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GATS – DISCIPLINES ON DOMESTIC REGULATIONS NEGOTIATIONS

Brief analysis of developing country issues

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Introduction

The General Agreement on Trade in Services (GATS) in its preamble recognizes the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories to meet national objectives, and further that given asymmetries existing with respect to the degree of development of services regulations, the particular need of developing countries to exercise this right.¹ Given that services are intangible, governments through regulation aim at ensuring that service consumers are not exploited through say information asymmetries, in this way regulation may require consumers are provided with information in advance, or qualification requirements of professionals, or licensing requirements as proof of competence of service suppliers and quality of the services provided.²

Despite the above recognition of Members right to regulate domestically, the GATS in Article VI.4 provides that measures relating to qualification requirements and procedures, technical standards and licensing requirements

should not constitute unnecessary barriers to trade in services, and through the Council for Trade in Services mandates development of any necessary disciplines to ensure that such requirements are, *inter alia*:

- a) Based on objective and transparent criteria, such as competence and the ability to supply the services;
- 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.

It is on that basis that the Working Party on Professional Services was established and later developed disciplines in the Accountancy Sector. Thereafter the Council for Trade in Services established the Working Party on Domestic Regulations (WPDR), whose mandate is to develop generally applicable disciplines as appropriate for individual sectors or groups.³

This note briefly analyses the main issues under negotiation in the development of the above disciplines, highlighting some of the concerns faced by developing countries and mapping the way forward.

¹ See preamble to the GATS

² WTO Trade in Services Division – Disciplines on Domestic Regulation Pursuant to GATS Article VI.4 Background and Current State of Play

³ Ibid

Main Issues in the Negotiations of Disciplines on Domestic Regulation

The negotiations on disciplines for domestic regulation are revolving around a number of issues that could be categorized as follows: 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. However there have been some proposals suggesting that the disciplines in this respect should require prior comment and publication of intended regulation, so that its objective and rationality can be explained before it is put in place. There are concerns that such disciplines would be intrusive on national regulatory autonomy.⁴

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. In effect 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.⁵ 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

⁴ Trade in Services and Sustainable Development: Domestic Regulations, UNCTAD

⁵ Ibid

objective.⁶ 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.⁷

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 with regard to 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 WPDR have focused the horizontal approach, which is envisaged to result in disciplines for all services sectors rather than only those considered to be more important.⁸

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;⁹ relevance of foreign qualification and experience wherein account should be taken 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;¹⁰ acceptance of international

⁶ Ibid

⁷ Ibid

⁸ Mattoo, Aaditya Developing Countries in the New Round of GATS Negotiations: Towards a Proactive Role, The World Economy

⁹ Supra footnote 2

¹⁰ Ibid

standards to facilitate evaluation of qualification obtained abroad.¹¹

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 WPDR raises a number of concerns for developing and least developed countries that arise from the negotiations.

Among the concerns raised is the attempt to adopt universally applicable regulatory frameworks or principles, or international standards, based mainly on the experience and practice of developed countries that already have such frameworks in place. This risks conflict with domestic values, institutions, and practices especially in developing countries given their varied levels of development and therefore adaptability.¹² Particularly it raises the issues of whether due account will be given to legal infrastructure, bureaucratic culture, market realities and political values in

the developing and least developed countries.¹³

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. This is specifically with regard to 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 are in any case more able to influence outcomes that suite their interest at the cost of domestic stakeholders.¹⁴

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.

The other concern is with regard to the reliance on international standards in

¹¹ Ibid

¹² Supra footnote 4

¹³ Cook, Kirkpatrick, et al. Competition, regulation and regulatory governance: an overview.

¹⁴ Supra footnote 4

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 lack of specialized knowledge their rate of involvement and degree of influence in setting such standards is very limited. Resulting international standards mostly reflect interests of developed countries, which have the capacity to effectively participate in their setting, and therefore relying on them to determine conformity would be detrimental to the developing countries.¹⁵

Way forward

Developing countries, along with the least developed countries should push the disciplines on domestic regulation to be general in nature such as to accommodate a wide 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.¹⁶

Applicability of the resulting disciplines on domestic regulation under Article VI.4 GATS

¹⁵ Ibid.

¹⁶ Ibid.

should cover only the specific commitments undertaken by Members as opposed to general application, which would ensure certainty, while also allowing Members to assess future commitments in light of their domestic regulations in place.¹⁷

Developing countries and least developed countries should also push for the linking of resulting obligations from the disciplines on domestic regulations, to the development of regulatory and institutional capacity at the local and regional levels of government. This should be premised on the principle of special and differential treatment similar to what was included in the Trade Facilitation Agreement.

¹⁷ Ibid