

## **DOMESTIC REGULATION OF SERVICES SECTORS: ANALYSIS OF THE DRAFT NEGOTIATION TEXTS**

### **SYNOPSIS**

This document provides a paragraph by paragraph analysis of the draft domestic regulation texts which are currently being discussed at the WTO's Working Party on Domestic Regulation (services negotiations). As long as countries have opened and 'bound' at the WTO certain services sectors and modes of supply, the disciplines being negotiated on Licensing Requirements (LR); Licensing Procedures (LP); Qualification Requirements (QR); Qualification Procedures (QP) and Technical Standards (TS) apply in those sectors and modes. These disciplines stipulate that countries' measures relating to LR; LP; QR; QP; and TS should be 'pre-established', based on 'objective and transparent criteria' and 'relevant' to the supply of the services. They should in principle not be 'disguised restrictions on trade'; they should be 'as simple as possible' etc.

These rules can have an innumerable number of consequences. Countries' stringent measures vis-à-vis the financial sector could be said to be unnecessarily burdensome or strict and should be relaxed. Doing so could have possible economy-wide consequences. Environmental regulations or those taking into account tribal sensitivities could be found, by a foreign construction company to be a 'disguised restriction on trade', not 'objective' or not 'pre-established'. Since services regulation affects not only the economy, but also people's well-being and access to essential/ universal services; societal preferences and cultural norms, the potential effects of these disciplines under negotiations are far-reaching.

The analysis gives an overview of what is at stake, provides paragraph by paragraph comments on the negotiating texts, and also suggests some recommendations.

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## I. INTRODUCTION

1. The WTO's Work Programme on Domestic Regulation (WPDR) negotiations remains a major challenge for developing countries. Many developing countries have both offensive and defensive interests in services.
2. The proposed disciplines on Licensing Requirements (LR), Licensing Procedures (LP), Qualification Requirements (QR), Qualification Procedures (QP) and Technical Standards (TS), following the mandate in Article VI:4 of the GATS could help countries in advancing their offensive interests to some degree. For example, Mode 4 (movement of natural persons) market access openings are limited by non-transparent qualification requirements. Arbitrary or burdensome entry requirements for companies could also make it difficult for Mode 3 (commercial presence) suppliers from developing countries to actually operate in overseas markets, despite scheduled market openings in those markets.
3. Yet at the same time, most developing countries are defensive when it comes to services trade. Apart from certain areas such as tourism and Mode 4 (movement of natural persons), most developing countries import more services than they export. Developing countries have an interest in being able to increase their supply of services – at least for starters, within their own countries.
4. In those sectors where developing countries have taken market opening commitments, these disciplines will bind countries' regulatory freedom and are likely to make it more difficult for developing countries to experiment and formulate their regulations according to their contexts, their institutional constraints, and their need to increase the local supply of services. Using these disciplines, foreign companies seeking greater market access could challenge developing countries' measures and regulations.
5. The analysis contained here approaches the issue of domestic regulation disciplines more from this latter viewpoint, focusing on the need to maintain the policy space of developing countries so that they can have the type of regulations that are most suited to their particular situation.
6. The analysis draws from several different negotiating texts that are currently being used. The paragraphs in bold on the extreme left column in the matrix is drawn from the 20 March 2009 Room Document 'Draft Disciplines on Domestic Regulation Pursuant to GATS Article VI:4'.<sup>1</sup> This text, until the time of writing, remains the basis

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<sup>1</sup> This 20 March 2009 document can be located at [www.tradeobservatory.org/library.cfm?refID=106851](http://www.tradeobservatory.org/library.cfm?refID=106851)

of negotiations in the Working Party on Domestic Regulation. In our analysis, we sometimes term this text 'Peter's text', after the Chairman who had written it.

7. The other documents used include

- the 'Annotated Text: Informal Note by the Chairperson', which is also a Room Document, released on 14 March 2010. This 'Annotated Text' captured comments and proposals from negotiators relating to the 2009 'Peter's text'.
- Chairman's Consultative Notes of early 2011. There are 3 versions of these: RD/SERV/46, 17 February 2011; RD/SERV/46/Rev.1; and RD/SERV/46/Rev.2, 23 March 2011. These Consultative Notes capture the most recent language options being discussed in the negotiations for each paragraph of 'Peter's text'.

Where relevant, comments have been provided in the enclosed matrix regarding these texts also.

## **II. THE REGULATION OF SERVICES - TRENDS**

1. Literature on the regulation of services (e.g. by Marcus Krajewski and others) show that there is a 'progression' in the type of regulation which countries take on board as they become more developed; increase in their institutional capacities; and as they have already put in place their basic infrastructural needs.

2. For instance, in the last 30 years, Europe and the US have moved from having monopoly suppliers in 'natural monopoly sectors' such as telecommunications, postal, rail transport, energy and water, towards having multiple players. These moves, it should be noted, have taken place only after the infrastructural needs in these sectors have been firmly established.

3. In step with these changes, on the regulatory front, the type of regulations put in place have also changed. Broadly, they have moved from entry controls towards price controls regulations and then towards standard-setting regulations etc.

4. **Entry Controls** regulations deal with quantitative or qualitative prerequisites that have to be adhered to before a supplier can enter the market. This is sometimes known as prior approval or screening measures. For example, limits on the number of airlines that can have a share of the domestic routes (US Civil Aeronautics Board regulations in the past), or limits on the number of trucks in order to encourage rail transport.

5. Qualitative controls include qualification requirements for service providers, but also prior approvals before marketing 'harmful' products such as alcohol or firearms,

or activities that could cause risks to others such as setting up of private hospitals, hunting licenses etc.

6. **Price Controls** regulations could include rent controls; fixed fees for lawyers or fixed prices for taxis; price controls regarding energy or telecommunication services, or price controls limiting the increases in retail prices for critical services such as water, gas, electricity, or telecommunications.

7. **Standards setting** regulations put in place mandatory standards that services suppliers have to comply with. Developed countries' regulatory approaches have moved in this direction. For example, rather than using entry controls, universal service obligations have been put in place through certain mandatory standards for service suppliers.

8. An example of standard setting regulation in Australia (Queensland), relates to the Extended Hours Trading Permit. To get a Liquor License, liquor shop operators simply have to submit a management plan of how they intend to ensure customer safety during the extended opening hour times (early hours in the morning). The Licensee is then bound to follow its own management plan. Similarly, airlines in the US have moved from predominantly entry control regulations and fare controls, towards more standard setting-type regulations e.g. safety inspection standards, crew requirements, risk management plans etc.

9. Standard setting-type of regulations can be argued to be 'less trade restrictive'. Suppliers can more easily enter the market as long as they are able to show that they meet the required standards. It could perhaps even be argued that they are 'less burdensome' in terms of entry requirements. The standards are already clearly pre-established (although changes can be made). The case can also be made that these regulations are more transparent, compared to entry controls.

10. These shifts map out the trends very broadly. Obviously all countries use a combination of these regulatory tools. However, as countries have developed, as infrastructure for key services have been fully developed, and certain sectors have become more liberalised, and as institutional capacities have improved, regulations have changed in the above described direction.

### **III. DOMESTIC REGULATION DISCIPLINES**

1. Countries in the WTO need only open up the sectors they deem are ready for liberalisation. However, once opened, the disciplines now being negotiated in domestic regulation relating to licensing requirements and procedures; qualification requirements and procedures; and technical standards would then apply.

2. Again, there is no hard and fast rule. All forms of regulation can in theory be used. However, the disciplines, by and large do clearly push countries towards certain regulatory norms and practices, such as a 'standards setting' mode of regulation. Unless they have been scheduled as limitations, countries' non-discriminatory, prior approval / entry controls type of regulation, and price controls regulation, could be called into question.

3. For instance, a price rise limit (price controls regulation) that is placed as a condition for the provision of a license to an electricity company could be challenged as being not 'relevant', 'objective' or 'arbitrary'.

4. Licenses based on the 'suitability' of the service supplier, for instance, in providing private security services where formal qualifications may not be the most important criteria; or the 'honesty and integrity' of financial suppliers (entry controls regulation) could also be called into question.

5. If a country lacks the revenue base, it may be more feasible for it to have entry controls type of regulation, rather than standard-setting regulation. It may not have the resources to conduct the necessary post-establishment checks to ensure that suppliers actually abide by these standards.

6. Furthermore, the yardsticks used to measure the appropriateness of a country's regulation - such as 'objective', 'relevant' to the services being provided, not a 'trade restriction', 'pre-established' - puts developing countries' development needs at a disadvantage from the start.

7. The following are only some development concerns and regulations that could be challenged:

- affirmative action to local communities e.g. suppliers have to take certain remedial action to these communities when supplying a service.
- establishing different criteria for licensing. For instance, new labour standards regulation in the face of population uprising may be challenged by foreign companies on the grounds that they were not 'pre-established'.
- limits on the rates companies can charge for essential services such as utilities, electricity etc.
- land development policies for example relating to aesthetics or the preservation of the environment or for other cultural reasons.
- re-regulation of the financial sector such as imposing higher capital requirements could be seen to be not 'relevant' to the supply of the service or a 'disguised restriction to trade'.

8. Regulations adopted by societies change according to development levels, institutional capacities, needs and preferences. It is therefore important that the disciplines in Domestic Regulation being negotiated, provide sufficient flexibility for developing countries to take on the regulatory approaches that best fit their particular needs and contexts. This is especially important as most developing countries are still developing their fledgling services sectors, and hence remain in an experimental phase as far as regulatory approaches are concerned.

