

**ICRIER**

**GATS : Domestic Regulations versus  
Market Access**

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## Abstract

Services have emerged as the engine of growth and an important source of export revenue for a large number of economies in the developing world. Developing countries are increasingly appearing on the global economic map as cost efficient providers of key business and professional services which are crucial links in the services supply chain.

Access to developed country markets by means of a more liberalized services trade regime under WTO has the potential of exacting the maximum benefits from the ongoing Doha Round of trade negotiations. Despite ostensible openness through liberal commitments in GATS (General Agreement on Trade in Services) schedules, challenges for market access in developed countries lie in domestic regulatory requirements, often involving securing additional professional qualifications and licenses, local residence requirements, lack of recognition of degrees, which add significantly to costs of market access for developing country service providers.

The paper highlights the dilemma of developing countries in balancing market access interests with the right to regulate service providers, in light of the ongoing negotiations under Article VI:4 of GATS that aims to discipline the regulatory freedom of WTO Members. While regulation is an essential development tool and regulatory requirements ensure that domestic consumers get qualitatively the best services, the very same tools become insurmountable market access barriers for developing country service providers in the WTO regime of MFN.

This paper evaluates the key elements of the Article VI:4 disciplines, and by analysing the levels of regulatory development in developing countries vis-à-vis the service providers assesses how useful (if at all) would the proposed disciplines on domestic regulations (DR Disciplines) be in securing or easing market access problems of developing country professionals in the developed country markets. A case study of Indian Professional Service providers and their costs and benefits from stricter disciplines on domestic regulation was undertaken to reinforce the analytical exposition. The alternative being increased litigation to redress developing country concerns, it is critical that the Members weigh their options carefully before taking sides in the ongoing deliberations on DR Disciplines.

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**JEL Classification:** F13, K33

**Key Words:** GATS and Liberalization, Domestic Regulations, Professional Services

## Foreword

International trade in services is often hampered by non-tariff barriers that originate in national regulatory requirements for service firms or service providers. Since most service trade differs from manufacturing trade given its requirements of the direct interface between the service provider and the customer, meeting national regulations become mandatory and often involve additional costs for complying with market-entry norms. The service provider essentially has to decide whether or not to invest in such sunk costs that are often specific to individual markets. The inter-country differences in regulation in services therefore substantially add to this cost element, and could potentially negate market access that WTO Members negotiate under GATS schedules. The proposed Disciplines on Domestic Regulation under GATS are aimed at redressing the above and easing market entry for foreign service providers.

It is in this context that this paper evaluates the desirability and implementability of such Disciplines from the perspective of developing country Members of the WTO.

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# GATS : Domestic Regulations versus Market Access\*

## I. Introduction

The service sector today is the undoubted growth engine for most economies. In the developed countries, it contributes over 80 per cent of domestic GDP; even in the developing world, service sectors are contributing upwards of 50 per cent of GDP since the turn of the century. Developing countries have seen their service sector exports rise by over a factor of four during the last decade,<sup>1</sup> a pace that superseded growth in their merchandise exports, and which resulted in the shares of developing country service exports doubling between 1980 and 2005. Information available on trade in commercial services by country points to faster growth in commercial services trade in the Asian economies than in North American or European economies, though most developing countries continue to remain net importers of commercial services. In 2006, Asia's commercial services exports continued for the third consecutive year to expand faster than the global average and faster than the region's services imports, thereby reducing the region's deficit in services trade.<sup>2</sup>

World commercial services trade grew by 11 per cent in 2006 to \$2.71 trillion in 2006,<sup>3</sup> growing at the same rate as the year before. A significant portion of this explosion in trade in commercial services has been under cross-border trade (Mode 1, popularly known as outsourcing) and consumption abroad (Mode 2) categories. It must also be noted that, outward investment in services (Mode 3 trade in GATS parlance and which does not get accounted for in the IMF BOP commercial services trade statistics) has been on the rise in the last decade, and was at an estimated \$6.8 trillion in 2004 (as opposed to \$0.83 trillion outward investment stock in 1990, that is, an eightfold growth between 1990 and 2004), or 68.6 per cent of the world outward FDI stock. It is also interesting to note that more than 69 per cent of global outward FDI stock (2004) was in 'finance' and 'business activities', the two most prominent sub-sectors with significant outsourcing/off-shoring activities in recent times.<sup>4</sup> Despite this impressive growth however, since 2003, commercial services exports have expanded less rapidly than the merchandise trade, the dollar value of the latter growing by 15 per cent to \$11.76 trillion in 2006. Interestingly, services represent only 20 per cent of total world trade

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<sup>1</sup> Sauv  (2005)

<sup>2</sup> WTO (2006 b)

<sup>3</sup> Commercial services data are derived from the IMF Balance of Payments database, which however does not include the sales of the majority-owned foreign affiliates abroad, that is, the commercial presence (Mode 3) data.

<sup>4</sup> UNCTAD (2006): calculated from Annex Table A.I.3, pg 267; also OECD (2005). A 2007 assessment of the New York-based investment and market analysis firm, Cycles Research, indicates that "the outstanding global stock of FDI more than doubled from 8.3 per cent of world GDP in 1990 to 17.5 per cent in 2000. At present, about 18 per cent of the global output is produced by foreign-controlled firms."

but account for over two-third of world GDP. Clearly, despite the recent spurt in commercial services trade, the services sector continues to be protected fiercely by most countries,<sup>5</sup> across the development spectrum.

The WTO Secretariat in 2005 had roughly estimated the share of individual modes in world commercial services trade (in the four modes of service supply recognized by GATS) as follows: Mode 1 at 35 per cent; Mode 2 at 10 – 15 per cent; Mode 3 at 50 per cent; and Mode 4 at 1 – 2 per cent.<sup>6</sup> Thus, the only poor performer in this rather impressive growth statistic of commercial services is the Mode 4 trade, or movement of natural persons, a sector of immense importance to developing countries.

Because services are crucial inputs into all economic activity potential gains from service trade liberalization are much more than that in industrial goods.<sup>7</sup> It is commonly agreed now that even developed countries have a lot to gain from liberalization-induced enhancement of competition in services supply in their home countries.<sup>8</sup> However, the road to market openness in services is strewn with obstructions. Due to their ‘invisible’ character, services are barely affected by border measures: there are no tariffs, and quotas are very hard to uphold. Rather, services are subject to a ‘myriad domestic regulations’.<sup>9</sup> Instituting and enforcing sound regulatory regimes are at the core of essential provisioning of efficient, effective and competitive services to the stakeholders. However, issues related to access of developing country service providers to developed country markets in these two important modes of service supply lie in regulatory barriers, including burdensome visa formalities, stringent quotas and qualification requirements, and discriminatory taxes, levies and technical standards.

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<sup>5</sup> Economists of Australian Research Council in 2000 tried to estimate the tariff equivalents of the barriers to trade in services, by fitting a gravity model on bilateral trade flows. They find that average barriers to trade in business services are not significantly large when compared to the average manufacturing tariffs. However, these are based on the sketchy data available on services, and also results are dated. Given that average manufacturing tariffs have come down rather drastically in the last five years, in the absence of commensurate decrease in service trade barriers, this result is likely to have been reversed. There is a need for a new estimation of the same, using a more complete inventory of existing barriers to trade and investment in services in the UNCTAD–MAST database.

<sup>6</sup> Compensation of Employees plus Workers’ Remittances as reported in the IMF - Balance of Payments Statistics is the proxy used for estimating Mode 4 trade in services. This statistics is from Cossy (2005).

<sup>7</sup> There also exist significant interlinkages between market access in services and potential gains from liberalization of merchandise trade. A recent study by the WTO Secretariat (Jansen and Piermartini, November 2005) finds that ‘the number of H-1B beneficiaries indeed ha(s) a significantly positive effect on bilateral merchandise trade’. Further, given that production of both agricultural and manufacturing products is dependent on timely supply of essential business services, there exist strong intersectoral linkages vis-à-vis of cross-border supply of services.

<sup>8</sup> The OECD Trade Policy Working Paper (TD/TC/WP(2003)23/FINAL) also concludes that for both developed and developing countries, ‘a large portion of benefits from services liberalization derive, not from seeking better market access abroad, but from the increased competitiveness and efficiency of the domestic market’. Recent research by Mattoo and Carzaniga (2004) and Winters and Walmsley (2005) has also emphasized the economic benefits to both host and home countries of increased Mode 4 liberalization.

<sup>9</sup> Matsushita, Schoenbaum and Mavroidis (2003), pg 229. Also, more recent simulations by Kox and Lejour (2005) on EU show that “if countries make more use of mutual recognition, bilateral trade in commercial services among EU countries could increase by 30 to 60 per cent.”

Most professions are closely regulated, often self-regulated, usually through their trade associations; some professions are more standardized than others. These regulations and requirements of strict standards pose compliance challenges. Entry restrictions are usually based on standards set in educational qualifications and experience, and in norms relating to licensing requirements and procedures. In the absence of explicit tariff barriers, as compared to goods, over the years, countries have more intensively regulated services on grounds of protecting consumer interests and ensuring quality and excellence of professional services provided, which has at times bordered on de-facto protectionism. Domestic regulations continue to play an important role in facilitating or nullifying the market access accorded by WTO Members under their respective GATS schedules of commitments. Effective management of service sector liberalization therefore requires concurrent efforts at strengthening regulatory regimes and institutions in conjunction with institution of appropriate regulatory disciplining mechanisms.

While clearly recognizing the sovereign right of Member countries to continue to regulate and issue new regulations in accordance with their national policy objectives, GATS simultaneously addresses the need for developing disciplines on domestic regulations so that this national right does not become a barrier to market access in services. However, this interplay of the obligations under the mandate of Article VI (domestic regulations) while retaining the flexibilities granted within GATS Articles XVI & XVII (market access and national treatment), insofar as GATS is a voluntary ‘bottoms-up’ approach to liberalization (making it the most ‘development-friendly’ of all WTO Agreements)<sup>10</sup>, is rather complicated and poses a grave dilemma especially for developing countries.

Issues pertaining to the sovereign right to regulate (and potential limitations arising out of disciplines on domestic regulations) versus market access barriers arising out of creative and selective application of domestic regulatory requirements in developed countries along with the desirability of formulating a ‘necessity test’<sup>11</sup> to ensure that regulatory measures are not unduly burdensome and restrictive to trade and so on have resulted in sharp divisions among developing country Members at the WTO. Concerns are increasing about the nature of rule making and depth of obligations under the Article VI:4 mandate. This is because the proposed disciplines on domestic regulations would in all probability turn out to be a double-edged sword, the impact of which will vary with the Members’ market access needs and regulatory capabilities. Not surprisingly, therefore, positions of developing and least developed countries differ widely on the issue. On one hand, stakeholders like Chile, India, Mexico, Brazil, Thailand and Philippines have indicated their concurrence with the need for suitably extensive Disciplines on Domestic Regulations in several elements under discussion.<sup>12</sup> On the other, a communication has been tabled by the ACP Group, entitled ‘Pro-Development Principles for GATS Article VI:4 Negotiations’<sup>13</sup>, which stresses that pro-development and flexibility

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<sup>10</sup> OECD (2002)

<sup>11</sup> This issue in particular has evoked maximum angst. Members fear that this provision would be used to effectively erode policy space of sovereign governments and help increase legal challenges of domestic regulatory policies at the Dispute Settlement Board thereby undermining the regulatory powers of developing country Member governments, especially at the sub-federal and regional levels in countries with decentralized governance systems.

<sup>12</sup> JOB(06)/133, 2 May 2006 and Informal Room Document presented to WPDR on 1 May 2006.

<sup>13</sup> JOB(06)/136, 2 May 2006, WPDR document.

principles for promoting appropriate domestic regulatory reform need to be incorporated into any possible future disciplines.

This paper analyses the main features of the prevalent regulatory measures and related market access barriers faced by developing country service providers, and tries to assess how, if at all, the proposed disciplines could help developing country Members in securing or easing market access for their professionals in the developed country markets. Our analysis brings out a unique predicament that developing countries suffer from. We find that on the one hand stricter disciplines and norms vis-à-vis domestic regulation could potentially be more intrusive and limit the regulatory flexibility of developing countries to meet national policy objectives (policy space); however, in the absence of such disciplines, developing countries would have to depend on the discretion and pronouncements of the Dispute Settlement Board (DSB) on a case-by-case manner to ensure that access for their service providers in key developed country markets is not unduly restricted by burdensome regulations that subvert the specific liberalization commitments scheduled by their trading partners. This last has an associated cost element which could turn out to be prohibitive and yield unsatisfactory results.

The paper is structured as follows: there are two broad sections, with the first (in Section II) analysing the subject in a generic developing context while the second (Section III) evaluating the implications of the same from an Indian stakeholder perspective. Section II discusses the importance and significance of domestic regulations in the economies of WTO Member countries and its treatment under GATS; its ability to enhance market access through service sector liberalization by working around the limitations imposed by domestic regulations, and whether regulatory disciplines are desirable. This last is a detailed exposition of the apparent conflict between regulatory autonomy and liberalization commitments of Members, and discusses the implications of imposing disciplines on domestic regulations, its scope and desirability, given the trade offs emerging out of additional restrictions on Members' sovereign rights that the proposed disciplines would impose, and related implementation and compliance issues.

Section III then builds on the different elements of Discipline as proposed by Members in their position papers, and analyses their applicability as well as desirability from the perspective of developing country service providers. A review of select professional services in India undertaken by this author underscores that for developing countries in general there exist many elements in the proposed disciplines (especially vis-à-vis horizontal and mandatory disciplines on transparency and qualification requirements) that are not only desirable but actually conducive to securing better market access into key developed country markets. However, the analysis also highlights important issues vis-à-vis the associated costs pertaining to implementation and technical feasibility of compliance, which need to be addressed while arguing in favour of stronger disciplines. Section IV concludes.

## **II:1 Domestic Regulations and GATS**

Regulation has become a prominent issue for debate given its interface with sovereignty and governance, and considerable effort is being made by Members to understand the operating dynamics of regulation, regulatory best practices and competition (anti-trust) policies. Part II of GATS (Articles II to XV) sets out general obligations and disciplines, of which Article VI is an



integral part. Since domestic regulations, rather than border measures, provide the most significant influence on services trade, Article VI provisions spell out that all such measures of general application should be administered in a reasonable, objective and impartial manner.

Unfortunately, GATS neither provides a definition for nor clearly outlines the concept of 'domestic regulation' as understood in Article VI. In all honesty, there is no universally agreed definition in the literature of the term 'regulation', which is used without distinction both to refer to different acts of governance as well as means of influencing behaviour of firms and individuals in society, and not necessarily only in the economic realm. For example, Baldwin et al define regulation in a wider sense to refer to all mechanisms of social control, including those, which are not necessarily products of state activity; a narrower meaning refers to all modes of state intervention in the economy; and in its narrowest and simplest sense regulation refers to a specific form of governance through targeted authoritative rules that are often accompanied by some regulatory body or agency entrusted with monitoring and enforcing compliance.<sup>14</sup>

### *II:1.1 The Negotiating Mandate*

As discussed earlier, the issue of Domestic Regulation (henceforth DR) has been explicitly dealt with under Article VI of GATS, while the mandate on developing disciplines is outlined in Article VI:4.<sup>15</sup> Unlike the other Uruguay Round Agreements, GATS is an agreement-in-making, especially vis-à-vis the Rules. As the first step, on 14 December 1998, the Council for Trade in Services (henceforth CTS) adopted the multilaterally agreed *Disciplines on Domestic Regulation in the Accountancy Sector*.<sup>16</sup> In 1999, the CTS created the Working Party on Domestic Regulation (WPDR) replacing the erstwhile Working Party on Professional Services (WPPS), with a mandate to 'develop generally applicable disciplines and may develop disciplines as appropriate for individual sectors or groups thereof'. It was stated that 'The Working Party *shall*<sup>17</sup> develop any necessary disciplines to ensure that measures relating to licensing requirements and procedures, technical standards and qualification requirements and procedures do not constitute unnecessary barriers to trade in services. This shall also

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<sup>14</sup> Baldwin, Scott & Hood: 1998. For a detailed discussion of different meanings of regulation and definitional issues refer to: Black, Julia (2002).

