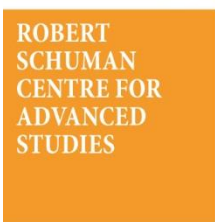




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A Technical Barriers to Trade Agreement for Services?

Bernard M. Hoekman and Petros C. Mavroidis



European University Institute  
**Robert Schuman Centre for Advanced Studies**  
Global Governance Programme

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European University Institute

Badia Fiesolana

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## **Abstract**

Services are regulated for a variety of reasons. Regulation is typically influenced by political economy forces and may thus at times reflect protectionist motivations. Similar considerations arise for goods, but the potential for protectionist capture may be greater in services as many sectors are self-regulated by domestic industry. There are specific disciplines on regulation of goods (product standards) in the WTO Agreement on Technical Barriers to Trade (TBT). This encourages the use of international standards and requires that norms restrict trade only to the extent necessary to achieve the regulatory objective. WTO disciplines on domestic regulation of services are weaker and differ in key respects from those for goods. We discuss reasons for this discrepancy and assess whether consideration should be given to seeking to adopt the TBT-type disciplines that apply to trade in goods.

## **JEL Classification**

F13, K33





## 1. Introduction\*

There is a vast literature regarding the potential rationales and motivations for domestic regulation of producers and products. There is also an extensive literature on the pros and cons of international standards and standardization. National standards and regulatory measures may act as barriers to trade, either deliberately or inadvertently. This is so because while standards-setting often reflects a ‘genuine’ need to regulate to address a market failure of some kind, it can also be influenced by political economy forces, and, consequently, the risk for protectionist capture of the process should not be under-estimated. The political economy literature on product standards concludes that these often will be beneficial for economic actors but guards that they can also serve protectionist aims. This is also the case for domestic regulation, which can be captured by incumbents to “raise rivals costs” or used as an instrument to discriminate against foreign suppliers.<sup>1</sup>

Allegations and evidence of protectionist abuse have been the basis of numerous trade disputes over the years. Such disputes motivated the negotiation and inclusion of specific disciplines on product standards for trade in goods in the GATT/WTO and the building of bridges between the trade and international standard-setting community. The key WTO agreements in this area are the Agreement on Technical Barriers to Trade (TBT) and the Agreement on Sanitary and Phytosanitary (SPS) measures. The TBT agreement addresses technical requirements (mandatory standards) imposed by governments for goods while the SPS agreement deals with health and safety-related norms for agricultural products (foodstuffs, plant and animal health). Both agreements provide ‘ports of entry’ into the WTO for product standards that have been established in specialized fora elsewhere and incorporated into national law or otherwise made mandatory by governments. The WTO does not get involved in establishing the content of product-specific technical requirements. The WTO’s two standards-related agreements provide a means for Members to ‘in-source’ the results of international cooperation on product safety-related norms. In principle, the use of international standards reduces the trade-impeding effects of countries adopting different standards for identical products by lowering trade costs and facilitating access to markets for firms no matter where they are located.

Empirical research has shown that the costs for firms associated with differences in services regulation across countries can be significant (see e.g., Kox and Nordas, 2007; François and Hoekman, 2010). However, there are no equivalent SPS- and TBT disciplines in the WTO in regard to standards in service industries. This raises the question why this is so, and whether similar types of disciplines should be envisaged in the context of services trade. One reason why two standards-specific sets of disciplines for goods trade exist in the WTO is that the health and safety concerns that arise in the production, trade and consumption of food, plant life and animals are considered to be particularly important – in effect many SPS norms can be characterized as measures that are aimed at catastrophe avoidance: spread of diseases, the probability of serious illness, etc. Similar considerations also arise with technical barriers to trade as these may have similar motivations – e.g., a ban on the use of lead paint; radioactive residues, etc.– but they often address other types of issues as well (e.g., radio frequency interference; interoperability, etc.). Thus, an additional question that arises is assuming there is a case for disciplines relating to services standards is whether one generic (i.e. horizontal) set of rules of the game applicable to all service sectors would be desirable and sufficient? Alternatively, what

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\* We are very grateful to Pierre Sauvé for constructive comments and detailed suggestions on the conference draft, to Peter Morrison for his willingness to present the paper and to Juan-Alberto Marchetti for numerous discussions on the subject of this paper.

<sup>1</sup> There are many examples of product standards and regulatory norms that were used for protectionist purposes. A classic example was a Japanese product standard adopted in 1986 by the Consumer Product Safety Association for skis sold in Japan. The Association argued that American or European standards for skis were not appropriate for Japan because snow in Japan was “wetter” and that Japan had unique geo-thermal activity (Vogel, 1992).

reasons might justify consideration of different sets of disciplines for different types of services, along the lines of what exists in the GATT context?

In Section 2, we discuss the main elements of the TBT agreement and the state of play as regards international standardization of services regulation.<sup>2</sup> Section 3 summarizes the relevant disciplines and the approach that was taken in the GATS towards domestic regulation of services (services standards). Section 4 discusses whether there is a case for a TBT-analogue for services and what WTO Members might consider doing in this area given the complex political economy associated with efforts to reduce the market-segmenting (cost-increasing) effects of differences in regulatory norms for services. Section 5 concludes.

## 2. One Sauce for the Goose, One for the Gander?

### 2.1 Goods Trade

The genesis of the WTO's TBT Agreement dates back to the 1970's. The first iteration of the agreement was negotiated during the Tokyo round (1973-79). It was part of the GATT '*à la carte*' approach followed during that round, and hence, was binding only on its signatories. It was subsequently revised and multilateralized during the Uruguay round, and incorporated as one of the core agreements that apply to all WTO Members.

