

Reference Paper on Services Domestic Regulations: Overview of main content and regulatory implications

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Summary

The plurilateral initiative on services domestic regulation (SDR) disciplines issued a Reference Paper (RP) that is cast as a potential harvest at the World Trade Organization (WTO)'s 12th Ministerial Conference (MC12). While the RP was released with a header containing the WTO logo, it is not an outcome of a multilaterally mandated WTO negotiation. The proposed method for integrating the RP under WTO law has been highly contested by a number of WTO Members as well as academics due to illegality and systemic implications, including because it circumvents a multilateral mandate built into the WTO Agreement on Services (GATS).

Developing countries and least developed countries (LDCs) have had longstanding concerns about the impact of such disciplines on the right to regulate. In many of these countries regulatory and institutional frameworks are still at an emerging stage or at times non-existing, especially in an era of rapid emergence of new services resulting from “servicification” of economies and digitalization of services. The RP disciplines do not address these concerns and could prove intrusive on the regulatory space in developing countries and LDCs.

The disciplines reach broadly and deeply into the State's regulatory processes pertaining to services sectors, including measures concerning government procurement. If brought under the GATS, they will apply to multiple levels of government, including central, regional and local governments and authorities, as well as non-governmental bodies in the exercise of powers delegated by government.

The disciplines could prove highly intrusive on the administration of fees systems in developing countries and LDCs, limiting the ability to charge certain fees for the purposes of achieving national policy objectives or for use in support of regulatory functions or public services. At the same time, States will face new compliance costs to implement the RP requirements.

The disciplines cover the content of the measures relating to authorizations of services as well as the procedures pertaining to these measures. They subject these measures to multilateral standards, such as “objectivity” and “impartiality”, which could be used to challenge regulatory interventions by different levels of government. This could undermine the role and restrict the regulatory space of national regulatory authorities, especially when they need to balance multiple criteria for assessing a service, such as the environmental, economic or community impact.

The disciplines require from States an intrusive transparency regime including advance publication of proposed laws and regulations and receiving comments from interested persons and other Members. This facilitates lobbying pressures and profiteering by interest groups and an undue influence on national regulatory and legislative processes. It poses a significant costly burden on the regulatory process in developing countries. These requirements could potentially come into conflict with certain emergency laws and other measures that States might need to take in times of crisis, such as the current COVID pandemic or the financial crisis witnessed in 2008.

The RP pays lip service to the right to regulate through language that is only permissive and creates neither a legal nor a moral obligation. The RP provides for a watered-down approach to special and differential treatment that is limited to transition periods and does not address the policy and regulatory challenges that could emerge as a result of the disciplines. The RP provides no meaningful commitment to technical assistance and capacity-building.

Introduction

The plurilateral initiative on services domestic regulation (SDR) disciplines issued a Reference Paper (hereafter referred to as RP) that is cast as a potential harvest at the WTO 12th Ministerial Conference.¹ The RP deals with a negotiation issue covered by a multilateral WTO mandate built into Article VI.4 of the General Agreement on Trade in Services (GATS). The preamble of the RP provides that it is “elaborating upon the provisions of the [GATS], pursuant to paragraph 4 of Article VI of the Agreement”.² This despite the fact that Article VI.4 of the GATS entrusts the referenced mandate to the WTO Council for Trade in Services.³

The joint-statement plurilateral initiative on SDR, along with other plurilateral initiatives on electronic commerce, investment facilitation, disciplines for micro, small and medium enterprises, and trade and gender were announced at the WTO’s 11th Ministerial Conference in Buenos Aires in 2017. These announcements took the form of declarations by selected Member States, which they launched when their proposals failed to secure multilateral consensus. While these plurilateral initiatives have been acknowledged and facilitated by the official representation of the WTO, including its director-general and secretariat,⁴ these initiatives and related outcomes are not an official part of the WTO mandated negotiations.

The disciplines of the RP are supposed to apply where specific services commitments are undertaken under the GATS, although countries adopting the RP are encouraged to extend its application to additional sectors (paragraph 8 of RP Section I). Moreover, the RP provides that Members shall inscribe the disciplines in their schedules of commitments under the GATS as “additional commitments” as per Article XVIII of the GATS⁵. This method of integrating the RP under WTO law has been a highly contested one. It has been opposed by a number of WTO Members as well as academics who pointed to illegality and systemic implications of such a move.⁶

¹ INF/SDR/1 released on 27 September 2021, can be retrieved from https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S001.aspx. At the time of its release, 65 States were taking part in the joint-statement initiative plurilateral negotiation. Source: https://www.wto.org/english/news_e/news21_e/serv_27sep21_e.htm#fnt-1

² The plurilateral declaration on services domestic regulation launched at MC11 was conceptualized as a step towards “concluding the negotiation of disciplines on domestic regulation pursuant to the mandate contained in Article VI:4 of the General Agreement on Trade in Services...”. See “Ministerial Conference – Eleventh Session – Buenos Aires, 10-13 December 2017 – Joint Ministerial statement on services domestic regulation”, WT/MIN(17)/61, 13 December 2017.

³ Article VI.4 of the GATS provides that: “With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, *inter alia*:

(a) based on objective and transparent criteria, such as competence and the ability to supply the service;
(b) not more burdensome than necessary to ensure the quality of the service;
(c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.”

³ The WTO secretariat plays a facilitating role for these initiatives by arranging the hosting of meetings at the WTO premises, supporting the coordinators of the initiatives in preparing the reports of the meetings, and providing technical support for posting the materials on subpages of the WTO website and use of interpretation and translation services. See for example: “DG inciting sponsors of plurilateral initiatives to intensify campaign”, published in *SUNS* #8629, 26 February 2018, and available as TWN Info Service on WTO and Trade Issues (Feb18/20) at <https://www.twn.my>. This article **notes that**: “During a retreat meeting of the ACP (Africa, Caribbean, and Pacific) countries..., the Director-General said: ‘I also want to acknowledge the declarations put forward by various groups of members in Buenos Aires – including some ACP members – covering e-commerce, investment facilitation, MSMEs and women’s economic empowerment.’”

