

**Domestic Regulation in Services (Art VI.4): Analysing the Proposals and Implications for Africa and Developing Countries**

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**A. What are Licensing Requirements, Licensing Procedures, Qualification Requirements, Qualification Procedures and Technical Standards? (LR, LP, QR, QP, TS)**

'Licensing requirements': these are substantive requirements, other than qualification requirements, with which a service supplier is required to comply in order to obtain formal permission to supply a service. They include measures such as residency requirements, fees, establishment requirements, registration requirements, etc.' (JOB(02)/20/Rev.10, 2005).<sup>1</sup>

"Licensing requirements" are substantive requirements, other than qualification 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' (20 March 2009 Chair's text on Domestic Regulation, Room document)

Examples:

- Distribution sector - regulations relating to government zoning policies (geographical location), operating hours, size of retail outlets (to protect small stores); number of stores; involvement of incumbent retailers to approve new licenses
- Business does not have 'negative impact' on the public, neighbourhood, or businesses in the vicinity (discretion of regulator required)
- Operator to abide by employment quotas of minority races; other labour market requirements e.g. wage levels
- Large capital assets required before a license is granted (construction; finance; distribution, mining, education, health)
- No. of licenses required before a business can operate e.g. construction/ engineering - need licenses from land authority; environment authority or need permits from local authorities or industry associations
- New entrants must come with 'provision of new technology'
- Environmental impact assessments
- Tariff rates that are set by the regulator
- Construction and Engineering services: must fit into existing urban planning design; environmental protection. Aesthetic, historic, or scenic values in relation to development of land; mining operations; infrastructure; power lines; pipelines; port facilities; urban planning restrictions on the location of disposal sites i.e. public policy objectives.
- Preserving local culture; character of neighbourhoods; Building laws that provide discretion to regulator: buildings should blend in with the local architecture and must not be 'unsightly or objectionable' (South Africa's National Building Regulations Standards Act 103 of 1977)
- Specified technologies to use (environmental services in order to result in certain environment quality; computer and related services; telecommunications; banking etc). A certain domestic technology could be specified. Alternatively, others may regulate to let the supplier decide the type of technology
- Different permits from different levels of government
- Universal access requirements e.g. requirement to provide services in the rural areas
- Residency requirements before being able to get a license: Licenses granted to certain types of services only if they are located domestically - banks, insurance companies, education suppliers, architects, lawyers (in order to be able to enforce standards; or for taxation reasons etc)
- Disclosure of source code when providing certain services that contain software.

'Licensing procedures': these are administrative procedures relating to the submission and processing of an application for a licence, covering such matters as time frames for the processing of a licence, and the number of documents and the amount of information required in the application for a licence.' (JOB(02)/20/Rev.10, 2005).

"Licensing procedures" are administrative or procedural rules that a natural or a juridical person, seeking authorization to supply a service, including the amendment or renewal of a licence, must adhere to in order to demonstrate compliance with licensing requirements." (20 March 2009 Chair's text on Domestic Regulation, Room document)

Examples

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<sup>1</sup> This definition is taken from a WTO Secretariat background paper, S/WPPS/W/9, 11 Sept 1996, and reproduced again later by the Secretariat in JOB(02)/20/Rev.10 in 2005.

- Fees and Charges: May charge more e.g. to telecommunications service providers for use of public infrastructure; or may charge much more to commercial or big operators rather than non-profit or small operators (one of the states in Canada has 2-tier fee system for profit and non-profit companies)
- Fees may be used to discourage applicants and regulate the number of outlets (e.g. MGM paid \$85 million licensing fees to open a casino in Massachusetts (Ellen Gould))
- Multiple permits and a 3 stage review process - too many steps
- Need to go through the same procedure in every state/region
- All papers have to be certified by the Notary Public
- Many different requirements to obtain a visa - air tickets, hotels
- Registration of business must be renewed frequently (eg every year or two years)
- Residency requirements (e.g. computer, telecommunications, audiovisuals, construction, distribution, energy, financial, tourism services)
- Processing time - long or uncertain
- Procedures relating to application - time it takes to respond to applicant

'Qualification requirements: these comprise substantive requirements which a professional service supplier is required to fulfil in order to obtain certification or a licence. They normally relate to matters such as education, examination requirements, practical training, experience or language requirements.' (JOB(02)/20/Rev.10).