#### IV. ANALYSIS OF DRAFT NEGOTIATING TEXTS

Proposed discipline	Issues	Recommendations
<p><b>Paragraph 2 (<i>Objectives</i>)</b>  <b>The purpose of these disciplines is to facilitate trade in services by ensuring that measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards are based on objective and transparent criteria, such as competence and the ability to supply the service, and do not constitute disguised restrictions on trade in services.</b></p> <p><b>Chair's annotated texts and consultative notes</b>  The discussions since 2009 showed that there has been significant opposition to any reference to the word "necessary". There is also some discomfort with the wording "disguised restrictions on trade in services"</p> <p>In the annotated text, the Chair noted that Members might wish to consider the following:</p> <p>(a) whether there is a need for a horizontal test for all measures within the scope of the disciplines;</p> <p>(b) whether more specific "tests" could be devised to address only specific aspects of the disciplines;</p>	<p><b><u>Necessity</u></b>  Some developing countries view the necessity test as incompatible with domestic regulatory authority.</p> <p>Necessity is a legal concept which can be found in many constitutional or administrative legal systems often as part of the wider proportionality principle.</p> <p>Necessity involves usually three steps:  First, the desired objective of the measure must be identified.  Second, the measure at stake must be compared with another measure which is less restrictive.  Third, the less restrictive measure must be at least as effective in achieving the desired policy goal.</p> <p>A key question when applying a necessity test in GATS law is the assessment of the availability of an alternative, less trade restrictive measure in the particular circumstances and its ability to fulfill the desired policy goal.</p> <p>Such an exercise requires the WTO dispute</p>	<p>'Disguised restrictions on trade' are a 'less onerous' option compared to a necessity test, due to its embedded ambiguity. However, it is only marginally better, and in many cases, (column on left), combined with the General Provision disciplines, could lead to necessity tests conducted by panels.</p> <p>If developing countries want to avoid both a necessity test and the 'disguised restrictions on trade' language, the following is proposed:</p> <p>"The purpose of these disciplines is to ensure that measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards <u>do not nullify their specific commitments in a manner that violates the disciplines that follow.</u> Adoption of these disciplines terminates the operation of article VI:5 and determines both the aims and operation of disciplines that Members consider to be necessary under article VI:4"</p> <p>Note that the above language contains a</p>

<p>(c) whether a test might be designed to apply only to procedures for the compliance with substantive requirements; but not to the substance of the requirements themselves;</p> <p>(d) whether discomfort with a "test" could be remedied by introduction of a suitable qualifying element, for example 'a reasonably available alternative measure' that was 'significantly less trade restrictive'.</p> <p>These options seem to have been dropped in the last two consultative notes in 2011. The options the Chair has now highlighted are:</p> <p>i) Domestic regulations should not be 'disguised restrictions on trade'. There is additional wording on the right to regulate to achieve public policy objectives; or</p> <p>ii) Domestic regulations should not be 'unnecessary barriers to trade in services' or</p> <p>iii) Domestic regulations should be</p> <ul style="list-style-type: none"> <li>- Based on objective and transparent criteria such as competence and ability to supply the services;</li> <li>- not more burdensome than necessary;</li> <li>- not be a restriction on the supply of the service.</li> </ul>	<p>settlement in a balancing exercise which is at the heart of a regulatory decision-making process. In many cases dispute settlement organs therefore need to become quasi-regulators and second-guess national regulatory requirements.</p> <p>Brazil, US and Canada have recently submitted a proposal highlighting such dangers in a necessity test. They note that :</p> <p>'The necessity test would allow another WTO member to challenge the way their regulator chose to address the non-trade concern even with no demonstrated effect on trade, by claiming that another measure, allegedly less burdensome, could have been taken to achieve the same policy objective. In such disagreements, the argument would come down to the legitimacy of the non-trade concern and how the regulator chose to address it...'(S/WPDR/W/44, 22 March 2011).</p> <p><b><u>Disguised restrictions</u></b>      As a compromise for not requiring "necessity," the chair's draft states that disciplines would aim to ensure that regulations "do not constitute disguised restrictions on trade in services."</p> <p>The foremost concern is whether "disguised restriction" could be a kind of operational</p>	<p>sentence on the termination of the mandate in VI: 5, which is very useful.</p>
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	<p>necessity test.</p> <p>The Secretariat reported that panels and the Appellate Body have introduced three criteria to determine whether a measure is a disguised restriction:</p> <ul style="list-style-type: none"> <li>- a publicity test that looks to whether a measure is unpublished</li> <li>- consideration of whether the application of a measure also amounts to arbitrary or unjustifiable discrimination</li> <li>- examination of design, architecture and revealing structure of a measure at issue.</li> </ul> <p>Reviewing WTO case law, legal expert Robert Stumberg provides four instances where regulations could be seen as 'disguised restrictions to trade':</p> <p>First, regulations impose greater costs on foreign suppliers (US-Gasoline)</p> <p>Second, regulations treat similarly situated suppliers in a different manner (Australia - Salmon)</p> <p>Third, regulations that justify different treatment based on policy objectives that are outside the scope of an exception or an affirmative obligation (Brazil-Tyres)</p> <p>Fourth, when governments fail to consult with trading partners when violation of a trade</p>	
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	<p>obligation is foreseeable (US-Gasoline).</p> <p>When ‘do not constitute disguised restrictions’ in para 2 of Peter’s text is read in conjunction with para 11 in the General Provisions section, the disciplines in Para 11 of ‘pre-established’, ‘objective’, ‘transparent’ and ‘relevant to the supply of the service’, this could lead to panels comparing regulatory conduct in similar situations and the pursuit of less trade-restrictive alternatives. This is why it could lead to operational necessity tests.</p>	
<p><b>Paragraph 3 (<i>Recognition of the Right to Regulate</i>)</b>  <b>Members recognize the right to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right. These disciplines should not be construed to prescribe or impose particular regulatory approaches or any particular regulatory provisions in domestic regulation.</b></p> <p><b>Chair’s annotated text:</b>  The Chair in the 2010 Annotated text seems to ask delegates may ‘wish to consider suppressing the first sentence of paragraph 3, as it is</p>	<p>In the Annotated Text, the Chair is recommending against retaining this paragraph designed to safeguard the right to regulate.</p> <p>The domestic regulation disciplines will govern non-discriminatory regulations. Mireille Cossy, a Counselor in the WTO’s Trade in Services Division, has explained the implications of this decision:</p> <p>‘In effect, the current understanding that Article VI (domestic regulation) applies to non-discriminatory measures leads to the questionable consequence that the WTO judiciary organs can rule on the ‘necessity’ of a measure which does not discriminate, whether de facto or de jure, against foreign services and service suppliers, but is seen as unsound from an economic point of view and has a possible</p>	<p>Right to regulate provisions should feature in both the preamble and the operative parts of the disciplines.</p> <p>For example, any direct or ‘soft’ form of necessity test such as ‘as simple as possible’, ‘less trade restrictive’, ‘pre-established’ etc should as far as possible be qualified, so that developing countries’ national objectives, technical and economic feasibility, as well as institutional capacity issues must be taken into account.</p>

<p>substantively identical with the fourth recital of the Preamble of the GATS, which also informs any of the Annexes to the GATS.’</p>	<p>restrictive effect on trade (this effect being the same for nationals and foreigners). As a consequence, it will allow a WTO judge to rule on societal choices (opening hours of shops, to take just one example), based on consideration on trade and economic efficiency. This is highly undesirable.’</p> <p>This means that the WTO dispute settlement organs would become something like a global regulatory review agency, second guessing domestic regulatory trade-offs in services regulations. It is highly questionable whether it should rest with a WTO tribunal to make value judgments about the importance of a domestic policy objective.</p> <p>Given these serious concerns, WTO members may wish to refrain from designing domestic regulation disciplines that give overly broad decision-making powers to WTO tribunals.</p> <p>It is important to retain this paragraph. It should be borne in mind that this right to regulate should in fact be further reinforced.</p>	
<p><b>Paragraph 4</b> (<i>Recognition of Difficulties of Developing Country Members</i>) Members recognize the difficulties which may be faced by individual developing country Members in implementing disciplines on domestic regulation, particularly difficulties</p>	<p>Peter’s text recognizes asymmetries of regulation capacity of developing countries, including the difficulties developing countries will have in implementing these disciplines.</p> <p>These “recognitions”, however, must be</p>	<p>This paragraph should be retained. In addition, in order to make it operative, it must be accompanied by operative language in the specific areas of disciplines, and also in the development chapter. (See above comments for para 3).</p>

<p>relating to level of development, size of the economy, and regulatory and institutional capacity. Members recognize the difficulties which may be faced by service suppliers, particularly those of developing country Members, in complying with measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards of other Members.</p>	<p>reinforced in the operational sections of the text or there may not be sufficient WTO deference to developing countries in the event of a dispute.</p> <p>In Mexico – Telecommunications, Mexico was not successful in arguing that its status as a developing nation should influence interpretation of its obligations under GATS regarding domestic regulation of telephone rates. The dispute panel ruled that under section 5(g) of the GATS Telecom Annex (developing country conditions), Mexico may impose reasonable limits on its GATS commitments, but it must do so in its schedule of commitments, as could any member nation. (WT/DS204/R, 2 April 2004, para. 7.386–7.388)</p> <p>The objective in this paragraph should be to ensure that the future disciplines are interpreted according to the needs of developing countries.</p> <p>When applying provisions, the future disciplines should take into account the level of development and administrative capacity of an individual developing country.</p>	<p><u>‘Size of economy’</u> could be replaced with the wording <u>‘needs of the economy’</u>. Large developing countries are not necessarily in a better position to implement these disciplines. Those still developing their institutional and regulatory capacities may in fact find their large countries/ large economies a major challenge to regulate, particularly as these disciplines are envisaged to cut across all levels of government.</p> <p>The suggestion by the current Chair to remove ‘particularly those of developing country Members’ in the Feb and March 2011 consultative notes should not be accepted.</p>
<p><b>Definitions</b>  <b>Paragraph 5 (Licensing Requirements)</b>          "Licensing requirements" are substantive requirements, other than qualification requirements, with which a natural or a juridical person is required to comply in order</p>	<p>In general terms qualification and licensing requirements refer to substantive requirements, whereas qualification and licensing procedures to administrative procedures and technical standards.</p>	<p>1) The dividing line between the categories LR, LP, QR, QP and TS should be as clearly spelt out as is possible.</p> <p>One of the Chair’s recommendations in the 2010 Annotated Text is helpful - that</p>

