Electronic Services:
Its Regulatory Barriers and the Role of the WTO

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I) Regulatory Barriers to Trade in E-Services

In this paper it will be argued that the significant potential behind trade in electronic content services (e-services)[1] may not materialize if the regulatory GATS disciplines on domestic regulations are not reformed. The increasing amount and the diversity of national regulatory approaches to electronically delivered content services may be at the origin of this untapped potential. Obviously, the increased "balkanization" of e-commerce via domestic regulations threatens to disappoint the early hopes for a global trading environment which was to be free of any trade barriers. New domestic regulations may also accommodate protectionist aims of national interest groups that want to avoid the competitive pressure of this new market access possibility (e-protectionism).

The argument is developed in two steps.

In the first part, it is shown that the increasing electronic delivery of content services creates a significant need for better developed GATS regulatory disciplines.

In the second part, light is shed on the weaknesses of the current GATS regulatory disciplines and the ongoing negotiations. A review of the ongoing GATS negotiations on this issue shows that despite of some laudable achievements no tangible results have been produced so far. Finally, the review takes note of the particular demands created by e-services and takes up some policy recommendations.

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[1] This definition of content E-services excludes distribution, retail or wholesale services conducted over the Web. In latter services the good is subsequently delivered in a physical non-electronic way. Also the provision of Internet access services themselves are not included in the definition of e-services (WTO, 1998b).

A. The former limited Services Trade and Regulatory Barriers

In modern knowledge-based economies the service sector has a dominant share in national output and employment figures. Also, it is a reliable source of innovation[2]. Nevertheless, for a long time, both economic theory and statistical figures showed that services were simply not traded[3]. Even today, services account for no more than one-fifth of total cross-border trade[4].

Three arguments justified this limited services trade: Firstly, the delivery of services was not technically feasible. To some degree, the provider of a service had to be at the same geographical location as the user of the service. Secondly, national GATS[5] liberalization commitments are subject to much more individual flexibility than under the GATT trade agreements for goods. The WTO members can choose what sectors and what modes of delivery to liberalize. Thus, the factual liberalization commitments were rather meager. Also, most commitments were made in such a way that foreign direct investment in the national service sector was admitted whereas cross-border service provision was not allowed[6]. This measure guaranteed that the foreign service provider would have to comply with the regulatory regime of the importing nation-state[7]. Moreover, competition between regulatory regimes that may be brought to existence via cross-border trade can be avoided or regulatory harmonization can be postponed. Thirdly, in cases of liberalized services trade the problem of regulatory heterogeneity between trading partners and the ensuing compliance costs to the service providers were prohibitive non-tariff trade barriers.

The last point on regulatory barriers to services trade will be of major interest in this paper. As opposed to trade in goods, the quality of a service can often be assessed only after consumption[8]. This problem of asymmetric information that is typical for services trade is the theoretical justification for service regulation that is to avoid buyer misinformation. Nevertheless the "capture" theory of regulation asserts that regulatory powers can be abused to raise protectionist trade barriers. Certainly, it is difficult to make the difference between

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2 See (Miles, 1996) or (Boden and Miles, 2000).

3 See (Rück, 2000) for a comprehensive treatment of services in economic theory.

4 See (WTO, 2001c), p. 98.

5 General Agreement on Tariffs and Trade (GATT) and General Agreement on Trade in Services (GATT).

6 See (Karsenty, 2000) for a quantitative analysis of the commitment schedules under the different service delivery modes.

7 In the literature this effort of nation-states to avoid access for services over which they have no regulatory control is often called "regulatory precaution". See (WTO, 2001c), p. 105.

8 See (UNCTAD and World Bank, 1994a), pp. 35-49 for an elaboration on conceptual issues of service regulation and its effects on trade.

necessary policies that are to serve a legitimate policy objective and policies that are the result of the rent-seeking activities by vested interests. Compared to the original problem of tariff barriers in the goods sector, non-tariff trade barriers in the service sector are extremely intransparent[9]. As shown by public choice theory, the influence of vested interests and ensuing protectionist regulation are extremely difficult to eliminate[10]. The literature on services trade even asserts that regulations in the service sector frequently limit trade even if they do not explicitly discriminate against foreign providers[11]. In other words, if a foreign service provider must comply with national regulations of the target market that differ from regulations of her home market, this often translates into a competitive disadvantage with respect to the local service suppliers. This competitive disadvantage is aggravated when all target markets of the service provider exhibit diverse regulations. In this case, global service trade is rather utopian.

