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Horizontal Measures

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Abstract

CARIFORUM States have generally taken a cautious approach in adopting commitments under the Economic Partnership Agreement by having them reflect their World Trade Organization commitments, excluding sensitive subsectors, and inscribing broad horizontal reservations. This report assesses the regulatory framework for trade and investment in five areas – horizontal measures, information and communications technologies, transport services, professional services, and tourism services in Barbados, Belize, Guyana, Jamaica, and Trinidad and Tobago under the CARIFORUM – European Union Economic Partnership Agreement. The analysis concludes that of the five areas reviewed, adjustments are recommended principally to legislation covering information and communications technologies, professional services, and transport services.

The report is part of the series: SERVICES REGULATION IN THE CARIBBEAN, which includes the present technical note of Horizontal Measures as well as a Summary Report and 4 technical notes. To access them, you may either go to the web page www.iadb.org/publications or use the links below:

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HORIZONTAL MEASURES

The scope of this review

The initial focus of this review is on horizontal measures affecting trade and investment in services, in particular, restrictions on international payments that affect the cross-border provision and consumption of services. Thereafter, this review examines and compares the consistency of sectorial measures that include restrictions on foreign participation and other differential measures for domestic and foreign services providers in the regulatory framework of the five countries. Targeted incentives schemes affecting covered sectors are also examined.

The EPA approach to trade and investment in services

Title II of the EPA covers trade in services and investment (commercial presence) in both services and non-services sectors. The services sectors that are covered for CARIFORUM States are those where specific commitments have been inscribed in Annex IV.F subject to any express limitations.[1]

The horizontal measures reviewed herein are those affecting trade and investment in services.[2] The word *affecting* is used in the EPA to define the scope of the measures subject to market access, national treatment, and procedural due process disciplines.[3] Adopting the approach taken in the GATS, the word *"affecting*" is not equated with *regulating* or *governing*, nor limited to measures taken "in respect of" such matters. The word "affecting" as used in relation to the national treatment provision, for example, potentially covers any measure bearing upon the conditions of competition within covered sectors regardless of whether the measure directly governs or indirectly affects it. Additionally, *any* alteration, no matter how small, in the

[1] The EPA text provides for a positive list approach for commercial presence in services and non-services sectors as well as cross-border supply, but essentially employs a negative list approach for the temporary movement of business personnel, which are tied to sectoral commitments; see EPA, Articles 81 and 82. The methodology adopted by CARIFORUM States in scheduling commitments is, in fact, a mixture of the "positive" and "negative" list approaches; the latter approach is used in Annex IV.E for scheduling commitments on commercial presence in non-services sectors.

[2] See EPA, Articles 66 and 75.

[3] E.g., EPA, Articles 66, 68, 70, 75, 77, 79 and 87.

conditions of competition is relevant.[4] The "measures" referred to include laws, regulations, procedures, rules, decisions, administrative actions, and other relevant instruments (irrespective of the form) adopted by any level of governmental authority, including the exercise of powers delegated to non-governmental bodies.[5] As such, this review applies a broad view to "measures affecting" trade and investment in services.

However, an assessment on compliance with a State's trade obligations may not be based on mere assumptions, but rather requires an examination of relevant facts, including who supplies a particular service and how the service is supplied.[6] The major constraint to carrying out such an examination in a 'desk top' study such as this is the availability of information on the web, particularly as regards laws and regulations. Nevertheless, this report raises possible red flags and highlights areas meriting further review in light of a State's international obligations and generally accepted best practices.

Expressly excluded from our review (the GATS and Title II of the EPA) are measures affecting natural persons seeking access to the employment market of another country, and measures regarding citizenship, residence or employment on a permanent basis.[7] The requirements for residency or citizenship may be distinguished from measures (such as the requirement to obtain work permits) to regulate the entry of natural persons into, or *temporarily* stay in, a country.[8]

Subsidies are excluded from the EPA, but such measures are subject to disciplines under the GATS and have been expressly included in the terms of reference for this review.[9] The exclusion of subsidies from the EPA is significant, because subsidies constitute one of the most important measures affecting trade in services and investment. Subsidies, taxes, and other

[4] See also WHO paper, "Legal Review of the GATS from a Health Policy Perspective." 2005, p. 65, which suggests that "*Any* alteration, no matter how small, in the conditions of competition by the different treatment qualifies as less favorable treatment."
[5] See also EPA, Article 61.
[6] E.g., Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, paragraphs 155-67.
[7] See GATS Preamble and Annex on the Movement of Natural Persons, paragraph 2 and footnote 13; EPA, Article 60(5).
[8] States retain the right to regulate the entry of natural persons into, or temporarily stay, in their territory, but this may not nullify or impair their specific commitments. See GATS Annex on the Movement of Natural Persons, paragraph 4; EPA, Article 60.
[9] See also EPA, Article 60(3); compare WTO Scheduling Guidelines (2001), Attachment 1, paragraph 3, which provides that, "although there is no definition of what constitutes a subsidy under the GATS and disciplines under Article XV are still subject to negotiations, paragraph 16 in the revised guidelines recalls that a discriminatory subsidy constitutes a national treatment limitation. For this reason, an example of a discriminatory subsidy has been included in this list. The same goes *mutatis mutandis* for tax measures and other financial measures such as fees."

financial measures are widely seen as the only instruments that can be used effectively in almost all economic activities and across all service subsectors and modes of supply.[10] Their omission from the EPA is a significant "WTO-minus" feature and undercuts comparisons of EPA and WTO commitments. It may be noted that CARICOM has maintained its position on the need for a similar exclusion in the CARICOM-Canada negotiations.

The breadth of measures saved by the exclusion of subsidies from the scope of the EPA is unclear. There is no universally agreed upon definition of a subsidy in relation to services. A subsidy is most often defined as a financial contribution by a government or any public body within the country which confers a benefit.[11] This definition has particular legitimacy with respect to trade in goods. However, there is no universally agreed upon definition of a subsidy in relation to trade in services. Tax measures and other financial measures, including fees, may serve as a channel for providing subsidies. Given the exclusion of subsidies from the EPA, the legitimacy of differential (higher) fees to be applied in certain instances to foreign service suppliers and other similar financial measures is unclear. It is possible to argue that such measures should have been scheduled as a limitation on the national treatment obligation. Alternatively, it could be suggested that differential fees are a *de facto* subsidy measure and, as such, are beyond the scope of the EPA. For the purpose of this review they are treated as "grey measures", noting that the debate on compliance is specific to the EPA, since there is no question that a discriminatory subsidy constitutes a national treatment limitation in the GATS.

