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# International Trade in Services and Domestic Regulations

*Necessity, Transparency,  
and Regulatory Diversity*

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Panagiotis Delimatsis

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Regulatory Diversity*

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## Foreword

This is a very welcome addition to the legal literature dedicated to the study of GATS. Delimatsis provides the first comprehensive account of Article VI GATS, the provision dealing with domestic regulation. Services markets are segmented largely through domestic instruments, trade instruments being often inappropriate for such use. Trade-liberalization is thus, largely a question of managing the divergent regulatory interface across national sovereignties: this book discusses both the current parameters, as well as the direction that future discussions on this score should, in the author's view, take.

The task of the author should not be under-estimated: trade economists have only recently started paying attention to trade in services, and, consequently, there is little theory on which he could rely. The law is a largely incomplete contract (GATS) which, contrary to what is the GATT-case, has to a very little, if not totally uninteresting manner, been completed through case-law. The secondary law, to which the author extensively refers in the latter part of his work, is sector-specific, and, more importantly, of uncertain legal value, WTO adjudicating bodies having provided only scattered and transaction-specific clarifications in this respect so far. Borrowing from the GATT-literature is not highly recommendable either, since, for a number of reasons that the author mentions, 'lock, stock, and barrel' solutions can do more harm than good. GATT case-law, for example, has not, as yet, provided meaningful interpretations of basic concepts such as *likeness*, for products with an important regulatory component: this is very much the case for services-products; the current interpretations concern cases where the goods concerned have little, or no, regulatory component, that is, cases uninteresting for many of the services-products. The author has had to create his own framework within which the disciplines on domestic regulation should be discussed and evaluated, and this is what he presents us with.

Previous literature has made the point that even the maximum promise (national treatment) does not necessarily mean much, since distinctions can always be drawn across two suppliers. National treatment is, of course, the maximum promise (in case no mutual recognition arrangement has been concluded, a rather infrequently used instrument), so, from a trade-liberalization perspective, the situation could be substantially worse. It comes thus as no surprise to read in many accounts that the GATS has provided a framework for trade-liberalization, but has not generated trade-liberalization itself. The author is motivated by this latter part, that is, how can we turn the GATS into a liberalization-generating instrument? This is what brought him to the study of Article VI GATS.

This provision functions as break on the private industry-driven administration of domestic legislation. Although, the experience so far—that the author masterfully explains—does not lend much to optimism, there are good reasons to believe that a different use of this instrument can change the current picture. To achieve this result, the author suggests that we need to re-visit some key concepts (such as necessity, which, loosely speaking, requires WTO Members to enact legislation no more stringent than what is required to achieve its unilaterally defined preferences). Necessity does not question regulatory diversity; it tames, nonetheless, its excesses. The multilateral surveillance of this *regulatory* principle will prove the make-or-break of the approach: courts will need to develop case-law in linear manner, for case-law to acquire legitimacy and complete the law.

It would be harsh, if not totally unfair, to equate the line taken in this work with a plea for judicial activism. The author makes a good case in favour of his approach, reminding us, whenever appropriate, that it would be unrealistic to expect a more promising (from a trade-liberalization perspective) outcome through renewed negotiations. It is, rather, management of the negotiated portfolio in between rounds that holds more of a promise, and management of Article VI GATS will be an important part in this equation.

The author honoured the task he assigned to himself. This book is, in my view, a great addition to the existing literature, a necessary companion to students and practitioners of the WTO alike. It is highly recommendable not only to those interested in trade in services, but to all those interested in trade in general, since the author's analysis is food for thought for the increasingly mainstream case where trade-liberalization occurs across regulated sectors. On a personal level, through his first book, the author has set for himself very high standards that he will have to emulate in his future scholarship.

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## *General Editor's Preface*

It is recognized that services (compared to goods production and other parts of economies) have been steadily increasing in importance, as represented partly by the percentage of major developed country economies which are devoted to services. This percentage now exceeds other portions of those economies, for example reaching 80 per cent for the United States, 68 per cent for Japan, 70 per cent for Germany. Services are also a comparably growing part of world commerce, so trade in services can be an exceedingly important portion of trade liberalization which could in some circumstances assist in large increases in citizen welfare and reductions in poverty.

For these and other reasons, therefore, it was probably inevitable in the 1980s that interest turned to the GATT (General Agreement on Tariffs and Trade) for an institutional model that might yield for service economies the benefits achieved by goods trade liberalization. In the last GATT trade round, the Uruguay Round of 1986–1994, the negotiators opened a new chapter in the world trading system, by adding services to the portfolio of major subjects to be supervised by the UR newly created WTO (World Trade Organization). This new chapter is embodied in a text part of the UR result, titled the GATS (General Agreement on Trade in Services), and some consider this text of rules and negotiating procedures to be potentially the most exciting part of the new WTO.

Yet for reasons which the author of this very welcome book addition to the Oxford University Press series regarding 'International Economic Law', authoritatively explains, the services agreement text has not yet developed into the force for benefiting the world that should be its promise.