Taken together, these arguments demonstrate the tension between the autonomous pursuit of regulatory objectives by the nation-state and free trade. Surely, the negotiators of the GATS Treaty were aware of the fact that both the protectionist abuse of regulations and regulatory heterogeneity were a potential threat to functioning services trade. But unsurprisingly, nation-states were reluctant to infringe on their right to autonomous regulation.

One side of this refusal may be legitimate: after all, individual national preferences may be best matched by individual regulatory stances. Theory shows that full regulatory harmonization is therefore undesirable[12]. Thus, regulatory competition of diverse national rules and regulatory harmonization are best viewed as complements rather than exclusive approaches[13]. The other side of this refusal to give up regulatory autonomy is not legitimate: it may simply be grounded on the unwillingness to curtail ones protectionist instruments. Certainly, it is not always in the interest of politicians to lessen their discretionary power to cater strong interest groups[14].

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9 Both exhaustive qualitative and quantitative research on regulatory trade barriers in the services sector is lacking. A qualitative analysis can be found in (Hoekman and Primo Braga, 1997). First steps in quantitative analysis of impediments to trade in services can be found in (Findlay and Warren, 2000).

10 See (Sykes, 1999).

11 See (Feketekuty, 2000).

12 As demonstrated by (Sykes, 1996).

13 See (Esty and Geradin, 2000).

14 See PERSSON and TABELLINI (2000), chapter 7 on Special-Interest Politics.

Taking these arguments into account, the literature advocates the concept of “policed decentralization” which lies in the middle of harmonization and regulatory heterogeneity. Under this concept regulators can operate independently in different jurisdictions and may adopt substantive regulations but must do so subject to a number of constraints[15]. This concept is not a purely theoretical construct. Policed decentralization via regulatory disciplines is rather the corner-stone of the WTO’s influence on domestic regulation. With the TBT and the SPS[16] fairly developed regulatory discipline treaties have come to existence for the goods sector. The current services trade framework under the GATS also takes note of the tension between trade and domestic regulations. Article VI of the GATS that is partly exposed in the appendix imposes boundaries on the content of domestic regulation. To avoid discriminatory regulatory trade barriers and foster the least-trade restrictive regulation this article calls for regulations to be administered in a reasonable, objective and impartial manner. Unnecessary barriers to trade in services shall be avoided. As will be seen in later parts, however, Art. VI is far from being a fully developed regulatory discipline. Consequently, the GATS even specifies that the Council for Trade in Services shall, through appropriate bodies, establish necessary disciplines.

As will be seen in following discussion of service in the new economy, the problem of regulatory heterogeneity and therefore the need for such an instrument is even aggravated in the new cross-border trade of services.

B. The new Tradability of Services and Regulatory Barriers

Today, the rise of electronic networks and other technological improvements allow for a “new” cross-border tradability of services[17]. Regulatory reforms and trade liberalization agreements have first boosted trade in infrastructure services like telecommunications. In addition, the rise of the Internet has created the possibility of trade in content services that are fully delivered in digitized information flows. Academics, international organizations and Internet consultancies forecast an overwhelming increase of a knowledge-intensive e-services

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[15] See (Sykes, 2001) or (Sykes, 1999).

[16] The abbreviations stand for the Agreement on Technical Barriers to Trade (TBT) and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS). Both treaties aim at technical, health or safety regulations that ensure the protection of life and health but that are not being used as an excuse for protecting domestic producers.

[17] (Schaden et al, 2000) elaborate on the link between increased services trade and the rise of information and communication technologies (ICTs).

or digitized goods. Examples for content e-services will be found in entertainment, financial services and potentially digitizable media goods such as software or books[18]. Despite of the fact that the media has focussed on online book-merchants, it is argued that Internet sales to private customers will be dominated by this type of online service transactions[19]. At a later stage, an increasing amount of professional services (architectural, management consulting, etc.) and social services (tele-health, tele-education, etc.) are predicted to be tradable online[20]. Especially the professional and backoffice services are already heavily used by companies.

The optimism with respect to the full online tradability of these sectors may differ.

On one side, some service transactions will probably always require the complementary move of natural persons or foreign direct investment (i.e. medical treatment). Currently, only e-services like gambling and pornography generate high online profits. Most electronic content services (access to music, for example) are still for free.