<sup>15</sup> Article VI:4 of GATS reads as follows:  
With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, *inter alia*:

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

<sup>16</sup> WTO document, S/L/64, dated 17 December 1998. The accountancy disciplines were adopted on 14 December 1998, and are applicable only to Members with specific commitments in accountancy in their schedules. They will be legally integrated into the GATS only at the end of the Doha Round of negotiations, viz. '*No later than the conclusion of the forthcoming round of services negotiations.*', para 2, S/L/63. A summary is provided in Annex 2.

<sup>17</sup> Emphasis added: The word 'shall' under law can be interpreted as: Members 'must' (as opposed to 'ought', which reads 'ideally should') do this, but without any obligation regarding any time frame for implementation of the requirement or obligation.

encompass the tasks assigned to the WPPS, including the development of general disciplines for professional services as required by paragraph 2 of the Decision on Disciplines Relating to the Accountancy Sector'.<sup>18</sup>

In the context of the current Round, paragraph 7 of the Guidelines and Procedures for the Negotiations on Trade in Services (hereafter GATS Guidelines) states that 'Members *shall aim* to complete negotiations under Articles VI:4... prior to the conclusion of negotiations on specific commitments'<sup>19</sup> under GATS Article XIX. Thus, under the Doha Development Agenda and subsequently the 2004 July Framework, it had been decided to include negotiations on rule-making under GATS Article VI:4 as a part of the single undertaking programme, which the mandate under paragraph 5 of Annex C of the Hong Kong Declarations reiterates: 'Members *shall* develop disciplines on domestic regulation pursuant to the mandate under Article VI:4 of the GATS before the end of the current round of negotiations. We call upon Members to develop text for adoption.'<sup>20</sup>

### *II:1.2 Definition and Scope of DR under GATS*

In the absence of a formal definition in the Agreement, the concept of domestic regulation as implied in the GATS would seem closest to the narrowest meaning of the term as discussed above, referring in general to the State directly prescribing and proscribing what private agents have to do, and what they can and cannot do. Defined in this way, regulation is distinguishable from other forms of state intervention in the economy, such as the provision of public goods or essential services, and also from intervention that intends to affect the behaviour of private agents by modifying price signals, as for example through taxes or subsidies. However, the issue of whether the GATS provisions on DR are confined to the narrowest meaning of the term is not clear-cut, and there is room for interpretation with respect to the scope of measures falling under Article VI.<sup>21</sup>

It would also not be out of place here to note that GATS does not even define the concept of 'services'.<sup>22</sup> The scope is framed by the concept 'trade in services is defined as the supply of a service' in four different ways (or Modes, in GATS terminology): cross-border supply without the physical movement of supplier or consumer (Mode 1: cross border trade), movement of the consumer to the country of the supplier (Mode 2: consumption abroad), services sold in the territory of a Member by foreign entities that have established a commercial presence (Mode 3: commercial presence) and the admission of foreign natural persons to another country to provide services there (Mode 4: presence of natural persons). The Annex on Movement of Natural Persons Supplying Services under the Agreement specifies the scope of Mode 4. The Annex excludes from GATS all measures affecting natural persons seeking access to the host-

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<sup>18</sup> S/L/70, dated 28 April 1999. The mandate of the WPPS on Professional Services has been reproduced in Annex 1.

<sup>19</sup> S/L/93, adopted in the Special Session of CTS, dated 29 March 2001; emphasis added.

<sup>20</sup> Page C-2, WT/MIN(05)/DEC, adopted on 18 December 2005.

<sup>21</sup> Majluf, Luis Abugattas, 2006.

<sup>22</sup> This reflects the difficulties in formulating a clear-cut definition of services. See UNCTAD, *World Investment Report 2004: The Shift towards Services*, pg 145. This lack of definition has far-reaching implications because the general obligations of GATS apply to all services except those which are scheduled by Members.

country employment market of Members and measures regarding immigration (citizenship, residence or employment) on a permanent basis.

Further, GATS is not only an agreement that follows the principle of progressive liberalization and allows for a positive listing of sectors in which Members make commitments in accordance to their level of development (Members are also allowed to schedule a negative list of ‘exemptions’), it also does not provide any listing of services that fall under the ambit of the Agreement. A non-mandatory non-exhaustive ‘Service Sectoral Classification List’ was developed during the Uruguay Round and is largely based on the United Nations Central Product Classification System (CPC).<sup>23</sup> This again highlights the lack of awareness and clarity of understanding on critical issues during the drafting of GATS, which was structured essentially as an agreement-in-making; the negotiations in the current round are also designed so as to flesh out the Uruguay Round vintage of GATS. This in turn therefore calls for well-informed and inclusive debates by Members so that the final Agreement is an outcome all Members are able to live with happily; the involvement and participation of developing and least-developed countries therefore is critical at this juncture to enable drafting of a development-friendly Agreement.

The fact that under GATS obligations Article VI is a ‘general obligation’, as opposed to a ‘specific commitment’, has further blurred the scope of the ‘disciplines on domestic regulations’ mandated under Article VI:4. While we will return to this issue later, it needs to be clarified at the outset that the confusion arises from DR being a general obligation but applicable for ‘sectors where specific commitments are undertaken’, and ‘each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner’.<sup>24</sup> The point therefore arises whether DR and disciplines thereof are applicable on ‘all services’ or only on those sectors where specific commitments have been taken by Members, given that Article VI:4 (unlike Article VI:5) is silent about the exact scope, though by virtue of its following the Article VI:1 the application of measures under Article VI:4 ought to be confined to only those sectors where Members have scheduled specific commitments. However, given that the aim of GATS is to regulate governments<sup>25</sup>, not corporations, and insofar as there are barriers to market access emerging out of the discriminatory regulatory requirements of the trans-national corporations, such ‘disciplines’ on regulations as being discussed would not apply in case where the private companies default.

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<sup>23</sup> See Matsushita, et al, op. cit., pg 235. However, as the recent DSB cases like *US-Gambling* and *EC-Bananas* indicate, Panels do consult these guidelines, and in case of any ambiguity and/or in a dispute, the country whose service schedules correspond most closely to the codes of UNCPD retains an advantage.

<sup>24</sup> Article VI:1 of GATS

<sup>25</sup> Article I:3(a) states:

For the purposes of this Agreement: ‘measures by Members’ means measures taken by:

- (i) central, regional or local governments and authorities; and
- (ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities;

In fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory

The ambiguity and the hybrid character of Article VI however has spurred heated debates and raised concerns vis-à-vis the overarching nature of the proposed disciplines and the desirability of bringing ‘all sectors’ under disciplines. This has strengthened the apprehensions of Members worried about potential erosion of regulatory autonomy and sovereignty under Article VI:4. Consequently, possibilities of ‘necessity tests’ and requirements of ‘prior comment’, that are deemed to be important elements of the general disciplining package, have met with stiff resistance from Members who fear that other legitimate national policy objectives would get subverted to trade considerations under a regime of DR Disciplines, with the latter requiring to be fairly intrusive in the domestic domain in order to be effective. This also brings out the related concerns as to whether the proposed disciplines should ideally be ‘horizontal’ or ‘sectoral’. Given the uniqueness and specificity of different service sectors which mandate specialized treatment, the latter option seems preferable. However, insofar as efficacy of regulations is deemed to improve when sectoral carve-outs are minimized, and in view of the limited understanding and ability of developing country Members to negotiate special Disciplines to their benefit, opting for horizontal disciplines to the extent possible seems to be beneficial as well as a more effective negotiating strategy.

That said, it needs to be remembered that at the moment, consensus in the WPDR is emerging for DR Disciplines applicable *only* in sectors where specific commitments have been scheduled by Members, and in the context of the five measures outlined in Article VI:4 (viz. qualification requirements and procedures, licensing requirements and procedures and technical standards) and transparency elements. Although measures under DR could potentially be applicable on services in any sector ‘except services supplied in the exercise of governmental authority’, with the latter being defined as any service ‘supplied neither on a commercial basis nor in competition with one or more service suppliers’, the consensus does not extend cover all sectors.<sup>26</sup> The CTS’ mandate to the WPDR is to develop generally applicable disciplines as appropriate for individual sectors or groups thereof, including the development of general disciplines for professional services, before the conclusion of the current round of market access Negotiations in Services. The most recent developments at the WPDR also seem to suggest that DR Disciplines under Article VI:4, when they are adopted, will be applied horizontally to all service sectors in which Members have taken specific commitments, specifically 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’.<sup>27</sup>

## **II:2 GATS – Balancing the Right to Regulate with Liberalization Commitments**

One of the most important and difficult issues in international trade liberalization is attaining the right balance between the rights conferred under ‘national treatment’ and domestic regulatory autonomy. GATS, like the GATT, recognizes the sovereign right of WTO Member governments to regulate, and to introduce new regulations on the supply of services within their territories in order to meet national policy objectives. The preamble to GATS outlines:

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<sup>26</sup> Articles I:3(b) & I:3(c) of GATS

<sup>27</sup> Interpretation and Application of Article VI:4 -- Explanation note 91, [http://www.wto.org/english/res\\_e/booksp\\_e/analytic\\_index\\_e/gats\\_03\\_e.htm](http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gats_03_e.htm)

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

This basic principle, which respects policy choices in accordance with the democratic will and perceived needs and cultural traditions of each society, has been re-emphasized in the Doha Round 'GATS Guidelines'<sup>28</sup> and further in paragraph 25 of the Hong Kong Declaration.<sup>29</sup>

### *II:2.1 Regulatory Autonomy versus Transparency Obligations*

The main disciplines for a transparent and fair regulatory system are outlined in GATS Articles III and VI:

- *Article III:* Article III.1 provides for the prompt publication of measures affecting trade in services. Articles III.3 and III.4 provide for notification to the GATS Council and for prompt responses to (and enquiry points for) WTO member governments.
- *Article VI:* Article VI.1 requires that in sectors where specific commitments are undertaken, all measures of general application affecting trade in services be administered in a reasonable, objective and impartial manner: this is a central principle, vital for understanding the mutual rights and duties of the regulator and the sector being regulated. Article VI.2 includes a commitment to maintain judicial, arbitral or administrative tribunals or procedures. Article VI.3 requires regulators to inform applicants within a reasonable period of time and to give information on the status of an application. Article VI.4 calls on the GATS Council to develop disciplines to ensure that qualification procedures are based on objective and transparent criteria, and are not more burdensome than necessary to ensure the quality of the service. Article VI.5 applies these principles to sectors in which a Member has undertaken specific commitments.

Domestic regulation fulfils many purposes and lies at the heart of efficient functioning and delivery of commercial services, in particular, of professional and business services. These typically govern matters such as entry into the profession, the conduct of members of the profession, the granting of exclusive rights to carry out certain activities, and (often) the organizational structure of professional firms. They are also often designed to meet non-economic goals, such as environmental and social objectives. Experience has shown that liberalizing services without proper regulatory institutions in place can be disastrous; unregulated competition results in Pareto-inferior solutions. There is also the fear that a universally acceptable regulatory framework of principles and standards would be based on international best practices which might not fully accommodate the national and diverse sectoral priorities of the developing country Members.<sup>30</sup>

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<sup>28</sup> Para 1, in S/L/93, op.cit.

<sup>29</sup> WT/MIN(05)/DEC, adopted on 18 December 2005.

<sup>30</sup> The recent telecommunications liberalization experiences of India and Brazil provide ample testimony to the efficiency- and consumer benefit-enhancing nature of government regulations. However, if unrestrained, regulatory authority may be exercised in a manner that addresses concerns of only one section of the

Such regulations also vary between countries, and also often within different regions in countries with large geographical distances. In countries with a federal form of government (like India, Canada and the United States), where local governments and municipalities have extensive regulatory power and autonomy, enforcing disciplines at a central level poses many other complexities relating to governance and sovereignty. Governments also delegate regulatory powers to professional associations. For reasons such as above, and also limited ability and sufficient motivation of (in particular developing country) Member states to provide efficient regulation in certain professional services, domestic regulation of services at times acts as a *de facto* barrier to trade.<sup>31</sup>

However, though GATS requires DR measures to be transparent, there is no mandatory requirement for scheduling of the regulations that Members use to control the quality of service provided or to meet other stated national policy objectives. The non-mandatory nature of the transparency obligation is in fact an aspect that poses a dilemma for developing countries. For example, in the Indian context, while it may be not easy to ensure compliance with transparency requirements at home at ‘all’ levels of governance, it also does adversely affect India’s interests when access to developed country markets is made difficult for the Indian service providers because of complicated and non-transparent (though non-discriminatory) qualification and licensing requirements. Selection of the right policy stance therefore is not an easy task.

It is undeniable, that in sectors with aggressive and offensive interests (viz. business and professional services, healthcare and tourism services etc), India would find advantages from disciplines on domestic regulations on her trading partners and the adoption of harmonized and pro-competitive application of all GATS disciplines and adoption of regulatory regimes based on internationally agreed standards; this would help to deepen liberalization in key service sectors. But there also exist certain other service activities with reservations on agreeing to legally binding horizontal disciplines regarding legitimacy, necessity and proportionality, especially services that are based on non-economic public policy principles. Consequently, the balance of the offensive and defensive interests of a country like India needs to be clearly worked out prior to adoption of more binding transparency commitments. It may also be of interest here to remember the potential implications of such deep commitments on related areas of ‘rules negotiation’, viz the domestic subsidies and government procurement issues.

## *II:2.2 National Right should not become a Disguised Barrier*

As Mattoo and Sauvé argue, Article VI can be seen as the third complementary dimension of a three-pronged approach to effective access to service sectors. Under the provisions of Article VI:4 of the GATS, WTO Members are required to develop necessary disciplines to

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stakeholders at the cost of the other; for example, producer surplus may be maximized at the cost of potential consumer benefits that are forgone.

<sup>31</sup> OECD 2000 - Report on Competition in Professional Services: Studies conducted by Muris & McChensney and Bond, et al have found that, often even in OECD countries, certain professional regulations (viz. restrictions on advertising), which are aimed at ensuring quality of service for protecting domestic consumers have had the effect of lowering quality overall, by restricting competition, raising prices and limiting variety and innovation in professional services. Concerns are that professional associations use these regulatory powers as a tool to restrict entry, fix prices and encourage anti-competitive cooperation among members.

ensure that measures relating to qualification requirements and procedures, licensing requirements and procedures and technical standards do not constitute unnecessary barriers to trade. Thus, it can be interpreted that there has been an implicit acceptance in GATS that the manner of implementation of domestic regulations could become a potential market access barrier for service providers, particularly under Mode 4, which would require disciplining. However, given the wide diversity of historical and cultural factors which ostensibly necessitate imposition of country-specific standards and regulations vis-à-vis services, till date a multilateral consensus to discipline domestic regulations has been difficult to achieve.

The need to enforce DR Disciplines to counter the regulatory barriers in Member countries has been intensifying over the years. Even in the professional service sector like accountancy where multilateral Disciplines have been agreed to since 1998, affecting such disciplines has been difficult.<sup>32</sup> Regulatory restrictions and arbitrariness do appear to impede free flow of developing country (and in particular Indian) service providers into developed country markets. There exist multiple regulators in countries with a federal system of governance, viz. United States and Canada. In the United States, there are 54 State Boards of Accountancy, the American Institute of Certified Public Accountants (AICPA) and the 54 state societies of CPAs. In Canada, certain provinces have licensing requirements while other states have specific regimes for various sub-categories of accounting and auditing services. Even though movement of professionals from the Indian accountancy sector to developed countries has been rising<sup>33</sup>, the entry barriers and complications emanating out of the requirement for formal accreditation of the CA qualification from India cannot be doubted. Similar regulatory and recognition issues exist for other professional services like legal, medical and nursing, engineering and architecture, as also for service providers in audio-visual, advertising and textile design.