The parties to the EPA have utilized a combination of scheduling lists in identifying sectors in the annexes to the EPA.[12] The commitments inscribed in Annexes IV.E follow the International Standard Industrial Classification of all Economic Activities as set out by the UN Statistical Office (ISIC Rev.3.1) and relate to investment in non-services sectors and are

[10] E.g., J. Adlung and P. Morrison, "Less than the GATS: 'Negative Preferences' in Regional Services Agreements" 13(4) J.I.E.L. 1103 at p. 1127.

[11] See also WTO Agreement on Subsidies and Countervailing Measures, Article 1. Note that the WTO Working Party on GATS Rules has not agreed on a definition of a subsidy in relation to services. It has been proposed that a provisional definition of subsidies in services could be based on the Agreement on Subsidies and Countervailing Measures; see communication from Chile, Hong Kong, China, Mexico, Peru and Switzerland (JOB(05)/96 dated 9 June 2005. But see comments by Japan suggesting caution owing to the many specifics of trade in services: the four modes of supply, sector particularities, and the wider context. Note that provisions for calculating benefits and countervailing measures could not be translated directly from goods to services. See Report of the Meeting held on 14 February 2011, WTO doc. S/WPGR/M/72, paragraphs 36 and 37.

[12] It should be recalled that the WTO agreements do not generally regulate investment in non-services sectors, though they clearly impact upon such investments, e.g. the Agreement on Trade-Related Investment Measures (TRIMS).

therefore not considered in this review. Those inscribed in Annex IV.F follow the Services Sectorial Classification List (MTN.GNS/W/120; hereinafter 'W/120'), which in turn refers to the UN Central Product Classification (CPC) list (the relevant CPC numbers that correspond to the sectors and sub-sectors are identified).[13] Some service activities not covered by these classification schemes are also included.[14] Where CPC codes are cited these may indicate the scope of the commitment undertaken.[15] Where a sector is inscribed in a specific commitment without reference to any of its sub-sectors it may be presumed that all sub-sectors are included in the absence of any specific exception.[16]

The succinct nature of the commitments inscribed in the annexes arguably requires that, in order to ascertain the true and accurate meaning of many reservations, one may need to consider the whole range of objective circumstances connected to them, including the relevant domestic legal regime at the time the reservations were taken.[17] The annexes to the EPA are expressly stated to be an integral part of the agreement.[18] The inference is that they must be read as representing the *common agreement* among the parties, and not merely what might have been intended by the State making the commitment. As such, a State's specific commitments must be

[13] The CPC is a detailed, multi-level classification of goods and services, consisting of Sections (10), Divisions (69), Groups (295), Classes (1,050) and Subclasses (1,811); of the 10 Sections of the CPC, only the latter five classify services and are referred to in W/120.

[14] The W/120 list contains 12 sectors and 160 sub-sectors; the 12th heading is titled "Other services not included elsewhere." As classification systems tend to become obsolete quickly, the CPC has been updated to take into account the evolution of new service activities since the end of the Uruguay Round. CARIFORUM commitments are classified based on the W120 categories but are supplemented in certain instances by references to sub-sectors that have no external reference to determine their meaning.

[15] See also *US-Measures Affecting the Cross-Broader Supply of Gambling and Betting Services* WT/D285/AB/R, paragraphs 209-211 (hereinafter '*US-Gambling'*) – where the appellate body determined that both the W/120 and the 1993 Scheduling Guidelines constitute supplementary means of interpretation within the meaning of Article 32 of the Vienna Convention on the Law of Treaties (VCTL) and, as such, may be used to confirm the meaning of specific commitments resulting from the application of Article 31 of the VCLT. But see Panel Report, *EC – Regime for the Importation, Sale and Distribution of Bananas* (Recourse to Article 21.5 of the DSU by Ecuador), WT/DS27/RW/ECU, adopted May 6, 1999, paragraph 6.88 (hereinafter "*EC-Banana"'*). where it was determined that a new version of the CPC classification system could not retroactively affect the specific commitments listed and bound on the basis of the 1991 UN Provisional CPC classification system, which was the version used during the Uruguay Round.

[16] See WTO Panel and the Appellate Body in *US-Gambling* WT/D285/R and WT/D285/AB/R. See also Julian Arkell, "GATS and Domestic Regulation Disciplines and Sustainable Development Principles and Operational Concepts: The Challenges - 26 June 2006," viewed on-line at http://ictsd.org/downloads/2009/09/arkell-final-20090928.pdf**.** See also Annex IV.F, paragraph 1 where it is stated that "The inclusion of two asterisks (**) indicates that the services specified constitute only a part of the total range of activities covered by the CPC concordance." This supports the view that where two asterisks are not used all subsectors are included.

[17] See also Eric H. Leroux "Eleven Years of GATS Case Law: What Have We Learned?" (2007) Vol. 10, Issue 4, J.I.E.L., p.749 at 759.

[18] See EPA, Article 250, which notes that the annexes, protocols and footnotes all form an integral part of the agreement.

interpreted in their proper context,[19] including the commitments of other States, the substantive provisions of Title II, as well as other clauses of the EPA, its protocols and annexes and matters referred to therein (including the classification lists above-noted).[20]

The explicit adoption of the WTO classification system in Annex IV.F and the transposition of much of the language used in the GATS to define the parties' obligations would seem to justify reliance on WTO jurisprudence as the persuasive authority in interpreting EPA commitments.

The EPA does not define the terms "service" or "economic activity," the latter of which is used with reference to mode 3, commercial presence. The inscriptions in Annex IV.F, read in conjunction with W/120 and CPC classification lists, identify the sectors of concern. The assessment of whether a measure is relevant to the review of a particular sector given its effect on an economic activity or service is linked to the meaning attributed to "supply of a service" and "commercial presence."

