the wording of Article 2(2) TBT, which equally covers the intent *and* the effect of creating unnecessary trade-restrictiveness. In addition, the accountancy disciplines impose a necessity test for relevant technical standards by requiring that they be prepared, adopted, and/or applied only to fulfil legitimate objectives as set out in paragraph (2).[117]

This provision also contains an illustrative list of four legitimate objectives that a Member can pursue, namely, consumer protection, quality of the service, professional competence, and/or integrity of the profession. By comparison, Article VI(4)(b) considers the quality of the service as the only objective that can justify the burdensomeness of a measure relating to licensing, qualifications, or technical standards. Therefore, by expanding the list of objectives that are deemed explicitly legitimate, paragraph (2) already contains a stronger necessity test than Article VI(4)/(5) GATS. This is so because, in the case of the accountancy disciplines, Members agreed unequivocally on four (rather than one, as under Article VI(4)) legitimate objectives which the adjudicating bodies are bound to take into account when they examine the link between the measure elected and the objective.

[114] See also Trolliet and Hegarty, 'Regulatory Reform and Trade Liberalization in Accountancy Services', in A. Mattoo and P. Sauvé (eds), *supra* note 85, at 147.

[115] WTO, 'Disciplines on Domestic Regulation in the Accountancy Sector', S/L/64, 1998.

[116] WTO, 'Decision on Disciplines Relating to the Accountancy Sector', S/L/63, 1998, at paras 1 and 3.

[117] WTO, *supra* note 115, at paras 25–26; see also WTO (WPDR), 'Report on the Meeting Held on 22 November 2004', S/WPDR/M/28, 2005, at para. 25.

This explicit reference to specific objectives in paragraph (2) is decisive, especially when a parallel is drawn with Article 2(2) and (5) TBT. Article 2(2) contains a necessity test and an *indicative* list of legitimate objectives. In Article 2(5), however, the rebuttable presumption of necessity appears to cover only those technical regulations that are prepared, adopted, or applied for one of the legitimate objectives *explicitly* referred to in Article 2(2). *A contrario*, then, other possible legitimate objectives that could come under Article 2(2) do not benefit from the Article 2(5) presumption simply because they are not explicitly mentioned in Article 2(2). Consequently, this provision appears to establish a hierarchy of legitimate objectives, i.e., objectives that take advantage of the presumption and objectives that do not have this benefit. Hence, the recognition of an objective as legitimate through its inclusion in an indicative list can have important ramifications.

'Quality' can undoubtedly be construed broadly to cover not only the delivery to the consumer, but also reliability, efficiency, and comprehensiveness as well as objectives associated with externalities and public policy.[118] To date, the AB has advanced a rather *narrow* interpretation of necessity in provisions entailing an *exception*, such as Article XX GATT.[119] Nevertheless, one cannot prejudge the interpretation of the phrase 'necessary to ensure the quality of the service' in a case involving an *obligation* provision, such as Article VI(4). As things stand, one could reasonably suggest that measures pertaining to licensing, qualifications, or technical standards that do not relate *stricto sensu* to the quality of the service would be outlawed under Article VI(4).[120] Measures that serve important social objectives could fall within this category, e.g., the obligation to supply a service in a bottleneck service sector in underserved regions of a given Member's territory at lower prices than in urban areas, or a regulation that aims to minimize the environmental impact of a given service.

As noted earlier, the WTO adjudicating bodies have taken a deferential approach towards Members' regulatory autonomy. However, it would be reasonable for the AB to dismiss an interpretation that would equate the phrase 'ensure the *quality* of the service' to the phrase 'ensure the *fulfilment* of a legitimate objective'. In addition, no persuasive argument can be made that, while 'quality of the service' should be interpreted broadly under Article VI(4) in order to cover various objectives, *inter alia*, professional competence, under paragraph (2) of the accountancy disciplines, the same objective, i.e., the quality of the service, must be interpreted narrowly, so that it does not overlap with professional competence, which is listed as a *separate* legitimate objective. Recourse to Article XIV GATS would always be possible, but in this case it would be incumbent upon the *responding* party to establish the affirmative defence under one of the exceptions defined in an exhaustive manner.[121] For these reasons, clarifying and

[118] WTO (WPDR), 'Communication from Australia', S/WPDR/W/1, 1999, at para. 7; also Leebron, 'Regulatory Discrimination in Domestic United States Law: A Model for the GATS?', in Mattoo and Sauvé (eds), *supra* note 85, at 43, 52.

[119] Appellate Body Report, *Korea – Beef*, *supra* note 33, at para. 161.

[120] See also Adlung, 'Public Services and the GATS', 9 *J Int'l Economic L* (2006) 455, at 480.

[121] Also P. Delimatsis, *International Trade in Services and Domestic Regulations – Necessity, Transparency, and Regulatory Diversity* (2007), at 177–178.

probably expanding the list of legitimate objectives under Article VI(4) is in the interests of domestic regulators and should be a priority for the current WPDR negotiations.[122]

Undeniably, the creation of a necessity test as laid down in paragraph (2) of the accountancy disciplines was a success. But it will be necessary to wait for the disciplines to become binding before it is possible to evaluate precisely the impact that the necessity test will have on the accountancy sector and the extent of sectoral regulatory reform that it will bring about. Meanwhile, the accountancy disciplines, and the necessity test in particular, exert considerable influence over the current work of the WPDR regarding the development of horizontal disciplines and serve as a useful parameter or guide in this respect.

B *Elements and Wording of a Prospective Horizontal Necessity Test*

For the creation of an effective, enforceable, and operationally useful horizontal necessity test WPDR negotiators could build on elements and wording adopted in other WTO Agreements. As regards the RIAs, the only arrangement that appears to be of interest for the purposes of the work of the WPDR is the European Union. All the other arrangements are either contemporary with, or proliferated in the aftermath of, the GATS and consequently reflect the structure, scope, and concepts of Article VI(4) GATS. Therefore, guidance cannot be sought from such agreements. In contrast, paragraph (2) of the accountancy disciplines is a useful benchmark, and Members acknowledged this in their WPDR discussions. In sum, the following elements emerge as common denominators relating to the concept of necessity in the WTO. These denominators extend beyond the strict confines of any particular WTO Agreement and do not seem to be dependent on whether necessity forms part of a WTO provision referring to an *obligation* or, rather, an *exception*.[123]

1 Burden of Proof

The allocation of the burden of proof is clear-cut as regards provisions establishing a *positive* obligation (such as paragraph (2) of the accountancy disciplines or the prospective necessity test under Article VI(4)). The *complaining* party bears the initial *onus probandi* and, once the violation of the necessity requirement is established, it is for the *responding* party to rebut the charge.[124]

2 Justiciability of Instruments/Level of Protection/Legitimate Objectives

Consistent WTO case law suggests that the objectives that a Member seeks to pursue will not be subject to judicial review. The legitimacy of the desired ends or the level of protection that the responding Member deems appropriate is unilaterally defined and

[122] Feketekuty, 'Regulatory Reform and Trade Liberalization in Services', in P. Sauvé and R.M. Stern (eds), *GATS 2000: New Directions in Services Trade Liberalization* (2000), at 225, 237; see also Nicolaidis and Trachtman, 'From Policed Regulation to Managed Recognition in GATS', in *ibid.*, at 241, 260.

[123] See also WPDR, 'Application of the Necessity Test: Issues for Consideration', Job No. 5929, Informal Note by the WTO Secretariat, 1999.