Coming to a consensus vis-à-vis DR have become crucial in the Doha Round, given that negotiations under Article VI:4 are now required to be completed prior to the conclusion of market access negotiations on specific commitments. This mandate, combined with the understanding that the exercise of the national right to regulate has the potential to nullify market access commitments taken by Members, has resulted in nearly every proposal to the CTS in the last few years containing some elements of DR. Members have come up with detailed position papers on key elements, and lately even proposed draft texts. Members are not only debating issues relating to wider applicability of the 1998 accountancy sector disciplines but also ways to strengthen the existing (accountancy sector) disciplines and enhance effectiveness thereof. There are a few draft texts on Article VI:4 negotiations which Members are deliberating on, including the pre-Hong Kong consensus draft contained in document JOB(05)/280 and the most recent July 2006 consolidated working paper JOB(06)/225.

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<sup>32</sup> It needs to be highlighted here that these disciplines are expected to take legal effect only after the conclusion of the Doha Round of negotiations.

<sup>33</sup> Statistical Yearbook of the Immigration and Naturalization Service: 16 per cent of the H1B visas granted to accountancy services went to Indians in 2002; also a recent trend has been use of Indian offshore accountants for preparation of US returns.

In view of clear Mode 4 linkages<sup>34</sup> under Article VI:4 as discussed above, the ongoing discussions relating to disciplines on DR have therefore been important for developing countries looking for higher and more comprehensive commitments from trading partners in the market access negotiations especially under Mode 4. Multiple rounds of offers and requests under GATS since 2000 have proved that developed country governments have no mandate of political authority to make substantial offers in Mode 4. Given the scheduling flexibilities allowed under GATS, DR disciplines on the qualification and licensing requirements remain the only other mechanism to knock down arbitrary and stringent entry barriers and improve effective market access for developing country service providers. In recognition of the above, India has made several submissions to the WPDR wherein the focus has been on disciplines on qualification requirements and procedures, which would complement the market access interests of developing country service providers.

### *II:2.3 Contentious DR Elements*

As has been discussed earlier, given that cheap labour (both the skilled and unskilled) is an important source of competitiveness for most developing countries, issues pertaining to effective market access of professional service providers (insofar as GATS deals with only temporary movement of skilled natural persons) in target developed-country markets remain the most contentious in the ongoing GATS negotiations. Therefore, for this category of service supply also, balancing regulatory autonomy and liberalization commitments become critical for Members. Hence, it is important to understand the interplay between the two, and evaluate to what extent Article VI:4 disciplines could be made use of in improving market access for developing country service providers.

In the opinion of professional service providers from developing countries (and in particular those from countries with revealed competitive advantage like India), and supported by a survey of existing literature on professional services in different WTO Member states, the existing domestic regulations and MFN exemptions that are deemed to be having the maximum restrictive impact on market access are:

- Regulations relating to visa requirements and work permits—economic needs tests, numerical quotas and duration/time limits for stay
- Discriminatory policies favouring domestic service providers—especially requirements relating to citizenship and residency, and also linkages with commercial presence requirements
- Non-recognition of professional qualifications and onerous licensing requirements

In view of these market access restrictions that the developing country service providers have been repeatedly subjected to, it is becoming increasingly apparent that for meaningful liberalization under Mode 4 to be effected, the GATS would need stronger disciplines on domestic regulations to promote greater transparency and market access across-the-board, in particular for the professional services that are critical inputs into businesses. The implication

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<sup>34</sup> Ranging from the more obvious linkages such as stringent skills recognition under qualification requirements, competence and ability to practice under host country standards and entry restrictions emanating from accreditation and localization requirements, to the less obvious such as indirect and costly operating licence requirements, complicated work permit formalities and wage parity requirements.



of this, however, has been a matter of concern for most WTO Members; also the reactions of regulators and the professional service providers have been divergent, many of whom are of the view that negotiations on Article VI:4 should be complemented with better implementation and enforcement of the Members' obligations and commitments under Articles II and XVII, viz. most-favoured nation (MFN) and National Treatment (NT). The rest of this section will evaluate the overlaps in the existing statutory provisions under GATS and the feasibility of resolving the apparent conflicts between regulatory autonomy versus market access commitments by insisting on better compliance. However, insofar as ensuring compliance and enforcement of specific commitments implies increasing recourse to the Dispute Settlement Mechanism, stricter Disciplines on DR for attaining the larger objective of ensuring enhanced effective market access is a desirable measure, particularly from the developing country point of view given their bad experience and poor record in getting the DSB rulings implemented.

In the general developing country (or specifically in an Indian) context, while the regulators are apprehensive of losing regulatory flexibility and the related development and sovereignty issues, service providers and other stakeholders have very strongly requested for the incorporation of some sort of horizontal disciplines to reduce market access uncertainties and procedural requirements for sectors where specific commitments have been taken, especially vis-à-vis Mode 4 access. In certain professional and business service sectors, stakeholders and experts are debating whether special sectoral agreements or scheduling can be used to set out additional transparency requirements for individual sectors, including broader regulatory reform as is necessary and appropriate. Some sectors may need little supplementation, while other sectors may need many special rules tailored to that sector. The approaches (covering standard-setting, including prior consultation and harmonization; the regulatory application process; desired scope and elements of the proposed disciplines; and judicial, arbitral or administrative tribunals) as suggested in the positions papers on Domestic Regulation by WTO Members, UNCTAD as well as by several GATS experts,<sup>35</sup> aim to allow negotiators to respond flexibly to the particular needs of each sector while at the same time building on the transparency disciplines that apply across all sectors.

At the request of the WPDR, the Secretariat has already prepared a note concerning examples of the kinds of measures that would be addressed by disciplines under GATS Article VI:4, based on contributions by Members and a review of the accountancy sector papers prepared by the WPPS. A perusal of the measures requiring action by WPDR as highlighted by Members<sup>36</sup> clearly indicates that there are issues in domestic regulatory requirements in Member countries which impede effective liberalization of trade in services even in sectors where Members have scheduled commitments, which heightens the need for expedited development of disciplines on DR, and in particular for professional services.<sup>37</sup> It appears that effective liberalization of internationally traded professional and business services would entail imposition of regulatory

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<sup>35</sup> For example analysts like Joel P Trachtman, Aaditya Mattoo, Pierre Sauvé, Markus Krajewski, Joost Pauwelyn, among others have outlined different approaches of DR Discipline that allow sectoral flexibility while at same time reducing the arbitrariness of DR and improving transparency.

<sup>36</sup> See Annex 3 for detailed list of domestic regulatory requirements that impede market access in professional services, a service sector of immense importance to developing countries.

<sup>37</sup> As mandated under Para 2 of Document S/L/63.

disciplines and reforms of the internal legal systems in Member countries,<sup>38</sup> for ensuring compliance with the GATS approved requirements of:

- Legitimacy, necessity, and proportionality (Article VI:4 -- the need for domestic regulation to be no more trade restrictive than necessary);
- Consistency with GATS requirements on market access (Article XVI) and national treatment (Article XVII).

But before discussing the implications of the requirements under necessity, trade-restrictiveness and conformity requirements vis-à-vis Articles XVI & XVII, it may be pertinent to note here that enhancing regulatory capacity and instituting regulatory disciplines in developing countries' home markets a la the proposed DR Disciplines would be in the interest of ongoing service sector liberalization processes in these countries. Appropriate reforms in the regulations and buildup of technical capacity would also help the developing countries with offensive interests from the ongoing Doha Round of negotiations (like India) to schedule market access commitments more aggressively. Technical feasibility of the discipline proposals ought to be addressed through phased introduction of the said reforms prior to further liberalization of key services. A survey of the Indian service providers in professional and business sectors reveals that the most dominant view of the stakeholders favours strengthening of the domestic regulatory requirements and procedures to match the internationally accepted standards, legislating appropriate reforms in domestic laws and development of statutory institutions to enforce compliance of rules and competition norms would be in the larger interest of the domestic stakeholders.<sup>39</sup>

#### *II:2.4 Necessity and Other Disciplines*

GATS Article VI:4(b) calls on the WPDR to develop any necessary disciplines so as to ensure that national measures relating to licensing requirements and procedures, technical standards and qualification requirements and procedures do not constitute 'unnecessary' barriers to trade in services. It is thus one of the provisions involved in the ongoing debate under DR on whether the GATS inhibits Member governments' rights to regulate as it contains the requirement that measures affecting trade in services must not be 'more trade restrictive than necessary'. Further, whether a measure is 'more restrictive' or 'more burdensome than necessary' or not can only be determined by establishing some sort of objective 'necessity tests'.<sup>40</sup> There have emerged multiple interpretations of necessity tests including debates on their intrusiveness and desirability.

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<sup>38</sup> This view is arising out reports of positions taken by stakeholders and professional organizations in different Member states (as posted in various internet sites) and from the author's interviews with Indian service providers in different professional and business sectors, who largely support these positions taken on different elements of disciplines that have been proposed.

<sup>39</sup> The details of this argument follow in Section III.

<sup>40</sup> In an Informal WTO Secretariat note 'Application of the Necessity Test: Issues for Consideration', WTO Document Code: Job No. 5929, 19 March 2000, a necessity test is defined as the means by which an attempt is made to balance between two potentially conflicting priorities: promoting trade liberalization and protecting the regulatory rights of governments. It is a process by which a country must prove whether the disputed regulatory measure is 'necessary' for fulfilling a policy objective. It would be also relevant to note here that Australia does apply the 'necessity test' prior to the adoption of any regulatory measure domestically so as to establish its relevance and appropriateness.

The first disciplines developed under the mandate of Article VI:4, the *Accountancy Disciplines*,<sup>41</sup> do contain a necessity test in the form of an obligation. In considering the question of extending such a ‘necessity test’ for all professional service providers, however, disciplines to be developed under GATS Article VI:4 need not extend beyond the five listed features, that is, qualification requirements, qualification procedures, licensing requirements, licensing procedures, and technical standards. In view of its importance in ensuring fair trade and market access in all the key professional and business services, there seems to exist a strong case for the necessity principle to apply on a horizontal basis. But this should not preclude, and might even require, variations in the implementation of the same necessity principle in different sectors; for depending on the circumstances and the nature of requirements in different professional services, a measure acceptable in one sector might be considered too trade-restrictive in others. Discussions on this issue in the WPDR have reviewed feasibility of drafting a ‘necessity test’, for example, a formula which could be used ‘to assess the level of trade-restrictiveness of a measure’.<sup>42</sup>

There is a cautionary view to such proposals, which foresees challenges at the Dispute Settlement Body (DSB) vis-à-vis legitimacy and burdensomeness of regulations. If measures suggested for this test are adopted, a government challenged by another through the WTO would first have to show that a disputed regulation met a ‘legitimate objective’—and the WTO would determine what counted as ‘legitimate’. Then, to clarify ‘burdensome’ and ‘restrictive’ as applied to the means of achieving that objective, the Working Party has considered importing into Article VI.4 the definition of ‘least burdensome’ from a GATS Annex on Telecommunications: ‘pro-competitive’. But measures taken in pursuit of a legitimate objective should not be applied in an arbitrary way or become a disguised barrier to trade in services. The following emerge as general principles that ought to apply:

- Technical standards, and licensing and qualification requirements and procedures, should not create unnecessary barriers to trade. In determining whether a measure is in conformity with this, account should be taken of internationally recognized standards of relevant international organizations applied by that Member.
- The regulator should act independently, that is, the decisions of and the procedures used by regulators should be impartial with respect to all market participants.

But in fact, in the recent cases, the DSB has been applying different kinds of necessity tests to establish ‘least burdensomeness’ of measures used by Members. In the *Mexico–Telecommunications* Case, a necessity test was applied to Mexico’s use of: 1) a uniform

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<sup>41</sup> Para 2 under General Provisions, *Disciplines on Domestic Regulation in the Accountancy Sector*, op cit. It provides: ‘Members shall ensure that such measures are not more trade-restrictive than necessary to fulfil a legitimate objective. Legitimate objectives are, *inter alia*, the protection of consumers (which includes all users of accounting services and the public generally), the quality of the service, professional competence, and the integrity of the profession.’ Further in para 15 it elaborates: ‘Application procedures and the related documentation shall be not more burdensome than necessary to ensure that applicants fulfil qualification and licensing requirements. For example, competent authorities shall not require more documents than are strictly necessary for the purpose of licensing, and shall not impose unreasonable requirements regarding the format of documentation.’ This has been interpreted by Members as a requirement for objectively assessing the ‘necessity’ of domestic regulation measures adopted by a Member government.

<sup>42</sup> For more details, see the EC communication, 1 May 2001, S/WPDR/W/14; Note by the Secretariat, 1 March 1999, S/C/W/96; Communication from Australia on Necessity, 19 July 1999, S/WPDR/W/1.

pricing policy for the policy objective of limiting predatory pricing and fulfilling development objectives, that is, strengthening domestic telecommunications infrastructure; and 2) higher interconnection rates for the policy objective of universal access. According to the panel, Mexico failed the necessity test in both instances. In the *US–Gambling* Case, a necessity test was applied on whether the United States’ ban on internet gambling, which was WTO-inconsistent and had a significant impact on trade, was: 1) necessary for the policy objectives of protecting public morals and maintaining public order; and 2) necessary to secure compliance with other WTO-consistent laws. Major implications from this type of necessity test are: 1) the substantial amount of burden that could be placed on a defending country to justify its domestic policies, and 2) the infringement (and consequent penalization) on the right of a country to adopt a regulation that is visionary. In the event of similar future disputes, developing country Members must ensure that necessity tests place a reasonable level of burden or burden commensurate with the level of regulatory development of an individual country, and take into consideration the GATS Preamble’s recognition of the right to regulate and introduce new regulations.

There is a further issue relating to necessity, as set out in Article VI.5(b) of the GATS, which recognizes that account shall be taken of international standards or relevant international organizations, that the WPDR is mandated to work on. The general objective must be that domestic regulation should be developed in accordance with international standards. But care needs to be taken to strike an appropriate balance: it is essential for the international standards themselves to have adequate regard for transparency, necessity and proportionality, if conformity with international standards is to be used as a justification for the necessity of any particular element of domestic regulation. As a general rule, it would probably be fair to assume that domestic regulations and measures adopted in accordance with international standards do comply in principle with the necessity test, which lends credence to the need for Members to intensify work on harmonizing towards a common international standard vis-à-vis the qualification and licensing requirements and procedures for the various professional services.

In addition, in the field of licensing requirements and procedures, specific principles would need to apply. Overall, the need for flexibility commensurate with the level of regulatory development must be recognized. Different industries may request some special rules, and new services that develop in the future may also necessitate special rules. Further, in the developing and least developed member countries, there exist lacunae in the domestic regulatory and enforcement mechanisms. The latter are a pre-condition for fulfilling national treatment obligations of service trade liberalization, and in particular vis-à-vis the requirements under Article VI.

Also, Article XIX:2 allows countries to pace their liberalization commitments in accordance with their national policy objectives and level of development, though this cannot be used in a manner that negates the Article VI commitments. Article IV:1 requires that increasing participation by developing country Members would be facilitated through (a) strengthening of their domestic services capacity and its efficiency and competitiveness, (b) improving their access to distribution channels and information networks, and (c) liberalization of market access in sectors and modes of supply of export interest to them. The need for considering a special and differential treatment (S&DT) clause in the disciplines agreement, therefore, is

already built-in through the existing GATS provisions.<sup>43</sup> The GATS Council therefore should recognize all these requirements and the dynamic nature of new industries by establishing a negotiating framework that has the flexibility to accommodate the unique nature of individual service sectors in different countries. Appropriate S&DT should therefore become a necessary condition for Article VI:4 negotiations.