<p>to obtain, amend or renew authorization to supply a service.</p> <p><b>Paragraph 6 (Licensing Procedures)</b> "Licensing procedures" are administrative or procedural rules that a natural or a juridical person, seeking authorization to supply a service, including the amendment or renewal of a licence, must adhere to in order to demonstrate compliance with licensing requirements.</p> <p><b>Paragraph 7 (Qualification Requirements)</b> "Qualification requirements" are substantive requirements relating to the competence of a natural person to supply a service, and which are required to be demonstrated for the purpose of obtaining authorization to supply a service.</p> <p><b>Paragraph 8 (Qualification Procedures)</b> "Qualification procedures" are administrative or procedural rules that a natural person must adhere to in order to demonstrate compliance with qualification requirements, for the purpose of obtaining authorization to supply a service.</p> <p><b>Paragraph 9 (Technical Standards)</b> "Technical standards" are measures that lay down the characteristics of a service or the manner in which it is supplied. Technical standards also include the procedures relating to the enforcement of such standards.</p>	<p>Specifically, "qualification" refers to regulatory requirements on people, "licensing" refers to regulatory requirements on service providers, and "standards" are rules by which a service is performed.</p> <p>Technical standards might best be understood to apply by their very nature only once a service is being supplied, i.e. in cases of licensed supply, after authorization to supply the service has been granted. Other requirements (except qualification requirements) that a service supplier would have to comply with before authorization is obtained would be considered to be licensing requirements.</p> <p>The definitions of LR, LP, QR, QP and TS have raised several issues:</p> <p>1) Measures can sometimes fall into more than one of the categories to be disciplined (LR, LP, QR, QP, TS). This can cause confusion as to the exact commitments taken. For instance, a licensing requirement could also be a technical standard, such as capital requirements for banks. The problem is that these categories overlap in practice, and the question on the table is, how the WPDR can clarify the definitions so that the categories do not overlap.</p> <p>2) There is still lack of clarify regarding the</p>	<p>technical standards are principally service-related, whereas licensing and qualification requirements are supplier-related.</p> <p>2) On the scope of these disciplines, see the comments on Para 10 in the row below.</p> <p>3) In order to add commercially meaningful movement to the negotiations on domestic regulation, Members might gain true value added by including issues such as visa procedures (Colombia's 2004 proposal), mutual recognition, amongst others.</p> <p>Some countries have declared that disciplines related to visas fall outside the scope of the five categories covered by Article VI:4 (e.g. the US). Colombia and the African Group have suggested they are not questioning the actual fact of requiring a visa. The main concern revolves around the administrative procedures involved in obtaining a visa or entry permit which could nullify or impair the benefits accruing to a Member. There is no reason not to be ambitious in this regard.</p> <p>In addition, regarding Mode 4, India submitted a paper (30 March 2005) suggesting that progress in mutual recognition is one of the crucial elements</p>
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<p><b>Chair’s 2010 Annotated Text</b> Deliberations in the Working Party reveal that delegations’ views appear to differ considerably both with regard to the coverage of the definitions chapter overall, as well as the scope of the individual definitions contained therein.</p> <p><b>Chair’s 2011 Consultative Notes</b> A suggestion in the consultative notes shows that there is an effort to also make sure that LRs are requirements needed even to ‘maintain’ authorisation of a service. This broadens the scope of the disciplines – i.e. the policy space of developing countries will be narrowed. It is best to avoid having this broadened scope.</p> <p>In the definition of ‘technical standards’, the suggestion that it includes ‘procedures relating to application, monitoring, compliance and enforcement’ raises the ambition of the text in TS, and is not in the interest of developing countries (if they are more defensive in these negotiations).</p> <p>The US has also suggested a definition for ‘authorisation’: which according to them can be any measure permitting a natural or legal person to engage in the supply of a service – i.e. all areas in the text – LR, LP, QR, QP, and TS would be covered by the authorisation definition. US has suggested the carving out from ‘authorisation’</p>	<p>scope of these disciplines. Paragraph 10 of Peter’s text talks about ‘measures’ <i>relating to</i> LR, LP, QR, QP and TS. This means it is not only the LR per se that is covered by the disciplines, but it could implicate many other measures associated with LR, LP, QR, QP and TS.</p> <p>3) The definitions of Qualification Requirements and Procedures only refer to ‘natural persons’. The 2010 Chair has rightly brought up the question of what should be done regarding natural persons that have been employed by companies. (See para 70 of the 14 March 2010 Annotated Text). The Chair’s suggestion – that the definitions of QR and QP are changed to ‘natural person <b>in relation to</b> the supply of a service’ is a good one. (See para 71 of Annotated Text).</p> <p>4) On technical standards the debate is whether technical standards include both mandatory government standards and voluntary standards.</p> <p>First, it should be recalled that standards set by non-governmental bodies with delegated regulatory powers are specifically included in the scope of GATS (Art I.3a(ii)). Such measures are deemed to be mandatory standards. Second, standards set by non-governmental bodies without expressed delegated powers are</p>	<p>for effective market access.</p> <p>Although the 2010 Annotated Text takes into account professional experience in assessing qualifications, there is no reference to mutual recognition. Recognition can be covered under VI:4 insofar as it concerns licensing, qualifications and technical standards.</p> <p>4) It should be made explicit that the disciplines would only cover mandatory governmental standards. Incorporating non-binding voluntary standards as binding standards in the WTO would considerably broaden the scope of these disciplines to cover ‘soft’ non-governmental regulatory instruments. Governments could also be brought to court based on standards they have not put in place and this raises questions about the legitimacy of such a law-making process.</p> <p>Voluntary and non-mandatory standards do crop up in Para 40 of Peter’s text. The Small and Vulnerable Economies (SVEs) for instance, have asked for transparency in these non-governmental standards (see Para 282 of the Annotated text). Whilst such a discipline may help developing country exporters, it could also be very burdensome for these countries, if not at</p>
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<p>the following:</p> <ul style="list-style-type: none"> <li>i) measures governing a business – e.g. times of operation and similar conditions</li> <li>ii) measures governing human, animal, plant life or health or in relation to construction and engineering</li> <li>iii) measures concerning government procurement.</li> </ul>	<p>excluded from the scope of GATS and due to this fact are voluntary standards.</p>	<p>present then in the future.</p> <p>5) In order ensure that the disciplines support development objectives, it would be good to include the following in the definitions of LR, QR, and TS: that for developing countries, these disciplines ‘should be aimed to ensure public policy objectives’. [This suggestion is in part to counter balance the proposal in QR that the definition should include ‘ensuring the quality of service’].</p> <p>6) On authorization – it seems unnecessary to define ‘authorisation’. A look at the development chapter proposed by the US shows the problems that could emerge if this US model is used. However, the US has taken this opportunity to carve out some areas from the disciplines – e.g. construction and engineering activities, and also government procurement.</p> <p>It may be a good idea not to define ‘authorisation’ the way the US is requesting, but to secure for developing countries certain sectors or areas that could be carved out from the disciplines, such as:</p> <ul style="list-style-type: none"> <li>- services relating to natural resources (including water);</li> <li>- public services</li> <li>- government procurement.</li> </ul>
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<p><b>Paragraph 10 (Scope of Application)</b></p> <p>These disciplines apply to <u>measures</u> by Members <u>relating to</u> licensing requirements and procedures, qualification requirements and procedures, and technical standards <u>affecting</u> trade in services where specific commitments are undertaken. They do not apply to measures to the extent that they constitute limitations subject to scheduling under Article XVI or XVII.</p> <p><b>Chair's 2010 Annotated Text:</b> According to the 2010 Chair, more discussion was devoted to the second sentence of paragraph 10. There appears to be a sense that delegations have in principal agreed</p> <p>(1) that the disciplines shall not interfere with limitations scheduled in accordance with Articles XVI or XVII; and</p> <p>(2) that only the exact measures that have been scheduled will be exempted from a sector that is opened. Other measures relating to that sector will be covered by the disciplines.</p> <p><b>Chair's 2011 Consultative Notes</b> A very problematic option has been raised – that the disciplines do not apply to limitations subject to scheduling under Article XVI or XIVV, but that they 'apply to measures administrating such</p>	<p>A couple of issues important to developing countries can be flagged:</p> <p>1) As noted above, '<u>measures... relating to</u>' LR, LP, QR, QP, TS is very broad. Disciplines could apply to a broader class of measures that relate to LR etc. but are not LR etc themselves. Many government actions or procedures could inadvertently be 'caught' by these disciplines.</p> <p>2) 'affecting trade in services' means that disciplines would apply not only to measures that directly regulate services in a committed sector, but also measures that merely 'affect' services in those committed sectors. The breadth of the scope is of concern. (Para 76 of the Annotated Text is an articulation of this concern).</p> <p>3) It still remains unclear whether countries' non-discriminatory regulation, even though scheduled, could still get 'caught' by the disciplines.</p> <p>For example, a country may have put in its schedule that there must be an Economic Needs Test before a new shopping mall will be approved. The ENT will be based on disturbance of traffic conditions in the surrounding area.</p> <p>This is a non-discriminatory measure. Will</p>	<p>1 and 2) Disciplines should cover only committed sectors and modes that are scheduled. This is logical and befits the 'bottom-up' structure of the GATS.</p> <p>The scope of coverage 'measures relating to...' and 'affecting' is still very broad.</p> <p>Developing countries which have a more defensive position may be interested in the following textual changes:</p> <p>'These disciplines apply to <del>measures by Members relating to</del> licensing requirements and procedures, qualification requirements and procedures, and technical standards [<del>affecting</del>] [<u>that directly regulate</u>] trade in services where specific commitments are undertaken [<u>in a subsector and a mode of supply</u>]. They do not apply to measures to the extent that they constitute limitations subject to scheduling under Article XVI or XVII.'</p> <p>3) For developing countries that are more defensive, the existing language in Peter's text is broader and better than any of the language options proposed in the 2011 Chair's Consultative Notes. This is because there is some creative ambiguity in Peter's text (as noted in para 77 of the Annotated Text). It could be read that the disciplines</p>
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<p>limitations'. This should be rejected. It seems to mean that the measures taken to limit market access or national treatment could be challenged.</p>	<p>having scheduled it absolutely protect it from being challenged? Is this the understanding of all Members? (Para 78 of the Chair's Annotated Text seems to suggest that some members have a different interpretation).</p>	<p>do not apply to Article XVI and XVII measures that are applied in practice, but are not scheduled.</p>
<p><b>Paragraph 11 (General Obligations) Measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards shall be pre-established, based on objective and transparent criteria and relevant to the supply of the services to which they apply.</b></p> <p><b>Chair's 2010 Annotated Text</b> According to the Chair's Annotated Text, there are still differences and questions regarding the disciplines of 'transparency', 'pre established', 'objective' and 'relevant to the supply of the services'.</p> <p>Some of these questions included:</p> <p>i) <b>Transparency:</b> whether 'transparency' meant Para 40 (of Peter's text) level of transparency, which relates to transparency non-governmental bodies.</p> <p>ii) <b>Pre-established:</b> Can LR, TS etc requirements be changed once a license has been granted? Some members say no. However, even the Chair acknowledges that in domestic legal settings,</p>	<p>It should be recalled that there is a legal link between definitions and general obligations and thus both provisions must be understood together.</p> <p>General obligations refer to "pre-established, objective, transparent and relevant criterions" with regard to licensing, qualification and technical standards.</p> <p><b>Pre-established:</b> It is indeed unclear what 'pre-established' means. This word has been used only once before, but without definition, in the WTO's 1998 Accountancy standards. Robert Stumberg has identified four possible meanings:</p> <p>(a) Most nations apply a change in regulations to investments that exist before the change, so long as the change is not retroactive so as to punish investors for their actions prior to the change in regulations. This discipline could therefore be interpreted to mean "before a government applies a change in regulations". This meaning is consistent with the practice of many countries.</p> <p>(b) A strict interpretation of <i>pre-establish</i> is to</p>	<p>1) Language should be inserted that developing countries can undertake 'transparency' obligations only as far as is possible within their institutional capacities.</p> <p>2) On pre-established: Regulations must not impose penalties or other sanctions for actions that a service supplier takes prior to the date that regulations are adopted or changed. The text can include the suggestion that for developing country, Members, these disciplines cannot supercede developing countries right to regulate for development and public policy objectives.</p> <p>3) On 'objective': A possible meaning of <i>objective criteria</i> is to require that regulations must not be arbitrary. This is a common standard of review in domestic courts.</p> <p><i>Proposed changes</i> <i>Option 1:</i> <del>Measures relating to licensing requirements and procedures, qualification</del></p>

