

MULTILATERAL DISCIPLINES ON THE DOMESTIC REGULATION OF SERVICES: IMPLICATIONS FOR THE PHILIPPINES

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Abstract

The development of multilateral rules on the domestic regulation of services sectors has long been part of the unfinished business of the WTO under the General Agreement on Trade in Services (GATS). Article VI(4) of the GATS mandates WTO Members to negotiate new rules that would ensure that measures on trade in services relating to qualification requirements and procedures, licensing requirements and procedures, and technical standards are based on objective and transparent criteria, not more burdensome than necessary to ensure the quality of the service, and not in themselves a restriction on the supply of a given service.

The GATS, however, also recognizes WTO Members' right to regulate in the public interest, and it is this fundamental tension with the Article VI(4) mandate that has made the ensuing negotiations intractable. Since 1999, multilateral disciplines on domestic regulation of services have been on the negotiating table in the Working Party on Domestic Regulation (WPDR). Progress has been slow, however, and WTO Members were eventually unable to fulfill the GATS Article VI(4) mandate. The 11th WTO Ministerial Conference (MC11) in November 2017 eventually concluded without any multilateral

¹ I wish to express my sincere gratitude to ICC Judge Raul C. Pangalangan and Professor Elizabeth Aguilino-Pangalangan, whose encouragement during their visits to Geneva inspired me to document my insights on the domestic regulation of services in the WTO and publish in the Philippine Yearbook of International Law. I am also deeply grateful to Ambassador Manuel A.J. Teehankee, my former superior at the Philippine Permanent Mission to the WTO, whose vision and leadership in guiding the Philippines' participation in the Joint Initiative on Services Domestic Regulation helped shape the analysis presented in this paper. Finally, my thanks to Atty. Lorenz Dantes for his valuable and constructive comments on earlier drafts. The views expressed in this paper are solely mine, and do not necessarily reflect the official position of the Philippine Department of Foreign Affairs. All errors remain my own.

consensus on the draft negotiating text of the disciplines developed through the WPDR.

Frustrated by yet another Ministerial failure, Ministers from a number of developed and developing WTO Members pushed forward with a “Joint Statement” reiterating their commitment to advancing negotiations on Services Domestic Regulation. From 2018 to 2021, participants in the ensuing Joint Statement Initiative negotiated a new draft of the disciplines through a “plurilateral” process that had been criticized as circumventing the express multilateral mandate for negotiations of such disciplines under the GATS. These plurilateral disciplines on domestic regulation of services were embodied in a “Reference Paper” which was to be incorporated into the Schedule of Specific Commitments of the participating WTO Members.

The Reference Paper contains a set of rules, expressed through binding and non-binding provisions, that signatories commit to observe in their respective service measures of general application, measures relating to qualification requirements and procedures, licensing requirements and procedures, and technical standards, and authorizations of a supply of the service. Although most of the disciplines in the Reference Paper are procedural in nature and focus on ensuring transparency and predictability of the regulatory process, the obligations nonetheless impose restrictions on a WTO Member’s regulatory sovereignty.

Upon joining the JSI-SDR, the Philippines committed to revising its schedule of specific commitments and incorporating the corresponding obligations in the Reference Paper. This Article will attempt to provide an analysis of the Philippines’ obligations under the Reference Paper and implications of the disciplines on the Philippines’ regulatory and policy space.

Introduction

“[T]he deregulation policy reduces the role of the State in the management of the economy and thus enhances the power of private capital to determine the conditions of their operations in the economy; in other words, the curtailment of economic sovereignty.”

- Dean Merlin M. Magallona²

² Merlin M. Magallona, *The Philippines towards a Supranational Economic Order: The Context of GATT*, WORLD BULL., Sept.–Dec. 1994, at 11, 14.).

The exercise of economic sovereignty in a globalizing world is an ongoing struggle for developing countries such as the Philippines. Since joining the General Agreement on Tariffs and Trade (GATT) in December 1979, the ASEAN Free Trade Area (AFTA) in 1992, and the World Trade Organization (WTO) in 1995, as well as entering into a succession of free trade agreements (FTAs) starting with the ASEAN-China Free Trade Agreement (ACFTA) in 2004 and the Philippines-Japan Economic Partnership Agreement (PJEPA) in 2006, the Philippines has been firmly on the path of economic liberalization. These initiatives have, by and large, contributed to the Philippines' economic growth trajectory and facilitated its integration into the global economy. The Philippines has been able to participate in regional production and supply chains, leverage international investment and capital flows, and tap into a global consumer market of goods and services. But it comes with a price—Philippine economic sovereignty is bound by the rules of the game.

This situation would certainly not have sat well with the late Dean Merlin M. Magallona, arguably the Philippines' staunchest defender of a truly independent economic sovereignty. His writings not only showed a deep distrust of the so-called neoliberal economic agenda and the "Washington Consensus," but also expressed support for the New International Economic Order (NIEO), while sharply condemning the Philippine government's decision to join the WTO and most especially the PJEPA.³ Dean Magallona was of the firm belief that the 1987 Constitution had set in stone a nationalist economic agenda that is fundamentally

³ For an examination of the legal scholarship of Dean Magallona on the NIEO and his critique of neocolonial economic systems, see José D. Bagulaya & Romel R. Bagares, *Hidden in Plain Sight: International Law and Marxist Praxis in the Life and Works of Merlin M. Magallona*, 14 *ASIAN J. INT'L L.* 235, 235–267 (2024), <https://www.cambridge.org/core/journals/asian-journal-of-international-law/article/hidden-in-plain-sight-international-law-and-marxist-praxis-in-the-life-and-works-of-merlin-m-magallona/24817F87259B5DAA8EF9238C274AB234>. See also Merlin M. Magallona, *Some Patterns of Political and Economic Developments in the ASEAN*, *ASIAN STUD. J.*, Apr.–Aug.–Dec. 1981, at 1, 5–7, <https://asj.upd.edu.ph/mediabox/archive/ASJ-19-1981/magallona.pdf>; Merlin M. Magallona, Former Dean, University of the Philippines College of Law, *Economic Nationalism and the National Treatment Clause: The Case of the Philippine Constitution vs. WTO Agreement* (Jan. 22, 2023), in *Documentation of Proceedings of the National Conference on A Nation in Crisis: Agenda for Survival*, OMBUDSMAN WEBSITE (2003), at 27–32, <https://www.ombudsman.gov.ph/UNDP4/wp-content/uploads/2013/01/Economic-Nationalism-Conference.pdf>.

at odds with the Philippine government's efforts to open up the domestic economy to greater participation of foreign capital.⁴

Recent developments would make the Dean turn in his grave. Two announcements were made on 2 December 2021 that did not gain much media attention, but were of significance to the Philippines' economic sovereignty, as a Member of the WTO and participant in the multilateral trading system. First, the plurilateral negotiations on the Joint Statement Initiative on Services Domestic Regulation (JSI-SDR), which were launched after the failure of the 11th WTO Ministerial Conference (MC11) in 2017, were successfully concluded. Second, the Philippines became the 66th WTO Member to join the JSI-SDR and committed to adopting the Reference Paper on Services Domestic Regulation.

Disciplines on the domestic regulation of services are one of many remaining frontiers of multilateral rulemaking on international trade in services at the WTO. For more than 25 years, multilateral disciplines on domestic regulation have eluded the Membership since the entry into force of the General Agreement on Trade in Services (GATS), one of the multilateral trade agreements of the Uruguay Round that also set the mandate for the negotiation on domestic regulation. The closest that the WTO has come to an agreement was during the run-up to the 11th WTO Ministerial Conference (MC11), when the Working Party on Domestic Regulation (WPDR) presented a consolidated draft negotiating text that did not achieve Ministerial consensus.

Fifty-nine co-sponsors of that draft negotiating text were compelled to pursue separate plurilateral negotiations on disciplines on domestic regulation of services by launching a "Joint Statement Initiative," which had been criticized for circumventing the express multilateral mandate for negotiations of such disciplines under the GATS, and for further constraining Members' "right to regulate." The outcome of those discussions is embodied in a "Reference Paper"⁵

⁴ See Merlin M. Magallona, *Economic Nationalism and the National Treatment Clause: The Case of the Philippine Constitution vs. the WTO Agreement*, *WORLD BULL.*, Jul.–Dec. 2001, at 72, 72–97 (analyzing the fundamental conflict between the national treatment principle and economic nationalism enshrined in the Philippine Constitution, conferring upon Filipino citizens preferential rights in the economy and in the use of natural resources).

⁵ World Trade Organization, *Joint Initiative on Services Domestic Regulation: Reference Paper on Services Domestic Regulation*, WTO Doc. INF/SDR/1 (Sept. 27, 2021),

document that sets out procedural and substantive rules on the regulation of services that signatories such as the Philippines are expected to bind as part of their specific commitments under the GATS Agreement.

Although around 40 percent of the Membership eventually signed on to the Reference Paper shortly after the conclusion of the JSI negotiations, making it a plurilateral initiative that cannot be considered for adoption by the WTO as a new multilateral treaty,⁶ the disciplines in the Reference Paper can be considered “multilateralized” upon their inscription as additional commitments in the Schedule of Specific Commitments of those WTO Members. Nonetheless, the “multilateral disciplines” on services domestic regulation as embodied in the Reference Paper thus emerged as the first negotiated multilateral outcome on trade in services in the WTO since 1997.⁷

This Article is an attempt to delve into the new disciplines on domestic regulation of services as set out in the Reference Paper, and the policy and legal implications for the Philippines going forward. Part I will provide an overview of the concept of domestic regulation of services in the WTO and how multilateral rulemaking thereon has progressed and evolved. Part II will briefly discuss the policy and regulatory environment for the regulation of services in the Philippines. Part III will take a deeper look into the important features of the Reference Paper, attempt to analyze the Philippines’ commitments and implications for the regulation of services, and suggest how the Philippines can address any policy and implementation gaps and preserve regulatory space to promote the public interest.

<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/SDR/1.pdf&Open=True>

⁶ Kadijatu Zainab Bangura & Abraham Zaqi Kromah, *An Overview of the WTO’s Plurilateral Agreement on Services Domestic Regulation*, 17 GLOB. TRADE & CUSTOMS J. 177, 182 (2022), <https://kluwerlawonline.com/journalarticle/Global+Trade+and+Customs+Journal/17.4/GTCJ2022023>.

⁷ Elena Bertola, Jaime Coghi, & Markus Jelitto, *Facilitating Services Trade Through the Adoption of Good Regulatory Practices: The New Reference Paper on Services Domestic Regulation*, 19 GLOB. TRADE & CUSTOMS J. 74, 74 (2024), <https://kluwerlawonline.com/journalarticle/Global+Trade+and+Customs+Journal/19.2/GTCJ2024001>.

I. Domestic regulation of services in the WTO

A. *The GATS and Multilateral Disciplines*

The General Agreement on Trade in Services (GATS), the first multilateral trade agreement to cover trade in services, is one of the major achievements of the Uruguay Round. Its formation was inspired by essentially the same objectives as the General Agreement on Tariffs and Trade (GATT): improving trade and investment conditions through multilaterally agreed disciplines; stabilizing trade relations through policy bindings on a “Most-Favored Nation” (MFN) basis; and achieving progressive liberalization through subsequent rounds of negotiations.

WTO Members’ universal acceptance of the GATS as part of their membership obligations is reflective of the economic importance of trade in services, which has become the most dynamic segment of international trade. Unlike trade in goods, where at-the-border measures in the form of tariffs and quotas are the main barriers to trade, trade in services is mainly affected by behind-the-border regulatory measures and domestic regulations in the service sector.⁸ In part due to its unique and diverse characteristics across countries, the liberalization and regulation of services does not lend itself easily to the application of traditional trade policy instruments. Services sectors covering hotels, restaurants, hospitality, and personal services, for instance, have been customarily considered as purely domestic activities.⁹ Services such as rail transport, energy, and telecommunications were considered in the realm of public utilities, given their strategic and infrastructural importance, and have been viewed as classical domains of full or close-to-full government ownership and control.¹⁰ Services that involve health, education, and basic insurance services that

⁸ WTO Secretariat – Trade in Services Division, *Disciplines on Domestic Regulation Pursuant to GATS Article VI.4 1* (June 2011) (Briefing Paper), https://www.wto.org/english/tratop_e/serv_e/dom_reg_negs_bckgddoc_e.doc. See Aik Hoe Lim & Bart de Meester, *An Introduction to Domestic Regulation and GATS*, in WTO DOMESTIC REGULATION AND SERVICES TRADE: PUTTING PRINCIPLES INTO PRACTICE 1, 1 (Aik Hoe Lim & Bart de Meester eds., 2014); Panagiotis Delimatsis, *The Interaction Between GATS Articles VI, XVI, XVII and XVIII After the US – Gambling Case 4* (NCCR Trade Regulation, Working Paper No. 2006/9).

⁹ WTO SECRETARIAT – TRADE IN SERVICES DIVISION, *A HANDBOOK ON THE GATS AGREEMENT* [hereinafter *GATS HANDBOOK*] 2 (2005).

¹⁰ *Id.*

have a strong public welfare component are considered in many countries to be governmental responsibilities and therefore should be tightly regulated.¹¹

Multilateral disciplines on services regulations would require an approach that is different from the treatment of liberalization and market access on trade in goods. Such disciplines would have to complement the at-the-border rules on national treatment and market access as applied to foreign services and service suppliers and prevent the regulatory regime over services from nullifying the effectiveness of such non-discriminatory obligations. At the same time, the disciplines would extend behind-the-border to measures affecting both the service and the supplier of the service, unlike in the GATT, which is confined to the flow of goods.¹²

Domestic regulation of services has long been part of the unfinished business of the WTO under the GATS. WTO Members recognized that excessively lengthy, complex, or opaque licensing requirements and procedures, or the lack of objective or transparent criteria for qualification of other technical standards, could have distorting and trade-restrictive effects on services trade.¹³ GATS negotiators acknowledged that a separate set of multilateral disciplines on domestic regulation would address a gap in the GATS rulebook. But as will be discussed in this paper, plurilateral efforts towards a new set of rules would eventually go beyond the scope of existing multilateral disciplines and commitments on services under the GATS.

The international legal framework on trade in services under the GATS has two main pillars: the framework agreement containing the general rules and disciplines, and the national “schedules” which list individual countries’ specific commitments on access to their domestic markets by foreign suppliers. Three broad types of measures affecting trade in services are covered: (1) quantitative restrictions on entry and establishment (whether discriminatory or not) which are subject to market access disciplines under GATS Article XVI(2),¹⁴ (2)

¹¹ *Id.*

¹² Lim & de Meester, *supra* note 8, at 1.

¹³ Bangura & Kromah, *supra* note 6.

¹⁴ “2. In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:

discriminatory measures modifying the conditions of competition in favor of domestic services suppliers, which are subject to national treatment obligations under GATS Article XVII, and (3) domestic regulations that are neither quantitative nor discriminatory in nature, which are subject to GATS Article VI.¹⁵ The first two types of measures are subject to negotiations towards progressive elimination, while the third type—domestic regulations—are not.¹⁶ This is because the GATS does not impose any *a priori* obligations to remove non-quantitative, non-discriminatory regulations in any service sectors.¹⁷ Yet, these non-discriminatory regulations governing services sectors, which include licensing and qualifications requirements and technical standards, add an additional layer of complexity in an already vast universe of measures regulating services sectors and cross-border trade in services.¹⁸

B. Progressive Liberalization vs. The Right to Regulate

In the negotiations leading to the GATS, multilateral trade rulemaking ventured into areas of internal regulation never before recognized as trade policy,

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

¹⁵ See generally Lim & de Meester, *supra* note 8, at 1–8.

¹⁶ See General Agreement on Trade in Services [hereinafter GATS] art. XIX, Preamble (par. 2 & 3), April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, annex 1B, 1869 U.N.T.S. 183.

¹⁷ Laura Baiker, Elena Bertola, & Markus Jelitto, *Services Domestic Regulation – Locking in Good Regulatory Practices 4* (WTO Economic Research and Statistics Division, Staff Working Paper No. ERSD-2021-14), https://www.wto.org/english/res_e/reser_e/ersd202114_e.pdf.

¹⁸ International Centre for Trade and Sustainable Development, *Negotiating Disciplines on Domestic Regulations in Services*, WTO: PATHS FORWARD, June 2018, at 1, 2.

raising one of the most difficult issues in international trade—the relationship between trade liberalization and domestic regulatory autonomy.¹⁹ The development of multilateral disciplines on domestic regulation represents a collision of fundamentally competing priorities. At one end is the WTO's *raison d'être* of trade liberalization, and relative to the GATS, progressive liberalization. The Preamble of the GATS provides that among the objects and purposes of the GATS is the establishment of “a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization.”²⁰ Under GATS Article XIX, WTO Members shall aim to achieve a “progressively higher level of liberalization” of trade in services through successive rounds of negotiations to provide effective market access for services.²¹ The principle of progressive liberalization is reflected in the structure of the GATS, which contemplates that WTO Members undertake specific commitments through successive rounds of multilateral negotiations with a view to liberalizing their services markets incrementally, rather than immediately and completely at the time of the acceptance of the GATS.²²

At the other end is the preservation of domestic regulatory autonomy generally, and under the GATS, the right to regulate and to pursue national policy objectives specifically. It is through regulation that governments pursue certain public policy objectives in regulating services trade, such as equitable access to services, consumer protection, job creation in disadvantaged regions, labor market integration of disadvantaged persons, reduction of environmental impacts and other externalities, macroeconomic stability, avoidance of market dominance and anti-competitive conduct, avoidance of tax evasion and fraud, among other examples.²³ As domestic regulation of services is at the core of a country's sovereignty and the ability of a state to pursue important public policy issues such as health and consumer protection, environmental concerns, and income

¹⁹ Lim & de Meester, *supra* note 8, at 2.

²⁰ Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* [hereinafter *China – Publications and Audiovisual Products*], ¶ 7.1219, WTO Doc. WT/DS363/R (adopted Jan. 19, 2010), *citing* GATS Preamble (par. 2).

²¹ PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES, AND MATERIALS* 481 (2nd ed. 2008).

²² Appellate Body Report, *China – Publications and Audiovisual Products*, ¶ 392–394, WTO Doc. WT/DS363/AB/R (adopted Jan. 19, 2010).

²³ GATS HANDBOOK, *supra* note 9, at 21.

redistribution,²⁴ governments across the development spectrum have at varying levels assiduously defended the right to regulate. Ensuring quality through regulation has a particular significance in the regulation of services, because the intangible and non-storable nature of the supply of a service entails some physical proximity and interaction between the service supplier and consumer; consumers frequently cannot appreciate the quality of the service until they have consumed it.²⁵ Governments resort to the use of regulations targeted at the service suppliers and not at the actual service, to ensure that service suppliers do not exploit information asymmetries,²⁶ in order to regulate the quality of the service provided.

The incongruence between these diametrically opposite but equally recognized values of multilateral trade in services is reflected in the Preamble to the GATS.²⁷ The first part of the Preamble of the GATS recognizes “*the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives,*”²⁸ which is reproduced in Section I, Paragraph 3 of the Reference Paper.²⁹ The second part of the GATS Preamble, meanwhile, takes into account the “*asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right,*”³⁰ which is also restated as Section I Paragraph 4 of the Reference Paper.³¹ These Preambular clauses can be seen as giving a certain deference to WTO Members that is unique among other

²⁴ Joost H.B. Pauwelyn, *Rien Ne Va Plus? Distinguishing Domestic Regulation from Market Access in GATT and GATS*, 4 WORLD TRADE REV. 131, 135 (2005).

²⁵ WTO Secretariat – Trade in Services Division, *supra* note 8, at 1; Lim & de Meester, *supra* note 8, at 1.

²⁶ WTO Secretariat – Trade in Services Division, *supra* note 8, at 1.

²⁷ See also Bregt Natens & Jan Wouters, *The Scope of GATS and of its Obligations* 4–5 (Leuven Centre for Global Governance Studies, Working Paper No. 117, 2013), citing MARKUS KRAJEWSKI, NATIONAL REGULATION AND TRADE LIBERALIZATION IN SERVICES 56 (2003).

²⁸ GATS Preamble (par. 4).

²⁹ World Trade Organization, *supra* note 5, at 2 (The Reference Paper states that “[m]embers recognize the right to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet their policy objectives.”).

³⁰ Kinda Mohamadieh, *Disciplining Non-discriminatory Domestic Regulations in the Services Sectors – Another Plurilateral Track at the WTO* 3 (Third World Network, Briefing Paper No. 103, 2019), https://ourworldisnotforsale.net/2019/TWN_103_services.pdf.

³¹ “4. Members further recognize the existence of asymmetries with respect to the degree of development of services regulations in different countries, especially in the case of developing and least-developed country Members.”

WTO agreements,³² and an acknowledgement of the sovereignty-constraining character of such rules that fundamentally impinge on the right of governments to regulate. The Appellate Body seemed to have reaffirmed this deference in *China – Publications and Audiovisual Products*, holding that the “right to regulate” in the abstract is an inherent power enjoyed by a Member’s government, rather than a right bestowed by international treaties such as the WTO Agreement.³³ The implication is that provisions of the WTO Agreements that guarantee regulatory autonomy should be regarded as cornerstones of the basic WTO bargain rather than narrow exceptions.³⁴

C. Negotiations on Domestic Regulation under GATS Article VI(4)

Article VI of the GATS provides the general framework for rules on the domestic regulation of services. It is, by design, however, incomplete. The GATS left room for WTO Members to further discuss substantive rules as part of the WTO’s unfinished business on trade in services. GATS Article VI(4) sets the mandate for WTO Members to negotiate multilateral disciplines on domestic regulation:

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

- (a) based on objective and transparent criteria, such as competence and the ability to supply the service;
- (b) not more burdensome than necessary to ensure the quality of the service;
- (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.³⁵

³² See Panagiotis Delimatsis, *Concluding the WTO Services Negotiations on Domestic Regulation – Walk Unafraid* (Tilburg Law and Economics Center, Discussion Paper No. DP 2009-032).

³³ Appellate Body Report, *China – Publications and Audiovisual Products*, *supra* note 22, at ¶ 222.

³⁴ Michael Trebilcock, Antonia Eliason, & Robert Howse, *THE REGULATION OF INTERNATIONAL TRADE* 497 (4th ed. 2013).

³⁵ GATS art. VI(4).

The negotiations towards disciplines on domestic regulation constitute the first serious attempt to concretize the GATS VI(4) mandate and how to achieve it in certain categories of domestic regulations relating to qualifications, licensing, and technical standards.³⁶ The Working Party on Professional Services (WPPS),³⁷ and later superseded by the Working Party on Domestic Regulation (WPDR),³⁸ was established by the Council for Trade in Services (CTS) pursuant to the GATS Article VI(4) mandate. The WPPS was tasked by the Ministers to come up with recommendations on the disciplines “necessary to ensure that measures relating to qualification requirements and procedures, technical standards and licensing requirements in the field of *professional services* do not constitute unnecessary trade barriers.”³⁹ Initially focusing on the accountancy sector, the WPPS delivered on its mandate with the adoption of the *Accountancy Disciplines*, discussed in Part I.C.2.⁴⁰

The *de jure* WTO body overseeing Article VI(4) negotiations on domestic regulation, the WPDR, replaced the WPPS with the mandate to “develop any necessary disciplines to ensure that measures relating to licensing requirements and procedures, technical standards and qualification requirements and procedures do not constitute unnecessary barriers to trade in services.”⁴¹ Whereas the WPPS was tasked to recommend domestic regulation disciplines on a particular sector (professional services), the WPDR was mandated to negotiate a set of *horizontal* disciplines on domestic regulation that would be applicable across sectors, which was later reaffirmed at the Sixth WTO Ministerial Conference in Hong Kong, China in December 2005.⁴² Although it took WTO Members, working through the WPPS and later the WPDR, more than two decades of negotiations before a complete draft of the horizontal disciplines on domestic

³⁶ Delimatsis, *supra* note 32, at 5.