"Qualification requirements" are substantive requirements relating to the competence of a natural person to supply a service, and which are required to be demonstrated for the purpose of obtaining authorization to supply a service." (20 March 2009 Chair's text on Domestic Regulation, Room document)

Examples (often on grounds of quality, standards, and safety):

- Particular certification requirements - qualifications, certification perhaps only provided by a government agency, interviews, requirements by professional associations
- Language requirements
- Sub-federal regulations for recognition of qualifications
- A large number of documents must be submitted
- Restrictions on advertisements
- Soundness and integrity of the applicant - financial services (regulatory discretion)
- Number of years of work experience
- Residency requirements
- Exams - scope of topics go beyond the subjects relevant; eligibility to take exams too burdensome e.g. must have stayed in the country for 3 years before taking the exam
- Location of the work experience - Requirement to have had previous work experience in host country

'Qualification procedures: these are administrative or procedural rules relating to the administration of qualification requirements. They include procedures to be followed by candidates to acquire a qualification, including the administrative requirements to be met. This covers inter alia where to register for education programmes, conditions to be respected to register, documents to be filed, fees, mandatory physical presence conditions, alternative ways to follow an educational programme (e.g. distance learning), alternative routes to gain a qualification (e.g. through equivalences) and organizing of qualifying examinations, etc.' (JOB(02)/20/Rev.10).

"Qualification procedures" are administrative or procedural rules that a natural person must adhere to in order to demonstrate compliance with qualification requirements, for the purpose of obtaining authorization to supply a service." (20 March 2009 Chair's text on Domestic Regulation, Room document)

Examples

- Process in verifying applicants' qualifications e.g. foreign qualifications- availability or not of legal framework to accept or assess foreign qualifications; or simply non-recognition of foreign qualifications (engineering, construction, financial services, architecture, medicine etc)
- Mutual recognition agreements (whether or not these exist - often not the case for developing countries)
- Submission of application; where, timeframe available for submission

- Verification of application - Time it takes for applicant to receive response
- Availability of exams – intervals between exams
- Fees

‘Technical standards: these are requirements which may apply both to the characteristics or definition of the service itself and to the manner in which it is performed. For example, a standard may stipulate the content of an audit, which is akin to definition of the service; another standard may lay down rules of ethics or conduct to be observed by the auditor’ (JOB(02)/20/Rev.10).

"Technical standards" are measures that lay down the characteristics of a service or the manner in which it is supplied. Technical standards also include the procedures relating to the enforcement of such standards." (20 March 2009 Chair’s text on Domestic Regulation, Room document)

Examples

- imposition of limits on CO2 emissions (beyond a certain point taxes are levied)
- the types of services a hospital must provide including standards of the services; and standards for the equipment;
- types of services a telecommunications provider or water distribution company is to provide;
- what should be on a utilities bill, its timeliness and accuracy
- the size of a credit card and the specifications for interoperability
- the technology an Internet Service Provider (ISP) may or may not use in the supply of its services
- localisation of the storage of data, or the processing of data
- Safety standards of workers

## **B. Proposals**

### **Development of Measures (EU, Australia, Canada, Colombia, Israel, Japan, Mexico JOB/SERV/250, Feb2017)**

#### Objective and transparent

According to Robert Stumberg, law professor, ‘objective’ can mean<sup>2</sup>

- Not arbitrary
- Not subjective
- Not biased
- Relevant to ability to perform the service
- Based on international standard.

- Electricity licenses – Kenya - consideration of impacts on the ‘social, cultural or recreational life of the community’
- Rate increases – Kenya’s utility regulations allow rejection of rate increases that are not ‘just and reasonable’ (discretion to the regulator)
- Government zoning and building permits, business license decisions that give weight to public opinion
- California’s Financial Code: supplier of loans, in obtaining a license must demonstrate ‘such financial responsibility, character, and general fitness as to command the confidence of the community’.<sup>3</sup>
- Vancouver, regulator for new businesses: ‘other conditions as the Chief License Inspector may require to ensure that the business does not have a negative impact on the public, the neighbourhood or other businesses in the vicinity’.<sup>4</sup>
- The Energy Regulatory Commission of the Philippines has been accused of ‘grave abuse of discretion’ for non-disclosure of its rate setting methodology (from Gould, from Supreme Court, Republic of the Philippines, GR NO. 163935, 2 Feb 2006).
- Data localization requirements could be seen to be not objective.