The term "commercial presence" in both the GATS and EPA relates to the constitution, acquisition, or maintenance of a juridical person, or to the creation or maintenance of a branch or representative office for the purpose of performing an economic activity.[21] The terms "constitution" and "acquisition" of a juridical person are defined in the EPA to include capital participation in a juridical person with a view to establishing or maintaining lasting economic links.[22] However, capital participation in a juridical person does not necessarily make that entity a juridical person of another party,[23] and as such, the EPA addresses *foreign investment*[24] as well

[19] Note that the relevant context may include the provisions of other titles of the EPA as well as the scheduled commitments of other States party to the EPA; see also *US-Gambling*, *supra*, paragraph 178.

[20] See also the WTO Appellate Body in *US-Gambling*, *ibid*, suggesting that the W/120 should be treated as a "supplementary means of interpretation" under Article 32 of the Vienna Convention on the Law of Treaties. It is submitted, however, that the classification lists are of even greater importance in interpreting Annexes IV.E and IV.F of the EPA given the introductory explanatory notes to the annexes.

[21] See GATS, Article XXVIII(d); EPA, Article 65(a).

[22] See footnote to Article 65(a)(i) clarifying further that "[w]hen the juridical person has the status of a company limited by shares, there is a lasting economic link where the block of shares held enables the shareholder, either pursuant to the provisions of national laws relating to companies limited by shares or otherwise, to participate effectively in the management of the company or in its control. Long-term loans of a participating nature are loans for a period of more than five years which are made for the purpose of establishing or maintaining lasting economic links; the main examples being loans granted by a company to its subsidiaries or to companies in which it has a share and loans linked with a profit-sharing arrangement." As such, commercial presence requires more than mere equity capital.

[23] See EPA, Article 61(e).

[24] E.g., EPA, Article 68 on "national treatment" covers investors and investments/commercial presence. Note that in order for GATS disciplines to apply, the measures must concern a foreign investor. Service suppliers are foreign when they meet the conditions of being a "juridical person of another member'," which goes to ownership and

as *foreign investors*.[25] The GATS and EPA both cover measures affecting pre- and post-establishment phases, i.e., market access as well as post-entry market regulation.[26]

The term "supply of a service" includes the production, distribution, marketing, sale and delivery of a service.[27] The definition highlights the indivisibility of service transactions and the breadth of measures potentially covered. For example, restrictions on how a service may be marketed, such as controls on advertising, may affect demand and supply. Bans on advertising in sectors such as professional services may therefore be open to challenge as to the legitimacy of the public purpose involved in spite of the right to regulate.[28] Significantly also, the extensive nature of the definition of "supply of a service" could be interpreted to suggest that a commitment on a "final" service essentially covers all operational processes required to support a service supplier in that covered activity. This interpretation would not apply in relation to WTO members' commitments due to footnote 9 of the GATS, which makes it clear that market access commitments do not cover inputs for the supply of services.[29] However, there is no equivalent footnote in the EPA.[30] This leaves unclear the implication of the omission in interpreting EPA commitments on services.

The general interpretation of footnote 9 of the GATS is that a liberalizing commitment on a particular service is not taken to imply that the member is obliged to allow liberalized trade in all other services that are inputs into that service. So, for example, a commitment on mode 2

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control by nationals or companies of another member. See also GATS, Article XVIII "(juridical person of another Member" means a juridical person which is either (i) constituted or otherwise organized under the law of that other member, and is engaged in substantive business operations in the territory of that member or any other member; or (ii) in the case of the supply of a service through commercial presence, owned or controlled by: 1. natural persons of that member; or 2. juridical persons of that other member identified under subparagraph (i)."

[25] See EPA, Article 65.

[26] The attempt to devise a clear distinction between pre-entry/pre-establishment (i.e., market access) and post-entry/post-establishment (i.e., market regulation) measures affecting the flows of services (or investments) is not always easy. Note also that the EPA is not an investment promotion and protection agreement with the sort of provisions typically evidenced in bilateral investment treaties. There are no restrictions on the imposition of performance requirements or specific disciplines on investment protection. There are also no measures relating to expropriation and investor-to-State dispute settlement; see EPA, Article 66, footnote 1.

[27] See EPA, Article 75(2)(e).

[28] See EPA, Article 60 affirming the right to regulate for "legitimate public policy objectives." Contrast this with Annex IV.F, which refers to "national policy objectives."

[29] Note that there is no definition of "input for the supply of a service" in the GATS. See also Mattoo and Wunsch, "Preempting Protection in Services: GATS and Outsourcing," 2004, at p. 15, which points to the new "Guidelines and Procedures for the Negotiations on Trade in Services" as giving an expansive interpretation to footnote 9: "It is understood that market access and national treatment commitments apply only to the sectors or sub-sectors inscribed in the schedule. They do not imply a right for the supplier of a committed service to supply uncommitted services which are inputs to the committed service."

[30] See EPA, Articles 67 and 76. The corresponding footnote in Article 67 concerns measures taken to limit the production of an agricultural product; and there are no footnotes to Article 76.

tourism services does not necessarily infer an undertaking to liberalize air and maritime transport services, although tourists require such services to visit distant locations. Similarly, a commitment on professional services, such as mode 1 cross-border advisory and consultative engineering services (CPC 86721), does not extend in the GATS context to telecommunication services, which may be required to facilitate this.[31] The absence of the footnote from the EPA could lead to a more expansive interpretation of EPA commitments than that which is permissible under the GATS, i.e., the inclusion within the "core" service or activity of "inputs for its supply." For the purpose of this review it is assumed that this is not what the parties to the EPA intended.

In defining the scope of this review, attention is drawn to the fact that certain sectors are expressly excluded from the scope of the EPA. These concern trade and investment related arms, munitions, war materials, and nuclear materials; audio-visual services;[32] maritime cabotage; and ostensibly a subcategory of air transport services that are generally treated within bilateral air services agreements. The latter two categories of exclusions are the most significant for present purposes in the context of the sectors identified for review in the terms of reference.[33] It is worth noting, however, that some CARIFORUM States have made commitments in Annex IV.F on certain excluded subsectors, most notably, passenger and freight air transport services. The EU has not done this, as evidenced in Annex IV.A and B. The CARIFORUM commitments underscore the importance of air transport services to the region and signal a possible positioning as *demandeurs* in future negotiations as mandated in the EPA[34] or in the on-going CARICOM/Canada talks.