The author's Introduction, along with an important foreword by the author's thesis supervisor, significantly establish the framework for the reader's appreciation of this remarkable book, about a very complex and puzzling subject. The author states his motivation—to explore ways that can lead finally to the GATS becoming a liberalization-generating instrument. Clearly this is no easy task, but the author succeeds admirably in setting forth the history and current status of the GATS, while suggesting the importance of the 'regulatory' features of the GATS (especially in Article VI), and noting the major importance of regulatory goals for transparency, and a 'necessity' test.

So far, after more than 11 years of the WTO (and therefore GATS) existence, there remain huge ambiguities in the GATS text. Thus there are important needs for further elaboration, through dispute case interpretations or negotiated text and interpretations. Nevertheless, the dispute settlement history is sparse still, with only five cases (out of a total for WTO case complaints of over 360)

which address services issues, and only one case that is distinctly and centrally a complete services case (namely the very curious case on internet gambling activity).

This book arrives at an important time for the world economy. It will clearly become necessary reading for those whose endeavours are interwoven with international legal and regulatory subjects.

John H Jackson

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My initial interest in the WTO and the GATS is due to Professor Ioannis Tzionas at the Democritus University of Thrace, Greece. He taught me the mechanics and the basic principles of the WTO legal order. At the Europa-Institut in Saarbrücken, Germany, I deepened my knowledge of the WTO law thanks to Professor Werner Meng and his guidance throughout my postgraduate studies. Michael J Hahn graciously answered my numerous questions. Thomas Cottier advised me in several stages of my research. I am also obliged to him because he acted as a liaison so that I could start my PhD in Switzerland. Several discussions with Professor Armin von Bogdandy and the academic staff of the Max Planck Institute for Comparative Public Law and International Law in Heidelberg improved my understanding of the WTO mechanics. In Geneva, my experience with the Appellate Body was unique and full of intense educational moments. For their help and the willingness to share their vast knowledge on WTO issues with me I would like to thank notably Victoria Donaldson and Arun Venkataraman. In Neuchâtel, Pauline Lièvre and Laurent Sigismondi have been supportive from my very first day there. Thanks to stimulating discussions with them I became more mature and open-minded. I owe a great deal to Professor Denis Oswald because he offered me a position at the Centre for Sport Studies in Neuchâtel and thereby allowed me to promptly complete my PhD. In Berne, Pierre Sauve, Marion Panizzon, Martin Molinuevo, Susan Kaplan, and Jane Müller tirelessly contributed to the improvement of the final product.

This work would have never been completed without the help, support, and enthusiasm of my wife, Despina, and my daughters, Melina and Lydia. The inspiration that I draw from them has been enormous. I only hope that they also receive something in return for their generosity to me. The least I can do is to wholeheartedly dedicate this book to them.

Berne, May 2007

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## *Abbreviations*

ACP	African, Caribbean, Pacific
AER	American Economic Review
AJIL	American Journal of International Law
ANZCERTA	Australia–New Zealand Closer Economic Relations Trade Agreement
APEC	Asia-Pacific Economic Cooperation
Art, Arts	Article, Articles
ATC	Agreement on Textiles and Clothing
CFI	Court of First Instance
CML Rev	Common Market Law Review
CTS	Council for Trade in Services
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EC	European Community
ECJ	European Court of Justice
ECR	European Court Reports
ECT	European Community Treaty
EJIL	European Journal of International Law
ENT	Economic Needs Test
EU	European Union
EUT	European Union Treaty
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
G10	Group of Ten
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GPA	Agreement on Government Procurement
IAIS	International Association of Insurance Supervisors
IASC	International Accounting Standards Committee
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
IFAC	International Federation of Accountants
IGBA	Illegal Gambling Business Act
IIE	Institute for International Economics
ILC	International Law Commission

IMF	International Monetary Fund
IOSCO	International Organization of Securities Commissions
ITO	International Trade Organization
JIEL	Journal of International Economic Law
JWT	Journal of World Trade
LDCs	Least-Developed Countries
MFA	Multifibre Agreement
MFN	Most-Favoured Nation
NAFTA	North American Free Trade Agreement
NBER	National Bureau of Economic Research
NGOs	Non-Governmental Organizations
NTBs	Non-Tariff Barriers
OECD	Organization for Economic Co-operation and Development
OJ	Official Journal of the European Communities
QRs	Quantitative Restrictions
PRWP	Policy Research Working Paper (World Bank)
RIA	Regional Integration Agreement
SCM	Agreement on Subsidies and Countervailing Measures
SMEs	Small and Medium Enterprises
SPS	Agreement on the Application of Sanitary and Phytosanitary Measures
TARIC	Integrated Tariff of the European Communities
TBT	Agreement on Technical Barriers to Trade
TPRM	Trade Policy Review Mechanism
TRIMs	Agreement on Trade-Related Investment Measures
TRIPs	Agreement on Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
UNCTAD	United Nations Conference of Trade and Development
USTR	United States Trade Representative
VERs	Voluntary Export Restraints
WHO	World Health Organization
WPDR	Working Party on Domestic Regulation
WPPS	Working Party on Professional Services
WTO	World Trade Organization



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