<sup>2</sup> See 2010 Stumberg R ‘GATS Negotiations on Domestic Regulation’, May 19, 2010

<sup>3</sup> Gould E Annex on Domestic Regulation, analysis of 10 October 2015

<sup>4</sup> Gould E Annex on Domestic Regulation, analysis of 23 April 2015

- Source code disclosure requirements could perhaps also be judged to be not objective.

'procedures do not in themselves unduly prevent fulfilment of requirements'

- Multiple permits / 3 stage review process (in Vancouver) to get a license in a sensitive sector
- EU complains that new Turkish retail regulations involve 'excessive interference and cumbersome registration processes in establishing retail businesses'
- Public hearings and democratic processes that take time
- When zoning approvals have been given but there are other holdups due to environment sensitivities (as in South Africa, Independent Online, 'Land claim delays 'have cost KZN R10bn' 6 Aug 2008).

'procedures are impartial'

- Faster process provided to minority group as affirmative action
- Less fees charged (Vancouver – non-profit operators have lower fees)
- Consultation processes, impact assessments, commissions or studies may be queried for not being impartial.

Competent authority reaches and administers its decisions in an independent manner

According to WTO Secretariat paper (JOB(02)/20/Rev.10, this could be outside the coverage of VI.4.

- Kenyan regulators asking for additional precautions and measures to be taken by mobile payment operators regarding financial data produced by mobile devices to meet anti-laundry requirements were accused of not regulating in an 'independent manner' and in favour of domestic service suppliers<sup>5</sup>
- Establishing environmental, health, safety standards, or regulating according to broad objectives such as socio-economic conditions of an area may not be seen to be 'independent'.

**Administration of Measures (Australia Chile Colombia, EU, Japan, Mexico, Norway, Peru, Korea, Separate Customs Territory of Taiwan, JOB/SERV/239/Rev.1 31 Oct 2016)**

Single Window: avoid requiring an applicant to approach more than one competent authority for each application for authorisation

- Expensive to maintain and upkeep – all departments at all levels will have to be computerized and interconnected
- Is it realistic to have a single window for all levels of government?

The following are excerpts from the UNCTAD Ecommerce Week by a couple of speakers (24 April 2017). They are referring to the trade facilitation (customs procedures relating to imports and exports) single window. Nevertheless, these elements are equally applicable to services. In fact, the domestic regulation issues covering services sectors is more complex than the trade in goods single window:

Philipp Isler, Executive Director of Global Alliance for Trade Facilitation (WEF and ICC):

'Single window has been a major topic now for the past 20 years. When I started out in Ghana in 2000, the word single window just meant single window and not an IT system to clear goods. The whole concept has evolved over many years. You have to wonder about the definition of Single Window and wonder whether it is time to recalibrate as there are so many single windows around the world. Some countries have multiple single windows.

'The benefits are starting to come through in the developing world. There are still a lot of challenges. My concern is that the IT systems, from the private sector perspective, are developing so quickly that we have a new gap that is being created. Before we had IT systems and no IT systems. Now, we have advanced IT systems and not so advanced IT systems.

<sup>5</sup> Nairobi Star, 'Kenya: Big Banks in Plot to Kill M-Pesa', 23 December 2008.

'In Africa, government single windows are starting to lag in terms of development. It is not necessarily an IT issue but the use of the IT. Are governments ready to be able to move to the next step in terms of getting into much more sophisticated solutions?

'The other issue is sustainability. There are many single window initiatives that have been implemented but how to ensure sustainability of single window over time because they are very costly to maintain. We have a number of countries that are struggling - high maintenance fees, infrastructure, power network. Some countries are starting to lag.'

Marianne Rowden, President and CEO of American Association for Exporters and Importers:

'US started these projects back in the 1990s. Our ITDS, our single window has been a heavy lift. Department of Homeland Security is in charge of that. The agencies are all over the place. We have 47 different agencies that at least can get data on imports and exports. 1 agency--- fish and wildlife -- have been on paper till this past year...

'Even for advanced country like ours, it is still a struggle. Somewhat humorous story: Once President Trump was elected, one association talked to him about Single Window and ITDS. Trump's team does not have trade policy people but only business people and so they were surprised that 47 different agencies were involved with imports and exports.'

processing of applications - provide an indicative timeframe for processing an application;  
within a reasonable period of time, complete application process and that applicant is informed;  
with undue delay, ascertain completeness of an application;  
at the request of the applicant, provide without undue delay information concerning the status of the application;  
for rejected application; inform reasons for rejection

All these rules are about procedures that are within 'reasonable' time frames and with undue delays. This could be difficult for sensitive issues, where thorough domestic consultation processes might be required.