<p>measures can be changed in the course of application. In the US for example, suppliers would have to be given ‘fair notice’ of this change before they are expected to comply. To understand pre-established as maintaining and not changing existing Members’ regulations ‘would impose a significant limitation on the right of Members to modify their regulations’.</p> <p>iii) ‘Objective’ was noted by a Member to be a ‘tested concept’ and was indispensable for these disciplines. However, it was questioned by another Member and also the Chair in her Annotation, since statutes do sometimes provide that ‘regulators are at times granted discretion to take subjective decisions’. (Paras 87 and 91). The Chair also observed that as currently drafted, ‘objective’ is broader than the mandate in VI:4 (a), where ‘competence and the ability to supply the services are identified as illustrative examples’.</p> <p>iv) One Member notes that ‘relevant’ should only mean relevance to the ‘services quality and consumer protection’...‘other exogenous factors should be excluded’. However, other delegates have had different views. The Chair notes that further reflection is needed when ‘a broader set of objectives (e.g. conservation or preservation of the environment)’ are at play.</p> <p><b>Chair’s 2011 Consultative Notes</b></p>	<p>prohibit application of a change in regulations to assets, enterprises or other investments that have a “commercial presence” prior to the change. This would impose significant limitations on the right of countries to modify their regulations.</p> <p>(c) In light of the adverse impact of a strict interpretation, the chair suggested a modification of the first meaning: ‘in case of modification of regulations, applicants must be offered a reasonable opportunity to adapt their application to the new conditions (Para 94).</p> <p>(d) A further meaning is a regulation is pre-established before service suppliers rely on pre-existing licensing standards and procedures. It would apply to applicants who are faced with changes to substantive requirements while their application is being processed. This meaning would limit the scope of “pre-established” so that the discipline would not affect changes in post-licensing regulations (i.e. technical regulations that govern ongoing service operations).</p> <p><b>Based on objective criteria</b> – This phrase is ambiguous due to multiple meanings. For example, “objective” could mean “not subjective.” This definition would conflict with delegation of plenary authority to utility regulators to set “just and reasonable rates.” It could also mean “not biased”. This definition</p>	<p>requirements and procedures, and technical standards [measures] shall be [<del>pre-established</del> established before they are enforced against a service supplier], based on [<del>objective and</del>] transparent [and <u>not arbitrary</u>] criteria and [<del>relevant to the supply of the services to which they apply</del>] [make a contribution to public policy objectives].</p> <p><i>Option 2:</i> Alternatively, if the language is left as it is, an addition phrase can be added:</p> <p>‘For developing countries, these disciplines shall take into consideration financial and technical feasibility considerations, institutional capacity and public policy objectives, and the right to regulate’. For developing countries, transparency obligations will be adhered to, to the extent that is feasible.’</p> <p><i>Option 3:</i> Another possibility is to delete this paragraph and to bring in disciplines such as ‘relevant’ only in the specified sections of the text e.g. under Qualification Requirements and Procedures, but not in LR or TS.</p> <p>4) Transparency obligations will be</p>
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<p>The 23 March 2011 Consultative Note by the Chair provides some good language options vis-à-vis paragraph 11. One option deletes ‘Measures relating to...’, hence narrowing the scope of the disciplines.</p> <p>Another option by the US draws on their authorisation proposal. The suggestion also removes ‘pre-established’ from the paragraph. US also includes a caveat on the interpretation of ‘objective’ that is also useful to developing countries. Developing countries can perhaps not agree to the language on ‘authorisation’, but benefit from the reduced scope of the disciplines.</p> <p>A suggestion for a new 11 bis paragraph by New Zealand includes the concept of ‘national policy objectives’, but ties it to 2 necessity tests: ‘measures relating to LR and procedures, TS and QR and procedures ... (do not create) unnecessary barriers to trade in services. For this purpose, Members shall ensure that such measures are not more trade-restrictive than necessary to fulfil specific national policy objectives...’</p>	<p>could conflict with any number of measures that are designed to express a preference in qualification requirements or preferences. Examples include SMEs, indigenous peoples, women-owned businesses, etc.</p> <p><b>Relevant to supply</b> – A strict interpretation of this would mean that “only issues related to service quality and consumer protection should inform regulations ... and that other exogenous factors should be excluded.” (Para 90) This interpretation would exclude consideration of the “exogenous” impact that services like mining, distribution of energy, pipeline transportation, etc. have on the environment and communities.</p>	<p>adhered to, to the extent that is feasible.’</p> <p>The recommendations in Consultative Notes for para 11 are improvements, although the focus on the term authorization can be dropped.</p> <p>The new Paragraph 11 bis language from New Zealand contains necessity tests language that should be dropped. Developing countries could perhaps retain only the part of the language referring to national policy objectives, stating that these disciplines should not impede the fulfillment of specific public policy objectives.</p>
<p><b>Paragraph 12 (Right to Use of Universal Service Policies)</b></p> <p><b>Nothing in these disciplines prevents Members from exercising the right to introduce or maintain regulations in order to ensure</b></p>	<p>The universal service provision appears to be an exception/ carve out, but it is not because it has been limited by the reference to countries’ obligations and commitments under GATS.</p> <p>In other words, countries may ensure universal</p>	<p>The paragraph should be retained and improved upon.</p> <p><i>Proposed changes</i> [These disciplines shall not be construed to prescribe or impose particular regulatory</p>

<p><b>provision of universal service, in a manner consistent with their obligations and commitments under the GATS.</b></p> <p><b>Chair’s 2010 Annotated Text</b>        The Chair questions whether this paragraph is necessary, and whether it provides anything in additional to paragraph 3 (which has preambular language on the right to regulate).</p> <p><b>Chair’s 2011 Consultative Notes</b>        Some delegations wanted the paragraph deleted, others want to keep it. And the Chair in the 23 March Consultative Note has put the paragraph in brackets!</p> <p>A New Paragraph has been suggested which is not in developing countries’ interests: ‘The content of the measures should be reasonable in light of ensuring the quality of the service...’. This reduces the regulatory space of countries to only the quality of the service and should be rejected.</p>	<p>service only so long as they comply with GATS, including the disciplines on domestic regulation.</p> <p>UNCTAD made a distinction between universal service and universal access. While the first refers to services provided to each person or household individually, the latter refers to making the service accessible to everybody, whether through individual or collective access. Hence, developing countries usually aim at ensuring universal access rather than universal services. With respect to universal access, there might be different definitions depending on policy goals and sectors.</p> <p>The key issues that need to be addressed when considering essential services are: availability, accessibility, affordability and adaptability/appropriateness.</p> <p>In the line with Brazil and the Philippines proposal (2 May 2006), each Member should have the right to maintain or establish the kind of universal service obligation it desires.</p>	<p><u>approaches or any particular regulatory provisions in domestic regulation or to restrict the right of a Member to adopt any measure that is otherwise consistent with its specific commitments and scheduled limits on commitments under the GATS.]</u>        Nothing in these disciplines prevents Members from exercising the right to introduce or maintain regulations in order to ensure provision of universal access to essential services [<del>in a manner consistent with their obligations and commitments under the GATS].</del></p> <p>Alternatively, add to existing language that developing countries’ institutional capacity and development and policy objectives must be given priority.</p>
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<p><b>Paragraph 15 (<i>Publication of and Prior Comment on Draft Regulation</i>)</b> Each Member shall endeavour to ensure that any measures of general application it proposes to adopt in relation to matters falling within the scope of these disciplines are published in advance. Each Member should endeavour to provide reasonable opportunities for service suppliers to comment on such proposed measures. Each Member should also endeavour to address collectively in writing substantive issues raised in comments received from service suppliers with respect to the proposed measures.</p> <p><b>Chair’s 2010 Annotated Text</b> Even though paragraph 15 is expressed in various degrees of best-endeavour language, it continues to pose difficulties to some delegations. Some of these difficulties appear to be more fundamental, in the sense that advance publication of and prior comment on draft regulations are seen as a negative element in the formulation of regulation.</p> <p><b>Chair’s 23 March Consultative Notes</b> There are various options provided. All the options water down the original paragraph 15. e.g. Changing the working from ‘measures’ to ‘regulations’ narrows the scope of the disciplines. For developing countries, it is a good idea to put the language in best endeavour terms (last</p>	<p>The Annotated Text creates a “soft law” obligation (“shall endeavor to ensure”) for countries to publish their measures in advance, give service suppliers an opportunity to comment, and collectively respond in writing to those comments.</p> <p>The WTO Secretariat cites several decisions in which an obligation to “endeavour to” do something creates a <b>procedural obligation</b> to do the preparatory work that the obligation implies . (WTO Secretariat, <i>Treatment of Flexibility Language in Dispute Settlement</i>, JOB/SERV/8 (31 May 2010). In this case, the reasonableness of providing opportunities to comment on proposed measures will vary depending upon a Member’s administrative capability.</p>	<p>Recognize the challenge to developing countries in meeting this obligation.</p> <p><i>Proposed changes</i></p> <p>Option 1. Each Member shall endeavour to ensure that any measures of general application it proposes to adopt in relation to matters falling within the scope of these disciplines are published in advance. Each Member should endeavour to provide [<del>reasonable</del>] opportunities [<u>as practicable given its level of development,</u>] for service suppliers to comment on such proposed measures. Each Member should also endeavour to address collectively in writing substantive issues raised in comments received from service suppliers with respect to the proposed measures.</p> <p>Option 2. Insert a new paragraph Paragraph 15 Bis ‘Developing countries shall undertake the above commitments on transparency (para 13 -15), to the extent that they have the financial, administrative and institutional capacity.’</p>
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<p>option).</p>		
<p><b>CHAPTERS V-VIII STRUCTURE OF THE CHAPTERS</b> A group of countries - Australia, Chile, Colombia, Hong Kong China, Korea, New Zealand and Switzerland had proposed merging LR with QR; and LP with QP.</p> <p><b>Chair’s 2010 Annotated Text</b> The Chair in the Annotated Text makes an interesting comment that ‘whilst there would be no need to artificially separate issues that the disciplines address in similar or identical language, structural considerations should also not come at a cost of losing sight of important nuances’.</p> <p><b>Chair’s 2011 Consultative Notes</b> The Chair seems to be supporting the new structure, as proposed by Australia etc (‘the Friends’ group). This is not in the interest of developing countries.</p>	<p>Changing the structure of the text and merging LR with QR, and LP with QP is not a good idea.</p> <p>For many (though perhaps not all) developing countries, the ambition for QR and QP is higher than the ambition for LR and LP. To merge them would mean to either lower the ambition on QR and QP or to raise the ambition for LR and LP.</p> <p>This in fact could be the strategy of some countries which do not want stringent QR and QP disciplines as they may want to retain barriers to Mode 4.</p>	<p>It is best to retain the separateness of the categories so that the ambition in each can be adjusted. I.e. retain the structure of Peter’s March 2009 text.</p>
<p><b>Paragraphs 16 and 29 (Residency Requirements)</b></p> <p><b>16. Where residency requirements for licensing not subject to scheduling under Article XVII of the GATS exist, each Member shall consider whether less trade restrictive means could be employed to achieve the purposes for which these requirements were established.</b></p>	<p>There are likely to be cases whereby Members have opened certain sectors, but effective or better access to these sectors may have been blocked by Residency Requirements.</p> <p>If deleted as suggested by the ‘Friends’, this will not help in advancing developing countries’ Mode 4 interests, or even their Mode 3 interests.</p>	<p>Deleting this will not help developing countries Mode 3 or 4 offensive interests.</p> <p>However, if developing countries are defensive, and may in fact want to have residency requirements themselves, in sectors where they have opened, but may not have scheduled residency limitations, the deletion may be in their interest.</p>