⁵ GATS Article XVIII

⁶ See: WT/GC/W/819 “The Legal Status of Joint Statement Initiatives and their Negotiated Outcomes” and Jane Kelsey, “Why the Joint Statement Initiatives Lack Legal Legitimacy in the WTO” (June 2021), available at: https://ourworldisnotforsale.net/2021/Kelsey_JSI_legitimacy.pdf

When multilateral disciplines on SDR were discussed under the Working Party on Domestic Regulation (WPDR) at the WTO (which falls under the auspices of the WTO Council on Trade in Services)⁷, a large number of developing and least developed country (LDC) Members had questioned the “necessity” of such horizontal disciplines in the light of the difficulties that might be faced in implementing them.⁸ The question of whether disciplines are necessary was never conclusively addressed among the WTO membership. In this context, developing countries and LDCs have had longstanding concerns about the preservation of the “right to regulate”, taking into account the fact that in many of these countries regulatory and institutional frameworks are still at an emerging state or at times non-existing.⁹ This is especially crucial in the era of rapid emergence of new services including through the servicification of economies and digitalization of services. These multilateral negotiations did not conclude, and the multilateral process was circumvented by the launch of the joint-statement plurilateral initiative on SDR.

Standards and disciplines for SDR can be found in regional integration and free trade agreements. A recent paper by WTO staff provides that a sample of 74 agreements concluded by 151 Members shows that the adoption of domestic regulatory disciplines in trade agreements is an established practice, particularly among agreements concluded after 2005.¹⁰ Yet, these referred-to disciplines do not follow a uniform approach,¹¹ and are not always enforced by adversarial dispute settlement mechanisms such as what is being proposed for the RP by attempting to bring it under the coverage of the WTO dispute settlement. Some agreements follow the approach taken by Article VI:4 GATS or contain a requirement to revisit the issue after the conclusion of the negotiations on domestic regulations in the WTO. This variance has been considered an indication of the complexity of disciplining domestic regulations particularly given the different legal and regional approaches to this concept,¹² as well as the differences in the developmental levels and related institutional capacities, which dictate how non-discriminatory regulations are utilized and for what reasons.

This note provides commentaries on some of the core provisions of the RP that could be most intrusive and problematic from a developmental and regulatory point of view. The note also discusses the approach to special and differential treatment adopted in the RP. The note does not comment on the legality and legitimacy issues embroiled in the proposition to adopt the RP through WTO Members’ services schedules of commitments without acquiring the consensus of the whole WTO membership. This issue is discussed in a note by Professor Jane Kelsey, which can be accessed on the link included in the footnote.¹³

⁷ The WPDR was established by WTO Members in 1999 pursuant to Article VI.4. See WTO document S/L/70. See also: Kinda Mohamadieh, “Disciplining Non-discriminatory Domestic Regulations in the Services Sectors – Another Plurilateral Track at the WTO”, Third World Network Briefing Paper No. 103, October 2019, available at: https://twon.my/title2/briefing_papers/No103.pdf. Under the multilateral process, negotiations specific to accountancy services were held that concluded with the adoption in 1998 of a set of Disciplines on Domestic Regulation in the Accountancy Sector. These were endorsed by the Council for Trade in Services. Implementation was put on hold pending the formal adoption of the Disciplines by the Members at the conclusion of the Doha Round of negotiations.

⁸ See, for example, paragraph 1.6 of WTO document S/WPDR/M/74, “Working Party on Domestic Regulation – Report of the meeting held on 5 December 2018 – Note by the Secretariat”, dated 13 February 2019.

⁹ Working Party on Domestic Regulation, *Communication by the African Group on Domestic Regulation*, 2 May 2006, Room Document.

¹⁰ Laura Baiker, Elena Bertola and Markus Jelitto, “Services Domestic Regulation: Locking in Good Regulatory Practice” (September 2021), available at https://www.wto.org/english/res_e/reser_e/ersd202114_e.pdf

¹¹ Max Planck Handbook on GATS, Page 178, referencing Krajewski, in: Bartels & Ortino (eds). WTO Members have studied provisions relating to domestic regulation in regional trade agreements in the course of the negotiations on domestic regulation. Working Party on Domestic Regulation, Overview of Regulatory Provisions in Services Economic Integration Agreements, Informal Note by the Secretariat, JOB(05)175, 14 September 2005.

¹² Ibid, Max Planck

¹³ Jane Kelsey (October 2021), “Briefing note on Services Domestic Regulation JSI text of 27 September 2021 (INF/SDR/1)”, Third World Network, available at: https://www.twon.my/title2/briefing_papers/twn/Domestic%20regulation%20TWNBP%20Oct%202021%20Kelsey.pdf

Broad scope and focus on “authorizations”

The RP provides that the disciplines will “apply to measures by Members relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards affecting trade in services” (paragraph 1 of RP Section II). This gives the impression that the scope follows that of Article VI.4 GATS. However, multiple provisions in the RP are organized around “authorizations”. The definition of “authorization” has implications for the scope of application of the RP and thus determines the application of the substantive provisions of the disciplines.

Under Section II of the RP, “measures relating to the authorizations” defines the scope of the provision on “Development of measures” which potentially carries the most intrusive impact on regulatory space (this provision is discussed later in this brief). Moreover, the term “authorization” will determine the scope of disciplines on fees, which cover “authorization fees”. This is unlike the text that was negotiated under the multilateral mandate at the WPDR, where fees were linked to licences, qualifications and technical standards specifically.