On the other side, it is highly probable that the increased digitization of goods, the delivery of new services on mobile devices and the fostered reliance on web-traded information services will become reality in the New Economy. Technology foresight studies predict an increase in portable devices and the interoperability of standard electronic equipment with the Internet. Hence, the current focus on PC-based access to the Internet and the difference between m-commerce and e-commerce will be rendered obsolete[21]. It can be concluded that a large potential for cross-border e-services trade has recently emerged that waits on proper business models to be realized.

As in the case of standard service trade, it is likely that e-services trade will not be restricted by quantitative measures[22]. The WTO members even agreed on a duty-free moratorium for E-commerce[23]. Compared to the three problems that were mentioned with respect to traditional services, two problems remain in electronic service delivery. Firstly, an analysis reveals that most service sectors that are prone to full electronic delivery are not

[18] (Schuknecht and Pérez-Esteve, 1999), p. 11 state that although trade in digitized goods in 1999 was less than one percent of world trade it will develop in a fast manner. Also, many financial and business services will be affected. This forecast is buttressed by latter studies by (Schuknecht L. and Mattoo A., 2001).

[19] See (OECD, 1997).

[20] See (WTO, 2001c), p. 126.

[21] See (Eames et al, 2000) p. 10 for a scenario on digital futures.

[22] For example, explicit limitation of quantity of services import or limitation of foreign provider's market share

[23] See the declaration on global electronic commerce (WTO, 1998a).

liberalized by the WTO members[24]. Secondly, the phenomenon of regulatory heterogeneity, mentioned in the traditional service world, also constitutes a severe trade barrier in the online world.

On the one hand, the global availability of e-services leads to a more direct confrontation of diverse regulatory systems that applied to the traditional service sectors. Henceforth, this phenomenon is called the "*electronic clash of national regulations*". The Internet simply worked as a catalyst to the interoperability problems of different regulatory regimes. On the other hand, the "pristine state of E-commerce" when it comes to regulations is increasingly a thing of the past[25]. Instead of avoiding to build up regulatory heterogeneity that will be difficult to dismantle later, it seems as if lacking policy co-ordination and national single-handed efforts are producing diverse cyber-regulations.

In the two cases, the catalyzed electronic clash of existing national regulations and the flood of new internet regulations, national protectionism of vested interests can be reintroduced to apply to the online world. To put it differently, offline protectionism is translated into e-protectionism. Thereby, the hope that the Internet would help to approximate the free trade textbook model when it comes to services markets may be deceived. It is hard to imagine a service firm penetrating the world market via electronic means when it has to do justice to a multitude of diverse domestic regulations.

In the face of electronic transactions nation-states face an enormous regulatory challenge. The goal of the next section is to show the vast potential sources of new regulatory trade barriers.

C. From Regulatory Paralysis to Regulatory Patchworks?

The political decision-making vis-à-vis e-services takes place in an environment characterized by great uncertainty. In general nation-states must wonder

- whether they can apply or adapt existing laws or if new laws must be drafted?
- how to formulate a reasonable and proportional new regulation[26]?

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[24] See (OECD, 2000) to see the limited GATS commitments in the service sectors with online potential. For instance, education, health, social and audio-visual services have nearly no commitments.

[25] (Mann et al, 2000b), p. 255

[26] The notion of proportionality states that a measure should not be considered more "trade restrictive than necessary" if it is not disproportionate to the objectives pursued. See (Craig and Búrca, 1999a), p. 349 ff. .

- how to devise rules that are flexible enough for technological change[27]?
- how to preserve unique national societal preferences?
- how to co-ordinate the national regulation with other nations to ensure policy interoperability or a harmonized Internet environment (interoperability)?
- if there is an optimal policy level (regional, national, supra-national, global) and an optimal type of policy actor (state, industry, social interest group)[28]?

The scope of regulatory activity to which these questions apply are hinted at in the non-exhaustive tables below:

Content Regulation of Services	E-Commerce Framework Regulation
1. Traditional services that are now distributed online (tele-health, tele-education, etc.) ⇒ Reformulation of old regulations to apply to the online world 2. Traditional goods that are now delivered as electronic services (software, music, etc.) ⇒ Reinterpretation of former goods regulation to new e-services regulation (i.e. content, intellectual property rights) 3. New electronic services (auction platforms, sophisticated Internet search agents, etc.) ⇒ New types of regulation	• Authentication • Cryptography • Intellectual Property Rights • Consumer Protection • Security modes • Privacy / Data Protection • Competition policy for open networks • Tax issues (i.e. VAT) • Standards, technological compatibility

As is done in the table, one can differentiate between content regulation of services and e-commerce framework regulations.

