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Is WTO Members' approach to international standards on services outdated?

This paper reviews the role that international standards on services play in defining WTO Members' rights and obligations. It argues that the growing importance of international standards on services with material implications – both positive and negative – for trade in services, questions the appropriateness of GATS' restrained approach to these standards. It advocates for a new approach that: a) gives international standards greater influence in disciplining WTO Members' exercise of their regulatory autonomy, b) creates new and more effective mechanisms for institutional cooperation with relevant international standard setting bodies, and c) requests Members to encourage private standard setters to observe open and inclusive standard setting practices. It argues that the GATS' embedded flexibility provides ample room for introducing the proposed changes without the need to reform the treaty and highlights the risks of continued rule-making paralysis.

I. Introduction

Multilateral rules for trade in goods prescribed by the Agreement on Technical Barriers to Trade and on Sanitary and Phytosanitary Measures allocate a prominent role to international standards in shaping WTO Members' rights and obligations, they encourage institutional cooperation with international standard setters, and impose obligations on Members to monitor the activities of private standard setters.¹ By contrast, multilateral rules for trade in services contain only a few references to international standards on services with minor implications for Members' rights and obligations, they

¹ These instruments are included in Annex 1A: Multilateral Agreements on Trade in Goods of the Agreement Establishing the World Trade Organization. See also introductory paragraph in Annex I, TBT Agreement, which expressly excludes services from its scope of application.

include only basic provisions encouraging cooperation with international standard setters and no provisions aimed at disciplining strictly non-governmental standard setting bodies.²

Back in the late 1980s, the fear of sailing uncharted waters might have influenced WTO drafters' choice for a more conservative approach to international standards on services. But with over twenty years of multilateral experience with trade in services and considering the significant changes on trade and rule-making patterns that have taken place since the entry into force of the WTO agreements, the case for this stark distinction merits a review.

First, standards on services are growing. Conventional wisdom suggests that the intangibility and idiosyncratic character of service transactions is incompatible with standardisation. However, it is perfectly feasible to formulate performance or process related standards for services by using proxies to quality, safety and reliability such as consumer satisfaction or prescribing requirements applicable, inter alia, to the manner the service is supplied, the type of equipment or technology to be used, or the characteristics of the service supplier or its staff. In fact, standards on services have been playing a crucial role in maritime transport, aviation, telecommunications, professional services, financial services and tourism for many years now, and in recent times there has been an explosion of standards for services supplied by electronic means.³ Moreover, given the unabated forces of technological innovation, new trade and production patterns⁴ and more demanding consumer behaviour resulting

² Sections III, IV and V provide a detailed analysis of GATS references to international standards.

³ For example, the recent growth of offshore industry (Information Technology Outsourcing, Business Process Outsourcing, Knowledge Process Outsourcing) has been accompanied by the emergence of a whole new body of standards developed by industry organizations such as the International Association of Outsourcing Professionals and the Information Systems Audit and Control Association.

⁴ The emergence of Global Value Chains (GVCs) has created a need for quality standards applicable to upstream firms supplying intermediate inputs. See Miroudot, S., D. Rouzet and F. Spinelli (2013), "Trade Policy Implications of Global Value Chains: Case Studies", OECD Trade Policy Papers, No. 161, OECD Publishing. <http://dx.doi.org/10.1787/5k3tpt2t0zs1-en>.

from higher incomes, together with a growing awareness of health, safety and environmental issues⁵, it is reasonable to expect the number of standards on services to continue growing.⁶

Second, technological innovation and the increase of services input in manufacturing processes is blurring the differences between goods and services.⁷ Accordingly, it is becoming increasingly difficult to distinguish standards for goods from standards for services. Many standards for goods have a service component while standards for services often relate to goods.⁸

Third, standards have both positive and negative implications for trade in services. On the one hand, by contributing to harmonize the technical requirements that services and service suppliers have to meet in other markets, international standards on services can have cost saving effects and facilitate trade. On the other hand, the proliferation of product and process-related standards can act as market entry barriers, particularly those imposed by leading firms concentrating large market

⁵ See World Trade Law Report 2013, Factors Shaping the Future of trade, at 276.

⁶ A study on standards on services in the EU identified a five-fold increase in the number of standards on services from the late 1990s to the late 2000s. See Technopolis, Mapping services standardisation in Europe Final Report to the Danish Enterprise and Construction, 2010, at 11.

⁷ See, inter alia, Kommerskollegium, 'At Your Service: The Importance of Services for Manufacturing Companies and Possible Trade Policy Implications' (Kommerskollegium Publications Stockholm, 2010).

⁸ ISO estimates that about 700 of its 19'000 standards are directly related to services, and this number is growing rapidly (see http://www.iso.org/iso/home/news_index/iso-in-action/services.htm, accessed 30/10/15). But there is a huge number of standards on goods that have a direct impact on trade in services. For example, ISO has over 1200 standards that focus on health in many sectors, ranging from dentistry to medical devices, and health informatics to traditional medicines, with material implications for health services. Not to mention standards on energy management, food safety management, quality management, environmental management, information security, risk management, social responsibility, with material implications for a whole spectrum of services ranging from retail distribution to financial services.

power within Global Value Chains (GVCs).⁹ Moreover, the sheer quantity, complexity and heterogeneity of international standards can in itself obstruct trade in services, with a disproportionate impact on small and medium-sized enterprises wishing to participate in GVCs.¹⁰

Finally, international rule-making patterns are changing rapidly.¹¹ Parallel to the stagnation of 'traditional' international law making, there has been a surge of 'informal' regulatory bodies developing not only international standards *strictu sensu*, but other 'informal' regulatory outputs such as international principles, policy guidelines or recommendations offering smart strategies to balance trade liberalisation goals with other public policy objectives.¹² According to some observers, in an

⁹ Ujal Singh Bhatia, 'The globalization of supply chains – policy challenges for developing countries' in Deborah K. Elms and Patrick Low eds, *Global Value Chains in a Changing World* (WTO and Fung Global Institute, 2013), at 316.