Attempts to include “authorizations” under the mandate of Article VI.4 GATS on domestic regulations was a subject of controversy. The mandate of Article VI.4 is specific to licensing and qualification procedures and does not cover “authorizations”. Also, Article VI.3 of GATS prescribes due process obligations for processing applications for authorizations to supply services, including the duty to inform the applicant of the decision within a reasonable period of time after a complete submission of an application, and the duty to provide, at the request of the applicant, information concerning the status of the application. In the discussions held under the WPDR, questions were raised on the extent to which Members can develop procedural disciplines on authorizations under Article VI.4 GATS while there is final agreement on procedural obligations for authorization processes prescribed by Article VI.3 GATS. For example, India noted that besides the two specific obligations prescribed by Article VI.3, there are neither other disciplines nor mandates for negotiating disciplines on authorization, which thus falls outside the remit of VI.4 mandate.¹⁴

Furthermore, the scope is not restricted to licensing requirements and procedures, qualification requirements and procedures, and technical standards affecting trade in services but extends to measures that relate to them. Under the GATS, the definition of “measures” is non-exhaustive, covering any measure by a Member, in the form of a law, regulation, rule, procedure, decision, administrative action or any other form.¹⁵ If GATS definitions will apply to the RP, given that this RP is presented as an elaboration on the GATS and its proponents want to make it part of their commitments under the GATS, then the scope will extend to any such measures related to licensing requirements and procedures, qualification requirements and procedures, and technical standards. Moreover, if the disciplines are to be incorporated in the GATS, the related obligations will fall on multiple levels of government, including central, regional and local governments and authorities, as well as non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities (See GATS Article 1.3a). Moreover, according to the GATS, “[i]n fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory”.¹⁶ Such language provides a limited safeguard, but requires that WTO Members take active steps to ensure compliance by different levels of covered government, governmental authorities, and non-governmental bodies.

A definition of “authorizations” is provided in the RP for the purpose of application to the disciplines of the RP. It provides that “For the purpose of these disciplines, ‘authorization’ means the permission to supply a service, resulting from a procedure to which an applicant must adhere in order to demonstrate compliance with licensing requirements, qualification requirements, or technical standards” (See paragraph 3 under RP Section II).

¹⁴ See for example S/WPDR/M/76, Report of WPDR December 2019.

¹⁵ See Article XXVIII.a GATS.

¹⁶ General Agreement on Trade in Services, Article 1.3, available at: https://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm

It remains unclear how the concept of “authorization” interacts with qualification requirements, licensing requirements and technical standards. For example, it is assumed, taking into consideration the discussions and definitions that were suggested in the WPDR, that qualification requirements, licensing requirements or technical standards are imposed as a requirement for obtaining an authorization. Yet, it is not clear whether there are requirements or measures related to authorizations besides qualification requirements, licensing requirements and technical standards. If it is so, that means that the scope of RP is broader than that considered under Article VI.4 GATS. That will in turn increase the burdensomeness of the obligations that are imposed by the RP.

During the multilateral WPDR discussions held in 2011, when the definition of the term “authorization” was discussed¹⁷, the proposition explicitly excluded measures concerning government procurement and measures governing the safety or the impact on human, animal or plant life or health of the service or the physical structures associated with the service. The GATS article on government procurement (Article XIII.1)¹⁸ exempts government procurement from the application of most-favoured nation, market access, and national treatment obligations but not from obligations under Article VI GATS pertaining to domestic regulations. Yet, the RP does not delimit the application of the disciplines pertaining to authorizations in such a way, meaning authorizations for services procured by the government could be questioned under the disciplines.

The reference paper does not provide a definition for “licensing requirements and procedures, qualification requirements and procedures, and technical standards affecting trade in services”. During the multilateral negotiations under the WPDR,¹⁹ definitions were considered for these terms, but there was no progress on defining technical standards in the WPDR, including whether technical standards include both mandatory and voluntary standards.²⁰ UNCTAD staff had noted that “disciplines on technical standards could have numerous unanticipated consequences, including for new types of services relating to climate change, pollution control or energy efficiency”.²¹ The RP reviewed here requires Members that adopt the disciplines to encourage their competent authorities to adopt technical standards developed through open and transparent processes. The obligations pertaining to publishing information on laws and regulations and providing interested persons and other Members with an opportunity to comment on them also apply to technical standards (these obligations will be reviewed later in this brief).

¹⁷ “For the purpose of these disciplines, ‘authorization’ refers to the granting of permission to a natural or legal person to supply a service in or into the territory or a regional subdivision of a Member, and includes a license or a determination that such a person is qualified to supply a service.

‘Authorization’ does not include measures:

- (a) governing the general conduct of business, including locations, times of operation and similar conditions;
- (b) governing the safety or the impact on human, animal or plant life or health of the service or the physical structures associated with the service; or
- (c) concerning government procurement.”

Source 2011 draft text of multilateral disciplines negotiated in the WPDR, in file with the author. It is important to note that the definition of authorization was referenced in the 2011 text not because the discussed disciplines were organized around authorizations but because it was a term used in defining the core focus of the scope LR and P and QR and P.

¹⁸ Article XIII GATS on Government Procurement: “Articles II, XVI and XVII shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale.”

¹⁹ Reference is made here to the negotiating text from 2009 (S/WPDR/W/45, April 2011).

²⁰ In the WPDR, Members were considering: “With respect to technical standards, ... whether voluntary standards fall within the scope of the disciplines and if so, how can Members effectively discipline action by private actors outside the overall scope of the GATS.” S/WPDR/W/45, 14 April 2011, Chairman’s Progress Report.

²¹ “GATS negotiations on domestic regulation: a developing country perspective”, Mina Mashayekhi and Elisabeth Tuerk in “The World Trade Organization and Trade in Services”, edited by Kern Alexander, Mads Tønnesson Andenæs, 2008

Disciplining fees systems

The RP sets multiple tests (reasonable, transparent, based on authority set out in a measure, and do not in themselves restrict the supply of the relevant service) that could be used to question the system of authorization fees administered by Members that will adopt these disciplines (paragraph 9 under RP Section II). Given the way scope is crafted under the RP, it is not clear whether those fees are limited to fees related to licences, qualifications and technical standards or whether they extend beyond that, given the lack of specificity on what authorization fees entail.