The former content rules shown on the left side are service-specific. In the case of tele-health or online architectural service for instance, one can expect rules requiring certain professional qualifications. It is shown that the three types of electronic services may trigger different policy reactions as to content regulation. The latter e-commerce framework rules shown on the right are specific to e-commerce. Regulations applying to electronic money or

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27 Also called technological neutrality.

28 These points are partly adapted from (Samuelson, 2000) p. 317. See also (Bertelsmann Stiftung, 2001) or (Marsden, 2000) for the regulatory complexity of Internet governance.

digital signatures for example will find horizontal application throughout different e-service sectors. In the table, the list of e-commerce framework questions demonstrates the myriad of fields that are open to policy reformulations.

A stylized historic contemplation allows to portray government reactions in two phases:

Phase 1: The Wild West Web (WWW)

In times of rapid technological change the institutional and political reality often lag behind the changes taking place in economic activity. In this first phase, Internet-related possibilities have provoked a loss of regulatory autonomy of the nation state. Libertarian movements cherished the rule-free Internet environment and the independence of cyberspace[29]. The internet was seen as a border-transcending medium that thrives on a deep-seated culture of anarchy[30].

In fact, the global nature of the medium makes it difficult to efficiently uphold national regulations. Single-handed efforts in the field of cyber-regulations run the danger of being unenforceable[31]. As the business location can be freely chosen, evasion of jurisdictional oversight becomes possible. Moreover, governments have no more border control of incoming or outgoing digitized goods or services. As in the case of the telecommunications market[32], by-pass technologies like the Internet can simply undermine traditional regulatory regimes. Existing regulations then apply to traditional transactions whereas new electronic transactions can evade this regulation; the technological neutrality of regulations cannot be maintained. Increasingly, over-ambitious efforts to enforce old regulations in this new environment have sometimes led to over-proportional means of enforcement or new regulations[33].

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[29] See John Perry BARLOW'S, "Declaration of Independence of cyberspace", 1996 under http://zolatimes.com/companieslaw/independence.htm.

[30] See (Martin, 1999), p. 353.

[31] For instance, the German efforts to control fascist content on the Web has led to the move of Nazi-controlled Internet hosts to the USA.

[32] In the Telecom Market, by-pass technologies like call-back systems eventually forced governments to reconsider market reforms.

[33] Examples are court rulings that hold Internet Service Providers responsible for fascist content, government efforts to block access to certain websites (as in China) or the French that try to transpose their foreign content quotas made for televisions to the Internet.

In the specific case of cross-border e-service provision another important factor arises that tends to undermine regulatory autonomy of nation-states. As mentioned before, nation-states prefer foreign service providers to be under their regulatory oversight. Thus, cross-border provision tended to be of minor importance. The predicted rise in cross-border e-services runs counter to this will to exercise regulatory precaution. When foreign service providers are free to sell a service in a country without being subject to its regulatory regime there is not only competition between producers but also between national regulatory regimes[34].

From the point of view of states a positive and negative effect of regulatory competition can be described. On the negative side, highly regulated economies fear "races to the bottom" through this type of competition. Especially the multi-national firms can reinforce this race through jurisdictional arbitrage. This race to the bottom may be particularly harmful in issues as privacy or other consumer protection. But this argument is also often abused by established industries to avoid a dilution of regulatory standards that would facilitate new foreign market entries. On the positive side, this form of Internet-related regulatory competition can also spur beneficial regulatory reforms. The Chairman of the Committee of Trade and Technology of the German Parliament has argued that this regulatory competition has forced the German government to introduce or at least to consider long-awaited reforms in several regulatory areas[35]. Hence, exogenous technological shocks like the Internet that expose regulatory regimes have the potential to stimulate reforms[36].

Summing up, the first phase of policy reaction was characterized by a loss of national regulatory autonomy. Existing regulations were undermined and few new regulations drafted.

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[34] (UNCTAD and World Bank, 1994b). Also, consider that the last EU E-commerce directive, for instance, requires the EU member states to apply the "origin principle" to electronic transactions.

[35] See (FAZ, 2000). The list of policy reconsiderations include rules on unfair competition (Lauterkeitsrecht), law of discount and Premiums (Rabattgesetz, Zugaberecht), law of obligations, and consumer protection laws.

[36] Prof. DONGES emphasised this point at the conference „Wirtschaftspolitik vor neuen Herausforderungen durch elektronischen Handel", 14.-16. February 2001, Cologne, Volkswagen-Stiftung.