As with the GATS, services or economic activities undertaken in the exercise of governmental authority, i.e., those not done on a commercial basis or in competition with one or

[31] E.g., Mattoo and Wunsh, *supra,* at p.16

[33] See EPA, articles 66 and 75. Note that this covers international air transport services, whether scheduled or nonscheduled, and services directly related to the exercise of traffic rights. Exceptions are aircraft repair and maintenance services during which an aircraft is withdrawn from service; the selling and marketing of air transport services; computer reservation system (CRS) services; other ancillary services that facilitate the operation of air carriers, such as ground handling services, rental services of aircraft with crew; and airport management services.

[34] See EPA, Article 62, which mandates that parties enter into further negotiations on investment and trade in services no later than five years from the date of entry into force of the EPA with the aim of enhancing the overall commitments that have been undertaken.

more economic operators and/or service suppliers, are excluded from the disciplines imposed by the EPA.[35] In the sectors under review, few activities would seem to fall within this category.[36]

Measures that are permissible as general or special exceptions under the GATS are also permissible under the EPA. These include specific exceptions, such as Article 124, as well as general exceptions, such as Articles 224 and 225. They concern measures to safeguard the operation of monetary policy, protect morals, health, privacy, the environment, heritage sites, essential security interests, and/or ensure the effective and equitable imposition or collection of direct taxes on services and investments.[37] The EPA exceptions are broader than those of the GATS, as these extend to measures relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption of goods, domestic supply or consumption of services and on domestic investors. Although a similar provision is contained in the GATT 1994, this is not mirrored in the GATS.[38]

Permissible exceptions may in certain respects be seen as limitations on the commitments made in Annex IV.F. The horizontal and sector specific reservations that have been included in Annex IV.F, however, may be maintained without having to justify their use. Where no such reservations have been made, the measures covered by articles 124, 224 and 225, may still be used even where they appear to be in breach of scheduled commitments once they are justifiable.[39]

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[35] See GATS, Article 1(3)(b) and (c); EPA, articles 65(d) and 75(2)(c). Note also that the concept of "the exercise of governmental authority" is defined with reference to the circumstances and conditions of supply of the services or economic activity. The nature of the activity itself or the characteristics of the supplier are irrelevant.

[36] See also EPA, Article 224(2), which further qualifies that "[t]he provisions of Title II and of Annex IV shall not apply to the EC Party and Signatory CARIFORUM States respective social security systems or to activities in the territory of each Party, which are connected, *even occasionally*, with the exercise of official authority." (added emphasis). The term *official authority* is not defined, but it may be equated with the term *governmental authority*. The list of activities that may be "connected, even occasionally," with the exercise of official authority is clearly broader than activities undertaken in the exercise of governmental authority as addressed in articles 65(d) and 75(2)(c) of the EPA. However, even adopting this approach it would not affect the scope of the review.

[37] See also the footnote to Article 224(h) which clarifies the nature of permissible measures aimed at ensuring the equitable or effective imposition or collection of direct taxes.

[38] See EPA Article 224(1)(f); compare GATS, Article XIV on general exceptions and Article XIV *bis* on "security exceptions."

[39] Note that the "necessity" test does not apply to all exceptions. Where it does apply, WTO jurisprudence suggests that certain tests define the permissibility of the measure; e.g. the importance of interests or values that the challenged measure is intended to protect; the extent to which the challenged measure contributes to the realization of the end pursued by that measure; or the trade impact of the challenged measure. A process of weighing and balancing takes place when comparing the challenged measure with a "reasonably available" alternative measure that is consistent with a member's obligations; e.g., *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO/DS169/AB/R; and *EC-Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/AB/R at paragraphs 172-174.

The test of a measure's compliance

This report does not comment on every measure potentially affecting trade and investment in the four services sectors of the five countries under review. Compliance concerns involving multilateral and regional obligations on trade in services may only be tested based on contrasting assessments of the jurisprudence of the limited number of cases that have been adjudicated. There is far less jurisprudence interpreting the GATS than the GATT 1994. The four basic areas for testing compliance—market access (including additional) commitments, national treatment, most-favoured-nation (MFN) treatment, and general regulatory disciplines—represent negotiated compromise text allowing for diverse interpretations. As a result, assessments of a measure's compliance are generally written in shades of grey, and less so in black and white.

Most-favoured-nation (MFN) principle

It should be noted that the MFN principle has only limited applicability in the context of the EPA and this relates to possible future free trade agreements (FTAs) which may be negotiated by CARIFORUM States with any major trading economy,[40] such as the proposed CARICOM/Canada Trade and Development Agreement. As such, the MFN norm is not a basis on which to assess compliance in the context of the present review.

The national treatment obligation

The national treatment obligation of the EPA is defined in similar language to the GATS.[41] The test of a measure's compliance is not whether formally identical or formally different treatment is accorded, but whether the measure modifies conditions of competition between investors and firms or services or service suppliers, recognizing that a State is not required to compensate for the inherent disadvantages that may be associated with the foreign character of the investor, investment or firm or relevant services or services suppliers.[42]

[40] See EPA, articles 70 and 79. Note that the MFN principle does not apply even in this limited context to measures providing for recognition of qualifications, licenses or prudential measures, double taxation agreements, and measures benefiting from GATS Article II:2 MFN exemptions.
[41] See GATS, Article XVII; EPA, articles 68 and 77.
[42] See EPA, articles 68 and 77.

The national treatment obligation applies to "like services or service suppliers" and "like commercial presences and investors,"[43] and is qualified by the conditions stated in Annex IV.F. The jurisprudence suggests that "likeness" may be compared across modes of supply,[44] and as such, for example, a service supplied remotely via internet is "like" that delivered where the service supplier is physically present. It may be contended, however, that where consumer tastes among other factors suggest that services supplied through different modes do not in fact compete against each other, then they are not 'like." It is unclear the extent to which the principle of technological neutrality may be used in defining "likeness," though it clearly is relevant and, significantly, plays a role in preventing the circumvention of specific commitments that may be delivered through various legitimate means in any mode of supply.[45]

The concept of "likeness" in trade in goods is fairly well defined, but defining "like" services is still largely unscripted in WTO jurisprudence. The query may be made, for example, whether a veterinarian, architect, or engineer from one country, say Trinidad and Tobago, is similar to one from other countries, such as Barbados, Belize, Guyana, or Jamaica. The answer to this is probably yes, but could be no if the comparison is made with their professional counterparts in Europe.

