



Note

Domestic Regulations and Trade in Services Negotiations

Considerations for South & South-East Asian countries

By Leslie Debornes

Summary

This note analyses through literature review, the GATS provision on domestic regulations and ongoing negotiations in this respect, domestic regulations related to trade in services in South & South East Asian countries (state of play and challenges), as well as alternative approaches being discussed and utilized elsewhere. Ultimately some recommendations and suggestions on the way forward are provided.

GATS provisions on domestic regulations & State of Play on this issue at the WTO

Trade in services is increasingly contributing to countries' economic outputs including for South & South East Asian countries, where it is considered as a potential source of social and economic development. The services' sector constitutes a significant share of gross domestic product (GDP) in many developing countries and LDCs of the sub-regions (for instance Nepal, Pakistan and Sri Lanka). With growing global trade and investment flows in services driven by liberalisation and deregulation of economies, technological advances, as well as cost and other imperatives, the services' sector offers many developing countries opportunities to diversify their economies, their export baskets and markets, to tap emerging segments that leverage their inherent and acquired sources of comparative advantages, and to address domestic concerns of service quality, accessibility and economic efficiency. Among many issues, "domestic regulation" has become very important for these countries while undertaking liberalisation of their service sectors. Domestic regulation has its importance in protecting national policy, only if it is not to be applied as a means for undue trade restrictions.¹

At the multilateral level, the General Agreement on Trade in Services (GATS) which provides the

framework of rules for trade in services, recognises the right of World Trade Organization (WTO) Members to regulate on the supply of services within their territories to meet national objectives. Given asymmetries existing with respect to the degree of development of services regulations, the particular need for developing countries to exercise this right is also recognized by the GATS.² Generally, it is through regulations that governments ensure that services of acceptable quality are provided for the welfare of their citizens, by *inter alia* preventing anti-competitive practices and monitoring the qualifications and competence of suppliers.³ The GATS therefore does not interfere with Members regulatory objectives and concerns, although it also recognises that certain regulatory measures could be trade restrictive. It is on this premise that Article VI.4 mandates the Council for Trade in Services to develop necessary disciplines that would ensure that measures relating to qualification requirements and procedures, technical standards and licencing requirements do not constitute unnecessary barriers to trade in services.⁴ The overarching objective for disciplines on domestic regulation is to ensure good regulatory practices that are criteria-based and transparent in order to promote efficiency.⁵ Such disciplines would curtail the capacity of powerful interest groups to influence regulations that aim at serving their interests rather than the wider needs of society welfare.⁶

The main issue at stake is the relationship between trade liberalization and domestic regulatory authority. It is in this context that the GATS Article VI:4 provides for establishment of criteria to

¹ <http://www.cuts-citee.org/pdf/BP08-WTO-1.pdf>

² Preamble to the GATS

³ WTO Trade in Services Division – Disciplines on Domestic Regulation Pursuant to GATS Article VI.4 Background and Current State of Play

⁴ Ibid

⁵ WTO Domestic Regulation and Services Trade Putting Principles into Practise : An Introduction to domestic regulation and GATS

⁶ Ibid

evaluate the trade restrictiveness of trade in services through the regulatory framework.

Services are regulated to achieve policy objectives considered to be in public interest.⁷ This is necessitated by the fact that market forces alone may not guarantee public interest. Regulation is therefore a governmental tool through which service suppliers are influenced to supply their services in a particular manner.⁸

Although the nature and function of regulatory measures *inter alia* depends on the sector, and objective to be attained, there are those that cut across the different service sectors, and amongst different countries.⁹ These could be categorized as supplier-related instruments, which set out requirements to supply a given service, and seek to ensure that the supplier has the competence and capacity to deliver the service. Such measures typically pertain to professional qualifications; authorization of the supplier; and supervision of the suppliers. The other category are the measures that are directly service related such as technical standards and price controls.¹⁰

The negotiations at the WTO on disciplines for domestic regulation presently revolve around a number of issues that could be categorized as: transparency obligations; the necessity test (i.e. the approach to determining trade effect of domestic regulatory measures to ensure that they do not

constitute unnecessary barriers to trade in services); applicability of the disciplines; and their nature (i.e. whether horizontal or sectoral). These issues are briefly expounded in *Annex 1*.