Why was a TBT Agreement put on the table in the Tokyo round? The Agreement deals with domestic instruments such as 'labelling', and 'packaging' and technical requirements that must be satisfied by a product when it is imported. A technical regulation is defined as any measure that applies to an identifiable product or group of products, specifies technical characteristics for these products (e.g., relating to composition and characteristics such as flammability, texture, density, toxicity, etc.) and is mandatory. Such measures fall under the aegis of Art. III GATT, the national treatment rule, which aims to preclude the use of domestic measures – taxes or regulatory and administrative requirements – to nullify, partially or completely, the tariff concessions that a country has granted when joining the GATT or as the result of a trade negotiation round. The main policy objective is thus to prevent a nation from increasing the level of protection through means other than a tariff by imposing a measure that discriminates against foreign products. This obligation is independent of the level of tariffs – a country may have high tariffs or zero tariffs; in both cases the national treatment rule ensures that governments do not treat foreign products differently from domestic products.

The TBT agreement goes further than simple national treatment, however, and imposes additional disciplines. First, it requires WTO Members to reflect on the need to intervene: Art. 2.2 TBT requires that WTO Members take into account 'the risks non-fulfillment would create'.<sup>3</sup> Second, given a decision in favor of regulation, Members must base their interventions on available science, whenever possible, and adopt the least trade restrictive measure that is necessary (and available) to achieve their stated regulatory objective. Necessity in this context means that WTO Members are free to pursue any objective they deem appropriate but must select an instrument that minimizes possible adverse effects on international trade. Necessity does not oblige WTO Members to use what economists would call the first best instrument (i.e., the most efficient policy). Instead, the focus is on trade effects. In most circumstances, however, a norm that minimizes adverse trade effects is likely to prove more efficient than one that does not, unless the source of the externality that the product regulation is addressing is at the border. The "least trade restrictive" criterion is a reflection of a basic objective of the agreement: to facilitate trade.

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<sup>2</sup> We will not discuss the SPS agreement as extending this agreement to services is by the nature of this agreement impossible, being limited to very specific types of tangible products.

<sup>3</sup> The risk referred to here is of not attaining the legitimate objective that motivates the technical regulation.

Another critical feature of the TBT agreement is that it encourages the use of harmonization as a way of reducing product standards-related trade costs. Art. 2.4 TBT pre-supposes the existence of ‘international standards’, and requires from WTO Members:

Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

International standardizing bodies provide a forum for governments and industry to debate on the need to regulate and to cooperate in the design of standards. The resulting international standards reflect a common view of how best to address a specific need to regulate through the adoption of a technical measure. Under the TBT agreement, there is a presumption that ‘international standards’, as the term has been understood in case law, are the least trade restrictive option, that is, these measures are considered to satisfy the necessity-test embedded in Art. 2.2 TBT. There is however no guarantee that this is actually the case, as the process of international standardization may devote as little attention to trade effects as do domestic norm-setting procedures. The presumption is that by having many countries involved in the standards development process, whatever is agreed is regarded as being non-discriminatory in intent, no matter the actual effect on trade. As a result, the TBT Agreement contributes to the ‘rationalization’ of product standards.

An implication of the definition of a technical regulation is that production and processing methods (PPMs) are only covered by the TBT agreement if they have a direct bearing on the physical characteristics of the product(s). Many of the standards that confront firms operating internationally address management processes and production methods. Norms such as those developed by the International Organization for Standardization (ISO) are used by companies as a signal of quality, a demonstration of a commitment to social responsibility or as requirements that must be met by suppliers in a trade relationship with buyers or by companies that are part of international value chains and production networks. Standards of this type are not covered by the TBT agreement because they pertain to processes used to produce a product as opposed to the physical characteristics of a product. The same applies to labels and certification marks insofar as these pertain to the way a product was produced as opposed to its content or physical characteristics.

The TBT Agreement includes disciplines on the procedures used to assess the conformity of a product with the applicable regulations, including the WTO non-discrimination rule. Relevant guides or recommendations issued by international standardizing bodies are to be used if they exist, except if inappropriate for national security reasons or deemed inadequate to safeguard health and safety. In principle, WTO members are free to join and use international systems for conformity assessment.<sup>4</sup> The results of conformity assessment procedures undertaken in exporting countries must be accepted if consultations determine these are equivalent to domestic ones. WTO Members are encouraged to negotiate mutual recognition agreements for conformity assessment procedures, and not to discriminate between foreign certification bodies in their access to such agreements.

## ***2.2 Services Trade and Regulation***

As mentioned, the TBT agreement only covers trade in goods.. The basic reason for the non-inclusion of services is that when the TBT agreement was first enacted in the late 1970’s, services were simply not covered by the GATT. The GATT applies only to measures affecting trade in goods. An important

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<sup>4</sup> Case law suggests that for a standard to be ‘international’, irrespective of whether we talk substantive standard or conformity assessment standard, the institution elaborating it must be open to all WTO Members (see for example, the Appellate Body report on *US-Tuna II*, at §347).

motivation for the negotiation of the GATS was to discipline measures affecting trade in services, which include both horizontal (cross-cutting) types of regulation (e.g., relating to economic pre-conditions that are imposed on the ability of foreign services providers to supply services) and sector-specific regulation. GATS negotiators were very cognizant of the potential trade restricting impact of national service standards and the need for disciplines that were analogous to those in the TBT Agreement, such as the application of the least trade restrictiveness principle.

A major constraint confronted by governments in developing disciplines on services standards was that national regulators often were concerned that the focus of services negotiations on market access objectives could trump their ability to regulate as they deemed appropriate. Such concerns were particularly prevalent in finance, transport and telecoms. The associated lack of trust and common understanding, and corollary need for extensive “learning by doing” by both regulators and trade policy officials, greatly constrained the feasibility of developing substantive disciplines along the lines of the TBT Agreement. As a result, a different approach was adopted in the GATS (discussed further below).