<p><b>29. Residency requirements, other than those subject to scheduling under Article XVII of the GATS, shall not be a pre-requisite for assessing and verifying the competence of a service supplier of another Member.</b></p> <p><b>Chair's Consultative Notes</b> The Chair suggests deleting both paragraphs.</p>		
<p><b>Paragraphs 17 and 31 (<i>Simplicity of Licensing and Qualification Procedures</i>)</b></p> <p><b>17. Each Member shall ensure that licensing procedures, including application procedures and, where applicable, renewal procedures, are as simple as possible and do not in themselves constitute a restriction on the supply of services.</b></p> <p><b>31. Each Member shall ensure that qualification procedures are as simple as possible and do not in themselves constitute a restriction on the supply of services.</b></p> <p><b>Chair's 2010 Annotated Text</b> Paragraphs 17 and 31 set out the general guiding principle for all licensing and qualification procedures. The standard for such procedures, to be either "as simple as possible" or "simple, reasonable, and clear" has attracted different levels of support.</p> <p>The Chair pointed out that a possibly similar idea</p>	<p><i>Simple as possible</i> – This provision is absolute, making simplicity for suppliers the highest priority and it could easily be interpreted as a procedural necessity test.</p> <p>This proposed discipline is equivalent to a requirement that procedures be no more burdensome than necessary. It is unqualified, making simplicity a paramount goal in the licensing of all services, even highly complex ones such as banking. Procedures that involve multiple stages could violate the simplicity discipline. For example, some WTO Members require higher education institutions to operate for a certain period and demonstrate the standard of their services before they can be considered for degree granting authority, creating an approval process that is not as simple as possible.</p> <p>Proposals for such strict disciplines on procedures ignore the challenges faced by regulators in many developing countries that do</p>	<p>Our recommendation is that this provision Should be a guideline, using “should” rather than “shall,” and “as possible” should be deleted.</p> <p>It is best to keep LP and QP sections separate, so that the level of ambition in both can be different.</p> <p><i>Proposed changes</i></p> <p>Each Member [<del>shall</del> <u>should</u>] ensure that licensing procedures, including application procedures and, where applicable, renewal procedures, are as simple as <u>[possible practicable considering a Member's level of development and capacity]</u> and do not in themselves constitute a restriction on the supply of services.</p>

<p>is pursued by Article 3:2 of the Agreement on Import Licensing, which stipulates with regard to non-automatic import licensing that the procedures shall "not have trade-restrictive or -distortive effects on imports additional to those caused by the imposition of the restriction." Of course, import licensing procedures for goods are inherently restrictive <i>only</i> on imports, whereas, licensing and qualification procedures are equally applicable to local suppliers.</p> <p><b>Chair's 2011 Consultative Notes</b></p> <p>Friends' proposal suggests combining chapters VI and VIII into a single chapter on "Licensing and Qualification Procedures" and replacing paragraphs 17 and 31 with the language below:</p> <p>'While recognising the need to take into account the nature of the requirements to be met and the criteria to be assessed, each Member shall nevertheless ensure that licensing and qualification procedures, including where applicable those for renewal, are simple, reasonable and clear. Each Member shall further ensure that such procedures are pre-established, based on objective and transparent criteria and relevant to the supply of the services to which they apply, and do not in themselves constitute a restriction on the supply of services.'</p> <p>There is also another proposal by the Swiss which reintroduces a necessity test - 'no</p>	<p>not have the resources in place to undertake streamlined, efficient and sophisticated procedures.</p> <p>The Friends' proposal in the Consultative Note even takes the requirements further by insisting that each member shall ensure that LP and QP are pre-established, based on objective and transparent criteria and relevant to the supply of the services to which they apply. By doing so the Friends reaffirm Para 11 general obligations (pre-established, objective, transparent and relevant criterions) with regard to licensing and qualification procedures.</p> <p>As mentioned above, it is unclear what 'pre-established' means. See Stumberg's analysis of four possible meanings of pre-established (comments relating to para 11 above).</p>	
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<p>procedures are imposed other than necessary to verify the compliance...'. This proposal is also not in the interest of developing countries.</p>		
<p><b>Paragraph 18</b> (<i>Impartiality of Procedures and Independence of Regulators</i>)</p> <p><b>Each Member shall ensure that the procedures used by, and the decisions of, the competent authority in the licensing process are impartial with respect to all applicants. The competent authority should be operationally independent of and not accountable to any supplier of the services for which the licence is required.</b></p> <p><b>Chair's 2011 Consultative Notes</b> Friends' proposal suggests combining chapters VI and VIII into a single chapter. Paragraph 18 would now apply to both LP and QP. The friends want it replaced with the following:</p> <p>'Each Member shall ensure that the licensing and qualification procedures used by, and the related decisions of, any competent authority are impartial with respect to all applicants. The competent authority should reach its decisions independently from any suppliers of the services for which the licence or qualification is required.'</p>	<p>Changing "all market participants" to "all applicants" would enable governments to maintain a preference for special classes of applicants (e.g. small business, women-owned business and minority -owned business), so long as the decision are impartial within each special class.</p> <p>The word 'related' has been introduced. Will these include decisions taken by the competent authority not directly dealing with LP and QP? Clearly, this broadens the scope of the disciplines, which could be positive for developing countries offensive in Mode 4, but is likely to also pose problems for developing countries that might be defensive in relation of LPs and the regulation of investors.</p>	<p>Our recommendation is to convert this obligation into a procedural guideline with "endeavor to ensure" language.</p>
<p><b>Paragraphs 19 and 32</b> (<i>Single Window for</i></p>	<p><i>In principle'</i> - This phrase could mean that the</p>	<p>Our recommendation is that this provision</p>

<p><i>Applications)</i></p> <p><b>19. An applicant shall, in principle, not be required to approach more than one competent authority in connection with an application for a licence.</b></p> <p><b>32. An applicant shall, in principle, not be required to approach more than one competent authority for qualification procedures.</b></p> <p><b>Chair’s 2010 Annotated Text</b>        Some Members have stated that often, more than one authorization was required to supply specific services, and that these different authorizations would not necessarily be granted by the same agency. The particular case of a specific construction permit, that was required by the supplier of construction services in addition to a license, was mentioned in this regard.</p> <p><b>Chair’s 2011 Consultative Notes</b>        The Chair noted that delegations were converging towards merging these paragraphs.</p> <p>Friends’ proposal suggest combining chapters VI and VIII into a single chapter on “Licensing and Qualification Procedures” and replacing paragraphs 19 and 32 with the language below:        Each Member shall, to the extent practicable, avoid requiring an applicant to approach more</p>	<p>article is a guideline rather than an obligation.</p> <p>It could also mean that a country must provide a single regulatory authority which could create conflict given that more than one authorization is sometimes required to supply specific services and these different authorizations would not necessarily be granted by the same agency.</p> <p>The phrase ‘shall to the extent practicable’ creates an obligation rather than a best endeavour commitment</p>	<p>should be a guideline, using “should endeavor” rather than “shall.”</p> <p><i>Proposed changes</i></p> <p><u>Members should endeavour, taking into account their regulatory structure and institutional capacity, not to require applicants to approach more than one competent authority in connection with the application for a licence.]</u></p> <p>A better option would be to limit the discipline to qualification procedures only.</p> <p>Other proposals in 2011 based on the original structure of the Chair’s text.</p> <p>19.An applicant <u>should</u>, in principle, not be required to approach more than one competent authority in connection with an application for a licence.</p> <p>32. An applicant <u>should</u>, in principle, not be required to approach more than one competent authority for qualification procedures.</p>
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<p>than one competent authority for each application required in order to obtain authorisation for the supply of a service.</p>		
<p><b>Paragraph 20 (<i>Submission of Applications</i>)</b></p> <p><b>An applicant should be permitted to submit an application at any time, except where licenses are limited in numbers, including in public tendering. Where specific time periods for applications exist, an applicant shall be allowed a reasonable period for the submission of an application. The competent authority shall initiate the processing of an application without undue delay. Where possible, applications should be accepted in electronic format under the same conditions of authenticity as paper submissions.</b></p> <p><b>33. An applicant should be permitted to submit an application at any time. The competent authority shall initiate the processing of an application without undue delay.</b></p> <p><b>Chair’s 2010 Annotated Text</b> Members expressed difficulty with the (a) level of ambition; (b) concept of “at any time”; (c) licenses are limited in numbers; (d) treatment of applications in electronic format; (e) public tendering; (f) specific time of period</p>	<p><i>‘Including public tendering’</i> – The reference to public tendering confirms that the disciplines apply to government concessions and government procurement.</p> <p>Government procurement is to a large extent beyond the scope of existing GATS disciplines. There is no need for stronger disciplines on government procurement in the GATS context.</p> <p><i>‘Limited in numbers’</i> refers to quantitative restrictions. According to the Chair’s Annotated Text of 2010, while limitations on the number of licenses fall under Article XVI:2 (a), there would seem to be agreement that the disciplines apply to the allocation of the licenses that are within the numerical limit.</p> <p><i>Specific timeframes and electronic format</i> should only be possible if the future disciplines include specific and operational S&amp;D provisions.</p>	<p>Make clear that the disciplines do not cover either government concessions or government procurement and delete the reference to public tendering in this article.</p> <p>Recognize the challenge to developing countries in meeting this obligation using “shall” rather than “should” and as far as possible, lower the level of ambition in the disciplines for LPs.</p> <p><i>Reasonable timeframe</i> – Our recommendation is to convert this obligation into a procedural guideline with “endeavour to ensure” language.</p> <p><i>Other proposals based on the original structure of the Chair’s text.</i></p> <p>20. An applicant should be permitted to submit an application at any time, except where licenses are limited in numbers, <del>including in public tendering.</del> Where specific time periods for applications exist, an applicant shall be allowed a reasonable period for the submission of an application. The competent authority shall initiate the</p>