Domestic Regulations in South and South-East Asian countries – a state of play

A-Some challenges and opportunities in the sub-regions

South and South-East Asian policy makers and trade negotiators need to be fully informed about the opportunities for expanding trade in services (unilaterally, regionally and multilaterally) as well as the domestic pre-conditions for successful services liberalization. Many developing countries and LDCs have not undertaken an assessment of the potential impacts of liberalization in services' trade, and are still evolving the regulatory frameworks and institutions to govern the services' sectors in their domestic economies.¹¹

The opportunities and risks of liberalizing trade in services in South and South-East Asia are delicately balanced. This is particularly so in an environment

⁷ Key Aspects of Domestic Regulation of International Trade in Services – Dr. Christian Pitschas, LLM April 2013

⁸ Ibid

⁹ Ibid

¹⁰ Ibid

¹¹ Trade in Services in South Asia: Opportunities and Risks of Liberalization,

(Saman Kelegama)

https://books.google.ch/books?id=1IyHAAQBAJ&pg=PA292&lpg=PA292&dq=working+party+on+domestic+regulation,+room+document+south+asia&source=bl&ots=blcOHtKeRg&sig=73ZzkMMDmKv6_3vCk8iKiz6r4_8&hl=fr&sa=X&ved=0ahUKEwi28aK4nJjNAhUDXhoKHZ-nDEwQ6AEIzAB#v=onepage&q=working%20party%20on%20domestic%20regulation%2C%20room%20document%20south%20asia&f=false

in which regulatory and competition authorities have only been recently established, and the restructuring of state assets is still far from complete.¹²

South and South-East Asia has historically been plagued by over-regulation; however what is required is effective regulation. This is particularly **important in the services' sector where the "good"** cannot be inspected prior to consumption. Regulation is even more important in services like health and education, which have important social impacts, and services like telecommunications and finance, which have important economic impacts.¹³

Overview of main Services' Agreements in place in the Sub-Regions

SAARC Agreement on Trade in Services (SATIS)

In order to expand cooperation in trade and further deepen the integration of the regional economies, the South Asian Association for Regional Cooperation (SAARC) Agreement on Trade in Services (SATIS) was signed at the Sixteenth SAARC Summit held in Thimphu in April 2010. The Agreement entered into force on 29 November 2012 after ratification by all SAARC Member States.¹⁴

The agreement is based on a 'positive list' approach (i.e. under such approach, the list of commitments

comprises a national schedule and contains all of the commitments, set out by sector, which a party to a trade agreement has chosen to include.) and 'GATS-plus' (i.e. further services liberalization commitments in regional services agreements than that of GATS are called GATS-plus ('GATS+') commitment).¹⁵

Since the signing of the Agreement, the Expert Group on the SAARC Agreement on Trade in Services has been engaged in negotiating Schedules of Specific Commitments. The SAARC Commerce Ministers have been monitoring the progress in this regard and giving requisite directives aimed at time-bound actions for finalization of Schedules of Specific Commitments. At the Eleventh Meeting of the Expert Group, the Schedules of Specific Commitments were expected to be finalized.¹⁶ However the current progress is not satisfactory, a good start would be to bind whatever unilateral liberalization in services at the existing level under SATIS.¹⁷

¹² <http://www.cuts-citee.org/pdf/BP08-WTO-1.pdf>

¹³ Ibid

¹⁴ http://saarc-sec.org/areaofcooperation/detail.php?activity_id=46

¹⁵ <http://www.unescap.org/sites/default/files/Saman-Kelegama.pdf>

¹⁶ http://saarc-sec.org/areaofcooperation/detail.php?activity_id=46

¹⁷ <http://www.unescap.org/sites/default/files/Saman-Kelegama.pdf>

► Provisions on domestic regulations in SATIS

Article 11: Domestic Regulations

In sectors where specific commitments are undertaken, each Contracting State shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.

Each Contracting State shall maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier of the other Contracting State, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services. Where such procedures are not independent of the agency entrusted with the administrative decision concerned, the Contracting State shall ensure that the procedures in fact provide for an objective and impartial review.[...]