Even if such political economy factors had not been a factor, simply extending the TBT Agreement to include services – assuming for purposes of discussion that this is something that governments would be interested in doing – is made difficult by the fact that in the case of services, regulatory standards often apply to both the suppliers of services as well as the service products that are offered for sale. The focus of attention is much more on the regulation of entry to ensure quality/safety of services that are offered for sale, and the qualifications/credentials of the suppliers as opposed to what is actually supplied (the product). The reason for this is that regulators often cannot easily observe and thus directly regulate the services product (the outputs) – the same is true of consumers, for whom services are often so-called experience or credence goods, as quality can only be determined *ex post*, if at all – and thus the focus is on regulating the inputs. This is an important difference between goods and services and between what the TBT Agreement focuses on (characteristics of products) and what it would need to focus on if it were to be extended to cover services (characteristics of producers).

A key feature of the TBT Agreement is the call for adoption of international standards and the presumption that use of international standards implies product regulation complies with nondiscrimination disciplines. Compared to goods, there is less activity around the development of international standards for services. The homepage of the International Organization for Standardization (ISO) is suggestive in this respect: services standards represent less than 0.5% of its total activity (Table 1). This percentage suggests that the pace of standardization in goods and in services is very different, as the ISO is an organization that services the interests of industry.

**Table 1. ISO Standards for Financial Services**

Years	Number
1990-94	2
1995-99	8
2000-04	6
2005-09	17
2010-14	18
Cumulative total	51
<i>Memo: ISO total (all sectors/areas)</i>	19,977

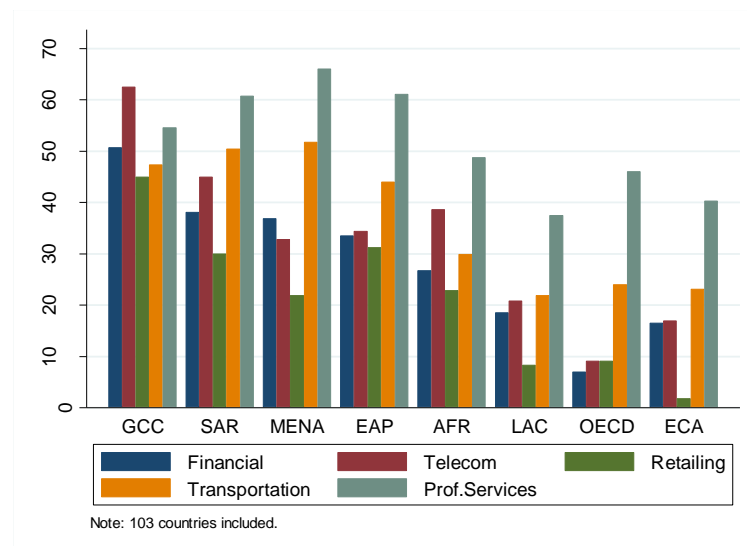
Source: <http://www.iso.org/iso/home/about/iso-in-figures.htm>

This is not to say that there is no activity on services—for some sectors there have been a number of standards issued. Examples include the accountancy sector and specific types of financial services products. ISO standards that have been concluded in the latter area in recent years deal with matters such as information security for electronic transactions, the structure of IBAN codes, biometric security frameworks, cryptographic algorithms and their use, the classification of financial instruments,

interchange message specifications, the format of Eurobonds and standards for personal financial planners. As is the case for all ISO standards, these are voluntary, with adoption a function of whether service providers find them useful. However, the number of standards issued in a given year by the ISO even in the most active service sectors is very low, both in an absolute sense and relative to the number of international standards issued for goods and other sectors of economic activity.

One potential explanation for the limited activity by the ISO on services is that national services industries do not have an interest in developing and adopting international standards because services are less tradable than goods, so that there is less of an incentive to pursue common standards across countries. Alternatively, the limited activity on services in the ISO may illustrate the existence of protectionist incentives. We have no evidence to bring to bear on this hypothesis, but the fact that in practice idiosyncratic national standards for services requiring licensing of providers are often alleged to impede trade suggests this may be a factor. The World Bank’s services trade restrictiveness database reveals that independent of per capita income levels, professional services are subject to the most restrictive regimes (Figure 1). Professional services, such as accounting, engineering, medical and legal services are often “self-regulated” by the associated national industry association, which is not generally inclined to adopt international standards that will facilitate entry by foreign providers.

**Figure 1: Services Trade Restrictiveness Indices by Region & Sector**



*Notes:* GCC: Gulf Cooperation Council; SAR: South Asia; MENA: Middle East & North Africa; AFR: Africa; LAC: Latin America and Caribbean; ECA: Europe and Central Asia

*Source:* Borchert, Gootiiz and Mattoo (2014).

Another potential explanation for the limited activity on services in the ISO is that international standards for services are set by specialized bodies to a much greater extent than is the case for goods. Thus, the reason for the virtual absence of services standards in the ISO may again be a lack of demand, but in this case because demand is satisfied by specialized suppliers. In fact there is substantial activity centering on international standardization of services activities, much of which is vertically sectoral. Major international regulatory/standards-setting bodies that deal with services include the International Air Transport Association (IATA) and the International Civil Aviation Organization (ICAO) (air transport), the International Accounting Standards Board (IASB) (accounting), the International Maritime Organization (IMO) (maritime transport), the UN Economic Commission for Europe (UNECE) (road transport), the International Telecommunications Union (ITU), the Bank for International Settlements (BIS), the International Organization of Securities Commissions (IOSCO) and the International Association of Insurance Supervisors (IAIS). There is also a plethora of

international agreements that act as de facto standard setting instruments in professional services, such as the Washington Accord in engineering services for instance.

These bodies have established international regulatory norms and standards in their respective areas. For example, the IMO, a specialized UN agency, has developed international regulations for ship safety, including international conventions on the safety of life at sea and on load lines for vessels, as well as codes on safety management and ship and port facility security. The UNECE administers the Transports Internationaux Routiers (TIR) Convention, a widely used international customs transit system that defines a set of requirements that transporters (trucking companies, etc.) must satisfy. For air transport, both passenger and cargo, IATA – an industry association – has developed numerous operational standards focused on safety and efficiency that are mandatory for members; ICAO does the same.<sup>5</sup> The ITU has issued some 4,000 ‘recommendations’: standards defining how information and telecommunication networks operate and interconnect.

