

March 2010 Status Report on the GATS Working Party on Domestic Regulation

In preparation for the WTO's stock-taking exercise, the Chair of the GATS Working Party on Domestic Regulation has issued an annotated text of draft restrictions on services regulation. This annotated text reveals:

- The **implications of the proposed disciplines on the right to regulate**. These restrictions may take the form of a new, stand-alone WTO Agreement.¹
- The **continuing lack of clarity**, eleven years since the Working Party first met², on the most fundamental questions in the negotiations. For example, delegations still have not agreed whether the disciplines should apply to voluntary standards (standards set by non-governmental organizations), or mandatory standards (standards set by governments), or both.³
- The **lack of definitions for key terms**. For example, one delegation is advocating that the proposed "relevance" discipline should mean regulations can only address the concerns of consumers.⁴ Regulatory requirements to meet environmental, cultural, or other objectives would be violations of the "relevance" discipline. As the draft now stands with "relevance" left undefined, in the event of a dispute there is nothing to prevent a panel from interpreting the relevance discipline in this extremely deregulatory way.

These problems, explained in more detail below, are especially worrisome given the scant attention being paid to the negotiations and the possibility that the disciplines in their current form will be approved as a non-controversial component of an overall Doha deal.

Implications of the proposed disciplines on the right to regulate

Because of the GATS' broad definition of trade, internal regulations that have nothing to do with cross-border trade would be governed by the proposed GATS disciplines on domestic regulation. What training a country asks its doctors and teachers to have, what standards it requires construction companies to meet, what environmental reviews it conducts of oil and gas pipelines are just some examples of the broad range of internal domestic regulations that will be governed by the disciplines.

The extensive reach of the GATS makes it inappropriate to merely lift language for the disciplines from other WTO agreements, as the Chair points out in relation to using clauses from the Agreement on Import Licensing: "Of course, import licensing

¹ "DISCIPLINES ON DOMESTIC REGULATION PURSUANT TO GATS ARTICLE VI:4 - Annotated Text", March 14, 2010, paragraph 3. p. 4.

² GATS Working Party on Domestic Regulation, "REPORT ON THE MEETING HELD ON 17 MAY 1999", S/WPDR/M/1, 14 June 1999.

³ Annotated Text, paragraphs 50 – 53, p. 17.

⁴ Annotated Text, paragraph 90, p. 23.

procedures for goods are inherently restrictive only on imports, whereas, licensing and qualification procedures are equally applicable to local suppliers.”⁵ This statement highlights the fact that the proposed GATS disciplines will restrict how governments regulate within their own borders.

The annotated text reports on the consensus among negotiators that the disciplines will govern non-discriminatory regulations – regulations that do not discriminate against foreign services or suppliers either directly or indirectly.⁶ Mireille Cossy, a Counsellor in the WTO’s Trade in Services Division, has explained the implications of this decision:

“In effect, the current understanding that Article VI [Domestic Regulation] applies to non-discriminatory measures leads to the questionable consequence that WTO judiciary organs can rule on the ‘necessity’ of a measure which does not discriminate, whether de facto or de jure, against foreign services and service suppliers, but is seen as unsound from an economic point of view and has a possible restrictive effect on trade (this effect being the same for nationals and foreigners). As a consequence, it will allow a WTO judge to rule on societal choices (opening hours of shops, to take just one example), based on consideration of trade and economic efficiency. This is highly undesirable.”⁷

Despite the undesirable implications, some delegations – Switzerland in particular - continue to press for a “necessity test” to be imposed through the disciplines. In response to this pressure, and because the necessity test “has been the single-biggest contentious issue during the negotiations”⁸, the Chair is proposing that the necessity test could be implemented through specific language that would define “necessity”. The options vary in terms of how much they would impair the right to regulate. A government regulation could be deemed to be necessary if it was “indispensable”, if it made a contribution to the achievement of an objective, or if there was no other reasonably available alternative measure that was significantly less trade restrictive.⁹

The Chair is recommending against retaining¹⁰ in the final draft the following two statements that are designed to safeguard the right to regulate:

“3. Members recognize the right to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right...”

⁵ Annotated Text, paragraph 163, p. 36.

⁶ Annotated Text, paragraph 81, p. 22.

⁷ Mireille Cossy, “Determining ‘likeness’ under the GATS: Squaring the circle?”, World Trade Organization Economic Research and Statistics Division, Staff Working Paper ERSD-2006-08, September 2006, p. 44. The disclaimer on the paper states that the paper is not meant to represent the position or opinions of the WTO or its Members, nor the official position of any staff members.

⁸ Annotated Text, paragraph 17, p. 7.

⁹ Annotated Text, paragraph 19, p. 7.

¹⁰ Annotated Text, paragraph 24, p. 9.

“12. Nothing in these disciplines prevents Members from exercising the right to introduce or maintain regulations in order to ensure provision of universal service, in a manner consistent with their obligations and commitments under the GATS.”