<p><b>Chair’s 2011 Consultative Notes</b> The Chair noted that delegations were converging towards merging these paragraphs.</p> <p>Friends’ proposal suggests combining <u>chapters VI and VIII into a single chapter on "Licensing and Qualification Procedures"</u> and replacing paragraphs 20 and 33 with the language below:</p> <p><u>‘The competent authority shall permit an applicant to submit an application at any time, except where licenses are limited in numbers, including in public tendering. Where specific time periods for applications exist, an applicant shall be allowed a reasonable period for the submission of an application. The competent authority shall initiate the processing of an application without undue delay. To the extent practicable, the competent authority shall accept applications in electronic format under the same conditions of authenticity as paper submissions.’</u></p> <p>Other options were also proposed. Some have placed these disciplines in weaker ‘should’ language, which is better for developing countries (as far as LPs are concerned).</p>	<p>The phrase ‘shall to the extent practicable’ creates an obligation on the competent authority to accept applications in electronic format rather than a best endeavour commitment.</p>	<p>processing of an application without undue delay. Where possible, applications should be accepted in electronic format under the same conditions of authenticity as paper submissions.</p> <p><i>During the 2011 consultations, the following language was proposed for paragraphs 33 of the Chair’s text:</i></p> <p>33. An applicant should, <u>in accordance with domestic law</u>, be permitted to submit an application at any time. The competent authority shall initiate the processing of an application without undue delay.</p>
<p><b>Paragraphs 24 and 38 (Timeframe for Processing of Applications)</b></p>	<p>‘Reasonable timeframe’ – This is an absolute obligation.</p>	<p>Reasonable timeframe – Our recommendation is to convert this obligation into a procedural guideline with</p>

<p>24. Each Member shall ensure that the processing of an application for a license, including reaching a final decision, is completed within a reasonable timeframe from the submission of a complete application. Each Member shall endeavour to establish the normal timeframe for processing of an application.</p> <p>38. Each Member shall ensure that the processing of an application, including verification and assessment of a qualification, is completed within a reasonable timeframe from the submission of a complete application. Each Member shall endeavour to establish the normal timeframe for processing of an application</p> <p><b>Chair’s 2011 Consultative Notes</b></p> <p><i>Friends’ proposal suggests combining chapters VI and VIII into a single chapter on "Licensing and Qualification Procedures" and replacing paragraphs 24 and 38 with the language below:</i></p> <p><u>‘Each Member shall ensure that the processing of an application, including reaching a final decision, is completed within a reasonable timeframe from the submission of a complete application. Each Member shall indicate the timeframe for processing of an application.’</u></p>	<p><i>‘Endeavour to establish the normal timeframe’ – The WTO Secretariat cites several decisions in which an obligation to “endeavour to” do something creates a procedural obligation to do the preparatory work that the obligation implies (WTO Secretariat, <i>Flexibility Language</i>, at para 14) In this case, that could be analysis to establish the normal timeframe. This could be a difficult undertaking for a developing country. There are many service sectors in which timeframes vary depending upon the complexity of the licensing decision or enforcement process. In others, major licensing decisions are infrequent, so there is no “normal</i></p>	<p>“endeavour to ensure” language.</p> <p><i>Endeavour to establish the normal timeframe – Our recommendation is to recognize the challenge to developing countries with “as practicable” language.</i></p> <p><i>During the 2011 consultations, the following language options were proposed, building further on the Friends’ proposal:</i></p> <p>Each Member shall ensure that the processing of an application, including reaching a final decision, is completed within a reasonable timeframe from the submission of a complete application. Each Member shall <u>indicate</u> <u>endeavour to establish</u> the timeframe for processing of an application <u>or, in case of licensing, explain why such an estimation of a timeframe may not be possible</u>.</p> <p><i>SC Proposed changes</i></p> <p>Each Member should <u>endeavour to</u> ensure that the processing of an application for a license, including reaching a final decision, is completed within a reasonable timeframe from the submission of a complete application. Each Member should endeavour <u>as practicable given its level of development,</u> to establish the timeframe for processing of an application.</p>
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<p>Another option which is better for developing countries was also proposed (see 3<sup>rd</sup> column).</p>		
<p><b>Paragraph 25 and 30 (Permission to Supply Service after Fulfilment of Requirements)</b></p> <p><b>25. Each Member shall ensure that a licence, once granted, enters into effect without undue delay in accordance with the terms and conditions specified therein.</b></p> <p><b>30. Once qualification requirements and any applicable licensing requirements have been fulfilled, each Member shall ensure that a service supplier is allowed to supply the service without undue delay.</b></p> <p><b>Chair's 2010 Annotated Text</b> Both paragraphs address the situation of a time-lag between the granting of a license (or the fulfilment of qualification requirements), and the actual moment in which a service supplier is permitted to supply the service. Members' comments have focussed predominantly on paragraph 30, which refers to a supplier being "allowed to supply the service" whereas paragraph 25 refers to the entry into effect of a license.</p> <p><b>Chair's 2010 Consultative Notes</b> <i>Friends' proposal suggests combining chapters VI and VIII into a single chapter on "Licensing and Qualification Procedures" and replacing paragraphs</i></p>	<p>These paragraphs should not be merged. Although they both address the issue of time lag to supply a service after the fulfilment of requirements, there are still differences between them in that paragraph 30 refers to a supplier being "allowed to supply the service" whereas paragraph 25 refers to the entry into effect of a license.</p> <p>The friends further propose that granting permission after meeting qualification and licensing requirements is 'without prejudice to the fulfillment of any requirements other than the applicable qualification and licensing requirements.' This means that other issues than those directly related to qualification and licensing requirements can be brought into play in determining whether a permission to supply a service is granted. Such issues or conditions could be potential barriers to trade. This additional caveat is good if developing countries have defensive interests vis-à-vis LPs. However, it waters down the value of this discipline in relation to Mode 4 as it could mean that visa requirements etc will be dealt with on a separate track outside of these disciplines.</p>	<p>Our recommendation is to convert this obligation into a procedural guideline with "endeavour to ensure" language and/ or limit the discipline to qualification procedures (Mode 4).</p> <p><i>Other proposal based on the original structure of the Chair's text:</i></p> <p>30. Once qualification requirements and any applicable licensing requirements have been fulfilled <u>and the competent authority grants a permission to operating,</u> each Member shall ensure that a service supplier is allowed to supply the service without undue delay.</p> <p><i>During consultations, the following language was proposed for paragraph 25 of the Chair's text:</i></p> <p><u>25. Each Member shall ensure that a licence is granted as soon as the conditions required for authorization have been met</u> and, once granted, enters into effect without undue delay in accordance with <u>[the] [its]</u> terms and conditions specified therein.</p>

<p>25 and 30 with the language below:</p> <p><u>'Each Member shall ensure that a licence, once granted, enters into effect without undue delay in accordance with its terms and conditions. Each Member shall also ensure that, once qualification requirements and any applicable licensing requirements have been fulfilled, a service supplier is allowed to supply the service without undue delay. This is without prejudice to the fulfilment of any requirements other than the applicable qualification and licensing requirements.'</u></p> <p>Other proposals have also been put forward - see column 3.</p>		
<p><b>Paragraph 26 (Fees).</b>  <b>Each Member shall ensure that licensing fees<sup>FN</sup> are reasonable in terms of the costs incurred by the competent authority, including those for activities related to regulation and supervision of the relevant service, and do not in themselves restrict the supply of the service.</b>  <sup>[FN: Licensing fees do not include fees for the use of natural resources, payments for auction, tendering or other non-discriminatory means of awarding concessions, or mandated contributions to universal service provision.]</sup></p> <p><b>29. Each Member shall ensure that any fees relating to qualification procedures are</b></p>	<p>The ACP Group has suggested (JOB(06)/136/Rev.1 19 June 2006): ...Members may grant service providers from developing countries concessional fees. If a Member chooses to exercise this option, it may, when setting fees to be charged from other service providers, take into account the need to compensate for losses sustained as a result of charging concessional fees"</p> <p>The African Group proposal (Room Doc. 2 May 2006) with regard to "fees" stated:          "We suggest that future disciplines, as they relate to fees, take into account that when charging fees, the respective administrative</p>	<p>Our recommendation is to recognize the challenge to developing countries in meeting administrative and other costs.</p> <p>On awarding concessions, it should be clear that the disciplines do not cover government concessions and government procurement.</p> <p>It would be good for language along the lines of the ACP Group proposal be added: that developing countries providers can be charged concessional fees.</p>

commensurate with the costs incurred by the competent authorities and do not in themselves restrict the supply of the service.

**Chair’s 2010 Annotated Text**

Generally, one might distinguish two stages in a licensing process where fees may be charged: initially, fees are often charged for the submission and processing of an application, independently of whether the application is successful. At a second stage, successful applicants may incur other fees, including those related to the supervision and regulation of the service activity. Paragraph 26, with its reference also to fees for regulations and supervision, would appear to discipline both types of fees. The proposal by the ‘Friends’ in the Annotated Text, on the other hand, is less clear in this regard, as it refers explicitly to application and processing fees, but also permits to take into account in the cost-calculation fees for supervision and regulation which normally would only be borne by suppliers who actually were supervised and regulated in their supply of a service, but would not be borne by unsuccessful applicants.

**Chair’s 2011 Consultative Notes**

Friends’ proposal suggests combining chapters VI and VIII into a single chapter on "Licensing and Qualification Procedures" and replacing paragraphs 26 and 39 with the language below:

authorities shall have regard to the costs of administrative activities involved (which, however, shall not result in inappropriate reductions of the respective regulatory budgets in developing countries).

*‘Means of awarding concessions’* – Care needs to be taken to ensure that this does not apply to government concessions and government procurement.