### *II:2.5 Conformity with Market Access and National Treatment obligations*

Through a number of instruments of liberalization, GATS aims to re-regulate domestic policy in order to establish competition and market access in service sectors without curtailing the freedom of Members to institute regulations in accordance with their national policy objectives and levels of development. GATS attempts to ban quantitative restrictions, regardless whether they are discriminatory or not, through requirements of Articles II (MFN) and XVII (NT). However, Members must fulfill the disciplines on market access and national treatment only to the extent that they make specific commitments in a certain service sector. Further, GATS also allows for Members to schedule MFN-exemptions, and a combination of these exemptions together with DR requirements may work at cross-purposes with the liberalization agenda of GATS.

Under market access, Members take commitments to admit foreign services and service suppliers; it requires no less favourable treatment to services and service suppliers of other Members than is provided in a Member's schedule of commitments. Six types of market access restrictions are, in principle, prohibited for scheduled sectors unless their use is clearly provided for in the schedule.<sup>44</sup> For example, limitations on the number of service suppliers are prohibited except if it is explicitly listed in the Member's schedule. National treatment obligations, on the other hand, require Members to give treatment to foreign services and service suppliers no less favourable than they give to their own services and suppliers. However, as a specific commitment, Members must fulfill this obligation 'in the sectors covered by its schedule, and subject to any condition and qualifications set out in the schedule'.

<sup>45</sup> This has the same character as a GATT-bound tariff: the stated conditions or qualifications represent the worst treatment that may be given, and there is nothing to prevent better treatment being given in practice. The national treatment obligation covers both *de jure* and *de*

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<sup>43</sup> Article XIX:2 provides: 'There shall be appropriate flexibility for individual developing country Members for opening fewer sectors, liberalising fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers.'

<sup>44</sup> These limitations are pursuant to Article XVI:2 of GATS: '(a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test; (b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic need test; (c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test; (d) limitations on the total number of natural persons that may be employed and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test; (e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and (f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

<sup>45</sup> WTO Secretariat, Trade in Services Division, 'An Introduction to the GATS', 1999, pg 8, available at: [http://www.wto.org/english/tratop\\_e/serv\\_e/gsintr\\_e.doc](http://www.wto.org/english/tratop_e/serv_e/gsintr_e.doc)

*facto* discrimination since Article XVII:3 GATS extends the national treatment requirement to formally identical treatment.<sup>46</sup>

Especially for Professional Services, an important sector of interest to developing countries, market access (Article XVI) and national treatment (Article XVII) obligations are in fact not easily available, in particular for Mode 4 trade. Licensed professional services such as law, accounting, medicine and architecture have been subject to extensive governmental regulation and licensing requirements in the developed countries, most severely in the United States and the European Union. But even in the case of non-licensed professional services (viz. services where there aren't any formal barriers and processes to verify the competence of professionals), service providers do face the same restrictions on visa regulations and taxation issues. Many experts argue that developed country regulatory policies may need to be *de jure* 'discriminatory' and provide 'unequal treatment' in order to ensure *de facto* national treatment to service providers from developing countries. In fact in the *EC-Bananas* Case, the Panel observed that under GATS Articles XVII:2 and XVII:3, a Member may act inconsistently with this provision by according treatment that is less favorable and modify conditions of competition between foreign and domestic suppliers either through formally *different* or formally *identical* treatment. Thus, according to Article XVII, formally identical treatment may, nevertheless, be considered to be less favorable treatment if it adversely modifies conditions of competition for foreign services or service suppliers.<sup>47</sup>

However, *de jure* or *de facto*, there is little evidence of developed country regulatory policies addressing the market access and national treatment concerns of developing countries in a favourable manner. An analysis of the UNITED STATES GATS Schedule reveals that the most important barriers to temporary movement of professionals mainly concern licensing and residency requirements for provision of services in different sectors. For example, licensing systems have separate components that can fall under Market Access, National Treatment and Article VI:4 measures, and distinguishing which parts constitute requirements and procedures of Article VI:4 is not always easy. Another example is residency requirements.<sup>48</sup> This provides a good example of how the scope of negotiations can impact the degree to which issues pertaining to liberalization can be addressed under Article VI:4.

The recent decision by the Appellate Body on the *US-Gambling* Case<sup>49</sup>, by broadly interpreting the *per se* prohibited market access restrictions has considerably expanded the reach of GATS prohibitions. Within the factual matrix of that case, although the United States had committed that there would be no restrictions in Mode 1 provisioning of gambling services, the United States restricted cross-border supply of gambling and betting services. The Appellate Body

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<sup>46</sup> Jan Wouters & Dominic Coppens (2006), pg 10. According to M. Krajewski: A measure discriminates *de jure* if it is based on the difference of origins of services or service suppliers (e.g. nationality of a service supplier). A measure discriminates *de facto* if it is origin-neutral but nevertheless has adverse, discriminating effects on foreign services or service suppliers.

<sup>47</sup> *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, Pp 380-81, paras 7.325-327, WT/DS27/R/USA, 22 May 1997

<sup>48</sup> Also see Ganguly (2005) for a sector specific economic expose on Barriers to Movement of Natural Persons in the United States.

<sup>49</sup> *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Pp 123-126, Findings and Conclusions, WT/DS285/AB/R (and the Panel report WT/DS285/R)

held that this cross-border prohibition was *de facto* a quantitative restriction, even though it was not explicitly quantified in the US domestic laws, it was tantamount to a violation of the GATS commitments. The conclusion was that a prohibition on one, several or all means of delivery cross-border is a limitation on the number of service suppliers in the form of numerical quotas within the meaning of Article XVI:2(a), because it totally prevents the use by service suppliers of one, several or all means of delivery that are included in Mode 1.<sup>50</sup>

Some scholars apprehend that this broad interpretation has the potential of transforming the interpretation of a requirement earlier falling clearly under the ambit of Article VI (viz. a domestic regulation requirement of a license to provide any particular service) to a prohibitory market access restriction in specific commitments undertaken, insofar as the quality requirements implied in grant of the license will limit access of foreign service providers in that jurisdiction. This will have serious implications for not only the interplay between Articles VI and XVI, but also narrowed distinction between domestic regulation requirements and market access barriers, thus creating more interlinkages and interpretational confusion regarding the nature of obligation in a requirement under Articles VI:4 and XVI.<sup>51</sup>

Furthermore in a federal structure, even if the commitments implied under Article VI:4 are obligations of Members, as discussed earlier, commitments taken at the federal level will not ensure market access at the local and regional dispensations. Regulations delegated to the sub-federal levels usually suffer from the problem of lack of harmonization of laws among the different jurisdictions. Although the goal of such regulations is mostly consumer protection and to ensure maintenance of the integrity and quality of service and service provider, it has often been observed that they give rise to greater entry barriers for foreign service providers, arising out of 'lack of technical feasibility' for implementation.

A case in point is the request for prior consultation, or an 'opportunity to comment' as agreed in the *Accountancy Disciplines* (paragraph 6 under the Transparency requirements). Some WTO Members have stated categorically that there is no place in their constitutions or domestic legal regimes for such consultation. In others, like India, there is a question of whether, or how, to implement prior consultation provisions at sub-national levels, in parallel with implementation at the national level—an issue of potentially crucial importance. As experienced for enquiry and notification requirements under the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) and the Agreement on Technical Barriers to Trade (TBT Agreement), getting stakeholders and sub-federal regulators to revert with comments in the stipulated period of time is difficult at the present moment, though a phase-out provision and capacity building and technical support initiatives could assist developing countries to fulfill their obligations. Such positions will have to be considered before finalizing an overall agreement on new disciplinary provisions.

It should also be recognized that while there is no precedent yet, the possibility of future challenge of WTO Member countries' domestic regulations cannot be discounted once the framework on disciplines is made wide and more comprehensive. However, it is undoubted

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<sup>50</sup> Commentary on the *US-Gambling* Case in WorldTradeLaw.net LLC, 2005

<sup>51</sup> As interpreted by Pauwelyn, Joost (2005): 'WTO Softens Earlier Condemnation of US Ban on Internet Gambling, but Confirms Broad Reach into Sensitive Domestic Regulation', ASIL Insight; <http://www.asil.org/insights/2005/04/insights050412.html>

that imposition of at least some element of mandated disciplines would be in the interest of developing countries like India, given that 'existing general disciplines are somewhat asymmetric in the wrong direction'<sup>52</sup> and uncertainties and policy flexibilities vis-à-vis Mode 4 access in developed country markets needs to be minimized for developing and least developed country professionals, while retaining enough regulatory discretion that is commensurate with their levels of development.

### **III:1 Elements of DR Disciplines and their Applicability in Developing Countries– A Case Study of Indian Stakeholders in Professional Services**

Now we turn to the experience and demands of stakeholders from a developing country like India, in particular vis-à-vis the relevance and desirability of tighter DR Disciplines under GATS. A vibrant and sound services sector is now deemed to be at the core of the development process of most economies. For India, with average economic growth at over 6 per cent a year during the past decade (and around 8 per cent in the last couple of years), recent economic performance has been robust. The country now ranks among ten fastest growing economies in the world, and the services sector has been the key driver of India's GDP growth for over a decade. During the 1990s, the sector grew at an average annual rate of 9 per cent, ahead of the growth rate of industry at 5.8 per cent per annum and that of agriculture at 3.1 per cent per annum. Services contributed approximately 68.6 per cent of the overall average GDP growth (Service Value Added) in the past 5 years between 2002-03 and 2006-07. In 2006-07, growing at 11.2 per cent, the share of services in Indian GDP is likely to cross 55 per cent (with the Indian GDP expected to grow at 9.2 per cent to Rs.28,44,000 crores). Also significant is the fact that service sector growth in India is broadbased, and cross-sectoral complementarities and synergies are helping to strengthen the overall performance of the sector. Business-services were the fastest growing sub-sector in the 1990s, attaining a growth rate of about 20 per cent per annum.<sup>53</sup>

More significantly, particularly from the global perspective, India has emerged as one of the leading exporters of commercial services in the world. In recent years, India's merchandise exports to the rest of the world crossed the 1 per cent mark (global ranking 28<sup>th</sup> as exporter), growing at an average 25 per cent over the last 3 years, although the net merchandise trade balance is negative. But India's invisible (net) inflows continue to compensate the growing trade deficit to a large extent; in 2005-06, India's commercial service exports constituted around 37 per cent of the country's global exports (goods and services). Indian export of commercial services has been among the fastest growing globally in the past 15 years, and grew at over 17 per cent per annum in the 1990s as compared to the world average of 5.6 per cent. Between 2001 and 2006, on average, India's exports of commercial services grew at over 30 per cent as opposed to the world average of 10 per cent. The Table 1 below highlights India's performance in exports of commercial services in the present decade. It should also be noted here that in India, service exports have been growing at a rate two-and-half times faster than the services sector catering to the domestic market.

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<sup>52</sup> Trachtman (2005).

<sup>53</sup> *Economic Survey*, various issues, and *NASSCOM Annual Report*, 2004-05.



**Table 1: Exports of Commercial Services**

	2000	2001	2002	2003	2004	2005	2006
Global Exports (US \$ billion)	1,493.8	1,498.0	1,607.8	1,842.2	2,210.9	2,451.9	2,710.8
India's Exports (US \$ billion)	16.0	16.8	19.1	23.1	37.2	54.4	72.8
RoG (y-o-y) of India's exports (%)		4.8	13.8	20.7	61.0	46.4	33.8
India's Share in World Exports (%)	1.1	1.1	1.2	1.3	1.7	2.2	2.7

Source: Author's calculations based on data from *International Trade Statistics*, WTO, several issues.

In 2006, India exported \$72.8 billion of commercial services, equivalent to 2.7 per cent of global service trade, and which grew at 34 per cent over last year's exports (see Table 1 above for details); this put India among the top 10 commercial service exporters in the world. In 2005, with a share of 2.8 per cent and \$54.4 billion of world exports in commercial services, India had moved up to the 10<sup>th</sup> position from 16<sup>th</sup> in 2004.<sup>54</sup> Statistical analyses indicate that India continues to exhibit a strong revealed comparative advantage (RCA) in services relative to goods. India's RCA in services has been rising sharply since mid-1990s; between 1996 and 2000, India's RCA in services increased by 74 per cent, while that of goods sector declined by 15 per cent.<sup>55</sup> A time series analysis of the service sector's RCA indicates that India's current strength in commercial service exports comes from business services, which includes software (IT & BPO) exports, finance, management and other professional services, among others.<sup>56</sup>

India also receives large global remittances in the low and high-skilled business and professional services sectors, with recorded inflows of \$21.7 billion in 2004, a sharp \$18 billion rise over the 2001 figures, according to the World Bank's *Global Economic Prospects Report 2006* (World Bank 2005). Over 90 per cent of India's trade in high-skill services is with the five developed economies, namely the United States, the European Union, Japan, Canada and Australia; India has also been the largest beneficiary of the H1B visas issued by the United States in the last few years.<sup>57</sup> Given their abundant educated labour force (both skilled and unskilled), a deeper GATS (General Agreement on Trade in Services) liberalization in the current round of WTO Negotiations would be important for maximising gains for developing

<sup>54</sup> While the dynamic growth of India's commercial — and in particular software services (comprising computer services, IT enabled services and business process outsourcing) — exports are widely reported, the dynamic expansion of its services imports attracts less attention even though the growth rate in 2006 exceeded that of exports. According to the most recent numbers put out by the WTO, India has turned a net exporter of commercial services in 2006, though India's commercial services imports grew by a hefty 40 per cent in 2006 and are only about 5 per cent short of its commercial services exports.

<sup>55</sup> Srivastava (2004); [www.intracen.org/wprldtradenet/docs/whatsnew/b4d\\_2004/india1.pdf](http://www.intracen.org/wprldtradenet/docs/whatsnew/b4d_2004/india1.pdf)

<sup>56</sup> Author's calculation based on data from *Balance of Payments Statistics*, 2005, IMF; further details in Appendix Table 1. Also see Karmakar, ICRIER Working Paper 176, for related sector specific details on market access and competitiveness.

<sup>57</sup> Data from the *Statistical Yearbook of the Immigration and Naturalization Service of the USA* indicates that in 2002 India was the top beneficiary of H1B visas (dealing with speciality professionals) in computer related services; managers and officials; architecture, engineering and surveying; and medical and health services; India is second only to China in education. For further details on occupations groups in H1B visas see *INS Annual Report: 2002*.

countries.<sup>58</sup> Effective Services Sector Liberalization under the Doha Work Programme (from a developing country perspective) therefore calls for easier norms for movement of natural persons (Mode 4) followed by market access through cross border supply of services (under Mode 1).

It would be relevant here to note that many experts<sup>59</sup> deem increased trade under Mode 1 (cross-border trade) a challenge to domestic regulation, especially as traditional territorial limits on enforcement jurisdictions expand, thereby making issues of cooperation, harmonization and recognition critical. Use and interpretation of the Member's domestic regulations vis-à-vis national sovereignty is at the heart of this problem; this, despite the widespread acknowledgement that (a) for developing countries to realize the Doha Round's development potential, a focus on movement of natural people (Mode 4) as well as cross border supply of services under Modes 1 and 2 is critical,<sup>60</sup> and (b) increased use of electronic supply of services (Mode 1 trade) will enable countries to counter the migration-related restrictions and social problems.

Be that as it may, most professional service providers in developing countries (both in the licensed and non-licensed sectors) feel that some elements of disciplines on domestic regulations as outlined in the *Accountancy Sector Disciplines*, albeit with sector-specific carve-outs, are necessary to improve market access and to reduce the 'discriminatory', 'unnecessary' and 'unnecessarily heterogeneous' regulations that professional service providers are currently being subjected to in Member countries. However, the issue of whether these elements of discipline envisaged could be implemented would depend upon the levels of development of the economic and regulatory systems in different Member states.

For addressing elements under GATS Article VI:4(b) which stipulates that domestic regulations should be 'not more burdensome than necessary', other professional service sectors feel that laws governing the regulation of professionals are at times based on non-economic public policy principles and extraneous objectives which are violative of this principle. Additionally, the requirements such as mandatory legal registration in host country for service provision are deemed to be unduly burdensome and not relevant for ensuring quality of service, and it is felt that this point should be addressed in the disciplines.