The fees could be reviewed under each of the proposed standards, each of which would be considered as legally independent. Thus, any violation of any of the standards could lead to a violation of the provision. In the WTO dispute settlement case entitled “Thailand – Cigarettes (Philippines)”, the Panel addressed the application of three standards of uniformity, impartiality and reasonableness. The Panel noted that: “The obligations of uniformity, impartiality and reasonableness are legally independent and the WTO Members are obliged to comply with all three requirements. This means that, ..., a violation of any of the three obligations will lead to a violation of the obligations under [the concerned] Article.”²²

The exact meaning of the tests can only be determined on the basis of the facts of each individual situation.²³ Yet, several challenging aspects pertaining to these tests can already be highlighted. Regarding “reasonableness”, it is not clear how it will be assessed, measured against what standards and criteria, considering what range of competing factors, and considering which administrative or legal traditions.²⁴ Assessing “reasonableness” under WTO law may entail a balancing exercise between the interests of the private and public parties concerned by the case. For example, the WTO Appellate Body opined in “US-Clove Cigarettes” that “[t]he obligation ...to provide a ‘reasonable interval’ ...carefully balances the interests of, on the one hand, the exporting Member whose producers might be affected by a technical regulation and, on the other hand, the importing Member that wishes to pursue a legitimate objective through a technical regulation.”²⁵

Regarding “transparency”, it is not clear how this requirement interacts with the RP requirement under the provision on “Publication and Information Available” (paragraph 13 of Section II) which also covers fees, and what specific addition it entails. For example, would the authorities be expected to explain and justify the imposed fees or changes thereafter, and why certain fees might be increased while others are not, or why some are increased with varied rates? National laws do not necessarily provide such detail. For example, some laws refer to “a fee as may be prescribed”.

Regarding the requirement that fees “do not in themselves restrict the investment”, UNCTAD experts had noted, during the multilateral negotiations on SDR, that this standard could potentially amount to a “necessity test” as it refers to concepts which have or could be used in the application of such a test²⁶. Brazil, Canada, and the United States had opposed the inclusion of the necessity test during the multilateral negotiations on SDR undertaken in the WPDR given its impact on regulatory space.²⁷ According to a communication by these three States during the negotiations under the WPDR, “the necessity test would allow another WTO Member to challenge the way the regulator chose to address the non-trade concern even with no demonstrated effect on trade by claiming that another measure, allegedly less burdensome, could have been taken to

²² Thailand – Cigarettes (Philippines) panel report

²³ For example, in WTO dispute US-COOL, the panel considered the meaning of the word “reasonable” under X.3(a) GATT, noting that: “whether an act of administration can be considered reasonable within the meaning of Article X:3 (a) entails a consideration of factual circumstances specific to each case. ...requiring the examination of the features of the administrative act at issue in the light of its objectives, cause or the rationale behind it”. (Panel report US- COOL, paras 7.850- 7.851). https://wikileaks.org/tisa/analysis/Analysis-of-20150220_Annex-on-Domestic-Regulation/

²⁴ Appellate Body Report, US – Clove Cigarettes, paras. 274-275, 279-283

²⁵ GATS negotiations on domestic regulation: a developing country perspective; by Mashayekhi and Tuerk.

²⁷ See: Communication from Brazil, Canada and the United States, “Views on the Issue of the Necessity Test in the Disciplines on Domestic Regulation”, (S/WPDR/W/44), 22 March 2011.

achieve the same policy objective”.²⁸ Moreover, the test in the RP is a broader threshold in comparison to “do not prohibit”, which broadens the basis on which fees could be questioned or challenged.

Consequently, the disciplines could prove highly intrusive on the administration of fees systems in developing countries. It is important to note that many developing countries that have limited capacity to levy income tax and want to limit regressive taxes, like value added taxes, could rely on these fees as a source of revenue. Moreover, a government might need to use fees to fund the administrative burden resulting from the implementation of the RP disciplines. Such arrangements could be challenged under the tests imposed by the RP. Furthermore, it is unclear whether the disciplines would be assessed when considering the overall fees applied at different levels of government in regard to the same supply of the service or if the fees would be assessed separately. Given the above, such complex disciplines could potentially prevent the charging of certain fees for the purposes of achieving national policy objectives, or for use in important regulatory functions such as the provision of public funds for certain public services. At the same time, implementing States might face burdensome new compliance costs to implement the other requirements under the RP.

A clarificatory footnote and its limitations

The RP includes a clarificatory footnote which provides that “[a]uthorization fees do not include fees for the use of natural resources, payments for auction, tendering or other non-discriminatory means of awarding concessions, or mandated contributions to universal service provision” (See footnote 10 of the RP).

This clarification might not be enough to capture the different practices related to using fees systems for broader legitimate policy objectives. During the multilateral discussions on SDR, similar disciplines on fees and charges had also raised concerns that they would prevent certain regulatory practices. For those reasons, many developing countries had proposed to curb disciplines of fees to apply only to administrative costs, thus keeping non-administrative fees outside the scope of the proposed disciplines²⁹. Moreover, during the multilateral process, developing countries had asked for a clarification that: “developing country Members are not precluded from charging fees utilized to meet national policy objectives”³⁰. Such approaches were not integrated in the latest RP.

Disciplining measures related to authorizations

The provision entitled “Development of Measures” sets disciplines on the content of the measures relating to authorizations (i.e. the criteria used under these measures) and the procedures pertaining to these measures. It requires that the criteria used be “transparent and objective”, while the procedures pertaining to these measures should be “impartial”, “adequate for applicants to demonstrate whether they meet the requirements”, “do not in themselves unjustifiably prevent the fulfilment of requirements” and “do not discriminate between men and women” (paragraph 22 under RP Section II). The latter condition is the only one covered by an exemption clause that Members can avail themselves of in order to exclude this discipline from the commitments they adopt under the RP (paragraph 9 under RP Section I).