[124] See also Appellate Body Report, *EC – Hormones*, WT/DS48/AB/R, DSR 1998:I, 135, at para. 98.

may entail a zero-risk level of attainment.[125] Rather what is examined is the Member's choice of *means*. As regards the legitimate objectives, it is still questionable within the WPDR discussions whether a (possibly indicative) list of legitimate objectives should be endorsed.[126] Such a list would not overlap with the Article XIV GATS list, but would include additional objectives deemed legitimate by the WTO Membership. Articles 2(2) TBT, 5(6) SPS, and paragraph (2) of the accountancy disciplines do include an illustrative list of legitimate objectives. Due to the potential problems with Article VI(4)(b) GATS which identifies quality of the service as the *only* legitimate objective, Members should address this issue, which is germane to all services sectors. There are four options available: (a) having no list at all, but simply referring to Members' prerogative to seek the achievement of legitimate objectives; (b) creating an open-ended list of legitimate objectives; (c) creating an indicative list of objectives acceptable at a horizontal level and then seeking to add sector-specific objectives when developing sectoral disciplines; (d) creating a list of the objectives that are not legitimate. In any case, while a list of legitimate objectives is not indispensable,[127] a clarification of what Members understand by 'quality of the service' definitely is.

3 Less Trade-restrictiveness/Reasonable Availability, and Comparison of Alternatives/'Third Aspect' of Necessity

According to established WTO case law,[128] for a measure to be deemed necessary it has to be designed to protect the interest at issue or to fulfil the objective pursued. Moreover, the 'nexus' – or degree of connection – between the measure and the legitimate objective should be sufficiently tight.[129] Furthermore, a measure is 'necessary' when there is no reasonably available alternative measure which is less trade-restrictive and which could attain the *same* level of protection as, or fulfil a legitimate objective *equally satisfactorily* with, the contested measure. Hence, in the first instance, the adjudicating bodies will look for *concrete* alternative measures. In so doing, the panels will examine whether less trade-restrictive measures are already applied by the responding party to achieve the same objectives as the challenged trade-restrictive measure.[130] After having identified a specific alternative measure that is *reasonably* available to the responding party,[131] the panels will proceed to a comparison between the contested and the

[125] Although an import prohibition is normally 'the heaviest "weapon" in a Member's armoury of trade measures': Appellate Body Report, *US – Shrimp*, *supra* note 5, at para. 171. This deference towards the level of protection chosen by a country can also be identified in ECJ rulings. See, for instance, Case C–36/02, *Omega* [2004] ECR I–9609, para. 37.

[126] See also WTO (WPDR), 'Report on the Meeting Held on 2 October 2001', S/WPDR/M/13, 2001, at para. 21.

[127] See also WTO (WPDR), 'Report on the Meeting Held on 20 March 2001', S/WPDR/M/10, 2001, at para. 25. See also the discussion in Section 5A.

[128] *Inter alia*, Appellate Body Report, *Korea – Beef*, *supra* note 33, at para. 157.

[129] *Ibid.*, at para. 161.

[130] The fact that *other* Members may employ less restrictive measures to tackle similar situations does not render a measure in a given Member unnecessary: see Case C–384/93, *Alpine Investments*, *supra* note 110, at para. 51.

[131] *Supra* note 56.

alternative measures. The comparison of available alternatives is crucial and, indeed, inherent in any objective evaluation of necessity. When comparing the measures, it is taken for granted that both protect the interest at stake or achieve the legitimate objective *equally effectively*. The comparison will be made on the basis of the *illustrative* list of factors that the *Korea – Beef* jurisprudence identified, i.e., (a) the relative importance of the interest or values at stake; (b) the contribution of each of the measures to the realization of the ends pursued by it and whether the *design* of the measures is suitable to fulfil the objective pursued (i.e., means–ends test); and (c) the degree of trade-restrictiveness.[132] Obviously, a considerable margin of appreciation exists in this analysis of qualitative nature and, thus, second-best measures may be deemed WTO-consistent depending on the circumstances and the interests at stake.

In the WPDR jargon, the idea that a measure that restricts trade can still be deemed necessary if there is no alternative, less trade-disruptive, and reasonably available measure that a Member could take to achieve the same policy objective echoes the 'third aspect' of the necessity test. While it has been suggested that the 'third aspect' is an essential part of any necessity test, as it contains the comparison of alternatives, it was revealed during the WPDR negotiations that several Members would consider it too burdensome a concept to be applied horizontally.[133] Arguably, this burden could be alleviated by considering the introduction of concepts available under the TBT or the SPS. In the TBT necessity test analysed earlier, the adjudicating bodies should take into account 'the risks non-fulfilment [of the legitimate objective at issue] would create'.[134] This implies a delicate balancing of the costs and benefits in which costs (or risks) require careful evaluation. In Article 5(6) SPS there are also elements that Members could consider in the process of creating a necessity test for the purposes of Article VI(4): first and foremost, the *de minimis* requirement that the alternative measure should meet, as it should be *significantly* less trade-restrictive than the measure actually chosen. Another valuable element in the SPS provision is the technical and economic feasibility concept, although this concept appears to encapsulate the WTO jurisprudence on the conditions that render a measure reasonably *unavailable*.

4 Proportionality/Balancing/Means–Ends Test

Having analysed the WTO jurisprudence on necessity and the ECJ application of proportionality, a reader can easily identify similarities as well as differences. Notably after the introduction of the concept of 'weighing and balancing' in *Korea – Beef*, the WTO adjudicating bodies have come closer to the tests that the ECJ applies in order to pronounce on the legality of national regulatory measures.[135] Then, the necessity test as it is applied at present in the WTO also entails two of the three conditions that

[132] Also Appellate Body Report, *Brazil – Retreaded Tyres*, *supra* note 38, at para. 182.

[133] WTO (WPDR), 'Report on the Meeting Held on 19 October 1999', S/WPDR/M/3, 2000, at para. 5 and WTO, WPDR, 'Report on the Meeting Held on 2 October 2000', S/WPDR/M/8, 2000, at 5.

[134] Art. 2(2) TBT.

[135] Regan argues that the concept of weighing and balancing is difficult to reconcile with Members' freedom to choose their level of protection. Actually, he argues, the WTO judiciary does not apply a cost-benefit balancing test when it examines necessity under Arts XX GATT and XIV GATS: Regan, *supra* note 43.

render a measure proportionate in the EC context: first, the suitability requirement, which examines whether the measure is *suitable* to attain the Member's desired objective or the level of protection (causal relationship);[136] and, secondly, the necessity requirement, which examines whether the measure is *necessary* for the achievement of a given objective.

As the ECJ often does *not* have recourse to the third requirement of the proportionality test (*stricto sensu* proportionate) in order to consider a measure proportionate, the differences between the tests that the EC and the WTO judiciaries apply are not so intractable. Of course, this by no means implies that the proportionality test as applied by the ECJ can be transposed to the WTO legal order. Again, the means–ends test is inherent in both tests, and so is balancing.[137] Cost–benefit analysis, on the other hand, is arguably included in the *stricto sensu* proportionality.[138] However, it is difficult for an international court to undertake such a primarily *quantitative* analysis, first, because of the absence of legitimacy, but, more fundamentally, because of the lack of factual information. In this regard, it is worth noting that in many cases the ECJ, although it has sufficient legitimacy, exercises judicial self-restraint and leaves the final decision on whether the measure satisfies the proportionality standard to the national court. Before doing this, however, the ECJ will provide the national court with some guidelines.[139]

5 *Burdensomeness vs. Trade-restrictiveness*

This issue arose early in the WPDR discussions, and Members appear to agree that these concepts have practically the same meaning.[140] This approach is perhaps convenient from a negotiator's viewpoint, but does not seem to derive from the Article VI(4) text itself. This provision seems to suggest a two-fold task for the WPDR, one under the *chapeau* and another under the body of the provision: first, Members are to ensure that measures relating to QRP, LRP, and TS do not constitute *unnecessary* trade barriers. This is the ultimate objective of the Article VI(4) work programme. Secondly, the disciplines that Members are called upon to develop must ensure that such measures are not more *burdensome* than necessary to ensure the quality of the service (and, arguably, of the service supplier). The accountancy disciplines replaced this with the phrase 'not more trade-restrictive than necessary to fulfil a legitimate objective', thereby adopting TBT-type language. In paragraph (15) of the disciplines, however, Members are required to make sure that application procedures and the

[136] Cf. Appellate Body Report, *Mexico – Soft Drinks*, *supra* note 29, at para. 74.