As discussed earlier, there is a strong view that in the interest of the domestic (Indian) service providers, the general obligation of transparency should be requested to be made more stringent and mandatory, and applicable to all professional service sectors. Accepting that there would be many issues relating to implementation at home to meet stricter disciplines and requirements with regards to transparency, respondents however do feel that given India's demonstrated expertise and advantage in telecom and information technology sectors, this

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<sup>58</sup> 'Several studies have estimated... the income effects attributable to a reduction in services protection... Developing countries stand to gain considerably from liberalization of trade in services, both on the part of their trading partners and in terms of their own policy regimes.' Pp 11-13, 'Developmental Aspects of the Doha Development Agenda Negotiations', Report to the Committee on Trade and Development, WT/COMTD/W/143/Rev.1, November 2005.

<sup>59</sup> For example, see views of Joel P Trachtman of The Fletcher School of Law and Diplomacy, presentation made at the 'WTO Symposium on Cross-Border Supply of Services', 28-29 April, 2005.

<sup>60</sup> WTO Secretariat Note on 'Developmental Aspects of the Doha Round of Negotiations', November 2005, WT/COMTD/W/143/Rev.1.

should not be an impossible target to meet; gains from seeking greater transparency will far outweigh the hardships.

Respondents universally find residency requirements for licensing as ‘trade restrictive’, particularly in the age of e-commerce and ever-increasing cross-border trade in services. So, it is agreed that a measure akin to para 24<sup>61</sup> of *Accountancy Disciplines* would benefit professional service providers to access foreign markets. Furthermore, harmonization of qualification procedures and requirements, and licensing procedures and requirements should be definitely aimed for in the disciplines.

Disciplines on (especially harmonization of) technical standards would however pose greater difficulties, in particular in developing countries where standards are still evolving and appropriate domestic regulatory and enforcement systems are not yet in place. As in the case of the SPS & TBT Agreements, however, WTO Members could be incentivized to adhere to internationally accepted standards pertaining to requirements for professional services. In cases where international standards are not in place, or for any particular service sector that is non-licensed, global norms for all regulatory requirements may be expediently finalized, and draft/model schedules created. Incidentally, the UNCTAD guideline on international standards relating to qualification requirements for professional accountants is a model that could be analyzed for extension in other professional services.

However, the most critical market access and regulatory barrier that domestic service providers face and request for resolution is equivalence and accreditation of Indian qualifications (degrees, diplomas and experience) in key developed country export partners. Most of the key professional services in the developed countries are licensed. Market access therefore is critically hinged on getting recognition and accreditation, and establishing equivalence of domestic qualification requirements and relevant experience, for which appropriate legal systems need to be put in place domestically and related implementation issues need to be addressed.

Whereas in principle, there was a convergence of Members views that domestic regulations pertaining to qualification and licensing requirements in importing countries need to be met, respondents were of the view that procedures are onerous and need to be streamlined and/or disciplined.

The more onerous elements of regulations where such disciplines are deemed to be desirable are<sup>62</sup>:

- heterogeneous federal and sub-federal licensing and qualification requirements and procedures which makes a license or qualification recognition obtained in one state not valid in other states;
- necessity to obtain/renew the same license in every regional government;
- overly complicated qualification and licensing requirements;

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<sup>61</sup> S/L/64: “Residency requirements not subject to scheduling under Article XVII of the GATS shall not be required for sitting examinations.”

<sup>62</sup> Similar points have been addressed earlier in an Indian submission to the WPDR on ‘Recognition Issues’, dated 30 September 2003, JOB(03)/192.

- requirement for fluency in language of the host country which in some cases is not relevant to ensure the quality of service;
- non-transparent registration procedures;
- unpredictable and long timeframe for registering process;
- onerous licensing requirements and restrictions on registration (e.g. residency requirements), which prevents foreign engineers from signing off on drawings and managing projects;
- to be licensed as a professional, there is a requirement or pre-requirement in certain sectors for membership of an affiliate professional organization which while having no regulatory authority over the profession (that is, union, country club), but to be a member of this organization, the licensee must be a resident of the territory or have lived in the territory for the past six months;
- long delays in the verification of an applicant's qualifications acquired in the territory of another Member;

and many other requirements that respondent felt could be streamlined without impacting adversely the ability of professional service providers to maintain the desired quality of the service and technical standards in importing countries. It was felt that with the commensurate modifications in the Indian legal and regulatory systems, it would be an element of strength for India to push for disciplines to address issues as above. Implementation in India however would take time, it was felt, for domestic laws need to first reflect complementary provisions. Most professional service associations in India, however, were confident in their ability to meet the requirements.

However, there are critical issues at home that need to be addressed before India can comply with the proposed disciplines domestically. The lack of a legal framework for accepting professionals with foreign qualifications, including lack of appropriate regulatory mechanisms, and lack of internal consistencies (i.e. different regulatory regimes at federal and sub-federal levels) of such a framework within the country pose severe problems vis-à-vis compliance.

Members of the different professional services in India however request for modernisation and reform of the domestic regulatory regime, and are also keen to see a tightening and upgradation of domestic technical standards and qualification requirements, which they feel will ease market access for their members. While the regulators feel that Indian certification system is stringent and quality of their recognised degrees are indubitable, in the absence of appropriate legal framework within which Indian regulators can operate, getting international accreditation and recognition will not be possible. The implementation and legal issues need to be addressed first as a part of domestic regulatory reform.

Another related issue pertains to the Mutual Recognition Agreements (MRAs) and working towards creating more mandatory and binding guidelines for the recognition of qualification and experience requirements of professional services that form key inputs to business. As mentioned earlier, lack of recognition of Indian qualifications and experiences and equivalence thereof is a critical limitation of market access for Indian professionals. Even in the accountancy sector where disciplines on recognition and equivalency have been agreed upon, lack of MRAs remain a major stumbling block. The problem with the existing guidelines in the accountancy sector seems to be the great degree of flexibility that has been accorded to

Members in granting recognition to trade partners. Further the conformity with market access and national treatment requirements are not strictly enforced. These are the areas that need to be disciplined and made binding, before extending these guidelines to other professional services. Instituting a framework for plurilateral and regional MRAs could be a step ahead to the ultimate multilateralization, for prevalent socio-cultural similarities would facilitate a faster conclusion of MRAs within a region and build confidence gradually for their ultimate multilateralization.

It is to be acknowledged that despite existence of detailed guidelines, signing of MRAs and establishment of equivalence among countries with disparate cultures have not resulted in an ideal environment for trade in services. Obstacles here pertain to lack of confidence and transparency among partners, and the fear that MRAs might lead to lowering of standards. Creating requisite affiliations with international accredited organisations in respective professional service sectors would help to facilitate movement of professionals from developing countries, in particular in sectors that are licensed. Other facilitation means that could be considered are: temporary licensing, aptitude test or facilitated examinations, abbreviated procedures for qualification recognition and licensing, among others. Harmonisation of technical standards, in particular in the professional services that form main inputs to businesses, ought to be the long term target that Members should work towards, as a facilitation measure for obtaining equivalence and recognition of regulatory requirements, and eventually MRAs.

### **III:2 Sector-specific Views: Disciplines on Domestic Regulations – Desirability and Compatibility with (Indian) Domestic Legal Systems and Technical Standards<sup>63</sup>**

#### *III:2.1 Accountancy and Auditing Services<sup>64</sup>*

Accounting has been a leading sector in GATS negotiations in reducing barriers to trade in professional services. As discussed earlier, accountancy is the only sector in GATS with an Agreement on Disciplines on Domestic Regulations. While these disciplines are expected to take legal effect only after the conclusion of the Doha Round of negotiations, concerns have been raised vis-à-vis the efficacy of such disciplines in reducing regulatory barriers to market access in professional services and related implementation issues. In keeping with the Article VI requirements of GATS, these disciplines are generally interpreted to be applicable to Members who have taken specific commitments in the WTO in the accountancy sector. It may be remembered here that only 56 out of the 148 WTO Members have taken commitments in the accountancy, auditing and bookkeeping service sectors, and further, Members have not made any significant commitments in mode 4, other than in case of intra-corporate transferees.

With transnationalization of business enterprises, the need for more international accounting services has grown; globally, trade in accountancy services have been increasing over time. The delivery of accounting services traditionally depended largely on physical presence of

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<sup>63</sup> Views and inputs used in this section reflect stakeholder position on different elements, and the presentations made by participants at the Pre-Hong Kong Ministerial Consultation meeting on GATS organised by UNCTAD-GoI-DFID at New Delhi.

<sup>64</sup> This section is based on interviews and submissions from ICAI, ICWAI, ICSI, Ministry of Company Affairs and existing literature on the issues pertaining to market access limitations in the Accountancy Sector.

local establishments (mode 3), but are now increasingly depending on modes 1 and 4, also because recent trend of wide-spread engagement of temporary accounting consultants and given the increased use of electronic communication in facilitating service trade liberalization.

However, despite the existence of domestic regulation disciplines in the accountancy sector since 1998 and in spite of the rising international demand, almost all countries continue to maintain various types of regulatory restrictions that impede free flow of foreign service providers across borders. There also exist multiple regulators in countries with a federal system of governance, viz. United States and Canada. For example, in the United States, there are 54 State Boards of Accountancy, the American Institute of Certified Public Accountants (AICPA) and the 54 state societies of CPAs. In Canada, certain provinces have licensing requirements while other states have specific regimes for various sub-categories of accounting and auditing services.

The major limitations arising out of domestic regulations and market access restrictions in importing countries faced by Indian accountancy sector professionals are as under:

- Linking market access with commercial presence (which is costly);
- Requirements for in-country work experience for sitting examinations;
- Large number of documentations required for application;
- Requirements for local work experience and residency/citizenship requirements for obtaining work permits/visa;
- Movement of professionals are restricted to business and intra-corporate transferees; also minimum requirements for local hiring;
- Onerous licensing requirements and time-consuming licensing procedures;
- Different sub-federal regulations for recognition of qualifications;
- Stringent and cumbersome qualification procedures, and in particular lack of recognition of qualification due to absence of appropriate equivalence mapping;
- Economic Needs Test and wage parity requirements;
- India's lack of MRAs which is a legally mandated requirement in many countries in this essentially licensed profession.

To effectively address the above limitations, respondents feel that two sets of issues that need to be addressed urgently. These are: (i) equivalence, accreditation, and mutual recognition of qualification, experience and licensing requirements among trade partners, and possible harmonization of standards; and (ii) a related set of issues that relate to the domestic policy changes necessary to facilitate such a harmonization.

All respondents in the accountancy sector agreed that mutual recognition is the key requirement for enhancing and facilitating service provision by Indian professionals.

In May 1997, a set of non-binding Guidelines were promulgated by the Services Council for facilitating MRAs in the accountancy sector. The Guidelines provide extensive framework that is intended to help Members structure their MRAs in ways to make them transparent and accessible. Detailed outlines of processes and substances of MRAs with respect to

qualifications (minimum levels of education, experience and examinations); registration mechanism; and implementation (rules and procedures for enforcement and dialogue and administrative cooperation and arbitration of disputes) have been put in place. However, these Guidelines are relatively broad, voluntary and non-binding. At present, India has no MRA in accounting services with any foreign accounting body.

Thus, in the absence of a binding nature of both the MRA Guidelines as well as the 1998 Accountancy Sector Disciplines on the Domestic Regulation elements, these provisions confer considerable flexibility to Members and thus have come to be best-endeavor wish lists; these therefore need to be strengthened. Till date, the most common way to achieve recognition has been through bilateral agreements, which allows countries to harmonise and establish equivalence with economies and systems, and access is granted according to needs for a particular skill-set in the more dominant of the trading partner. Currently, MRAs are seen to exist between countries where the socio-cultural similarities and historical ties make it easier to integrate; hence, MRAs have largely been concluded between developed countries. The GATS however permits these bilateral agreements on MRAs as a derogation to its fundamental principle of non-discrimination, and it is hoped that the guidelines will also serve as an affective means of facilitating the movement of accountants across borders, and of avoiding the emergence of new disparities between recognition regimes around the world. This needs to be implemented and facilitated, and regulatory disparities and discrimination between Members should be encouraged.

Lack of accreditation of Indian accountancy degrees abroad is another major market access block for domestic service providers; thus, establishing equivalence is a critical requirement for facilitating market access for Indian accountancy professionals, in particular the independent service providers. Also the strict licensing procedure (starting from application, testing fees, assessment of educational qualifications and relevant experience) is clearly a limitation. These processes abroad discriminate against foreign service providers. Studies also indicate that even in cases where regulations appear to be non-discriminatory, it is more restrictive for the foreign entrant. The nationality requirements and residence and establishment requirements definitely falls foul of the 'not more burdensome than necessary' principle. However, domestic stakeholders accepted that Indian standards on the quality control of service provision need to be harmonized upwards to the accepted international norms and requisite equivalence of degrees be established. Respondents are also unanimous in their view that establishing disciplines would help enhance the quality of the service supplied domestically as well as internationally.

Therefore, even though movement of professionals from the Indian accountancy sector to developed countries have been rising<sup>65</sup>, the need for formal accreditation of the CA qualification from India cannot be doubted. Recognition would raise the value of the Indian qualification and reduce uncertainties for the service providers. But to meet global standards, domestic capacity needs to be built and upgraded to the internationally established standards for service providers. Also there is a need to develop enforceable standards and an institutional

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<sup>65</sup> Statistical Yearbook of the Immigration and Naturalization Service: 16 per cent of the H1B visas granted to accountancy services went to Indians in 2002; also a recent trend has been use of Indian offshore accountants for preparation of US returns.

infrastructure for accreditation. A model that could be based on the ISAR Guidelines<sup>66</sup> on international standards with respect to qualification requirements for professional accountants (which includes a model curriculum for technical education) could be evolved by the WTO to help service providers from developing countries to integrate with the rest of the world in this key infrastructure service for businesses. There is also a need to further address national regulatory and licensing restrictions in target (developed) countries and focus on the implementation issues therein. The requirement of residency for short-term movement of professionals and mode 1 service provision may be relooked and negotiated under the revised disciplines.

The elements that are mandatory for the conclusion of MRAs where India needs updation in domestic laws are:

- Transparency of licensing provisions and conditions for licensing requirements
- Principles of disciplines and enforcement of professional standards
- Minimum requirements for competence and ongoing verification of competence as per established international norms
- Procedures relating to revocation of registration, and statutory requirements for disciplinary action

Professionals in the accountancy sector in India are required to register for practicing, for which an application could be made after the requisite degree is obtained. Verification of competence is not undertaken at any regular intervals, and neither is there any requirement regarding any minimum experience to practice. On the other hand in all other countries, professionals are allowed certification after professional competence is proved and for establishing professional competence there is a minimum full-time experience requirement that ranges between 5-7 years. There are also requirements for specialisations in select key areas of technical competence before registration and certifications are allowed. These are not mandatory in the Indian context which poses barriers for concluding recognition and equivalence agreements with developed countries.

Three related issues that respondents feel would help in facilitating market access of Indian professionals in accountancy sector are (a) review of existing practices in domestic regulatory regimes of WTO Members, (b) opportunity of prior comment on impending changes in domestic regulatory regimes of Members would be beneficial, and (c) legal enforceability of disciplines at both the federal and sub-federal levels would be a desired element. However, it is doubtful if India would be in a position to meet with these requirements domestically, given the present structure of governance in the country and the lack of enforceability of central regulatory policies at the state and panchayat government levels.

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<sup>66</sup> The UNCTAD ISAR (1999) Guidelines cover general and technical education, the examination system, practice requirements, continuing professional education and competence norms, and a code of professional ethics.



### *III:2.2 Legal Services<sup>67</sup>*

Like accountancy, legal services also are a key business facilitating service. Multinationalization of firms and emerging requirements for legal advice on transactions involving multiple jurisdictions have contributed to the globalization of this service to a large extent and recent trends have seen a rise in demand from abroad (particularly from the United States) for Indian professionals to help in the legal outsourcing sphere. While most countries (including India) have not taken any meaningful commitments in legal services, newer opportunities are emerging in the legal advisory and commercial arbitration sphere, which the Indian professionals are keen to benefit from. Indian lawyers are increasingly engaged in short-term assignments in foreign markets, advising on home country law, and making increasing use of the e-commerce options to offer consultancy (mode 1) to off-shore corporate clients.