Financial services are one sector where significant efforts have been made to define international standards. Thus, the IASB has developed the International Financial Reporting Standards (IFRS). The BIS devotes a substantial amount of time and resources to the development of prudential standards and has produced the Basel Core Principles for Effective Banking Supervision. The IAIS is the global international standards setter in the area of supervision of insurance companies – a recent output is the Basic Capital Requirements for Global Systemically Important Insurers. The Financial Stability Board (FSB) has emerged as a global norm-setting agency for financial services providers. The IOSCO has developed the Objectives and Principles of Securities Regulation.

International standardization of what the required characteristics are, e.g., capital adequacy requirements for financial service providers, or how to define, measure and report specific concepts to ensure international comparability, e.g., definitions of the various elements of the financial statements of companies for accounting purposes – typically involves communities of national regulators. Many of the norms developed by the above international entities are adopted by governments and the relevant national regulatory entities that are members of these bodies. When this is the case, such norms may become mandatory for service suppliers that are active in the sectors concerned and that operate in their respective jurisdictions. For example, some 85 countries require the use of IFRS by companies listed on domestic stock exchanges; ITU standards are often directly embedded into national laws; and so forth. The upshot is that internationalization of standards for services is centered on the characteristics of service suppliers or on common definitions of concepts, and tends to be sector-specific. An implication is that service standards may lend themselves less readily to horizontal or generic disciplines than product regulation for goods, given their high sectoral intensity.

While international standardization of regulation pertaining to service providers is actively pursued in some areas, most notably financial services<sup>6</sup> and activities that involve cross-border interaction (telecommunications; air transport) in many sectors regulation remains purely national in character. The feasibility of general cross-sectoral standards is further reduced insofar as regulatory bodies for many services are primarily if not exclusively focused on domestic needs and are very fragmented across sectors/countries. For some service sectors, the regulatory regime is often sub-national, especially in countries with a federal system of government. Thus, in the US and Canada, the states and provinces regulate professional service providers—this is the case for legal services, the medical professions, engineering, etc. In the EU, service sector regulation remains in large part national and is not developed at the EU level.

The essentially national nature of standard-setting and enforcement implies that emulation of the TBT approach in referring to international standards where these exist will generally have less salience

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<sup>5</sup> However, much of the focus of these bodies is on goods: the ships, trucks and aircraft used to transport people and consignments.

<sup>6</sup> See Bismuth (2010) and Claessens and Kodres (2014) for a recent assessment and discussion.

in services than in the case of goods. Matters are complicated by the fact that de facto standardization may occur through and by the relevant industry, as is the case for many professional services (Arnold, 2005 and Suddaby, Cooper and Greenwood, 2007). While the norms that are established by industry associations typically operate under delegated authority and hence must respect broad regulatory and competition disciplines nationally, in practice they may imply explicit barriers to entry. For example, there may be limits on the number of people who are permitted to study to obtain the needed qualifications (e.g., quotas on the number of students permitted to study medicine or dentistry) or non-recognition (non-acceptance) of qualifications and licensing obtained in another jurisdiction.

This brief review of the state of play with respect to services regulation makes clear that the feasibility of simply emulating the TBT agreement as it stands is limited. The focus on products in the TBT agreement as opposed to producers is perhaps the most immediate reason for this, but another is that a key feature of the TBT agreement is the reference to international standards as a solution to the potential protectionist abuse of technical product regulation. As we discuss below, efforts in the GATS context to move towards adoption of regulatory disciplines for services sector regulation have made virtually no progress in the last 20 years. The experience in the context of preferential trade agreements (PTAs) is somewhat better but with great heterogeneity across sectors (Marchetti, 2009; Mattoo and Sauvé, 2010; van der Marel and Shepherd, 2013). While limited progress towards internationalization of regulatory norms has proven possible through specialized sectoral standards-setting bodies such as those mentioned previously, these operate outside the confines of trade agreements. Most regulation remains national and thus may be used in a manner that nullifies trade commitments and acts as a disguised restriction to services trade by being disproportionate relative to legitimate regulatory aims.

### **3. The Current GATS Regime**

Given the much greater intensity of regulation in services compared to goods, it is not surprising that domestic regulation of services was an important element of the negotiations that led to the creation of the GATS. The GATS differs from the GATT in several important respects. For our purposes a key feature of the GATS is that national treatment is not a general obligation as it is in the GATT. The reach of national treatment (as well as market access commitments) under the GATS is determined by specific commitments made by each WTO Member. These commitments are scheduled on both a sectoral and mode of supply-specific basis. The GATS also differs from the GATT in that it includes general disciplines on domestic regulation—something that the GATT does not do. However, this has only limited reach, both because key issues were left for future deliberation and negotiation, and because national treatment is a ‘specific commitment’ under the GATS. If no such commitment is made for a sector WTO Members have no obligation to observe it. Thus, if a country has standards for the supply of accountants, it need not treat suppliers from foreign nations as it does domestic suppliers even if a foreign country has adopted identical standards for its own accountants.

#### **3.1 Domestic Regulation**

Instead of a generally applicable national treatment rules and additional TBT-like rules, the GATS includes disciplines regarding domestic regulation of services. Art. VI.4 GATS on Domestic Regulation reads:<sup>7</sup>

With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish,

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<sup>7</sup> Delimatsis (2007) offers a comprehensive discussion and analysis of this provision.

develop any necessary disciplines. “Such disciplines shall aim to ensure that such requirements are, *inter alia*:

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

In similar vein, Art. VI.5(a) GATS reads:

In sectors in which a Member has undertaken specific commitments, pending the entry into force of disciplines developed in these sectors pursuant to paragraph 4, the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments.

Article VI on Domestic Regulation therefore imposes a “least-trade restrictive” test in requiring that norms are no more burdensome than necessary to ensure the quality of the services concerned, and do not constitute a restriction on supply in themselves. However, how this test is to be applied – “the necessary disciplines” – were left for future agreement. Moreover, countries must have in place appropriate legal procedures to review administrative decisions affecting trade in services.

