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## MEMORANDUM

TO: Kay Wilkie, Chair, Intergovernmental Policy Advisory Committee (IGPAC)  
FROM: Jonathan Allen, Robert Stumberg  
DATE: March 1, 2007 – *Draft “6” for circulation*  
RE: GATS proposal that domestic regulations must be “objective”

### INTRODUCTION

The General Agreement on Trade in Services (“GATS”) authorizes negotiations to create disciplines on domestic regulation, which could cover qualification requirements and procedures, technical standards and licensing requirements.<sup>1</sup> Most of the disciplines proposed to the WTO’s Working Party on Domestic Regulation (“WPDR”) would require regulations to be “*based on objective and transparent criteria, such as competence and the ability to supply the service.*”<sup>2</sup> GATS does not define “objective.”

This memo illuminates the range of possible meanings that a WTO dispute settlement body could give to the “objective criteria” requirement. Out of five possible definitions, four would probably conflict with domestic law and thus encroach on state sovereignty. This memo applies the definitions to U.S. legal standards, but the analysis could be the same for other legal systems.

### ANALYSIS

If the “objective criteria” requirement is agreed to by GATS negotiators, a range of domestic laws could be challenged. Imagine that a foreign country files a trade complaint against the United States, alleging that the “just and reasonable” rate requirement of the Federal Power Act violates GATS because it is not based on “objective criteria.” The country argues that the discretion inherent in determining whether an electricity rate is “just and reasonable” is too subjective, not relevant to the ability to provide the service, and a restriction on trade.

Would compliance with the “objective criteria” requirement mandate changing this 50-year-old U.S. legal standard? What about 70 years of rational-basis review for

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<sup>1</sup> General Agreement on Trade in Services art. VI:4–5, Apr. 15, 1994, 33 I.L.M. 44 (1994) [hereinafter GATS], *available at* [http://www.wto.org/English/docs\\_e/legal\\_e/legal\\_e.htm#services](http://www.wto.org/English/docs_e/legal_e/legal_e.htm#services) (last visited Jan. 24, 2007) (emphasis added).

<sup>2</sup> GATS art. VI:4(a); *see, e.g.*, Working Party on Domestic Regulation, Note by the Chairman, Disciplines on Domestic Regulation Pursuant to GATS Article VI:4 Consolidated Working Paper, JOB(06)/225, July 2006, ¶ F.1 (“Each Member shall ensure that licensing requirements are pre-established, objective, transparent and publicly available”).

economic regulation? Would review of administrative agency decisions require stricter scrutiny than merely to assure that a standard is not arbitrary? Would delegation to those agencies no longer permit broad discretion and imprecise standards?

The WTO dispute settlement body that decides these complaints would not begin with established authority on the meaning of “objective” because little analysis has been written in relation to the requirement in GATS. For example, the U.S. submission to the Working Party on Domestic Regulation on Article VI:4 addresses only “transparency”; but it is silent on the issue of “objectivity.”<sup>3</sup> The July 2006 WPDR Chairman’s note summarizes the status of the negotiations and includes the “objectivity” requirement in several places, but it does not discuss the meaning of “objectivity.”<sup>4</sup>

## I. How Would a Dispute Panel Give Meaning to “Objective”?

The Appellate Body in *U.S. – Gambling* outlined the analysis to give meaning to an ambiguous term in a trade agreement.<sup>5</sup> Interpreting 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.”<sup>6</sup> A treaty must be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>7</sup>

Following the Vienna Convention and the framework developed in *U.S. – Gambling*, a dispute settlement panel may consider:

- the ordinary meaning of the word<sup>8</sup>;

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<sup>3</sup> See Communication From the United States, *GATS Article VI:4: Possible Disciplines on Transparency in Domestic Regulation*, S/WPDR/W/4 (May 3, 2000).

<sup>4</sup> WPDR Chairman, *Disciplines on Domestic Regulation Pursuant to GATS Article VI:4 Consolidated Working Paper*, JOB(06)/225 (July 2006)

<sup>5</sup> See Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶ 158–213, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter Appellate Body Report, *U.S. – Gambling*]. The Appellate Body analyzed the meaning of “sporting” to determine if the United States had excluded gambling services from its specific commitment on “Other Recreational Services (except sporting).”