With the objective of ensuring that domestic regulation, including measures relating to qualification requirements and procedures, technical standards and licensing requirements, do not constitute unnecessary barriers to trade in services, the contracting States shall jointly review the results of the negotiations on disciplines on these measures, pursuant to Article VI.4 of the WTO General Agreement on Trade in Services (GATS). [...]

Source: [http://saarc-sec.org/uploads/document/SAARC%20Agreement%20on%20Trade%20in%20Services%20\(signed\)_20121011091030.pdf](http://saarc-sec.org/uploads/document/SAARC%20Agreement%20on%20Trade%20in%20Services%20(signed)_20121011091030.pdf)

ASEAN Framework Agreement on Services (AFAS)

Trade in services is one of the core fundamentals in ASEAN economic integration. The initiative formally started in 1995 through signing of the ASEAN Framework Agreement on Services (AFAS), which was two years after ASEAN launched the initiative to work towards ASEAN Free Trade Area (AFTA) for trade in goods through the Agreement on Common Effective Preferential Tariff Scheme for the AFTA (CEPT) signed in 1993. AFAS provides

the mandate for progressive negotiations on the liberalisation of trade in services, recognising that intra ASEAN services liberalisation will strengthen the flow of trade and investment in the services sector among ASEAN Member States, and will eventually contribute to overall economic integration in the region. AFAS is based closely on the provisions of the GATS. Subsequent decisions were made to further strengthen the services liberalisation in ASEAN, while remaining consistent with the GATS provisions.¹⁸

Free flow of trade in services is one of the important

¹⁸ [http://www.asean.org/storage/2015/12/ASEAN-Integration-in-Services-\(Dec%202015\).pdf](http://www.asean.org/storage/2015/12/ASEAN-Integration-in-Services-(Dec%202015).pdf)

elements in realising ASEAN Economic Community, where there will be substantially no restriction to ASEAN services suppliers in providing services and in establishing companies across national borders within the region, subject to domestic regulations. Liberalisation of services has been carried out through rounds of negotiation mainly under the Coordinating Committee on Services. Negotiation of some specific services sectors such as financial services and air transport are carried out by their respective Ministerial bodies.

In liberalising services, there should be no back-loading of commitments, and pre-agreed flexibility shall be accorded to all ASEAN Member Countries. In facilitating the free flow of services, ASEAN is also working towards recognition of professional qualifications with a view to facilitate their movement within the region.¹⁹

Mutual Recognition Arrangements (MRAs) are important initiatives in ASEAN integration on trade in services. The MRAs facilitate trade in services by

● Provisions on domestic regulations in ASEAN FTAs

Article 5: Domestic Regulations

[...] Each Party shall maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services. Where such procedures are not independent of the agency entrusted with the administrative decision concerned, the Party shall ensure that the procedures in fact provide for an objective and impartial review.[...]

With the objective of ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Parties shall jointly review the results of the negotiations on disciplines on these measures, pursuant to Article VI.4 of GATS, with a view to their incorporation into this Agreement. The Parties note that such disciplines aim to ensure that such requirements are, inter alia:

- 1. based on objective and transparent criteria, such as competence and the ability to supply the service;*
- 2. not more burdensome than necessary to ensure the quality of the service;*
- 3. in the case of licensing procedures, not in themselves a restriction on the supply of the service. [...]*

In sectors where specific commitments regarding professional services are undertaken, each Party shall provide for adequate procedures to verify the competence of professionals of any other Party.

Source: Agreement on Trade in Services of the Framework Agreement on Comprehensive Economic Co-operation between the Association of Southeast Asian Nations and the People's Republic of China

¹⁹ [Ibid](#)

mutual recognition of authorisation, licensing, or certification of professional service suppliers obtained in one ASEAN Member State by other ASEAN Member States. The goal of the MRA is to facilitate the flow of foreign professionals taking into account relevant domestic regulations and market demand conditions.²⁰

ASEAN has also specific articles on domestic regulation in its Free Trade Agreements with other countries, such as Korea or the People's Republic of China.