Thus, GATS does include disciplines on national services standards, albeit the terminology used in the body of Art. VI GATS might be prone to confusion (‘technical standards’ are distinguished from ‘licensing and qualification requirements’). However, this provision addresses only ‘national’ standards, as there is no obligation in the GATS akin to Art. 2.4 TBT calling on Members to use international standards (discussed above). By omitting a provision of this type, Art. VI GATS leaves it open to WTO members to use standards that they themselves have unilaterally defined, or that have been elaborated in international standard-setting institutions. They have assumed no obligation to use international norms where these exist and not deemed to be inappropriate.

A Working Party on Domestic Regulation was established in 1999 with the mandate to develop horizontal (cross-sectoral) disciplines called for by Art. VI:4 GATS to ensure that licensing and qualification requirements and related standards are not unnecessary barriers to trade in services. A precursor to this working party, the Working Party on Professional Services agreed in 1998 on a set of principles regarding regulations pertaining to licensing of accountants and accountancy services. These were adopted by the Council on Trade in Services in 1998 but have yet to enter into force. Entry in force was linked to the conclusion of negotiations to extend the GATS that were to start in 2000 (WTO, 1998) and that became part of the Doha Development Agenda negotiations in 2001. The accountancy disciplines do not deal with the substance of regulation of professional standards and qualifications. Similar to the approach under the GATT for product standards for goods, this is left to national bodies. Instead, the focus is on procedural disciplines such as transparency. A noteworthy feature of the accountancy disciplines was specific language pertaining to a “necessity test” for prevailing licensing-related requirements (i.e., a commitment to limit trade only to the extent necessary to achieve the regulatory objective).

The Working Party on Domestic Regulation proved unable to agree to a set of horizontal disciplines or to expand sectoral disciplines to additional professional services. Thus the accountancy agreement remains the only outcome of efforts to agree to disciplines on domestic regulation that go beyond what was negotiated in the Uruguay Round. Specific sticking points were disagreement on the need for inclusion of a “necessity test” – an obligation that a government demonstrate that a specific regulation that involves some level of restriction of trade is needed in order to attain a regulatory objective – and whether disciplines should extend to private standards setting bodies (WTO, 2011). Other issues that divided negotiators were similar to those that affected the Doha Round more generally – how to address capacity constraints of developing countries and include appropriate differentiation in obligations.

It is unclear why there has been so little progress in developing multilateral disciplines for domestic regulation, but clearly one reason is the difference in view regarding the need for (appropriateness of) a necessity test. This has two dimensions: (i) that measures do not constitute unnecessary barriers to



services trade; and (ii) that measures are not more burdensome than necessary to ensure the quality of the service/regulatory objective (Delimatsis, 2013). Whatever WTO Members decide to do regarding the substantive requirements of a regulation, they should adopt the least restrictive measure that is available to them (*US-Gambling*, Appellate Body report). The second conception of necessity is more far-reaching than the first and gives rise to legitimate concerns about the desirability of WTO bodies and ultimately the DSU determining whether a measure is indeed necessary to achieve a regulatory objective.<sup>8</sup> But even the first type of necessity (least trade restrictiveness) may be something that regulatory agencies have concerns about. Ensuring that a standard minimizes impacts on trade may involve actions and consultations that they do not have a mandate – or the resources – to undertake. More generally, regulators may not be much inclined to have to take into account objectives that have no direct bearing on the attainment of their legal mandate.

Another (complementary) reason for the inability to agree on disciplines for domestic regulation may be that business has concluded that prospects for agreement in the WTO are simply too dim to be worth the effort. The issue of domestic regulation of services has not been a high profile one in the WTO in the sense that global business has exerted public pressure for more action in this area. This may reflect a more general sense that the linkage that was made between the entry into force of the 1998 agreement on accountancy to the conclusion of the Doha round meant that there was little to be gained by lobbying for (or against) efforts to bolster disciplines on domestic regulation. Perceptions that the prospects of a broad Doha deal between the major players were limited and the recognition that the decision by governments to structure the Doha negotiations to focus first on agreeing to modalities to liberalize trade in goods and prioritizing agriculture and NAMA negotiations meant that services were a priority (Hoekman, Martin and Mattoo, 2010) could be contributing factors explaining limited engagement.

In the event, business interest and support has shifted away from the WTO towards efforts by governments to negotiate rules on a regional and plurilateral basis – examples being the Trans-Pacific Partnership (TPP), the Transatlantic Trade and Investment Partnership (TTIP), the Canada-EU Comprehensive Economic and Trade Agreement (CETA) and the Trade in Services Agreement (TiSA). PTAs are increasingly the venues where the trade effects of (differences in) regulatory policies are the subject of discussion, often building on bilateral or regional regulatory cooperation that has developed independently of – or in the absence of – trade agreements. It will be interesting to observe what disciplines on domestic services regulation, if any, will be incorporated into the PTAs. All of the initiatives just mentioned are still being negotiated or remain to be implemented and there is little information on what is on the table, let alone what may emerge. The outcomes will be informative as regards the extent of interest and willingness of governments to agree to disciplines affecting the manner in which they regulate services activities.

More standard political economy factors may also have played a role in the status quo bias that has characterized multilateral rule-making on domestic regulation of services. The case of accountancy is rather special in that the sector is relatively concentrated as far as global players are concerned: there were only a few large companies that had an interest in internationalizing in the 1990s and that saw multilateral disciplines as a useful tool to facilitate entry into foreign markets that were often controlled by national industry associations (Troillet and Hegarty, 2003). Such concentration does not prevail for other professional services which are much more fragmented. A related factor is that accounting already had moved down the international standards path working through bodies such as the International Federation of Accountants (IFAC), the International Accounting Standards

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<sup>8</sup> A corollary factor here may be a chilling effect of Appellate Body decisions in specific services-related cases, most notably *US-Gambling*, where it held that a nondiscriminatory measure aiming to combat internet gambling by under-aged consumers was still illegal, since it had not been properly scheduled in the US schedule of concessions. See Irwin and Weiler (2008) for a discussion on the ‘chilling effect’ of this decision.