The national character of the legal education and professional experience requirements in Member countries make domestic regulations a very important determinant of market access. Foreign lawyers in most countries are only allowed to act as consultants and provide legal advisory services in most countries, and even then, there exist limitations in the scope of practice allowed. However disciplines to harmonize qualification and licensing and certification requirements and procedures would be necessary before trade under modes 1 and 4 of legal advisory services are genuinely liberalized. Legal firms often need to establish a commercial presence overseas for providing service to clients. But some countries also require citizenship and permanent residency as preconditions for lawyers to become partners in law firms.<sup>68</sup> Conditions of scope of practice, eligibility and qualification requirements, and licensure also often differ among states in countries with federal structure of governance.

The United States is an interesting case in point. Like the accounting services, there are no “United States” Bar Exam nor any standard eligibility norm, and foreign service providers wishing to act as lawyers in the United States needs to follow the rules for the particular state in which they wish to practice. Thus to the extent that there are variances in the rules’ pertaining to qualification and licensing requirements and procedures in different states, market access is made difficult in terms of the time taken to meet the requirements repeatedly in different states; the rules and procedures are also often not very clear. The American Bar Association (ABA) in 1993 issued guidelines and a Model Rule with provisions for licensing of legal consultants. Till date only 24 states have enacted the licensing rules, and some states

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<sup>67</sup> This section is based on interviews and submissions received from Society of Indian Law Firms, Bar Association of India.

<sup>68</sup> In India also, legal services generally can only be provided by natural persons who are citizens of India, and those who are commercially present in the place of service and are on the rolls of the advocates in the State where the service is being provided. The Advocates Act and the Bar Council of India (BCI) Rules prescribe conditions for recognition of foreign legal qualifications in India and impose many restrictions on foreign service providers in legal services, which has sharply curtailed foreign participation in the Indian legal services market. In order to be eligible for enrolment as an advocate, a foreign service provider has to be from a country which allows Indian nationals to practice, has to hold a degree in law from an institution/university recognized by BCI, and needs to be enrolled with the respective State Bar Council and/or BCI.

have outlined requirements that exceeds the ABA Model Rule for licensing requirements for foreign legal consultants.<sup>69</sup>

Also there are many instances of discrimination in recognizing foreign qualification and experience, and equivalence of accredited degrees, even between different states in the United States. The lengthy and complicated process of securing admission to a state bar in the federal countries is another sticky regulatory issue that needs to be disciplined for ease of market access. In particular, in areas of practice where commitments have been taken by Members, harmonization of licensing requirements and procedures, and recognition of licenses conferred to foreign professionals in different states and sub-federal administrative jurisdictions are areas where disciplines could be sought. For example, the requirement of in-state residency to practice in the various states in the United States is deemed to be unnecessarily trade restrictive and affects the American lawyers as much as the foreign legal consultants. The diversity in approaches by the sub-federal regulatory bodies pertaining to rules of practice creates a complex and opaque web of barriers for foreign lawyers.

Recognition of foreign qualifications is necessary for any substantial movement of foreign professionals. The multiplicity and variety of state regulations pertaining to licensure and qualification requirements of foreign lawyers is sure to deter market access and mode 4 access. The international legal community is also not very keen to participate in GATS meetings relating to MRAs. The trade that goes on at the moment is narrowly focused on legal consultancy and advisory, and off-shored legal job-work, which is practiced through accredited and qualified lawyers allowed to practice in the country of origin of the out-sourced work.

In India, the Advocates Act of 1961 governs the legal profession and determines the domestic regulatory requirements. The Act allows Indian Bar's representatives to participate in foreign legal conferences and imposes many restrictions on foreign lawyers in India. Market access in the sector is furiously guarded even other countries. Indian legal practitioners are unwilling to consider liberalization of the sector without reciprocity. Admittedly while at most only 1-2 per cent of the 1.1 million Indian lawyers could potentially face competition from foreign service providers, yet Indian legal practitioners are of the view that given the current nascent state of development of the profession, Indian firms need a transition period to attain a critical mass of expertise necessary to compete with foreign legal firms before a liberalization process is embarked upon.

However, the members of Bar Association of India and the Society of Indian Law Firms have maintained that disciplines on domestic regulations as regards qualification requirements and procedures and increased transparency (which is expected to reduce regulatory arbitrariness and discrimination in countries of interest) would be welcome. As in the United Kingdom, for creating the level playing field for domestic law firms, certain regulatory limitations prevalent in India<sup>70</sup> need to be addressed through domestic policy and statutory reform. In particular, in

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<sup>69</sup> Further details on the rules could be seen from Reports to the House of Delegates in the USA on requirements for International Law and Practice.

<sup>70</sup> According to the domestic legal practitioners, the interim regulatory reform measures that need to be addressed are: removal of limitations on maximum number of partners (vide Section 11 of Companies Act, 1956); remove restrictions on advertising and information dissemination (vide Rule 36 of BCI Rules); allowing limited liability companies/partnerships (vide Sections 2(1)(a), 29, 33 of Advocates Act, Chapter III of BCI Rules and appropriate section amendment of the Companies Act and the Partnership Act); allowing law firms to share

keeping with the increased demand in legal advisory and consultancy services, members feel that there is a need to develop appropriate framework in the Indian Rules (Sections 24, 29 of the BCI Rules and Section 47 of the Advocates Act) for regulation of foreign legal consultants. Further, definitions for practice, licensing, qualification and registration requirements for Foreign Legal Consultants<sup>71</sup>, concept of limited licensing; scope of service; and related disciplinary requirements need to be clearly spelt out as per the international established standards to avoid disputes relating to malpractice and unethical practice. These statutory changes in domestic regulatory practices were deemed to be necessary preconditions before any discussions on either liberalization in legal services of disciplines in legal services in WTO Member countries could be entered into.

Domestic stakeholders interviewed also favour improving domestic technical standards pertaining to their profession and tightening domestic qualification and experience requirements to meet international standards prior to embarking on liberalization in the sector. Responding to the stringency of qualification requirements in developed countries, the respondents are of the view that these requirements need to be followed to ensure quality of service.

However, it was felt that there is a need for recognition and establishing equivalence of qualification and licensing procedures of WTO Members. Disciplines to implement recommendations by the International Bar Association with respect to adoption of a limited licensing system and qualification requirements (viz the reciprocity in recognition of degrees) among Member countries were considered as having a positive impact on quality and ease of service provision in the sector, both under modes 1 & 4.

While comparing the applicability of existing Accountancy Sector Disciplines in the sector, other than the requirements vis-à-vis elements of equivalence, timeline for review of application, opportunity for prior comment, and other domestic provisions pertaining to regulation of foreign professionals, it appears that most other elements of discipline envisaged could be met by the legal sector in India. The provisions pertaining to disciplines on technical standards are presently deemed to be technically unfeasible, until such time domestic standards and requirements are made more stringent. As discussed earlier, members welcome the Disciplines which they view would be inimical to improving their access to foreign country markets by incentivizing domestic regulatory regimes and standards to be upgraded to internationally accepted standards.

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remuneration with persons other than advocates (vide Chapter III of BCI Rules); facilitate borrowing to help Indian law firms attain the critical scale economies, allow charging of contingent fees by advocates, etc.

<sup>71</sup> It was suggested that as in the developed countries, domestic regulatory requirements for foreign legal consultants in India should be allowed to render advisory services only in conjunction with Indian advocates and should individually meet certain threshold practice requirements, viz. minimum years of practice, financial capability and minimum capital requirements, partnerships with Indian advocates where Indian partner has the majority stake and also the management control etc.

### *III:2.3 Healthcare Services<sup>72</sup>*

The sub-sectors in this professional category are: Medical and Dental Services, Nursing and Midwifery, Hospital Services - technicians in Pharmacological and Diagnostic Services, and Veterinary Services. Government involvement and regulations in this sector worldwide is high, although private provision of healthcare services are becoming increasingly in vogue, and are being used the most in the United States. The demand for foreign professionals also have risen in recent years, arising out of a skills shortage in developed countries; for many years until recently, the United States did not allow foreign-born physicians and nurses to practice, and denied them licenses and temporary work permits (H1B visas). There were other stringent requirements that needed to be met pertaining to qualification requirements and procedures and licensing procedures.

Since 1980s, however, things have changed, with effective market access for Indian professionals (Philippines and India among developing countries are two of the top recipients of H1B visas in the sector) remaining healthy given the shortage of this particular skill-set in the developed country markets. Also the profile of J1 exchange visitor physicians in the United States for 2001-02 indicates that India is the leading nation of origin for foreign physicians. However, despite this change in India's share among the United States medical graduates, the profession is still regulated strictly and obtaining licenses for medical practice in the United States involves many years of education, training and following diligently related procedures for licensure and certification; professionals in certain specialties, viz. dental and veterinary, may also need to get special certification from their Boards. Undergoing residency and training in the hospitals in the United States and the European Union is also a procedural requirement, as is the requirement that qualifying exams be taken in the host countries. Also for practicing in different states in the United States requires professional service providers to be licensed in each individual state separately, with heterogeneous requirements for licensure, which has similar cost and 'necessity and burdensomeness' implications as has been discussed in earlier sections on other professional services. For getting the license to practice in the United States, on an average, a foreign service provider has to spend upwards of US\$ 5000<sup>73</sup> in addition to the related visa and transit fees.

The main access barriers faced by the Indian professionals abroad are:

- Burdensome visa formalities
- Stringent and prohibitory quotas imposed through economic needs tests
- Wage parity conditions and requirements that negative impact on cost-competitiveness
- Non-recognition of professional qualifications
- Stringent licensing requirements

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<sup>72</sup> This section is based on submissions received from the Dental Council of India, the Pharmacy Council of India, the Medical Council of India, and the Indian Nursing Council.

<sup>73</sup> Estimate of an earlier ICRIER research paper on Movement of Healthcare Professionals from India to the United States.

- Taxation issues – social security deductions that do not confer commensurate benefits to the temporary professionals

Obtaining recognition and equivalence of qualifications acquired in India and formal accreditation of Indian institutes are therefore necessary to ensure that movement of professionals in the sector is further eased. Mutual recognition in the medical sector is also critical for facilitating movement of healthcare professionals. At home, Indian laws pertaining to qualification and licensing requirements, viz. requirements and standards pertaining to education, examinations, practical training, experience, language skills and licensing norms, and powers of related regulatory authorities, need to be modified to meet globally accepted norms. International guidelines and standards for the sector also need to be developed in qualification requirements, school curricula, experience and residency training programmes and licensure requirements to facilitate and harmonize the regulatory requirements in Member countries. International professional associations, most importantly the International Council for Nurses (ICN), have started to take initiatives to create norms for credentialing, standardized regulations and quality assurance. Replication of such good practices for the other sub-sectors of healthcare services would help the profession immensely.

Main concerns in developed countries being lowering of standards in a professional sector with strong social and health implications, amending domestic laws to incorporate stricter competence requirements and standards, and statutory monitoring and disciplinary action on defaulters with procedures for revocation of licenses would help build confidence and facilitate market access. It is however clear that in the absence of uniform standards and recognition of qualifications in healthcare, there can only be a limited exchange of professionals and domestic regulations would continue to be more burdensome than necessary. Given the aging populations in the developed countries, rising healthcare costs and the rapid emergence of telemedicine and diagnostic activities (mode 1 trade) in the last decade, it has become possible for services to be provided cross-border, thus benefiting both the healthcare professionals as well as patients worldwide. However, commensurately, implementation of related domestic regulations targeted at protection of consumer interests and quality control, have become even more critical. It is therefore imperative for the Member countries to cooperate and explore means of regulating service providers internationally.

Countries like India which has a very large stake being a large supplier of this essential service, should take initiative in setting such best practice standards and working towards harmonization of regulations relating professional ethics and equivalence requirements. Domestic regulatory reforms therefore become a precondition for developing countries like India to help create the necessary international standards. Harmonizing the technical standards and qualification and licensing requirements in the different states in India should be the first step. In a recent policy move, in a bid to improve inflow of medical tourists into India, the Quality Council of India (QCI) has proposed to start accreditation services for hospitals and nursing homes in India. QCI is setting up a National Accreditation Board for Hospitals and Healthcare, which will formulate the requisite regulatory norms for service providers, domestic and foreign, which is being formulated in the lines of the quality and safety monitoring norms set by the Joint Commission International (JCI), headquartered in the United States.<sup>74</sup> Other

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<sup>74</sup> Joint Commission International (JCI) is a division of Joint Commission Resources (JCR), the subsidiary of the Joint Commission on Accreditation of Healthcare Organizations (JCAHO). For more than 75 years, JCAHO

countries like Canada, Australia, France, Italy, and Thailand, also have similar systems in place. This will help to enhance the quality of service provided and further assist in getting accreditation with international professional associations in the healthcare sector, which will in turn help obtaining insurance portability in the sector.

In the views of the relevant professional bodies as regards their ability to meet the requirements of discipline in all the designated sectors, the Dental Council mentioned that the local rules and regulations already are mostly compliant with the requirements of transparency, and also partly with that of prior consultation with the interested parties at home. However, they are not keen and/or comfortable with the concept of allowing WTO Members to comment on domestic policy proposals and regulatory issues. The Medical Council Act in India has provisions that meet most of the qualification and licensing requirements discussed under the *Accountancy Disciplines*; however the procedures for qualification and licensing norms are lacking in terms of verification requirements time frame, examination of applications of foreign service providers at regular intervals, providing reasons for rejections of licensure requests, and finally the applicability of international standards. Domestic regulations in all the above need to be framed and standards upgraded. Lack of domestic technical standards that are at par with international standards are however a limitation which impacts our ability to conclude MRAs (recognition and equivalence) and needs to be addressed in the interest of the domestic stakeholders.

As for the Nursing services, while the Council is the most vigilant in sending professionals abroad given the increased demand for Indian nurses, meeting requirements such as providing reasons for rejection of application, maintaining disclosure timelines, enshrining the practical training and experience requirements, and most critically requirements of disciplines under technical standards are not feasible to meet at the present moment. Members however agree that domestic standards need to be improved to meet the international requirements. Stakeholders feel that despite high demand, the lack of practical training and experience requirements at home has become an important market access barrier in the developed countries. This also comes in the way of establishment of equivalence and getting accreditation. It is therefore important to maintain a general broad approach to disciplines and support development of appropriate regulatory mechanisms.

The responses from the Pharmacy Council indicate that most of the *Accountancy Disciplines*, in particular the transparency requirements, are already applicable in India and should be requested for, with only recognition and equivalence being the contentious issues. Further, maintaining specific disclosure timelines as proposed under the S/L/64 seems to be suffering from implementation problems, though in principle it is allowed for under the domestic law. Domestic statutory norms however do not allow for establishing MRAs with partner countries, and an amendment of the Pharmacy Act to incorporate the same is needed before formulating requests for discipline. This latter is deemed to be vital from the point of view India's economic interests, in particular equivalence and international standards, which contain the necessary elements for signing MRAs.

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and its predecessor organization have been dedicated to improving the quality and safety of health care services. Today the largest accreditor of healthcare organizations in the United States, JCAHO surveys nearly 20,000 health care programs through a voluntary accreditation process. JCAHO and its subsidiary are both not-for-profit corporations.

To sum up, therefore, stakeholders in different sub-sectors do agree that meeting disciplines on qualification and licensing procedures will be a tough task, and also meeting the technical standards requirements, unless statutory changes in domestic regulations are undertaken to reflect the requirements that are deemed to follow the norms of international best practice in the healthcare sector. Signing of MRAs and getting equivalence and accreditation, even ease if getting temporary licenses to practice, will only follow once the changes in domestic laws have been notified and regulations pertaining to professional ethics and credibility are complemented by related provisions of penalty for non-compliance, which is important if only as a confidence building measure.