- Europeans may want their governments to give priority to thorough regulatory assessments in relation to fracking, whereas companies like Chevron, which have shale interests in Poland, Romania and other EU countries are interested in getting licensing approvals as soon as possible. Moratoria on fracking have been imposed by Romania and Germany - obviously causing 'undue' delays and surpassing 'reasonable' timeframes.<sup>6</sup>

'Authorisation fees charged ... are reasonable, transparent, and do not in themselves restrict the supply of the relevant service'

- fee of \$85 million for license for casino; \$30,000 for a retail license to reduce number of outlets<sup>7</sup>
- fees might be higher for purposes of cross subsidisation: in South Africa, at the local levels, fees in a development project can sometimes also cover infrastructure costs - sewers, electricity, water supply, road improvements etc.<sup>8</sup>
- higher license fees to telecom providers or internet service providers (ISPs) to pay for use of telecommunications infrastructure (otherwise there is the situation of socialising the costs but privatising the profits)
- ISPs in the US are now allowed to sell the data that they collect. There should be a way to compensate users for their data, licensing fees could be one way (e.g. collected yearly)

'reasonable' fees

This is a highly 'subjective' term - reasonable to whom? What standards and criteria are used? Comparison is made against whose legal, administrative and social traditions?

<sup>6</sup> Gould Ellen 2015 Analysis of Annex on Domestic Regulation

<sup>7</sup> Gould Ellen 2015 Analysis of Annex on Domestic Regulation

<sup>8</sup> City of Johannesburg, 'Development Planning - Landuse Management'.

**Transparency (Australia, EU, Colombia, Japan, Korea, Mexico JOB/SERV/251, 28 February 2017)**Publication of

- a. the requirements and procedures
  - b. contact information of relevant competent authorities
  - c. fees
  - d. technical standards
  - e. procedures for appeal or review of decisions concerning applications
  - f. procedures for monitoring or enforcing compliance with the terms and conditions of licenses
  - g. opportunities for public involvement, such as through hearings or comments
  - h. indicative timeframes for processing of an application
- There is no mandate to negotiate transparency under Art VI.4 and therefore this proposal should not be accepted. The GATS already has a transparency provision in Art III requiring publication of *'all relevant measures of general application which pertain to or affect the operation of this Agreement'*. It also requires notification of any new, or any changes to existing laws, regulations or administrative guidelines affecting the sectors and modes that have been opened.
  - There is already a high level of obligation in GATS Art III on responding to requests – para 4: *'Each Member shall respond promptly to all requests by any other Member for specific information on any of its measures of general application ...'*
  - The level of transparency proposed is likely to have an impact on market access e.g. item e - providing foreign investors with appeal or review procedures etc.
  - What is proposed is too burdensome for developing countries. It is highly unlikely that countries have such capacity, particularly also given that these rules cover all levels of government, and to all measures *'relating to'* LR, LP, QR, QP, and TS *affecting* trade in services. i.e. these become very broad categories of information.

Enquiry points

- The current GATS enquiry points are for Member-to-Member enquiries. What is proposed is much broader, for persons seeking to supply a service and would be very burdensome, requiring unfunded staff time.

Prior comment and prior publication before entry into force

- The literature has shown that this can easily lead to regulatory capture by those with resources and interests. This has been shown to have had an unhealthy impact on national legislative processes.
  - This would be extremely burdensome – most developing countries would not have the required institutional resources.
  - It provides an opportunity for other governments to exert pressure on developing countries as developing countries are deliberating their own laws. Furthermore, it gives private entities the opening to push forward their private interests, at the expense of public policy-making based on public interests. It could possibly also lead to regulatory chill effects in developing countries.

According to GATS expert Luis Abugattas Majluf, prior comment on proposed regulation *'will effectively open domestic legislative and administrative procedures to foreign intervention... Besides the administrative burden that would be imposed'*, it is *'widely recognised in the literature on domestic regulation, that those interest groups that are more cohesive, that can best formulate their interests, and that have the resources available to be invested in influencing decision-making are the ones that will see their interests prevail. In the light of the uneven distribution of resources; to what extent will the internationalization of decision-making processes in developing countries play more in favour of foreign interests to the detriment of national ones?'*<sup>9</sup>