Developing Countries Concerns in the Negotiations of Disciplines for Domestic Regulation

Literature dealing with the issue of negotiations of disciplines for domestic regulation in the GATS, as well as the discussions in the Working Party on Domestic Regulation raise a number of concerns for developing and least developed countries (categories in which the South & South East Asian countries participating in CUTS Business & Trade Connexion project belong) that arise from the negotiations/discussions.

Among the concerns raised is the attempt to adopt universally applicable regulatory frameworks or international standards, based mainly on the experience and practice of developed countries that already have such frameworks in place. Hence there

is a risk to create a conflict with domestic values, institutions and practices especially in developing countries, given their varied levels of development and therefore adaptability.²¹

Another concern for developing countries that may result from international disciplines on domestic regulatory processes is the possibility of likely interventions of foreign governments and firms. To address this concern, there are proposals for prior comment on proposed regulation, wherein Members would have to justify the rationale for such regulations before they are adopted. In such scenarios the resulting legislation and/or regulation would also reflect the interests of foreign parties, which would be able to influence outcomes that promote their interests (possibly at the detrimental cost of domestic stakeholders).²²

Additionally, most developing countries, and more so in the case of least developed countries, are faced with institutional weaknesses, coupled with low regulatory capabilities, as well as fragile private sector institutions, which all raise implementation concerns of the future disciplines on domestic regulations.

Any other concern is with regard to the reliance on international standards in determining conformity as provided for in Article VI.5(b). Although most international standard setting bodies are formally open to participation of all WTO Members, developing countries due to limited resources and often lack specialized knowledge, have a rate of involvement and degree of influence in setting such standards that is very limited. As a result, international standards would mostly reflect

²⁰ [Ibid](#)

²¹ WTO Domestic Regulation and Services Trade Putting Principles into Practice - Services : Lessons from GATS – Hamid Mamdouh

²² WTO Domestic Regulation and Services Trade Putting Principles into Practice - Services : Lessons from GATS – Hamid Mamdouh

interests of developed countries, which have the capacity to effectively participate in their setting. Therefore relying on such standards to determine conformity would be detrimental to many developing and least developed countries.²³

Alternatives approaches for domestic regulation

Services are a major feature of a new generation of Regional Trade Agreements (RTAs) that are oriented towards deeper and comprehensive integration with a strong regulatory focus, addressing behind-the-border regulatory measures affecting services, investment and competition. As of 1 February 2016, 625 such agreements were notified to WTO; of these, 419 are in force and 153 consist of services agreements. While only six services RTAs had been notified to WTO before 2000, over 130 additional agreements have been notified since then. Particularly notable is the emergence of two mega RTAs – the recently concluded Trans-Pacific Partnership Agreement (see more details in IV-A) and the Transatlantic Trade and Investment Partnership. Apart from creating large markets and inducing deep market opening, these agreements would introduce disciplines to induce regulatory coherence and reduce divergence in national regulatory standards.²⁴

Developing countries have also embarked on regional services liberalization in the context of RTAs (i.e. ASEAN and SAARC as presented above). For instance, the Asia-Pacific Economic Cooperation (APEC) group on services developed a

services cooperation framework of which the coherence in regulatory frameworks is highlighted as one of the main outcomes. A multiple forum and multi-stakeholder agenda will contribute to pursuing this objective.²⁵

The Trans Pacific Partnership

The recently concluded Trans Pacific Partnership (TPP) agreement provides for regulatory issues on trade in services. The agreement consists of 12 Trans-Pacific countries, namely, Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States, and Vietnam. The trade partnership aims to:

- ▶ *promote economic growth;*
- ▶ *support the creation and retention of jobs;*
- ▶ *enhance innovation, productivity and competitiveness;*
- ▶ *raise living standards;*
- ▶ *reduce poverty;*
- ▶ *promote transparency, good governance; and*
- ▶ *enhance labor and environmental protections.*

Relevantly, Chapter 25 of the TPP makes provisions for “Regulatory Coherence”, which aim to ensure an open, fair, and predictable regulatory environment for businesses operating in the TPP markets by encouraging transparency, impartiality and coordination across each government to achieve a coherent regulatory approach.

The chapter aims to facilitate regulatory coherence

²³ Ibid.