<sup>6</sup> *Id.* ¶ 159 (emphasis in original) (citation omitted).

<sup>7</sup> Vienna Convention on the Law of Treaties art. 31(1), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention], available at [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf) (last visited Jan. 28, 2007), *quoted in* Appellate Body Report, *U.S. – Gambling* ¶ 164.

<sup>8</sup> Appellate Body Report, *U.S. – Gambling*, ¶ 164. The Appellate Body stated that the Panel should start with the dictionary definition but will often need to move to other sources to give meaning to the term in the context of the agreement. *See id.* (citing Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, ¶ 7.22, WT/DS152/R (Jan. 27 2000) (“For pragmatic reasons the normal usage . . . is to start the interpretation from the ordinary meaning of the “raw” text of the relevant treaty provisions and then seek to construe it in its context and in the light of the treaty's object and purpose.”)).

- the context in which the word is used and the purpose of the agreement<sup>9</sup>;
- subsequent agreements between the parties,<sup>10</sup> including Members' schedules<sup>11</sup>;
- any special meaning of the word if evidenced by the parties' intent<sup>12</sup>; and
- if still ambiguous, any secondary means of interpretation.<sup>13</sup>

Following this framework, there are at least five possible definitions that a dispute settlement body could give to the “objective criteria” requirement in GATS Article VI:4. Each one is supported by WTO-member documents using the word “objective,” and each one varies in its intrusive affect on domestic legal standards.

## II. What *Could* “Objective” Mean?

Preliminary research indicates five possible definitions:

- not arbitrary
- not biased
- relevant to the ability to perform or supply the service
- not subjective
- the least-trade-restrictive alternative.

Only the first definition is consistent with U.S. standards; the other four definitions conflict with them. This section presents each definition and its supporting WTO authority, followed by examples of U.S. legal standards that may not withstand a trade challenge if that definition were adopted. The definitions are ordered from least to most intrusive effect on U.S. law.

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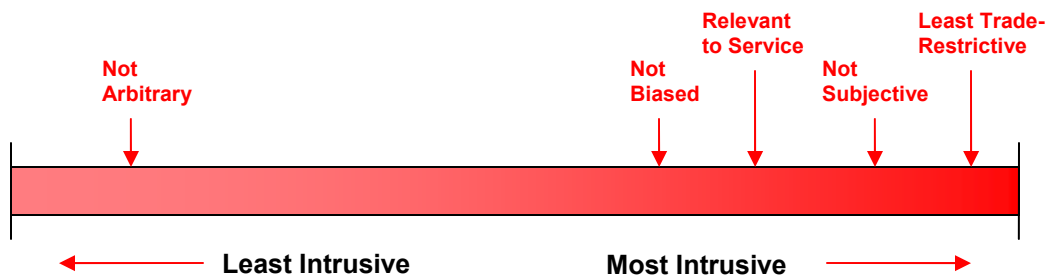
<sup>9</sup> Under the Vienna Convention, a document used as context to give meaning to the ambiguous term must be either “an agreement relating to the treaty” or “an instrument which was made by one or more of the parties . . . and accepted by the other parties.” Vienna Convention art. 31(a)–(b); Appellate Body Report, *U.S. – Gambling* ¶¶ 169–78 (finding certain background documents used in preparation of GATS schedules were not context as defined by Art. 31(a)–(b) but could be used as secondary means of interpretation under Art. 32).

<sup>10</sup> See Vienna Convention art. 31(3)(a); Appellate Body Report, *U.S.–Gambling*, ¶ 190.

<sup>11</sup> See Vienna Convention art. 31(3)(b) (allowing use of “subsequent practice in the application of the treaty”); Appellate Body Report, *U.S. – Gambling*, ¶ 182 (stating “other Members’ Schedules constitute relevant context for the interpretation” of the U.S. schedule, and “Members’ Schedules are “an integral part” of the GATS”).

<sup>12</sup> See Vienna Convention art. 31(4).