The scope under this provision is broader than authorization procedures as it covers “measures relating to the authorization” and its boundaries are not clear. Given the use of the term “related”, it may include measures of indirect relationship with authorizations. This may extend beyond licensing requirements and

²⁸ Ibid, S/WPDR/W/44

²⁹ Proposals from Brazil, Philippines and Indonesia, the Small, Vulnerable Economies, Africa Group, and China and Pakistan, referenced in South Centre “The Development Dimension of the GATS Domestic Regulations”, available at: https://www.southcentre.int/wp-content/uploads/2013/08/AN_SV11_The-Development-Dimension-of-the-GATS-Domestic-Regulations_EN.pdf See also: “The Draft GATS Domestic Regulation Disciplines-Potential Conflicts with Developing Country Regulations”, prepared by Ellen Gould with contributions from Robert Stumberg for the South Centre, October 2009, available at: https://www.southcentre.int/wp-content/uploads/2013/08/AN_SV12_The-Draft-GATS-Domestic-Regulation-Disciplines_EN.pdf

³⁰ See: “GATS negotiations on domestic regulation: a developing country perspective”, Mina Mashayekhi and Elisabeth Tuerk in “The World Trade Organization and Trade in Services”, edited by Kern Alexander, Mads Tønnesson Andenæs, 2008.

procedures, qualification requirements and procedures and technical standards. It also implies that the practices of a broad number of domestic institutions and decision-makers could be potentially implicated by this provision and potentially questioned under the multiple proposed tests.

The “objectivity” standard, given that it is not strictly and explicitly defined, could be taken to mean “not subjective”. If so, such a standard could be used to challenge regulation that is based on subjective balancing which can be required when there are multiple criteria for assessing a service, such as the environmental, economic or community impact of a proposed oil drilling platform, power plant, mining investment, etc. During the multilateral discussions on SDR, and in reviewing the potential impacts of similar standards, Professor Robert Stumberg had raised the question of whether the “objectivity” test would conflict with a public interest approach that requires regulators to balance competing interests. Stumberg noted that while the quality of the service may be one concern, other interests that regulators have to consider can include “environmental protection, financial stability of the utility, affordability of rates for most consumers, or economic development of the community at large”³¹. This could undermine the authority and restrict the regulatory space of national regulatory authorities. This standard could also be taken to mean “not biased” meaning that the interests of specific groups or communities could not be favoured.

The test of “transparency” as used in relation to measures related to authorizations could fall in tension with the regulatory discretion needed in order to ensure critical objectives are met in key sectors.³² For example, a country may require “honesty and integrity” as qualification requirements for financial service providers, which enables regulators to consider “any information in possession of the Registrar or brought to the Registrar’s attention”. Countries could also require that applications for offering educational services be assessed based on whether that is “in the interest of university education”. Others might give discretion to the licensing officers to decide whether an application for a licence should be approved or refused based on whether it “is consistent with national economic and social objectives and would promote the orderly development” of manufacturing and services activities. The disciplines set in the RP could mean that relevant factors, and the weightings to be given to each, must be spelt out by the decision-making agency in advance, removing the ability of decision-makers to apply discretion and make judgements appropriate to the circumstances. The disciplines will also allow an adjudicator to assess the clarity and specificity of the criteria and whether it gives certainty to service suppliers.

Another clarificatory footnote and its limitations

The RP provides for a clarificatory footnote (footnote 17) that reads as follows: “Such criteria may include, inter alia, competence and the ability to supply a service, including to do so in a manner consistent with a Member’s regulatory requirements, such as health and environmental requirements. Competent authorities may assess the weight to be given to each criterion.”³³

This clarification just restates a sovereign right to regulate for environmental, health and other purposes but does not exclude these regulations from potential challenge under the proposed tests. This clarificatory footnote does not create a carve-out for those measures establishing regulatory requirements pertaining to health and environment, and does not save them from being potentially questioned under a dispute settlement

³¹ Robert Stumberg, “GATS and Electricity – Interim Report”, National Conference of State Legislatures: Working Group on Energy and Trade Policy, 15 April 2005, p. 26. For example, in the case of the electricity sector, licences in the electricity sector usually cover “generation, importation or exportation, transmission or distribution of electrical energy”. In determining whether to grant a licence, the regulatory authority consider among other things “the impact of the undertaking on the social, cultural or recreational life of the community...”. These are areas where it would be difficult to meet the “objective” and “transparent” requirements of the disciplines.

³² Lack of transparency has been associated at WTO compliance reviews with “lack of clarity”, “open-ended(ness)”, and “uncertainty” for foreign suppliers, and situations where “considerable bureaucratic discretion” is allowed. See: “Some Analyses of Domestic Regulation Disciplines- Compilation for MC 11”, Sanya Reid Smith (2017), Third World Network, available at: https://www.twn.my/briefings_MC11.htm

³³ Similar language is included in existing agreements, such as USMCA that clarify that “objective criteria” include criteria that may not be quantifiable, such as competence, ability to supply the service and environmental, social and health effects (4 See footnote 15, DRP2019 and Article 15.8.2(a), USMCA).

case. It is not self-judging. It does not allow a Member to self-judge whether a measure it is taking falls under a regulatory requirement pertaining to health and environmental reasons, nor can the Member self-judge whether the concerned measure is objective or transparent. Under WTO jurisprudence, listing of examples has been taken to mean a provision of indication of types of issues intended to be covered by the provision. For example, the Appellate Body considered in the case “US-Large Civil Aircraft” (2nd complaint) that Article 1.1(a)(1)(i) of the WTO Subsidies and Countervailing Measures (SCM) Agreement, which lists in brackets examples of direct transfers of funds (“e.g. grants, loans, and equity infusion”), provides an indication of the types of transactions intended to be covered by the more general reference to “direct transfer of funds”.³⁴ This will further limit the footnote to cover regulatory interventions of the kind or type mentioned in the footnote.³⁵ Thus, this footnote will not save Member’s regulatory requirements, such as health and environmental requirements, or other regulatory interventions in the public interest or for developmental purposes, from being scrutinized under the tests of “transparency” and “objectivity”.

An intrusive transparency regime

The RP requires advance publication of laws and regulations of general application that a Member proposes to adopt in relation to measures falling under the scope of the disciplines (i.e. those relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards affecting trade in services). Otherwise, the Member is required to publish documents that provide sufficient details about such a possible new law or regulation (paragraph 14 under RP Section II). The RP also requires providing interested persons and other Members with a reasonable opportunity to comment on these measures and to consider received comments (paragraphs 16 and 17 of RP Section II).