³⁷ World Trade Organization, Ministerial Decision on Professional Services [hereinafter Decision on Professional Services], WTO Doc. S/L/3, ¶ 1 (1995).

³⁸ World Trade Organization, Ministerial Decision on Domestic Regulation [hereinafter Decision on Domestic Regulation], WTO Doc. S/L/70, ¶ 1 (1999).

³⁹ Decision on Professional Services, *supra* note 37, at ¶ 1.

⁴⁰ See discussion *infra* Part. I.C.2.

⁴¹ Decision on Domestic Regulation, *supra* note 38, at ¶ 2.

⁴² World Trade Organization, Ministerial Declaration of 18 December 2005, WTO Doc. WT/MIN(05)/DEC, annex C, ¶ 5 (2005).

regulation was formally tabled at the 11th WTO Ministerial Conference in November 2017, some notable milestones were achieved during that period.

1. Telecoms Reference Paper

The first major regulatory milestone in multilateral trade negotiations did not even take place under the Article VI(4) mandate. Within three years after the entry into force of the GATS, market access commitments on telecommunications services, one of the three sector-specific services negotiations that continued after the conclusion of the Uruguay Round,⁴³ were undertaken by 69 WTO Members (including the Philippines) and annexed to the Fourth GATS Protocol.⁴⁴ Due to profound technological and structural changes taking place at the time in global telecommunications markets,⁴⁵ a number of Members were of the view that effective market access could be undermined through governmental measures not regulated by the GATS,⁴⁶ including anti-competitive measures and the abuse of market power, and that GATS rules were insufficient to obviate the effective nullification of such negotiated commitments.⁴⁷

The solution was a set of regulatory principles and competition disciplines embodied in a “*Reference Paper Regarding Telecommunications Services*”⁴⁸ (hereinafter “Telecoms Reference Paper”)—the first successful attempt to address the highly specific regulatory issues faced by services operators in the telecoms sector,⁴⁹ through negotiated provisions on competitive safeguards,

⁴³ The other two being maritime services and financial services.

⁴⁴ Fourth Protocol to the General Agreement on Trade in Services, Apr. 16, 1997, 2061 U.N.T.S 209. See also WORLD TRADE ORGANIZATION, SPECIAL STUDIES – MARKET ACCESS: UNFINISHED BUSINESS POST-URUGUAY ROUND INVENTORY AND ISSUES 109–10, https://www.wto.org/english/res_e/booksp_e/special_study_6_e.pdf.

⁴⁵ WORLD TRADE ORGANIZATION, *supra* note 44, at 110.

⁴⁶ Hunter Nottage & Thomas Sebastian, *Giving Legal Effect to the Results of WTO Trade Negotiations: An Analysis of the Methods of Changing WTO Law*, 9 J. INT'L ECON. L. 989, 1013 (2006).

⁴⁷ WORLD TRADE ORGANIZATION, *supra* note 44, at 110.

⁴⁸ World Trade Organization, Negotiating Group on Basic Telecommunications: Reference Paper on Telecommunications Services (1996), https://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.

⁴⁹ International Centre for Trade and Sustainable Development, *supra* note 18, at 4, citing Aaditya Mattoo & Pierre Sauvé *Domestic Regulation and Trade In Services: Key Issues*, in DOMESTIC

interconnection arrangements, universal service obligations, licensing criteria, regulatory independence and the allocation of scarce resources.⁵⁰ Although the Telecoms Reference Paper was not developed through the process mandated by GATS Article VI(4), it was nonetheless instrumental in drawing upon domestic regulation principles in GATS Article VI, and in informing WTO Members in the negotiations on domestic regulation as mandated by GATS Article VI(4).⁵¹ On its own, the Telecoms Reference Paper was not itself law,⁵² but it provided WTO Members an innovative template to use as a basis for additional commitments that would only become legally binding on those that have inscribed the same in their GATS schedules. This template would later be used for additional commitments on domestic regulation under the JSI-SDR, as will be explained in Part III.A.2.⁵³ The legally binding nature of the Telecoms Reference Paper was such that it became a justiciable source of obligations under the WTO Dispute Settlement Mechanism, and was the subject of the first GATS dispute, *Mexico–Measures Affecting Telecommunications Services* (hereinafter *Mexico – Telecoms*).⁵⁴

2. *Accountancy Disciplines*

A second milestone was the successful adoption of the *Disciplines on Domestic Regulation in the Accountancy Sector* (hereinafter “accountancy disciplines”) by the WPPS, which was tasked by the CTS to focus on the accountancy sector “as a matter of priority”⁵⁵ in the development of multilateral disciplines.⁵⁶ The accountancy disciplines were envisioned as a possible prototype for GATS disciplines in other fields and even as a model for developing horizontal disciplines that would apply to all professional services.⁵⁷ Although the

REGULATION AND SERVICE TRADE LIBERALIZATION 1, 4 (Aaditya Mattoo & Pierre Sauvé Domestic eds., 2003).

⁵⁰ Council for Trade in Services, *Note by the Secretariat: International Regulatory Initiatives in Services*, WTO Doc. S/C/W/97, ¶ 12 (Mar. 1, 1999).

⁵¹ *Id.* at 3, citing Lee Tuthill, *The GATS and New Rules for Regulators*, 21 TELECOMM’NS POL. 783, 783–798 (1997).

⁵² ANDREAS LOWENFELD, INTERNATIONAL ECONOMIC LAW 136 (2nd ed. 2008).

⁵³ See discussion *infra* Part. III.A.2.

⁵⁴ See discussion *infra* Part. III.B.1.

⁵⁵ Decision on Professional Services, *supra* note 37, at ¶ 2.

⁵⁶ Council for Trade in Services, *Disciplines on Domestic Regulation in the Accountancy Sector*, WTO Doc. S/L/64 (Dec. 17, 1998).

⁵⁷ Patricia J. Arnold, *Disciplining Domestic Regulation: The World Trade Organization and the Market For Professional Services*, 30 ACCT., ORG., & SOC’Y 299, 308 (2005).

accountancy disciplines were focused on non-discriminatory measures relating to licensing, qualifications, and technical standards that are not subject to scheduling under Articles XVI and XVII,⁵⁸ it also sets forth procedural innovations intended to facilitate cross-border trade in professional services and promote transparency and legal certainty in the process of securing a license. Three particular procedural innovations would later figure prominently in negotiations on the domestic regulation disciplines. Two of these innovations would become part of the JSI-SDR Reference Paper disciplines. First, under paragraph 5 of the accountancy disciplines, Members were required, for the first time, to explain upon request the specific objectives intended by their regulations, while in paragraph 6, Members were required, also for the first time, to provide an opportunity for trading partners to comment upon proposed regulations, and to give consideration to such comments.⁵⁹ The third innovation establishes a core element of the accountancy disciplines—the so-called “necessity test” for all applicable regulatory measures, i.e., the principle that regulatory measures shall not be more trade-restrictive than necessary to fulfill a specified legitimate objective,⁶⁰ which would subsequently become a thorny negotiating issue in the WPDR and will be discussed in the next section.⁶¹

It should be noted that the effectivity of the accountancy disciplines, its integration as part of the GATS *acquis*, and its applicability to Members would depend on two conditions, namely: the conclusion of the Doha Round of trade negotiations and the inscription of the disciplines as specific commitments on accountancy in the GATS schedules of Members.⁶² As both conditions did not occur, the accountancy disciplines have not entered into force, and are thus not binding on Members. Nonetheless, some elements of the accountancy disciplines found their way into the discussions at the WPDR, informing the negotiating outcomes on the draft disciplines and the overall horizontal approach to domestic regulation of services.

⁵⁸ Where such measures discriminate between foreign and domestic suppliers, whether formally or in fact, these would have to be scheduled as national treatment limitations. See WTO Secretariat – Trade in Services Division, *supra* note 8, at 3.

⁵⁹ Council for Trade in Services, *supra* note 50, at ¶ 9.

⁶⁰ *Id.*

⁶¹ See discussion *infra* Part. I.C.3.

⁶² World Trade Organization, Ministerial Decision on Disciplines Relating to the Accountancy Sector, WTO Doc. S/L/63, ¶¶ 1, 2 (1998).

3. 2017 Consolidated Draft Text on Domestic Regulation

Finally, a consolidated draft text of the Disciplines on Domestic Regulation was elevated for the first time as a draft Ministerial document to the 11th WTO Ministerial Conference (MC11) in December 2017.⁶³ The 2017 consolidated draft text (hereinafter the “2017 WPDR text”) was the amalgamation of a number of proposals submitted by WTO Members to the WPDR from 2016-2017, focusing on transparency, administration of measures, authorization, and development of measures. Those submissions carried forward only some elements of the 2009 Chair’s Text⁶⁴—the previous consolidated draft that had a number of provisions already agreed *ad referendum* by the WPDR delegates in 2011,⁶⁵ but had failed to gain enough traction at the WPDR to be included in the 8th WTO Ministerial Conference in December 2011. Ultimately, the 2017 WPDR text of the Disciplines on Domestic Regulation was not adopted by the Ministers at MC11 due to opposition from India and the African Group, both of whom believed that the 2017 WPDR text was a significant departure from the 2009 Chair’s Text and from the GATS Article VI(4) mandate itself.⁶⁶ Despite not reaching the requisite Ministerial consensus, the 2017 WPDR text contains elements a great majority of which were also carried over into the Reference Paper adopted by the JSI-SDR, as discussed in Part III.⁶⁷

Thus far, in the more than two decades of negotiations on the Article VI(4) mandate in the WPPS and the WPDR, a few observations on the evolution of the text of multilateral disciplines on domestic regulation of services can be made. First is the treatment of the so-called “necessity test” in the disciplines. Under the

⁶³ World Trade Organization, Disciplines on Domestic Regulation [hereinafter Disciplines on Domestic Regulation], WTO Doc. WT/MIN(17)/7/Rev.2 (WT/GC/190/Rev.2) (Dec. 13, 2017); World Trade Organization, Disciplines on Domestic Regulation (Revised) [hereinafter Disciplines on Domestic Regulation (Revised)], WTO Doc. WT/MIN(17)/7 (WT/GC/190) (Dec. 1, 2017).

⁶⁴ Working Party on Domestic Regulation, *Informal Note by the Chairman: Draft Disciplines on Domestic Regulation Pursuant to GATS Article VI.4*, WTO Doc. TN/S/36 (attachment) (Mar. 20, 2009).

⁶⁵ Working Party on Domestic Regulation, *Chairman's Progress Report: Disciplines on Domestic Regulation Pursuant to GATS Article VI.4*, WTO Doc. S/WPDR/W/45 (Apr. 14, 2011).

⁶⁶ See Comments by India on Co-Sponsors' Text on Disciplines on Domestic Regulation (WT/MIN(17)/7, WT/GC/190), *Disciplines on Domestic Regulation*, WTO Doc. WT/MIN(17)/19, JOB/GC/168 JOB/TNC/70, JOB/SERV/276 (Dec. 5, 2017).

⁶⁷ See discussion *infra* Part. III.

chapeau of GATS Article VI(4), the disciplines shall ensure that measures “do not constitute *unnecessary barriers to trade in services*,” while paragraph (b) ensures that requirements should “*not [be] more burdensome than necessary* to ensure the quality of the service.” The concept of a “necessity test” in WTO law is well-documented in the multilateral trade literature.⁶⁸ It would be recalled that a sector-specific necessity test was adopted by the WPPS as part of the accountancy disciplines,⁶⁹ but language on a *horizontal* necessity test has yet to be agreed upon by negotiators in the WPDR. The 2009 Chair’s Text excludes any textual references to a necessity test despite express references to the mandate for such a test in GATS Article VI(4), reflecting fundamental disagreement among WTO Members on whether such provisions are to be made part of the disciplines. The Chair of the WPDR later acknowledged that the question of whether a normative standard in the form of a “necessity test” should be included in the disciplines is one of the most difficult issues in the negotiations in the WPDR.⁷⁰ In the run-up to MC11, proposed language on a necessity test was reintroduced in an early version of the 2017 WPDR text,⁷¹ and was bracketed as placeholder language in the final version elevated to the Ministers at MC11.⁷² The JSI-SDR Reference Paper did not, however, carry over the suggested language on a necessity test bracketed in the 2017 WPDR text, and completely omits any reference in the final version that was adopted in November 2021. This could be evidence of a shift away from strict disciplines as a necessity and towards a good regulatory practice approach, through disciplines that emphasize transparency, procedural fairness, and regulatory governance.⁷³ It

⁶⁸ Gilles Muller, *The Necessity Test and Trade in Services: Unfinished Business?*, 49 J. OF WORLD TRADE, 951, 951–974 (2015); Panagiotis Delimatsis, *Towards a Horizontal Necessity Test for Services: Completing the GATS Article VI:4 Mandate*, in GATS AND THE REGULATION OF INTERNATIONAL TRADE IN SERVICES 370, 370–396 (Marion Panizzon, Nicole Pohl, & Pierre Sauvé eds., 2009); Panagiotis Delimatsis, *Determining the Necessity of Domestic Regulations in Services – The Best is Yet to Come*, 19 EUR. J. INT’L L. 365, 365–408 (2008); Panagiotis Delimatsis, *Creating a Horizontal Necessity Test for Services*, in INTERNATIONAL TRADE IN SERVICES AND DOMESTIC REGULATIONS: NECESSITY, TRANSPARENCY AND REGULATORY DIVERSITY 166, 166–254 (2007).

⁶⁹ Council for Trade in Services, *supra* note 50, at ¶ 9.

⁷⁰ Working Party on Domestic Regulation, *supra* note 65, at ¶ 14.

⁷¹ Based on a proposal from Chile, Hong Kong (China), Moldova, Peru, New Zealand, and Switzerland.

⁷² See Disciplines on Domestic Regulation (Revised), *supra* note 63, at 7.

⁷³ Markus Krajewski, *Trading Away Public Policy Space? Assessing the Risk of Enhanced Domestic Regulation Disciplines in Trade and Investment Agreements for Public Interest Regulation*, EUROPEAN PUBLIC SERVICE UNION AND THE CHAMBER OF LABOUR VIENNA 9 (Nov. 2021), https://www.epsu.org/sites/default/files/event/files/EPSU%20AK%20Study%20Domestic%20Regulation%20FINAL_Layout_202111.pdf.

should be noted, however, that in Footnote 1 of Section 1, Paragraph 1 of the Reference Paper, further disciplines may be developed by Members pursuant to GATS Article VI(4), which does not rule out the inclusion of a necessity test in future meetings of the JSI-SDR, or in the event that the Reference Paper is multilateralized through the WPDR.

Second, the 2017 WPDR text reflected a shift in the approach to the negotiations of the disciplines specific to four of the five mandated areas under GATS Article VI(4), namely licensing requirements, licensing procedures, qualification requirements, and qualification procedures, by reframing them as part of the broader process of “*authorization to supply a service*.”⁷⁴ The 2009 Chair’s Text had initially contained separate provisions under the four mandated areas of GATS Article VI(4), which had common structural and textual elements. During the revival of WPDR negotiations in 2017, those common elements in the 2009 Chair’s Text of a *procedural* nature related to the application and approval process of licensing and qualifications for the supply of a service were consolidated, ostensibly as part of an effort to simplify the approach to the draft text and expedite the negotiating process. These merged procedures include a single competent authority for license applications, submission of applications at any time, processing of applications within a reasonable timeframe, acceptance of authenticated copies in place of original documents, specific procedures in case an application is incomplete or rejected, prompt effectivity of a granted license or fulfilled qualifications, reasonable fees, and reasonably frequent intervals for examinations where required. It bears noting that the provisions in the 2009 Chair’s Text on licensing and qualification requirements, which contain language of a more *substantive* nature, were not included in the 2017 consolidated draft text, and were not carried over to the Reference Paper. These and other procedural and transparency elements of the authorization to supply a service would become major features of the JSI-SDR Reference Paper, and will be taken up under Part III.D.1.⁷⁵

Finally, one particular element of domestic regulation of services that was consistently on the table in the WPDR and embodied through draft language in the 2009 Chair’s Text, the 2017 WPDR text, and in the JSI-SDR Reference Paper, is administrative rule-making—more specifically, the prior notice-and-comment

⁷⁴ See discussion *infra* Part. I.C.

⁷⁵ See discussion *infra* Part. III.D.1.

and substantive requirements of any proposed law or regulation of services sectors. The basic elements of the prior notice-and-comment provisions were retained by and large in all three versions of the disciplines, with only minor textual variances. But this is far from indicating any general and broad support for such rules among WTO Members. To the contrary, notice-and-comment disciplines were one of the most controversial and extensively discussed issues within the WPDR, as discussions among delegates focused on the necessity and desirability of prior comment and consultation procedures and the appropriate level of detailed legal language to be drafted.⁷⁶ Developing countries initially voiced their opposition, decrying the additional administrative burden, particularly for sub-national levels of government that may lack sufficient technical or financial capacity to establish a prior notice-and-comment mechanism.⁷⁷ In addition, the 2017 WPDR text included disciplines on “*Development of Measures*,” which is not found in the 2009 Chair’s Text, but introduced for the first time proposed disciplines that go into the content of service measures. This will be discussed in greater detail in Part III.D.2.⁷⁸

D. The Joint Statement Initiative and the Reference Paper

1. The Joint Statement Initiatives (JSIs)

The failure to reach a Ministerial consensus at MC11 on the 2017 WPDR text and on any of the draft negotiating texts circulated on all mandated issues compelled a number of WTO Members to issue Joint Ministerial Statements⁷⁹ to pursue separate negotiations on such issues with interested Members. Ministers representing 59 WTO Members,⁸⁰ including all 29 co-sponsors of the 2017 WPDR text,⁸¹ issued the Joint Ministerial Statement on Services Domestic Regulation, in

⁷⁶ Delimatsis, *supra* note 68, at 277.

⁷⁷ *Id.* at 278.

⁷⁸ See discussion *infra* Part. III.D.2.

⁷⁹ The Joint Ministerial Statements issued in MC11 are follows: Joint Ministerial statement - Declaration on the Establishment of a WTO Informal Work Programme for MSMEs (WT/MIN(17)/58), Joint Ministerial Statement on Investment Facilitation for Development (WT/MIN(17)/59), Joint Statement on Electronic Commerce (WT/MIN(17)/60), and Joint Ministerial Statement on Services Domestic Regulation (WT/MIN(17)/61).

⁸⁰ Including all 27 Member States of the European Union.

⁸¹ The original 29 co-sponsors of the 2017 WPDR Text are: Albania; Argentina; Australia; Canada; Chile; China; Colombia; Costa Rica; The European Union; Hong Kong, China; Iceland; Israel; Japan; Republic of Kazakhstan; Republic of Korea; Liechtenstein; The Former Yugoslav

which they committed to advance “negotiations on the basis of recent proposals as set out in WT/MIN(17)/7/Rev.2 and related discussions in the WPDR and future contributions by Members to deliver a multilateral outcome.”⁸² Shortly after MC11 concluded in December 2017, the signatories to the Joint Ministerial Statement on Services Domestic Regulation, convening as the “Joint Statement Initiative on Services Domestic Regulation” (JSI-SDR), continued text-based discussions over the course of three years.⁸³

The literature is rife with commentary on what transpired at MC11—an unprecedented, highly publicized break with a fundamental consensus rule in multilateral trade negotiations that has been described as a “plurilateral approach.”⁸⁴ The issue still divides delegations in Geneva, but with the “success” of the JSI-SDR, the meetings and activities of the other Joint Statement Initiatives (now referred to as “Joint Initiatives”)⁸⁵ continue despite a lack of universal certainty on the legitimacy of any outcome that may result. To be sure, it would be entirely sensible to think that the level of difficulty in achieving consensus among

Republic of Macedonia; Mexico; Republic of Moldova; Montenegro; New Zealand; Norway; Peru; The Russian Federation; Switzerland; The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu; Turkey; Ukraine; and Uruguay. Brazil, Indonesia, and Singapore later joined as part of the original signatories to the Joint Ministerial Statement on Services Domestic Regulation.

⁸² World Trade Organization, Joint Ministerial Statement on Services Domestic Regulation, WTO Doc. WT/MIN(17)/61, ¶ 3 (2017).

⁸³ World Trade Organization, *supra* note 5. See also Press Release, World Trade Organization, Participants in Domestic Regulation Talks Conclude Text Negotiations, on Track for MC12 Deal (Sept. 27, 2021), https://www.wto.org/english/news_e/news21_e/serv_27sep21_e.htm.

⁸⁴ Americo B. Zampetti, Patrick Low, & Petros C. Mavroidis, *Consensus Decision-Making and Legislative Inertia at the WTO: Can International Law Help?*, 56 J. OF WORLD TRADE 1, 1–26 (2022); Hamid Mamdouh, *Plurilateral Negotiations and Outcomes in the WTO*, FRIENDS OF MULTILATERALISM WEBSITE (Apr. 16, 2021), <https://fmg-geneva.org/7-plurilateral-negotiations-and-outcomes-in-the-wto/>; Jane Kelsey, *Why the Joint Statement Initiatives Lack Legal Legitimacy in the WTO: A Response to Hamid Mamdouh, "Plurilateral Negotiations and Outcomes in the WTO,"* THE UNIVERSITY OF AUCKLAND LAW SCHOOL (Apr. 21, 2021), https://ourworldisnotforsale.net/2021/Kelsey_JSI_legitimacy.pdf; KINDA MOHAMADIEH, *PLURILATERAL INITIATIVES AND THEIR INTERACTION WITH WTO RULES* (2020), <https://www.twn.my/title2/t&d/tnd44.pdf>; Fiana Angeles, Riya Roy, & Yulia Yarina, *Shifting from Consensus Decision-Making to Joint Statement Initiatives: Opportunities and Challenges*, GRADUATE INSTITUTE GENEVA (Dec. 2020), <https://repository.graduateinstitute.ch/record/299033/files/WTO%20Capstone%20Final%20Report%20JSIs.pdf>.

⁸⁵ See Informal Discussions: Joint initiatives, WORLD TRADE ORGANIZATION WEBSITE (n.d.), https://www.wto.org/english/tratop_e/jsi_e/jsi_e.htm.

164 veto-wielding WTO Members, on any one issue of the multilateral trading system, let alone a complex set of rules that would govern potentially US\$ 1.6 trillion⁸⁶ worth of trade in services, is unimaginably high. Although the wisdom and legality of the JSI “plurilateral approach” and its consistency with WTO rules is beyond the scope of this paper, a reminder of the systemic and development implications of JSIs bears mentioning: “[a]ny attempt to introduce new rules resulting from the JSI negotiations into the WTO without fulfilling the requirements of Articles IX and X of the Marrakesh Agreement, will be detrimental to the functioning of rule based multilateral trading system. Such a step will. . . result in Members disregarding existing multilateral mandates arrived at through consensus in favour of matters without multilateral mandates.”⁸⁷

2. The Reference Paper on Services Domestic Regulation

The “text-based discussions” under the JSI-SDR culminated in the conclusion of the negotiations on 27 September 2021 on a draft *Reference Paper on Services Regulation* (referred to in this paper as “JSI-SDR Reference Paper” or simply “Reference Paper”).⁸⁸ The Reference Paper is twelve pages long and is divided into three Sections: Section I (Sectoral Coverage and Scheduling Modalities, Development), Section II (Disciplines on Domestic Regulation), and Section III (Alternative Disciplines on Financial Services). Section I contains preambular provisions that include an express recognition of the right to regulate and to introduce new regulations on the supply of services to meet policy objectives. It also includes the obligation to inscribe the disciplines under Section II in the Members’ GATS schedules as additional commitments, which shall be discussed in Part III.A.1. Section II is the essential core of the Reference Paper, setting forth the domestic regulation disciplines covering procedural, transparency, and a few substantive obligations as embodied in 22 paragraphs of text. The disciplines under Section II and Section III are nearly identical, except for two: (1) the obligation to avoid requiring the applicant for an authorization to approach more than one competent authority, and (2) the duty to support

⁸⁶ Value of global trade in services as of July 2022. See Global Trade Update, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (July 2022), at 2, https://unctad.org/system/files/official-document/ditcinf2022d2_en.pdf.