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<sup>9</sup> Abugattas Majluf L 'Domestic Regulation and the GATS: Challenges for Developing Countries', [www.ictsd.org/downloads/2008/06/dom\\_reg.pdf](http://www.ictsd.org/downloads/2008/06/dom_reg.pdf)

He goes on to note that enhanced transparency is, according to the OECD, 'an antidote to regulatory capture or rent-seeking influence. However, it might as well be that these requirements will effectively open the door for this type of behaviour and problem. This is not just an academic concern. It can have strong implications on the nature of domestic regulation and on the extent to which it will effectively respond to legitimate national concerns'.<sup>10</sup>

- This tool is likely to be used by developed countries rather than developing countries since most developing countries lack the resources to make use of such an instrument.
- Will developing countries have the resources to respond, particularly when powerful industries get organised? An astonishing article in the Guardian reveals that Philip Morris, in the tobacco plain packaging case had planned to generate 18,000 comments to the UK government about its plain packaging law.

*'The PMI [Philip Morris International] documents reveal that, in a bid to swamp the Department of Health's consultation exercise on plain packs with supporting arguments, the company boasted that it had the "potential" to help generate more than 18,000 responses, including 6,000 from its recruited group of smokers, 950 from industry, 10,050 from its "retail group", 40 from thinktanks and 1,000 from a trade union, believed to be Unite.'*<sup>11</sup>

It should also be noted that the level of commitment is more ambitious in this area compared to the 2009 text where prior comment had the language 'should endeavour' and prior publication 'shall endeavour'. In this proposal, it is 'to the extent practicable, shall' provide for prior comment and advanced publication. This is a significantly higher level of obligation.

**Technical Standards (Australia, Colombia, Hong Kong China, Japan, Korea, NZ, JOB/SERV/257, 1 May 2017)**  
**'adopt technical standards developed through open and transparent processes'**

- How is this different from the transparency proposal? What does 'open and transparent processes' mean? Like the transparency proposal, this is not in the mandate
- This is very burdensome for developing countries – most developing countries are struggling to put in place technical standards and would find it difficult and also not desirable to have the kind of prior comment process that this might imply (that could lead to regulatory capture).

**Gender Equality (Canada, Chile, Colombia, Iceland, Uruguay, JOB/SERV/258, 8 May 2017)**

LR, LP, QR, QP measures do not discriminate on the basis of gender

- WTO rules do not differentiate between groupings at the national level for whom rules should apply. It is the domain of national governments to create legislation at the national level that provides equity to different groups. Why select gender? Why not race, indigenous groups, blue collar workers etc?

**Development (Australia, JOB/SERV/261, 2 June 2017)**

'Members recognise the right to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives...'

- It seems that this language could be in the General Provisions of the proponents' DR text. It is not useful since it contradicts with the substantive rules that the text would contain. In itself, it does not provide any substantive content or any mechanism to operationalise this right to regulate in relation to the substantive rules. Nor does it override the substantive DR rules. Hence, it is not meaningful. As noted in the *US-Gambling* case (WT/DS285/R):

'Articles XVI and XVII are obligations that apply only to scheduled sectors. Hence, Members can, but are not obliged to, undertake market access and/or national treatment commitments. In scheduled sectors, Members have the freedom to maintain limitations, terms, conditions and qualifications to these specific commitments.

<sup>10</sup> Abugattas Majluf L ibid.

<sup>11</sup> <https://www.theguardian.com/business/2013/jul/28/philip-morris-plain-packaging>



Moreover, Members maintain the sovereign right to regulate within the parameters of Article VI of the GATS. Members' regulatory sovereignty is an essential pillar of the progressive liberalization of trade in services, but this sovereignty ends whenever rights of other Members under the GATS are impaired' (10 Nov 2004, para 6.316).

This same interpretation is provided in the panel report of *Argentina – Measures Relating to Trade in Goods and Services* (WT/DS453/R):

'In addition, the right to regulate is an essential pillar of the progressive liberalization of trade in services which, according to Article XIX of the GATS "shall take place with due respect for national policy objectives". Members retain the right to regulate in order to meet their national policy objectives, subject to the relevant GATS disciplines, Article VI in particular, including in those sectors where they have made specific commitments under Article XVI of the GATS.' (30 Sept 2015, para 7.423).

- In fact, panels in the recent past have even turned the 'right to regulate' on its head by suggesting that the commitments taken by Members are the expression of their right to regulate. See box below on *China-Raw Materials* and *Argentina – Measures Relating to Trade in Goods and Services*.