*During the 2011 consultations, the following language options were suggested for paragraph 26 of the Chair's text:*

<p><u>'Each Member shall ensure that any fees<sup>1</sup> related to licensing procedures are reasonable, and any fees related to qualification procedures are reasonable and commensurate with the costs incurred by the competent authority, including those for activities related to regulation and supervision of the relevant service, and do not in themselves restrict the supply of the service.'</u></p> <p>___<sup>1</sup> Such fees do not include fees for the use of natural resources, payments for auction, tendering or other non-discriminatory means of awarding concessions, or mandated contributions to universal service provision.</p> <p>Other proposals were also put forward.</p>		<p>26. Each Member shall ensure that licensing fees<sup>1</sup> <u>charged by the competent authority are reasonable, may include the cost of activities related to regulation and supervision of the relevant service, but not in themselves restrict the supply of the service.</u></p> <p>___<sup>1</sup> Licensing fees do not include fees for the use of natural resources, payments for auction, <u>[tendering or other non-discriminatory means of awarding concessions,]</u> or mandated contributions to universal service provision. <u>Except in situations described in Article I:3(a)(ii) of the GATS, such fees also do not include fees charged by private entities for assessments in support of applications such as fees for privately-administered examinations or privately-generated credit reports.</u></p> <p><i>During consultations, the following language options were suggested for paragraph 39 of the Chair's text:</i></p> <p>39. Each Member shall ensure that any fees<sup>1</sup> relating to qualification procedures are <u>[reasonable, may include the cost of activities related to regulation and supervision of the relevant service], but not in themselves restrict the supply of the service.</u></p>
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<p><b>Paragraph 27 (verification and Assessment of Qualifications)</b></p> <p><b>Where a Member imposes qualification requirements for the supply of a service, it shall ensure that adequate procedures exist for the verification and assessment of qualifications held by service suppliers of other Members. In verifying and assessing qualifications, where the competent authority finds it relevant, it shall give due consideration to relevant professional experience of the applicant as a complement to educational qualifications. Where the competent authority considers that membership in a relevant professional association in the territory of another Member is indicative of the level of competence or extent of experience of the applicant, such membership shall also be given due</b></p>	<p>It should be noted that beyond the process of formal qualification assessment, there are issues involved in credential recognition, including not only the recognition of an individual's paper credentials, but of their language and communication skills, workplace competencies and experience, and even national origin</p> <p>Hence, these negotiations should provide an opportunity for developing mechanisms that ensure that disciplines become effective tools for facilitating the international movement of professionals from developing countries and for adding commercially meaningful movement through the negotiations of new trade issues such as visa procedures, mutual recognition, amongst others.</p>	<p>It is important to ensure that relevant professional experience in addition to education qualifications is taken into account in order to allow the supplier an equal opportunity of being assessed with other candidates who may only have educational qualifications.</p>

<p><b>consideration.</b></p> <p><b>Chair’s 2010 Annotated Texts</b>          Members expressed difficulties with the a) discretion by the competent authority in the process of verification and assessment of qualifications b) professional experience in addition to educational qualifications.</p> <p><b>Chair’s 2011 Consultative Notes</b>          The Friends suggest the addition of the term “registry”. Switzerland proposed to add that no requirements are imposed other than as necessary to ensure the compliance of the applicant.</p> <p>India proposed to add the following language:</p> <p>Where a Member imposes qualification requirements for the supply of a service, it shall ensure that adequate procedures exist for the verification and assessment of qualifications held by service suppliers of other Members. In verifying and assessing qualifications, <del>where</del> the competent authority <del>finds it relevant, it</del> shall give due consideration to relevant professional experience of the applicant as a complement to educational qualifications. Where the competent authority considers that membership in a relevant professional association in the territory of another Member is indicative of the level of competence or extent of experience of the</p>	<p>Regarding the issues at stake further discussions in order to clarify the reach and envisaged operation of this discipline are needed, such as the difference between “registry” and “professional”, and amount of discretion.</p> <p>The difference between “registry” and “professional association” is namely that an association is an instituted body with membership on a long term-basis, while a registry is a not an organisation which requires membership, but a list drawn up by an authority or association. A supplier could be entitled to be on such a list which could be inspected by others.</p> <p>In the Swiss proposal the term “competence” was replaced by “compliance” which may slightly help developing countries get the qualifications recognised.</p> <p>India’s proposal strengthens the obligation to help developing countries who have offensive Mode 4 interests. However, whether members wish to address this issue in future discussions, clarifying language in this regard would be needed to prevent members’ competent authorities from having an excessive amount of discretion in the process of verification and assessment of qualification.</p>	
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<p>applicant, such membership shall also be given due consideration.</p>		
<p><b>Paragraph 28. (Identification of Deficiencies of Qualifications)</b></p> <p><b>Provided an applicant has presented all necessary supporting evidence of qualifications, the competent authority, in verifying and assessing qualifications, shall identify any deficiency and inform the applicant of requirements to meet the deficiency. Such requirements may include, <i>inter alia</i>, course work, examinations, training, and work experience. Where appropriate, each Member shall allow applicants to fulfil such requirements in the home, host or any third jurisdiction.</b></p> <p><b>Chair’s 2010 Annotated Text</b> The Friends proposed to delete paragraph 28 in its present form.</p> <p><b>Chair’s 2011 Consultative Notes</b> India, based on the original structure, proposed to add the following language:</p> <p>Provided an applicant has presented all necessary supporting evidence of qualifications, the competent authority, in verifying and assessing qualifications, shall identify any deficiency and inform the applicant of</p>	<p>Paragraph 28 is a good illustration that there might not be a clear distinction between requirements and procedures. Paragraphs 21 and 35 were listed under the headings of Licensing Procedures and qualification Procedures, respectively, whereas paragraph 28 which imposed similar requirements on regulators, was placed under the heading of qualification requirements.</p> <p>According to the 2010 Chair, in comparing paragraphs 28 and 37, it should be noted that they relate to different situations: the former paragraph addresses a situation in which an application is complete, but the qualification is found to be deficient, while the latter establishes due process obligations in cases that an application is considered incomplete. It would hence appear that paragraph 28 could not be substituted entirely by incorporating reference to identification of deficiencies of applications into paragraphs 23, 37, or a merger of the two provisions as proposed in paragraph 213 of the Annotated Text.</p> <p>India’s proposal raises the level of ambition on Mode 4.</p>	<p>Any agreement on Mode 4 should provide for a considerably higher level of ambition than the current WTO commitments with the aim of achieving real market access.</p> <p>The omission of this paragraph would constitute a reduction in ambition and a dilution of the current draft text.</p> <p>It is best to retain the structure of Peter’s text – retaining the paragraph, and improving on it - as India is proposing.</p>

<p>requirements to meet the deficiency. Such requirements may include, inter alia, course work, examinations, training, and work experience, each of which shall be based on <u>criteria relevant for the supply of the service. The possibility of fulfilling such requirements should not be restricted to host country institutions. The possibility of meeting these requirements in the home country, including through electronic submissions, should also be provided for unless there are justifiable reasons to the contrary which should be clearly stated. Where appropriate, each Member shall also allow applicants to fulfil such requirements in <del>the home, host or</del> any third jurisdiction.</u></p> <p>India also proposed to include a paragraph in between paragraph 29 and paragraph 30.</p> <p><u>Where examination requirements take into account knowledge and fluency of the language of the host country, such requirements should be based on meeting legitimate public policy objectives such as the safety of the consumer, ensuring quality of the services or where working knowledge of the language is essential for practice. Such language requirements shall not be used as a barrier to prevent foreign service suppliers from appearing for the examinations.</u></p>		
<p><b>Paragraph 34. (Examinations).</b></p>	<p>Some delegations stated that in their domestic</p>	<p>India has proposed language that is an</p>

<p><b>Where examinations are required, each Member shall ensure that they are scheduled at reasonably frequent intervals. Applicants for examinations shall be allowed a reasonable period to submit applications.</b></p> <p><b>Chair's 2010 Annotated Text</b> It was suggested to replace the first sentence of paragraph 34 with the following language: "Where the examinations are required ; members shall encourage the relevant authority to schedule examinations at reasonably frequent intervals.</p> <p><b>2011 Consultative Notes.</b> Friend's proposal suggests combining chapters VI and VIII into a single chapter on "Licensing and Qualification Procedures" and replacing the following paragraph 34 with the following language:</p> <p><u>Each Member shall ensure that examinations, if required, are scheduled at reasonably frequent intervals, and are open for all eligible applicants both local and foreign. Applicants shall be allowed a reasonable period for the submission of applications for examinations. Each Member shall encourage the competent authorities in its territory to consider means of facilitating foreign applicants to take part in such examinations, having regard to the costs and administrative burden involved, including by conducting</u></p>	<p>context, the professions are regulated mostly at the sub-national level or by self regulating bodies acting under delegated authority. Hence, examinations were outside the purview of the federal government, which could only encourage the relevant authority to schedule examination at reasonably frequent intervals.</p> <p>On the issue of combining chapters VI and VIII into a single chapter on "Licensing and Qualification Procedures", a better option should be limiting the discipline to the licensing of natural persons. Some very ambitious proposals on licensing requirements have already been put on the table, hence, work should not be faster and broader on licensing issues than on qualifications issues.</p> <p>India has interest in the movement of workers in professional services and several proposals on this issue have been submitted by them. These might be seen as a basis from which negotiations can begin, and for the level of ambition to be raised from there.</p> <p>With this aim of raising the ambition on Mode 4, the concept of equivalence could play an important role to facilitate trade in services.</p> <p>The Accountancy Disciplines go a step further and require members to take account of qualifications acquired in the territory of</p>	<p>improvement from Peter's text.</p> <p>In order to ensure that the disciplines truly support developing countries objectives, it would be good to include the wording related to mutual recognition agreements and enhanced cooperation in the field of education and training.</p>
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<p><u>examinations abroad or by electronic means.</u></p> <p>India proposed the following language:</p> <p>34. Where examinations are required, each Member shall ensure that they are scheduled at reasonably frequent intervals. Applicants for examinations shall be allowed a reasonable period to submit applications. <u>Members shall, wherever feasible, having regard to the costs and administrative burden involved, use electronic means for conducting such examinations and provide opportunities for conducting such examinations from the home country of the foreign service supplier.</u></p> <p>During consultations, the following language was also proposed:</p> <p><u>Members note the role which mutual recognition agreements can play in facilitating the process of verification of qualifications and/or in establishing equivalency of education.</u></p>	<p>another member on the basis of equivalence of education, experience and or examination requirements.</p> <p>Although the concept of equivalence works better among countries with similar regulatory regimes and might have limits in a system where members differ greatly in their regulatory traditions, the idea is to encourage more automatic recognition of qualifications in parallel to efforts aimed at enhancing cooperation in the field of education and training.</p> <p>Another alternative tool to facilitate developing countries exports through Mode 4 of trading services are mutual recognition agreements. Mashayekhi and Tuerk argue that mutual recognition can be understood as the (mutual) acceptance of regulatory conditions of goods and services in one country as equivalent to the conditions necessary in another country.</p> <p>With this objective in mind the last proposed language formulation (see column on the left) by a member points to the right direction, but the wording “Members note the role which mutual recognition agreements can play” will have to be strengthened in order to be useful.</p>	
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<p><b>II. CHAPTER IX: TECHNICAL STANDARDS</b></p> <p><b>Paragraph 40</b> (<i>Transparency for Standards by Non-Governmental Bodies</i>)  <b>Members are encouraged to ensure maximum transparency of relevant processes relating to the development and application of domestic and international standards by non-governmental bodies.</b></p> <p><b>Chair’s 2010 Annotated Text</b>  Concerning the application of technical standards, the language in draft paragraph 40 is somewhat unclear. It might be interpreted to refer to either the application of the standards by the non-governmental bodies, or to the application by a Member of the standards that were developed by the non-governmental bodies.</p> <p><b>Chair’s 2011 Consultative Notes.</b></p> <p><i>The Friends suggested adding under chapter IX a paragraph before Paragraph 40:</i></p> <p><u>Each Member shall ensure that any measures relating to application, monitoring, compliance and enforcement of technical standards are not more burdensome than necessary to ensure that a service conforms with the relevant technical standards, taking into account the risks that non-fulfilment would create.</u></p>	<p>The issue at stake within technical standards is whether voluntary standards or standards of non-governmental bodies without delegated regulatory authority should be subjected to these disciplines.</p> <p>It should be recalled that standards set by non-governmental bodies without expressed delegated regulatory powers are excluded from the scope of GATS and due to this fact, they are voluntary standards.</p> <p>Krajewski (‘National Regulation and Trade Liberalisation in Trade in Services, 2003) argues that voluntary standards should not be subjected to the Art VI.4 disciplines since this would mean possibly subjecting governments to trade dispute settlement procedures, even if it is a measure conceived without governmental authorisation, by a non-governmental body without delegated regulatory powers.</p> <p>Transparency cannot be a plausible justification for holding a government accountable for decisions made outside its jurisdiction.</p> <p>This consideration is not intended to ignore the interests of some countries in ensuring access to markets. Countries should assess whether including these measures is useful for achieving their goals.</p> <p>The Friends proposal adds a major substantive</p>	<p>It should be made explicit that the disciplines would only cover mandatory governmental standards. Incorporating non-binding voluntary standards as binding standards in the WTO raises questions about the legitimacy of such a law-making process.</p> <p>Our recommendation is to explore ways to promote regulatory forms, which are less intrusive on domestic regulatory processes.</p>
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<p><i>The following proposals were made by SVEs on Paragraph 40:</i></p> <p>40. As a matter of good practice, Members involved in the development and application of measures relating to prudential standards and standards developed and applied by non-governmental standardisation bodies, should ensure maximum transparency of relevant processes for the benefit of other Members.</p>	<p>obligation by way of a necessity test.</p> <p>The word “maximum transparency” in the SVE proposal may place a heavy administrative burden on countries with less administrative resources and capacity.</p>	
<p><b>Paragraph 41 (Taking Account of Relevant International Standards)</b></p> <p><b>Where technical standards are required and relevant international standards exist or their completion is imminent, Members should take them or the relevant parts of them into account in formulating their technical standards, except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of national policy objectives.</b></p> <p><b>Chair’s 2010 Annotated Text</b> Paragraph 41, as currently drafted, establishes a principle that international standards should be <i>taken into account</i> in the formulation of domestic standards</p> <p><b>Chair’s 2011 Consultative Notes</b> <i>During consultations, the following language options were suggested:</i></p>	<p>Some members have suggested that since there is no clear definition of technical standards, countries might refer to the definitions given in other international agreements administered by the WTO (i.e. TBT Agreement), and even to definitions of the terms technical standard and technical regulation given in standards established by international standard-setting bodies.</p> <p>Whilst the TBT Agreement may be a useful reference point, the characteristics of services and goods differ. Services encompass a wide variety of activities linked to the provision of essential services, human rights, and is politically must more sensitive.</p> <p>At the same time, developing countries face difficulties in participating effectively in all the international standardisation processes as a result of lack of technical experts and financial resources.</p>	<p>Basing a country’s services technical standards on a blanket acceptance of so-called ‘international standards’ which would have been largely crafted by others (and often with the largest involvement being corporate interests) may not be the best way to safeguard the democratic interests and preferences of different societies.</p> <p>As far as possible the language should be kept weak – this would be in the best interest of developing countries. Therefore, use ‘are encouraged to’ rather than ‘shall’ language. The suggestion to delete ‘their completion in imminent’ is also good. The following language may also be useful:</p> <p>Members shall, where requested grant other members, especially developing country members, technical assistance on</p>