Phase 2: The Emergence of Regulatory Patchworks

Some regulation of e-service transactions is absolutely necessary. Contrary to what one may think, companies are not always keen on a rule-free environment where legal uncertainty prevails. Most reports on the barriers to electronic commerce state that the absence of framework regulations stifles e-business[37]. Consumers then simply lack the necessary trust to engage in transactions. In this respect, some entrepreneurs assert that E-commerce is rather under- than over-regulated. Finally, as opposed to early Web adherents, it is not clear why the Internet should be devoid of a legal environment.

Therefore, nation-states now aim at recouping some of their regulatory control over the electronic transactions. States have gone from passive contemplation or very reactive policy-making to a more active approach. In sum, the libertarian hopes for internet anarchy have been deceived. Governments now aim at finding answers to the questions of above-mentioned new regulatory control. Increasingly technology will decrease the helplessness of governments in cyberspace. Tools as zoned filtering or new tracking software will enable governments to better pursue their policy objectives. So whereas new technologies were responsible for the loss of policy autonomy in the first place, even newer technologies will allow a partial restoration of policy enforceability. In cases where single-state policies may not be viable for this global medium, country-groups like the EU will pool forces to create regulations. Nations that want to influence internet policy in a particular direction are likely to regulate faster to influence a still-unformed agenda[38]. This rise of new regulations, will also be the time when vested interests will call on their governments to introduce new forms of e-protectionism. After all, protectionism of this sort has existed for centuries. There are no reasons to believe that national rent-seeking of this type will not be with us for the foreseeable future[39].

Of course there have been numerous E-commerce dialogues and work programs in international fora[40]. After all, international harmonization is also a means of governments to avoid jurisdictional arbitrage and to foster policy interoperability. In policy documents produced at this international level, there is a surprising consent of most nation-states that

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[37] (OECD, 1999).

[38] See (Martin, 1999).

[39] Currently, the French authorities for example are searching for means to forbid the online sale of English financial products. Contrary to the origin principle set forth in the EU E-commerce directive, the French authorities argue that English products do not comply with French financial regulations.

[40] See (OECD, 2001) for a detailed study of all e-commerce related activities of the international organisations.

the Internet shall remain free of burdening regulations. Most open questions shall be dealt with by the self-regulatory market forces[41] and if regulations are needed, it is argued that the Internet can do without territorially based laws[42]. Finally, governments stress the fact that more experience with the web shall be accumulated before rules shall be established.

But this apparent consent may be misleading: It is not exaggerated to say that for example the EU and the USA have very different and often incompatible approaches to internet transaction regulation[43]. Recent disputes have shown the diverse approaches in data protection issues, issues of taxation of e-services, etc. Whereas the EU wants the WTO to have a more extensive coverage of trade-related aspects, including issues like authentication, privacy or consumer protection, the US believes the subjects to be better placed in other organizations[44].

As a consequence the "wait-and-see attitude" in the international fora have led to the rise of heterogeneous and often incompatible national regulations.

[41] See (European Council, 1994;IITF, 1996) or the (European Commission, 2000).

[42] (The Economist, 2001).

[43] See (Mann, 2000) on transatlantic issues in E-Commerce.

[44] (Aaron, 1999).

II) The weaknesses of the GATS disciplines and negotiations on domestic regulations in the light of e-services

As mentioned the current WTO framework for services (GATS) contains disciplines on domestic regulations. Up until now the relevance of these disciplines has been rather limited. With traditional non-electronic service trade, only a low pressure existed to substantiate and improve regulatory service disciplines. Today, the WTO is faced with the promising rise of an electronic delivery mode for services that creates even more challenges with respect to regulatory heterogeneities.

The second part of this paper shows that neither the current GATS instruments nor the negotiations on domestic regulations do justice to the increased necessity for GATS disciplines. Finally, light is shed on possible improvements with respect to e-services.

A. The weaknesses of the current GATS Art. VI and E-services

The effectiveness of GATS regulatory discipline is curtailed by three facts: Firstly, Article VI on domestic regulation holds only for service sectors and delivery modes where countries scheduled trade commitments.

Secondly and most importantly, the content of Article VI is defined in such a general, widely interpretable manner that it is doubtful whether it really lessens the chance of unnecessary regulations[45]. Compared to the regulatory disciplines in the goods sector following five criticisms along the different regulatory discipline components apply[46]:

i) Although the concept of "necessity" play a crucial role in both the goods and the service disciplines, the TBT and SPS have far more developed "necessity tests[47]" than the GATS Art VI.