¹⁰ See Julia Tijaja 'Standards in Global Value Chains: Rationale, Role and Implications' (Fung Global Institute Real Sector working Paper, 2013) and Kaplinsky, R., "The Role of Standards in Global Value Chains" (World Bank Policy Research Working Paper No. 5396, 2010). See also See Miroudot, S., D. Rouzet and F. Spinelli (2013), **above footnote 4**. According to this study, upstream firms supplying intermediate inputs to several destinations may have to duplicate production processes to comply with conflicting standards, or to incur burdensome certification procedures multiple times for the same product or service.

¹¹ For a horizontal analysis of changing patterns of international rule making see Ayelet Berman et al (eds) (2012) *Informal International Law making: Case Studies* (Torkel Opsahl Academic EPublisher The Hague). For a sector specific analysis of these changes on international trade law see Joost Pauwelyn (2014), 'Rule-Based Trade 2.0? The Rise of Informal Rules and International Standards and how they May Outcompete WTO Treaties', 17 JIEL, 739 and Delimatsis, Paniagotis (2011) 'The Fragmentation of International Trade Law', 45 JWT, 87.

¹² The distinction between 'traditional' international law making and 'informal' international law making is borrowed from Joost Pauwelyn who distinguishes between the two based on the presence (or absence) of certain formalities. These formalities may have to do with outputs (treaties vs standards, guidelines, principles or arrangements), processes (treaty-making in formal international organizations v cooperation within loosely organized networks or forums) or the actors involved (state representatives vs regulators, public agencies,

increasingly complex 'knowledge society' where facts, problems and expertise change and evolve rapidly, the contribution of these informal regulatory outputs to the governance of trade in services may well match, and at times outcompete, that of traditional law rules in terms of predictability, stability and neutrality.¹³

Against this background, the aim of this paper is to discuss the need for a new approach to international standards on services: should WTO Members give greater influence to international standards on services in disciplining their regulatory autonomy? Should new and more effective mechanisms for institutional cooperation with relevant international standard setting bodies and other informal regulatory forums concerned with services be created? Should WTO Members undertake fresh obligations to monitor non-governmental standard setting practices on services? There is not a great deal of literature devoted to explore the role of standards in trade in services agreements.¹⁴

central banks, expert groups, cities, business and NGOs). See Joost Pauwelyn, 'Informal International Law making. Framing the Concept and Research Questions', in Joost Pauwelyn, Ramses A. Wessel and Jan Wouters (eds.) (2012), *Informal International Law making*, Oxford University Press, Oxford, pp. 13–34.

¹³ See J. Pauwelyn (2014), above footnote 11, at 745.

¹⁴ See Joel Trachtman, 'Lessons for the GATS from Existing WTO Rules on Domestic Regulation', in Aaditya Mattoo and Pierre Sauvé (eds), *Domestic Regulation and Service Trade Liberalization* (OUP 2003) and three articles included in the forthcoming *Research Handbook on Trade in Services*, edited by Martin Roy and Pierre Sauvé (Edward Elgar, 2016), namely, Hoekman, Bernard and Petros Mavroidis "A Technical Barriers to Trade Agreement for Services?"; Delimatsis, Panagiotis, "Standardization in Services: New Frontiers in Rule-Making" and Krajewski, Markus, *Domestic Regulation and Services Trade: Lessons from Regional and Bilateral Free Trade Agreements*. On the implications of the recent wave of private standards for the WTO more generally, see Mavroidis, Petros and Robert Wolfe, "Private Standards and the WTO: Reclusive No More (EUI Working Papers, RSCAS 2016/17); Han-Wei Liu "International Standards in Flux: A Balkanized ICT Standard-Setting Paradigm and its Implications for the WTO", *Journal of International Economic Law*, 2014, 17, 551–600; and Konstantinos

It can be argued that giving greater influence to rules external to the WTO legal system, developed by organizations that may have different membership and that follow different rule making processes risks modifying Members' rights and obligations without their consent or altering the balance of a painstakingly negotiated package of reciprocal trade concessions. Similar concerns could be raised about proposals to impose obligations on Members that step beyond the traditional intergovernmental boundaries of the WTO legal system.

Notwithstanding these sensible concerns, there are still compelling reasons to discuss the relationship between GATS and international standards on services. First, WTO Members face opportunity costs for remaining still in a fast changing environment. In this case, such costs consist on failing to take advantage of relevant international standards to facilitate trade in services and failing to discipline protectionist standard setting practices. Second, some WTO Members have already chosen a new approach to international standards on services outside the WTO legal system. Recent preferential trade agreements include provisions on standards on services that clearly illustrate this new trend.¹⁵

At some point WTO members will have to address the growing gap between existing multilateral trade rules and current trade practices or risk rendering the WTO system irrelevant. But is there political appetite for change? WTO's rule making record is extremely poor. With trade clout now dispersed beyond a couple of developed nations, a larger and diverse WTO membership and

Karachalios and Karen McCabe, "Standards, Innovation, and their Role in the Context of the World Trade Organization" (E15 Expert Group on Trade and Innovation Think Piece, International Centre for Trade and Sustainable Development and World Economic Forum, December 2013).

¹⁵ The paper refers to provisions included in the EU-Moldova and EU Georgia Association Agreements, Japan – Australia Free Trade Agreement (FTA), Chile – Hong Kong FTA, Trans-Pacific Partnership, China-Australia FTA and in leaked drafts of Trade in Services Agreement Annexes on financial services, international maritime transport, telecommunications, electronic commerce and domestic regulation available at <https://wikileaks.org/tisa/> (accessed 31/10/15).

increasingly sensitive 'within the border' issues to deal with, the prospects for reverting this trend any time soon are not encouraging. However, the fact that the last Ministerial Conference in Nairobi failed to endorse the Doha Round will inevitably force WTO Members to reflect on new ways to move forward.¹⁶ And there are already signs of efforts in this direction coming from the Working Party on Domestic Regulation.¹⁷ Moreover, the GATS embedded flexibility offers ample manoeuvring room for a coalition of WTO members accounting for a critical mass of trade in services willing to embrace the opportunities and address the challenges stemming from this new trading landscape without the need to embark on a painstaking treaty reform process.

In sum, the paper advocates for a new approach to international standards on services that a) gives international standards greater influence in disciplining WTO Members' discretion to regulate services, b) creates new and more effective mechanisms for institutional cooperation with relevant international standard setting bodies, and c) requests Members to encourage private standard setters to observe open and inclusive standard setting practices. It also suggests ways to implement this new approach within the current GATS framework.