<sup>13</sup> See *id.* art. 32; Appellate Body Report, *U.S. – Gambling*, ¶ 196.



### A. Not Arbitrary

The requirement that a measure be based on “objective criteria” could simply mean that the measure cannot be arbitrary. If the member can support its standard with a reason, the measure would be based on “objective criteria.”

There is support for this interpretation in three countries’ existing GATS schedules. Discussing the terms for setting rates for the interconnection of public telecommunication transport networks, the European Communities’ schedule states: “Different terms, conditions and rates may be set in the Community for operators in different market segments, on the basis of non-discriminatory and transparent national licensing provisions, where such differences *can be objectively justified because these services are not considered ‘like services.’*”<sup>14</sup>

In this context, the EC considers its rate-setting to be “objective” in the sense that it can explain differences in regulatory treatment based upon differences in the service suppliers being regulated. However, note that the EC felt compelled to state its approach to different treatment of different service suppliers as a limit on its commitments within the GATS schedule. This implies that the EC felt that its differential treatment could have been challenged on “objectivity” grounds based on the telecom reference paper without this limit on its commitment.

The EC’s explanation parallels language elsewhere in GATS. Article XIV conditions the general exceptions to a potential violation on “the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination.”<sup>15</sup> Because a dispute panel would use the entire agreement to provide context in which to interpret the word “objective,” this provision may be used to support the “not arbitrary” definition.

<sup>14</sup> European Communities and Their Member States, *Schedule of Specific Commitments, Supplement 3*, GATS/SC/31/Suppl.3, at 8 n.7 (Apr. 11, 1997) (emphasis added). Iceland and Norway also include this limitation in their schedule. See Iceland, *Schedule of Specific Commitments, Supplement 1*, GATS/SC/41/Suppl.1, at 4 n.2 (Apr. 11, 1997); Norway, *Schedule of Specific Commitments, Supplement 3*, GATS/SC/66/Suppl.3, at 4 n.2 (Apr. 11, 1997). At least one other member is now including the limitation in its revised offer. See, e.g., Liechtenstein, *Revised Offer*, TN/S/O/LIE/Rev.1, at 35 n.7 (Jul. 20, 2005) (same).

<sup>15</sup> GATS Art. XIV.

The “not arbitrary” definition could be consistent with many U.S. legal standards. Judicial review of administrative agency decisions is often limited to whether the agency decision was “arbitrary, capricious, or not otherwise in accordance with the law.”<sup>16</sup> Rational-basis deference to economic legislation requires that “legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.”<sup>17</sup>

Nevertheless, the “not arbitrary” definition could be interpreted in a way that actually conflicts with U.S. law. In a GATT case, the Appellate Body stated that an importing country was not in danger of “arbitrary or unjustifiable discrimination” when it required an exporting country to adopt a program that was “comparable in effectiveness” to the importing country’s program.<sup>18</sup> However, requiring “essentially the same” practices was not allowed under GATT. The Appellate Body found that to require practices that are “essentially the same” is too inflexible and potentially arbitrary.<sup>19</sup> This example illustrates that a dispute panel enforcing the “not arbitrary” definition could still hold domestic measures to greater scrutiny than merely requiring any rational reason.

The “not arbitrary” definition is the one that could be the most consistent with U.S. law and would thus be the least intrusive option, short of no “objective” requirement at all. Nevertheless, the intrusive effect of the definition could increase depending on how a panel determines if a stated reason is “arbitrary” or whether it combines the definition with any of the definitions below such as “not biased” or “not subjective.”

**? GATS Questions:** How likely is it that a dispute settlement panel would interpret “objective” to mean “not arbitrary”? Further, how likely is it that a panel would interpret “not arbitrary” to mean merely “rational,” as opposed to a heightened standard or other possible meanings such as “not biased” or “not subjective”?

## ***B. Not Biased***

One ordinary meaning of objective is, “Without bias or prejudice; disinterested.”<sup>20</sup> Thus, “objective” could mean that the criteria or the decision-maker cannot favor one party over another.

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<sup>16</sup> Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2000).

<sup>17</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (“When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.”) (citation omitted).