Measures relating to qualification and licensing requirements and technical standards that conform to basic regulatory disciplines are an acceptable basis on which to differentiate between service suppliers who otherwise might appear to be "like", and therefore are not generally treated as a limitation on market access and/or national treatment. This view is restated in annexes IV.A-F containing EU and CARIFORUM commitments on trade in services and investment.[46] Indeed, the statements in the annexes go beyond standard qualification requirements to include conditions such as language tests and, on the EU's part, the need to have a legal domicile in the territory where the economic activity is performed. The statements in the annexes appear to suggest that local language tests, domicile criteria, and other mentioned measures, even if not

[43] See EPA, articles 77 and 68.
[44] See Panel Report, *Canada – Autos*, paragraph 10.307. Note that this conclusion of the panel was not appealed before the appellate body.
[45] E.g., cross-border surface mail versus electronic mail.
[46] See also annexes IV.E and IV.F, paragraphs 7 and 10 respectively, stating that "[t]hose measures (e.g. need to obtain a license, need to register with the Registrar of Companies, universal service obligations, need to obtain recognition of qualifications in regulated sectors, need to pass specific examinations, including language examinations, non-discriminatory requirement that certain activities may not be carried out in environmental protected zones or areas of particular historic and artistic interest), even if not listed, apply in any case to investors of the other Party."

inscribed, do not constitute a violation of the national treatment rule. The list of measures referred to in the introductory interpretive notes may deserve greater scrutiny.[47]

The 2001 WTO Scheduling Guidelines provide useful illustrations of the sorts of measures that would breach the national treatment provision where a commitment has been made without reservation. An example is as follows:

> A measure stipulates that prior residency is required for the issuing of a license to supply a service. (Although the measure does not formally distinguish service suppliers on the basis of national origin, it *de facto* offers less favourable treatment to foreign service suppliers because they are less likely to be able to meet a prior residency requirement than like service suppliers of national origin.)[48]

These are the sorts of competitive issues which are considered in the analysis on the national treatment obligation.

Market access obligations

The market access obligation of the EPA draws on the language of the GATS[49] and complements the national treatment principle. The obligation is meant to capture measures that restrict trade and competition through the application of quantitative–type limitations irrespective of whether they are discriminatory.

In sectors where market access commitments are undertaken in relation to commercial presence, the measures that may not be maintained or adopted, either on the basis of a regional subdivision or in relation to the entire territory (unless otherwise specified in Annex IV), are defined as measures limiting the number of business entities in a particular sector or the volume of business they may do or assets they may hold, or the number of activities in which they may be involved/functions they may perform, limiting the level of foreign participation in a business or requiring joint ventures or a specific form of legal entity to engage in certain business activities.[50]

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[47] E.g., Julian Arkell, "GATS and Domestic Regulation Disciplines and Sustainable Development Principles and Operational Concepts: The Challenges - 26 June 2006," p.18, viewed on-line at http://ictsd.org/downloads/2009/09/arkell-final-20090928.pdf**.** The passage questions the use of local language tests.

[48] "Guidelines for the Scheduling of Specific Commitments under the General Agreement for Trade in Services (GATS)" S/L/92, page 6, paragraph 13.

[49] See GATS, Article XVI; EPA, articles 67 and 76.

[50] See EPA, Article 67(2). Note that a footnote to Article 67(2) clarifies that States may require that in the case of incorporation under its own law, investors must adopt a specific legal form. To the extent that such requirement is

Where commitments are taken on commercial presence, the EPA imposes an additional obligation not to maintain or adopt (unless specified in Annex IV) limitations on the total number of natural persons that an investor may employ as key personnel (business visitors and intra-corporate transfers, the latter comprising managers and specialists) and graduate trainees in a specific sector in the form of numerical quotas or a requirement of an economic needs test and as discriminatory limitations.[51] Commitments made on commercial presence and cross-border supply (modes 1 and 2) are similarly tied to permitting the temporary entry and stay of business of services sellers for a period of up to 90 days in any 12-month period.[52]

Where market access commitments are undertaken in relation to cross-border supply (modes 1 and 2), measures that may not be maintained or adopted either on the basis of a regional subdivision or in relation to the entire territory, unless otherwise specified in Annex IV, are defined as measures imposing limitations on the number of service suppliers in the market or the volume of business they do, the value of assets they may hold, or the number of service activities in which they may be involved or functions they may perform.[53]

With regard to mode 4, movement of natural persons, aside from the specific undertakings related to key personnel, graduate trainees, and business service sellers, the parties to the EPA reaffirm their respective obligations arising from their commitments under the GATS as regards the entry and temporary stay of contractual services suppliers and independent professionals.[54] This would seemingly cover market access and MFN and national treatment obligations as well as the general regulatory disciplines imposed by Article VI of the GATS.

All the above-mentioned measures, irrespective of whether portrayed as quantitative or qualitative,[55] must have been scheduled to be maintained or adopted, whether or not such measures are discriminatory as they affect market access, according to the national treatment standard. Where such measures have not been scheduled they should be eliminated. A limitation stated in the market access column effectively circumscribes the nature of the State's

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applied in a non-discriminatory manner, it does not need to be specified in a party's list of commitments in order to be maintained or adopted by that party.

[51] See EPA, Article 81(2). See also EPA, Article 80, which defines the categories of natural persons covered by mode 4 commitments.

[52] See EPA, Article 82.

[53] See EPA, Article 76(2).

[54] See EPA, Article 83.

[55] See *US-Gambling*, WT/DS285/AB/R, paragraph 250. Note that in the abstract it is neither necessary nor appropriate to draw a line between quantitative and qualitative measures. A limitation may be expressed as a percentage or described using words such as *majority*.

commitment on national treatment. However, the converse is not equally true. A qualification made to national treatment is not read as necessarily limiting market access.