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[45] See SENTI (2000), pages 581-582.

[46] Given the space constraint of the paper, this overview is necessarily somewhat superficial. The existence of various shortcomings within the TBT and the SPS demonstrate that they are far from being perfect benchmarks to the services sector (see for example PAUWELYN (1999), ROBERTS (1998) or SENTI (2000), pages 521 ff. for the weaknesses of the GATT disciplines on domestic regulations. Nevertheless, a comparison of the various components of such a regulatory discipline provides us with a good starting point to assess the less-developed GATS Art. VI.

[47] The necessity test is the means by which an effort is made to balance between two potentially conflicting priorities: promoting trade expansion versus protecting the regulatory rights of governments. See "Evolution of necessity tests in WTO Agreements", 8 October 1999 Job No. 5929, Informal Note by the Secretariat.

ii) Whereas the TBT and the SPS define a coherent list of legitimate regulatory policy objectives, the GATS Art. VI does not. Certainly, as will be mentioned below, the GATS Art. XIV identifies legitimate policy objectives. However, this article falls under the category of "General Exceptions" and is not directly comparable or applicable to the rules on domestic regulations[48].

iii) Compared to the GATS, the transparency requirements on domestic regulations (i.e. right for prior consultation, obligation for prompt publishing and the maintenance of contact points) are far more demanding under both the SPS and the TBT[49].

iv) The mutual recognition principles / procedures of foreign regulations and qualifications are more developed under the SPS and the TBT.

v) Whereas the SPS and TBT oblige the WTO members to use international standards when they are adequate to pursue the national policy goal, the GATS falls short of creating a presumption of "necessity" in favor of requirements based on international standards.

Thirdly, the GATS permits members to override any of their trade commitments for a list of widely interpretable national policy objectives. GATS Article XIV allows for exemptions to safeguard public morals, public order, ensuring compliance with laws and regulations, deception and fraud, the non-fulfillment of contracts, protection of privacy, confidentiality and safety.

In addition to the first part of the paper that has demonstrated that the electronic environment leads a more direct clash of national regulations, three points show that the considerations relating to Art. VI receive particular twists when looking at them from the angle of electronic services.

In the TBT the necessity test (Art II.2) runs as follows: "Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create". In the SPS the necessity test (Art II.2 and V.6) runs as follows: „Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5." And "Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility(4)." (Article V.6)

[48] See "Evolution of necessity tests in WTO Agreements", 8 October 1999 Job No. 5929, Informal Note by the Secretariat.

[49] See OECD (1999b) and WTO document S/WPDR/W/4 (USA)

First of all, in the electronic commerce environment one of the most active debates at present is the balance between public regulation and business-self-regulation. The importance of avoiding 'excessive' and/or 'restrictive' government regulation is becoming clear. Hence there exists a need for a clear indication as to what regulation would be 'legitimate' and non-restrictive for e-commerce transactions. Still, the generality of Art. VI does not allow to judge what regulatory measures match the "reasonable", "unnecessary barriers to trade" criteria[50].

Secondly, the general exception provisions under Art. XIV (fraud, data privacy) of the GATS are particularly relevant to e-services. So even if WTO members would make commitments to all their service sectors and reform Art. VI, the general exception clause would currently enable the member countries to side-step any regulatory disciplines[51].

Thirdly, again emphasis shall be put on the fact that content services have not been subject to extensive domestic regulations as of yet. Hence, in the context of e-services Art. VI has a great *preventive* role to play[52].

To summarize the current state of affairs: the WTO provides the instruments and constitutes a necessary and recognized anchor point to establish disciplines on domestic regulations. Nevertheless, substantial weaknesses of the GATS Art. VI prevail. Latter weaknesses led the negotiators to mandate additional work on the refinement of the disciplines on domestic regulations that will be considered below. In addition, the WTO Working Program on Electronic Commerce has also discussed an Art. VI reform[53].

[50] See WTO (1999), page 2.

[51] See HAUSER and WUNSCH (2001), page 22.

[52] See DRAKE and NICOLAIDES (2000), page 33.

[53] See WTO Document S/C/W/115 (July 1999) or S/C/13 (December 2000).