<sup>18</sup> Appellate Body Report, *United States – Import Prohibition on Certain Shrimp and Shrimp Products*, ¶¶ 142–44, WT/DS58/AB/RW (Oct. 22, 2001) [hereinafter Appellate Body Report, *U.S. – Shrimp*].

<sup>19</sup> *Id.* ¶ 143.

<sup>20</sup> BLACK’S LAW DICTIONARY (8th ed. 2004); *see also* OXFORD ENGLISH DICTIONARY (2d ed. 1989) (“Of a person or their judgment: not influenced by personal feelings or opinions in considering and representing

Appellate Body interpretations of the “objective examination” requirement of the General Agreement on Tariffs and Trade (“GATT”)<sup>21</sup> support this definition. The Appellate Body in *Mexico – Beef* stated that an objective examination requires an “accurate and unbiased picture.”<sup>22</sup> The Appellate Body stated: “[A]n ‘objective examination’ requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation.”<sup>23</sup> The Appellate Body determined the Mexican ministry’s dumping examination was not “objective” in part because the ministry limited its analysis to six months of the year and because the ministry was influenced to use this time period by the parties who admitted it reflected the greatest influx of foreign goods.<sup>24</sup>

If GATS requires completely unbiased administration of law, certain U.S. legal standards would be in danger of conflict. This definition is more intrusive than “not arbitrary” because laws like small business preferences or affirmative action were enacted specifically to create preferences in order to overcome historical disadvantages or market failures. The European Commission has specifically questioned the trade-restrictive effects of “[a]ffirmative action schemes favouring small business or particular types of business (e.g. minority-owned) . . . .”<sup>25</sup> These policy preferences would be in conflict with a requirement that domestic measures cannot be biased.<sup>26</sup>

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facts; impartial, detached.”); MERRIAM WEBSTER (11th ed. 2003) (“Expressing or dealing with facts or conditions as perceived without distortion by personal feelings, prejudices, or interpretations.”)

<sup>21</sup> See GENERAL AGREEMENT ON TARIFFS AND TRADE, art. VI, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]; AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994, Apr. 15, 1004, art. 3.1, in ANNEX 1A TO THE AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION, RESULTS OF THE URUGUAY ROUND VOL. 1 (1994), 33 I.L.M. 1125 (1994) [hereinafter Anti-Dumping Agreement].

<sup>22</sup> Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice*, ¶ 180. WT/DS295/AB/R (Nov. 29, 2005) [hereinafter Appellate Body Report, *Mexico – Beef*]. There are likely several other dumping cases interpreting the “objective examination” requirement. Further research may refine understanding of the possible definitions that may be derived from this term.

<sup>23</sup> *Id.* (quoting Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, ¶ 193, WT/DS184/AB/R (Aug. 23, 2001)). This definition is also consistent with GATS text requiring that measures must not be “a disguised restriction on trade in services.” See GATS art. XIV.

<sup>24</sup> Appellate Body Report, *Mexico – Beef*, ¶ 180 (“The duty of the investigating authorities to conduct an ‘objective examination’ recognizes that the determination will be influenced by the objectivity, or any lack thereof, of the investigative process.”).

<sup>25</sup> European Commission, *Report on United States Barriers to Trade and Investment*, at 44 (Dec. 2004), available at [http://trade.ec.europa.eu/doclib/docs/2006/february/tradoc\\_121929.pdf](http://trade.ec.europa.eu/doclib/docs/2006/february/tradoc_121929.pdf) (last visited Jan. 31, 2007).

<sup>26</sup> The intrusive effect of this definition is especially poignant because unlike the National Treatment obligation, a violation would not require favoring domestic suppliers over foreign ones. Even if applied equally to foreign and domestic suppliers, any bias in the law would be contrary to this definition that *any* bias is prohibited.

**? GATS Questions:** If defined as “not biased,” does “objectivity” under GATS preclude giving preferences to small businesses in the procurement process, to minorities in affirmative action programs in higher education, or other biases not based on country of origin and thus not covered by National Treatment?