[137] For a different approach advocating a flexible use of balancing and proportionality see Andenas and Zleptnig, *supra* note 104, at 415–416.

[138] See also Trachtman, 'Negotiations on Domestic Regulation and Trade in Services (Article VI GATS): A Legal Analysis of Selected Current Issues', in E.-U. Petersmann (ed.), *Reforming the World Trading System – Legitimacy, Efficiency, and Democratic Governance* (2005), at 205, 216.

[139] For instance, see Case C–368/95, *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v. Heinrich Bauer Verlag* [1997] ECR I–3689.

[140] WTO (WPDR), 'Domestic Regulation: Necessity and Transparency', Communication from the European Communities and their Member States, S/WPDR/W/14, 2001, at para. 17; also Leebron, *supra* note 118, at 52.

related documentation are not more *burdensome* than necessary to ensure that applicants fulfil qualification and licensing requirements, and that the establishment of the authenticity of documents be sought through the least *burdensome* procedure. Then, following an interpretation that is faithful to the texts of Article VI(4) and the accountancy disciplines, trade-restrictiveness and burdensomeness can be construed to mean different things.[141]

There are two possibilities for overcoming this interpretative conundrum.[142] The *first* would advocate that, while trade-restrictiveness is not mentioned in Article VI(4), the objective of a prospective necessity test is to discipline measures relating to LRPs, QRPs, and TS so that they do not create unnecessary *trade* barriers.[143] Therefore, only the existence of an unnecessary trade-restrictive measure could give rise to a successful complaint before the WTO adjudicating bodies. The mere argument that a measure is inefficient or over-burdensome, while *not* restrictive of trade, would not be sufficient to challenge a measure under Article VI(4) and the nascent disciplines thereunder. The *second* possibility would be to stick to the text and suggest that a prospective necessity test should consist of two subsets: an external and an internal layer of judicial review. First, the adjudicating bodies will examine whether the measure at issue (relating to licensing, qualifications, or technical standards) unnecessarily hampers trade in services. If so, under the internal layer, judicial scrutiny would then focus on the burdensomeness of the measure *vis-à-vis* the legitimate objective that it seeks to pursue, e.g., ensuring the quality of the service. If, however, a given measure is found not to be more trade-restrictive than necessary, would the adjudicating bodies have the right to outlaw such a measure on the basis that it was unduly burdensome? If so, this would mean that in the *absence* of a trade restriction the WTO adjudicating bodies would still have a say in unduly *burdensome* regulations. A similar interpretation would surely undermine the regulatory sovereignty of the Members. In practice, in the WPDR discussions, Members use the two terms interchangeably.[144]

Drawing on relevant jurisprudence and several regional lessons, this section identified key elements and concepts that could be relevant for the creation of an effective necessity test aimed at disciplining the trade-inhibitory effects of non-discriminatory domestic regulations in services. No doubt, legal drafting and judicial rulings already present in other WTO Agreements, such as the TBT, the SPS, and the GATT, as well as the draft accountancy disciplines under the GATS and the EU experience, can all inform the development of a horizontally applicable necessity test pursuant to Article VI(4) GATS. Importantly, the choice of wordings similar to those used in other WTO Agreements, especially in the TBT or the SPS, will also be conducive to similar interpretations of the

[141] See also WTO (WPDR), *supra* note 18, at 10.

[142] For an alternative view see Krajewski, 'Article VI of the GATS', in R. Wolfrum, P.-T. Stoll, and C. Feinäugle (eds), *Max Planck Commentaries on World Trade Law – Volume 6: Trade in Services* (2008).

[143] See also M. Krajewski, *National Regulation and Trade Liberalization in Services – The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* (2003), at 142.

[144] *Inter alia*, WTO (WPDR), 'Report of the Meeting Held on 7 and 18 February 2005', S/WPDR/M/29, 2005, at para. 112.

necessity requirement, bringing a considerable degree of coherence, legal certainty, and textual uniformity. Of course, Members could add to these concepts the clarifications that they deem apposite in the case of services trade and thus reduce the probability of judicial activism.[145]

6 Proposals for a Necessity Test Under Article VI(4) GATS

Because Article VI(4) can be likened to a potentially powerful positive-integration-type provision, the completion of the Article VI(4) mandate may contribute to greater regulatory co-operation and convergence, and/or pressures towards harmonization and recognition of domestic regulations dealing with licensing, qualifications, or technical standards.[146] Although this is not going to occur in the near future, it fuels caution and wariness on the part of regulators in capitals and negotiators in Geneva. After a critical review of the proposals submitted to date to the WPDR and which advocate a horizontal necessity test,[147] this section will explore a number of related questions and concerns, both services-inherent and political.

A *Untangling the Proposals Advocating a Horizontal Necessity Test*

Seven communications have so far been submitted to the WPDR proposing a horizontal necessity test covering the five types of measures identified under the Article VI(4) *chapeau*.[148] Recently, the WPDR Chairman circulated the first consolidated draft text on possible regulatory disciplines under Article VI(4). This documents draws on the proposals analysed below.[149]

1 Proposal Submitted by Australia[150]

Australia was the first to propose a horizontal necessity test modelled on Article 5(6) SPS and footnote 3 thereto. According to Australia, 'a measure is not more trade-restrictive than required unless there is another measure, *reasonably available* taking into account *technical* and *economic feasibility*, that achieves a *legitimate* policy objective and is *significantly* less restrictive to trade' (emphasis added). A TBT-type test, according to Australia, would not be an appropriate solution, as the concepts in the SPS test are more germane to services. Furthermore, inspired by the accountancy disciplines, Australia favoured the introduction of an illustrative list of legitimate objectives which

[145] Just as was done in the SPS Agreement by incorporating footnote 3 to Art. 5(6).

[146] The necessity test is indeed a form of 'forced recognition': Productivity Commission and Australian National University, *Achieving Better Regulation of Services, Conference Proceedings* (2000), at 56.

[147] There have also been proposals for introducing a necessity test with respect to a *specific* category of Art. VI(4) measures, e.g., on licensing procedures (EC), on qualification requirements and procedures (Chile *et al.*), or even on technical standards (Switzerland). Such proposals are beyond the scope of this article.

[148] See also Table 2.

[149] WPDR, 'Disciplines on Domestic Regulation Pursuant to GATS Article VI:4 – Consolidated Working Paper', JOB(06)/225, 2006.

[150] WTO (WPDR), *supra* note 118, at para. 5; and WTO (WPDR), 'Necessity and Transparency', Communication from Australia, S/WPDR/W/8, 2000, at paras 4–5.

could include the protection of consumers, the quality of the service, professional competence, the integrity of the profession, and administrative efficiency and fairness.

2 Proposal Submitted by Korea[151]

Korea's proposal also had some elements originating in the SPS relevant provisions. Korea suggested the following wording: 'Members shall ensure that such measures are not more restrictive to trade in services than necessary to achieve a legitimate policy objective [as specified herein]. [For this purpose,] a measure is deemed not more trade restrictive than necessary, unless there is another less restrictive measure reasonably available taking into account technical and economic feasibility'. This wording embraces the so-called 'third aspect' as well as the relevant GATT/WTO jurisprudence.