### *III:2.4 Engineering, Construction and Architecture Services<sup>75</sup>*

While these sectors are considered to be relatively liberalized in most countries with Members having taken larger commitments as compared to the legal or accountancy sectors, being a part of the accredited professional services, these also face barriers in the form of licensing, qualification, standards, nationality and residency requirements. In particular the multiplicity of licensing requirements and stringency of region specific licensing procedures appear to be the main stumbling blocks and creates uncertainty in market access in developed countries. Further, in the construction sector, given that some of the professionals are also in the semi-skilled category, getting work permits and visas run into even immigration relating issues and screening, and also are subjected to economic needs tests and related wage-parity requirements.

In India, while there is a requirement for licenses in the provision of architecture services, there are absolutely no laws of regulations that govern practice of professionals in the engineering, integrated engineering, and construction services. Foreign professionals are allowed to practice and have been providing services in India, except for in the case of architecture, where to get an architectural plan sanctioned, an Indian partner (registered architect) has to sign. Foreign firms may only participate through joint ventures with Indian firms. Foreign engineering and construction firms are also not awarded government contracts unless local firms are unable to perform the work.

However, it is this lack of norms and regulations to govern and verify professional competence which is becoming the barriers for ease of movement of Indian professionals. While the barriers to free mobility of Indian professionals remain as visa requirements and quotas, wage parity requirements and economic needs tests, taxation related issues and social security deductions, are experience requirements between four and seven years for certification as a Professional Engineer, respondents have also maintained that issues relating to domestic regulations are more restrictive and cumbersome in India, mostly because there exists no laws governing the sector in India. While Indian qualifications and the quality thereof is not generally subjected to very stringent retesting procedures, in the absence of accreditation and

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<sup>75</sup> This section is based on interviews and submissions received from Council of Architecture, Project Exports Promotion Council of India (formerly known as OCCI), Builders Associations of India, Confederation of Real Estate developers Association of India (CREDAI), Construction Federation of India, Consulting Engineers Association of India (CEAI), Engineering Export Promotion Council (EEPC) and Larsen & Toubro Ltd.

recognition of Indian degrees and educational institutes,<sup>76</sup> the absence of experience and competence requirements for licensing of professionals, and requirements for periodic assessments for competence in the country has hampered the free movement of professionals in a sector that is a recognized licensed professional service internationally. Lack of statutory remand applicable for enforcement and related penalty norms for regulating cases of professional misconduct and non-compliance with rules and regulations also remains as a bone of contention for equivalence and applicability of norms pertaining to disciplines on technical standards.

Unfortunately, India's membership in recognized international agreements relating to engineering services like the Washington Accord and the Engineers Mobility Forum, which are the key facilitators worldwide for identifying domestic regulatory norms, sorting out sticky recognition issues and movement of professionals in this sector, is not feasible because of required domestic regulatory laws. There is a need therefore to create the requisite statutory basis before recognition of qualification and accreditation related issues in the sector can be resolved. Coming to the multiplicity of regulatory requirements emerging as potential barriers to trade, EMF and also the European Committee for Standardization (CEN) are working on harmonization of the licensing requirements and existing standards in the three sub-categories, especially in countries with federal governance systems or customs unions like the European Commission, but this is not a major barrier de facto for Indian service providers. However, given India's stake in the sector, the country should take initiative and active part in formulation of the internationally acceptable technical standards and harmonization of the qualification and licensing requirements, which will further help facilitate conclusion of MRAs with key trading partners.

Thus, it emerges that the critical issue at hand is of putting in order first the domestic legal system, and in view of the above, requesting for multilateral disciplines on domestic regulations would be untimely and unwarranted. Some members of the Engineering Council of India have also opined that the Draft Engineering Bill for registration of Professional Engineers needs to be passed with immediate effect, and without some agreements and understanding of reciprocity, it would be unfair to open the engineering services in India to foreign competition. The reason is that given domestic circumstances and lack of a legal regulatory system in the sector in India, Indian professionals are unable to get market access abroad while anybody can come in and practice in India. Given that this is a domestic policy issue, the legal system needs to be put in place in the country first before agreeing to any kind of disciplining agreements to be implemented at a multilateral level. Thus amendments to the CEA Act to incorporate equivalency of qualification and other examination and licensing requirements are needed for compliance with disciplines relating to qualification procedures and for effecting facilitation of verification and timeframe requirements. As discussed, domestic laws in these sub-sectors are silent on the licensing requirements and procedures, and needs to be amended.

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<sup>76</sup> For example, a precondition for licensure in the United States is that professionals need to graduate from an engineering programme accredited by the Accreditation Board for Engineering and Technology (ABET). However, ABET does not accredit engineering programmes of degrees offered by other countries, and foreign service providers need to have their educational credential evaluated by the Engineering Credential Evaluation International (ECEI) of the ABET, which takes about six weeks and has a fee of around US\$425. ABET has also recently entered into a number of MRAs that recognize substantial equivalence of accredited engineering degrees in partner countries.



In the engineering and integrated engineering, and construction services, technical standards in different sub-federal levels differ, and when coupled with the lack of adequate transparency, it becomes difficult for foreign service providers to meet the local technical standards requirements. Domestic laws are also silent on the requirements for compliance with international technical standards. Of date therefore, subject to commensurate changes in the domestic statutes, applicability of *Accountancy Disciplines* in India seem to be technically infeasible, though desirable.

The views of the Indian Institute of Architecture and the Council of Architecture are as follows: domestic laws and regulations in this sector do conform to the licensing requirements and the related transparency requirements. Practice of architecture in India requires registration of professionals, and like in most countries, has a residency requirement for licensure. Foreign service providers may also function as consultants or design projects with prior permission of the Central Government. Thus, prima facie, it appears that most of the elements of disciplines as under the *Accountancy Sector Disciplines* would be compliant with Indian regulations and statutory requirements, and in fact would be welcome provided certain modifications are incorporated to suit the specific requirements of the profession of architecture. Stakeholders reiterated that meeting the disciplines on residency requirements is not suitable for the profession, and verification requirements within a prescribed time-frame in qualification procedures and conformity of domestic standards with international technical standards is not feasible at the moment.

It has been noted that the need for licensure in developed countries is far greater in architecture as compared to engineering. The requirements for education and examination are also commensurately stringent. Furthermore, for example, a precondition for entry of foreign professionals into many developed countries market is need for registration with the National Council/Boards for Architectural Registration. Hence, as discussed, domestic regulatory systems need to be reformed prior to agreeing to disciplines on the relevant elements of Domestic Regulations as in the Accountancy Sector. Domestic technical standards in the sector should therefore be framed in accordance with the established international norms of best practice. In architecture, the Barcelona Accord on 'Recommended International Standards of Professionalism in Architectural Practice' has been adopted by several Member countries. The Accord has laid down a loose set of guidelines which provides Member governments practical guidance for seeking mutual recognition for architectural services. In view of the fact that MRAs have played important roles in establishing equivalence and recognition of qualification and licensing requirements of developed country members, there is a need for India to develop similar formal recognition agreements with key trade partners.

### *III:2.5 Other Professional & Business Services*

In the recent past, it has been noted that trade in the other professional and business service sectors have also grown rapidly. We highlight here the domestic regulation issues pertaining to a few key sectors among these miscellaneous professional services, namely the Software and Computer-related Services, Advertising and Management Consultancy Services. India's stake in these professional service sectors are high, and it is well known that in the last decade, software has been the fastest growing sector and the revenue from the sector's exports has balanced India's external payments situation to a large extent. However, there is a crucial difference between the characteristics of these professional services: globally, these are in the

non-licensed sector, operating successfully through self-certification and self-regulation. Hence, the role of professional associations in regulation and ensuring quality control is much more critical as compared to the professional service sectors discussed in the sections above.

### *III:2.5.1 Software and Computer-related Services<sup>77</sup>*

This sector is one of the largest non-licensed sectors in GATS. Due to the dominance of private capital in this sector, the standards and other regulatory norms have been set by the large multinational firms and professional associations in the Member states. In India, NASSCOM and ESC have been the key regulatory bodies that are involved in setting rules and standards for the IT and ITeS sectors. The government intervention in the sector is only to set an independent regulator that supervises activities of the stakeholders; operational matters are handled by the relevant professional associations.

The sector is overall deregulated the world over, and trade barriers pertain generally to delays and quotas on work permits and visa-related issues, economic needs tests and wage parity requirements, double taxation and social security payment problems, residency requirements and requirements for experience in relevant fields in addition to standards qualification requirements. Members of the ESC further list existing limits on foreign ownership and compulsory local incorporation for delivery of service; cumbersome, burdensome and non-transparent qualification requirements and procedures for foreign service providers; lack of recognition of Indian qualification, as additional barriers to entry and provision of services, which may benefit from disciplines.

As mentioned earlier, there are no licensing requirements in the sector. In the United States, while there are no licensing requirements, often there are several work experience requirements and heterogenous certification requirements at the sub-federal levels. The qualification requirements are usually more stringent; in the United States, the norms are generally three-year post-graduation experience in the occupation and a degree directly related to the service being offered. In the case of companies, as opposed to professionals, it was mentioned that in the United States and the European Union, the procedures and requirements for registration and local incorporation for companies are onerous and time consuming, and at times even fail to meet the transparency requirements. In the absence of standardized requirements and/or established technical standards for the sector, there exists some amount of discretion of importing countries; however, countries like India with strong engineering base and background face fewer recognition problems for market access.

However, domestic regulatory issues have started to become a bone of contention in the recent years, in the aftermath of the technology sector bust in the United States. Although the barriers in this sector are much less than in other sectors, there are concerns of increased regulation in the sector by Member countries and their local governments. Industry and business houses however are apprehensive that such an increase in government regulations will stifle growth, trade and innovation in the sector. Professional association internationally have therefore joined forces to deter the move of enhanced regulation by governments in Member countries.

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<sup>77</sup> This section is based on interviews and submissions received from the National Association of Software and Service Companies (NASSCOM), Infosys Technologies, and Electronic and Computer Software Export Promotion Council, and inputs received from the Ministry of Information Technology.

Members from the private sector in software and computer-related services in India, under the aegis of NASSCOM and Department of IT (Government of India), are working towards addressing these concerns of regulation and security (in particular for the ITeS services) through a draft Bill on data Protection and Privacy that works on the model of self-regulation on standard guidelines relating to ethics and business practices, and is subject to arbitration by the independent regulator. Overall, the stakeholders in the sector feels that there aren't any acute need for imposing disciplines as in Accountancy Sector, as the barriers or limitations faced are minimal to the potential regulatory interference that might come with the imposition of Domestic Regulation in this sector.

### *III:2.5.2 Advertising and Management Consultancy Services*

These are the other two sectors where Indian professionals are keen to see an enhancement of market access, and also where the usual problems relating to obtaining of work permits, visa limitations and quotas, taxation, economic needs test and wage parity requirements, and recognition of Indian qualification and accreditation thereof have been the concerns of Indian service providers. However, again as in the case of the software and computer-related services, these are non-licensed services, and as such the Indian professionals are not facing very many problems that they feel could/ought to be addressed through an imposition of multilateral disciplines on domestic regulations governing these sectors in different Member countries.

## **IV. Conclusion and Policy Recommendations**

As discussed above, recent data indicate that both Mode 1 and Mode 4 market access for developing country (and in particular Indian) professionals has been steadily increasing, primarily due to increased internationalization of firms from developed countries in the manufacturing as well as the service sector. This is a demand-driven shift, which is benefiting from and feeding the demographic advantage of developing countries. Thus, today, effective market access is not an important issue in key markets of interest; however, stakeholders in select professional services in developing countries feel that negotiating on multilateral Disciplines on Domestic Regulations would ensure market access for their service suppliers when the demand-pull weakens.

Summarising views of the professional service providers in developing countries, on the elements of desirable disciplines, it appears that horizontal disciplines (for harmonization, streamlining and equivalence) should be sought for qualification procedures and requirements and licensing procedures, and for creating harmonized technical standards. Further, harmonization of licensing requirements and procedures was deemed to be beneficial, facilitating market access in developed country markets, especially in federal jurisdictions like the United States and Canada. However, it was unanimously stated that commensurate changes in the domestic legal and regulatory systems would need to be incorporated prior to adopting such Disciplines so as to fulfil the requirements under these Disciplines.

Transparency is the other element that was deemed to be in dire need for horizontal and mandatory disciplines; it is also a general obligation under the GATS. However, implementation of this discipline in developing countries will continue be an issue, especially in countries with decentralized structure of governance and regulation, and multiple of regulatory agencies. Similarly, there would be issues in licensing in sectors where Member countries have undertaken commitments.

An important point to note here is that there is a strong correlation between the level of development and regulatory procedures. Developing countries often have weaker and inefficient regulatory regimes, and need capacity building to improve regulatory abilities and standards domestically. Experiences of trade liberalization for goods indicate that a multilaterally coordinated and synchronized set of rules and obligations could be beneficial in incentivizing and compelling a larger number of WTO Member countries to move towards adoption of certain best practices at a rate that is often faster than what could be achieved by unilateral policy changes. This, however, needs to be done keeping in mind the development concerns of countries. This necessitates inclusion of a clause which incorporates certain principles of special and differential treatment (S&DT) while discussing disciplines on domestic regulations.

Most of the key professional services in the developed countries are licensed. Market access therefore is critically hinged on getting recognition and accreditation, and establishing equivalence of domestic qualification requirements and relevant experience. In order to achieve this, appropriate legal systems need to be put in place domestically and related implementation issues need to be addressed. In fact, members of the different professional service associations in developing countries like India are keen to see domestic technical standards and requirements strengthened and made more effective. It is felt that the introduction of a well formulated set of technical standards and requirements at home will ease market access for their members, especially in those professional services where licensing and accreditation is mandatory. However, technical assistance is needed to achieve these objectives and aspirations of the developing WTO Member countries.

In spite of the existence of WTO guidelines in the accountancy sector since 1998, the looseness of overall disciplines on recognition has resulted in a situation where WTO Members are accorded considerable flexibility to grant qualification recognition to trade partners. Also these guidelines do not tackle Article XVI (market access) and Article XVII (national treatment) issues, nor do they tackle the important residency and citizenship requirements. These should be addressed to narrow down the existing WTO guidelines on Mutual Recognition Agreements and efforts should be made to render the commitments binding and mandatory.

In conclusion, it appears that while the main advantage for professionals from developing countries lies in Modes 1 and 4, market access is in effect restricted by developed country members through the requirements under domestic regulations. However, given that the main problem in these countries pertains to accreditation and recognition of domestic qualifications, this needs to be addressed by instituting complementary legal and statutory changes in domestic legal system. Without this, qualification recognition will not be possible and signing of MRAs will not be feasible, even if disciplines on domestic regulations are implemented multilaterally.

The fact remains that given that domestic regulations in services are used as *de facto* market access barriers by importing countries, unless there is any agreement on disciplines on their indiscriminate use, no amount of market access negotiations would ensure gains for developing countries from services liberalization, thereby undermining the development agenda of the Round.

## MINISTERIAL DECISION ON PROFESSIONAL SERVICES

*Ministers decide* to recommend that the Council for Trade in Services at its first meeting adopt the decision set out below.

*The Council for Trade in Services,*

*Recognizing* the impact of regulatory measures relating to professional qualifications, technical standards and licensing on the expansion of trade in professional services;

*Desiring* to establish multilateral disciplines with a view to ensuring that, when specific commitments are undertaken, such regulatory measures do not constitute unnecessary barriers to the supply of professional services;

*Decides* as follows:

1. The work programme foreseen in paragraph 4 of Article VI on Domestic Regulation should be put into effect immediately. To this end, a Working Party on Professional Services shall be established to examine and report, with recommendations, on the disciplines necessary to ensure that measures relating to qualification requirements and procedures, technical standards and licensing requirements in the field of professional services do not constitute unnecessary barriers to trade.
2. As a matter of priority, the Working Party shall make recommendations for the elaboration of multilateral disciplines in the accountancy sector, so as to give operational effect to specific commitments. In making these recommendations, the Working Party shall concentrate on:
  - (a) developing multilateral disciplines relating to market access so as to ensure that domestic regulatory requirements 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 ensure the quality of the service, thereby facilitating the effective liberalization of accountancy services;
  - (b) the use of international standards and, in doing so, it shall encourage the cooperation with the relevant international organizations as defined under paragraph 5(b) of Article VI, so as to give full effect to paragraph 5 of Article VII;
  - (c) facilitating the effective application of paragraph 6 of Article VI of the Agreement by establishing guidelines for the recognition of qualifications.