The paper is organised as follows: section II provides an overview of international standards on services, section III discusses GATS' use of international standards for disciplining WTO Members' regulatory autonomy, section IV looks at the mechanisms for institutional cooperation with international standard setters, section V considers the case for monitoring private standard setting practices and section VI concludes.

II. International Standards on Services

¹⁶ See Nairobi Ministerial Declaration adopted on 19 December 2015, par 30.

¹⁷ Most services negotiators supported a call from a number of WTO members to re-engage in developing new disciplines for domestic regulation in services at a meeting of the Working Party on Domestic Regulation on 16 June 2016. https://www.wto.org/english/news_e/news16_e/serv_16jun16_e.htm accessed 23/06/16.

At its very simplest, a standard refers to an agreed, repeatable way of doing something.¹⁸ For the International Organization for Standardization (ISO) a “standard” is a “document established by consensus and approved by a recognized body that provides for common and repeated use, rules, guidelines or characteristics for activities or their results, aimed at the achievement of the optimum degree of order in a given context”¹⁹. A “standard on services” is “a standard that specifies the requirements to be fulfilled by a service, to establish its fitness for purpose”²⁰, namely “the ability of a product, process or service to serve a defined purpose under specific conditions”.²¹

In most cases standards are designed for voluntary use. Even when the standard setting body is a public authority, compliance with standards remains voluntary. It is only when observance of a particular standard is required by law, that compliance with the standard becomes a mandatory requirement.²² Notwithstanding their lack of formally binding effects, in practice observance of relevant standards tends to be high. This is not only because of the efficiency gains that can be achieved by following the practices prescribed by the standards, but also because of the moral suasion that relevant standards command.

¹⁸ Note by the WTO Secretariat, Technical Standards in Services (WTO Document S/WPDR/W/49, 13 September 2012), par. 7.

¹⁹ ISO/IEC Guide 2:2004, definition 3.2

²⁰ Ibid.

²¹ Ibid.

²² The Note by the WTO Secretariat provides the example of the Maritime Transport Act 1994 of New Zealand. Section 452 list a series of standards that may be incorporated by reference into a rule made under the Act. See [above footnote 18](#), par 16.

There is a rich and varied landscape of standard setting bodies (governmental, non-governmental, mixed nature) and standard setting processes (varying degrees of transparency and stakeholder participation) for the adoption of international standards on services.²³

The International Maritime Organization (IMO)²⁴, the International Civil Aviation Organization (ICAO)²⁵, and the Universal Postal Union (UPU)²⁶ are examples of intergovernmental international standard setting bodies. These are fully fledged international organizations that have an established constitution and their own administration. Membership is strictly limited to government representatives. Participation in the standard setting process is open to all Members and decisions are taken either by consensus or voting according to one vote per member.

The International Telecommunication Union (ITU) is an example of an international standard setting body of a mixed nature based on a public-private partnership. It has a membership of 193 countries and over 700 private-sector entities and academic institutions representing a cross-section of the global ICT sector.²⁷ Standardization work is carried out by technical Study Groups (SGs) consisting on representatives of ITU-T membership (private sector representatives and academia). The standard-setting process is based on consensus and it is open to all countries and companies, which

²³ For an illustrative list of standard setting bodies on services see WTO Secretariat note on Technical Standards in Services, [above footnote 18, Annex I.](#)

²⁴ IMO is the global standard-setting authority for the safety, security and environmental performance of international shipping.

²⁵ ICAO sets Standards and Recommended Practices (SARPs) for the safe and orderly development of international civil aviation.

²⁶ UPU's Standards Board develops and maintains standards to improve the exchange of postal-related information between postal operators and promotes the compatibility of UPU and international postal initiatives.

²⁷ See <http://www.itu.int/en/ITU-T/about/Pages/default.aspx> (accessed 30/10/15).

are afforded equal rights to influence the development of ITU-T Recommendations, regardless of their size.²⁸

Likewise, the International Organization for Standardization (ISO) – the world’s largest developer of voluntary international standards – and the International Electrotechnical Commission (IEC) - the world’s leading organization for the preparation and publication of international standards for all electrical, electronic and related technologies -, are made up of members representing national standards bodies, whose nature varies across countries.²⁹ Each member represents a given country and works in pursuance of its national interest. ISO and IEC standards are developed through a multi-stakeholder process with the participation of experts from the industry, consumer associations, academia, NGOs and government, and based on consensus.³⁰

In addition, a new wave of more informal and flexible - but not less relevant - non-governmental standard setting bodies has emerged outside the traditional network of nation-centric standard setting bodies such as the World Wide Web Consortium (W3C)³¹ and the Internet Engineering Task Force (IETF)³². Unlike ISO or IEC, these standard setters are not fully fledged international organizations and their members are not national representatives of different countries. They are informal forums or networks open to all types of organizations (including commercial, educational and

²⁸ Ibid.

²⁹ National standard setting bodies are national standards institutes or similar organizations most representative of standardization in each country. Some of them are strictly private, some are of a mixed public-private nature and some are strictly public.

³⁰ See ISO/IEC Directives Part 1 and Consolidated ISO Supplement (Fifth Edition, 2014).

³¹ See <http://www.w3.org/Consortium/> (accessed 30/10/15)

³² See <https://www.ietf.org/> (accessed 30/10/15).

governmental entities) and individuals that produce standards mainly for e-services services or e-infrastructure in an open process in accordance with 'OpenStand' principles.³³

Finally, there are standard-setting bodies of a strictly industry character, i.e. professional associations or industry organizations that set standards by themselves and for themselves. Usually, membership of these organizations is limited to industry players (corporations or individuals) subject to the payment of a fee. The standard setting process is controlled by industry members and it is not as transparent as those identified above. The standards they produce may or may not be available to the public for free, but they normally charge a fee for the certification process necessary to ascertain the fulfilment of the standard's specifications.³⁴

³³ See Principles OpenStand principles at <https://open-stand.org/about-us/principles/> (accessed 30/10/15).