3 Proposal Submitted by the EC[152]

The EC proposal did not include any specific wording, but it emphasized the importance of having a horizontal necessity test and a definition of necessity that could be valid regardless of services sector, and identified several important features that the necessity test should encompass. In the EC's view, a measure that is not the least trade-restrictive but is *proportionate* to the objective stated and pursued should still be regarded as necessary. According to the EC, the validity of, rationale for, or appropriateness of any policy objective cannot be questioned by the WTO judiciary. The proposed proportionality test would incorporate several concepts to be found in other WTO Agreements, such as the technical and economic feasibility and the risks that non-fulfilment would create, but also the level of development of a given Member, or the specificities of the sector at stake. It would not, however, be the same as the far-reaching proportionality test applied by the ECJ.[153]

4 Proposal Submitted by Japan[154]

Japan was the first Member to advance a comprehensive draft text that spelled out rules on all five categories of Article VI(4) measures. The Japanese proposal elaborated on the accountancy disciplines and adopted the form of an Annex, which would ideally become part of the GATS pursuant to Article XXIX GATS. Paragraph (6) of this proposal reads:

> Each Member shall ensure, in sectors where specific commitments are undertaken, that measures *of general application* relating to licensing requirements and procedures, qualification requirements and procedures as well as technical standards are not prepared, adopted or applied *with a view to* or *with the effect of* creating *unnecessary* barriers to trade in services. For this purpose, each Member shall ensure that such measures are *not more burdensome than necessary* in order to fulfil *its national policy objectives*. [Emphasis added]

This necessity test is conditional on the existence of specific commitments in a given services sector. Japan's proposed necessity test, while mirroring in some respects the

[151] WTO (WPDR), 'The Necessity Test', Communication from the Republic of Korea, S/WPDR/W/9, 2000.
[152] WTO (WPDR), *supra* note 140.
[153] WTO (WPDR), 'Report on the Meeting Held on 3 July 2001', S/WPDR/M/12, 2001, at para. 52.
[154] WPDR, 'Draft Annex on Domestic Regulation', Communication from Japan, JOB(03)/45, and Rev.1, 2003.

necessity test laid down in the accountancy disciplines, also differs from it in several important ways: first, it applies to measures of general application. Hence, it also covers measures that are subject to scheduling under Articles XVI and XVII. Arguably, this implies that the regulatory aspects and the administration of these measures will be judged against Article VI(4) future disciplines. Secondly, Japan does not deem it necessary to establish a list of legitimate objectives. All national policy objectives are *de facto* legitimate and their legitimacy should not be scrutinized by the adjudicating bodies, but only the instruments that a Member employs in order to attain them.[155]

5 *Proposal Submitted by Switzerland*[156]

The Swiss proposal appears to encompass two necessity tests. The first reproduces the wording of Article VI(4) and informs the entirety of the proposed horizontal disciplines that follow.[157] Indeed, this provision reflects the *objective* of the disciplines. Nevertheless, the Article VI(4) criteria become concrete in paragraph (10), which embodies the main necessity test of this proposal:

> Members agree to ensure that measures *of general application* relating to licensing requirements and procedures, qualification requirements and procedures as well as technical standards are *not more trade-restrictive than necessary* to fulfil a *national policy objective, taking account of the risks non-fulfilment would create*. Bearing in mind that nothing shall prevent a Member from availing of the rights granted under XIV, XIVbis, such national policy objectives are, *inter alia*: the access to essential services; the quality of the service; professional competence; or the integrity of the profession. Requirements shall be based on objective and transparent criteria. [Emphasis added]

As in the Japanese proposal, the disciplines proffered by Switzerland would equally apply to measures subject to scheduling. It also adopts the language used by Japan, in preferring the term '*national* policy objective' to the term '*legitimate* objective'. In fact, the former is to be found in the GATS Preamble, and hence may be considered more 'GATS-specific' than the latter. The Swiss proposal, contrary to that submitted by Australia, considers the TBT-type wording more suitable and adds the risks of non-fulfilment of a given objective to the elements that the adjudicating bodies should consider in their judicial scrutiny. Finally, it incorporates an open-ended list of objectives that may be relevant, such as access to essential services or the integrity of the profession.

6 *Proposal Submitted by Brazil* et al.[158]

Brazil *et al.* recently submitted a proposal also embodying a horizontal necessity test. This test echoes Article VI(4) criteria by providing that:

> Each Member shall ensure that measures relating to licensing requirements and procedures, qualification requirements and procedures and technical standards are: (i) based on objective and transparent criteria, such as competence and the ability to supply the service; (ii) not more

[155] WTO (WPDR), 'Report on the Meeting Held on 31 March 2004', S/WPDR/M/25, 2004, at para. 66.

[156] WPDR, 'Initial Elements for Modalities for Negotiations on Disciplines on Domestic Regulation', Communication from Switzerland, JOB(05)/68, 2005.

[157] *Ibid.*, at para. 5.

[158] WPDR, 'Elements for Draft Disciplines on Domestic Regulation', Communication from Brazil, Colombia, Dominican Republic, Indonesia, Peru and the Philippines, JOB(06)/34, 2006.

> *burdensome* than necessary to meet *national policy* objectives; and (iii) in the case of *qualification* and licensing procedures, not in themselves a restriction on the supply of the service. [Emphasis added]

In this case, too, the horizontal necessity test would apply only to committed sectors. The proponents of this proposal also prefer the terms 'burdensome' and 'national policy objectives' to 'trade-restrictive' and 'legitimate objectives', respectively, like in this respect the Japanese proposal. The innovative feature of this test (representing a view now shared by most Members) is that it adds the qualification procedures in Article VI(4)(c). Indeed, introducing such an obligation to the disciplines is in the interest of those service suppliers aiming to provide their services in a foreign market. This obligation can be an important step towards further liberalization in mode 4 notably with respect to professional services.

It should be noted that the proponents submitted a revision of their proposal in May 2006 (presented by Brazil and Philippines) from which the necessity test had been removed. They justified their decision by arguing that while Article VI(4), accompanied by the criteria, contains the mandate and the aims of the negotiations, there is no actual requirement or legal obligation to translate the necessity test laid down therein into any regulatory disciplines. In a proposal submitted at the same time, the ACP Group also expressed its disagreement with the inclusion of a necessity test in the future disciplines because it would endanger its domestic regulatory prerogatives.[159] Other Members, however, insist that without a necessity test, the Article VI(4) mandate is not fulfilled. The latter approach appears to be in line not only with the text of Article VI(4), but also with the early negotiating history of the discussions on domestic regulation.

7 Proposal Submitted by Australia et al.[160]

This is the most recent and probably most comprehensive proposal to date. As in the majority of the proposals submitted, the proponents clarify that these disciplines are applicable to measures in committed sectors. Furthermore, these disciplines codify the WPDR discussions on the issue of scope by making it clear that the disciplines, although not applicable to limitations subject to scheduling under Articles XVI and XVII, cover all measures *administering* such limitations and relating to LRP, QRP, and TS. The test that they put forward underscores the general objective that the prospective disciplines should serve and essentially transforms the Article VI(4) wording into a legal obligation by stating:

> The purpose of these disciplines is to facilitate trade in services by ensuring that measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards do not constitute *unnecessary* barriers to trade in services. In applying these disciplines, Members shall have regard to the objectives of Article VI:4 of the GATS. In

[159] WPDR, 'Pro Development Principles for GATS Article VI:4 Negotiations', Communication from the ACP Group, JOB(06)136, 2006.

[160] WPDR, 'Article VI:4 Disciplines – Proposal for a Draft Text', Communication from Australia, Chile, Colombia, Hong Kong, China, Korea, New Zealand, and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu, JOB(06)/193, 2006.