Committee (IASC) and the International Organization of Securities Commissions (IOSCO).<sup>9</sup> This meant that the GATS-based discussions could build on and work with these interlocutors, something that has been less feasible for other professional services.

An interesting development that has occurred in the last decade or so is a rise in what Delimatsis (2012) calls transnational private regulation for a variety of professional services, which includes a focus on cross-border exchange and the adoption of good practices and norms. The move towards transnational professional associations that are based on the active participation of national professional associations is driven in part by the increasing interest of service providers to serve international markets and the fact that it has become easier to establish a commercial presence in foreign markets through FDI as governments have liberalized access to services markets. An implication may be that the perceived need for multilateral rules has declined as professional associations have “gone global” and adopted transnational “good practices” that members should conform to. It is important in this connection to recognize that while the WTO has been standing still, cooperation to reduce the market segmenting (cost-raising) effects of differences in regulation and duplication, and to improve regulatory efficiency has been the focus of more attention by governments. The focal point for such cooperation has been provided by various international bodies, including the OECD, APEC and the UN. The focus of activity of these bodies has been mainly on horizontal principles (“good practices”).

### 3.2 *Qualifications*

Article VII GATS (Recognition) promotes the establishment of procedures for (mutual) recognition of licenses, educational diplomas and experience granted by a particular member. It permits (encourages) a Member to recognize standards of one or more Members, but does not require Members to recognize foreign regulations as equivalent (Adlung, 2006). Art. VII:2 GATS requires a Member who enters into a mutual recognition agreement (MRA) to afford adequate opportunity to other interested Members to negotiate their accession to such an agreement or to negotiate comparable ones. Art. VII:3 GATS stipulates that a Member must not grant recognition in a manner which would constitute a means of discrimination between countries. Members must inform the Council for Trade in Services about existing MRAs and of the opening of negotiations on any future ones.

As of April 1, 2015, a total of 54 notifications were received under Art. VII:4 GATS. Only two were received in the last two years, both from Montenegro. Almost all pertain to the recognition of educational degrees and professional qualifications obtained abroad. In practice, WTO Members prefer to pursue MRAs as part of PTAs (as permitted by Art. V GATS on Economic Integration) as opposed to Art. VII GATS and the associated requirement to ensure that any MRA must be open to participation by third countries as this allows them to limit MRAs with countries that have similar standards and norms and the requisite implementation capacity.<sup>10</sup> Insofar as a country negotiates PTAs with different partners and these give rise to bilateral MRAs for a given sector that differ, the result may be continued market segmentation and trade diversion. There is little evidence to date whether approaches to MRAs in the PTA context are consistent.<sup>11</sup>

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<sup>9</sup> See e.g. Humphrey et al. (2006) and Loft and Aggestam-Pontoppidan (2007).

<sup>10</sup> Even then, research suggests that in PTAs where MRAs for professional services have been negotiated, these tend to be relatively ineffective as a result of holes and loopholes. See e.g., Nikomborirak and Jitdumrong (2013) on the case of ASEAN.

<sup>11</sup> Laurenza and Mathis (2013) compare provisions for negotiating MRAs in the PTAs that the EU and the US, respectively, have negotiated with the Republic of Korea and note that these are similar.

### **3.3 Transparency**

Art. III GATS imposes an obligation on WTO Members to be transparent with respect to laws and measures that affect trade in services. This provision, although not a monument of clarity, should be understood as covering those standards, both national and international, that might have been implemented. Transparency, however, does not extend to participation in the elaboration of standards, the duty to explain the rationale for regulation or the other obligations that the TBT imposes for product regulation for goods.

The TBT agreement requires governments to notify the WTO when they plans to adopt technical requirements that do not conform to an international standard, to allow a reasonable periods of time for comment, and for exporters to adapt to new requirements. Moreover, Members must establish a national enquiry point where traders may obtain documents and answers regarding technical regulations adopted or proposed by bodies which have legal power to enforce them; standards adopted or proposed by central or local government bodies, or by regional standardizing bodies; and conformity assessment procedures, existing or proposed, applied by enforcing bodies. Best efforts are to be made to ensure that enquiry points can respond to inquiries on standards adopted or proposed by nongovernmental standardizing bodies such as industry associations, as well as conformity assessment procedures operated by such bodies. The TBT agreement mandates the WTO secretariat to establish an information system under which national standards bodies or enquiry points transmit to the ISO Information Centre in Geneva the notifications required under the Code of Good Practice for the preparation, adoption and application of standards.

One can ask why the relative intrusiveness of these TBT requirements was acceptable to regulatory communities when it comes to trade in goods but was not incorporated and applied to trade services. We can only speculate. In general, transparency provisions as regards measures affecting trade in services are relatively weak – this is not just a matter that pertains to regulatory measures.<sup>12</sup> Thus, as has often been pointed out, the approach towards scheduling commitments is complex and generates limited transparency as regards applied policies because Members are not required to report measures that violate national treatment if they have not made such a commitment, or policies that apply to sectors that they have not bound.

More generally, it must be borne in mind that the GATS is the first cut at developing multilateral disciplines on services trade policies, and that the agreement includes a built-in agenda to deepen and expand the coverage of disciplines. Developing countries favored the adoption of the positive list approach to determine the coverage of GATS commitments in part because of a concern to limit implementation-related costs, and the adoption of TBT-like transparency requirements would give rise to greater costs. Whatever the case may be, bolstering transparency would appear to be a priority looking forward.