⁸⁷ World Trade Organization, The Legal Status of ‘Joint Statement Initiatives’ and their Negotiated Outcomes, WTO Doc. WT/GC/W/819/Rev.1 ¶ 11 (2021).

⁸⁸ World Trade Organization, *supra* note 5. See also Press Release, *supra* note 83.

dialogues between competent bodies on issues relating to the recognition of professional qualifications, licensing, and registration.

The domestic regulations disciplines in the Reference Paper are considered “GATS+” because they build on and expand on the good governance provisions of the GATS,⁸⁹ based on the three core principles of transparency, legal certainty and predictability, and regulatory quality and facilitation.⁹⁰ To improve the transparency of regulatory processes, participating WTO members are required to publish and make available information required for compliance with authorization and regulatory decision-making processes to service suppliers in order.⁹¹ The Reference Paper disciplines seek to achieve legal certainty and predictability of regulatory processes by requiring regulatory and procedural guarantees from competent authorities addressing applications for authorization of the supply of services.⁹² Finally, signatories are expected to observe regulatory quality and facilitation, among others, ensuring centralized authorization procedures and disseminating good regulatory practices to facilitate service suppliers’ ability to trade.⁹³

II. Domestic Regulation of Services in the Philippines

The Philippines announced its intention to join the Joint Statement Initiative on Domestic Regulation of Services in a meeting of the JSI-SDR on 28 November 2021. On 2 December 2021, the Philippines formalized its participation in the JSI-SDR and joined 67 other WTO Members in adopting the *Declaration on the Conclusion of Negotiations on Services Domestic Regulation*,⁹⁴ including the Reference Paper on Services Domestic Regulation that was annexed to the Declaration.⁹⁵ As of September 2022, 70 WTO Members have signed on to the JSI-

⁸⁹ Bertola, Coghi, & Jelitto, *supra* note 7, at 77.

⁹⁰ Bangura & Kromah, *supra* note 6, at 179.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ World Trade Organization, Declaration on the Conclusion of Negotiations on Services Domestic Regulation, WTO Doc. WT/L/1129 (2021), ¶ 1, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/1129.pdf&Open=True>.

⁹⁵ World Trade Organization, Joint Initiative on Services Domestic Regulation: Reference Paper on Services Domestic Regulation, WTO Doc. INF/SDR/2 (Nov. 26, 2021), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/1129.pdf&Open=True>.

SDR Reference Paper,⁹⁶ and 67 WTO Members have submitted their “Pre-Finalization Schedule of Specific Commitments,” including the Philippines.⁹⁷ In a press release on the announcement of the Philippines’ participation in the JSI-SDR, it was highlighted that “services represent the driver of [the] economy, accounting for more than 60% of GDP and covering more than 55% of [the] labor force. . . . The Philippines expects that the disciplines will make it easier for . . . MSMEs to enter the global market, where they will stand to benefit from a higher-than-average trade cost reduction of up to 10 percent. Philippine firms, particularly those involved in transport and logistics, financial services, and knowledge-based professional services, will be in a better position to attract. . . investments, [and] allow MSMEs to pursue further integration into global services value chains, and support. . . economic recovery.”⁹⁸ This move reflects a deliberate policy decision that is presumably aligned with the Philippine government’s development strategy to enhance the competitiveness of its services sectors and integration into the global economy.⁹⁹

The Philippines’ services sectors comprise a diverse range of industries, from retail and business services to education and health, with some sectors serving as inputs in production, while others directly affect human capital development.¹⁰⁰ Given the diversity and breadth of its domestic services sectors, the Philippines’ overall policy on trade in services is not subject to a horizontal or cross-cutting mandate by any single agency. There is no specific governmental entity that formulates an overall services policy applicable horizontally to the

. See also Informal Discussions: Services Domestic Regulation, WORLD TRADE ORGANIZATION WEBSITE (n.d.), https://www.wto.org/english/tratop_e/serv_e/jsdomreg_e.htm; Press Release, Department of Foreign Affairs of the Philippines, PH at the Forefront of ASEAN in Facilitating Trade in Services in WTO (Dec. 3, 2021), <https://dfa.gov.ph/dfa-news/news-from-our-foreign-service-postsupdate/29934-ph-at-the-forefront-of-asean-in-facilitating-trade-in-services-in-wto>.

⁹⁶ World Trade Organization, *supra* note 95.

⁹⁷ World Trade Organization, Pre-Finalization Schedule of Specific Commitments (Philippines), WTO Doc. INF/SDR/IDS/PHL (2022) (Access to the contents of this document is restricted to WTO delegations.).

⁹⁸ Press Release, *supra* note 95.

⁹⁹ See *Services*, Department of Trade and Industry Website (n.d.), <https://industry.gov.ph/category/services/>.

¹⁰⁰ Ramonette Serafica & Jean Colleen M. Vergara, *Regional Analysis of the Philippine Services Sector i* (abstract) (Philippine Institute for Development Studies, Discussion Paper, Series No. 2019-25), <https://pidswebs.pids.gov.ph/CDN/PUBLICATIONS/pidsdps1925.pdf>.

different agencies or oversees the implementation of services commitments across sectors. The National Economic and Development Authority (NEDA), the Philippines' central economic planning agency, has been serving as the *de facto* coordinator for GATS-related negotiating positions as Chair of the Inter-Agency Committee on Services.¹⁰¹ The Department of Trade and Industry (DTI), meanwhile, has been chairing a fairly recent inter-agency body, the Philippine Working Group on Services (PH-WGS), which coordinates negotiating positions on services in the Philippines' free trade agreement (FTA) negotiations.

As far as the regulation of the services sectors is concerned, it is subject to the Philippine government's exercise of regulatory power and is administered through its rulemaking authority.¹⁰² Because of the diversity of the services sectors and the legal mandates of agencies authorized to regulate such sectors, the Philippines' regulatory framework over services is decidedly more decentralized, in a way that line agencies handle trade issues for their respective sectors.¹⁰³ More specifically, under the Philippines' system of government, administrative agencies are bound by their respective charters or legal mandates to regulate the service sectors under their jurisdiction through administrative rulemaking.¹⁰⁴ This is because the rulemaking power of administrative agencies is itself a power delegated by Congress to implement the law, which they are entrusted to enforce within the confines of the granting statute, as required by the Constitution and its doctrine of non-delegability,¹⁰⁵ *potestas delegata non delegari potest*.¹⁰⁶ The legislative grant of quasi-legislative powers in the organic laws creating administrative agencies or substantive status usually takes the form of an

¹⁰¹ Trade Policy Review Body, *Trade Policy Review of the Philippines*, WTO Doc. WT/TPR/S/368/Rev.1, at 23 (Feb. 5, 2018), https://www.wto.org/english/tratop_e/tpr_e/tp468_e.htm.

¹⁰² See generally UNCTAD Secretariat, *Services, Development and Trade: The Regulatory and Institutional Dimension*, Note by the Secretariat, at 11, Conference on Trade and Dev't, U.N. Doc. TD/B/C.I/MEM.4/11 (Mar. 9, 2016) https://unctad.org/system/files/official-document/cimem4d11_en.pdf.

¹⁰³ Ramonette Serafica & Queen Cel Oren, *A Review of Philippine Participation in Trade in Services Agreements* 6 (Philippine Institute for Development Studies, Discussion Paper, Series No. 2021-43).

¹⁰⁴ HECTOR S. DE LEON & HECTOR M. DE LEON JR., *ADMINISTRATIVE LAW: TEXT AND CASES* 22 (7th ed. 2016).

¹⁰⁵ *Id.* at 78–80.

¹⁰⁶ *Echegaray v. Secretary of Justice*, G.R. No. 132601, Oct. 12, 1998, citing *Defensor-Santiago v. Commission on Elections*, G.R. No. 127325, Mar. 19, 1997.

authorization to issue the implementing rules and regulations (IRR), and may sometimes prescribe specific procedural requirements for its issuance, such as publication and public consultation.¹⁰⁷

The reality, however, is that in a modern, globally-connected domestic economy, national regulators face the challenge of constantly adapting regulatory instruments and approaches to evolving market conditions and public policy needs.¹⁰⁸ Developing country governments often regulate in a less efficient manner, need to set up standards and regulatory arrangements from scratch, lack sufficient monetary resources, and have a deficit in competent human resources.¹⁰⁹ These challenges are symptomatic of the relationship between the level of development and regulatory burden that can also be seen as applicable to the Philippine experience.

The first step of regulatory reform in many countries is to cut administrative red tape and simplify rules and reporting requirements, with a view to facilitating business transactions and improving the overall business environment, an approach that the Philippines had adopted for improving the domestic regulatory environment as early as 2005.¹¹⁰ One of these reforms, the 2007 Anti-Red Tape Act (Republic Act No. 9485), which created the Anti-Red Tape Authority or ARTA, broadly applied to most Philippine administrative agencies, but was limited to mandating fixed processing times instead of evaluating whether the regulatory requirements themselves remained appropriate—a narrow scope reflective of the operational realities of receiving government services in the Philippines at the time.¹¹¹ Despite these early reform efforts, regulatory quality remained poor, institutional capacity for regulation was weak, and the deliberative process of proposed improvements in existing regulation was lacking.¹¹²

¹⁰⁷ Graciela Base, *Notice-and-Comment Rulemaking in Comparative Perspective: Some Conceptual and Practical Implications*, 15 ASIAN J. COMP. L., 95, 99 (2020).

¹⁰⁸ UNCTAD Secretariat, *supra* note 102, at 12.

¹⁰⁹ Juan A. Marchetti, *Developing Countries in the WTO Services Negotiations: Doing Enough?*, in WTO LAW AND DEVELOPING COUNTRIES 82, 118 (George A. Bermann and Petros C. Mavroidis eds., 2007).

¹¹⁰ ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT & ASIAN DEVELOPMENT BANK, REGULATORY IMPACT ASSESSMENT IN THE PHILIPPINES 24, 28–29 (2020).

¹¹¹ *Id.* at 29.

¹¹² Gilberto Llanto, *Regulatory Coherence: The Case of the Philippines*, in THE DEVELOPMENT OF REGULATORY MANAGEMENT SYSTEMS IN EAST ASIA: COUNTRY STUDIES 231, 231–239 (Derek Gil and Ponciano Intal, Jr. eds., 2016)

The Philippines began to enact structural reforms and follow a “good regulatory practice” approach on regulatory reform, which typically involves the design of objective, criteria-based, and transparent rules to promote efficiency and to lessen the scope for discretionary decision-making.¹¹³ With the reconstituting of the Public-Private Sector Task Force on Philippine Competitiveness as the National Competitiveness Council (NCC) in 2011, and armed with a fresh and expanded mandate and authority, the NCC would shepherd the launch of *Project Repeal*—a program to encourage agencies to amend, repeal, consolidate, or delist irrelevant, unnecessary, and excessive regulations and institutionalize an evidence-based and systematic regulatory management system in the Philippines.¹¹⁴ The conduct of regulatory impact assessments (RIA), an essential tool in the good regulatory practices toolbox,¹¹⁵ began to be mainstreamed by the NEDA, acting in the absence of a government office that could initiate whole-of-government regulatory reform efforts.¹¹⁶

These and other related reform efforts¹¹⁷ would culminate in the passage of the Ease of Doing Business and Efficient Government Service Delivery Act of 2018 (RA 11032, hereinafter “EODB Act”), amending the Anti-Red Tape Act. The EODB Act was notable for reinforcing the ARTA with an expanded mandate that includes reviewing proposed regulations of government agencies through the use of regulatory impact assessment and recommending policies, processes, and systems to improve regulatory management of agencies that process business permits and licenses.¹¹⁸ The EODB Act also reconstituted the ARTA as a formal oversight body to assess the quality of regulations and make the conduct of regulatory impact assessment (RIA) a mandatory requirement.¹¹⁹ As GATS disciplines on domestic regulation share objectives similar to those espoused by good regulatory

¹¹³ Lim & de Meester, *supra* note 8, at 9.

¹¹⁴ ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT & ASIAN DEVELOPMENT BANK, *supra* note 110, at 34.

¹¹⁵ See generally *id.*

¹¹⁶ *Id.* at 32.

¹¹⁷ See generally *id.*

¹¹⁸ Republic Act No. 11032 (Titled “An Act Promoting Ease of Doing Business and Efficient Delivery of Government Services, Amending for the Purpose Republic Act No. 9485, otherwise known as the Anti-Red Tape Act of 2007, and for other Purposes”) [hereinafter “EODB Act”] (2017), sec. 17(f) & (g).

¹¹⁹ ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT & ASIAN DEVELOPMENT BANK, *supra* note 110, at 39, citing Republic Act No. 11032 (2017).

practices,¹²⁰ the question of whether these reforms are enough to align the Philippines' domestic regulatory regime on services with the GATS and with its commitments under the JSI-SDR Reference Paper will be discussed in Part III.

III. Analysis of the Philippines' Commitments under the Reference Paper

As one of the last¹²¹ WTO Members to join the JSI-SDR before the conclusion of negotiations on the Reference Paper, the Philippines had agreed to formally participate in plurilateral negotiations on what was, for all intents, a final agreement, as the JSI-SDR participants had already closed text-based negotiations on 27 September 2021.¹²² By committing to inscribe the Reference Paper disciplines on services domestic regulation in its GATS Schedule, the Philippines has bound itself to ensure compliance with the mandatory obligations. Although the Reference Paper disciplines on services domestic regulation by and large preserves the basic elements of the draft disciplines developed through the GATS Article VI:4-mandated WPDR process, the Reference Paper version poses certain challenges for the Philippines' regulatory regime for services. Part III of this Paper will focus on the main areas of the disciplines under Section II of the Reference Paper, identify the obligations that significantly impact the Philippines' domestic regulatory regime on services, and attempt to provide an analysis of the legal implications of incorporating the new JSI-SDR commitments and look into ways in which the Philippines can preserve any regulatory or policy space.

A. Mandatory Obligations Related to GATS Commitments

When WTO Members join the JSI-SDR and adopt the Reference Paper, whether as an original party or after the conclusion of the JSI negotiations on services domestic regulation, there are three main obligations that Members comply with to give the Reference Paper its legal effect: (1) inscribe the Reference Paper as additional commitments in their respective GATS schedules; (2) domestic

¹²⁰ Lim & de Meester, *supra* note 8, at 9.

¹²¹ The Philippines was the 66th (of 69) WTO Member to join the Joint Statement Initiative on Services Domestic Regulation upon the public announcement of the conclusion of negotiations on December 2, 2021. See Press Release, World Trade Organization, Negotiations On Services Domestic Regulation Conclude Successfully in Geneva (Dec. 2, 2021), https://www.wto.org/english/news_e/news21_e/jssdr_02dec21_e.htm; Press Release, *supra* note 95.

¹²² Press Release, *supra* note 83.

regulation disciplines of the Reference Paper become conditional obligations as to the services sectors committed; and (3) such commitments shall be extended to other WTO Members and non-JSI participants on a Most-Favored Nation (MFN) basis.

1. *Inscription of Reference Paper in the GATS Schedule*

The obligation to inscribe the domestic regulation disciplines as additional commitments in each participating Members' schedule of specific commitments is mandatory for all participants to the JSI-SDR. Paragraphs 7 and 8, Section 1, of the Reference Paper provide:

7. Members *shall* inscribe the disciplines in Section II in their Schedules as additional commitments under Article XVIII of the Agreement.

8. The disciplines inscribed pursuant to paragraph 7 of this Section apply where specific commitments are undertaken. In addition, Members are encouraged to inscribe in their Schedules additional sectors to which the disciplines apply.¹²³ (Emphasis added)

Under GATS Article XVIII, “[m]embers may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII, including those regarding *qualifications, standards, or licensing matters*. Such commitments shall be inscribed in a Member’s Schedule.”¹²⁴ GATS Article XVIII itself does not entail any legal obligation; Members are not obliged to make additional commitments. It simply provides the legal basis for Members to negotiate and subsequently make specific commitments that fall outside the scope of the obligations on market access and national treatment.¹²⁵ GATS Article XVIII allows WTO Members to undertake additional commitments in areas such as qualifications, licensing, or standards—on a *voluntary* basis.¹²⁶ The process would depend solely on the acceptance by each

¹²³ World Trade Organization, *supra* note 95, at 2.

¹²⁴ GATS art. XVIII.

¹²⁵ Panagoitis Delimatsis, *Trade in Services in the WTO – Specific Commitments*, in ELGAR ENCYCLOPEDIA OF INTERNATIONAL ECONOMIC LAW 427, 430 (2017).

¹²⁶ Delimatsis, *supra* note 8, at 21.

individual member to incorporate the disciplines into their schedule.¹²⁷ Whether or not such specific commitments are to be undertaken and in what sectors is the outcome of negotiations between and among Members, which would still be up to the discretion of a WTO Member. Under GATS Article XX(1)(c), it is obligatory for each Member to set out in a schedule the specific commitments it decides to undertake under Part III of the GATS, which includes additional commitments under Article XVIII.¹²⁸

The decision to make the act of inscribing the disciplines a binding obligation is a departure from the 2009 Chair's Text and the 2017 WPDR text. Unlike the Reference Paper, both versions do not make it a mandatory obligation to inscribe the disciplines as additional commitments. This is because there is no need to. As both negotiated texts represent the stillborn outcome of the discussions in the WPDR as mandated by GATS Article VI(4), the Members would not have used the Reference Paper approach, which means that the GATS Article XVIII need not be resorted to, and the disciplines would not have to take the form of additional commitments.¹²⁹

¹²⁷ Aik Hoe Lim & Bart de Meester, *Addressing the Domestic Regulation and Services Trade Interface: Reflections on the Way Ahead*, in WTO DOMESTIC REGULATION AND SERVICES TRADE: PUTTING PRINCIPLES INTO PRACTICE, *supra* note 8, at 332, 349.

¹²⁸ "Article XX. Schedules of Specific Commitments.

1. Each Member shall set out in a schedule the specific commitments it undertakes under Part III of this Agreement. With respect to sectors where such commitments are undertaken, each Schedule shall specify:
 - (a) terms, limitations and conditions on market access;
 - (b) conditions and qualifications on national treatment;
 - (c) undertakings relating to additional commitments;
 - (d) where appropriate the time-frame for implementation of such commitments; and
 - (e) the date of entry into force of such commitments.
2. Measures inconsistent with both Articles XVI and XVII shall be inscribed in the column relating to Article XVI. In this case the inscription will be considered to provide a condition or qualification to Article XVII as well.
3. Schedules of specific commitments shall be annexed to this Agreement and shall form an integral part thereof."

¹²⁹ It is surmised that had there been a successful conclusion to the GATS Article VI:4 negotiations on domestic regulation, the outcome would have taken the form of a standalone agreement (such as the Trade Facilitation Agreement or the Fisheries Subsidies Agreement), an Annex to the GATS, or a revision of the GATS itself.

The Reference Paper, on the other hand, was negotiated outside the GATS Article VI(4) mandated process, although it expressly refers to GATS Article VI(4) as its guiding objective.¹³⁰ Thus, making the inscription of the disciplines an express, legally binding obligation for JSI-SDR participants adds additional legal certainty that the participating Members give effect to the Reference Paper. If the inscription of the disciplines were voluntary, the Reference Paper would just be a common template or a Model Agreement for a set of rules and norms on the domestic regulation of services that WTO Members may *choose* to adopt or incorporate elements as part of their respective domestic legislation. It would have no legal status *per se* unless it was inscribed in the GATS Schedule of a WTO Member.¹³¹ In this regard, the JSI-SDR Reference Paper follows a similar approach to the Telecoms Reference Paper,¹³² except that, unlike the Telecoms Reference Paper, which allowed WTO Members to adopt only parts of it as additional commitments, it would seem that Members are expected to inscribe the entire Reference Paper.¹³³

2. *Domestic Regulation Disciplines as Binding Additional Commitments in the GATS Schedule*

The inscription of the domestic regulation disciplines in the Reference Paper as additional commitments in the specific schedules of commitments itself creates a set of legal obligations binding as to the services sectors committed thereunder. Under GATS Article XX(3), the Schedules will be attached to, and form an integral part of, the GATS.¹³⁴ Any additional commitments made, such as the disciplines on domestic regulation in the Reference Paper, will likewise become part of the GATS. Like tariff concessions in a WTO Member's Schedule, which are reciprocal and result from a mutually advantageous negotiation between importing and exporting Members, the concessions provided for in a GATS

¹³⁰ World Trade Organization, *supra* note 95, at 4 (sec. 1, ¶ 1).

¹³¹ See Nottage & Sebastian, *supra* note 46, at 1013.

¹³² World Trade Organization, *supra* note 48.

¹³³ The Reference Paper gives Members the option to inscribe alternative disciplines in Section III for financial services (Section I, Paragraph 7) and to exclude the obligation to ensure non-discrimination between men and women in Paragraph 22 (d) of Section II and paragraph 19 (d) of Section III. See Krajewski, *supra* note 73, at 17.

¹³⁴ GATS art. XX(3).

Schedule of Specific Commitments become part of the terms of the treaty,¹³⁵ including any additional commitments.

The binding nature of GATS Schedules is such that once commitments have been entered into, WTO members have to abide by them, under the principle of *pacta sunt servanda*.¹³⁶ The rules of interpretation for treaties and international agreements, as set out in Articles 31 to 33 of the Vienna Convention on the Law of Treaties, that apply with respect to GATS schedules are the same as those applicable to the GATS itself.¹³⁷ Under the Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS), because schedules (including footnotes, headnotes, and attachments) are a record of legal commitments, nothing should appear in them that a Member does not intend to be legally binding.¹³⁸ Although the Scheduling Guidelines are not meant to be an authoritative legal interpretation of the GATS,¹³⁹ these are nonetheless instructive in helping WTO Members ensure clarity in the formulation of specific commitments, given the legal nature of the schedule.

Paragraph 8, Section I of the Reference Paper, however, adds that “[t]he disciplines inscribed pursuant to paragraph 7 of this Section apply where specific commitments are undertaken,” which places the domestic regulation disciplines in the class of conditional obligations under the GATS. Paragraph 2 of Section II further limits the disciplines by excluding “any terms, limitations, conditions, or qualifications set out in a Member’s Schedule pursuant to Articles XVI or XVII of

¹³⁵ Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* [hereinafter *US – Gambling*], ¶¶ 430–431, WTO Doc. WT/DS285/R (adopted Apr. 20, 2005) (“This jurisprudence is relevant, mutatis mutandis, in respect of the GATS Schedules.”), citing Appellate Body Report, *European Communities — Customs Classification of Certain Computer Equipment*, ¶ 84, WTO Doc. WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (adopted June 22, 1998).

¹³⁶ Mitsuo Matsushita, et al., *The World Trade Organization: Law, Practice, and Policy* 592 (2017).