³⁴ For example, the International Association of Outsourcing Professionals (IAOP) develops standards for the outsourcing industry. IAOP Membership is open to Customer Corporate Members (organizations that are currently outsourcing or are considering outsourcing), Provider/Advisor Corporate Members (outsourcing service providers and advisory firms) and Professional Members (practitioners working in the field of outsourcing as customers, providers or advisors) on a fee basis. The IAOP's standards program is led by the Outsourcing Standards Board -- a separate not-for-profit organization created by IAOP expressly for the purpose of developing and advancing industry-wide standards and certification programs. The IAOP website does not provide information about the standard setting process. Standards are available to the industry at large at no cost. However, IAOP charges a fee for the process to certify the attainment of such standards. See <https://www.iaop.org/Content/19/206/3037/> (accessed 30/10/15). Similarly, the Cloud Security Alliance (CSA) develops standards to help ensure a secure cloud computing environment. CSA is a chartered, member-driven organization open to corporations and individuals with an interest in cloud computing and expertise to help make it more secure. CSA operates the most popular cloud security provider certification program, the CSA Security, Trust & Assurance Registry (STAR). See <https://cloudsecurityalliance.org/about/> (accessed 30/10/15).

III. Alignment of Domestic Regulations to International Standards

The alignment of domestic regulations to international standards contributes to minimize the trade restrictive effect caused by regulatory disparities and to enhance the quality of domestic regulations. But references to rules beyond the control of the parties to a trade agreement can undermine the balance of trade concessions and raise legitimacy concerns. The criterion for the eligibility of relevant international standards and the role assigned to such standards in disciplining WTO Members' regulatory autonomy are key factors in getting the balance right. The following paragraphs examine how both matters are handled by the GATS.

A. ELIGIBILITY OF INTERNATIONAL STANDARDS

Given that there is no such thing as a uniform, coherent and clearly identifiable set of international standards on services, the GATS' criterion for identifying which standards should be taken into account for disciplining WTO Members' regulatory autonomy is crucial. Standards are produced for different purposes, by different types of standard setting bodies and following different standard setting process. Even the very concept of standard is loosely used to identify different types of regulatory outputs.³⁵ And while some standards may result from a transparent and inclusive standard setting process, others may not. A sound eligibility criterion should capture those international standards, guidelines and recommendations that can make a valuable contribution to the liberalisation of trade

³⁵ For example, the expression 'international financial standards' includes not just standards strictu sensu, i.e. specific requirements to be fulfilled by financial services such as auditing and financial reporting, but also principles and recommendations aimed at financial regulators and supervisors concerned with the soundness, stability and well-functioning of financial systems.

in services, and avoid those that either for legitimacy or quality reasons are unsuitable for incorporation into the GATS framework.

Both the GATS and the Accountancy Disciplines refer to “international standards of relevant international organizations” when dealing with disciplines applicable to licensing and qualification requirements and technical standards, but neither of them define ‘technical standards’ or ‘international standards’.³⁶ Discussions amongst Members in the context of the negotiations of disciplines for the Accountancy Sector suggest that ‘technical standards’ refers to “rules specifying the characteristics of the service itself (e.g. the format of financial reports) as well as the manner in which it should be performed (.e.g. the way in which an audit must be performed including the checks that must be performed, the way work should be documented and so on)”³⁷. More recent discussions under the umbrella of the Working Party on Domestic Regulation confirm this meaning.³⁸

The problem with this definition of standards is that it is too narrow to encompass a number of relevant international principles, guidelines or recommendations which neither prescribe the characteristics of a service or the manner in which it should be performed, but could still play a useful role as benchmarks for disciplining domestic regulations. For example, non-binding principles, policy guidelines or recommendations in areas such as financial services³⁹, data protection⁴⁰,

³⁶ See GATS paragraph VI.5 and Disciplines on Domestic Regulation in the Accountancy Sector (WTO Document S/L/63, 15/12/98), par 26.

³⁷ See Note by WTO Secretariat (2012), **above footnote 18**, par 21.

³⁸ Paragraph 9 of the draft text on Disciplines on Domestic Regulation Pursuant to GATS Article VI:4 defines ‘Technical Standards’ as “measures that lay down the characteristics of a service or the manner in which it is supplied”. See Chairman’s Progress Report (WTO Document S/WDP/W/45, 15/04/11), at 55.

³⁹ For a compendium of key international financial standards see <http://www.financialstabilityboard.org/what-we-do/about-the-compendium-of-standards/> (accessed 31/01/16).

⁴⁰ E.g. OECD’s Guidelines on the Protection of Privacy and Transborder Flows of Personal Data a <http://www.oecd.org/sti/ieconomy/oecdguidelinesontheProtectionofPrivacyandTransborderFlowsOfPersonalData>

telecommunications⁴¹, and labour standards.⁴² In particular, there is a growing body of policy guidelines and recommendations relating to internet governance that could be used as benchmarks to combat the regulatory balkanization of the internet at a time of growing governments' appetite to intervene.⁴³

In addition, both the GATS and the Accountancy Disciplines restrict eligible international standards to those adopted by 'relevant international organizations', namely, 'international bodies whose membership is open to the relevant bodies of at least all Members of the WTO'.⁴⁴ The term international 'organization' suggests some degree of formality, including elements such as a constitution, an administration, headquarters, etc.⁴⁵ Yet, there are a number of international standards adopted by more informal - but not less relevant - standard setters that fail to meet this requirement.⁴⁶

[ata.htm](#) (accessed 6/2/16) and APEC Privacy Framework http://publications.apec.org/publication-detail.php?pub_id=390 (accessed 6/02/16).

⁴¹ E.g., the TISA draft Annex on Telecommunications refers to ITU radio regulations and ITU recommendations See Articles 4 and 6 (accessed 6/2/16).

⁴² E.g. the TISA draft Annex on Maritime Services refers to ILO standards. See Article 12 (accessed 6/5/16).

⁴³ See, inter alia, the Declaration of principles of the World Summit on Information Society (WSIS) (http://www.itu.int/dms_pub/itu-s/md/03/wsis/doc/S03-WSIS-DOC-0004!!PDF-E.pdf, accessed 31/10/15), the reports from 'Best Practice Forums' that operate under the umbrella of the Internet Governance Forum (<http://www.intgovforum.org/cms/aboutigf>, accessed 31/10/15) and the Internet Governance Principles adopted by NETmundial (<https://www.netmundial.org/>, accessed 31/10/15).