### **3.4 Re-cap**

Under the current regime, WTO Members must simply act in a non-discriminatory manner towards foreign suppliers of services. They can, but are not required, to go beyond that and afford foreign suppliers with national treatment. The distinction between product and process standards noted above and the fact that services are generally nontangible credence or experience goods means that the focus of regulation and standards is frequently on the producers as opposed to the service product. This does much to explain the lack of a TBT analogue under the GATS, as the TBT deals with product regulation

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<sup>12</sup> Moreover, even when unambiguously binding obligations are imposed, like Art. III GATS, which is the ‘default’ provision on transparency, there may be little incentive to litigate alleged violations. The WTO has de facto espoused ‘prospective remedies’ when it comes to compliance with the rules. A finding that Art. III GATS has been violated will therefore give rise to a recommendation to bring the measures into compliance prospectively. This greatly reduces the incentive to litigate violations of this provision.

as opposed to the producers and production processes involved in generating a product. Moreover, the more limited prevalence of international standardization of services is another factor that differentiates many services from goods, as promotion of international standardization is a core feature of the TBT agreement.

#### **4. No Need to Rock the Casbah**

Is a TBT analogue for the GATS needed? Our response is yes and no. Yes, insofar as it is clear that the GATS does too little to ensure that governments do not use domestic regulation unnecessarily to restrict trade and nullify specific commitments. Arguably the GATS also does too little to help governments to adopt good regulatory practices. No, in terms of the specific approaches embedded in the TBT Agreement. For one, there is relatively little in the way of international standardization (regulation) of services, reducing the utility of the TBT Agreement's reliance on international standards as a way of satisfying the national treatment principle. Nor it is feasible to emulate the science-based requirement for product standards, which is not relevant as a general principle when it comes to services. Moreover, one should not under-estimate the potential for a 'cooperation freeze' of fully emulating the TBT Agreement: adding in the threat of the DSU, and countermeasures, may have a chilling effect on the willingness, or even the ability of regulators to cooperate on the adoption of multilateral disciplines for standards for services and service providers. It seems to us that even if it were technically feasible there is not much appetite for implementing a TBT-like agreement for services – the fact that deliberations on disciplines on domestic regulation have gone nowhere since 1999 surely is informative in that regard.

GATS negotiators certainly recognized the importance of domestic services regulation ("standards") as a potential source of trade restrictions and this is reflected in the various provisions of the GATS that were discussed above. It is important therefore to reflect on the reasons why no progress has been made on fleshing out the disciplines on domestic regulation. At the time the GATS negotiations were concluded, officials had run out of time to address a number of matters that pertained to domestic regulation – including rules on subsidies and public procurement, which were left for future deliberation. The same is true for domestic regulation, where the Working Party was tasked with pursuing this agenda after the GATS entered into force. Regulation, procurement and subsidies are all government measures, and to some extent are all substitutes. Twenty years after the entry into force of the GATS it is clear that time constraints cannot explain the lack of progress in getting to yes on the contours of desirable rules of the game for domestic regulation. The current situation must reflect a perception on the part of some or all of the large players that negotiating disciplines in this area is not in their interest or that it is simply not feasible to get 160+ countries to agree to substantive norms.

Negotiating GATS disciplines on domestic regulation is difficult because the regulators need to be on board. After all, they are the ones that will need to abide by and implement whatever rules are agreed. Regulators generally do not focus on the trade effects of what they do, not least because they generally do not have a mandate to do so. Trade agreements in turn are not designed to improve regulations but seek to reduce explicit discrimination against foreign suppliers of goods and services through a process of reciprocal exchange of commitments to do so. Regulations, in contrast, generally are (should be) applied equally to domestic and foreign products and service suppliers. The source of regulatory trade costs lies in differences in regulations across jurisdictions and the need to comply with the requirements of multiple regulatory bodies in different countries. Reducing the market-segmenting effects of differences in regulations is difficult because of concerns that it would compromise countries' regulatory objectives and hinder the execution of regulatory agencies' legal mandates and obligations.

Key obstacles to international regulatory cooperation include (1) mandate gaps between trade negotiators and domestic regulators; (2) coordination gaps within government and between government and business; and (3) informational gaps within and among countries (Hoekman, 2015).

Addressing these obstacles requires institutions and processes that foster learning and build trust through regular communications and repeated interaction, both among countries and among the agencies within countries that set and enforce regulations. In federal states with many regulatory jurisdictions, such as Canada and the United States, the difficulty of such cooperation is compounded. Regulators, moreover, often have a limited appreciation of the trade and business implications of what they do. If regulators are to consider the cross-border economic implications of their work, they need incentives to do so. It is here that trade agreements can make a difference—by creating a mechanism that creates the needed incentives.

In our view the most important element of the TBT Agreement has already been incorporated into the GATS, the ‘least trade restrictiveness’ principle. Looking forward the challenge is to make this principle more operational. The deadlock in the negotiations on domestic regulation regarding the inclusion of a cross-cutting, general necessity test suggests that the likelihood of agreeing to specific language on this matter is very low absent a change in perceptions and positions.<sup>13</sup> Whether the issue is uncertainty regarding the implications of adopting such disciplines for the regulatory process, or worries about the potential downside in terms of what the Appellate Body might rule in specific disputes, at this point in time a binding necessity test appears to be a bridge too far. What is needed instead is to build greater understanding and comfort as to what a “necessity” provision might mean in practice, including the feasibility of making greater use of international standards.

A first step in enhancing such awareness would be to start with greater transparency – including a mapping of what has been done and is going on at the sectoral level in terms of international standardization and transnational private efforts to establish norms for services suppliers. Too little is known about the state of play and the extent to which efforts to agree to international norms have been implemented, what their impact has been, the underlying political economy, etc. Insofar as more recent PTAs generate innovative approaches to attenuate the market-segmenting effects of differences in regulatory policies, they can help all countries identify approaches that can usefully be emulated. Documenting and analysing the approaches that are implemented by PTAs to reduce barriers would both help ensure transparency —potentially informing a process of learning about what works and what does not—and identify specific features of cooperation in PTAs that might be multilateralized (Hoekman, 2014). Ongoing efforts to monitor developments in this area by the OECD are important and need to be extended to span non-OECD member countries. This is a task that could be undertaken by the WTO Secretariat if the membership was willing to give it the mandate to do so. The Secretariat is now working with the World Bank on a database of applied policy measures affecting trade in services – extending this effort to cover international standardization/regulation initiatives would help improve access to information and stimulate much needed analysis.