¹³⁷ Panel Report, *US — Gambling*, *supra* note 135, at ¶ 431; See also Delimatsis, *supra* note 125, at 428.

¹³⁸ Council for Trade in Services, *Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS)*, WTO Doc. S/L/92, ¶ 3 (Mar. 28, 2001).

¹³⁹ See Eric Leroux, *Eleven Years of GATS Case Law: What Have We Learned?*, 10 J. INT’L ECON. L. 749, 760, 765 (n.69) (2007) (“It is also a reminder that caution and precision must be used in the preparation of scheduling guidelines for any particular round of negotiations. While such guidelines are not binding, they will remain important tools for WTO adjudicatory bodies when trying to ascertain the correct meaning of specific commitments[.]”).

the [GATS]" from the applicability of the Reference Paper commitments. Unlike in the market access provisions of the GATS, where every WTO member has to communicate *erga omnes partes contractantes* in its schedule both the sectors for which it grants market access and the "terms, limitations[,] and conditions" that may modify or "custom-tailor" the "standard package" of market access,¹⁴⁰ the terms, limitations, conditions, or qualifications on market access that a WTO Member specifies in its schedule of specific commitments will not apply to its additional commitments under the Reference Paper. This is also consistent with the interpretation of specific commitments under the 1993 and 2001 Scheduling Guidelines, which differentiate additional commitments as "undertakings" compared to the market access and national treatment commitments, which refer to "limitations."¹⁴¹

The inscription of the Reference Paper as part of a Member's specific schedule of commitments would necessarily require the modification of the Member's schedule. The revised GATS Schedules, which would include the Reference Paper domestic regulation disciplines as additional commitments, will only be given full legal effect after the certification process is completed—a necessary step in the revision process. In April 2000, the Council for Trade in Services adopted the Procedures for the Certification of Rectifications or Improvements to Schedules of Specific Commitments (S/L/84), a set of detailed and more streamlined procedures for the inscription of new sectors or removal of existing limitations.¹⁴² Paragraph 1 thereof states that

Modifications in the authentic texts of Schedules annexed to the GATS not resulting from action under the procedures for the implementation of Article XXI of the GATS (modification of schedules) adopted by the Council for Trade in Services on 19 July 1999, which consist of new commitments, improvements to existing ones, or rectifications or changes of a purely technical character that do not alter the scope or the substance of the

¹⁴⁰ Mitsuo et al., *supra* note 136, at 586.

¹⁴¹ See Council for Trade in Services, *supra* note 138.

¹⁴² GATS HANDBOOK, *supra* note 9, at 18.

existing commitments, shall take effect by means of certification.¹⁴³

In the WTO's dedicated webpage on Services Domestic Regulation, the next steps for the JSI-SDR participants would be to submit their draft schedules incorporating the disciplines for certification (S/L/84) by the end of 2022, subject to the completion of any required domestic procedures.¹⁴⁴

Once a Member's revised GATS schedules are finalized, certified in accordance with the procedures, and have entered into force, they become binding for that Member.¹⁴⁵ Any further modifications to the schedule—including the withdrawal of any commitment—can only be done after three years have elapsed from the date on which that commitment entered into force.¹⁴⁶ When a Member notifies its intent to withdraw its commitment, any other Member whose benefits under the GATS are affected by such withdrawal can request negotiations on “compensatory adjustments,” which shall also be extended on a “Most-Favored Nation” (MFN) basis.¹⁴⁷ What this means is simply that commitments undertaken in a GATS schedule, including additional commitments made, shall be “locked in.” WTO Members that renege or backslide on any specific or additional commitments made and initiate the modification procedures under GATS Article XXI(1)(a) would have to enter into negotiations on compensation upon the request of any Member whose interests are affected by the backsliding.¹⁴⁸

3. Extension of MFN to JSI and Non-JSI Members

The other important legal consequence of the Reference Paper is that while the obligations under the domestic regulation disciplines will become

¹⁴³ Council for Trade in Services, *Procedures for the Certification of Rectifications or Improvements to Schedules of Specific Commitments*, WTO Doc. S/L/84, ¶ 1 (Apr. 18, 2000).

¹⁴⁴ Informal Discussions: Services Domestic Regulation, *supra* note 95.

¹⁴⁵ Delimatsis, *supra* note 125, at 428.

¹⁴⁶ GATS art. XXI(1)(a).

¹⁴⁷ GATS art. XXI(2)(a) & (b). The withdrawing Member would also have to comply with the Procedures for the Implementation of Article XXI adopted by the Council for Trade in Services on July 19, 1999. See Council for Trade in Services, *Procedures for the Implementation of Article XXI of The General Agreement on Trade in Services (GATS)*, WTO Doc. S/L/80, ¶ 1 (Oct. 29, 1999).

¹⁴⁸ It is not clear, however, how the negotiations for compensation would proceed if additional commitments were withdrawn.

binding only on those WTO Members who inscribe them into their GATS schedules, such additional commitments will be applied to the rest of the WTO Membership on a “Most-Favored Nation” (MFN) basis, i.e., that services suppliers from all WTO members—even those who did not incorporate the disciplines as additional commitments—will be able to equally benefit from them.¹⁴⁹ The MFN obligation under the GATS is contained in Article II, in which WTO members are obligated to accord unconditionally and automatically to any other WTO member treatment no less favorable than the treatment they accord to like services and like service suppliers from any other country. The MFN obligation is a general obligation which is, in principle, applicable across the board by all Members to all service sectors, including in sectors or sub-sectors where specific commitments have been undertaken.¹⁵⁰ In other words, additional commitments, which are made in a Member’s schedule of *specific commitments*, must also be provided on a non-discriminatory basis, to the extent that no specific MFN exemptions have been taken.¹⁵¹ As a Member’s Schedule of Specific Commitments are an integral part of the GATS pursuant to Article XX(3) that reflects not only that Member’s specific commitments, but collectively represent a common agreement among all WTO Members,¹⁵² it should follow, going by the position of JSI-SDR participants, that any additional commitments introduced, such as the Reference Paper disciplines on domestic regulation, would have the same MFN status.

The implications of requiring MFN treatment in giving effect to the Reference Paper disciplines can be viewed in one of two ways. The JSI-SDR group that negotiated the Reference Paper disciplines on domestic regulation can be described as an “*MFN club*” arrangement—a group of countries that agree to take on additional commitments that go beyond existing WTO rules (WTO+) that bind only those that sign on to implementing them, while the benefits of which extend

¹⁴⁹ World Trade Organization, *Services Domestic Regulation: Rationale and Content, Potential Economic Benefits, and Increasing Prevalence in Trade Agreements*, WORLD TRADE ORGANIZATION WEBSITE (July 2022), https://www.wto.org/english/tratop_e/serv_e/sdr_factsheet_e_oct21.pdf.

¹⁵⁰ Matsushita et al., *supra* note 136, at 567, quoting Panel Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, ¶ 7.298, WTO Doc. WT/DS27/R/ECU (adopted on Sept. 25, 1997).

¹⁵¹ Matsushita et al., *supra* note 136, at 613.

¹⁵² Appellate Body Report, *US – Gambling*, ¶ 159, WTO Doc. WT/DS285/AB/R (adopted Apr. 20, 2005).

on a non-discriminatory basis to all WTO members.¹⁵³ The MFN principle is a binding constraint on the ability of a group of WTO Members to negotiate new rules so that the results of such negotiations that are scheduled cannot be applied in a discriminatory manner.¹⁵⁴ As mentioned in Part I.E.1, because the Reference Paper disciplines were the product of a deviation of a group of WTO Members from the fundamental consensus rule in multilateral trade negotiations,¹⁵⁵ the outcome cannot benefit only the Members of that group. If such an outcome would involve trade in goods under the GATT, the parties thereto must either pursue an Annex 4 plurilateral agreement or conclude preferential trade agreements (PTAs) with each other.¹⁵⁶ Unlike the GATT, however, the "flexibility" for "MFN clubs" is unique to trade in services under the GATS, as WTO Members are permitted under GATS Article XVIII to make additional commitments that complement the specific commitments on national treatment and market access, such as outcomes of negotiations among a subset of WTO Members.¹⁵⁷ At the same time, the non-reciprocal character of such an arrangement means that by signing on to the JSI-SDR Reference Paper, such a WTO Member agreed to undertake the obligations thereunder as additional commitments in its GATS Schedule, knowing fully well that the benefits from those commitments will be extended to non-JSI Members without extracting any reciprocal commitments from them.

Second is the issue of "*free riding*." A situation of "free riding" arises when, by virtue of the MFN treatment obligation, a country gets the benefits of the opening of other countries' markets without having itself opened its own market or made any concessions.¹⁵⁸ As applied to the Reference Paper disciplines on domestic regulation, "free riding" non-JSI members that did not sign on to the disciplines are spared the burden of ensuring compliance with the mandatory obligations and other bindings that result from its inscription into the JSI Members' GATS Schedule, but are assured that the disciplines would be applied to

¹⁵³ Bernard Hoekman & Petros Mavroidis, *MFN Clubs and Scheduling Additional Commitments in the GATT: Learning from the GATS*, 28 EUR. J. INT'L L. 387, 389 (2017).

¹⁵⁴ See *id.* at 403.

¹⁵⁵ See *supra*, at Part I.E.1.

¹⁵⁶ General Agreement on Tariffs and Trade [hereinafter GATT] art. XXIV, October 30, 1947, Marrakesh Agreement Establishing the World Trade Organization, annex 4, 1869 U.N.T.S. 183; Hoekman, *supra* note 154, at 403.

¹⁵⁷ *Id.* at 398.

¹⁵⁸ Leroux, *supra* note 139, at 768.

all WTO Members so as not to discriminate against them. Non-signatories would therefore not be obliged to undertake the necessary regulatory adjustments arising out of the observance of the Reference Paper disciplines, but would have the same trade benefits accorded to the original signatories.¹⁵⁹

In the GATT, the “free riding” problem was addressed by Article II:3 of the Marrakesh Agreement,¹⁶⁰ which recognizes the so-called Annex 4 Plurilateral Trade Agreements that are binding on WTO Members that have accepted them, but do not create rights or obligations for Members that have not, allowing signatories to discriminate against non-parties. Although there are only two out of four such Annex 4 Plurilateral Trade Agreements in force,¹⁶¹ Article X:9 of the Marrakesh Agreement authorizes the WTO Membership, acting through the Ministerial Conference, to decide “exclusively by consensus” to add a “trade agreement” to the Annex 4 list, upon the request of the parties to that “trade agreement”. It has been argued, however, that particular trade issues where negotiated policies or rules would be in the self-interest of WTO Members, independent of whether other Members do so, can be applied on an unconditional MFN basis, as these may be impervious to “free riding” concerns.¹⁶² Thus, plurilateral agreements embodying forms of cooperation that are domain-specific, such as services domestic regulation, where the primary focus is not on liberalization or on constraining the use of discriminatory policies but in areas such as harmonization, good regulatory practices, and mutual recognition, would fall under this rubric.¹⁶³

4. *Mandatory Obligations—implications for the Philippines*

¹⁵⁹ Charles F. Sabel & Bernard Hoekman, *Open Plurilateral Agreements, International Regulatory Cooperation and the WTO*, Robert Schuman Centre for Advanced Studies, Global Governance Programme EUI Working Paper No. RSCAS 2019/10 (2019), https://scholarship.law.columbia.edu/faculty_scholarship/2304

¹⁶⁰ Marrakesh Agreement Establishing the World Trade Organization, Article II(3), 1869 U.N.T.S. 183.

¹⁶¹ The Agreement on Trade in Civil Aircraft and the Agreement on Government Procurement. The other two Annex 4 Plurilateral Trade Agreements, the International Dairy Agreement and the International Bovine Meat Agreement, were terminated on 10 December 1997.

¹⁶² Bernard Hoekman and Charles Sabel, *Plurilateral Cooperation as an Alternative to Trade Agreements: Innovating One Domain at a Time*, Global Policy, Volume 12, Issue S3, (2021), at 51, https://scholarship.law.columbia.edu/faculty_scholarship/2746

¹⁶³ *Id.*

The Philippines' decision to join the JSI-SDR and sign on to the Reference Paper triggers a series of obligations that it is bound to comply with as a condition of its membership. First, it is duty-bound to inscribe the Reference Paper as additional commitments in its GATS schedule. The Reference Paper must be inscribed in full, except for either the Alternative Disciplines on Financial Services under Section III or the non-discrimination between men and women (or both). After the formalities of certification of the revised schedule (and presumably the Philippines' domestic requirements for entry-into-force) are completed, the disciplines on domestic regulation set forth in the Reference Paper would become Philippine services commitments under the GATS. The MFN obligation made sure that whatever the Philippines inscribes as additional commitments, including the Reference Paper disciplines, would be extended not only to other JSI-SDR participants, but also to the rest of the WTO membership on an MFN basis, significantly expanding the universe of beneficiaries of domestic regulatory reforms in services.

Nothing in the Reference Paper, however, requires that it shall be inscribed in all the services sectors already committed in the GATS schedule; this view is supported by the fact that the Reference Paper itself allows for an exception for financial services.¹⁶⁴ The Philippines has undertaken GATS commitments in 4 of the 12 sectors listed in the Services Sectoral Classification List, namely communications services, financial services, tourism and travel-related services, and transport services.¹⁶⁵ If the Philippines decides not to inscribe the Alternative Disciplines on Financial Services under Section III of the Reference Paper as it pertains to financial services, then a maximum of three out of four service sectors committed may be inscribed. It would be incumbent upon the Philippines to be judicious about the services sectors it decides to be subject to the additional commitments under the Reference Paper.

The extension of MFN treatment may also be viewed in relation to services, domestic regulation chapters, or provisions in free trade agreements (FTAs) of which the Philippines is a party. Preferential services trade between and among parties to FTAs or regional trading arrangements would be permitted as an exception to the GATS general MFN obligation if it conforms to the requirements

¹⁶⁴ World Trade Organization, *supra* note 95, at 4 (sec. 1, ¶ 9).

¹⁶⁵ See GATS, *Philippines Schedule of Specific Commitments*, GATS/SC/70, 15 April 1994

under GATS Article V on “Economic Integration,”¹⁶⁶ which are modelled on GATT Article XXIV. Unless the services chapters of the Philippines’ FTAs contain an “automatic MFN” clause, which extends services commitments made in other FTAs to the Philippines’ FTA partners that benefit from such a clause, any FTA disciplines on services domestic regulation would not be applicable to non-parties on an MFN basis.

Another important difference is that the Philippines’ FTA commitments on services domestic regulation do not follow the Reference Paper approach of inscribing the disciplines as additional commitments.¹⁶⁷ The relevant chapters of the Philippines’ bilateral and regional FTAs on domestic regulation largely hew to general GATS language.¹⁶⁸ Some of its FTAs contain clauses that simply refer to the completion of GATS VI:4 negotiations in lieu of a full set of rules on services domestic regulation. The Regional Comprehensive Economic Partnership Agreement (RCEP), the ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA), the ASEAN Trade in Services Agreement (ATISA), and the Philippines-European Free Trade Association (EFTA) Free Trade Agreement include the Parties’ commitment to review the results of the GATS Article VI:4 negotiations and, after inter-Party consultation, to bring the outcomes into effect by amending their domestic regulation provisions as appropriate.¹⁶⁹ It remains to be seen, however, whether the Reference Paper, which was negotiated and adopted outside the GATS Article VI:4 mandate,¹⁷⁰ would be covered by the review provisions.

B. Applicability of the WTO Dispute Settlement Mechanism

¹⁶⁶ The agreement should have “substantial sectoral coverage”, eliminates measures that discriminate against service suppliers of other countries in the group, and prohibits new or more discriminatory measures.

¹⁶⁷ See *infra* note 327.

¹⁶⁸ But the Philippines’ FTA positions on administrative rulemaking as it relates to services domestic regulation has been evolving. See *infra* note 195.

¹⁶⁹ Regional Comprehensive Economic Partnership Agreement (RCEP), Article 8.15(4): Domestic Regulation, (2022); ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA), Article 10(2): Domestic Regulation (2016); Philippines-European Free Trade Association (EFTA) Free Trade Agreement, Article 6.7(5): Domestic Regulation; Contra GATS Article VI(5); See *infra* note 327.

¹⁷⁰ See *supra* note 164.

One important legal implication of the disciplines on domestic regulation, as adopted under the Reference Paper, is the applicability of the WTO dispute settlement system. Embedding JSI outcomes into national schedules makes the provisions enforceable through the DSU. Although the GATS provides fertile ground for difficult and often sensitive interpretive issues to arise, Members have thus far not made extensive use of dispute settlement procedures to resolve services disputes.¹⁷¹ Panels and the Appellate Body have nonetheless been increasingly sensitive to the right of Members to set and implement legitimate public policy objectives, as long as this is done within the parameters of non-discrimination and using those measures that are least damaging to the trade interests of other Members freely negotiated and agreed upon under the WTO Agreement.¹⁷²

In the general dispute settlement provisions of GATS under Article XXIII, Paragraph 1 authorizes a Member to have recourse to the WTO Dispute Settlement Understanding (DSU) if another Member is failing to carry out its obligations or specific commitments.¹⁷³ DSU Article 1.1 further provides that the rules and procedures of the DSU shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 thereof—referred to as the “covered agreements”—which include the GATS. Thus, in accordance with GATS Article XXIII in relation to DSU Article 1.1, disputes relating to the interpretation of the GATS or the scope of the Schedule of Commitments of a WTO Member can be resolved exclusively through recourse to the DSU.¹⁷⁴

1. Mexico – Telecoms

¹⁷¹ Eric H. Leroux, *From Periodicals to Gambling: A review of systemic issues addressed by WTO adjudicatory bodies under the GATS*, in *GATS and the Regulation of International Trade in Services*, Marion Panizzon, Nicole Pohl And Pierre Sauvé (eds.), Cambridge University Press (2008), at 237.

¹⁷² Eric H. Leroux, *Twenty years of GATS case law: Does it taste like a good wine?*, in *Research Handbook on Trade in Services*, Pierre Sauvé and Martin Roy (eds.), (2016) at 201.

¹⁷³ William J. Davey, *Specificities of WTO dispute settlement in services cases*, *GATS and the Regulation of International Trade in Services*, Marion Panizzon, Nicole Pohl And Pierre Sauvé (eds.), Cambridge University Press (2008), at 277.

¹⁷⁴ Delimatsis, *supra* note 125, at 423.

This was affirmed by the panel in the *Mexico – Telecoms* dispute—the first panel proceeding in the WTO to deal solely with trade in services under the GATS.¹⁷⁵

The GATS constitutes an integral part of the WTO Agreement. As such, the GATS (including its annexes and schedules of specific commitments that are made an integral part of it under GATS Article XX:3) is one of the ‘covered agreements’ and is therefore subject to the Dispute Settlement Understanding (the “DSU”).¹⁷⁶

Mexico – Telecoms is pertinent to the JSI-SDR as it was the first dispute to consider the legal obligations of a “Reference Paper.” As explained in Part I.B.1,¹⁷⁷ the Telecoms Reference Paper sets out common regulatory guidelines that Members should follow to support the transition of the telecommunications sector to a competitive marketplace and to guarantee effective market access and foreign investment commitments.¹⁷⁸ The U.S. had argued that by reason of Mexico’s inscription of the entire text of the Telecoms Reference Paper into its GATS Schedule as an additional commitment, Mexico not only undertook the interconnection obligations of Section 2 of the Telecoms Reference Paper, but it also committed to the U.S. and all other WTO Members that it would abide by the strict terms and conditions contained in Section 2 thereof, pursuant to GATS Article XVIII.¹⁷⁹ Mexico did not specifically contest this point, essentially acknowledging that the Telecoms Reference Paper, which was embodied as Mexico’s own version of the Reference Paper, is binding and justiciable under the DSU. The rulings as captured in the panel report demonstrates the power and broad scope of WTO disciplines on the regulation of trade in services¹⁸⁰ and shows

¹⁷⁵ Panel Report, *Mexico – Measures Affecting Telecommunications Services* [hereinafter *Mexico – Telecoms*], ¶¶ 7.2, WTO Doc. WT/DS204/R (adopted Jun. 1, 2004).

¹⁷⁶ *Id.* at ¶¶ 7.14.

¹⁷⁷ *See supra*, at Part I.B.1.

¹⁷⁸ Boutheina Guermazi, *Exploring the reference paper on regulatory principles*, South Centre, Geneva, (2005), https://www.wto.org/english/tratop_e/serv_e/telecom_e/workshop_deco4_e/guermazi_refere_ncepaper.doc

¹⁷⁹ *See supra* note 175, at ¶¶ 4.3.

¹⁸⁰ Andrew W. Shoyer, *Lessons learned from litigating GATS disputes: Mexico – Telecoms*, in *GATS and the Regulation of International Trade in Services*, Marion Panizzon, Nicole Pohl And Pierre Sauvé (eds.), Cambridge University Press (2008), at 234

the reach of GATS disciplines and their potential impact on Members' policies and regulations.¹⁸¹

2. *U.S. – Gambling*

The dispute *U.S. – Gambling*¹⁸² is also significant in considering dispute settlement vis-à-vis the legal commitments under the Reference Paper disciplines, as it had sparked a debate as to what should be the right balance between trade constraints, on one hand, and the autonomy of Members' service regulators, on the other.¹⁸³ In that dispute, the AB clarified the rationale behind the rule in the interpretation of a specific commitment in a GATS Schedule, comparing it with tariff commitments in the GATT:¹⁸⁴

In the context of the GATT 1994, the Appellate Body has observed that, although each Member's Schedule represents the tariff commitments that bind one Member, Schedules also represent a common agreement among all Members. Accordingly, the task of ascertaining the meaning of a concession in a Schedule, like the task of interpreting any other treaty text, involves identifying the common intention of Members, and is to be achieved by following the customary rules of interpretation of public international law, codified in Articles 31 and 32 of the Vienna Convention.¹⁸⁵
(footnotes omitted)

3. *Non-violation and Situation Complaints*

A question arises as to the applicability of the Reference Paper domestic regulation disciplines of the so-called “non-violation” and “situation” complaints. Following GATT practice, the DSU allows a remedy for complaints concerning a nullification or impairment of benefits without an infringement of a WTO

¹⁸¹ Leroux, *supra* note 139, at 750.

¹⁸² Appellate Body Report, *US – Gambling*, WTO Doc. WT/DS285/AB/R (adopted Apr. 20, 2005).

¹⁸³ Leroux, *supra* note 139, at 751.

¹⁸⁴ See *supra* note 182, at ¶¶ 159.