The Chair is recommending against retaining a statement on the right to regulate as part of the disciplines because “it is substantively identical with the fourth recital of the Preamble of the GATS”.¹¹ However, in the three WTO cases where GATS rules have played a major part in a successful challenge, the panels have explained the limits of the existing right to regulate included in the agreement.¹² For example, in a 2009 decision against China, the panel stated “We observe that China has the undoubted right to regulate trade in services under the GATS... This regulation must however be in accordance with the GATS commitments that China has chosen to make in its Schedule.”¹³

The draft disciplines impose some obligations on regulators that would be impossible to fulfill, opening the door to unlimited disputes. The Chair reports that one delegation has explained that “the term ‘as simple as possible’ could not be applied by regulators, or satisfied in the context of dispute settlement.”¹⁴ The disciplines as drafted also require that procedures “do not in themselves constitute a restriction on the supply of services”. All procedures would be vulnerable to challenge since as one delegation has pointed out “any procedure that a regulator applied would dissuade some applicants and would hence in itself restrict the supply of services.”¹⁵

No clarity over what the disciplines cover

Negotiators do not agree on exactly what it is they are “disciplining”, so imposition of the disciplines as currently drafted would create legal uncertainty for governments. The definitions of the regulatory categories in the existing draft have been shown to be full of problems. The Chair reports that:

“Deliberations in the Working Party reveal that delegations’ views appear to differ considerably both with regard to the coverage of the definitions chapter overall, as well as the scope of the individual definitions contained therein.”¹⁶

Negotiators disagree on how to distinguish between the different categories of regulations that would be subject to the disciplines. Just some examples of the unresolved questions are:

¹¹ Ibid.

¹² All three panels dealing with GATS cases - Mexico – Telecoms, US-Gambling, and China – Publications – have interpreted the limits of the right to regulate.

¹³ WTO, “China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products”, WTO document WT/DS363/R, 12 August 2009, paragraph 7.11139

¹⁴ Annotated Text, paragraph 155, p. 35.

¹⁵ Annotated Text, paragraph 156, p. 35.

¹⁶ Annotated Text, paragraph 55.p. 17.

- whether qualification requirements apply only to individuals (“natural persons”) or to corporations (“juridical persons”) as well;
- whether licensing requirements may in some cases include technical standards;
- whether technical standards cover mandatory or voluntary standards, or both.

These disagreements are significant because the disciplines differ according to which category of regulations they are supposed to apply to – qualification requirements and procedures, licensing requirements and procedures, or technical standards. If the dividing line between these categories is not clear it would be impossible for governments to know how they are supposed to reform their regulations in order to avoid a GATS challenge.

The profound lack of clarity around the scope of the disciplines and the radical consequences of this lack of clarity are illustrated by the Chair’s discussion of what “licensing requirements” may mean. The definition currently states that licensing requirements are “substantive requirements... with which a natural or a juridical person is required to comply in order to obtain, amend or renew authorization to supply a service”. The Chair is proposing that the meaning of “authorization” be clarified:

*Licensing requirements and procedures would appear to address the authorization of a supplier to supply a service generally, but would not address other necessary authorizations related to any specific service. Such authorizations would typically be applied for after a supplier has obtained a license, and at different points in time depending on when a specific service is to be delivered. If it was understood that such subsequent service-specific authorizations such as construction permits or transport permits, did not constitute licensing requirements, perhaps the single-window approach might appear less problematic.*¹⁷

Since construction permits are often the responsibility of municipal governments, they have a particular stake in whether the definition of what constitutes an “authorization” is narrowed or whether permits will be governed by the disciplines.

Lack of definitions for key terms

Paragraph 11 of the draft disciplines sets general provisions that “Measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards shall be pre-established, based on objective and transparent criteria and relevant to the supply of the services to which they apply.”

In terms of regulations having to be **pre-established**, the Chair reports that the division in opinion among delegations is between wanting to ensure certainty for service suppliers versus ensuring governments are allowed to change their regulations. The Chair points out: “While pre-establishment of requirements and procedures was typically possible in the field of professional services, this might not be the case in other areas.”¹⁸ She cautions that “a strict

¹⁷ Annotated Text, paragraph 183, p. 39.

¹⁸ Annotated Text, paragraph 86, p. 23.

interpretation to the word ‘pre-established’ might suggest that it would impose a significant limitation on the right of Members to modify their regulations.”¹⁹

In terms of regulations having to be **objective**, delegations have raised concerns that regulators sometimes have to use their discretion and make subjective judgments. However, “Other delegations noted that objectivity was a tested concept that was an indispensable element in the disciplines.”²⁰

“Objectivity” may be a concept that is used at the WTO, but that does not mean there is a uniform interpretation of what it means. Professor Robert Stumberg has reviewed mentions of “objective” in the WTO context, and found that five different meanings have been given to the word:

- not arbitrary
- not biased
- relevant to the ability to perform or supply the service
- not subjective
- the least-trade-restrictive alternative.²¹

In terms of regulations having to be **“relevant”**, one delegation has expressed concern about whether this discipline could rule out “culturally informed choices regarding race or gender”.²² However, another delegation has argued that “this obligation was meant to ensure that only issues related to service quality and consumer protection should inform regulations under the purview of the disciplines, and that other exogenous factors should be excluded.”²³ Under this interpretation of relevance, government regulations could not address “exogenous factors” such as impacts on the environment and access to services. Governments should be aware that this is a possible outcome of the deliberations of the Working Party on Domestic Regulation, and appreciate the significance of what has been to this point been treated as a minor aspect of the Doha negotiations.

¹⁹ Annotated Text, paragraph 93, p. 24.

²⁰ Annotated Text, paragraph 88, p. 23.

²¹ Professor Robert Stumberg, Memo to the Intergovernmental Policy Advisory Committee, March 1, 2007.

²² Annotated Text, paragraph 89, p. 23.

²³ Annotated Text, paragraph 90, p. 23.