⁴⁴ GATS footnote 3 and Accountancy Disciplines footnote 2.

⁴⁵ For example, ISO/IEC Guide 2 defines "organization" as a "body that is based on the membership of other bodies or individuals and has an established constitution and its own administration".

⁴⁶ For example, W3C and IETF do not have a typical organizational structure, nor they are incorporated legal persons. There are also a number of international financial standard setters that are simply a forum for

The GATS' eligibility criterion contrasts sharply with that chosen by the SPS Agreement who refers more broadly to "international standards, guidelines and recommendations". In addition, the SPS Agreement identifies, *ex ante*, those standards, guidelines and recommendations that Members must take into account when adopting sanitary or phytosanitary measures.⁴⁷ It also leaves open the door for the SPS committee to identify other appropriate standards, guidelines and recommendations.⁴⁸

Ultimately, it would be for an adjudicatory body to decide on a case-by-case basis whether a particular international standard meets the eligibility criteria set by the Agreement. Assigning a gatekeeper role to the Dispute Settlement Body gives the legal framework the necessary flexibility to adjust to changing circumstances.⁴⁹ An evolutionary interpretation of the eligibility criteria and the legitimacy concerns that stems thereof, could result in an interpretative outcome that captures valuable international guidelines and recommendations other than standards *strictu sensu*. However, the legal regime will only evolve on a haphazard basis at the instigation of the most skilled users of the dispute settlement system, lacking the systemic perspective necessary for addressing this kind of matter.

Outside the WTO, recently adopted preferential trade agreements have chosen a more encompassing language to capture a broader range of relevant international standards, guidelines and recommendations. For example, with respect to the development of protection standards for the

cooperation among financial regulators such as the Basle Committee on Banking Supervision or the Financial Action Task Force.

⁴⁷ SPS Agreement, Article 12.4 and Annex A, paragraph 3(d).

⁴⁸ *Ibid.*

⁴⁹ For example, in the TBT context, a significant change in the Appellate Body's role in controlling the legitimacy of international standards has taken place. Whereas in the *EC-Sardines*, the AB followed a hands-off approach, in the more recent *US-Tuna II* case, it adopted a much more proactive role, reviewing both of source and procedural characteristics of the standard setting process. See Joost Pauwelyn (2014), [above footnote 15](#) at 749-750.

personal data of electronic commerce users, the Japan-Australia FTA request the parties to take into account 'relevant international standards and criteria of relevant international bodies' without further specifications.⁵⁰ Similarly, the EU-Georgia Association Agreement, call parties to make their best endeavours to implement and apply 'internationally agreed standards for regulation and supervision in the financial service sector' in their territory.⁵¹ The relevant provision provides an open ended list of principles, guidelines and recommendations to take into account.⁵²

In sum, GATS' current eligibility criterion fails to capture a growing body of relevant international standards *latu sensu*, developed by non-state actors outside formal international organizations, which can make a valuable contribution to an agreement aimed at the liberalization of trade in services. However, this can be amended without the need to reform the treaty. Political will notwithstanding, there is nothing in the GATS which would prevent Members from incorporating whatever eligibility criteria they deem relevant into the disciplines to be negotiated pursuant to Article VI.4.⁵³

B. USE OF INTERNATIONAL STANDARDS

The GATS allocates only a very limited role to international standards in disciplining Members' regulatory autonomy. First, the scope of domestic measures that are meant to be aligned to international standards is too narrow. Paragraph VI.5 (b) refers to international standards only in connection with the application of licensing and qualification requirements and technical standards.

⁵⁰ Chapter 13, Electronic Commerce, Article 13.8.

⁵¹ Article 116.3

⁵² *Ibid.*

⁵³ In fact, the 2011 Draft Text on Disciplines on Domestic Regulation includes two alternative ways to define the eligibility criteria for international standards, one which is unqualified and another one which is limited to standards developed by relevant international organizations whose membership is open to the relevant bodies of at least all Members of the WTO. See Chairman's Progress Report, Working Party on Domestic Regulation (WTO Document S/WPDR/W/45, 14 April 2011) at page 43.

Other domestic measures such as licensing and qualification procedures or those which are not a technical standards *strictu sensu* but can still create ‘dual regulatory problems’ are left out of the hook.⁵⁴

Second, the GATS falls short of imposing an obligation on Members to base domestic measures on international standards where they are available. Paragraph VI.5 (a) stipulates that when applying licensing and qualification requirements and technical standards, Members must not nullify or impair specific commitments in a manner that does not comply with the criteria outlined in paragraph VI.4 and could not reasonably have been expected at the time the specific commitments were made. In its turn, paragraph VI.5 (b) stipulates that the application of international standards must be taken into account when a Member’s compliance with paragraph VI.5 (a) is being evaluated. But given the difficulties in meeting the non-violation nullification or impairment standard, this provision offers only a weak incentive for Members to apply international standards.⁵⁵ Similarly, the Accountancy Disciplines simply stipulate that at the time of determining whether a technical standard is not more trade-restrictive than necessary to fulfil a legitimate objective “account shall be taken of internationally recognized standards of relevant international organizations applied by that Member”⁵⁶.

This restrained use of international standards for disciplining domestic measures contrasts with that prescribed by WTO instruments applicable to trade in goods. For example, according to the TBT

⁵⁴ For example, on financial services there is a range of measures taken for prudential reasons that do not fit with the definition of technical standard *strictu sensu* and hence would not be required to be aligned in accordance with relevant international financial standards.

⁵⁵ The non-violation nullification or impairment standard is extremely difficult to meet, as shown by the WTO caselaw (see, e.g. *Japan- Films* and *EC-Asbestos*). Hence, paragraph VI.5(a) has been rightly described first and foremost merely as a standstill obligation in the sense that only new regulatory measures subsequent to scheduling are likely to be disciplined. See Joel P. Trachtman (2003), above footnote 4 at 71.