²⁴ http://unctad.org/meetings/en/SessionalDocuments/c1mem4d11_en.pdf

²⁵ Ibid

in each TPP country by promoting mechanisms for effective interagency consultation and agencies' coordination. It encourages widely-accepted good regulatory practices, such as impact assessments of proposed regulatory measures, communication on the grounds for the selection of chosen regulatory alternatives and the nature of the regulation being introduced.

The chapter also includes provisions to help ensure regulations are written clearly and concisely, that the public has access to information on new regulatory measures (if possible online), and that existing regulatory measures are periodically reviewed to determine if they remain the most effective means of achieving the desired objective.

In addition, it encourages TPP parties to provide an annual public notice of all regulatory measures they expect to take. Toward these ends, the chapter establishes a Committee which will give TPP countries, businesses, and civil society continuing opportunities to report on implementation, share experiences on best practices, and consider potential areas for cooperation.

The chapter does not in any way affect the rights of TPP parties to regulate for public health, safety, security, and other public interest reasons.

The Trade in Services Agreement

Another alternative approach to domestic regulations is the ongoing Trade in Services Agreement (TiSA) negotiations. Although limited official information is available on the negotiations, the agreement's main purpose is to improve and

expand trade in services with the current involvement of 50 participants (all members of WTO) that represent 70 percent of the world's trade in services. Specifically, TiSA aims at opening up markets and improving rules in areas such as licensing, financial services, telecoms, e-commerce, maritime transport, and professionals temporarily moving abroad to provide services.²⁶ For instance in the negotiations, the European Commission's position with regard to licensing is that any amount charged for a license could be considered a restriction on the unlimited supply of a service.

In determining whether or not a TISA member's regulation is unnecessarily burdensome, "international standards of relevant international organizations applied by that Party" should be taken into account. For instance, members would have to adopt international standards for licensing so as to avoid such measures and procedures being considered unnecessarily burdensome.²⁷

The architecture of the TiSA annex on domestic regulations is such that its application will be, across the board, covering any measures related to services regulations, although some Members are insisting that the annex' application should be limited to technical standards (which are defined within the text).²⁸

Recommendations & Conclusion

The South & South-East Asian countries should push for disciplines on domestic regulation to be general in nature such as to accommodate a wide

²⁶ European Commission, *Trade in Service Agreement (TiSA)*. (October 2015) online at: <http://ec.europa.eu/trade/policy/in-focus/tisa/> (last accessed February 5, 2016)

²⁷ *Ibid.*

²⁸ The TiSA Annex on Domestic Regulation-Analysis of 23rd April 2015 Draft accessed at <https://wikileaks.org>

variety of national circumstances, while striking a balance so as not to be rendered ineffective. Disciplines based on the prevailing frameworks in the developed countries should be avoided as they would likely cause implementation challenges.

Applicability of the resulting disciplines on domestic regulation under Article VI.4 GATS should cover only the specific commitments undertaken by Members as opposed to general application. It would ensure certainty, while also allowing Members to assess future commitments in light of their domestic regulations in place.

Resulting obligations from the disciplines on domestic regulations should be conditioned upon

development of regulatory and institutional capacity at the local, national and regional levels of government, which in itself may require technical assistance and capacity building. This should be premised on the principle of special and differential treatment similar to what was included in the Trade Facilitation Agreement.

Annex 1

WTO Negotiations of Disciplines on Domestic Regulations: the Main Issues and State of Play

The negotiations on disciplines for domestic regulation presently revolve around a number of issues that could be categorized as: transparency obligations; the necessity test i.e. the approach to determining trade effect of domestic regulatory measures to ensure that they do not constitute unnecessary barriers to trade in services; applicability of the disciplines; and their nature, whether horizontal or sectoral. These are briefly expounded upon.