With such obligations, Members could be asked to explain the justification of a regulation upon request by other Members, notify other Members of the scope, objective and rationale of proposed regulations, provide other Members with particulars or copies of the proposed regulations and allow other Members and their service industries to make comments on proposed regulations, and show that they have considered these comments or taken them into account.³⁶ Krajewski notes that such prior comment requirements in effect “internationalize” domestic decision-making processes, because it is no longer sufficient for a Member’s parliament or administration to act based on the interests of the domestic stakeholders and economy.³⁷ Rather, the views of other Members and their service industries can become an important factor in the national regulatory process, Krajewski adds.³⁸ Such obligations have been questioned in the context of the multilateral discussions on services domestic regulations, which have not been concluded.³⁹ While it is argued that similar provisions are provided for under existing WTO Agreements, such as the Trade Facilitation Agreement, the potential implications of the provisions under the RP go much further in terms of its intrusiveness on the regulatory space, given the breadth of the measures and levels of government it will apply to.

³⁴ See: https://www.wto.org/english/tratop_e/dispu_e/repertory_e/s2_e.htm#S.2.3B.3. This approach is a reflection of the “*Ejusdem Generis*” rule that means that when general words are followed by more specific words, the general words are limited by the “class” indicated by the more specific words.

³⁵ The term “inter alia” used in the footnote does not seem to stop the effect of the “*Ejusdem Generis*” principle from applying since “inter alia” means other similar requirements are possible, according to the Panel in EC – Approval and Marketing of Biotech Products. See: https://www.wto.org/english/res_e/publications_e/ai17_e/sps_anna_jur.pdf.

³⁶ Krajewski, Markus, Domestic Regulation and Services Trade: Lessons from Regional and Bilateral Free Trade Agreements (1 May 2015). Forthcoming in Edward Elgar Research Handbook on Trade in Services, Pierre Sauvé and Martin Roy, editors, Available at SSRN: <https://ssrn.com/abstract=2647053>

³⁷ Ibid.

³⁸ Ibid page 14.

³⁹ A non-public communication at the WTO by the African, Caribbean and Pacific Group of States (ACP) entitled “Pro-Development Principles for GATS Article VI:4 Negotiations”(JOB(06)/136/Rev.1), seen by the author, provides that “any future disciplines must not contain prior comment requirements either in a legally binding or best endeavour form. This is also supported by the fact that such requirements may be contrary to constitutional structures and legal systems in many developing countries as well as result in granting foreign-service suppliers opportunities to exert undue pressure on domestic decision making process, which is the core of sovereignty”.

Requiring mandatory comment opportunities for service suppliers and “other interested parties” could put a significant costly burden on the regulatory process in developing countries. Such exposure could potentially leave a “chilling effect” on the regulatory process if the authorities are exposed to campaigns by the organized lobbies of big services industries. The category of “interested parties” could encompass an undefined open-ended class of parties. It could include an expanded list of entities that have a direct or indirect relation to the services covered by the disciplines, and do not necessarily have to be located in the territory of the Member State implementing the measure. This may enhance opportunities for lobbying pressures and profiteering by interest groups and an undue influence on national regulatory and legislative processes. Such lobbying and influence could tilt the balance in national regulatory and legislative processes away from the national constituencies and development priorities. For example, it could skew the pressure on the regulatory and legislative processes towards interests defined primarily by private profit (of multinational companies and their industry and national associations, such as the international chambers of commerce, rather than the interests of domestic MSMEs and farmers’ and workers’ associations) and away from the concerned public interest.⁴⁰ This is specifically worrying in the context of the services sectors, given that the services industry lobbies are highly well organized and because such lobbying could end up impacting essential services sectors.

These requirements, which are also included under Section III of the RP specific to financial services, could potentially come into conflict with certain measures that States might need to take in times of crisis, such as the current COVID pandemic or the financial crisis witnessed in 2008. In the financial sector, limits on bank withdrawals imposed for indeterminate periods in the context of an imminent recession or crisis could fall in conflict with the disciplines. Emergency economic laws enabling the executive to issue economic decrees in case of emergency or economic crisis could fall in conflict with the “prior comment” requirement. Even if the GATS prudential exception (paragraph 2a of the Annex on Financial Services)⁴¹ is to apply to the RP disciplines, the chance of this defence providing a way out for Members is limited. Benefiting from the exception imposes burdensome requirements that a Member should fulfil beforehand.⁴² It is generally agreed that this defence is ambiguous, some argue this defence is self-cancelling, and numerous scholars, including WTO panelists, have discussed the need for clarification.⁴³ Beyond financial-services-related measures, many of the measures taken in the context of the COVID crisis such as closure of many services facilities in

⁴⁰ For example, it was documented that: “Internal documents leaked from Philip Morris’ offices give indications of targeted efforts to delay the regulatory decision making in this regard. The company apparently used 161 lobbyists to this end, who cost it £1.25 million in meeting expenses alone. 31% of MEPs had been met by Philip Morris at least once within a six months period. These documents are said to contain evidence that the company commissioned economic and academic studies to influence opinion. They are also believed to have used farmers organizations and retail industry bodies to lobby the E.U. In 2013, a crucial vote in this regard had been delayed for a while, raising apprehensions about the future of the regulation.” See for example, <https://www.reuters.com/investigates/special-report/pmi-who-fctc/>; <https://www.reuters.com/article/us-pakistan-tobacco-insight-idUSKCN1IU11R>; <https://www.forbes.com/sites/greatspeculations/2014/10/03/why-did-philip-morris-spend-more-than-anyone-else-lobbying-the-e-u/#1a268b012963>

⁴¹ “2(a) Notwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Member’s commitments or obligations under the Agreement.” (GATS Annex on Financial Services)

⁴² For example: WTO jurisprudence on the GATS prudential defence points that:
a) the country invoking the defence must prove : “(i) that [the measures at issue] are measures ‘affecting the supply of financial services’; (ii) that [the measures at issue] were taken ‘for prudential reasons’; and (iii) that [the measures at issue] have not been used ‘as a means of avoiding [the defendant’s] commitments or obligations’ under the GATS”.
b) the *reason* for the measure must be prudential. (Prudential measures such as those usually cited in the context of the Basel banking standards.)
c) the measure must be “for” prudential reasons, the country invoking the defence must demonstrate that in the measure’s design, structure and architecture there is a rational relationship of cause and effect between the measure and the prudential reason for it.