⁵⁶ Accountancy disciplines, paragraph 26.2

Agreement, when relevant international standards are available or their completion is imminent, Members *shall* use them as a basis for their technical regulations.⁵⁷ This Agreement also provides that technical regulations adopted in accordance with relevant international standards shall be rebuttably presumed not to create an unnecessary obstacle to international trade.⁵⁸ Similarly, the SPS Agreement, compels Members to base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist.⁵⁹ It also includes a rebuttable presumption of compliance with the necessity test and other obligations for sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations.⁶⁰

Outside the WTO, recently adopted preferential trade agreements have chosen to impose stricter obligations on Members to align domestic regulations to international standards on services. For example, the Parties of the EU-Moldova Association Agreement agreed that the development of electronic commerce “must be fully compatible with the highest international standards of data protection, in order to ensure the confidence of users of electronic commerce”.⁶¹ The parties to the China - Australia FTA agreed “to maintain domestic legal frameworks governing electronic transactions based on the UNCITRAL Model Law on Electronic Commerce 1996 and taking into account, as appropriate, other relevant international standards”⁶². A recent draft of the Trade in Services Agreement (TISA) Annex on Telecommunications creates a safe harbour according to which measures based on relevant international standards are rebuttably presumed not to create unnecessary obstacles to trade.⁶³ Using non-justiciable language, the parties to the Chile Hong Kong FTA agreed to

⁵⁷ Article 2.4, TBT Agreement.

⁵⁸ Article 2.5 TBT Agreement.

⁵⁹ Article 3.1 SPS Agreement.

⁶⁰ Article 3.2 SPS Agreement.

⁶¹ Article 254.2.

⁶² China-Australia FTA, Chapter 12 Electronic Commerce, Article 12.5.

⁶³ See Article 4.3. Document date: 1/10/15, available at

make their “... best endeavours to implement and apply in its Area internationally agreed standards for regulation and supervision in the financial services sector and for the fight against money laundering”.⁶⁴ Similarly, the parties to the China-Australia FTA agreed, to the extent possible, to “take into account international standards and the criteria of relevant international organisations” for the development of data protection standards.⁶⁵

By imposing more demanding obligations on Members to use international standards, filtered, of course, through adequate eligibility criteria, the GATS could be in a better position both to facilitate trade in services and to be a conduit for high regulatory standards concerned with a wide range of public policy issues. But the ongoing negotiations of disciplines on domestic regulation pursuant to GATS Article VI:4 reflect different views among Members on the way forward on this matter.⁶⁶ Some Members have submitted proposals for more demanding obligations to use international standards

https://wikileaks.org/tisa/document/20151001_Annex-on-Telecommunication-Services/20151001_Annex-on-Telecommunication-Services.pdf (accessed 18/06/16).

⁶⁴ Chapter 12 Financial Services, Article 12.7

⁶⁵ China-Australia FTA, Chapter 12 Electronic Commerce, Article 12.8.2.

⁶⁶ While the Chair’s March 2009 draft text uses a best endeavour formula (‘... Members ‘should’ take international standards into account when formulating their technical standards...), alternative proposals have been tabled that both water down such duty (‘...Members are encouraged to take international standards into account...’) and strengthen it (‘... Members shall take international standards into account ...’). See Chairman’s Progress Report S/WPDR/W/45, 14 April 2011, par. 41.

and more significant incentives for those who use them⁶⁷, while others have called to limit the role of international standards in determining GATS' right and obligations.⁶⁸

Even if Members fail to agree a consensual text under the umbrella of the Working Party on Domestic Regulation, there are alternative ways to allocate international standards a more prominent role in disciplining Members' right to regulate the supply of services. For example, WTO Members accounting for a critical mass of trade in financial services could undertake a commitment to base their prudential measures in accordance relevant international financial standards and record this as an additional commitment in their schedules of specific commitments via Article XVIII. The same strategy could be applied to international standards, principles, guidelines or recommendations relevant for other service sectors.

IV. Institutional Cooperation with Standard Setting Bodies

Improving the institutional cooperation with relevant international service standard setters could enable non-expert trade diplomats to benefit from standard setters' experience in tackling market

⁶⁷ See Communication from Mexico and Switzerland, Proposal for Disciplines on Technical Standards in Services, paragraph 4 ' (WTO Document S/WPDR/W/32/Rev.1, 28 October 2005) including a mandatory duty to use international standards as a basis for domestic technical standards (paragraph 10) and a broad safe harbour for domestic technical standards that conform to an international standard, which are presumed to be consistent with the Disciplines on Domestic Regulation.

⁶⁸ See Communication from Antigua and Barbuda, Belize, Fiji Islands, Guyana, Papua New Guinea, The Maldives, Solomon Islands and St Kitts And Nevis, The GATS and the Annex on Financial Services International Regulations and Financial Services (S/FIN/W/29/Rev.1, 17/09/03). Concerned about their limited participation in the standard-setting process and the disproportionate implementation costs they would have to bear compared with developed countries, the proponents call to resist attempts to give international financial standards any role in determining GATS' right and obligations.

failures affecting services markets. It could also contribute to mitigate concerns over the legitimacy of the standard setting processes. By the same token, standard setters could benefit from a better understanding of the intricacies of the multilateral regulatory framework for trade in services.

The TBT and SPS Agreements provide an enabling framework for institutional cooperation with international standard setting bodies. For example, the SPS Agreement mandates the Committee on Sanitary and Phytosanitary Measures to maintain close contact with relevant international standard setting bodies with the objective of securing the best available scientific and technical advice for the administration of the Agreement and to avoid unnecessary duplication of efforts.⁶⁹ It also grants the Committee the right to invite the relevant international organizations to examine specific matters with respect to a particular standard, guideline or recommendation.⁷⁰ Similar provisions can be found in the TBT Agreement.

For trade in services, however, the current framework for institutional cooperation with relevant international standard setters is minimal. The GATS mandates the General Council to “make appropriate arrangements for consultation and cooperation with the United Nations and its specialized agencies as well as with other intergovernmental organizations concerned with services”.⁷¹ But in practice, the scope of institutional cooperation, where it exists, is limited to granting Intergovernmental Organizations (IGOs) observer status to attend meetings of GATS bodies.⁷²

⁶⁹ Article 12.3 SPS Agreement.

⁷⁰ Article 12.6 SPS Agreement.