¹⁸⁵ *Id.*

obligation.¹⁸⁶ A non-violation dispute is described as it is coined—a dispute arises not out of a violation of the exact words of the agreement, but from a claim that the benefits of a WTO Member from the WTO agreements are being impaired or nullified. In accordance with GATT Article XXIII:1(b), DSU Article 26.1 authorizes a complaint against ‘a measure’ by a member even if such a measure does not conflict with any WTO agreement, if the complaining member considers that any benefit under a covered agreement is being nullified or impaired or the attainment of any objective of a covered agreement is being impeded as a result of the application of the measure.¹⁸⁷

GATS Article XXIII:3 allows a non-violation complaint if a member considers that any benefit it could reasonably have expected to accrue to it under a specific commitment of another Member under the GATS is being nullified or impaired as a result of the application of any measure that does not conflict with the provisions of GATS. If the DSB finds a measure to have nullified or impaired a benefit accruing because of a specific commitment under GATS, the affected member shall be entitled to a mutually satisfactory adjustment, which may include modification or withdrawal of the measure. It should be stressed that, unlike GATT Article XXIII:1(b), GATS Article XXIII:3 authorizes recourse to a non-violation complaint only as regards the specific commitments of a Member made pursuant to Part III of the GATS, and not to the general obligations. As the specific commitments in a Member’s GATS Schedule would include additional commitments made in accordance with GATS Article XVIII, it can be argued that the incorporated Reference Paper disciplines on services domestic regulation can be the subject of a non-violation complaint. Thus, even if a particular regulatory measure does not involve a textual breach of the mandatory provisions of the Reference Paper, if a WTO Member considers that the benefits from the Reference Paper are being nullified or impaired due to that regulatory measure, there would be recourse to a non-violation complaint.¹⁸⁸

¹⁸⁶ Matsushita, Mitsuo, Schoenbaum, Thomas J., Mavroidis, Petros C., Hahn, Michael, *The World Trade Organization: Law, Practice, and Policy*, Oxford International Law Library, 97, Oxford University Press.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* (As for the so-called ‘situation’ complaints, unlike GATT Article XXIII:1(c) which permits cases to be brought in the event of a nullification or impairment of the benefits from a covered agreement or any impediment of its objectives by “the existence of any other situation,” i.e., besides a violation or non-violation situation, the GATS does not make any provision for such

4. Recourse of non-JSI-SDR Member

Can a WTO Member that did not inscribe the Reference Paper in its GATS schedule have recourse to WTO dispute settlement on the grounds that, in its view, its rights under the WTO agreements are impaired because it is precluded from enjoying the benefits of the Reference Paper (by reason of the extension of MFN)? It has been opined that insofar as a non-participating WTO member perceives a plurilateral agreement (loosely defined to include JSIs and the Reference Paper) to undercut its rights or negotiated concessions, such Member can invoke the DSU, leaving it to panels and the Appellate Body to make a determination whether such nullification has occurred.¹⁸⁹ Indeed, as to the alleged nullification or impairment of a benefit that a non-participating WTO Member could reasonably expect to accrue to it under a specific commitment made by another WTO Member participating in the JSI-SDR Reference Paper, this view is supported under GATS Article XXIII:3 as a legal consequence of the extension of MFN treatment.¹⁹⁰

The applicability of non-violation disputes to the Reference Paper should be read with the standstill obligation in GATS Article VI:5(a), which prohibits Members from applying licensing and qualification requirements and technical standards that “nullify or impair such specific commitments,” in a manner which: (1) does not comply with the criteria in Article VI:4, and (2) “could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made.”¹⁹¹ Note that GATS Article VI:5 imposes a resolatory conditional obligation “pending the entry into force of disciplines developed in these sectors pursuant to paragraph 4,” *i.e.*, Article VI:4 disciplines on domestic regulation, which shall be developed by the Council for Trade in Services through appropriate bodies it may establish. Strictly speaking, the Reference Paper disciplines on

complaints. No Panels, however, have been called on to address ‘situations’ in the sixty-year history of the GATT/WTO.)

¹⁸⁹ Hoekman, *supra* note 154, at 403.

¹⁹⁰ See *supra* note 164.

¹⁹¹ See Graham Cook, *The legalization of the non-violation concept in the GATT/WTO system*, WTO System, (Oct. 24, 2018). (GATS Article VI:5(a) blurs the conceptual distinction between violation and non-violation complaints in the context of licensing and qualification requirements and technical standards for service suppliers, as it transforms the traditional legal standard developed in the context of GATT non-violation complaints into a legal obligation that could give rise to a violation complaint no different from any other WTO obligation.)

domestic regulation, which were developed through the JSI-SDR and not through the GATS-mandated bodies, do not conform to this requirement. This would mean that the resolutive condition has not been fulfilled, which leads to the conclusion that GATS Article VI:5(a) is still in full force and effect, even if the relevant Reference Paper provisions would also enter into force after the certification process for the revised GATS Schedules is completed.

The Reference Paper itself does not have built-in provisions on dispute settlement. Thus, if another JSI participant is unable to comply with the binding obligation to inscribe the Reference Paper in a Member's specific schedules of commitments in order to give effect to the disciplines,¹⁹² it would be unclear what will be the remedies available to other JSI-SDR participants. The Reference Paper, standing alone and uninscribed in a GATS Schedule, would not be considered among the WTO "covered agreements"¹⁹³ in which any dispute would be subject to the procedures under the WTO Dispute Settlement Mechanism. It is only when the Reference Paper disciplines are inscribed as additional commitments and the new Schedules of Specific Commitments are finalized through the certification process that these become an "integral part" of the GATS, which would make it justiciable under the WTO DSM. This point may still be tested, as new entrants Georgia, the United Arab Emirates, and Timor-Leste have recently announced their decision to join the JSI-SDR.¹⁹⁴

¹⁹² See *supra* note 164.

¹⁹³ Dispute Settlement Understanding, Article 1, World Trade Organization, ("The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the "covered agreements"). The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (referred to in this Understanding as the "WTO Agreement") and of this Understanding taken in isolation or in combination with any other covered agreement.")

¹⁹⁴ World Trade Organization, *Georgia, Timor-Leste and United Arab Emirates join initiative on services domestic regulation*, (Jun. 13, 2022), https://www.wto.org/english/news_e/news22_e/serv_13jun22_e.html. (It should be noted that Timor-Leste—the first least-developed country to join the JSI-SDR—made the announcement even if it has yet to complete its formal accession into the WTO.)

C. GATS+ Transparency Requirements: Multilateralizing Notice-and-Comment

The Reference Paper disciplines on domestic regulation contain new transparency requirements that build on the GATS Article III by enhancing transparency in measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards affecting trade in services.¹⁹⁵ While GATS Article III addresses transparency at a multilateral and intergovernmental level, the transparency disciplines of the Reference Paper follow GATS Article VI, focusing on transparency in the “vertical relationship between the domestic regulatory authority and a private person, *i.e.*, the affected service supplier, in order to ensure effective market access by service suppliers.”¹⁹⁶ The applicability of the GATS transparency obligations under Article III, which had only applied to “relevant measures of general application,” is further extended to the authorization process by Section II, Paragraph 13 of the Reference Paper, and will be taken up in Part III.C.1.¹⁹⁷

Covering six full paragraphs under the heading “*Opportunity to Comment and Information before Entry Into Force*”—making it the longest sub-section of the Reference Paper—transparency disciplines go beyond GATS Article III rules on transparency by setting multilateral disciplines on administrative due process in the domestic regulation of services. More importantly, it multilateralizes, for the first time, notice-and-comment requirements for laws and regulations that impact trade in services. The new notice-and-comment disciplines are contained in Paragraphs 14-17 of the Reference Paper:

¹⁹⁵ Apart from the three paragraphs with mandatory provisions, three other paragraphs also contain transparency disciplines not found in the GATS, but are more permissive in their obligatory character and are couched in best endeavor language, namely: encouraging Members to provide advance publication of administrative rulings (Para. 15); explanation of purpose and rationale of proposed regulation (Para. 18); and reasonable time from publication to effectivity of regulation (Para. 19). All six paragraphs under the subsection, *Opportunity to Comment and Information before Entry Into Force* include a “best endeavor” qualifier, “to the extent practicable,” which seeks to provide a certain level of flexibility in implementation. The provisions also takes into account the diversity of specific country approaches with the inclusion of the clause, “in a manner consistent with [the JSI-SDR Member’s] legal system,” which was further elaborated in footnote 13 of the Reference Paper.

¹⁹⁶ Panagiotis Delimatsis, *International Trade in Services and Domestic Regulations: Necessity, Transparency, and Regulatory Diversity*, Oxford University Press (2007), 269.

¹⁹⁷ See *infra*, at Part III.C.1.

Opportunity to Comment and Information before Entry into Force

To the extent practicable and in a manner consistent with its legal system for adopting measures, each Member shall publish in advance:

(a) its laws and regulations of general application it proposes to adopt in relation to matters falling within the scope of paragraph 1 of this Section; or

(b) documents that provide sufficient details about such a possible new law or regulation to allow interested persons and other Members to assess whether and how their interests might be significantly affected.

To the extent practicable and in a manner consistent with its legal system for adopting measures, each Member is encouraged to apply paragraph 14 of this Section to procedures and administrative rulings of general application it proposes to adopt in relation to matters falling within the scope of paragraph 1 of this Section.

To the extent practicable and in a manner consistent with its legal system for adopting measures, each Member shall provide interested persons and other Members a reasonable opportunity to comment on such proposed measures or documents published under paragraphs 14 or 15 of this Section.

To the extent practicable and in a manner consistent with its legal system for adopting measures, each Member shall consider comments received under paragraph 16 of this Section.¹⁹⁸

Paragraphs 14 to 17 can be distilled to two basic components. The “notice” component would refer to the *advance publication* requirement on laws and regulations proposed to be adopted in Paragraph 14, while the “comment” component in Paragraphs 16-17 would require Members to provide “interested persons” a reasonable *opportunity to comment* on proposed laws and regulations,

¹⁹⁸ *Joint Initiative on Services Domestic Regulation: Reference Paper on Services Domestic Regulation*, WTO Doc. INF/SDR/2 (Nov. 26, 2021), available at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q%3A%2FINF%2FSDR%2F2.pdf>.

and obliges Members to consider such comments. The obligations in Paragraphs 14-17 of the Reference Paper are subject to the flexibility clause, “[t]o the extent practicable and in a manner consistent with its legal system for adopting measures.”

As the notice-and-comment disciplines in the Reference Paper become additional commitments in the GATS schedule of the Philippines, they must also be read together with the provisions of the GATS.¹⁹⁹ Both the advance publication and opportunity to comment requirement under Paragraphs 14-17 of the Reference Paper pertain to “*laws and regulations* of general application it proposes to adopt.” “*Laws and regulations*” are considered “measures” under the GATS, which is defined for GATS Article III purposes as “any measure by a Member, whether in the form of a *law, regulation, rule, procedure, decision, administrative action* or any other form,”²⁰⁰ and covers not just substantive law but also administrative issuances and rules.²⁰¹ Under this definition, “measures” in the form of “laws and regulations” would be subject to prior notice-and-comment requirements under the Reference Paper, but not a “*rule, procedure, decision, administrative action, or any other form*” under the rule of statutory construction *expressio unius est exclusio alterius*. At the same time, a GATS measure would also include measures taken by regional or local governments and authorities, as well as non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities.²⁰² Following this logic, it would seem that the Reference Paper’s prior notice-and-comment requirements would apply to measures of local governments that are in the form of “laws and regulations.”²⁰³

Meanwhile, the use of the term “*of general application*” is said to be modelled on the publication requirements of Articles X:1 and X:2 of GATT 1994, in reference to the obligation to publish laws, regulations, judicial decisions, and

¹⁹⁹ See Kinda Mohamadieh, *Reference Paper on Services Domestic Regulations: Overview of main content and regulatory implications*, Third World Network, (Nov. 2021), 10, https://www.twn.my/title2/briefing_papers/MC12/briefings/Reference%20paper%20on%20SDR%20TWNMC12BP%20Nov%202021%20Mohamadieh.pdf

²⁰⁰ GATS Article XXVII(a)

²⁰¹ Nellie Munin, *Legal Guide to GATS*, Global Trade Law Series 31, Kluwer Law International, (2010), 61.

²⁰² GATS, Article I(3)(a). (The application of the GATS definition of “measures” including those taken by central, regional or local governments and authorities is also relevant in the context of the new notice-and-comment requirements.) See *infra* note 268.

²⁰³ See *supra* note 133.

administrative requirements in the GATT.²⁰⁴ While WTO Panels and the Appellate Body have understood the concept “of general application” as being not limited in application to a specific individual case or economic operator, and could apply to a range of situations rather than being limited in their scope of application,²⁰⁵ the language of Paragraphs 14-17 limits the concept to matters covered under Paragraph 1 of Section II, which is essentially the scope of the GATS Article VI:4 mandate.

1. *Advance Publication*

Paragraph 14 requires JSI-SDR Members to ensure advance publication of: (a) proposed laws and regulations of general application to be adopted on licensing requirements and procedures, qualification requirements and procedures, and technical standards, or (b) documents that provide sufficient details about the possible new law or regulation. The scope of Paragraph 14 is limited to sectors where specific commitments are made. Thus, to fall under the advance publication requirement: (1) it must be a law or regulation *proposed to be adopted*; (2) proposed law or regulation must be *of general application*; (3) the measures must be “relating to *licensing requirements and procedures, qualification requirements and procedures, and technical standards affecting trade in services*,” (4) must be in the Member’s *schedule of specific commitments*. The documents to be published in advance in (b), on the other hand, should be of such detail that it would “allow interested persons and other Members to assess whether and how their interests might be significantly affected.”

The advance publication of proposed laws and regulations is a departure from the transparency requirements in the GATS. Under the GATS general transparency rule in Article III:1, which was by and large patterned after the GATT transparency provisions in Article X,²⁰⁶ Members are required to promptly publish all measures of general application affecting trade in services, at the latest *by entry into force*.²⁰⁷ In the Reference Paper, however, the status of the law or regulation is that it is “proposed to be adopted,” which means that even if the law or regulation

²⁰⁴ Working Party on Domestic Regulation, “Measures of General Application,” S/WPDR/W/47, (Feb. 9 2012), 2, 7.

²⁰⁵ *Id.* at 7.

²⁰⁶ Ala’i, *infra* note 291, at 2.

²⁰⁷ Article III(1) second sentence would include international agreements that pertain to and affect trade in services.

has yet to enter into force, it should be published in advance to give a reasonable time for interested parties to comment. Once the law or regulation enters into force, the GATS transparency requirement in Article III:1 would be applicable, covering all measures affecting trade in services (including international agreements) regardless of whether specific commitments have been made or not.

2. Reasonable Opportunity to Comment and Consider such Comments

The second element of the notice-and-comment disciplines in the Reference Paper can be seen as a two-pronged obligation. First, Paragraph 16 obliges Members to provide “interested persons” a reasonable opportunity to comment on the proposed laws and regulations published in advance, as referred to in Paragraphs. 14 or 15, and second, Paragraph 17 requires Members to consider comments on the proposed laws or regulations. Although the obligations under both Paragraphs are mandatory, Members have the flexibility to implement the same “[t]o the extent practicable and in a manner consistent with its legal system for adopting measures.”

As a binding transparency norm in the regulation of trade in services, prior notice-and-comment disciplines in the Reference Paper are new to the GATS. WTO Members were required under the GATS to respond promptly to requests by other Members for specific information on any of its measures of general application or international agreements affecting trade in services.²⁰⁸ But Members are not under any GATS obligation to give notice of proposed laws and regulations affecting trade in services and receive comments from “interested persons” thereon, let alone to even consider such comments before the proposed measures are adopted. It should be noted, however, that a previous, “softer” version of the notice-and-comment requirement was introduced in the *Disciplines on Domestic Regulation in the Accountancy Sector*,²⁰⁹ specifically Paragraph 6, in which Members, “[w]hen introducing measures which significantly affect trade in accountancy services, ... shall *endeavour* to provide opportunity for comment, and give consideration to such comments, before adoption.”

Notice-and-comment disciplines in other WTO Agreements, particularly those with a substantive focus on behind-the-border regulatory aspects of trade,

²⁰⁸ GATS, Article III(4).

²⁰⁹ See *supra* note 56.

may have informed the development of the notice-and-comment disciplines in the Reference Paper.²¹⁰ Similar provisions can also be found in the Technical Barriers to Trade (TBT) Agreement and the Sanitary and Phytosanitary (SPS) Agreement. When the content of a *proposed* technical regulation is “not in accordance with” or a *proposed* SPS regulation is “not substantially the same as” the content of an international standard,²¹¹ and “may have a significant effect on trade,”²¹² Members are required to allow other Members a “reasonable time” to submit comments on the proposed regulations in writing, discuss the comments “upon request,” and are obligated to take the comments into account.²¹³ More recently, the 2017 Trade Facilitation Agreement contains an obligation to provide “traders and other interested parties” an opportunity to comment within an appropriate time period on the *proposed* introduction or amendment of laws and regulations of general application “related to the movement, release, and clearance of goods, including goods in transit,” albeit subject to the similar implementation flexibilities, *i.e.*, “to the extent practicable and in a manner consistent with its domestic law and legal system.”²¹⁴

3. *Prior Notice-and-Comment Disciplines in Free Trade Agreements*

The Philippines’ adoption of multilateral disciplines on prior notice-and-comment in the Reference Paper is not its first foray into more enhanced public participation rules. The Philippines had also subscribed to prior notice-and-comment disciplines in its bilateral and regional free trade agreements (FTAs). This present inquiry will focus on four Philippine FTAs: the ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA), the ASEAN Trade in Services Agreement (ATISA), the Regional Comprehensive Economic Partnership (RCEP), and the Philippines-Japan Economic Partnership Agreement (PJEPA), which is notable for not only being the Philippines’ first bilateral FTA, but also the first to successfully negotiate preferential public participation rules:²¹⁵

²¹⁰ Delimatsis, *supra* note 196, at 271-272.

²¹¹ Agreement on Technical Barriers to Trade, Article 2.9.4., (1995). Under the TBT Agreement, the international standard must be “relevant.”

²¹² *Id.*

²¹³ *Id.*

²¹⁴ Trade Facilitation Agreement, Section I, Article 2, Paragraph 1.1, World Trade Organization, (2014).

²¹⁵ Philippines-Japan Economic Partnership Agreement (PJEPA), Article 5, (2006).

Article 5
Public Comment Procedures

The Government of each Party shall, in accordance with the laws and regulations of the Party, *endeavor to provide*, except in cases of emergency or of purely minor nature, a *reasonable opportunity for comments* by the public *before the adoption, amendment or repeal* of regulations of general application that affect any matter covered by this Agreement.²¹⁶ (italics supplied)

While the PJEPA “public comment” disciplines applies to any matter covered by the Agreement, including domestic regulation of services, it is the weakest of the four FTAs because of its use of non-binding language (“endeavor to provide”), lack of an express advance publication requirement, adherence to the existing domestic legal framework for public comment, and the type of measures covered (regulations of general application). Years later, this approach would be nearly replicated in the ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA), except that a notice-and-comment regime was tailored specifically for the Trade in Services chapter:²¹⁷

Article 11
Transparency
...
Publication

Each Party shall publish promptly and, except in emergency situations, at the latest by the time of their entry into force:

(a) *all relevant measures of general application affecting trade in services*; and

(b) all international agreements pertaining to, or affecting, trade in services to which a Party is a signatory.

...

To the extent provided for under its domestic legal framework, each Party *shall endeavour* to provide a *reasonable opportunity for*

²¹⁶ *Id.*

²¹⁷ ASEAN-Australia-New Zealand Free Trade Agreement, Article 11.2 and 11.5, (2009).

comments by interested persons of the Parties on measures referred to in Paragraph 2(a) *before adoption*.²¹⁸ (italics supplied)

Three deviations from the Reference Paper are apparent. First, there is no specific advance publication requirement (which is also implied in the PJEPA). Second, the scope covers all relevant measures of general application affecting trade in services, not just the areas covered by the domestic regulation mandate in GATS Article VI:4. Finally, it is couched in best endeavor language. The ASEAN Trade in Services Agreement (ATISA), specifically Section IV, *Regulatory Obligations and Disciplines*, tracks the AANZFTA approach in not including an advance publication requirement and in setting a broad scope not limited to Article VI:4 areas, but takes it a step further by making the obligation mandatory, subject to a flexibility clause nearly identical to the Reference Paper, “[t]o the extent possible and provided for under its domestic legal framework.”²¹⁹

Article 14 Transparency

...

To the extent possible and provided for under its domestic legal framework, each Member State shall provide a *reasonable opportunity for comments* by interested persons of the Member States on any regulation of general application affecting trade in services that it proposes to adopt, amend or repeal, before its adoption and publication.²²⁰ (italics supplied)

Of the three previously reviewed FTAs with prior notice-and-comment disciplines, the Regional Comprehensive Economic Partnership Agreement (RCEP)²²¹ has the version that is substantively closest to the Reference Paper in terms of its application to the areas covered by GATS Article VI:4 and its mandatory character. It is also arguably the most ambitious and high-standard compared to the previously mentioned FTAs. The prior notice-and-comment

²¹⁸ *Id.*

²¹⁹ ASEAN Trade in Services Agreement, Article 14, (2020).

²²⁰ Article 14, ASEAN Trade in Services Agreement, 7 October 2020

²²¹ As to RCEP, as of 20 September 2022 the ratification process has yet to be completed, as the deliberations at the Senate for its concurrence with the ratification are still ongoing. Only the Philippines and Myanmar have yet to complete domestic procedures for entry-into-force.

disciplines in the RCEP are set forth in two Articles: Article 17.3 on Publication and in Article 7 of Annex 8A on Financial Services. Article 17.3 reads:²²²

Article 17.3: Publication

...

To the extent possible and practicable, each Party shall:

(a) *publish in advance* any such laws, regulations, procedures, and administrative rulings of general application with respect to any matter covered by this Agreement that it *proposes to adopt*; and

(b) provide, where appropriate, interested persons and other Parties with a *reasonable opportunity to comment* on any such laws, regulations, procedures, and administrative rulings of general application with respect to any matter covered by this Agreement.

²²³ (italics supplied)

Like the PJEPA, the notice-and-comment disciplines of Article 17.3 are under *General Provisions and Exceptions* (Chapter 17), making its application horizontal in nature and applicable to all RCEP Chapters. Thus, unlike AANZFTA and ATISA, the disciplines would apply to the entire Agreement,²²⁴ including domestic regulation of services, which does not have public participation disciplines that are specific thereto.²²⁵ The scope of the measures is broader than the Reference Paper as it applies to proposed “laws, regulations, procedures, and administrative rulings of general application with respect to any matter” under RCEP. The comment component is also mandatory, but it is subject to flexibilities in implementation, *i.e.*, “[t]o the extent possible and practicable” and “where appropriate,” a more subjective standard compared to “under its domestic legal

²²² Regional Comprehensive Economic Partnership Agreement (RCEP), Article 17.3, (2022).

²²³ Article 17.3, Regional Comprehensive Economic Partnership Agreement

²²⁴ The RCEP’s chapters on Customs Procedures and Trade Facilitation (Chapter 4), Sanitary and Phytosanitary Measures (Chapter 5), and Standards, Technical Regulations, and Conformity Assessment Procedures (Chapter 6), have public participation requirements that are comparable to the TFA, SPS, and TBT Agreements, respectively.

²²⁵ See *supra* note 222, at Article 8.15.

framework” in AANZFTA and ATISA, as well as the Reference Paper. Annex 8A on Financial Services contains a separate notice-and-comment paragraph:²²⁶

Annex 8A: Financial Services

Article 7: Transparency

...

To the extent practicable, each Party shall:

(a) *publish* or make available to interested persons *in advance* any regulation of general application relating to this Annex that it *proposes to adopt*, and the purpose of such regulation; and

(b) provide interested persons and other Parties with a *reasonable opportunity to comment* on such proposed regulation.”²²⁷
(italics supplied, footnote omitted)

The notice-and-comment provisions in Article 7 of the RCEP Financial Services Annex have the same elements as the horizontal notice-and-comment disciplines in Article 17.3, except for the following: (1) scope of the measures is limited to proposed regulations of general application on financial services; (2) the purpose of the proposed regulation is required to be disclosed; and (3) “interested persons” are defined in footnote 6, “[f]or the purposes of this Article, the Parties confirm their shared understanding that “interested persons” are persons whose direct financial interest could potentially be affected by the adoption of the regulations of general application.” Parties are allowed an exception for measures that prevent deceptive and fraudulent practices or deal with the effects of a default on financial services contracts.²²⁸ Attention is drawn to the counterpart domestic regulation disciplines in the Reference Paper, which are labelled as “Alternative Disciplines,” and outlined in a separate Section in which Members have the option not to inscribe in their respective GATS schedules.²²⁹ Should the Philippines decide to invoke this option, the prior notice-and-comment disciplines on financial services would still be applicable for the benefit of the RCEP Parties and their

²²⁶ See *supra* note 222, at Article 7, Annex 8A.