Transparency:

Article VI.4(a) GATS provides that measures relating to qualification requirements and procedures, technical standards and licensing should *inter alia* be based on objective and transparent criteria, such as competence and the ability to supply the service. The disciplines in this regard will aim at ensuring that all required information is available to service providers so that trade is not unnecessarily restricted. This envisages that regulations will be made public once they are made. The criteria would include publication and availability of information on regulations and procedures; specification of reasonable time periods for responding to applications for licenses, information as to the reasons for rejecting an application, notification on missing information and specification of time periods for responding to applications among others. In the negotiations, there have been proposals suggesting that the disciplines in this respect should require prior comment and publication of intended regulation, so that their objective and rationality can be explained before they are put in place. There are however concerns that such a requirement would be intrusive on national regulatory autonomy.²⁹

Necessity:

Article VI.4 GATS provides for the necessity test in that disciplines shall aim to ensure measures of domestic regulation do not constitute unnecessary barriers to trade in services. For a measure not to constitute an unnecessary barrier to trade it should be based on objective and transparent criteria, and in the case of licensing procedures, not in themselves being a restriction to trade.³⁰ The test is therefore to determine if a measure is in effect restricting trade, and whether there is a need to restrict trade in order to achieve the national policy objective.³¹ If the measure is found to be restrictive, the next test is to establish whether it is more restrictive than necessary to achieve the set national policy objective, all in all a complex process.³²

²⁹ Trade in Services and Sustainable Development: Domestic Regulations, UNCTAD

³⁰ Ibid

³¹ Ibid

³² Ibid

Applicability:

The debate on applicability of future disciplines on domestic regulations is whether they should only apply to sectors in which a Member undertakes specific commitments or even where no specific commitments have been undertaken. There are concerns that disciplines of generic application would erode the flexibility in particular for developing countries, to adopt whatever commitment they deem in line with their development needs and institutional capabilities. The other issue with regard to applicability of disciplines is the level of government to be covered, how measures from non-governmental bodies in the exercise of powers delegated by central, regional, local governments, should be dealt with. This issue raises concerns on the administrative burden especially for developing and least developing countries.

Horizontal Vs. Sectoral Disciplines:

Another issue under consideration is whether common disciplines on domestic regulation should be developed for all services (horizontal approach), or on a sectoral basis. Ongoing deliberations in the Working Party on Domestic Regulation have focused on the horizontal approach, which is envisaged to result in disciplines for all services sectors.³³

Other Principles guiding negotiations:

The other main principles guiding the negotiations on disciplines for domestic regulation include: impartiality and objectivity wherein decisions of competent authorities should be independent of commercial interests or political influence and criteria for such impartiality should be clearly spelled out to avoid excessive discretion;³⁴ relevance of foreign qualification and experience wherein account should be taken of such qualifications and experience obtained abroad by a service supplier. Governments are encouraged to negotiate agreements to accept equivalence of qualifications obtained under other jurisdictions;³⁵ acceptance of international standards to facilitate evaluation of qualification obtained abroad.³⁶

A major challenge for the negotiations on domestic regulations is to strike a balance between the sovereign right to regulate and ensuring that such regulation does not unnecessarily restrict trade in service. It has been proposed that adopting a set of guidelines for regulatory principles could address this challenge.³⁷ Such principles would apply to rules relating to the supply of services and the regulatory institutions that implement them.

In the case of the rules, certain characteristics are suggested to the effect that they should be clear, based on

³³ Mattoo, Aaditya *Developing Countries in the New Round of GATS Negotiations : Towards a Proactive Role*, The World Economy

³⁴ *Trade in Services and Sustainable Development: Domestic Regulations*, UNCTAD

³⁵ *Ibid*

³⁶ *Ibid*

³⁷ *WTO Domestic Regulation and Services Trade Putting Principles into Practice - Services : Lessons from GATS – Hamid Mamdouh*

objective criteria and should as far as possible reduce the scope for discretionary decision-making.³⁸ The scope of the rules is also important in that the interface between central and other government levels should be taken into account by ensuring that all levels act in a coherent and complementary way.³⁹

On the other hand, in establishing regulatory institutions, it is suggested that certain aspects are taken into account and these include: clear mandate of the institution that reflects its objectives, functions and *modus operandi*; guarantee the independence of the institution; ensure accountability for decisions taken; and have the requisite human resources in manning such institutions.⁴⁰



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The Geneva Trade & Business Connexion Forum project is undertaken with funding support from the Australian Aid agency (Australian government).

³⁸ Ibid

³⁹ Ibid

⁴⁰ Ibid