⁷¹ Article XXVI, GATS.

⁷² IGO observers may be invited to speak at meetings and may have the right to receive relevant documentation, but not to participate in decision making. So far, only twelve IGOs have observer status to attended meetings of GATS bodies. And within them, just three have within their mandate, the setting of international standards for services: ITU, ICAO and UPU. See http://www.wto.org/english/thewto_e/coher_e/coher_e.htm, accessed 12/11/14

Pursuant to Article V of WTO Agreement, Article XXVI of GATS and section 7 of the Annex on Telecommunications⁷³, the WTO concluded a cooperation agreement with ITU.⁷⁴ The agreement provides for cooperation in areas of common interest in telecommunications within their respective mandates, it grants reciprocal observer status to each other's secretariat to attend meetings of each other's relevant bodies.⁷⁵ It also provides for the exchange of agendas and documents of relevant meetings, cooperation between the staffs of the two institutions on technical, regulatory and policy issues related to trade in telecommunications, and cooperation in technical assistance for developing countries.⁷⁶ Similar proposals were put forward to conclude cooperation agreements with UPU and ICAO but were never adopted.⁷⁷

Paragraph VII.5 of GATS calls on Members "In appropriate cases, to work in cooperation with relevant intergovernmental and nongovernmental organizations towards the establishment and adoption of common international standards and criteria for recognition and common international standards for the practice of relevant services trades and professions". This provision is particularly suitable for the professional sector, where self-regulatory bodies play a fundamental role in the mutual recognition of qualifications, licenses, education and experience necessary for the supply of services in this sector. But its impact is undercut by the use of conditional language and the failure to define the scope of cooperation in more specific terms.

⁷³ Paragraph 7(a), Annex on Telecommunications recognizes the importance of international standards for global compatibility and inter-operability of telecommunication networks and services and calls Members to promote such standards through the work of relevant international bodies, including ITU and ISO.

⁷⁴ See WTO Document S/C/11, 21/09/00.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ See JOB No. 865, dated 16 February 2000 and Communication from the International Civil Aviation Organization (ICAO) (WTO Document S/C/W/199, 2 October 2001).

Looking ahead, there are no legal impediments in the GATS that would prevent Members from deepening institutional cooperation with relevant international service standard setters. For example, the Council of Trade in Services could invite representatives from international standard setting bodies to attend their meetings, to co-organize joint technical symposiums to discuss current policy issues of mutual interest, to exchange relevant technical information on a regular basis, and so forth. The WTO Secretariat could also play a catalyst role in fostering cooperation with relevant international standard setting bodies.⁷⁸

Yet, so far, efforts to move in this direction have encountered stiff resistance among some WTO Members. Discussions about the relationship between macro-prudential regulation and GATS rules held in the Committee on Trade in Financial Services (CTFS) shortly after the end of the financial crisis illustrate this point. A proposal to invite representatives from international standard setting bodies to inform the discussions was blocked on the grounds that the purpose of the GATS is to further the liberalization of trade in services, not the regulation of services⁷⁹, that other international organizations should not participate in the discussions of a strictly Member-driven organization such as the WTO, and that no clear benefits for the WTO could be identified.⁸⁰

In order to establish new and more effective cooperation mechanisms with relevant international standard setting bodies, rather than reforming the GATS, WTO Members will have to overcome their fears to be changed from outside and recognize the increasing relevance of non-state actors for

⁷⁸ The WTO Secretariat currently maintains working relations with over fifty international organizations with competence or direct interest in trade in services, including some international standard setting bodies such as ISO. See https://www.wto.org/english/thewto_e/igo_obs_e.htm (accessed 26/10/15).

⁷⁹ See, inter alia, remarks by Hong Kong and Costa Rica, Report of the Meeting held on 27/06/12 (S/FIN/M/76, 30/07/12), paras. 14 and 45.

⁸⁰ See report of the Meeting of the Council for Trade in Services held on 1/10/12 (S/FIN/M/74, 16/11/12), paras 14, 21, 26, 29, 42 and 45.

international economic governance and the value added of relevant international standards for advancing GATS objectives.

V. Monitoring Standard Setting Practices

Some private standards can raise barriers to entry by increasing compliance costs, or they can reduce variety in order to exploit economies of scale, which may, in some circumstances, lead to a reduction in trade.⁸¹ In some sectors, a private certification is almost a *sine qua non* condition for market access.⁸² Also, in the absence of inclusive and transparent standard setting processes, standards may not reflect the interests of all relevant stakeholders or, even worse, they can be deliberately used as a protectionist device.⁸³

The TBT Agreement uses a combination of three types of measures to discipline, indirectly, non-governmental standard setting bodies.⁸⁴ First, the adoption of a Code of Practice for the Preparation, Adoption and Application of Standards, open to acceptance by any standardizing body, that stipulate

⁸¹ See Swann, G. P. (2010), "International Standards and Trade: A Review of the Empirical Literature", OECD Trade Policy Working Papers, No. 97, OECD Publishing.

⁸² See, inter alia, standards adopted by the International Association of Outsourcing Professionals or the Cloud Security Alliance (CSA).

⁸³ For example, when standards are based on practices which dominant stakeholders have already adopted or are better suited to follow, the standard might only solidify the status quo and make it difficult for new competitors to join the market. See WTO Secretariat Note on Technical Standards (2012), above footnote 18, paragraph 29.

⁸⁴ It must be noted that non-governmental bodies are defined as a "[b]ody other than a central government body or a local government body, including a non-governmental body which has legal power to enforce a technical regulation" (TBT Annex 1.8). NGOs which have not been conferred such power by the state are not subject to the TBT agreement.

minimum procedural requirements for the adoption of standards.⁸⁵ Second, the obligation of Members to take reasonable measures to ensure that non-governmental standardizing bodies within their territories accept and comply with the Code of Practice.⁸⁶ Third, the obligation of Members not to take measures which have the effect of requiring or encouraging such standardizing bodies to act in a manner inconsistent with the Code of Good Practice.⁸⁷

In addition, the TBT Committee adopted a Decision on Principles for the Development of International Standards to ensure the quality, relevance and representativeness of international standards.⁸⁸ The principles outline a series of procedural requirements concerning transparency, openness, impartiality and consensus, relevance and effectiveness, coherence and developing country interests.⁸⁹ The Decision falls short of imposing any direct obligation on international standard setting bodies to follow these principles. It simply stipulates that these principles 'should be observed' when international standard setting bodies elaborate international standards.⁹⁰

By contrast, article I of the GATS provides that the Agreement "applies to measures by Members affecting trade in services". It further provides in Article I:3 (a) that "measures by Members" means measures taken by: "(i) central, regional or local governments and authorities; and (ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities". A standard, whether voluntary or otherwise, falls under the scope of the GATS as long as

⁸⁵ For example, make every effort to avoid duplication of, or overlap with, the work of other standardizing bodies, before adopting a standard allow a minimum period for the submission for comments, duty to take comments made into account, etc.