B. The slow progress in the ongoing GATS Negotiations on Domestic Regulations and issues raised in the WTO Working Program on Electronic Commerce

The GATS Negotiations on Domestic Regulations

The work on domestic services regulations within the WTO is spurred by two initiatives. First, the Ministerial Decision on Professional Services from April 1995 has produced a mandate to develop disciplines on domestic regulations in the accountancy sector[54]. Second, the GATS Article VI:4 calls on the Council to establish appropriate bodies to develop the necessary disciplines on domestic regulation. All in all, the two mandates are very similar. The latter mandate of Article VI:4 gives priority to regulatory disciplines that are horizontally applied to all service sectors whereas the former mandate deals with sector-specific regulatory disciplines[55]. However, Art. VI:4 does not rule out the possibility of developing sectoral disciplines[56] Until 1999, Art. VI has not been used to establish bodies to deal with horizontal disciplines on domestic regulation. In contrast, since 1995 the mandate relating to professional services has been taken on by a new Working Party on Professional Services (WPPS). The work of the WPPS has seen some notable achievements.

In December 1998, the Council for Trade in Services adopted the Disciplines on Domestic Regulation in the Accountancy Sector[57]. They are applicable to members with specific commitments on accountancy in their schedules. The main articles of this discipline specify rules on transparency, licensing and qualification (both applying to requirements and procedures) and technical standards. The Accountancy Disciplines, provisionally adopted by the Council for Trade in Services in December, are not as fully developed as those in the SPS and TBT agreements but nevertheless comprise a higher standard on transparency than prevails in existing GATS obligations. The legitimate objectives specified in the accountancy disciplines created by the WPPS include: the protection of consumers, the quality of the service, professional competence and the integrity of the profession.

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[54] See WTO Document S/L/3 (April 1995).

[55] See WTO working document S/C/10 (October 1999).

[56] See WTO working document S/WPDR/223 (November 2000).

[57] See WTO document S/WPPS/W/21 (December 1998).

After the Uruguay Round, this has been the first and only tangible step in the development of regulatory disciplines in the service sector. The proposals may serve as guideline to a comprehensive development of horizontal or sector-specific disciplines as they tackle some of the most important criticisms developed in the previous sections. However, this result still needs to be integrated into the GATS during the ongoing services negotiations[58].

Only in April 1999 did the Council assume its responsibility with respect to the creation of bodies appropriate to develop necessary disciplines as called for by Article VI:4[59]. At the same time, it paid respect to the above-mentioned overlapping mandates and merged the WPPS into a newly founded Working Party of Domestic Regulations (WPDR)[60].

Some interesting exchanges have occurred within this working group. The main debate deals with the concept of necessity and transparency, whether the accountancy disciplines shall be used to develop horizontal disciplines[61], what the legitimate policy objectives are and if they should be listed. With respect to necessity tests, the member countries have advanced some notable suggestions. For instance, very recently the European Union proposed to introduce the concept of proportionality into the rules on domestic regulations[62] whereas Australia suggested to make regulatory impact analysis compulsory before the enactment of a new trade affecting regulation[63]. Specific proposals have also been tabled for the improvement of transparency aspects. A consultation of the WTO secretariat with international organizations has equally produced a review of existing international standards in services regulation[64].

To evaluate the meetings, the drafting of the accounting disciplines and the valuable exchanges have certainly advanced the negotiations. Still, in terms of applicable domestic regulations that could be of use to the trade in e-services the five years of negotiations have not brought any tangible results. The point that neither horizontal nor sectoral disciplines will be developed in the near future must be made forcefully.

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[58] See WTO document S/WPPS/4 (December 1998).

[59] See WTO document S/C/10 (October 1999).

[60] See WTO document S/L/70 (April 1999).

[61] See WTO document S/L/70 (April 1999).

[62] „A measure should be considered not more trade-restrictive/not more burdensome than necessary if it is not disproportionate to the objective[s] pursued. This means that the degree of trade-restrictiveness meeting the requirements of necessity will depend on, and be assessed against, the specific objective[s] pursued, while the validity, or rationale, of the policy objective[s] must not be assessed.“, see S/WPDR/W/14 (May 2001).

[63] See WTO document S/WPDR/W/15 (May 2001).

The WTO Working Program on Electronic Commerce

Coming to the WTO Working Program on Electronic Commerce some introductory words to begin with[65]: The relevant councils of the WTO (Council for Trade in Goods, Council for Trade in Services, Council for Trade-Related Aspects of Intellectual Property and the Committee on Trade and Development) were commissioned to develop a work program on all trade-related aspects of E-Commerce.

In July 1999, the results of these Council consultations were publicly available. In one important point the Councils reached a consensus: the different existing WTO-treaties with all their rights, obligations and country-specific commitments are applicable in the E-Commerce dimension. Hence the regulatory disciplines of Art. VI also apply to electronic transactions. At various points, the interrelationship between domestic regulations and e-services has been discussed[66].