²²⁷ Article 7, Annex 8A, Regional Comprehensive Economic Partnership Agreement.

²²⁸ See *supra* note 222, at Article 8.

²²⁹ See *supra* note 126.

respective “interested persons,” giving them a clear preference compared to non-RCEP Parties.

Unlike the Reference Paper, the PJEP, AANZFTA, ATISA, and RCEP did not use the approach of inscribing the disciplines in the schedule of specific commitments. Instead, the prior notice-and-comment disciplines were made part of the main text of their respective chapters on Trade in Services or as part of the General Provisions applicable to the entire Agreement. As far as those disciplines in the Trade in Services chapters are concerned, these were not part of either market access or national treatment. Such notice-and-comment provisions are thus considered as general obligations that are not subject to scheduling, and cannot be subject to carve-outs based on a schedule of MFN exemptions or non-conforming measures. The other main departure from the Reference Paper that is common to all four FTAs is that none of the public participation disciplines therein were specifically negotiated 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,”²³⁰ but would inform and influence discussions at the JSI-SDR. What the Reference Paper requires that goes beyond any of the FTA versions is the obligation to “consider” the comments on the proposed law or regulation, subject to implementation flexibilities.

4. Prior Notice-and-Comment and Philippine Administrative Rulemaking

The public participation provisions of the Revised Administrative Code of 1987²³¹ are relevant to the advance publication and notice-and-comment requirements under the Reference Paper, and can be found in Section 9, Book VII, Chapter 2:

SECTION 9. Public Participation. — (1) If not otherwise required by law, an agency shall, *as far as practicable, publish or circulate notices*

²³⁰ See supra note 169. (It should be noted that AANZFTA, ATISA, and RCEP obligates the Parties thereto to review the results of the conclusion of negotiations on GATS Article VI:4, and after consultation with the Parties, to revise or modify their respective FTAs accordingly in order to bring such disciplines into effect.)

²³¹ Exec. Order No. 292, (Jul. 25, 1987).

of proposed rules and afford *interested parties* the opportunity to submit their views *prior to the adoption* of any rule.

(2) In the fixing of rates, no rule or final order shall be valid unless the proposed rates shall have been published in a newspaper of general circulation at least two (2) weeks before the first hearing thereon.

(3) In case of opposition, the rules on contested cases shall be observed.”²³² (*italics supplied*)

On its face, Section 9 of the Revised Administrative Code does not reveal any fundamental inconsistency with the prior notice-and-comment disciplines of the Reference Paper. The basic components—publication and notice of proposed rules, the opportunity to comment by interested persons, submission of views prior to adoption, and even the flexibility, “as far as practicable”—are all present, except for the obligation to consider prior comments. Given the dilution of the mandatory character of the prior notice-and-comment disciplines in the Reference Paper, the absence of an express provision in the Revised Administrative Code on the consideration of prior comments would not fatally detract from the overall consistency of the Philippines’ administrative public participation rules with the Reference Paper.

Nonetheless, the Philippines’ decision to adopt Reference Paper disciplines on advance publication and notice-and-comment for the domestic regulation of services is consequential for the domestic regulatory regime. It represents the first time that the Philippine government agreed to binding multilateral commitments on what are, at its most rudimentary level, certain elements of U.S.-style administrative rulemaking. The prior notice-and-comment disciplines in the Reference Paper can be traced to the U.S. Administrative Procedures Act (APA),²³³ which has been described as “one of the greatest inventions of modern government.”²³⁴ The APA requires that advance notice of proposed rulemaking be published in the U.S. Federal Register, that interested persons be afforded the chance to submit comments concerning the proposed rule, consider those comments, and then publish the rule with a concise general

²³² Section 9, Book VII, Chapter 2, E.O. 292 series of 1987

²³³ 5 U.S.C. §§ 551–559

²³⁴ William D. Araiza, *Note, Notice-and-Comment Rights for Administrative Decisions Affecting International Trade: Heightened Need, No Response*, 99 Yale L.J. 669 (1989), at 672

statement of its basis and purpose.²³⁵ The purpose of the APA notice-and-comment requirement is two-fold: “to give the public an opportunity to participate in the rulemaking process” and to allow the agency “to educate itself before establishing rules and procedures which have a substantial impact on those regulated.”²³⁶

A number of hallmarks of U.S. administrative rulemaking and the APA notice-and-comment mechanism can be seen in the Reference Paper version. Under the APA, the “[g]eneral notice of proposed rulemaking shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law,”²³⁷ which corresponds with the advance publication requirement in Paragraph 14 of the Reference Paper. The APA requires that “the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation,”²³⁸ which pertains to Paragraph 16 of the Reference Paper. Finally, the APA mandates that “[a]fter consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose,”²³⁹ which aligns with Paragraph 17 of the Reference Paper.

The Philippines’ prior notice-and-comment rules under the Revised Administrative Code is generally aligned with the basic tenets of U.S.-style administrative rulemaking. But a comparative analysis²⁴⁰ of the public participation rules in the Revised Administrative Code with the more robust notice-and-comment requirements in U.S. administrative rulemaking under the APA revealed the clear limitations of the Revised Administrative Code.²⁴¹ Under the public participation requirements of the APA, *i.e.*, the publication of the proposed administrative rule or regulation, the opportunity for the general public

²³⁵ Dorit Rubinstein Reiss, *Tailored Participation: Modernizing the APA Rulemaking Procedures*, 12 N.Y.U. J. Legis. & Pub. Pol’y 321 (2009), at 327. See also Araiza, *supra* note 234.

²³⁶ Base, *supra* note 107, at 98, *citing* *Texaco, Inc v Federal Power Commission*, US Court of Appeals for the Tenth Circuit, 337 F.2d 253, (10th Cir. 1964).

²³⁷ 5 U.S.C. §§ 553(b)

²³⁸ 5 U.S.C. §§ 553(c)

²³⁹ *Id.*

²⁴⁰ See Graciela Base, *Notice-and-Comment Rulemaking in Comparative Perspective: Some Conceptual and Practical Implications*, 15 Asian J. Comp., 95, 99 (2020).

²⁴¹ Base, *supra* note 107, at 98.

to submit comments in writing, and the publication of the final rule 30 days before effectivity, is the established general rule.²⁴² In practice, U.S. courts “rigorously police agency compliance with the procedure”²⁴³ and “have nullified administrative rules that dispensed with the notice-and-comment process without justifiable reason.”²⁴⁴ To be sure, there is no U.S.-style judicial system that will “rigorously police” the Philippines’ implementation of the Reference Paper’s notice-and-comment disciplines. But as discussed in Part III.B, the domestic regulation disciplines under the Reference Paper, including the new advance publication and notice-and-comment requirements, will be covered by the WTO Dispute Settlement Understanding (DSU), which renders any violation justiciable under the DSU.²⁴⁵

Philippine compliance with Section 9 of the Revised Administrative Code, on the other hand, is “practically discretionary on the part of the agency,”²⁴⁶ and unless the right to public participation in administrative rulemaking is explicitly mandated in the agency’s charter or otherwise by substantive law, such right will not be actionable,²⁴⁷ rendering its practical application “largely [...] meaningless.”²⁴⁸ At the same time, the organic charter of the administrative agency or the relevant substantive law is usually silent with respect to other forms of issuances establishing a rule, such as orders, resolutions, or circulars that the agency may subsequently promulgate, which means that the Revised Administrative Code would apply by default.²⁴⁹

Despite the language of the Revised Administrative Code, the Philippine Supreme Court pronounced that “notice and hearing are not essential to the validity of administrative action where the administrative body acts in the exercise of executive, administrative, or legislative functions,”²⁵⁰ which had become the

²⁴² *Id.* at 98.

²⁴³ *Id.*

²⁴⁴ *Id.* at 108.

²⁴⁵ See *supra*, at 187.

²⁴⁶ Base, *supra* note 107, at 97.

²⁴⁷ *Id.* at 98.

²⁴⁸ *Id.* at 110.

²⁴⁹ *Id.* at 100.

²⁵⁰ *Id.* at 103, citing *Philippine Communications Satellite Corporation v. Alcuaz*, G.R. No. 84818, Dec. 18, 1989.

prevailing doctrine and was affirmed in subsequent cases.²⁵¹ While “notice-and-hearing” as understood in the context of an administrative agency’s *quasi-judicial* functions is not essential in the discharge of that agency’s *quasi-legislative* functions, it was cogently observed that “a variant of this process, that is, ‘notice-and-comment’ in administrative rulemaking, is recognized under the [Revised Administrative Code]. The effect of the doctrine is the perpetuation of the idea that no notice and hearing *of any kind* is essential in quasi-legislative proceedings.”²⁵²

Perhaps due to the lack of specificity and substantive guidance in the Revised Administrative Code and the lack of clarity in its interpretation by the Supreme Court, regulatory reforms instituted by the Executive branch sought to integrate public consultation in the regulatory process, which necessarily entails the exercise of administrative rulemaking or quasi-legislative functions. In strengthening the mandate of ARTA, the EODB Act highlighted principles on the importance of stakeholder consultation, particularly as part of the process of RIA. Under Section 6(b), Rule III of the Implementing Rules and Regulations of the EODB Act, government agencies covered by the Act are now required to conduct consultations to ensure the quality of a regulation as part of the RIA process, and are to properly disseminate the results of the RIA as a “feedback and feedforward” mechanism.²⁵³ While the Philippines has established good practice in these areas, a joint OECD and ADB study found that stakeholder consultation in the Philippine government still “tends to happen at a late stage, after the production of a draft law, rather than at a more nascent stage of policy development,”²⁵⁴ which implies that public participation in the administrative rulemaking process has not reached the level of standard operating practice in the Philippines.

²⁵¹ See *id.* at 105, citing *Quezon City PTCA Federation, Inc. v. Department of Education*, where the Supreme Court reaffirmed the rule that “[n]otice and hearing are not essential when an administrative agency acts pursuant to its rulemaking power,” despite the fact that the assailed order was subject to the General Administrative Procedure regime because the statute granting rulemaking powers to the Secretary of Education does not require public consultations in the issuance of IRRs.

²⁵² *Id.* at 104

²⁵³ Joint Memorandum Circular No. 2019-001, Series of 2019, The Implementing Rules and Regulations of Republic Act No. 11032 otherwise known as the “Ease of Doing Business and Efficient Government Service Delivery Act of 2018” (EODB Act) [hereinafter “EODB IRR”].

²⁵⁴ ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT & ASIAN DEVELOPMENT BANK, *supra* note 110, at 54–55.

5. *Internationalizing Notice-and-Comment Disciplines on Services*

One consequential implication of the Philippines' adoption of Reference Paper disciplines on advance publication and prior comment is that it would not only "multilateralize" U.S.-style notice-and-comment requirements, but it will also further "*internationalize*" the domestic regulation of services sectors.²⁵⁵ The inscription of the Reference Paper disciplines on notice-and-comment in the Philippines' GATS schedule not only creates a binding MFN commitment applicable to all other WTO Members, but it would also extend the application of such disciplines to their respective service sectors and suppliers, assuring them of a voice in the national regulatory process.²⁵⁶ The Reference Paper's obligation for JSI-SDR signatories to "consider" comments on proposed laws and regulations from interested persons applies as well to comments from foreign suppliers, subject to implementation flexibilities. This commitment implies that it would no longer be sufficient for a WTO Member's executive or legislative branch to take into account only the interests of domestic stakeholders in the development of laws and regulations on the matters covered by GATS Article VI(4).²⁵⁷

By giving foreign service suppliers a "reasonable opportunity to comment on the proposed laws and regulations published in advance," and whose comments shall be considered prior to the adoption of such laws and regulations, the Reference Paper effectively guarantees them a say not only in the administrative rulemaking, but also in the legislative process on matters affecting trade in services. To be sure, the public participation requirements in the legislative process are set by the 1987 Constitution itself,²⁵⁸ and to give full effect to the Constitutional mandate, both Houses of Congress have established rules of procedure governing the conduct of committee hearings on proposed bills and other measures. Notably, under the Rules of the House of Representatives of the 18th Congress, Committees "shall undertake measures and establish systems to ensure that constituencies, sectors or groups whose welfare and interests are directly affected by measures to be discussed are enabled to participate in these meetings or public hearings."²⁵⁹

²⁵⁵ Krajewski, *supra* note 73, at 27.

²⁵⁶ *Id.*

²⁵⁷ Mohamadieh, *supra* note 30, at 7.

²⁵⁸ CONST. art. VI, §2.

²⁵⁹ Rules of the House of Representatives of the 18th Congress, available at <https://www.congress.gov.ph/download/docs/hrep.house.rules.pdf>.

As the obligation to accord foreign service suppliers from other WTO Members, including from developed countries with offensive interests in services exports, an opportunity to comment expands the universe of “voices” to be heard in domestic rulemaking, it may have a significant effect on regulatory policy space.²⁶⁰ The risk of opening up the domestic rulemaking process on the regulation of services to foreign service suppliers of WTO Members with strong services export interests, who may exert undue pressure on regulators and possibly create the conditions for a “corporate capture” of the services regulatory regime, would certainly be elevated under the Reference Paper.²⁶¹ The organized lobbying and influence that can be wielded by foreign service suppliers, which may include multinational companies, could “tilt the balance in national regulatory and legislative processes away from national constituencies and development priorities.”²⁶²

It has been argued, however, that allowing foreign service suppliers to comment on proposed services regulations and participate in the administrative rulemaking process would “inform the work of a benevolent regulatory authority seeking to set up efficient and least trade-restrictive regulatory measures, which could benefit from the collection of the views of all economic stakeholders, be they domestic or foreign.”²⁶³ Conversely, a counterintuitive view posits that where a strong culture of public participation is lacking, the consultation might end up being dominated by a few interest groups, rendering the agency vulnerable to corporate capture.²⁶⁴

6. Options for the Philippines in a Multilateralized Transparency Regime

Efforts to improve domestic prior notice-and-comment rules go a long way in enhancing the ability of the general public to participate in domestic economic governance. As the Philippines’ existing public participation rules in the Revised Administrative Code are not as robustly implemented and have been watered

²⁶⁰ See Krajewski, *supra* note 73.

²⁶¹ *Id.*

²⁶² Mohamadieh, *supra* note 30, at 11.

²⁶³ Delimatsis, *International Trade in Services and Domestic Regulations*, *supra* note 68, at 266-267.

²⁶⁴ Base, *supra* note 107, at 124.

down further by an inconsistent Supreme Court doctrinal ruling, the adoption of the Reference Paper could be an opportunity for the Philippine government to provide definitive clarity and give full effect thereto. But tethering these reforms to an international standard through binding international obligations could potentially place enormous strain on developing country governments, such as that of the Philippines, including subnational entities or local government units (LGUs).

One way forward is perhaps an obvious one—the Philippines would have to make full use of the built-in flexibility language where applicable in the Reference Paper. The flexibility clause “*to the extent practicable and in a manner consistent with its legal system for adopting measures*” qualifies a number of mandatory obligations, particularly the prior notice-and-comment disciplines in Paragraphs 14-17 of the Reference Paper. As far as administrative rulemaking on services sectors is concerned, the Philippines can maximize the use of such flexibilities by improving the public participation requirements of Section 9 of the Revised Administrative Code. The Philippine government can enact implementing rules that further clarify the applicability of Section 9 by providing clearer and more detailed requirements to guide administrative agencies in operationalizing the objectives of public participation.²⁶⁵ Although their utility in downgrading some of the mandatory obligations to a more appropriate “best endeavor” type is limited, the Reference Paper flexibilities could still cushion the impact of its implementation and allow for some degree of regulatory flexibility. This flexibility can be particularly useful for LGUs, given the potential administrative and financial difficulties in operationalizing, let alone sustaining, a prior notice-and-comment mechanism in the near future.²⁶⁶

As the Reference Paper derives its legal status and the binding character of its obligations from its inscription into a GATS schedule, GATS rules and exceptions may also be applicable. The GATS grants two exceptions to the general obligation requiring transparency. First, Article III *bis* allows Members to deny providing confidential information, provided that its disclosure would impede law enforcement, or otherwise be contrary to the public interest, or would prejudice the legitimate commercial interests of public or private enterprises. Second, GATS Article XIV *bis*, paragraph 1(a), exempts Members from providing information that

²⁶⁵ See *id.*, at 106-107

²⁶⁶ Delimatsis, *International Trade in Services and Domestic Regulations*, *supra* note 68, at 280.

they consider would be contrary to essential security interests.²⁶⁷ For LGUs in particular, the last paragraph of GATS Article I(3)(a) provides that in fulfilling its obligations and commitments under the GATS, reasonable measures as may be available to WTO Members shall be taken to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory.²⁶⁸

Ultimately, the enhanced transparency disciplines that would be applied to the administration of measures that affect trade in services, combined with the continued implementation of similar transparency rules in the Philippines' FTAs and the entry-into-force of the RCEP, would necessitate a systematic, whole-of-government approach to improving transparency and public participation in administrative rulemaking as an essential component of the regulatory reform process. Although the Reference Paper's GATS+ transparency disciplines and APA-based public participation rules would only be binding on the services sectors in the Philippines' GATS schedule, any domestic effort at improving transparency and public participation administrative rulemaking to conform to such enhanced standards would necessarily have to be applied to all services sectors. It would be costly, confusing, and burdensome to maintain two systems—one with a mandatory public participation process for services sectors where the Reference Paper is inscribed as additional commitments, and a second permissive one for all other services sectors subject to the regulator's discretion.

D. New Rules on Authorization for the Supply of Services

The Reference Paper provides for new disciplines on the authorization for the supply of services—an uncharted area of the GATS landscape before it was mapped by the Members of the JSI-SDR.²⁶⁹ As explained in Part I.C, four of the five GATS Article VI(4) mandated issues, namely licensing requirements, licensing procedures, qualification requirements, and qualification procedures, were bundled together as part of a broader process of “*authorization to supply a service*.”²⁷⁰ Unlike the Reference Paper, the GATS does not define “authorization

²⁶⁷ *Id.*, at 268.

²⁶⁸ GATS art. I(3)(a)

²⁶⁹ *See supra*, at 12 describing the shift in the negotiations from individual disciplines on four of the GATS Article VI(4) mandated issues to a broader approach involving “authorization for the supply of a service.”

²⁷⁰ *See supra* note 74.

for the supply of a service,” although “supply of services” is defined in GATS Article XXVIII(b) as “including the production, distribution, marketing, sale and delivery of a service.”

Existing GATS rules referencing authorization are sparse and provide limited guidance. Under GATS Article VI(3), Members shall ensure that their competent authorities provide an applicant seeking authorization for the supply of a service with information concerning the status of the application without undue delay, who shall be informed of the decision made by a WTO Member’s competent authorities concerning the application within a reasonable period of time after its submission.²⁷¹ Outside GATS Article VI, the only other reference to authorization for the supply of a service is found in GATS Article VII, wherein a Member may recognize the education, experience, requirements, licenses, or certifications granted in a particular country in fulfilling the standards or criteria for the authorization (among others) of services suppliers,²⁷² but such recognition should not discriminate between countries or serve as a disguised restriction on trade in services.²⁷³ The new disciplines on authorization for the supply of a service are decidedly more robust and purposely designed to augment the GATS. For instance, the duty of the competent authorities to provide information when requested and notify the applicant of the decision under GATS Article VI(3), which only applies to a Member’s specific commitments, is reflected in Section II Paragraphs 7.b and 7.d. of the Reference Paper.

1. Procedural aspects of authorization for the supply of a service

Comprising half of the Section II disciplines, the procedural aspects of the authorization for the supply of a service are outlined in Paragraphs 4 to 8 of the Reference Paper, and focus more on facilitating and improving procedural certainty in the administrative process of securing authorizations for the supply of services. A WTO Factsheet explains that the Reference Paper disciplines have focused on measures that are “closely linked” to the process of authorization to supply a service, to ensure that “opaque and complex authorization procedures”

²⁷¹ GATS art. VI(3).

²⁷² GATS art. VII(1).

²⁷³ GATS art. VII(3).

do not nullify existing market access and national treatment commitments.²⁷⁴ Like other provisions of the Reference Paper, the disciplines on authorization for the supply of services also provide for built-in flexibilities, which can be summarized as follows:

PROVISION	NATURE OF COMMITMENT	FLEXIBILITY
Single competent authority for each application (Section II, Para 4)	mandatory	to the extent practicable/possible
Submission of application at any time throughout the year (Section II, Para 5)	mandatory	to the extent practicable/possible
Applications for authorization in electronic format (Section II, Para 6.a)	mandatory	best endeavor language
Accept copies of documents in place of original documents (Section II, Para 6.b)	mandatory	none
Indicative timeframe for processing of an application (Section II, Para 7.a)	mandatory	to the extent practicable/possible
Information on the status of the application without undue delay (Section II, Para 7.b)	mandatory	none
Ascertain without undue delay the completeness of an application (Section II, Para 7.c)	mandatory	to the extent practicable/possible
Ensure complete processing of application and the applicant is	mandatory	to the extent practicable/possible

²⁷⁴ World Trade Organization, *Services Domestic Regulation: Rationale and Content, Potential Economic Benefits, and Increasing Prevalence in Trade Agreements*, at 2 (July 2022).

PROVISION	NATURE OF COMMITMENT	FLEXIBILITY
informed in writing of the decision (Section II, Para 7.d)		
Inform applicant of the incompleteness of an application, additional information needed to complete it (Section II, Para 7.e)	mandatory	to the extent practicable/possible
Inform applicant of the reasons for refection and the procedures for resubmission (Section II, Para 7.f)	mandatory	to the extent practicable/possible
Ensure authorization enters into effect without undue delay (Section II, Para 8)	mandatory	none
Examination at reasonably frequent intervals and reasonable period of time to request the taking (Section II, Para 10)	mandatory	none
Accept requests for examinations in electronic format and the use of electronic means in other aspects of the examination (Section II, Para 10)	permissive	to the extent practicable best endeavor language

Notwithstanding these built-in implementation flexibilities, the obligatory nature of a majority of the disciplines on authorization, coupled with the specificity of the procedural requirements to be observed and the highly detailed nature of the information required, could impose a significant administrative burden for Members with a nascent or underdeveloped administrative bureaucracy or do not have the resources to implement such

disciplines. Even for Members such as the Philippines, which has fairly recent legislation such as the EODB Act and a corpus of general administrative law that are generally aligned with the Reference Paper disciplines on authorization, the scope of the disciplines that start from before the application to the decision by the competent authorities and the robustness of the procedural requirements can still be a daunting task to execute fully. As these disciplines would apply only to those services sectors in a Member's GATS Schedule, it would behoove that Member's regulatory agencies to be extra vigilant and circumspect with respect to the administration of the procedural aspects of the granting of authorizations on the supply of services they regulate. This is further compounded by the fact that the disciplines would apply to not just central or national government agencies but also to regional and sub-level government units including local government.²⁷⁵

2. *Development of Measures Relating to Authorization for the Supply of a Service*

The second subset of disciplines on authorization under the Reference Paper covers the rather prosaically termed “development of measures,” set forth in Paragraph 22. Unlike the previously discussed Paragraphs on the procedural side of the authorization process, Paragraph 22 on the development of measures relating to authorization deals with standards of a substantive nature, *i.e.*, relating to the content of such measures.²⁷⁶ The origins of Paragraph 22 can be traced to two separate textual proposals circulated to the WPDR in the first quarter of 2017.²⁷⁷ A comparison of the two proposals reveals that some of the language was lifted from the domestic regulation chapters of the free trade agreements of the proponents.²⁷⁸ It was also observed that certain phraseologies were based on text from the 2009 Chair's Text as well as the accountancy disciplines.