Beyond transparency, the focus could be on enhancing what is often called “coherence” in the literature on this subject (Bollyky, 2012; OECD, 2013). This involves efforts among jurisdictions to ensure that the regulatory process conforms to what are generally accepted to be good practices: e.g., ensuring that regulation is transparent; that there is the opportunity to for stakeholders including foreign firms and governments to comment on proposed new regulations, that the process of regulatory development be informed by an impact assessment or a cost/benefit analysis, etc. The aim here is not to question or discuss the objectives or the substance of regulation. Instead the focus is on the process through which regulation is developed and implemented, a presumption being that adoption of generally considered ‘good practices’ will be highly correlated with satisfying any reasonable ‘necessity test’. Coherence is an important element of discussions on regulatory regimes in the recent mega-regionals (TPP, TTIP) and has been the focus of work programmes in organizations such as the OECD and APEC for many years. Much of what is in the draft text on Domestic

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<sup>13</sup> In the recent PTAs that the EU and the US negotiated with the Republic of Korea, no necessity test was specified – see Laurenza and Mathis (2013).

Regulation (WTO, 2011) is consistent with good regulatory practice as defined by the OECD (see e.g., OECD, 2013).

Efforts to do more to operationalize principles such as “least trade restrictive” and “unnecessary barriers to trade in services”) can build on good practices that have been developed by these organizations and their member states, but also the experience that has been obtained in the WTO with the SPS and TBT Agreements. Another initiative that could be taken would be to focus on working towards creating a process in which WTO Members would be encouraged to raise instances where domestic regulation is perceived to unnecessarily restrict trade or, more far-reaching, to be less effective than it might be in attaining a regulatory objective. This could be pursued under the auspices of the Council on Trade in Services – as an activity to be undertaken in the Working Party on Domestic Regulation. This could build on the approach that is used in the TBT and SPS Committees where Members can table so-called specific trade concerns arising from proposed or implemented regulatory policies pertaining to a product (see, e.g., Lang and Scott, 2010).

## **5. Conclusion**

The TBT Agreement has proven to be an effective instrument to constrain the ability of WTO Members to use product regulation as protectionist device and to raise questions in instances where standards unnecessarily restrict trade. The TBT Committee has no vocation to serve as a venue for a dialogue between regulators – instead it serves as a forum where domestic regulators may be made aware of the trade impact of what they do (propose to do) and trade officials may be questioned regarding the rationale underlying specific standards and certification or qualification regimes. The GATS does not include an analogue set of disciplines – it instead has language on domestic regulation that has a similar goal as the TBT Agreement but that is both less far-reaching and less specific as regards what Members need to (can) do to ensure that services regulation has minimal adverse trade impacts.

Much of what is embodied in the TBT Agreement cannot be extended to services. There is much less in the way of international standardization in services than is the case for trade in goods. Moreover, services regulation generally pertains to suppliers as well as to the products produced, and the TBT Agreement focuses on the characteristics of products, and not on the characteristics of producers. But there are important principles included in the TBT Agreement that are pertinent to services regulation and that were incorporated into the GATS, most notably the requirement that domestic regulation be least trade restrictive. Operationalizing this has been a core focus of the efforts during the past 15+ years to agree to disciplines on domestic regulation of services. The effort has proven to be controversial and divisive. In principle it makes eminent sense to ensure that regulation does not give rise to unnecessary obstacles to trade in services. The problem is that implementation of this notion may leave a lot to interpretation, and, ultimately to the discretion of panels and the Appellate Body. The associated uncertainty and perceptions of downside risk appears to be greater than many WTO Members are willing to accept. The references to international standards and to science in the TBT Agreement are two devices that reduce this uncertainty in the case of goods. However, these cannot be applied in the services context. Services negotiators therefore need to find alternative approaches to reduce the uncertainty that presumably motivates much of the resistance to operationalizing the concept of “necessity”.

One possible path forward is to do more to increase the understanding of WTO Members as to what necessity could mean in practice and the implications of different approaches towards establishing a presumption that it has been satisfied. Taking a break from negotiations based on an agenda where there does not appear to be a landing zone and pursuing a process of deliberation, discussion and analysis of specific instances where firms perceive domestic regulation to be more trade restrictive than necessary could help identify where and how to craft rules of the game that both regulators and trade officials regard as beneficial. Rather than continue down the path of trying to

negotiate a binding agreement on the basis of a mandate that is now almost 20 years old, greater progress may be made by using existing GATS structures to focus attention on discussing specific instances of domestic services regulation that are of concern to a country, learning, and better understanding of areas where regulation is unnecessarily trade restrictive. Such deliberation must include the regulators and industry/business associations that are affected by the regulations.

Whether it is possible to undertake such deliberative processes in the WTO is an open question. But the evolution of the operation of the SPS and TBT Committees to become venues where officials can – and do – raise specific trade concerns about the effects of product regulation for goods suggests a move in this direction might be feasible if supported by the large players. The alternative is likely to be a long period where nothing continues to be achieved in the WTO, with countries instead moving more towards pursuing regulatory cooperation in bilateral, regional or plurilateral settings.

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**Author contacts:**

**Bernard Hoekman**

Robert Schuman Centre for Advanced Studies, EUI

Villa La Fonte

Via delle Fontanelle, 18

50014 San Domenico di Fiesole (FI)

Italy

Email: [bernard.hoekman@eui.eu](mailto:bernard.hoekman@eui.eu)

**Petros C. Mavroidis**

Columbia Law School and EUI

435 West 116 Street

New York, NY 10027

USA

and

Robert Schuman Centre for Advanced Studies, EUI

Global Governance Programme

Via delle Fontanelle 18

I-50014 San Domenico di Fiesole (FI)

Italy

Email: [petros.mavroidis@eui.eu](mailto:petros.mavroidis@eui.eu)