⁸⁶ Article 4.1, TBT Agreement.

⁸⁷ *Ibid.*

⁸⁸ G/TBT/9, 13 November 2000, para. 20 and Annex 4.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

it is adopted by a Member and it affects trade in services.⁹¹ But standards adopted by non-governmental standard setting bodies which do not exercise powers delegated by public authorities are not reached by GATS disciplines.⁹² This is particularly problematic in light of the increasing predominance of private standards in many service sectors.⁹³

To fill this loophole, WTO Members could negotiate disciplines on domestic regulation pursuant to Article VI.4 similar to those prescribed by the TBT Agreement. In fact, the draft text of disciplines on domestic regulation currently under negotiation includes a provision that ‘encourages’ Members to ensure maximum transparency of relevant processes relating to the development and application of domestic and international standards by non-governmental bodies, although it falls short of imposing an obligation on Members to do this.⁹⁴ However, the Chairman’s report indicates that Members have not agreed whether the disciplines to be negotiated should reach voluntary standards or not and if so, how can Members effectively discipline action by private actors outside the overall scope of the GATS.⁹⁵

Alternatively, Members accounting for a critical mass of trade in services could undertake a commitment to encourage non-governmental bodies to adopt the principles set out in the TBT Code

⁹¹ See Note by WTO Secretariat, above footnote 1, at 32.

⁹² There is only one example whereby GATS disciplines refer indirectly to private standard setting bodies and it is limited to transparency issues. Paragraph 4 of the Annex on Telecommunications imposes on Members the obligation to make publicly available information on bodies responsible for the preparation and adoption of standards affecting access to and use of public telecommunications transport networks and services.

⁹³ Pauwelyn describes this phenomenon as the risk of under-inclusion of WTO obligations. See J Pauwelyn, (2004) ‘Non-Traditional Patterns of Global Regulation: Is the WTO ‘Missing The Boat’?’, paper Presented at the European University Institute, Florence, 24-25 September 2004 Conference on Legal Patterns of Transnational Social Regulations and Trade.

⁹⁴ See Chairman’s Progress Report S/WPDR/W/45, 14 April 2011, par 40.

⁹⁵ Ibid, para 13.

of Good Practices for standards development⁹⁶ and record this as an additional commitment in their schedules of specific commitments via Article XVIII. They could also commit to ensure that domestic competition law is enforced to prevent standard setting bodies from adopting anti-competitive standards. The Reference Paper on Telecommunications is an example of how this could be done.⁹⁷

In sum, there is no legal restriction in the Agreement that would prevent Members from adopting measures designed to monitor non-governmental standard setting practices. Provided there is political will, there is room for improving the current legal system to meet the challenges stemming from changes on international rule-making patterns without the need to reform the agreement.

VI. Concluding Observations

The rising importance of standards on services with material implications - both positive and negative - for trade in services, brings to light the gap between trade rules and a fast-changing trade and rule-making environment. A quick review of recent preferential trade agreements suggests that a trend to close this gap is gaining ground, but has not yet reached the shores of Lac Léman in Geneva.

The failure of the Nairobi Ministerial Conference to endorse the Doha Round forced a time of reflection on how to move forward. It is thus timing to flag the opportunity costs for remaining still in

⁹⁶ See Communication from Mexico and Switzerland, Proposal for Disciplines on Technical Standards in Services, paragraph 4: 'Recognising the role of business associations involved in the exercise of standard setting impacting trade even in the absence of delegated power by the competent governments and authorities, Members encourage these non-governmental bodies to adopt the principles set out in the Code of Good Practices, Annex III of the Agreement on Technical Barriers to Trade.' (WTO Document S/WPDR/W/32/Rev.1, 28 October 2005).

⁹⁷ The Paper contains some regulatory principles for telecommunications, including a comprehensive competition safeguard provision that mandates Members to maintain appropriate measures for the purpose of preventing telecom suppliers from engaging in or continuing anti-competitive practices. Some Members made a commitment to observe these principles by recording such commitment as an additional commitment in their schedule of concessions.

a fast changing environment. In this case in particular, such costs consist on failing to take advantage of relevant international standards to facilitate trade in services and failing to discipline protectionist standard setting practices.

This paper sought to make the case for a review of the relationship between the GATS and international standards on services and argued for a new approach that a) gives international standards greater influence in disciplining WTO Members' discretion to regulate services, b) creates new and more effective mechanisms for institutional cooperation with relevant international standard setting bodies, and c) requests Members to encourage private standard setters to observe open and inclusive standard setting practices.

The GATS' embedded flexibility offers ample manoeuvring room for implementing these suggestions without the need to reform the treaty. The broad mandate to negotiate disciplines on domestic regulation pursuant to Article VI.4 offers an opportunity to review the eligibility criteria for the international standards to be taken into account and to allocate a more prominent role to those standards in disciplining Members' regulatory autonomy.

Alternatively, a coalition of WTO members accounting for a critical mass of trade in services willing to embrace the opportunities and address the challenges stemming from the rise of standards on services, could undertake a specific commitment to base domestic measures such as licensing or qualification requirements and procedures, technical requirements or prudential measures on relevant international standards and record it in their schedules of specific commitments via Article XVIII. They could also negotiate additional commitments to encourage private setters to observe a code of practice calling for open and inclusive standard setting practices and to enforce competition law to tackle anti-competitive standard setting practices. In addition, the paper identified practical ways for improving the framework for institutional cooperation between GATS bodies and international standard setters.