See: https://www.wto.org/english/res_e/publications_e/ai17_e/gats_annfinancialservices_jur.pdf from https://www.wto.org/english/res_e/publications_e/ai17_e/gats_e.htm

⁴³ Discussion Proposal at the WTO to Safeguard Financial Stability, Public Citizen, available at: <https://www.citizen.org/wp-content/uploads/fact-sheet-ecuador-june-2012-proposal.pdf>

which foreign service suppliers are active whether in hospitals or restaurants, and the taking over of medical and health facilities to dedicate them to COVID response could be caught under these measures.

Clarificatory footnote and qualifications and their limitations

The provision on “opportunity to comment” (paragraph 14 of RP Section II) includes several references to qualifications such as “to the extent practicable and in a manner consistent with its legal system”. This does not give discretion to Members not to implement the provision. Moreover, the margin of discretion available to Members might be more limited in comparison to the discretion that could be available if the language or choice of words was “if that party considers that it is practicable [or not practicable]...” instead of “to the extent practicable”. Even in such cases, the margin of appreciation available to the concerned Member will be subject to review by the adjudicators in case of a dispute.⁴⁴ The provision clearly includes obligations that Members will have to demonstrate progress in fulfilling, and thus Members could be questioned in that regard.

Moreover, despite using language that refers to the Member’s legal system, that language does not mean that a Member is allowed to refrain from implementing the obligations because its legal system does not allow for it to implement. For example, a wording that would allow a member to opt out from implementing because the obligation is not allowed under their legal system would more directly provide that the obligation is “subject to the Party’s legal system...”. The language used under the RP sets an obligation on the Member to implement but allows the Member to choose the way to do so. Furthermore, an explanatory footnote seems to put restrictions in this regard by limiting the options of implementation available to either publishing the covered laws and regulations or publishing documents that provide sufficient detail about them. The footnote provides that “...this Section recognize that Members have different systems to consult interested persons and other Members on certain measures before their adoption, and that the alternatives set out in paragraph 14 of this Section reflect different legal systems”. This footnote could mean that the two alternatives provided for are considered a comprehensive reflection of the different legal systems of Members, and consequently Members shall do one or the other among these two choices as a demonstration of their fulfilment of the concerned obligation.⁴⁵

A very narrow approach to the right to regulate and special and differential treatment

The establishment and utilization of operational and effective provisions for special and differential treatment (SDT) has been a longstanding request of developing countries and LDCs when the multilateral negotiations on SDR disciplines were undertaken.⁴⁶ There was always a looming and unanswered question of whether any form of SDT could help developing countries and LDCs deal with the challenges to regulatory and policy space that such disciplines imply.

⁴⁴ Based on the use of word “practicable” as contained in Article 22.3 DSU (on suspension of concession and other obligations), and approached in the Decision by the Arbitrators, European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, WT/DS27/ARB/ECU, para 52, 24 March 2000, DSR 2000:V, 2237. This argumentation was repeated in: Decision by the Arbitrator, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Recourse to Arbitration by the United States under Article 22.6 of the DSU, WT/DS285/ARB, 21 December 2007, at paras 4.15-18. Referenced in WTO secretariat Informal Note “Treatment of Flexibility Language in Dispute Settlement”, (JOB/SERV/8) 31 May 2010 Working Party on Domestic Regulation.

⁴⁵ Jane Kelsey (October 2021), “Briefing note on Services Domestic Regulation JSI text of 27 September 2021 (INF/SDR/1)”, Third World Network, available at: https://www.twn.my/title2/briefing_papers/twn/Domestic%20regulation%20TWNBP%20Oct%202021%20Kelsey.pdf

⁴⁶ For example, see Working Party on Domestic Regulation, *Communication by the African Group on Domestic Regulation*, 2 May 2006, Room Document.

Lip service to the right to regulate

The preamble of the RP provides that “Members recognize the right to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet their policy objectives” and that “[t]he disciplines shall not be construed to prescribe or impose any particular regulatory provisions regarding their implementation” (See paragraphs 3 and 5 of Section I).

This language merely reiterates countries’ right to regulate so as to achieve national policy objectives. Yet, this language does not shield any regulations falling under the scope of the RP from questioning under the set disciplines and from being potentially found to be in contravention of these requirements. It is language that is only permissive and purports to create neither a legal nor a moral obligation. Moreover, given the placement in the preamble, the language would lack operative character. It cannot operate as an exception that overrides the substantive obligations in the RP.

In a December 2017 statement⁴⁷, the African Group raised multiple issues pertaining to similar “right to regulate” language, which are relevant to recall here. These include the following: “Does the mere recognition of the right to regulate override the substantive obligations in the disciplines? What is the legal meaning of ‘recognize’? Is ‘recognition’ of the right the same as ‘holding’ and ‘exercising’ the right? What is the precise relationship between the right to regulate and the disciplines on domestic regulation? If a regulation is put in place that is not the ‘least burdensome’, or is not considered to be ‘objective’, will Members be challenged under these disciplines in the dispute settlement body? In which case, is there a right to regulate? ...”