> this regard, these disciplines aim to ensure that such measures are (a) based on objective and transparent criteria, such as competence and the ability to supply the service; (b) not more *burdensome* than necessary to meet *specific national policy* objectives *including* to ensure the quality of the service; and (c) in the case of licensing and *qualification* procedures, not in themselves a restriction on the supply of the service. [Emphasis added]

Additionally, Members are required, when preparing or applying Article VI(4) measures, to ensure that these measures 'are not formulated, introduced, implemented, administered or applied *with a view* to creating unnecessary barriers to trade in services'.[161] In derogation from the accountancy disciplines and the Japanese proposal, it is only the protectionist *intent* that should be condemned under this provision. Such an intent can be traced at any stage before the adoption of a given measure. It follows that an Article VI(4) measure that would generate a similar *effect* would fall outside the scope of this obligation.

The proposed necessity test includes an open-ended list of objectives. In addition, the objectives have to be specific. Arguably, the rationale behind an Article VI(4) measure should be easily identifiable. This necessity test also seeks to ensure that none of the procedural rules relating to licensing or qualifications are in themselves a restriction on the supply of a given service. The originality of this proposal is that it introduces a generally applicable necessity test and then, for each separate category of Article VI(4) measures, provides a category-specific necessity test. In the case of technical standards, for instance, it provides for a TBT-type necessity test. This means that the general necessity test is likely to remain out of judicial reach. This is because a measure that would fall within the ambit of these disciplines will always be in one of the categories mentioned in Article VI(4). Thus, logically, this measure will be scrutinized pursuant to the category-specific necessity test rather than the general one. However, the latter serves as a yardstick or a guideline to remind regulators and adjudicators that necessity is a concept that they should take into account.

B *Common Ground among the Proposals*

Several findings are apparent from these proposals. First, Members appear increasingly to be in agreement that the future disciplines will apply only to committed sectors. Nevertheless, this is in sharp contrast to the text of Article VI(4), which, unlike paragraphs (1), (3), (5), and (6) of Article VI, does not include a similar qualification. Members disregarded this in the case of accountancy, and it seems that they will repeat this error here. Another element that emerges is that Members prefer an indicative list of national policy objectives, the legitimacy of which should not be questioned. This list may include the quality of the service as an *example* of objectives of this kind. An interesting element is also that there will definitely be derogations/transitional periods/sunset provisions, or, alternatively, best-endeavours language for the LDCs and perhaps for the developing countries as well, depending on the level of development of their services sectors. Best-endeavour language may also be used in specific

[161] This two-pronged approach was also followed by the WPDR Chairman in his proposed draft text: WPDR, *supra* note 149, at paras A.3 and C.1.

provisions such as those relating to sophisticated transparency disciplines (prior comment mechanisms, etc.).

7 Services-inherent and Political Concerns Relating to the Adoption of a Horizontal Necessity Test

A services-inherent concern at the beginning of the services negotiations was whether the creation of a horizontally applicable necessity test was feasible, given the extensive sectoral diversity. However, given that the reasons for regulating, e.g., market failures, externalities, abuse of market power, or information asymmetries, are similar whatever the services sector, a horizontal approach makes sense. Besides, Members never ruled out the possibility of developing sector-specific disciplines. In fact, the two approaches are considered to be reinforcing and complementary. Of course, in a horizontal approach there is always a risk of not bringing the negotiations to a close because of the number of substantial issues that have to be addressed. Nevertheless, the proposals analysed above demonstrate that a horizontal approach can bring satisfactory results. In addition, in negotiations of such magnitude, the mutual interests are more easily identifiable. For instance, objective, transparent, and least trade-restrictive licensing and qualification requirements and procedures have obvious implications for modes 3 and 4. Under the current WPDR negotiations, Members have demonstrated in essence their willingness to conclude their discussions with the creation of horizontal disciplines, no matter how unsatisfactory these disciplines may be at the end of this Round due to possible derogations or transitional periods, or because of the weak 'bite' of the disciplines. Hence, the momentum for creating horizontal disciplines under Article VI(4) is considerable and, for many, a necessity test should form part of such disciplines.

Furthermore, the quality of the outcome of the WPDR negotiations will depend on the degree of involvement of national regulators in the negotiations. To date, the involvement of national regulators has been marginal.[162] As the time for the creation of a draft text approaches, national regulators start to become more active in the drafting of specific disciplines on licensing, qualifications, or standards in the proposals submitted to the WPDR. Their growing involvement will greatly enhance the quality and enforceability of the final text.

Another services-inherent concern that may protract negotiations or affect their outcome is the absence of international standards. International standards could constitute a yardstick against which the necessity of a given measure could be tested. Arguably, an abundance of international standards would allow the introduction of a TBT/SPS-like rebuttable presumption of necessity for those measures that conform

[162] This lack of involvement also touches countries that have the means to cope with the demanding negotiating burden. See also Sauvé, 'Been There, Not [Quite] [Yet] Done That: Lessons and Challenges in Services Trade', in M. Panizzon, N. Pohl, and P. Sauvé (eds), *GATS and the Regulation of International Trade in Services* (2008), at 599.

to these standards.[163] Theoretically, such a presumption would facilitate the task of the adjudicating bodies by making their judgments more informed and objective. In practice, however, the manner in which some of the standard-setting bodies operate makes this assumption problematic. Experience shows that there have been standards that benefit from the TBT/SPS-like presumption and which have not been adopted by consensus. Sometimes, they do not even reflect the views of the majority in the standard-setting body.[164] Another issue is that it may be erroneous to allow *voluntary* standards to benefit from this presumption because it distorts preferences and, in the long run, transforms such standards into *de facto* mandatory ones, as countries are willing to adopt them in order to avoid litigation. This could even lead to a race to the bottom in the case of countries that had initially opted for a higher level of protection. For these reasons, the question whether the absence of international standards may have a negative influence on the effectiveness of a horizontal necessity test cannot be answered straightforwardly.

As regards the political concerns, one could first refer to the leeway that the adjudicating bodies should be allowed when interpreting the suggested necessity test. Based on the earlier analysis of the proposals, one can infer that guidance to the WTO judiciary on how it should construe numerous concepts, such as necessity, burdensomeness, trade-restrictiveness, professional competence, or quality of the service, is insignificant. This could mean that Members feel comfortable with the interpretations that the adjudicating bodies advanced when dealing with similar concepts in other WTO Agreements. Alternatively, this might imply that Members could not be more specific without jeopardizing the effectiveness of a necessity test destined to apply horizontally. Or, perhaps, that Members could not agree on more specific provisions, for instance on a provision similar to footnote 3 to Article 5(6) SPS, and hence this was the only way in which to avoid the deadlock and, *a fortiori*, the incremental transaction costs.

Nonetheless, the most important challenge that the proponents of a necessity test for services face is to reassure those Members that oppose the adoption of a horizontal necessity test on the ground that it curtails their flexibility in regulating domestic services industries. Indeed, such a test has been anathema to several Members and NGOs. The fear of an abstract loss of regulatory sovereignty appears time and again and delays the adoption of meaningful disciplines. This occurs despite the numerous assurances in Members' proposals or during the WPDR discussions that Members' right to regulate, including the right to introduce or to maintain regulations that aim to ensure the fulfilment of national policy objectives, and to adopt certain regulatory approaches or regulatory provisions cannot be limited by the necessity test in any way.[165] After all, similar necessity tests are also present in other WTO Agreements, and the experience from the case law demonstrates that this right has been adequately preserved.

[163] Even with the current scarcity of international standards in services, there are RIAs that introduce a similar presumption. For instance, Arts 28(6) EFTA-Singapore FTA, 28(6) EFTA-Chile FTA, and 21(4) NZ-Singapore Closer Economic Partnership Agreement.