### C. Relevant to the Service

The objective-criteria requirement could also mean that domestic regulation must be based on criteria relevant to the ability to perform or supply the service. This definition could preclude criteria not relevant to the quality of the service, which would jeopardize many traditional standards that are based on the external impact that a service has on the local environment or community.

The support for this definition comes from Article VI:4(a) itself, from reports on the status of the WPDR negotiations, and from existing service schedules. The proviso in Article VI:4(a)—“such as competence and ability to provide the service”—could modify “objective criteria.”<sup>27</sup> Summarizing the status of the negotiations, the July 2006 WPDR Chairman’s note uses “objective” in several places in exactly this way.<sup>28</sup> Assuming the proviso does modify “objective,” the canon *ejusdem generis*<sup>29</sup> would limit the definition of objective to modifiers “of the same class” as competence and ability.

The use of “objective” in many service schedules is also consistent with this interpretation. Many schedules include the identical commitment to allocate scarce resources to public telecommunication lines “in an objective, timely, transparent and non-discriminatory manner.”<sup>30</sup> Columbia defines the word

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<sup>27</sup> A prior version GATS omitted the word transparent, stating that “requirements shall be based upon objective criteria, such as competence and the ability to provide such services.” See Council on Trade in Services Secretariat, *Article VI:4 of the GATS: Disciplines on Domestic Regulation Applicable to All Services*, ¶ 2, S/C/W/96 (Mar. 1, 1999). It could be interpreted that this prior version indicates that the proviso only applies to “objective” criteria. Further, transparency is often referred to in terms of a Member’s laws be open and publicly available not in terms of substance of the standards.

<sup>28</sup> WPDR Chairman, *Disciplines on Domestic Regulation Pursuant to GATS Article VI:4 Consolidated Working Paper*, at Part H ¶ 2, JOB(06)/225 (July 2006) (using the same phrase and omitting transparency when discussing qualification requirements). The Chairman’s note continues, “Such additional qualification requirements shall be based on objective means such as course work, examinations, training and work experience.” *Id.* at Part H ¶ 5; see also WPDR Proposal, *Communication from Australia et al.*, ¶ 24, JOB(06)193 (June 19, 2006) (“Such additional qualification requirements shall be based on objective requirements such as course work, examinations, training and work experience.”).

<sup>29</sup> This canon of statutory interpretation means “of the same kind, class, or nature.” See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about how Statutes are to be Construed*, 3 VAND. L. REV. 395, 405 (1950) (“It is a general rule of construction that where general words follow an enumeration they are to be held as applying only to persons and things of the same general kind or class specifically mentioned.”)

<sup>30</sup> See, e.g., Uganda, *Schedule of Specific Commitments, Supplement 1*, GATS/SC/89/Suppl.1, at 8 (Jan. 29, 1999).

objective in this context: “‘Objective’ means that allocation and use depend on availability and the national frequency table.”<sup>31</sup> Like the proviso in the actual agreement, Columbia’s definition is limited to the ability to provide the scarce resources necessary for this service.<sup>32</sup>

This definition would heighten scrutiny of domestic laws by requiring a limited basis on which to premise legislation. If policy choices are limited by relevance to the ability to perform or supply the service, any policy looking to impacts external to the service would conflict. This definition intrudes directly on U.S. law, calling into question policy choices based on criteria such as environmental standards, community land use, coastal zone regulation, historic preservation, competition preferences for small businesses or minority-owned businesses, and criteria used by state public utility commissions in granting electricity licenses for electricity, gas, or water utilities.<sup>33</sup>

**? GATS Question:** If “objective” in GATS is limited to criteria necessary to perform or supply the service, are measures that consider other criteria not “objective” and thus in conflict with the requirement?

#### *D. Not Subjective*

Another ordinary meaning of objective is, “Of, relating to, or based on externally verifiable phenomena, as opposed to an individual’s perceptions, feelings, or intentions.”<sup>34</sup> In other words, “objective” could mean no room for individual discretion. Many U.S. legal standards involve balancing tests or findings of reasonableness. One definition of “objective” that would significantly conflict with this substantial portion of U.S. law is one that affords no room for individual discretion.

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<sup>31</sup> Colombia, *Schedule of Specific Commitments, Supplement 2*, GATS/SC/20/Suppl.2, at 9 n.4 (Apr. 11, 1997).