When in July 2000 the General Council asked the four Councils to take up their work from where they had left it in 1999 the working groups concerned with services basically repeated the conclusions taken in 1999[67]. All meetings recognized the increased importance of regulatory disciplines in the light of e-services. However even more than three years after the program start, a comprehensive resolution or shared declaration on how Art. VI should be specifically changed with respect to e-services has not been produced. So basically, the meetings only served as an information exchange[68]. Hence, although the working results will certainly be raised in the standard Working Group on Domestic Regulations (WPDR), not enough clarity on how the Councils' results would translate into specific actions existed. As has been argued in part one of the paper, this absence of international commitment to regulatory disciplines on e-commerce regulation has led to very active single-handed national regulatory approaches.

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[64] See S/C/W/97 (March 1999).

[65] This part draws heavily on HAUSER and WUNSCH (2001), pages 8-13.

[66] See WTO (1999).

[67] „The Council's discussion on 6 October took as its starting-point the progress report which it had made to the General Council on 27 July 1999 (S/L/74). It was the general view that this report was still an accurate reflection of the thinking of Members on the subject, and that there was no need to re-open or repeat what was said in it."

[68] In principal the Councils do neither have the right to fill gaps in the current WTO-laws (therefore the meetings are not trade negotiations) nor do they have the right to widely interpret existing WTO-treaties.

Conclusion

As has been shown by the paper an increased necessity for regulatory disciplines with respect to electronic services has not yet been met with the necessary policy reactions from the side of the WTO working bodies that could potentially influence a reform of GATS Art. VI.

Specifically, both the Working Group on Domestic Regulation and the Working Groups of the WTO Working Program in Electronic Commerce have not yet come up with tangible results. The reason for this lacking commitment to new policy rules is three-fold:

i) The issue of imposing sound and goal-oriented horizontal rules on the service sector is a very difficult process. As MATTOO (2000) notes on why the GATS regulatory disciplines are so weakly developed:

> „The reason is not difficult to see: it is extremely difficult to develop effective multilateral disciplines in this area without seeming to encroach upon national sovereignty and unduly limiting regulatory freedom.“[69]

Governments are also reluctant to constrain their regulatory autonomy by international rules.

Some even argue that horizontal rules are impossible to devise in such a way that the target of obtaining the least-trade restrictive regulations is met. Hence, they contend that only sector-specific regulatory disciplines (the insurance industry, for example) can do the job. Other trade services experts, however, make the case for horizontal disciplines as this procedure economizes on negotiating effort, leads to the creation of disciplines for all services sectors rather than only the politically important ones, and reduces the likelihood of negotiations being captured by sectoral interest groups[70].

The above complexity is not particularly relevant for e-services, but pertains to all service modes and types. In addition, another complexity dimension arises out of these final two e-service specific points:

ii) Throughout the work on e-commerce and on domestic regulations it does not seem clear to what extent electronic services shall be treated differently than standard

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[69] Page 12.

[70] See MATOO (2000), page 13.

services trade. Some argue that a special annex, reference paper or special version of Art. VI shall be elaborated for the special needs for e-services. Others argue that the technological neutrality of the WTO has been a very useful and important concept that should not be given up in the case of electronic commerce.

iii) Finally, the optimal regulation or non-regulation of electronic commerce is a particularly complex issue. The phenomenon is so recent and dynamic that neither regulators nor business associations know how the new trade medium is best tackled. Even the business fora do not contest that some e-services regulation is necessary. But just how much and what is "not more burdensome than necessary" remains an unknown parameter.

Obviously, this increased complexity does not justify an absence of commitment to solution-oriented negotiations. Rather the opposite holds: an increased complexity and the rather enormous potential which lurks behind the new online tradability of services should be reason enough to devote enough resources and willingness for compromise to a renewed negotiation effort which may benefit from a possible launch of a new trade round this fall. These negotiations shall not fall short of producing a subtle and comprehensive reform of Art. VI or the drafting of a new annex on horizontal regulatory service trade barriers.

Excerpt of Article VI on Domestic Regulation[71]

1. In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.

4. With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, inter alia:

(a) based on objective and transparent criteria, such as competence and the ability to supply the service;

(b) not more burdensome than necessary to ensure the quality of the service;

[71] Important parts are underlined by the author. Only the parts directly pertaining to regulatory disciplines are shown.

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