[164] Delimatsis, *supra* note 121, at 126.

[165] See also Mattoo, 'Services in a Development Round: Three Goals and Three Proposals', 39 *J World Trade* (2005) 1223, at 1229.

A necessity test is crucial for effective and operationally useful disciplines under Article VI(4). This view is notably corroborated by the proposal submitted by Australia *et al.* Necessity tests are envisaged for all categories of measures, simply because a criterion or benchmark is needed against which the future disciplines should be judged. This is true wherever a necessity test exists. In other words, some kind of necessity test will inevitably be part of the final outcome of the WPDR negotiations.[166] Therefore, it is in the interests of the Members to clarify the content of a prospective horizontal necessity test rather than entrust the interpretation of ambiguous wording to the WTO judiciary and its judicial creativity.

To allay the worries that are expressed by developing countries or LDCs, Members could allow for derogations that would apply to the developing country Members for a certain period. An additional safeguard in this respect is the decision to apply the future disciplines only to committed sectors. Hence, when a Member decides to liberalize a sector, it should be aware that this sector is also covered by a necessity test for those measures that relate to licensing, qualifications, or technical standards. While the wording of Article VI(4) seems to call for an application of the prospective disciplines *regardless* of commitments made, the conditional application of a horizontal necessity test may be a crucial element for its political acceptance.

Of course, developed countries may also oppose a necessity test. Discussions in the WPDR have, for instance, revealed the considerable reluctance of the United States' government, and of its powerful domestic regulatory agencies, to contemplate the adoption of a necessity test under the GATS that might subject sovereign non-discriminatory regulatory conduct to a trade or market-access test.[167] This is somewhat paradoxical for a country with such a long tradition of applying cost–benefit analysis in its domestic jurisdiction, the goods producers of which are already subject to a necessity test under TBT and SPS, and the services industry of which is the world's most internationalized, and hence the most likely to suffer from unduly burdensome regulatory conduct overseas. To date, the United States' government has argued in favour of a strengthening of the GATS transparency disciplines rather than developing a horizontal necessity test, and has advanced proposals on such disciplines.[168] Nevertheless, the United States would not mind agreeing on a horizontal necessity test in the final outcome of the WPDR negotiations on condition that its proposal for horizontal transparency disciplines finds acceptance among Members. From a public-interest point of view, a trade-off between necessity and transparency would appear a highly desirable solution for enhancing the GATS. Such a combination would arguably help to improve the quality of domestic rule-making in both substantive and procedural

[166] In this direction see WPDR, *supra* note 149.

[167] WPDR, 'Outline of US Position on a Draft Consolidated Text in the WPDR', Communication from the United States, JOB(06)/223, 2006, at para. 3; see also Sinclair, 'Crunch Time in Geneva – Benchmarks, Plurilaterals, Domestic Regulation and other Pressure Tactics in the GATS Negotiations', Canadian Centre for Policy Alternatives (2006), at 18.

[168] The most recent version of the US' proposal is contained in WPDR, 'Horizontal Transparency Disciplines in Domestic Regulation', Communication from the United States, JOB(06)/182, 2006.

terms. Transparency, together with necessity, can indeed be expected to reduce the trade-restrictiveness and burdensomeness of regulatory measures by increasing accountability, predictability, and legal certainty, while also reducing protectionist bias, regulatory capture, and similar 'siren calls'.

Finally, an important element that may affect the final effectiveness of the future disciplines is their legal status. The most suitable option appears to be the creation of an Annex on Domestic Regulation, as first proposed by Japan. By virtue of Article XXIX GATS, then, the disciplines would become an integral part of the GATS. Another option would be to create a reference paper. In this case, no consensus would be required, but Members would be requested to list the disciplines in the form of additional commitments in their schedules. Nevertheless, this option would involve request–offer-type negotiations.[169]

8 Conclusions

This article has discussed issues of legal interpretation, political realism, and intense bargaining associated with the fulfilment of the Article VI(4) legal mandate. The creation of a horizontal necessity test is the nucleus of this mandate. Whereas necessity has made a long journey through the GATT/WTO history, it remains a highly controversial concept, and understandably so, as it touches upon regulatory sovereignty and questions its rationale *vis-à-vis* trade liberalization.

This article aspired to come to grips with theoretical and practical issues associated with the possible creation of a horizontal necessity test. It was pointed out that several interpretations made by the adjudicating bodies relating to the necessity tests embodied in other WTO Agreements or in RIAs (notably the proportionality test and its interpretation by the ECJ) can be helpful in clarifying similar notions under Article VI(4). Essential elements of any of the necessity tests set out in numerous WTO Agreements, such as the less/least trade-restrictiveness, balancing, means–ends test, and comparison between alternatives and reasonable availability, are not Agreement-specific.

Members should seek the creation of a horizontal necessity test that will build on these concepts and be flexible enough to encompass several qualifications, thereby allaying Members' worries as regards the preservation of their regulatory autonomy. For instance, Members should consider the *de minimis* requirement laid down in Article 5(6) SPS with respect to the possible alternative measures that could outlaw the measure at hand. Equally interesting for the WPDR negotiations could be the TBT language. However, a necessity test that covers measures having the *effect* of unnecessarily restricting trade has few chances of acceptance at a horizontal level. Such coverage can be accepted more easily at a sectoral level, as the accountancy disciplines demonstrated. In more general terms, qualifications that allow a margin of appreciation

[169] For instance, the regulatory disciplines of the Reference Paper on Telecommunications were negotiated as additional commitments under this provision and Members inscribed them under the Additional Commitments column in their Schedules of Commitments.

and room for manoeuvre to national regulatory authorities should form part of a prospective horizontal necessity test. Provisions that lay down transitional periods for the application of the necessity test to developing countries and LDCs depending on the level of development of their service sector are equally crucial for the overall acceptance of the future Article VI(4) disciplines.

The creation of a horizontal necessity test as part of the Article VI(4) prospective horizontal disciplines is both feasible and essential. Not only because, if no necessity test is created by the end of this Round, Members will not have fulfilled the mandate prescribed in Article VI(4), but also because the absence of a necessity test would effectively render the new disciplines valueless, for no benchmark will be available to the WTO judiciary against which to judge the challenged measures. This would mean that several regulatory barriers that significantly hinder trade in services will remain unaddressed. This would be in sharp contradiction to the approach adopted in Articles 2(2) TBT and 5(6) SPS. Arguably, it would also create a certain imbalance between Members' stance *vis-à-vis* regulatory barriers in goods and those in services. Operational regulatory disciplines under Article VI(4) that embody a necessity test are in the interests of all Members.