<sup>32</sup> See also WPDR Secretariat, *Report on the Meeting Held on 7 and 18 February 2005*, S/WPDR/M/29 (Jul. 11, 2005). Explain how the discussion from this meeting is consistent with the definition.

<sup>33</sup> State public utility commissions (“PUCs”) balance a complex set of objectives in determining whether to grant a license. “[I]n the context of a merger or acquiring a subsidiary, these objectives include economic interests of ratepayers, financial condition of the utility, quality of service, quality of management, fairness to utility employees, fairness to utility shareholders, community economic benefits, and preservation of the regulatory capacity of the PUC.” See Letter from George Eskridge, Idaho State Representative and Chair of the State and Local Working Group on Energy & Trade Policy, to Carol Balassa, Director of Service Trade Negotiations for USTR (Jun. 16, 2006) [hereinafter Eskridge Letter] (citing CAL. PUB. UTIL. CODE § 854), available at [http://www.forumdemocracy.net/public\\_leadership/documents/Eskridge\\_letter\\_2006-06-16.pdf](http://www.forumdemocracy.net/public_leadership/documents/Eskridge_letter_2006-06-16.pdf).

<sup>34</sup> BLACK’S LAW DICTIONARY (8th ed. 2004); see also MERRIAM WEBSTER (“Of, relating to, or being an object, phenomenon, or condition in the realm of sensible experience independent of individual thought and perceptible by all observers : having reality independent of the mind.”); MERRIAM WEBSTER (“Limited to choices of fixed alternatives and reducing subjective factors to a minimum.”).

In a WPDR meeting discussing proposed VI:4 disciplines, one member used the “not subjective” interpretation. Responding to a proposal from Columbia on visa procedures, the delegation from the Philippines commented “that if there was discretion not based on objective criteria in the application of visa procedures, these became the subject of the work under Article VI:4, i.e. the development of disciplines to ensure that such administrative procedures were based on transparent and objective criteria.”<sup>35</sup>

The “not subjective” definition is in direct conflict with many existing U.S. legal standards that are based on the discretion of the decision-maker, including constitutional balancing tests and many statutory regulations. For example, administrative agencies are given broad discretion to interpret the scope of statutory delegation, a practice that the Supreme Court has not rebuked since the pre-*Lochner* era.<sup>36</sup> Further, administrative agencies exercise broad discretion when they balance multiple criteria in cases such as granting electricity licenses or approving the rates in electricity contracts.<sup>37</sup>

**? GATS Question:** Does “objectivity” under GATS exclude consideration of multiple criteria or broad discretion to an agency?

#### *E. Least Trade-Restrictive*

Interpreting the “objective criteria” requirement to prohibit any measure that is not the least trade-restrictive is the most intrusive definition of objective in the context of GATS. If there is a less-trade-restrictive alternative than the existing standard, it would conflict with the agreement.

Though it is not the dictionary definition of objective, treaty interpretation “involves identifying the common intention” of the parties, and Article 31 of the Vienna Convention specifically permits the parties to give words special meaning. Further, the Appellate Body in *U.S. – Gambling* chided the Panel for relying too heavily on dictionary definitions and stressed that the ambiguous terms must be interpreted “in their context and in the light of [the agreement’s] object and purpose.”<sup>38</sup>

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<sup>35</sup> WPDR Secretariat, *Report on the Meeting Held on 24 September 2004*, S/WPDR/M/27, at ¶ 45 (Nov. 15, 2004). Though these meeting notes would not be binding authority under Article 31 of the Vienna Convention, a dispute panel that still finds ambiguity may look to such secondary means of interpretation under Article 32. See note 13 and accompanying text.

<sup>36</sup> The Supreme Court has only struck down delegation to an administrative agency as impermissibly broad on two occasions, but both cases came before *Lochner v. New York* where the constitutional jurisprudence significantly relaxed restraints on economic legislation. See *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); RONALD A. CASS ET AL., *ADMINISTRATIVE LAW CASES AND MATERIALS* 20 (5th ed. 2006) (“The Supreme Court’s brief dalliance with a forceful application of nondelegation principles came to an abrupt halt after *Panama Refining* and *Schechter*.”).