²⁷⁵ GATS art I(3)(a). Members, however, are not expected to take every possible step to prevent local governments from infringing the GATS, but only take reasonable measures. See Munin, *supra* note 201, at 67.

²⁷⁶ Gabriel Gari, *Recent developments on disciplines on domestic regulations affecting trade in services: convergence or divergence?* COHERENCE AND DIVERGENCE IN SERVICES TRADE LAW, European Yearbook of International Economic Law, Rhea Tamara Hoffmann, Markus Krajewski (eds.)

²⁷⁷ *Communication from Australia, Canada, Colombia, the European Union, Israel, Japan, and Mexico*, JOB/SERV/250 (Feb. 27, 2017); *Communication from Hong Kong, China, and New Zealand*, JOB/SERV/252 (Mar. 2, 2017).

²⁷⁸ Notably Hong Kong (China) and New Zealand. See *infra* note 3, at 56.

The final text in Paragraph 22, which is nearly identical to the counterpart language in the 2017 WPDR text, is a patchwork of relevant text from various sources and combined under the broad rubric of Development of Measures. The text is as follows (footnotes omitted):

22. If a Member adopts or maintains measures relating to the authorization for the supply of a service, the Member shall ensure that:

- (a) such measures are based on objective and transparent criteria;
- (b) the procedures are impartial, and that the procedures are adequate for applicants to demonstrate whether they meet the requirements, if such requirements exist;
- (c) the procedures do not in themselves unjustifiably prevent the fulfilment of requirements; and
- (d) such measures do not discriminate between men and women.²⁷⁹

Of all the provisions of the Reference Paper, the disciplines on development of measures potentially carry the most intrusive impact on regulatory policy space,²⁸⁰ save perhaps for the notice-and-comment provisions discussed in the preceding section. At the outset, the disciplines on development of measures under Paragraph 22 are mandatory. But unlike other provisions of the Reference Paper, the disciplines in Paragraph 22 are not attenuated by textual flexibilities or best endeavor language.

The chapeau of Paragraph 22 and (a) and (d) refer to *measures*, while (b) and (c) refers to *procedures*,” but the GATS treatment of these terms might be pertinent to its practical scope and application. A “measure” has a broader meaning in the GATS, which defines it as one by a Member in the form of law,

²⁷⁹ Under Section I, Paragraph 9, Members may exclude Paragraph 22 (d) of Section II from the additional commitments to be scheduled in accordance with the Reference Paper.

²⁸⁰ Mohamadieh, *supra* note 30, at 5.

regulation, rule, procedure, decision, administrative action or any other form.²⁸¹ At the same time, the chapeau of Paragraph 22 covers “measures *relating to* the authorization for the supply of a service.” Taken together, one could interpret Paragraph 22 as applicable to a wide range of government acts and issuances, over matters that would only need some relation (direct or indirect) to the authorization to supply a service, significantly widening its scope. At the same time, the specific Paragraph 22(b) and (c) requirements for *procedures* on authorization, which would refer to the disciplines in Paragraphs 4-10 and 11-12 of the Reference Paper, could mean that such requirements are in addition to those for measures, of which procedures is a subset under the GATS definition of measures.

This distinction may also be particularly relevant for two other reasons. First, for purposes of examining the applicability of specific provisions of the GATS—and by extension the Reference Paper—a dispute settlement panel would have to determine the applicability of the provisions invoked by the complaining party as the basis for its claims with respect to the measures at issue.”²⁸² If the measures covered by Paragraph 22 would impair any direct or indirect benefits accruing to another Member, WTO dispute settlement may be resorted to under DSU Article 3.3. Second, under the GATS, measures taken by WTO Members include not only national government agencies, but also “regional or local governments and authorities” as well as “non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities.”²⁸³ The scope of Paragraph 22 is broader compared to the notice-and-comment requirements in Paragraphs 14-17, which are limited to proposed *laws and regulations* on authorization for the supply of a service.²⁸⁴

“[M]easures are based on objective and transparent criteria...” (Paragraph 22(a))

²⁸¹ GATS art. XXVII(a). See *supra*, at 30 for a similar discussion on the use of the GATS nomenclature vis-à-vis the application of “laws and regulations” to prior notice-and-comment requirements.

²⁸² Munin, *supra* note 201, at 61, citing Panel Report, China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, *supra* note 20, at ¶ 7.1619.

²⁸³ GATS Article I(3)(a)(i) and (ii)

²⁸⁴ See *supra* note 281.

Paragraph 22 imposes substantive requirements for measures related to authorization for the supply of a service that should be compared with what GATS Article VI(4) requires. Paragraph 22(a) is essentially a reproduction of GATS Article VI(4)(a), although the latter's reference to "competence and the ability to supply the service" is relegated to a footnote.²⁸⁵ Objectivity is a standard that is widely recognized and a multifaceted principle in other areas of WTO law. In dispute settlement for instance, under DSU Article 11, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.²⁸⁶ The objective standard is certainly essential in an adjudicatory process such as the WTO dispute settlement system, as the adjudicator is expected to approach the facts and the evidence before him without any bias or prejudice.

As far as a regulator is concerned, objectivity of the criteria it considers in the process of authorization to supply a service is just one of a number of values that guide its decision-making. An inflexible objectivity standard could conflict with considerations that are core to a regulatory process that may be deemed as non-objective, such as preserving historic or cultural values or those based on a public interest or public welfare standard, or could otherwise restrict a regulator's discretion to undertake the balancing required when there are multiple considerations in evaluating the environmental, economic, or community impact.²⁸⁷ To be sure, structural safeguards must be in place to prevent abuse of a regulator's discretion that may be based on arbitrary and capricious considerations, and where such safeguards exist, any inquiry into the inconsistency of a given criteria with the objectivity standard under the pretext of the Reference Paper disciplines should be subordinate to such safeguards under the principle of exhaustion of local remedies.²⁸⁸ At the same time, the objectivity standard in Paragraph 22(a), including that in GATS Article VI(4), should be read in conjunction with the prevailing view that GATS Article VI applies to non-

²⁸⁵ The complete text of Footnote 17 of Paragraph 22(a) reads: "Such criteria may include, *inter alia*, competence and the ability to supply a service, including to do so in a manner consistent with a Member's regulatory requirements, such as health and environmental requirements. Competent authorities may assess the weight to be given to each criterion."

²⁸⁶ DSU, Art. 11, World Trade Organization.

²⁸⁷ Mohamadieh, *supra* note 30, at 5.

²⁸⁸ See Chittharanjan Felix Amerasinghe, *LOCAL REMEDIES IN INTERNATIONAL LAW* (2d ed. 2005).

discriminatory measures.²⁸⁹ The structure of the GATS differentiates between measures that limit market access for foreign services and service suppliers and measures that are aimed at public policy objectives.²⁹⁰ Thus, criteria that are considered non-objective but effectively discriminate against foreign suppliers in favor of domestic suppliers or among other foreign suppliers should be subject to GATS rules in Articles XVII and XVI, respectively.

Transparency is an established principle in WTO law and policy and an indispensable obligation in the GATS as in other WTO Agreements. GATS Article III largely follows GATT Article X in requiring publication of all relevant measures (including international agreements affecting trade in services), as well as additional transparency obligations on annual reports on changes to laws affecting trade in services, and the establishment of enquiry points.²⁹¹ Thus, transparency in the GATS is often referred to in terms of a Member's laws being open and publicly available.²⁹² Paragraph 22(a), however, requires that the *criteria* of measures relating to the authorization for the supply of a service are transparent. This effectively goes deeper than transparency requirements in the GATS, because it would entail going behind the curtain of such measures and requiring that the substance of the criteria be made available or accessible. The substance of such criteria could, in turn, be based on legitimate public policy objectives or subject to the discretion legally conferred upon or delegated to the regulator.

“[P]rocedures are impartial and adequate for applicants to demonstrate whether they meet the requirements, if such requirements exist...” (Paragraph 22(b))

²⁸⁹ See *supra* note 35.

²⁹⁰ Simon Tans, *The GATS Approach Towards Liberalization: The Interaction Between Domestic Regulation, Market Access, National Treatment and Scheduled Commitments in the GATS*, CTEI Working Paper No. 2009-02, at 16 (2009), citing Patrick Low & Aaditya Mattoo, *Is There a Better Way? Alternative Approaches to Liberalization under GATS*, in GATS 2000: NEW DIRECTIONS IN SERVICES TRADE LIBERALIZATION 455 (Pierre Sauvé & Robert M. Stern eds., Brookings Inst. Press 2000).

²⁹¹ Padideh Ala'i, *From the Periphery to the Center? The Evolving WTO Jurisprudence on Transparency and Good Governance*, 11 J. INT'L ECON. L. 779, 779–802 (2008).

²⁹² Robert Stumberg, Memorandum to Kay Wilkie, Chair, Intergovernmental Policy Advisory Committee (IGPAC), Note 70, at 18 (Feb. 12, 2008), available at https://www.iatp.org/sites/default/files/451_2_101603.pdf.

The reference to “impartial” procedures in the first part of Paragraph 22(b) would be consistent with the conditional obligation under GATS Article VI(1) to ensure that “measures of general application affecting trade in services are administered in a reasonable, objective, and *impartial* manner.” The notion of impartiality in GATS Article VI:1 relates to the bias rule as an aspect of administrative due process.²⁹³ In *China – Raw Materials*, “impartial” administration in the context of GATT Article X(3)(a) was taken to mean the application or implementation of the relevant laws and regulations in a fair, unbiased, and unprejudiced manner.²⁹⁴ Paragraph 22(b), however, requires that the *procedures* must be impartial. This could be understood to mean that the authorization procedures must be impartial on their face, while GATS Article VI(1) requires that measures of general application, which incidentally may also include procedures,²⁹⁵ be administered in an impartial manner. In any event, the obligation to ensure impartial procedures and impartial administration of measures of general application would only apply to sectors where specific commitments are undertaken.

The second part of Paragraph 22(b) imposes conditions on the fulfillment of requirements by applicants for authorization to supply a particular service. The reference to “requirements” should be understood in the context of the GATS Article VI(4) mandate on licensing requirements and qualification requirements. In the 2009 Chair’s Text, “qualification requirements” were defined as substantive requirements relating to the competence of a natural person to supply a service, and which are required to be demonstrated for the purpose of obtaining authorization to supply a service.²⁹⁶ “Licensing requirements” are substantive requirements other than qualification requirements with which a natural or juridical person is required to comply in order to obtain, amend, or renew authorization to supply a service.²⁹⁷ As these were understood in the 2009 Chair’s Text, qualification and licensing requirements are of a substantive nature that goes

²⁹³ Andrew D. Mitchell & Tania Voon, *Reasonableness, Impartiality and Objectivity*, in WTO Domestic Regulation and Services Trade: Putting Principles Into Practice 65, 65–78 (Aik Hoe Lim & Bart De Meester eds., Cambridge Univ. Press 2014).

²⁹⁴ *Id.* at 75, citing Panel Report on China - Raw Materials ¶ 7.694

²⁹⁵ See Note by the Secretariat, *Measures of General Application in WTO Agreements*, Working Party on Domestic Regulation, WTO Doc. S/WPDR/W/47 (Feb. 9, 2011).

²⁹⁶ World Trade Organization, *Disciplines on Domestic Regulation in the Accountancy Sector*, World Trade Organization Doc. RD/SERV/46/Rev.1 [hereinafter “2009 Chair’s Text”], at 8 (2009).

²⁹⁷ *Id.*, at 6.

into an applicant's competence or ability to comply with substantive requirements in order to supply a service, which in turn is consistent with the criteria under GATS Article VI(4)(a).

As to the “adequacy” of such procedures, GATS Article VI(6) obliges Members with specific commitments in their GATS schedules on professional services to provide for “adequate procedures to verify the competence of professionals of any other Member.” Paragraph 22(b) however, does not distinguish between qualification procedures as applied to professional services or other qualification or licensing procedures; the implication is that Paragraph 22(b) seems to go beyond GATS Article VI(6) by extending its application to licensing procedures and other qualification procedures of services other than professional services in a Member's respective GATS schedule. Reference to *adequacy* can also be found in the WTO Anti-Dumping Agreement, which mandates authorities to “examine the accuracy and *adequacy* of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation.”²⁹⁸ The Panel in *Guatemala – Cement II*,²⁹⁹ faced with the question of whether an anti-dumping investigation was properly initiated, held that whether or not the evidence in an anti-dumping investigation is *adequate* is not the legal standard to be applied, but whether the evidence was *sufficient*, and did not provide any further analysis on the “adequacy” of the evidence. WTO Members have tabled proposals for an “accuracy and *adequacy* test,” which, by-and-large, reflect their respective national practices and experiences on initiating anti-dumping investigations rather than proposing a concrete adequacy test.³⁰⁰

“[P]rocedures do not in themselves unjustifiably prevent the fulfilment of requirements ...” (Paragraph 22(c))

Paragraph 22(c) appears to correspond to GATS Article VI:4(c), which provides that “in the case of licensing procedures, *not in themselves a restriction on the supply of the service*.”³⁰¹ GATS Article VI(4)(c) connotes a “less trade restrictive”

²⁹⁸ WTO Agreement on Anti-Dumping, Article 5.3.

²⁹⁹ Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R (Oct. 24, 2000).

³⁰⁰ South Africa, *Paper on Article 5.3 – Accuracy and Adequacy*, G/ADP/AHG/W/189 (Sept. 13, 2011); Colombia, *Paper on Article 5.3 – Accuracy and Adequacy*, G/ADP/AHG/W/192 (Oct. 5, 2011); Jamaica, *Paper on Article 5.3 – Accuracy and Adequacy*, G/ADP/AHG/W/196 (Apr. 11, 2013).

³⁰¹ GATS Article VI(4)(c)

standard that was not reiterated in Paragraph 22(c), which instead requires that authorization procedures do “*not in themselves unjustifiably prevent the fulfilment of requirements.*” That language is similar to a provision in Annex III to Chapter 13 (Trade in Services) of the Hong Kong, China - New Zealand Closer Economic Partnership Agreement (HK-NZ CEPA),³⁰² the parties to which are two of the main proponents of a separate paragraph on Development of Measures.³⁰³ Paragraph 12 of Annex III to Chapter 13 of the HK-NZ CEPA reads:

Licensing Procedures

Each Party shall ensure that licensing procedures, including application procedures and, where applicable, renewal procedures, are as simple as possible, are *not more burdensome than necessary to ensure that applicants fulfil or comply with the licensing requirements*, and do not in themselves constitute a restriction on the supply of services.³⁰⁴ (italics supplied)

In the 2009 Chair’s Text, alternative language that is much closer to the text of Paragraph 22(c) was also proposed in the merger of what was then separate draft language on licensing procedures and qualification procedures:

Each Member shall ensure that licensing and qualification procedures for the purpose of obtaining authorization to supply a service are [simple,] reasonable, clear and relevant [to the underlying policy objectives], [taking into account the nature of the requirements to be met and the criteria to be assessed,] [and do not in themselves constitute a restriction on the supply of services]. [Members shall ensure that such procedures *do not in themselves unduly impede fulfilment of requirements.*]³⁰⁵ (italics supplied)

What is common in the above-cited provisions of the HK-NZ CEPA and the 2009 Chair’s Text is the need for simplicity in the licensing and qualification

³⁰² Hong Kong, China–New Zealand Closer Economic Partnership Agreement, Annex III, ¶ 3(b), Mar. 29, 2010.

³⁰³ See *supra* note 78.

³⁰⁴ *Supra* note 302.

³⁰⁵ Chairman’s Progress Report, Disciplines on Domestic Regulation Pursuant to GATS Article VI.4, S/WPDR/W/45 (Apr. 14, 2011).

procedures so as not to overburden the applicant and thus facilitate the process of obtaining an authorization to supply a service. The main difference is that the HK-NZ CEPA incorporates a “necessity test” (*i.e.*, “not more burdensome than necessary”), while the 2009 Chair’s Text does not. It was explained in an annotation to the 2009 Chair’s Text that:

[t]he application for licensing and/or qualification shall be examined under existing procedures valid at the date of application. Members shall, as far as practicable, *not amend such procedures or issue new procedures in respect of pending applications*. In the event such procedures are required to be amended or replaced, the Member shall promptly inform all applicants and provide reasonable time to such applicants for adapting their applications to such amended/new procedures.³⁰⁶ (*italics supplied*)

Given the divergent views among WTO Members on the “necessity test” in services domestic regulation that have proven to be irreconcilable over the course of the negotiations in the WPDR and even in the JSI-SDR,³⁰⁷ the language of 2009 Chair’s Text, part of which has been transplanted into Paragraph 22(c), would appear to provide an acceptable landing zone for JSI-SDR participants, even if it seems to have strayed from the original GATS Article VI(4)(c) language.

“[M]easures do not discriminate between men and women ...” (Paragraph 22(d))

Paragraph 22(d) is based on draft language proposed by Canada, Chile, Colombia, Iceland, and Uruguay on gender neutrality in the development of measures relating to the authorization for the supply of services.³⁰⁸ Strictly from a GATS perspective, Article VI(4) does not provide for a mandate for the negotiation of disciplines that, among others, would proscribe discrimination based on gender in the process of securing authorization for the supply of a service. Perhaps due to this, Paragraph 22(d) is covered by an exemption³⁰⁹ that Members can avail of in

³⁰⁶ 202009 Chair’s Text, at 23.

³⁰⁷ See *supra* note 60.

³⁰⁸ World Trade Organization, *Communication from Canada, Chile, Colombia, Iceland, and Uruguay – Gender Equality in Services Domestic Regulation*, World Trade Organization Doc. JOB/SERV/258 (May 8, 2017).

³⁰⁹ Reference Paper, § I, ¶ 9.

order to exclude this discipline from the additional commitments to be inscribed in their respective GATS Schedules. Despite the absence of a Ministerial mandate for the adoption of gender neutrality in the domestic regulation of services in the Reference Paper, it was lauded as the first gender equality provision in a WTO-negotiated outcome.³¹⁰

3. *Other mandatory obligations relating to authorization*

Three separate Reference Paper obligations linked to both the procedural and substantive aspects of measures relating to the authorization for the supply of a service deserve separate mention. The disciplines on *Authorization fees*, *Independence of competent authorities*, and *Enquiry points* pertain to key aspects of a regulator's functions—the power to set and impose fees, the authority to render decisions on applications for authorization, and the responsibility to respond to concerns of stakeholders. It should be noted that the provisions governing the three disciplines are couched in mandatory language, without any mitigating soft law commitments or implementation flexibilities.

Authorization fees

Paragraph 9, Section II of the Reference Paper requires that the authorization fees charged by a Member's competent authorities are “*reasonable, transparent, based on authority set out in a measure, and do not in themselves restrict the supply of the relevant service*” (italics supplied).³¹¹ A footnote qualifies that fees for the use of natural resources, payments for auction, tendering, or other non-discriminatory means of awarding concessions, or mandated contributions to universal service provision are not covered by the provision. Although the GATS Article VI(4) mandate does not include a specific textual reference to negotiating disciplines on “authorization fees,” fees to be charged to defray the cost of processing applications for a license or to comply with qualification requirements and technical standards could be considered as measures relating to such requirements and procedures.

³¹⁰ World Trade Organization, DDG Ellard: “Deeds not words” as the WTO becomes more gender-responsive, WTO News (Jan. 27, 2022), https://www.wto.org/english/news_e/news22_e/ddgae_27jan22_e.htm.

³¹¹ Reference Paper, § II, ¶ 9.

The requisites for authorization fees under Paragraph 9 of Section II would have to be unpacked here, *vis-à-vis* the Philippines' domestic legal requirements for the setting and levying of fees, charges, and rates. First, the Reference Paper requirement that authorization fees must be *reasonable* would be satisfied by DOF-DBM-NEDA Joint Circular No. 1-2013 dated 30 January 2013, or the Implementing Rules and Regulations (IRR) of Administrative Order No. 31 series of 2012 (IRR of A.O. No. 31), which directs all agencies and offices of the national government to rationalize the rates of fees and charges and to ensure that such rates are just and reasonable by maintaining a balance between recovering the costs of services rendered and the socio-economic impact of their imposition.³¹² Paragraph 5 of the IRR of A.O. 31 even enumerates a non-exhaustive list of factors to be considered in coming up with just and reasonable revised rates, such as direct costs of rendering the service, the inflation rate, and the rates for comparable services, among others.³¹³

Second, as far as *transparency* in the charging of authorization fees are concerned, the public participation provisions of the Revised Administrative Code of 1987 discussed in Part III.C require mandatory notice and hearing in the fixing of rates.³¹⁴ Section 9(2), Book VII, Chapter 2 provides that “[i]n the fixing of rates, no rule or final order shall be valid unless the proposed rates shall have been published in a newspaper of general circulation at least two (2) weeks before the first hearing thereon.”³¹⁵ Paragraph 5.5 of the IRR of A.O. 31, however, provides that public hearing and stakeholder consultations be conducted on the proposed new or revised rates prior to approval “when required by the agency’s charter or other applicable laws” or “where appropriate,” and if not so mandated by law, shall be

³¹² Administrative Order No. 31, § 2 (Oct. 1, 2012) (Phil.).

³¹³ See DOF-DBM-NEDA Joint Circular No. 1-2013, ¶ 5(5.1-5.5) (Jan. 30, 2013).

³¹⁴ A “rate” is “any charge to the public for a service open to all and upon the same terms, including individual or joint rates, tolls, classifications, or schedules thereof, as well as commutation, mileage, kilometerage and other special rates which shall be imposed by law or regulation to be observed and followed by any person.” See Revised Administrative Code, Book VII, Chapter 1, § 2(3), Exec. Order No. 292 (July, 25, 1987). “Fees and charges” are defined in the Implementing Rules and Regulations of Administrative Order No. 31, series of 2012, on the Rationalization of Rates and Fees and Charges, Increase in Existing Rates, and Imposition of New Fees and Charges, as “levies imposed on direct recipients of public goods and services by agencies and GOCCs in the exercise of their mandated regulatory and service delivery functions. See DOF-DBM-NEDA Joint Circular No. 1-2013, ¶ 4(c) (Jan. 30, 2013).

³¹⁵ Revised Administrative Code, Book VII, Chapter 2, § 9(2), Exec. Order No. 292 (July 25, 1987).

subject to the discretion of the head of agency.³¹⁶ As discussed in the preceding section, the prior notice and hearing in the fixing of rates under Section 9(2), Book VII, Chapter 2 of the Revised Administrative Code is mandatory, and this has been affirmed in a number of Supreme Court decisions.³¹⁷

Third, there are enough domestic legal safeguards in Philippine law to adequately meet the requirement that the authorization fee must be based on the *authority* set out in a measure. The general legal basis for the authority to impose fees and charges is the Revised Administrative Code of 1987. Under Section 54, Chapter 12, Book IV of the Revised Administrative Code of 1987, the heads of bureaus, offices, and agencies, upon approval of the concerned department head, shall exercise the continuing authority to revise the rates of fees and charges to recover the costs of rendered services.