Table 1. Horizontal necessity tests in RIAs

NAFTA Art. 1210	Canada – Chile Free Trade Agreement Art. H-10	Chile – Mexico Free Trade Agreement Art. 10–12	New Zealand – Singapore Closer Economic Partnership Agreement Art. 21	Central America – Chile Free Trade Agreement Art. 11.07	Japan – Singapore Free Trade Agreement Art. 64	EFTA – Singapore Free Trade Agreement Art. 28:4,5,6	Singapore – Australia Free Trade Agreement Art. 11	MERCOSUR Art. X
With a view to ensuring that any measure adopted or maintained by a Party **relating to the licensing or certification of nationals of another Party** does not constitute an unnecessary barrier to trade, each Party shall *endeavour* to ensure that any such measure: (a) is based on objective and transparent	1. With a view to ensuring that any measure adopted or maintained by a Party **relating to the licensing or certification of nationals of the other Party** does not constitute an unnecessary barrier to trade, each Party shall endeavour to ensure that any such measure: (a) is based on objective and transparent. criteria, such as competence and the ability to provide a service;	1. With a view to ensuring that any measure adopted or maintained by a Party **relating to the licensing or certification of nationals of the other Party** does not constitute an unnecessary barrier to trade, each Party shall endeavour to ensure that any such measure: (a) is based on objective and transparent. criteria, such as competence and the ability to	2. The Parties shall jointly review the results of the negotiations on disciplines for certain regulations, including qualification requirements and procedures, technical standards, and licensing requirements, pursuant to Article VI(4) of the General Agreement on Trade in Services (GATS) with a view to their incorporation into this Agreement. The Parties note that such disciplines aim to ensure that such requirements are, *inter alia*: (a) based on objective and transparent criteria, such as competence and the ability to supply the service; (b) not more burdensome than necessary to ensure the	For the purpose of ensuring that any measure that a Party adopts or maintains **in relation to the requirements and procedures for granting permits, authorizations, licences and certificates to nationals of another Party** does not constitute an unnecessary barrier to trade, each Party shall endeavour to ensure that such measures: (a) are based on objective and transparent criteria, such as the capacity and	In sectors where a Party has undertaken specific commitments subject to any terms, limitations, conditions, or qualifications set out therein, the Party shall not apply **licensing and qualification requirements and technical standards** that nullify or impair such specific commitments in a manner which: (i) does not comply with the following criteria:	4. The Parties shall jointly review the results of the negotiations on disciplines for certain regulations, including qualification requirements and procedures, technical standards, and licensing requirements, pursuant to Article VI(4) of the GATS, with a view to their incorporation into this Agreement. The Parties note that such disciplines aim to ensure that such requirements are *inter alia*: (a) based on objective and transparent criteria, such as competence and the ability to supply the service; (b) not more burdensome than necessary to ensure the quality of the service; (c) in the case of licensing procedures,	5. With the objective of ensuring that domestic regulation, **including measures relating to qualification requirements and procedures, technical standards, and licensing requirements,** do not constitute unnecessary barriers to trade in services, the Parties shall jointly review the results of the negotiations on disciplines on these measures, pursuant to Article VI(4) of the WTO General Agreement on Trade in Services (GATS), with a	4. With a view to ensuring that measures relating to technical standards, qualification requirements, and procedures, and licensing requirements do not constitute unnecessary barriers to trade in services, Parties shall ensure that such requirements and procedures, *inter alia*: (a) are based on objective and

Table 1. *Continued*

NAFTA Art. 1210	Canada – Chile Free Trade Agreement Art. H-10	Chile – Mexico Free Trade Agreement Art. 10–12	New Zealand – Singapore Closer Economic Partnership Agreement Art. 21	Central America – Chile Free Trade Agreement Art. 11.07	Japan – Singapore Free Trade Agreement Art. 64	EFTA – Singapore Free Trade Agreement Art. 28:4,5,6	Singapore – Australia Free Trade Agreement Art. 11	MERCOSUR Art. X
criteria, such as competence and the ability to provide a service; (b) is not more burdensome than necessary to ensure the quality of a service; and (c) does not constitute a disguised restriction on the cross-border provision of a service.	(b) is not more burdensome than necessary to ensure the quality of a service; and (c) does not constitute a disguised restriction on the cross-border provision of a service.	provide a service; (b) is not more burdensome than necessary to ensure the quality of a service; and (c) does not constitute a disguised restriction on the cross-border provision of a service.	quality of the service; (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service. 3. Until the incorporation of disciplines developed pursuant to paragraph (2), in sectors where a Party has undertaken specific commitments, and subject to any terms, limitations, conditions, or qualifications set out therein, a Party shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which: (i) does not comply with the criteria outlined in	ability to provide a cross-border service; (b) are not more burdensome than necessary to ensure the quality of a cross-border service; and (c) do not constitute a disguised restriction on the provision of a cross-border service.	(a) based on objective and transparent criteria, such as competence and the ability to supply the service; (b) not more burdensome than necessary to ensure the quality of the service; or (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service; and (ii) could not reasonably have been expected of	not in themselves a restriction on the supply of the service. 5. In sectors where a Party has undertaken specific commitments, subject to any terms, limitations, conditions, or qualifications set out therein, pending the incorporation of disciplines developed pursuant to paragraph (4), a Party shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which: (i) does not comply with the criteria outlined in paragraph (4)(a), (b), or (c) and (ii) could not reasonably have been expected of that Party at the time	view to their incorporation into this Agreement. The Parties note that such disciplines aim to ensure that such requirements are *inter alia*: (a) based on objective and transparent criteria, such as competence and the ability to supply the service; (b) not more burdensome than necessary to ensure the quality of the service; (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service. Pending	transparent criteria, such as competence and the ability to provide a service; (b) are not more burdensome than necessary to ensure the quality of a service; and (c) in the case of licensing procedures, do not constitute a restriction on the provision of the service.

Table 1. *Continued*

NAFTA Art. 1210	Canada – Chile Free Trade Agreement Art. H-10	Chile – Mexico Free Trade Agreement Art. 10–12	New Zealand – Singapore Closer Economic Partnership Agreement Art. 21	Central America – Chile Free Trade Agreement Art. 11.07	Japan – Singapore Free Trade Agreement Art. 64	EFTA – Singapore Free Trade Agreement Art. 28:4,5,6	Singapore – Australia Free Trade Agreement Art. 11	MERCOSUR Art. X
			paragraph 2(a), (b), or (c); and (ii) could not reasonably have been expected of that Party at the time the specific commitments in those sectors were made. 4. Whenever a domestic regulation is prepared, adopted, and applied in accordance with international standards applied by both Parties, it shall be rebuttably presumed to comply with the provisions of this Article.		that Party at the time the specific commitments in those sectors were made.	the specific commitments in those sectors were made. 6. Whenever a domestic regulation is prepared, adopted, and applied in accordance with international standards of relevant international organizations applied by a Party, there shall be a rebuttable presumption that it complies with the provisions of this Article.	the incorporation of disciplines. pursuant to Article 11.5, a Party shall not apply licensing and qualification requirements and technical standards that nullify or impair its obligations under this Chapter in a manner which: (i) does not comply with the criteria outlined in Article 11.5(a), 11.5(b) or 11.5(c); and (ii) could not reasonably have been expected of that Party at the time the obligations were undertaken.	