<p>Where technical standards are required and relevant international standards<sup>1</sup> exist <del>[or their completion is imminent]</del>, Members <del>[are encouraged to]</del> [should] [shall] take them or the relevant parts of them into account in formulating their technical standards, except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of national policy objectives.</p> <p><u>No Member may prepare, adopt, maintain or apply any technical standards with a view to or with the effect of creating an unnecessary obstacle to trade between the Members. For this purpose, Members shall ensure that such measures are not more trade-restrictive than necessary to fulfil a national policy objective, taking account of the risks non-fulfilment would create. Such national policy objectives are, inter alia: the protection of human health or safety, animal or plant life or health; the protection of public morals and the maintenance of public order; national security requirements; the access to essential services; the quality of the service; professional competence; the integrity of the profession; or the prevention of deceptive and fraudulent practices. Requirements should be based on objective and transparent criteria.</u></p>	<p>Mashayekhi and Tuerk (GATS Negotiations on Domestic Regulation: A Developing Country Perspective, 2008) point out that judging from experience in goods, developing countries encounter difficulties a) when aiming to effectively participate in international standards setting process; and b) when their service suppliers are required to meet such international standards.</p> <p>The 2011 Consultative Notes suggest proposals which reduce policy space further - including introducing a necessity test in relation to countries' technical standards.</p>	<p>mutually agreed terms and conditions regarding the establishment of technical standards and participation in the international standardizing bodies. (SVE, African Group, ACP Group )</p>
<p><b>Paragraph 42 (Transition Period)</b> <b>A developing country Member shall not be</b></p>	<p>Taken as a whole, the draft text would impose disciplines that exceed the institutional capacity</p>	<p>Effectively, with the current proposals, S&amp;D for developing countries in domestic</p>

<p>required to apply these disciplines for a period of [X] years from their date of entry into force. Before the end of this transitional time period, upon request by a developing country Member, the Council for Trade in Services may extend the time period to implement these disciplines, based on that Member's level of development, size of the economy, and regulatory and institutional capacity.</p> <p><b>Chair's 2011 Consultative Notes.</b>        One of the options for the number X is 10 years.</p> <p>Another proposal by the US provides for a transition of 1 year. The US proposal, reproduced by the Chair as one of the options in the 23 March Consultative Notes also provides strict time limits under which some authorisation exemptions can be enjoyed by developing countries.</p>	<p>of many developing countries. Moreover, some of the proposed disciplines would conflict with Constitutional rights and mandates, as well as regulatory schemes to implement legislated policy objectives.</p> <p>The US proposal is worse than the old text. The US S&amp;D proposal consists of a transitional period of 1 year, and is capped at 3 years, but it is almost impossible to use these 2 additional years.</p> <p>It also excludes any S&amp;D with regards to general provisions and transparency disciplines, branding them as a core set of rules to be followed by all countries.</p>	<p>regulation has been limited to a transition period. (This is with the exception of the newest language proposed by Bolivia and Ecuador to take into consideration countries' constitutional rules. This works for countries with good / elaborate constitutional rules in this area).</p> <p>For many developing countries where regulations have not yet been adequately put in place, and are still being developed, these disciplines can easily be used to challenge their existing regulations. Developing countries simply do not have the institutional maturity to be adopting the kinds of regulations developed countries have (e.g. based on standards or market-based criteria, and which arguably are therefore more objective). Such developed country regulatory approaches are not necessarily appropriate for developing countries. Most developing countries still use entry-based types of regulations (which are the most effective if there are no robust post-establishment checks) which can be challenged as not objective, not simple, or not relevant etc.</p> <p>It is important that much stronger development language is provided, so that countries can take on board commitments only when they are at a more mature</p>
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		<p>regulatory level.</p> <p><i>Proposed changes</i></p> <p>I) <u>Notwithstanding all the preceding paragraphs, a developing country Member may, consistent with its level of development, adopt or maintain measures for purposes of meeting its domestic policy objectives (Part of the language adapted from Annex on Telecommunications, para 5g)</u>  <b>OR</b></p> <p>II) <u>The implementation of disciplines that require adjustment of existing domestic regulation and / or the adoption of new implementation mechanisms shall be consistent with developing countries' financial, administrative and institutional capabilities (language from 13 (a) (ii) of the SVESs proposal JOB (06)/66/rev. 1 May 2006)</u></p>
<p><b>Paragraph 45 (Technical Assistance)</b>  <b>Developed country Members, and to the extent possible other Members, shall provide technical assistance to developing country Members and in particular least-developed country Members (LDCs), upon their request and on mutually agreed terms and conditions. Technical assistance shall be aimed, <i>inter alia</i> at:</b>  <b>(a) developing and strengthening institutional and regulatory capacities to</b></p>	<p>The paragraph 45 only talks about technical assistance without making reference to the broader concept of capacity building.</p> <p>Important to link entering into force of obligations by developing countries to technical assistance and capacity building (as in trade facilitation negotiations). As put by the ACP Group " future disciplines should ensure that technical assistance and capacity building</p>	<p><i>Proposed changes</i></p> <p>Developed country Members, and to the extent possible other Members, shall provide technical assistance to developing country Members and in particular least-developed country Members (LDCs), upon their request and on mutually agreed terms and conditions. <u>These obligations shall not enter into force for developing country</u></p>

<p>regulate the supply of services and to implement these disciplines;</p> <p>(b) assisting developing country and in particular LDC service suppliers to meet the relevant requirements and procedures in export markets;</p> <p>(c) facilitating the establishment of technical standards and participation of developing country Members and in particular LDCs facing resource constraints in the relevant international organizations;</p> <p>(d) assisting, through public or private bodies and relevant international organizations, service suppliers of developing country Members in building their supply capacity and in complying with domestic regulation in their markets. Such assistance may also be provided directly to the respective service suppliers.</p>	<p>results in concrete improvements in domestic regulatory capacities as well as enhancement of developing country exports in receiving members”</p> <p>The African Group also suggested that the future disciplines that technical assistance and capacity building are granted, amongst others:</p> <ul style="list-style-type: none"> <li>a) To assist developing country regulators to building the regulatory and institutional framework in their countries.</li> <li>b) To assist service suppliers and regulators in developing countries to comply with theses disciplines and to apply them.</li> <li>c) To assist service suppliers in upgrading their services (including their quality and competitiveness, as well as their qualifications) to effectively compete in an ever more demanding global services market</li> <li>d) To assist policy makers and service suppliers in developing countries to effectively participate in international standard setting processes in an informed and sustained manner.</li> </ul> <p>The technical assistance language in Peter’s 2009 text should be further reinforced.</p>	<p><u>Members after the conclusion of the negotiations unless all requests for the provision of technical assistance and capacity building support have been met to the satisfaction of those making the requests. In cases where the required support and assistance has not been provided to the satisfaction of those making the requests, and where a developing Member continues to lack the necessary capacity, implementation of the obligations under these disciplines will not be required</u></p>
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<p><b>Chair's 2011 Consultative Notes</b>  <i>During consultations, Bolivia and Ecuador suggested including the following language in the Chapter on Development:</i>  <u>Nothing in these disciplines shall oblige a Member to take action or refrain from taking action, in a manner inconsistent with its Constitution.</u></p>	<p>The Bolivia and Ecuador constitutions place restrictions on reaching any agreement against their national policy objectives.</p>	<p>Other developing countries might also want to take into account the Bolivia and Ecuador proposal in order to avoid constraints to their right to regulate if the new domestic regulation disciplines are approved.</p>
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