It should be reiterated that the market access obligation applies even to non-discriminatory market access restrictions. The lists of measures contained in articles 67, 76, and 81 of the EPA (approximating Article XVI of the GATS) may be considered as exhaustive and arguably do not cover *de facto* breaches, However, the extent to which the market access obligation extends to measures which *in effect* impose a quantitative limitation (e.g. a zero quota) is unclear.[56] The WTO Appellate Body has clarified that reference to numerical limitations in defining market access obligations encompass things that have the characteristics of a number, even if they are not themselves a number. Because zero is quantitative it may be deemed to have the characteristics of a number, that is, to be "numerical."[57] It is logical to assume that if a State desires to maintain a full prohibition it would not have scheduled such a sector or subsector.[58]

An example of a zero quota found in the 2001 WTO Scheduling Guidelines is the imposition of a nationality requirement.[59] These guidelines provide several other examples of the six categories of market access limitations found in Article XVI of the GATS.[60] The list of illustrations that follows includes one from each category while recognizing the scope for overlap between elements:[61]

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[56] E.g., *US-Gambling* WT/DS285/AB/R, paragraphs 230-232. See also Federico Ortino, "Treaty Interpretation and the WTO Appellate Body report in *US-Gambling*: A Critique" (2006) 9(1) J.I.E.L. 117 – observing that "Extending the *per se* prohibition of Article XVI to measures that have an *effect* equivalent to a quota (whether it be a quota equal to, or greater than, zero) runs a serious risk of *de facto* banning any type of domestic regulation with a restrictive effect on the flow of services, thus tilting the balance in favour of multilateral liberalization to the detriment of domestic regulatory prerogatives."

[57] See *US-Gambling* WT/DS285/AB/R, paragraph 227.

[58] Among the examples of the limitations falling within the scope of sub-paragraph (a) of Article XVI:2, the guidelines include the following: "'nationality requirements for suppliers of services (equivalent to zero quota)." According to the appellate body, this example "confirms the view that measures equivalent to a zero quota fall within the scope of Article XVI:2 (a)"; *US-Gambling*, *supra*, paragraph 237. The function of articles 67(2) and 76(2) generally appears to be to define certain limitations that are prohibited unless specifically reserved in annexes IV.E and IV.F. The lists stated in these articles mirror Article XVI of the GATS. The function of articles 67(2) and 76(2) generally appears to be to define certain limitations that are prohibited unless specifically reserved in annexes IV.E and IV.F. The lists stated in these articles mirror Article XVI of the GATS.

[59] See 2001 WTO Scheduling Guidelines, S/L/92, paragraph 12. See also 1993 Uruguay Round Scheduling Guidelines, paragraph six, which also cites a nationality requirement as an example of zero quota.

[60] The six categories are: (1) Limitations on the number of service suppliers; (2) limitations on the total value of transaction or assets; (3) limitations on the total number of service operations or quantity of service output; (4) limitations on the total number of natural persons; (5) restrictions or requirements regarding type of legal entity or joint venture; (6) limitations on the participation of foreign capital

[61] See also *US-Gambling* WT/DS285/AB/R, paragraph 247, which notes that "[o]n the contrary, there is scope for overlap between such elements: between limitations on the number of service operations and limitations on the quantity of service output, for example, or between limitations in the form of quotas and limitations in the form of

- Government or privately owned monopoly for labour exchange agency services.
- Limitations on the percentage market share a foreign supplier may have.
- Restrictions on the broadcasting time of a (audio-visual) service supplier.
- Restrictions on the number of foreign workers.
- Requirements for foreign companies to establish local subsidiaries or similarly, to exclude representative offices from commercial presence.
- The imposition of foreign equity ceilings for a particular form of commercial presence.

These illustrations are useful for our discussion of the laws and regulations affecting service sectors in the countries reviewed.

Minimum requirements such as those common to licensing criteria would not normally fall within the scope of articles 67(2), 76(2), or 81(2) of the EPA unless they in effect impose a quota.[62] As a general rule, where licensing criteria are discriminatory and cannot be justified as a permissible exception, the measure(s) should have been scheduled as a limitation on national treatment. If such a measure is non-discriminatory and implements "legitimate policy objectives" in keeping with Article 60(4) of the EPA, it is subject to EPA requirements on transparency and due process.[63]

Transparency and the right to regulate and procedural due process

The EPA and GATS impose an obligation on States to promptly publish or otherwise make publicly available all relevant measures of general application as well as international

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an economic needs test. That sub-paragraph (c) applies in respect of all four modes of supply under the GATS also suggests the limitations covered thereunder cannot take a single form, nor be constrained in a formulaic manner."

[62] Licensing and qualification requirements and technical standards should normally be interpreted as imposing *qualitative minimum* requirements, as opposed to *quantitative maximum* limitations. However, qualitative requirements may be coupled with quantitative measures such as economic needs tests or result in barring the supply of a service through a particular mode resulting in a "zero quota" which would bring the measure within the market access obligation. Note that the EPA does not include a provision repeating the language of Article VI:4 and 5 of the GATS on disciplining measures relating to qualification requirements and procedures, technical standards, and licensing requirements with a view to ensuring that they are (i) based on objective and transparent criteria, such as competence and ability to supply the service; (ii) not more burdensome than necessary to ensure the quality of the service; and (iii) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

[63] See also the WTO Scheduling Guidelines, page 4, paragraph 11, to this effect: "[m]inimum requirements such as those common to *licensing criteria* … do not fall within the scope of Article XVI. If such a measure is discriminatory within the meaning of Article XVII and, if it cannot be justified as an exception, it should be scheduled as a limitation on national treatment. If such a measure is non-discriminatory, it is subject to the disciplines of Article VI:5."

agreements which pertain to or affect trade in services.[64] This obligation also requires the establishment of contact points to provide information to other State parties as well as to investors and traders.[65] Transparency is particularly important given a State's right to regulate.

The GATS and EPA recognize that regulatory autonomy is required to allow domestic rules to respond to local conditions, but which may lead to disguised protectionism. They therefore impose basic disciplines on a State's right to regulate. The EPA falls short in not explicitly referring to the key benchmarks adopted in the GATS, most notably, that measures must be "administered in a reasonable, objective and impartial manner," "based on transparent and objective criteria, such as competence and the ability to supply the service"; be "not more burdensome than necessary to ensure the quality of the service"; and "not in themselves [serving] as a restriction on the supply of the service."[66] The general affirmation of WTO disciplines in Article 83 of the EPA concerning contractual service suppliers and independent professionals imports these disciplines into the EPA in this limited context. However, it is doubtful that the parties intended to exclude the international standards reflected in the GATS from their bilateral/plurilateral relations.