Table 1. *Continued*

United States – Chile Free Trade Agreement Art. 11.8	United States – Singapore Free Trade Agreement Art. 8.8	Free Trade Agreement between the Republic of Korea and Chile Art. 11.10	Free Trade Agreement between the EFTA States and Chile Art. 28	United States – Australia Free Trade Agreement Art. 10.7	Panama – Central America Free Trade Agreement Art. 11.07	Japan – Mexico Economic Partnership Agreement Art. 104
2. With a view to ensuring that measures **relating to qualification requirements and procedures, technical standards, and licensing requirements** do not constitute unnecessary barriers to trade in services, each Party shall endeavour to ensure, as appropriate for individual sectors, that any such measures that it adopts or maintains are: (a) based on objective and transparent criteria, such as competence and the ability to supply the service; (b) not more burdensome than necessary to ensure the quality of the service; and	2. With a view to ensuring that measures **relating to qualification requirements and procedures, technical standards, and licensing requirements** do not constitute unnecessary barriers to trade in services, each Party shall *endeavour* to ensure, as appropriate for individual sectors, that such measures are: (a) based on objective and transparent criteria, such as competence and the ability to supply the service; (b) not more burdensome than necessary to ensure the quality of the service; and (c) in the case of licensing procedures, not in themselves	1. With a view to ensuring that any measure adopted or maintained by a Party **related to requirements and procedures to the licensing or certification of nationals of the other Party** does not constitute an unnecessary barrier to cross-border trade in services, each Party shall *endeavour* to ensure that any such measure: (a) is based on objective and transparent	4. The Parties shall jointly review the results of the negotiations on disciplines for measures **relating to qualification requirements and procedures, technical standards, and licensing requirements** pursuant to Article VI(4) of the GATS aiming to ensure that such measure do not constitute unnecessary barriers to trade in services, with a view to their incorporation into this Agreement. The Parties note that such disciplines aim to ensure that such requirements are, *inter alia*: (a) based on objective and transparent criteria, such as competence and the ability to supply the service; (b) not more burdensome than necessary to ensure the quality of the service; (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service. 5. In sectors in which a Party has undertaken specific commitments, until the incorporation of disciplines developed pursuant to paragraph	2. With a view to ensuring that measures **relating to qualification requirements and procedures, technical standards, and licensing requirements** do not constitute unnecessary barriers to trade in services, each Party shall endeavour to ensure, as appropriate for individual sectors, that such measures are: (a) based on objective and transparent criteria, such as competence and the ability to supply the service; (b) not more burdensome than necessary to ensure the quality of the service; and (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.	For the purpose of ensuring that any measure that a Party adopts or maintains **in relation to the requirements and procedures for granting permits, authorizations, licences, and certificates to nationals of the other Party** does not constitute an unnecessary barrier to cross-border services, each Party shall endeavour to ensure that such measures: (a) Are based on objective and transparent criteria, such as the capacity and ability to	1. With a view to ensuring that any measure adopted or maintained by a Party **relating to the licensing, certification, or technical standards of service suppliers of the other Party** does not constitute an unnecessary barrier to cross-border trade in services, each Party shall endeavour to ensure that such measure: (a) is based on objective and transparent criteria, such as competence and the ability to supply the

Table 1. *Continued*

United States – Chile Free Trade Agreement Art. 11.8	United States – Singapore Free Trade Agreement Art. 8.8	Free Trade Agreement between the Republic of Korea and Chile Art. 11.10	Free Trade Agreement between the EFTA States and Chile Art. 28	United States – Australia Free Trade Agreement Art. 10.7	Panama – Central America Free Trade Agreement Art. 11.07	Japan – Mexico Economic Partnership Agreement Art. 104
(c) in the case of licensing procedures, not in themselves a restriction on the supply of the service. 3. If the results of the negotiations related to Article VI(4) of GATS (or the results of any similar negotiations undertaken in other multilateral fora in which both Parties participate) enter into effect, this Article shall be amended, as appropriate, after consultations between the Parties, to bring those results into effect under this Agreement. The Parties agree to coordinate on such negotiations as appropriate.	a restriction on the supply of the service. 3. If the results of the negotiations related to Article VI(4) of GATS (or the results of any similar negotiations undertaken in other multilateral fora in which both Parties participate) enter into effect, this Article shall be amended, as appropriate, after consultations between the Parties, to bring those results into effect under this Agreement. The Parties agree to coordinate on such negotiations, as appropriate.	criteria, such as competence and the ability to provide a service; (b) is not more burdensome than necessary to ensure the quality of a service; and (c) does not constitute a disguised restriction on the cross-border provision of a service.	(4), a Party shall not apply licensing and qualification requirements and technical standards in a manner which: (i) does not comply with the criteria outlined in paragraph (4)(a), (b), or (c); and (ii) could not reasonably have been expected of that Party at the time of the conclusion of the negotiation of the present agreement. 6. Whenever a domestic regulation is prepared, adopted and applied in accordance with international standards applied by both Parties, it shall be rebuttably presumed to comply with the provisions of this Article.	3. If the results of the negotiations related to Article VI(4) of GATS (or the results of any similar negotiations undertaken in other multilateral fora in which both Parties participate) enter into effect, this Article shall be amended, as appropriate, after consultations between the Parties, to bring those results into effect under this Agreement. The Parties shall coordinate on such negotiations, as appropriate.	provide a cross-border service; (b) are not more burdensome than necessary to ensure the quality of a cross-border service; and (c) do not constitute a disguised restriction on the provision of a cross-border service.	services; (b) is not more burdensome than necessary to ensure the quality of the services; and (c) does not constitute a disguised restriction on the cross-border supply of the services.

Table 2. WPDR proposals for a horizontal necessity test

Australia	Korea	EC	Japan	Switzerland	Brazil; Colombia; Dominican Republic; Peru; Philippines	Australia; Chile; Colombia; Hong Kong, China; Korea; New Zealand; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu
A measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves a legitimate policy objective and is significantly less restrictive to trade.	Members shall ensure that such measures are not more restrictive to trade in services than necessary to achieve a legitimate policy objective [as specified herein]. [For this purpose,] a measure is deemed not more restrictive to trade in services than necessary, unless there is another less restrictive measure reasonably available	• A measure that is not the least trade restrictive to trade will not be considered more burdensome/ more trade restrictive than necessary so long as it is not disproportionate to the objective stated and pursued. • The concept of proportionality, were it to be applied in a discipline, would have to relate to the type of measure at stake. It would also have to take account of the technical and economic context, including the level of development of a Member, the specific nature of the sector in which the measure is used, and also of the risks that non-fulfilment would present. • The fact that one Member imposes stricter rules than another Member does not mean that the former's rules are disproportionate. Measures taken by a member which set stricter requirements than international standards shall not, *a priori*, be considered disproportionate. • There is justification for the view that measures by Members that implement international standards	Each Member shall ensure, in sectors where specific commitments are undertaken, that measures of general application relating to licensing requirements and procedures, qualification requirements and procedures, as well as technical standards are not prepared, adopted, or applied with a view to or with the effect of creating unnecessary barriers to trade in services. For this purpose, each Member	Members agree to ensure that measures of general application relating to licensing requirements and procedures, qualification requirements and procedures, as well as technical standards are not more trade-restrictive than necessary to fulfil a national policy objective, taking account of the risks non-fulfilment would create. Bearing in mind that nothing shall prevent a Member from availing of the rights granted under XIV, XIV*bis*, such national policy objectives are, *inter alia*:	Each Member shall ensure that measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards are: (i) based on objective and transparent criteria, such as competence and the ability to supply the service; (ii) not more burdensome than necessary to meet national policy objectives; and (iii) in the case of qualification and licensing procedures, not	The purpose of these disciplines is to facilitate trade in services by ensuring that measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards do not constitute unnecessary barriers to trade in services. In applying these disciplines, Members shall have regard to the objectives of Article VI(4) of the GATS. In this regard, these disciplines aim to ensure that such measures are (a) based on objective and transparent criteria, such as competence and the ability to supply the service; (b) not more burdensome than necessary to meet specific national policy objectives including to ensure the quality of the service; and (c) in the case of licensing and qualification procedures, not in themselves a restriction on the supply of the service. Members shall ensure that measures relating to licensing requirements and procedures, qualification requirements

Table 2. *Continued*

Australia	Korea	EC	Japan	Switzerland	Brazil; Colombia; Dominican Republic; Peru; Philippines	Australia; Chile; Colombia; Hong Kong, China; Korea; New Zealand; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu
	taking into account technical and economic feasibility.	of the relevant international organisations in the sense of footnote 3 of the GATS be deemed to be not more trade restrictive than necessary. However, there may be circumstances in which international standards play a different role, which would mean that such a conclusion could not necessarily automatically be drawn. Even where such an approach is justified, it should in no way imply an obligation of Members to implement international standards.	shall ensure that such measures are not more burdensome than necessary in order to fulfil its national policy objectives.	the access to essential services; the quality of the service; professional competence; or the integrity of the profession. Requirements shall be based on objective and transparent criteria.	in themselves a restriction on the supply of the service.	and procedures, and technical standards are not formulated, introduced, implemented, administered, or applied with a view to creating unnecessary barriers to trade in services.