It might be argued that the language on the right to regulate embodies the recognition on the part of WTO Members of the need to maintain a balance of rights and in that sense could be invoked to buttress a country’s right to regulate in case of conflicting claims about the disciplines. Yet, if it is to be resorted to in case of a dispute, the “ordinary meaning” of the term must take account of the “context” in which it is used given the “object and purpose” of the treaty.⁴⁸ The “object and purpose” of the disciplines are subject to two conflicting principles: on the one hand the right of Members to freely regulate for public policy objectives within their territories, and on the other hand the goal of achieving progressive liberalization and facilitation of trade in services. The substantive paragraphs of the RP leave no doubt as to the subordinate position of the right to regulate when set against the other objectives specific to services trade. For those reasons, this language on the right to regulate cannot be relied on as a defence for regulatory action or as a potential carve-out for public interest regulation from being questioned under the disciplines.

Special and differential treatment reduced to transition periods

The special and differential treatment (SDT) under the RP is limited to transition periods. It provides that “[a] developing country Member may designate specific disciplines for implementation on a date after a transitional period of no longer than 7 years following the entry into force of these disciplines” (paragraph 10 under RP Section I). The designation of seven years does not seem to be grounded in empirical evidence pertaining to implementation needs that developing countries will face, and which will vary depending on the levels of development as well as the national specificities including whether a State operates a federal decentralized system or a centralized system of governance. The readiness of a Member State to implement the disciplines might also be impacted by a financial crisis, natural disaster or pandemic as the one the world has been facing due to the coronavirus. In those cases, the transition period might not serve its purpose. Furthermore, by providing that “[a] developing country Member may designate specific disciplines”, it might mean that a developing country has to select the specific disciplines it wants to inscribe for a transition period, and not the whole reference paper. The adopted formulation may allow for pressure to be exerted on developing countries in order to be selective in regard to the obligations they request transition periods for and in regard to the number of transition years they request.

⁴⁷ Statement WT/MIN(17)/8 , December 2017.

⁴⁸ See: Vienna Convention on the Law of Treaties, Articles 31 and 32.

The approach to SDT under the RP does not match that adopted under the Trade Facilitation Agreement (TFA), which allows developing countries and LDCs to define the transition period they require (under Category B) and request assistance for certain provisions in addition to a transition period (under Category C). Unlike the TFA, where transitional periods can be extended upon a simple request of the Member (See Article 17 of the TFA Section II), a developing country requesting an extension of the transition period under the RP would have to go down the road of requesting a waiver under Article IX of the WTO Agreement or renegotiating commitments under Article XXI GATS. This would be a much more complex road; waivers usually require “exceptional circumstances” and are normally for one year, with longer periods requiring review of the “exceptional circumstances”, and renegotiating commitments can be blocked by other countries or require other concessions in return. This practically makes an extension of a transition period unattainable.

Overall, transitional periods do not address the policy and regulatory challenges that could emerge as a result of the disciplines imposed under the RP (for example those on development of measures related to authorizations or those related to authorization fees). For those reasons, it is not enough to rely on SDT to address the challenges pertaining to regulatory space.

More lip services to technical assistance and capacity-building

Technical assistance and capacity-building (TACB) envisioned under the reference paper will be provided “upon request and on mutually agreed terms and conditions”. This could be compared to much stronger language such as “developed countries shall provide/agree to provide TACB upon request...”. Since “mutual agreement” requires agreement by developed countries on a case-by-case basis, there is no guarantee that developing countries and LDCs could access the TACB that they require. There is also no guarantee that TACB would include financial assistance to aid with the costs that developing countries and LDCs will entail in the implementation of the RP.

For example, in the context of the TFA, many developing countries and LDCs have requested TACB in order to be able to implement the requirements under the TFA. Yet, the access to TACB in the form of grants and allocation of resources through donor support on “mutually agreed terms” has been very low. According to a report by UNCTAD in 2020, only 5% of developing countries (DRC, Guinea-Bissau, Haiti, Liberia, Mauritania, Solomon Islands, Tanzania, Vanuatu and Yemen) that requested TACB have announced that they have reached arrangements with donor Members, and only one LDC announced TACB arrangements, numbers that do not match with the level of resource mobilization pledged for the TFA.⁴⁹

Pressure projected on least developed countries

LDCs wanting to adopt the RP are requested to inscribe the disciplines in their schedules of their commitments in order to utilize the flexibility of the transition period “no later than 6 months in advance of their graduation from least-developed country status” (See para. 11 of the RP Section I). This could entail ample challenges for LDCs because it will require LDCs to do their assessment on the potential implications of the disciplines on their institutional and regulatory systems and decide on how to utilize the available SDT before graduation. This will put a great strain on LDCs. It is unclear from the language what would be the fate of an LDC that misses the deadline and fails to inscribe the disciplines and indicate how they intend to use the available transition periods six months in advance of their graduation from least developed country status. Could that mean that LDCs wanting to adopt the RP will lose the opportunity to avail themselves of the SDT?

⁴⁹ “Implementation of the WTO Trade Facilitation Agreement: Not a sprint but a marathon” (February 2020), available at: <https://unctad.org/news/implementation-wto-trade-facilitation-agreement-not-sprint-marathon>

Alternative disciplines in services domestic regulations for financial services

Alternative disciplines on financial services domestic regulations are provided together with the RP and Members have the choice to adopt them in relation to their commitments in the financial services sector. The alternative disciplines generally follow the same structure of the RP but include a few important changes that attest to the sensitivity of the financial services sector, and the lessons learnt from the financial crisis and the need for regulatory space in that regard.

The main differences between the RP and the alternative disciplines on financial services include:

- Removal of technical standards from the scope.
- Removal of the disciplines on submission of applications which, under the RP, requires that “[e]ach Member shall, to the extent practicable, avoid requiring an applicant to approach more than one competent authority for each application for authorization”. This RP provision, however, allows multiple applications for authorization to be required if a service is within the jurisdiction of multiple competent authorities.
- Reformulation of the section on fees to a much lighter approach that only requires providing applicants with a schedule of fees or information on how fee amounts are determined. All the standards set under the RP for assessing the fees systems are removed.
- Removal of the section on recognition which under the RP encourages dialogues on issues relating to recognition of professional qualifications, licensing or registration among professional bodies.
- Limiting the requirement for publication and information available, by removing from its scope fees, technical standards and indicative timeframes for processing of an application.

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