Finally, the Reference Paper requirement that authorization fees do not *per se* “restrict the supply of the relevant service” is an express reference to the “less trade restrictive” standard. The “less trade restrictive” standard is considered as one of the elements of a necessity test as it is applied in the GATS context,³¹⁸ and appears only once in the entire Reference Paper. Under a necessity test, the restrictive effect on the supply of a service cannot be assessed as such; it should be evaluated against an objective, *i.e.*, an assessment of the restrictive effect of a given measure against the objective pursued and the contribution to this objective.³¹⁹ There should be no other reasonably available alternative measure that is less trade-restrictive and that can fulfill the legitimate objective sought to be achieved by the contested measure.³²⁰ In the context of authorization fees *per se*, however, the only other alternative to imposing a fee is to not impose a fee, which could not possibly be a viable alternative because the objective of fees and charges is to

³¹⁶ DOF-DBM-NEDA Joint Circular No. 1-2013, ¶ 5.5 (Jan. 30, 2013).

³¹⁷ See Base, *supra* note 107 for a comprehensive analytical discussion on the evolution of Supreme Court jurisprudence on the notice-and-hearing requirements for rate-fixing.

³¹⁸ See Delimatsis, *Determining the Necessity of Domestic Regulations in Services*, *supra* note 68 at 387–397.

³¹⁹ Panagiotis Delimatsis, *Who’s afraid of necessity? And why it matters?* in WTO DOMESTIC REGULATION AND SERVICES TRADE: PUTTING PRINCIPLES INTO PRACTICE, (Aik Hoe Lim and Bart de Meester, eds.), Cambridge University Press (2014), at 108.

³²⁰ See Delimatsis, *Determining the Necessity of Domestic Regulations in Services*, *supra* note 68 at 388.

account for the costs involved in the provision of the public service, or in this instance, the processing of the application for authorization.³²¹

Independence of competent authorities

Under Paragraph 12, Section II of the Reference Paper, Members shall ensure that their respective “competent authorities reach and administer their decisions in a manner *independent* from any supplier of the service for which authorization is required” (italics supplied).³²² Foreign service suppliers seeking to supply their service in other jurisdictions typically want to be assured that decision-making by regulatory authorities on applications for authorization to supply a service is made independently from commercial interests or political influence. As a matter of principle, the independence of a regulator, much like that of an adjudicator, is an essential element of any regulatory regime that is based on the idea of the rule of law.³²³ This is reflected in GATS Article VI:2(a), which obligates Members to maintain independent judicial, arbitral, or administrative tribunals or procedures for the prompt review of administrative decisions affecting trade in services.³²⁴ Where such procedures are “not independent of the agency entrusted with the administrative decision concerned,” GATS Article VI:2(a) requires that such procedures provide for objective and impartial review.³²⁵

The universality of the principle of an independent regulator or decisionmaker is also recognized in Philippine law. The Supreme Court held in *Ang Tibay v. Court of Industrial Relations* that in administrative proceedings or in the exercise of quasi-judicial functions, the administrative tribunal “or any of its judges ... must act on its or his own independent consideration of the law and facts of the controversy, and not simply accept the views of a subordinate in arriving at a decision.”³²⁶ In the Philippines’ FTAs, specifically the PJEP, AANZFTA, ATISA, and RCEP, the language of GATS Article VI(2)(a) on the maintenance of

³²¹ Administrative Order No. 31, § 2 (Oct. 1, 2012); DOF-DBM-NEDA Joint Circular No. 1-2013, ¶ 5.5 (Jan. 30, 2013).

³²² Reference Paper, § II, ¶ 12.

³²³ See Chiara Giorgetti et al., *Independence and Impartiality of Adjudicators in Investment Dispute Settlement: Assessing Challenges and Reform Options*. 21 J. World Investment & Trade 441-474 (June 22, 2020).

³²⁴ GATS art. VI(2)(a).

³²⁵ GATS art. VI(2)(a).

³²⁶ G.R. No. L-46496, Feb. 27, 1940.

independent administrative tribunals has been practically reproduced verbatim.³²⁷ While not strictly part of the GATS Article VI(4) mandate, the discipline on independence of competent authorities adds an important element of administrative due process in the authorization for the supply of a service.

Enquiry points

Lastly, Paragraph 20, Section II of the Reference Paper enjoins Members to “maintain or establish appropriate mechanisms for responding to enquiries from service suppliers or persons seeking to supply a service.”³²⁸ The scope of the enquiries to be directed to the enquiry point would cover measures “relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards affecting trade in services.”³²⁹ Paragraph 20, however, gives Members the option to address such enquiries through either the enquiry and contact points established under GATS Article III (Transparency) and Article IV (Increasing Participation of Developing Countries) or any other mechanisms as appropriate.³³⁰

GATS Article III(4) sets a mandatory requirement for WTO Members to establish enquiry points to respond promptly to requests for information from other Members regarding the measures covered by the general transparency requirement under GATS Article III(1), *i.e.*, “all relevant measures of general application which pertain to or affect the operation of [the GATS]” as well as “[i]nternational agreements pertaining to or affecting trade in services to which a Member is a signatory.”³³¹ In the most recent WTO Secretariat compilation of notified enquiry and contact points as required under GATS Articles III:4 and IV:2, NEDA is still the Philippines’ designated “Enquiry and Contact Point.”³³²

³²⁷ PJEP, Chapter 1, Article 7; AANZFTA, Chapter 8, Article 12(2); ATISA, Article 16.2(a); RCEP, Article 8.15.2.

³²⁸ Reference Paper, § II, ¶ 20.

³²⁹ Reference Paper, § II, ¶ 1.

³³⁰ The obligation to designate contact points under GATS Article IV pertain to developed countries to facilitate developing countries’ access to market information.

³³¹ GATS art. III(1).

³³² Council for Trade in Services, *Contact and Enquiry Points Notified to the Council for Trade in Services*, Note by the Secretariat, WTO Doc. S/ENQ/78/Rev.22 (Feb. 10, 1998), at 30.

Paragraph 20 of the Reference Paper, however, extends the GATS enquiry point requirement on requests for information directly from “service suppliers or persons seeking to supply a service.” Compare this with the Philippines’ FTAs, specifically the PJEPA, which contains a positive obligation to promptly respond to requests for information from “service suppliers of the other Party.”³³³ In the ATISA, Parties are also required to respond to enquiries from “interested persons of the Member States” on any relevant measure covered by the ATISA, but only “to the extent possible and required under its laws and regulations.”³³⁴ In other words, the PJEPA and ATISA confine the universe of “interested persons” or “service suppliers” to those from other signatories or parties to the FTA. The Reference Paper, however, does not qualify whether “service suppliers or persons seeking to supply a service” should come from JSI-SDR Members. Moreover, because of the MFN requirement and its inscription as an additional commitment in the GATS Schedule, service suppliers from other WTO Members who are not signatories to the JSI-SDR can address their enquiries to the enquiry and contact points to be designated under Paragraph 20. In any event, unlike the PJEPA (and to a lesser extent, the ATISA), the Reference Paper does not set a positive obligation for the designated enquiry or contact point to respond promptly to such enquiries.

4. Regaining Regulatory Sovereignty over Authorization to Supply Services

With its adoption and subsequent inscription of the Reference Paper in its GATS schedule, the Philippines will be bound to observe the procedural and substantive disciplines in the process of “authorization for the supply of a service” in its domestic legal framework. As far as the procedural disciplines on the authorization for the supply of a service are concerned, there appears to be no fundamental inconsistency with the Philippines’ applicable statutory and administrative framework. Just as no single government agency exercises a horizontal policy or regulatory mandate across the Philippines’ services sectors, so too is there no single overarching national law or implementing regulation that sets domestic rules specifically on the authorization for the supply of a service.³³⁵

³³³ See PJEPA, Article 79.

³³⁴ See ATISA, § IV, art. 14, ¶ 9.

³³⁵ The Philippines’ domestic legal and policy framework on trade in services and the regulation of services sectors is discussed in Part II. *See supra*, at 24.

Because of its ascribed policy objective to “reduce red tape and expedite business and non-business related transactions in government,”³³⁶ the EODB Act of 2016 is arguably the statute that comes closest to an overarching legal framework that relates to the procedural aspects of authorization. Quite presciently, the EODB Act actually provides for a definition of “authorization” generally, which it describes as “the permission embodied in a document granted by an agency to a natural or juridical person who has submitted an application for government service in order to implement or sanction specific acts or to engage in a particular line of business. The authorization can take the form of a permit, a clearance, a license, a certificate of registration, accreditation, compliance, or exemption, or any similar document.”³³⁷ In those procedural areas where the EODB Act provides little or no guidance, the Revised Administrative Code of 1987 finds application. A non-exhaustive table of relevant provisions in the EODB Act of 2016, Revised Administrative Code of 1987, and other related laws and regulations that correspond to the procedural disciplines on authorization to supply a service is as follows:

SECTION II – DISCIPLINES ON SERVICES DOMESTIC REGULATION	RELEVANT PHILIPPINE LEGISLATION
Scope of the Disciplines Definition of “authorization” (Paragraph 3)	EODB IRR Rule I, Sec. 4(g)
Submission of Applications (for Authorization for the Supply of Services) One competent authority for each application for authorization (Paragraph 4)	EODB Sec. 4 (b). <i>Business One Stop Shop (BOSS)</i> EODB Sec. 11. <i>Streamlined Procedures for the Issuance of Local Business Licenses, Clearances, Permits, Certifications or Authorizations.</i>

³³⁶ EODB Act, § 4(g).

³³⁷ EODB IRR, Rule I, § 4(g)

SECTION II – DISCIPLINES ON SERVICES DOMESTIC REGULATION	RELEVANT PHILIPPINE LEGISLATION
	EODB Sec. 13. <i>Central Business Portal (CBP)</i>
Application Timeframes Permit submission of an application at any time throughout the year or allow a reasonable period to submit (Paragraph 5)	EODB Sec. 11(e): option to renew business permits within the 1st month of the year or the anniversary date of the issuance of the permit EODB Rule VII, IRR Section 7. <i>Adoption of Working Schedules to Service Clients</i>
Electronic Applications and Acceptance of Copies “endeavor” to accept electronic applications for authorization (Paragraph 6.a) accept copies of authenticated documents in place of original documents (Paragraph 6.b)	EODB Sec. 9 (e) Electronic Versions of Licenses, Clearances, Permits, Certifications or Authorizations; EODB Sec. 11 (b) (c) EODB IRR Rule VII Sec. 6. Electronic Versions of Licenses, Permits, Certifications or Authorizations
Processing of Applications Provide an indicative timeframe for processing of an application (Paragraph 7.a)	EODB Act Sec. 9 Accessing Government Services Sec. 9(a) Acceptance of Applications or Requests Sec. 9(b) Action of Offices

SECTION II – DISCIPLINES ON SERVICES DOMESTIC REGULATION	RELEVANT PHILIPPINE LEGISLATION
Provide without undue delay information concerning the status of the application (Paragraph 7.b) Ascertain without undue delay the completeness of an application (Paragraph 7.c) if application is complete, ensure that the processing of the application is completed and the application is informed in writing of the decision (Paragraph 7.d) if application is incomplete, inform the applicant of such fact, identify any additional information needed to complete the application or explain why it is incomplete, and provide an opportunity to provide additional information (Paragraph 7.e) if application is rejected, inform the application of the reasons therefor and the procedures for resubmission if applicable (Paragraph 7.f)	EODB IRR Rule VII Accessing Government Services Sec. 2 Acceptance of Applications and Requests Sec. 3 Action of Offices Administrative Code of 1987, Book VII, Sec. 17 Licensing Procedure EODB IRR Rule I, Sec. 4 (s): definition of “complete requirements” EODB Act Sec. 9 Accessing Government Services Sec. 9(a) Acceptance of Applications or Requests Sec. 9(b) Action of Offices EODB IRR Rule VII Accessing Government Services Sec. 2 Acceptance of Applications and Requests Sec. 3 Action of Offices EODB Sec. 9 (c) Denial of Application or Request for Access to Government Service; EODB IRR Rule VII, Sec. 4 EODB Sec. 10. Automatic Approval or Automatic Extension of License,

SECTION II – DISCIPLINES ON SERVICES DOMESTIC REGULATION	RELEVANT PHILIPPINE LEGISLATION
	Clearance, Permit, Certification or Authorization. Administrative Code of 1987, Book VII, Sec. 18 Non-expiration of License [with reference to any activity of a continuing nature]
Ensure approved authorization enters into effect without undue delay (Paragraph 8)	EODB Sec. 10. Automatic Approval or Automatic Extension of License, Clearance, Permit, Certification or Authorization. EODB IRR Rule VIII, Secs. 1-3

Although the procedural disciplines of the Reference Paper on the process of authorization manifest a discernible regulatory reform and administrative law element and a one-to-one correspondence with relevant provisions of the EODB Act, sector-specific deviations would have to be accounted for. For instance, Paragraph 5 of Section II of the Reference Paper requires Members to permit the submission of an application for authorization at any time throughout the year, or allow a reasonable period to do so. Although there is no uniform general restriction in the EODB Act or the Revised Administrative Code as to the point in time within a fiscal year when an applicant can submit an application, there could be divergences that are specific to the agency or to the LGU. This is understandable because of the institutional boundaries set by their respective organic charters, as well as the operational realities that agencies or LGUs are faced with, which is why implementation flexibilities such as “to the extent practicable” provide some regulatory breathing room. It would nonetheless be useful to take an inventory of such divergences by establishing a form of notification mechanism of procedural differences in various jurisdictions. This could also further improve transparency and better inform the transacting public. To that end, and because of its central role in overseeing the implementation of the EODB Act and in monitoring and evaluating the compliance of agencies covered by the Act,³³⁸ the ARTA could serve

³³⁸ EODB Act, § 17(c).

as the repository of information regarding the consistency of the agencies' and LGUs' authorization procedures with the Reference Paper's procedural disciplines on authorization to supply a service.

As far as the substantive aspects of the domestic regulation disciplines in the Reference Paper are concerned, Paragraph 22 comes closest to setting substantive standards on the contents of the regulation, procedure, or measure that has any relation to the process of authorization to supply a service. Disciplines on the development of regulations and substantive standards have the largest impact on domestic regulatory autonomy and public interest regulation.³³⁹ Although the disciplines on development of measures fall short of requiring a "necessity test" that has been the subject of much tension throughout the negotiations under the WPDR, a rigorous application of such disciplines could still be intrusive enough to place limits on the right and ability of government agencies and LGUs to regulate. This is further compounded by the mandatory character of the obligation and the absence of any implementation flexibilities or best endeavor language that could afford some regulatory elbow room.

Given the possible effect of Paragraph 22 on regulatory policy space, and similar to the implementation of disciplines on prior notice-and-comment, the Philippines would have to exploit the flexibility afforded by the built-in transitional periods. Paragraph 10 of Section I of the Reference Paper states:

Development

Transitional Periods for Developing Country Members

A developing country Member may designate specific disciplines for implementation on a date after a transitional period of *no longer than 7 years* following the entry into force of these disciplines. The scope of the designation may be limited to individual service sectors or subsectors. The transitional periods shall be inscribed in the respective Schedules of specific commitments. A developing country Member requiring an extended transitional period for implementation shall submit a request in accordance with relevant procedures. Members shall give sympathetic consideration to

³³⁹ Krajewski, *supra* note 73, at 31. See also Mohamadieh, *supra* note 280.

granting such requests, taking into account the specific circumstances of the Member submitting the request.” (italics supplied)

Apart from being designated in the revised GATS schedule as subject to a transitional period for its implementation in accordance with the above provision, the disciplines under Paragraph 22 on development of measures can be limited to selected service sectors in the Philippines’ GATS schedule. For instance, service sectors in the Philippines’ GATS schedule with a mature regulatory framework or those whose regulatory agencies oversee a robust regulatory management system that observes good regulatory practices could be candidates for the application of Paragraph 22. As suggested in Part III.A.4, there is no requirement that the Reference Paper shall be inscribed in all the services sectors already committed in the GATS schedule.³⁴⁰

Another source of flexibility may be found in Section I, Paragraph 5 of the Reference Paper: “The disciplines shall not be construed to prescribe or impose any particular regulatory provisions regarding their implementation.”

This paragraph suggests a degree of regulatory flexibility in implementing the Reference Paper disciplines, allowing governments to design their own regulatory frameworks tailored to their specific needs and priorities, and consistent with the WTO’s recognition of the diversity in WTO Members’ regulatory practices.³⁴¹ While the above paragraph primarily serves as an interpretative tool, its true utility may lie in preventing the misuse of the Reference Paper disciplines to easily challenge the substance or content of existing domestic regulations. The reality is that developing countries such as the Philippines still do not possess the institutional maturity or sophistication to adopt the regulatory approaches of developed countries, which often rely on standards or market-based criteria.³⁴² As far as the administrative or procedural aspects of the authorization to supply a service, the Reference Paper sets baseline minimum obligations of result, subject to any built-in flexibilities, which means countries can have some

³⁴⁰ See *supra* note 164.

³⁴¹ Bangura et al., *supra* note 6, at 180.

³⁴² South Centre, *Domestic Regulation of Services Sectors: Analysis of the Draft Negotiation Texts*, Analytical Note, SC/TDP/AN/SV/13 (Apr. 2011).

degree of freedom in the type of regulatory provisions to implement such obligations.

The substantive standards set by Paragraph 22 on the content of government measures related to the process of authorization to supply a service, when coupled with the prior notice-and-comment requirement under Paragraphs 14 to 17 for laws and regulations proposed for adoption, can be a powerful tool in the context of regulatory reform and improving the quality of regulation and delivery of public services. But it can also be used as an effective one-two punch to the government's ability to regulate services in the public interest. Large foreign service suppliers from advanced, services export-oriented countries are more cohesive, organized, and well-funded, and will not hesitate to invest their considerable resources in participating actively in regulatory decision-making to see that their commercial services interests are protected. The substantive standards outlined in Paragraph 22 will be accessible to foreign service suppliers to scrutinize and challenge the content of domestic measures relating to the authorization for the supply of a service, even when such measures are in pursuance of the public interest and other legitimate public policy objectives. One way to counterbalance this was to negotiate a "general exception clause" or a "public interest clause":

Such a clause would need to fulfil the following objectives: First, it would need to give sufficient space for a variety of different concepts of public interest, without, however, leaving the concretisation of the term completely to the discretion of a Member state. This could be achieved by referring to key legal and policy documents of the Member state which establish the public interest. Second the clause would need to contain a clear definition of the concept of public interest to give relevant dispute settlement institutions clear guidance in how to apply the clause. Thirdly, the clause would need to be sufficiently legally binding. The clause would therefore need to be part of the relevant agreement, chapter or binding commitments. The clause should not be a mere interpretative guideline and therefore leave the determination of the scope of the agreement or its chapters in the hands of trade or investment tribunals deciding a specific dispute. (footnote omitted)³⁴³

³⁴³ Krajewski, *supra* note 73, at 35.

A “general exception clause” or “public interest clause” can serve as a rebalancing device in the implementation of the Reference Paper disciplines on domestic regulation. While the Reference Paper echoes the GATS in the right to regulate and to introduce new regulations on the supply of services to meet national policy objectives,³⁴⁴ the disciplines under Paragraph 22 could limit the exercise of that right in the event that the pursuit of certain national policy objectives, particularly those that conflict with the substantive standards under the Reference Paper. A “general exception clause” or “public interest clause” would clarify, for example, that in the implementation of Paragraph 22 of the Reference Paper, the Philippines shall give primary consideration to the covered measure's legitimate public policy objectives, if any, in line with the right to regulate services in the public interest. One useful formulation of the “general exception clause” or “public interest clause” has been suggested: “*Nothing in these Disciplines shall prevent [the Philippines] from developing, adopting, maintaining and implementing non-discriminatory measures regulating services in the public interest as defined by [the Philippines].*”³⁴⁵

Such a clause could be inscribed (contemporaneously with or separately from the Reference Paper) as an additional commitment in the Philippines' Revised GATS schedule. Under GATS Article XVIII, Members may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII, including those regarding qualifications, standards, or licensing matters. In order to conform to GATS Article XVIII, the additional commitment must pertain to: (1) measures affecting trade in services, and (2) not subject to scheduling under Articles XVI or XVII. Although the 2001 Scheduling Guidelines state that additional commitments must be crafted as “undertakings” and not “limitations,”³⁴⁶ the Appellate Body in *U.S. – Gambling* cautioned that the Scheduling Guidelines should only serve as “supplementary means of interpretation” consistent with Article 32 of the Vienna Convention on the Law of Treaties (VCLT).³⁴⁷ In line with Article 31 of the VCLT, an ordinary language interpretation of GATS Article XVIII would not foreclose the inscription of a “general exception clause” or “public interest clause” as an additional

³⁴⁴ Reference Paper, *supra* note 6, ¶ 3, § I; GATS pmbl. ¶ 4.

³⁴⁵ Krajewski, *supra* note 73, at 35.

³⁴⁶ *Supra* note 138, at 7.

³⁴⁷ *US – Gambling*, ¶¶ 175, 178, 196, WTO Doc. WT/DS285/AB/R (April 7, 2005).

commitment. As the JSI-SDR and its participants have cited GATS Article XVIII as the legal basis for inscribing regulatory principles set forth in the Reference Paper in their respective GATS schedules, so too can other WTO Members inscribe other additional commitments on that basis. If Paragraph 22 will be covered by the seven-year transitory period under Paragraph 10 of Section I, then the “general exception clause” or “public interest clause” can take effect upon the expiry of the transitory period.

Conclusion

The Philippines’ decision to sign on to the JSI-SDR and adopt the domestic regulation disciplines in the Reference Paper could be rationalized by its progress in its internal regulatory reform efforts, the progressive evolution of domestic regulation rules in its FTAs, and by a general legal and administrative framework that is not fundamentally incompatible with the regulatory requirements of the Reference Paper. After more than 20 years of multilateral negotiations, three failed draft negotiating texts, and countless Member proposals, it took a bold and controversial move by 59 WTO Members to forge ahead with their own draft set of disciplines that was perhaps not as bad as initially thought:

The Reference Paper is therefore clearly not as problematic from the perspective of domestic regulatory autonomy as some of the earlier drafts discussed in the WPDR and as the sets of domestic regulation disciplines in some free trade agreements which go significantly beyond the scope of the Reference Paper. It can therefore be questioned whether the Reference Paper is a continuance of these developments and in fact an attempt to lock-in the neoliberal trade agenda. However, the Reference Paper also clearly goes beyond “cutting red-tape” by including certain administrative, institutional and transparency requirements which would not only have an impact on administrative capacity and the institutional framework but could potentially also influence the actual contents of regulations.”³⁴⁸

³⁴⁸ Krajewski, *supra* note 73, at 34.

The last sentence of that quoted paragraph should give JSI participants some pause. Because, notwithstanding the transition periods, implementation flexibilities, and best endeavor language scattered throughout the text, the Reference Paper disciplines on domestic regulation have firmly become a part of the international legal order. It represents a significant step forward in advancing what the GATS Article VI(4) mandate seeks to achieve, which would not be diminished by lingering questions about the legitimacy of what has come to be called a “plurilateral” JSI approach to reaching negotiating outcomes on multilateral trade. It was a triumph of pragmatism in trade politics and a referendum against the wisdom of adhering to rigid negotiating mandates as if they represent immutable principles. In the end, like all negotiating outcomes in the WTO, the Reference Paper was a compromise—some of the more substantively intrusive aspects of GATS Article VI(4) were reduced, some transparency aspects were increased—that still led to a final product that will impact regulatory sovereignty over services, regardless of the modality or vehicle in which it was delivered. It also seemed to have validated a theory that Dean Magallona abhorred—that the act of ceding or constraining economic sovereignty through treaty is itself an exercise of sovereignty. If that should be the case, then nothing should prevent states from taking concrete steps to reclaim that sovereignty.

And the struggle continues.