<sup>37</sup> See Eskridge Letter, *supra* note 33 (“PUCs exist to make subjective decisions that balance competing public and private interests.”).

<sup>38</sup> Appellate Body Report, *U.S.–Gambling*, ¶¶ 165–66.

The word “objective” has been used synonymously with “international standards,” requiring the measure to be the least-trade-restrictive alternative, and such an interpretation would be right in line with the purpose of GATS. Discussing technical standards in a WPDR meeting, a member of the Secretariat stated, “There was also the element of the perceived objectivity of international standards, as found in the rebuttable presumption in GATS Article VI:5(b) that when a Member applied internationally recognized standards, the Member was presumed to have applied the least trade restrictive measure.”<sup>39</sup> This definition is also consistent with language throughout GATS and with the disciplines on domestic regulation in the accountancy sector, both of which are binding authorities under Article 31 of the Vienna Convention.<sup>40</sup>

This is potentially the most intrusive definition on the operation of U.S. law because there is always a less-restrictive alternative. The least-trade-restrictive definition would require domestic law to conform with international standards or else risk conflict with the “objectivity” requirement of GATS.

**? GATS Questions:** How would a dispute panel determine if a challenged measure is the least-trade-restrictive alternative? Would conformance with international standards be the only route to compliance? Is such a standard as intrusive as a necessity test? Does the decision to include necessity language in the preamble<sup>41</sup> lend further support to this definition of “objective” in the text?

## CONCLUSION

Negotiations on new domestic regulation disciplines are ongoing. The parties can ask to have the term defined or removed completely; however, the talks are currently silent on the issue.

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<sup>39</sup> WPDR Secretariat, *Report on the Meeting Held on 22 November 2004*, S/WPDR/M/28, at ¶ 25 (Jan. 25, 2005). The Secretariat continued, “There was no mandatory requirement to use international standards, but Article VI:5(b) did provide a benchmark for determining the objectivity of regulatory requirements.” *Id.* It is unclear from this statement whether the Secretariat is using “objective” to mean “least trade-restrictive” or to mean “consistent with internally recognized standards.” It seems that the rationale is that international standards are “objective” because they are the least trade-restrictive; thus, “objectivity” requires the least-trade-restrictive alternative. Nonetheless, this statement could be interpreted to require consistency with international standards, which is a nuanced difference in the definition.

<sup>40</sup> See GATS XIV (stating a measure cannot be “a disguised restriction on trade in services”); WPPS, *Report to the Council for Trade in Services on the Development of Disciplines on Domestic Regulation in the Accountancy Sector*, at ¶ 14, S/WPPS/4 (Dec. 10, 1998) (“Licensing procedures . . . shall be pre-established, publicly available and objective, and shall not in themselves constitute a restriction on the supply of the service.”); Working Party on Professional Services (“WPPS”), *Disciplines on Domestic Regulation in the Accountancy Sector*, at ¶ 14, S/WPPS/W/21 (Nov. 30, 1998) (same).

<sup>41</sup> *Moving Ahead in Services Negotiations*, WASHINGTON TRADE DAILY, January 16–17, 2007, Vol. 16, No. 12–13 (stating negotiators accepted the chairman’s compromise proposal to move necessity language to the preamble).

WTO countries are not raising the issue of “objectivity.” The U.S. position concerning “objective and transparent criteria” concerns only transparency and offers no comment on the “objectivity” proposals by other nations. The WPDR Chairman’s summary of the negotiations was equally silent on a meaning of “objective.” This is disturbing in that four out of five realistic definitions that could be given to the “objective criteria” requirement would significantly constrict the scope of domestic regulation in the United States and most other countries. Some overall questions loom large:

- ❓ **GATS Questions:** Which definition would a dispute panel choose? Would a panel need to choose one definition, or can the definitions be combined? How would each definition actually be applied to the facts of a specific complaint?

These questions cannot be answered without more information. If the term is not defined or removed, the scope of the “objective criteria” requirement will be left to the discretion of a dispute panel.