In elaborating these disciplines, the Working Party shall take account of the importance of the governmental and non-governmental bodies regulating professional services.

## DISCIPLINES ON DOMESTIC REGULATION IN THE ACCOUNTANCY SECTOR

Pursuant to Article VI:4, the *Accountancy Sector Disciplines*<sup>78</sup> outlined provisions on transparency requirements, administration of licensing requirements, qualification requirements and procedures, and technical standards for the accountancy profession. A key provision is the general requirement that measures taken for the purposes above ‘are not more trade-restrictive than necessary to fulfill a legitimate objective. Legitimate objectives are, *inter alia*, the protection of consumers (which includes all users of accounting services and the public generally), the quality of the service, professional competence, and the integrity of the profession.’<sup>79</sup> The objectives are further qualified by obligations to: 1) inform another Member of the rationale behind domestic regulatory measures in relation to the legitimate objectives (Transparency provision); 2) ensure that, when membership of a professional organization is required, the terms for membership are reasonable, and do not include conditions or pre-conditions unrelated to the fulfillment of a legitimate objective (Licensing Requirements provision); and 3) in determining whether a measure relating to technical standards is not excessively restrictive, take account of internationally recognized standards of relevant international organizations applied by a Member (Technical Standards provision). Measures related to technical standards must be prepared, adopted and applied only to fulfill legitimate objectives.

The para 3 of the Accountancy Disciplines vis-à-vis the transparency provision requires that Members make publicly available contact information of competent authorities (governmental and non-governmental), as well as information describing the activities and professional titles which are regulated or which must comply with technical standards; requirements and procedures to obtain, renew or retain any licenses or professional qualifications and the regulator’s procedures for monitoring compliance; information on technical standards; and confirmation that a particular professional or firm is licensed to practice within their jurisdiction. Members should also endeavor to provide opportunity for comment before adoption of new measures and make public details of procedures for the review of administrative procedures.

Licensing requirements and procedures shall be pre-established, publicly available and objective, and shall not in themselves constitute a restriction on the supply of the service. Where residency requirements not subject to scheduling under GATS Article XVII exist, Members shall consider whether less trade restrictive means could be employed to achieve the purposes for which these requirements were set, taking into account costs and local conditions. Use of firm names may not be restricted, save in fulfillment of a legitimate objective. Requirements regarding professional indemnity insurance for foreign applicants must take into account any existing insurance coverage and fees charged by the competent authorities shall not represent an impediment in themselves to practicing the relevant activity. Application procedures and the related documentation shall be not more burdensome than necessary to ensure that applicants fulfill qualification and licensing requirements. A license, once granted, shall enter into effect immediately.

In respect to qualification requirements, competent authorities must take account of qualifications acquired in the territory of another Member, on the basis of equivalency of education, experience and/or examination requirements. The scope of examinations and of any other qualification requirements shall be limited to subjects relevant to the activities for which authorization is sought. Qualification requirements may include education, examinations, practical training, experience and language skills.

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<sup>78</sup> Summarized from: S/L/64, dated 17 December 1998.

<sup>79</sup> General provisions, para 2, S/L/64, op cit.

The importance of mutual recognition agreements is explicitly acknowledged regarding the process of verification of qualifications and/or in establishing equivalency of education.

Qualification procedures must expedite the verification of qualifications acquired in the partner country and, when additional qualifications are necessary, this must be identified. Examinations shall be open to all eligible applicants, including foreign and foreign-qualified applicants, and must be scheduled at reasonably frequent intervals. Fees charged by competent authorities shall not represent in themselves an impediment to practicing the relevant activity. Residency requirements not subject to scheduling under GATS Article XVII shall not be required for sitting examinations.

## EXAMPLES OF REGULATORY REQUIREMENTS AFFECTING MARKET ACCESS FOR PROFESSIONAL SERVICE PROVIDERS<sup>80</sup>

- A. **{All Sectors}** These examples appear to meet the requirements set by Members, that is, specific measures not already covered by the *Accountancy Disciplines*, which are also not GATS Article XVI or XVII measures:

### Transparency

1. Lack of opportunity for interested non-governmental market participants to meet with government officials to discuss the impact of new or proposed regulations.
2. Inadequate information available, or information not readily available, to non-governmental market participants about new or proposed regulations affecting their interests.

### Licensing requirements

1. [Subject to Members' interpretation.] Restrictive regulations relating to zoning and operating hours, to protect small stores.
2. Federal and sub-federal licensing and qualification requirements and procedures are different, making a license or qualification recognition obtained in one state not valid in other states.
3. Too many licenses required in order to operate a business.
4. Overly burdensome licensing requirements (e.g. minimum age required for a physiotherapist is 25 years old).
5. [deleted]
6. Lengthy censorship procedures; too many censoring agencies with different criteria.
7. Overly large capital asset or office-size requirements for establishment or registration (road transportation, construction, and distribution).
8. Minimum requirements for number of vessels (maritime).
9. Precondition for providing/maintaining license is a two-year working period, but a two-year working visa is difficult to obtain (construction).
10. Minimum paid-in capital requirements: to apply for a Fixed Network Business, the applicant shall subscribe to the applicable minimum paid-in capital (telecommunication services).
11. Minimum build-out requirements: to apply for an Integrated Network Business, the applicant shall, within the effective period of the Network Construction Permit (that is, six years), construct a local network possessing the minimum capacity requirements (telecommunication services).
12. [Subject to Members' interpretation.] The requirement that foreign agents, brokers, and adjusters for insurance services who apply for establishing commercial presence in the host Member shall employ at least one individual who has secured a domestic agent, broker, or adjuster (insurance services).

### Licensing procedures

13. It is necessary to obtain/renew the same license in every regional government.
14. All the important papers necessary to establish business operation have to be certified by the Public Notary which can take a long time to process with no other alternative available.
15. The effective period of licensing is very short.
16. Authorization may not be handled through a single point.
17. Inability of applicants to file complaints regarding review of their applications.

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<sup>80</sup> Annex 1 of JOB(02)/20/Rev.7, dated 22 September 2003: *Examples Of Measures To Be Addressed By Disciplines Under GATS Article VI:4*, Informal Note by the WTO Secretariat.



### **Qualification requirements**

1. Only persons who have specific certification from a government agency can take up managerial posts (e.g. managers of an insurance company must have certification from the insurance agency in that country).
2. Requirement for fluency in language of the host country which in some cases is not relevant to ensure the quality of service.
3. Different sub-federal regulations for recognition of qualifications.
4. Minimum requirements for local hiring (accountancy).
5. Qualification procedures
6. A large number of documents is required (application procedures).
7. Need for in-country experience before sitting examinations (accountancy).
8. [Subject to Members' interpretation.] The chairperson of the board and the general manager of an engineering consulting firm are both required to be licensed professional engineers of the host Member (engineering services).
9. At least half of all the directors or shareholders who are actually conducting the business of an engineering consulting firm shall be licensed professional engineers (engineering services).
10. At least one third of the directors should be medical professionals (hospital services).

### **Qualification procedures**

1. [Subject to Members' interpretation.] In a certain sector, prior approval is required by the competent authority to the employment of managers, assistant managers and supervisors of certain departments as designated by the authority (banking services).

### **Technical standards**

1. Unreasonable environmental and safety standards (maritime transport).
2. Local standards requirements: in some federal system Members, the sub-federal governments maintain different technical standards from one another, which has constituted severe impediments to foreign construction firms contracting projects.
3. [Subject to Members' interpretation.] The required minimum paid-in capital is adjusted in accordance with the domestic inflation rate every year (banking services).
4. [Subject to Members' interpretation.] The internal documents of a foreign establishment have to be written in a local official language (banking services).
5. [Subject to Members' interpretation.] When producing the financial statement, firms are required to follow the headings and codes specified by the local competent authority, rather than those of international practices (banking services).

- B. **{Non-Accountancy Sectors}** The following measures also appear to meet the requirements set by Members – provided they apply to sectors other than accountancy (otherwise they seem to already be covered by the *Accountancy Disciplines*):

### **Transparency**

1. Regulatory changes without adequate prior notice, making the applicants not eligible to apply or have to find new supporting documents within a short period of time.
2. Non-transparent regulatory environment (architecture, postal and courier, audiovisual, distribution, education, energy, environmental, sporting, and tourism services).
3. Domestic laws and regulations are unclear and administered in an unfair manner; subsidies for higher and adult education, and training are not made known in a clear and transparent manner.
4. A lack of transparency in domestic town planning regulations, that might prejudice decisions on the location of installations to provide such services through commercial presence (distribution services).

5. Long delays when government approval is required, and, if approval is denied, no reasons or information given on what must be done to obtain approval in the future (postal and courier services).
6. Domestic regulations contain ambiguous criteria and conditions for service suppliers to observe (e.g. when applying to form an establishment, the applicant should have an 'adequate asset base as well as appropriate management and support staff and be unlikely to disturb the local economy') (banking services).
7. Lack of transparent regulations or standards for a company's risk management (banking services).

### **Licensing requirements**

1. Absence of pre-determined, clear criteria for licensing requirements (including postal and courier, and distribution services).
2. Unreasonable restrictions on licensing (legal services).
3. Restrictive licensing practices (tourism).
4. Unclear licensing and approval requirements (energy services).
5. Unspecified approval and licensing requirements (environmental, financial and tourism services).
6. Irrelevant requirements to obtain license (e.g. jewellery artists must obtain a permit or license from the National Bank).
7. Too many steps for business registration and such registration must be renewed relatively frequently (e.g. every two years) at considerable time and expense.
8. Non-transparent registration procedures; unpredictable timeframe for registering process.
9. Restrictions on registration (e.g. residency requirements), which prevents foreign engineers from signing off on drawings and managing projects.
10. Unduly burdensome requirements.
11. Onerous licensing requirements (consulting, engineering, construction, and distribution services).
12. As licences can be difficult or impossible to obtain, forwarders often have to resort to intermediaries or form partnerships (Other transport services).
13. Registration is required both at the central and local governments (or local commercial courts); the procedures at the local level are often not transparent and taking a long time without adequate explanation for the delay.
14. Residency requirements (including computer, telecommunications, audiovisual, construction, distribution, energy, financial, sporting, and tourism services).
15. Residency requirements for advertising production professionals filming in some countries and/or for employees of the advertising firm.
16. Mandatory membership of a Chamber of Commerce or a local association required as a pre-condition to operate business in local areas.
17. To be licensed as a professional, there is a requirement or pre-requirement to be a member of an affiliate organization. This organization has no regulatory authority over the profession (that is, union, country club). To be a member of this organization, the licensee must be a resident of the territory or have lived in the territory for the past six months.
18. Requirement to have numerous different legal entities as a pre-condition to apply for a business operation license.
19. Applicant must possess indemnity insurance or be bonded prior to licensing.
20. Licensing fees that are considered as expensive by international standards.
21. Registration/approval is required in order to provide services.
22. Special registration requirements for firms to operate in individual countries (construction service).
23. Authorization requirements are cumbersome: e.g. a permit is required for every single project.
24. Residency requirements: architects or other registered professional must stay in the host regions for a long period of time and in case of no fulfilment of such requirements, license will be lifted.

## **Licensing procedures**

1. Work history and letters of reference from all previous employers unrelated to the authorization sought.
2. Documented proof of physical and mental well-being.
3. Overly complicated licensing procedures (e.g. have to go through many steps in many agencies in order to obtain a license).
4. Excessive, vexatious formalities, lacking in transparency, for professional licensing purposes, etc.
5. Only original documents will be accepted.
6. Only documents translated or authenticated by that country's embassy will be accepted, causing unnecessary delays and expenses (especially if additional documents for an application are required at short notice).
7. Delays in receiving an application.
8. Delays in informing the applicant of the decision (unreasonable time).
9. Where government approval is required but denied, no reasons are given for denial, and no information is given on what must be done to gain approval in the future.
10. No possibility for the applicant of correcting minor errors in its application form.
11. No possibility of resubmitting applications for licensing after a first rejection.
12. Delays in implementing the terms of the licence
13. Lack of transparency.
14. The period of time required for the processing of a license application is not very clear.
15. The processing period for a license application is long.
16. A great deal of documents must be submitted throughout several stages in order to obtain authorization.
17. Excessive application and processing fees (including postal and courier, distribution, and educational services).
18. Authorization procedures are costly.
19. Authorization procedures take up a considerable amount of time.

## **Qualification requirements**

1. Residency requirements.
2. The scope of examinations of qualification requirements goes beyond subjects relevant to the activities for which authorization is sought.
3. Requirements needed for eligibility to take exams are more burdensome than necessary and not relevant to ensure the quality of service (e.g. must stay in that country at least three years to be eligible to take exam).
4. Qualification requirements other than education, examinations, practical training, experience and language skills.
5. Examinations that do not appear to be directly related to the concerned qualifications are required.
6. Educational background in certain countries/regions is the prerequisite for granting of licenses, while the academic background of foreign professionals is not recognized.
7. Requirements of previous working experiences in host markets: Natural persons applying for professional licenses should have certain years of working experiences in the host markets.

## **Qualification procedures**

1. Long delays in the verification of an applicant's qualifications acquired in the territory of another Member.
2. Lack of a legal framework for accepting professionals with foreign qualifications, or lack of internal consistencies of such a framework.
3. Non-recognition of foreign qualifications (including engineering, construction, financial and sporting services).

4. Limited or no recognition of foreign qualifications (architecture, legal services).
5. Non-recognition of qualifications obtained in country of origin (e.g. not accepting cooking certificate from a government institute) and refusal to consider past working experiences and/or apprenticeship in country of origin.
6. Common exclusion of developing countries from mutual recognition agreements
7. Unreasonable intervals for examination of applications.
8. Limited openness of process (all eligible applicants do not benefit from the same level of openness).
9. Unreasonable period of time for the submission of applications.
10. Excessive administrative costs that do not reflect fees charged.
11. Residency requirements for sitting examinations (not subject to Article XVII).

## Index of Revealed Comparative Advantage in Services

YEAR	INDIA			
	Transport	Travel	Other Commercial Services	All Commercial Services
1995	1.14	1.19	0.85	<i>0.92</i>
1996	1.17	1.22	0.80	<i>0.90</i>
1997	0.92	1.02	1.06	<i>1.03</i>
1998	0.68	0.81	1.26	<i>1.26</i>
1999	0.56	0.67	1.46	<i>1.39</i>
2000	0.45	0.57	1.56	<i>1.54</i>
2001	0.39	0.48	1.66	<i>1.62</i>
2002	0.49	0.42	1.64	<i>1.56</i>
2003	0.61	0.59	1.46	<i>1.42</i>

Data Source: Balance of Payments Statistics, 2005, IMF

Notes:

1. The Figures in the table are Balassa's Revealed Comparative Advantage (RCA) Index, computed as:

$$R_{ih} = (X_{ih}/X_{it}) / (X_{wh}/X_{wt}),$$

where  $R_{ih}$  = Balassa's Index of RCA

$X_{ih}$  = country i's export of product h

$X_{it}$  = total export of country i

$X_{wh}$  = world export of product h

$X_{wt}$  = total world exports

A country is said to have revealed comparative advantage (disadvantage) in product h if  $R_{ih} > (<1)$

2. Other Commercial Services being Communications, Construction, Insurance, Financial Services, computer and Information, Royalties and Licence fees, Other Business Services, Personal, cultural and recreational Government.

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