The disciplines imposed on the right to regulate arguably address best practices as promoted in annual benchmarking exercises undertaken by institutions such as the World Bank in its *Doing Business* report. A fundamental premise of *Doing Business* is that economic activity requires good rules—rules that establish and clarify property rights and reduce the cost of resolving disputes; and rules that increase the predictability of economic interactions and provide contractual partners with certainty and protection against abuse. The objective is regulations designed to be efficient, accessible to all and simple in their implementation.[67] Much the same

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[65] See GATS, Article III:4 and IV.2; EPA, Article 86. Note that Article III of the GATS is limited to establishing enquiry points to provide information to other members. GATS Article IV.2 is targeted at developed countries to facilitate access of developing country members' service suppliers to information related to their respective markets. Other WTO members, including developing countries, are required to establish contact points "to the extent possible."

[66] See GATS, Article VI, paragraphs 1, 4, and5. Note that pending the entry into force of specific disciplines, the general disciplines stated in the main text apply where specific commitments have been undertaken, but only where these could not reasonably have been expected of that member at the time the specific commitments in those sectors were made.

[67] *Doing Business 2012*, a co-publication of the World Bank and the International Finance Corporation, p. v, viewed on-line at http://www.doingbusiness.org/~/media/FPDKM/Doing%20Business/Documents/Annual-Reports/English/DB12-FullReport.pdf

could be said of the rationale of Article VI of the GATS, and provisions such as Articles 86, 87, and 235 of the EPA.

The EPA expressly recognizes that States retain "the right to regulate and introduce new regulations to meet *legitimate* policy objectives."[68] The preamble to the GATS recognizes the right of members to regulate and introduce new regulations "to meet national policy objectives." The reference to "legitimate" policy objectives in the EPA, in contrast to "national" policy objectives in the GATS, would seem to suggest greater objectivity in assessing the compliance of a measure with a State's specific commitments. CARIFORUM countries, however, have included interpretative statements in Annex IV.F that clarify the nature of the commitments undertaken, including the proviso that "[t]his Schedule of commitments cannot be construed as … preventing any Signatory CARIFORUM State from regulating any sector or economic activity in order to meet *national* policy objectives."[69] It may be recalled that the annexes to the EPA form an integral part of the agreement.[70] The commitments in the annexes must be read consistently with the EPA; they are additional specific commitments and should not derogate from the general obligations imposed by the agreement. Still, the distinction between *legitimate* policy objectives and *national* policy objectives may, in fact, be of little consequence, as it is doubtful that EPA arbitration panels would take it upon themselves to assess the legitimacy of well-defined national goals.

The right to introduce new regulations is qualified by a "standstill" clause included in Annex IV.F in relation to CARIFORUM States, which precludes the introduction of new measures which derogate from the market access or national treatment obligations (as defined within articles 67, 68, 76, and 77 of the EPA) in *all services sectors irrespective of whether or not specific commitments have been undertaken.*

Article 87 of the EPA requires that minimum standards of procedural fairness be applied by persons or bodies with judicial or quasi-judicial capacities and regulatory authorities in national jurisdictions. Article 87(1) applies only where specific commitments have been undertaken. It requires that a State ensure expeditious decisions on applications; more specifically, it provides that where authorization is required, the regulatory authorities must communicate to the applicant the decision on his or her application within a reasonable period

[68] See EPA, Article 60(4) (added emphasis).
[69] See EPA, Annex IV.F, paragraph 8 (added emphasis).
[70] See EPA, Article 250.

of time after the submission of an application considered complete according to domestic laws and regulations. Additionally, regulators must promptly provide information on the status of an application whenever requested to do so.

Article 87(2) requires States to maintain or institute procedures for the review of administrative decisions. The requirement is of general application and not limited to those sectors in which specific commitments have been undertaken. Article 87(2) requires that each State party to the EPA provide *de jure* or *de facto* independent judicial, arbitral, or administrative tribunals or procedures for prompt, objective, and impartial review, upon request of, and appropriate remedies for, administrative decisions affecting trade in services and commercial presence. Each State is free to decide on the institutional structure it needs. The provision essentially mirrors the GATS Article VI.2 (a), while Article 87(1) of the EPA largely follows GATS Article VI.3.

The obligations imposed by Article 87 apply to the administration of a measure as opposed to the substance of the measure. The GATS and EPA rules on procedural fairness are arguably reflective of natural justice principles embedded in the common law. Fundamental norms of public law such as *nemo iudex in causa sua* (rule against bias) and *audi alteram partem* (right to a fair hearing) are part and parcel of the legal systems of the five countries reviewed. Indeed, it is suggested that the rule of law and principles such as participation, consultation, transparency, due process, and prompt review are inherent (in varying forms) in the public law of most WTO Members. The GATS merely adds a multilateral level of scrutiny as regards the adherence of the national regulatory and administration authorities to the rule of law and due process in an origin-neutral manner.[71]

The five countries reviewed have a shared common law tradition.[72] The requirement for an impartial review of administrative decisions where this is not expressly provided by an enabling statute may be derived from the common law. Indeed, this exists even where an enactment contains language which suggests that the administrative decision is final and binding.

[71] See Panagiotis Delimatsis, "Due Process and 'Good' Regulation Embedded in the GATS – Disciplining Regulatory Behaviour in Services through Article VI of the GATS," (2007) 10(1) J.I.E.L. 13 at 26, fn.91.

[72] Note that Guyana and Trinidad and Tobago to some extent demonstrate a mix of British common law and Roman-Dutch and Spanish civil law, respectively. However, Spanish law in Trinidad and Tobago gave way almost entirely to common law in the mid 19th century and only vestiges of Roman-Dutch law in Guyana survived an early 20th century reform; see Jane Matthews Glen, "Mixed Jurisdictions in the Commonwealth Caribbean: Mixing, Unmixing, Remixing," Electronic Journal of Comparative Law, viewed on-line at http://www.ejcl.org/121/art121-10.pdf.

Common law courts have identified three grounds for judicial review that may be invoked even where ouster clauses exist;[73] a decision is open to judicial review if it is irrational, illegal, or based on a procedural impropriety. In both Guyana and Jamaica an aggrieved party may seek judicial review based on the inherent common law jurisdiction of the courts.

In Belize, Rule 56 of the Supreme Court (Civil Procedure) Rules 2005 specifically allows applications to be filed for judicial review of administrative decisions. Belizean courts have emphasized that the "judicial review jurisdiction of the court is not an appeal jurisdiction, and judicial review proceedings are not appeal proceedings."[74]

In Barbados the right to judicial review is governed by statute. The Administrative Justice Act CAP 109B provides for the review of administrative acts or omissions,[75] and provides relief in circumstances that include a breach of natural justice.[76] The act goes beyond what is required in Article VI of the GATS and Article 87 of the EPA in providing that a person adversely affected by a decision is entitled to request and receive a statement of reasons for a decision refusing, modifying, or revoking any license, permission, qualification, or authority;[77] the obligation to state reasons in the EPA is limited to certain economic activities.[78]

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[73] E.g., *Council of Civil Service Unions* v. *Minister for the Civil Service* [1985] A.C. 374.

[74] A claim for the exercise of judicial review powers of the court is a claim requesting the court to review the lawfulness or otherwise of a decision, action, or failure to act by a tribunal or public body or a person, in relation to the exercise of a public function. See *Humberto Patt v. AG et al,* Claim No. 65 of 2010, per Awich (CJ ag), at paras 12 and 13 – citing *Council for Civil Service Union v Minister for the Civil Service [1985] A.C. 374; R v Inland Revenue Commissioners Ex p. National Federation of Self Employed and Small Businesses Ltd [1982] A.C. 617; R v Panel on Takeovers and Mergers Ex p. Datafin Plc [1987] Q.B. 815; and R (Beer) v Hampshire Farmers Market Ltd [2004] 1 W.L.R. 233.*In exercising judicial review jurisdiction, (*sic)* court does not substitute its own decision for that of the tribunal or public authority. Deciding the merit of the decision or action is a power exercisable in an appeal." See also the Supreme Court Judicature Act (CAP 91); *Queen and the Minister of Budget Management, Investment & Public Utilities; Ex parte Belize Telecommunications Ltd*, Supreme Court Action No. 47 of 2002, A.O. Conteh, C.J.

[75] See Administrative Justice Act CAP 109B, sections 2 and 3, further defining an "act" as including any decision, determination, advice, or recommendation made under a power or duty conferred or imposed by the Constitution or by any enactment.

[76] The application for judicial review allows for relief to be granted in circumstances where, *inter alia*, there is an unreasonable or irregular or improper exercise of discretion, an absence of evidence on which a finding or assumption of fact could reasonably be based, conflict with the policy of an Act of Parliament, breach of natural justice, abuse of power, excess of jurisdiction, fraud or bad faith or taking into account improper or irrelevant considerations, failure to satisfy or observe conditions or procedures required by law, error of law, a decision is unauthorized or contrary to law, and breach of or omission to perform a duty; see Administrative Justice Act CAP 109B, section 4.

[77] See Administrative Justice Act CAP 109B, sections 13-16 and First and Second Schedules. The act provides the right to receive reasons where any law or contract requires that a decision be made in accordance with the principles of natural justice or in a fair manner, except where it is expressly stated that reasons are not required. The law relating to natural justice is specifically stated to apply, *inter alia,* to any person or body refusing, modifying, or revoking any license, permission, qualification or authority. Other examples of where the rules of natural justice apply provided in the schedules include imposing any penalty under powers conferred by any enactment, and a

In Trinidad and Tobago, the Judicial Review Act CAP 7:08 of 2000 provides for the judicial review of judicial and administrative acts or omissions, and specifically allows for an application for judicial review where a person, such as a public official, who is under a duty to make a decision fails to do so within a reasonable period of time (as required by GATS, Article VI.3 and EPA, Article 87(1)). A person may seek judicial review on a variety of grounds, including natural justice concerns.[79] A public authority or a person acting in the exercise of a public duty or function is required to exercise that duty or perform that function in accordance with the principles of natural justice or in a fair manner;[80] this essentially affirms the basic obligation imposed by GATS, Article VI.1, that measures be "administered in a reasonable, objective and impartial manner." Additionally, as in the case of Barbados, a person adversely affected by a decision is given the right to request a statement of reasons for the decision.[81]

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decision to approve a development plan under the Town and Country Planning Act. But note that it is expressly provided that reasons need not be given for any decision under the Immigration Act or the Expulsion of Undesirables Act; see also Immigration Act CAP 190, section 2C.

[78] E.g. EPA, Article 92(3), on courier services; articles 95(4) and 96(3)(b), on telecommunication services; and Article 177(2), concerning public procurement. See also J.A. Ali, "Duty to give Reasons: the way forward" http://www.guyaneselawyer.com/index.html**,** which argues the progressive development of administrative law to possibly include a duty to give reasons as an element of natural justice. A duty to give reasons would facilitate a prompt review as required by GATS, Article VI and EPA, Article 87. However, the EPA requirement for a prompt review may not be read as mandating the provision of reasons in all cases.

[79] See Judicial Review Act, sections 5 and 15. The decision was in any way unauthorized or contrary to law; excess of jurisdiction; failure to satisfy or observe conditions or procedures required by law; breach of the principles of natural justice; unreasonable, irregular or improper exercise of discretion; abuse of power; fraud, bad faith, improper purpose or irrelevant consideration; acting on instructions from an unauthorized person; conflict with the policy of an act; error of law, whether or not apparent on the face of the record; absence of evidence on which a finding or assumption of fact could reasonably be based; breach of or omission to perform a duty; deprivation of a legitimate expectation; a defect in form or a technical irregularity resulting in a substantial wrong or miscarriage of justice; or an exercise of a power in a manner that is so unreasonable that no reasonable person could have so exercised the power. Note that the court will not normally grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates, save for where the court is satisfied that an application for judicial review is justifiable in the public interest; see also *ibid*, sections 6 and 7.

[80] See Judicial Review Act, section 20.

[81] See Judicial Review Act, section 15.