*China-Raw Materials*, WT/DS394/R, WT/DS395/R, WT/DS398/R of 5 July 2011, Paras 7.156 and 7.157: 'The Panel agrees with China that WTO Members have an inherent and sovereign right to regulate trade.<sup>12</sup> WTO Members and China have exercised this right, inter alia, in negotiating and ratifying the WTO Agreement. China has exercised its inherent and sovereign right to regulate trade in negotiating, among other actions, the terms of its accession into the WTO.

'To the Panel, the implication of China's argument is that because it has an inherent right to regulate trade, this right prevails over WTO rules intended to govern the exercise of that right. In the Panel's view, it is China's sovereign right to regulate trade that enabled it to negotiate and agree with the provisions of Paragraph 11.3 of its Accession Protocol. Thus, there is no contradiction between China's sovereign right to regulate trade, the rights acquired, and the commitments undertaken by China that are contained in its Accession Protocol, including in its Paragraph 11.3. On the contrary, China's Accession Protocol and its various rights and obligations, are the ultimate expression of China's sovereignty.'

*Argentina – Measures Relating to Trade in Goods and Services*, WT/DS453/R of 30 September 2015, para 7.217:

'It is our understanding that Members' right to regulate in accordance with their national policy objectives, as enshrined in the preamble to the GATS, confirms the relevance of the regulatory framework established to meet these objectives in the area of trade in services.'

- In a communication from the ACP in 2006, the grouping in their JOB(06)/136/Rev.1 document had suggested that the right to regulate language should also contain the following: "Nothing in these disciplines shall prevent a Member from exercising its right to regulate and to introduce new, or maintain or modify existing, regulations on the supply of services within its territory in order to meet national policy objectives".

'Least-developed country Members (LDCs) shall not be required to apply these disciplines...'

- The rules are still highly problematic for LDCs because they would set the international norm for the types of regulations that are seen to be acceptable or not acceptable according to WTO law. E.g. if there is a case taken in the future where stopping the free flow of data is seen to be not 'objective'. These standards would also percolate to LDCs through
  - common policies at the regional level with non-LDCs; or through
  - demands put on LDCs by investors; or
  - they would set the norms that LDCs would be asked to comply with when provided with technical assistance – the technical assistance, aid or advice provided would be about enforcing such 'norms'.

LDCs and many other developing countries are at a different level of development compared to proponents, with different economic circumstances, and therefore different priorities. They cannot be imbibing the

<sup>12</sup> China's second written submission, para. 162.

regulatory priorities and styles of developed countries which are at the top of the ladder in the supply of services, including digital goods and services.

## C. General Comments

### 1. In the Digital Economy, DR rules will be the Main Market Access Trade Policy Tool for Digitalised Goods and Services (the equivalent of tariffs today for goods)

i) In the emerging digital economy, with increasing trade taking place via Mode 1, GATS Art XVI market access limitations are more difficult to operationalize in reality. E.g.

- no. of services suppliers;
- value of services transactions;
- number of operators;
- type of legal entity or joint ventures etc.

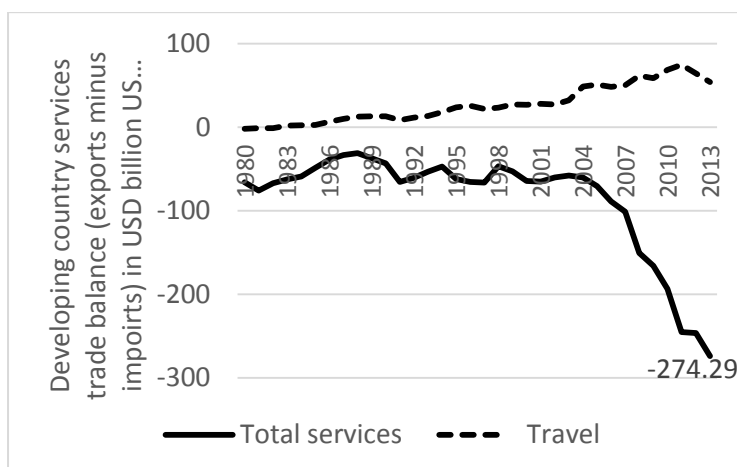
Hence DR rules can de facto become the ‘gate keepers’ to markets i.e. the ‘tariff’ equivalent to physical goods trade today. E.g. a country wanting to protect its market could set certain technical standards on the encryption technology to be used, or the authentication method which is provided by its local suppliers, or include data localisation in its licensing requirements.

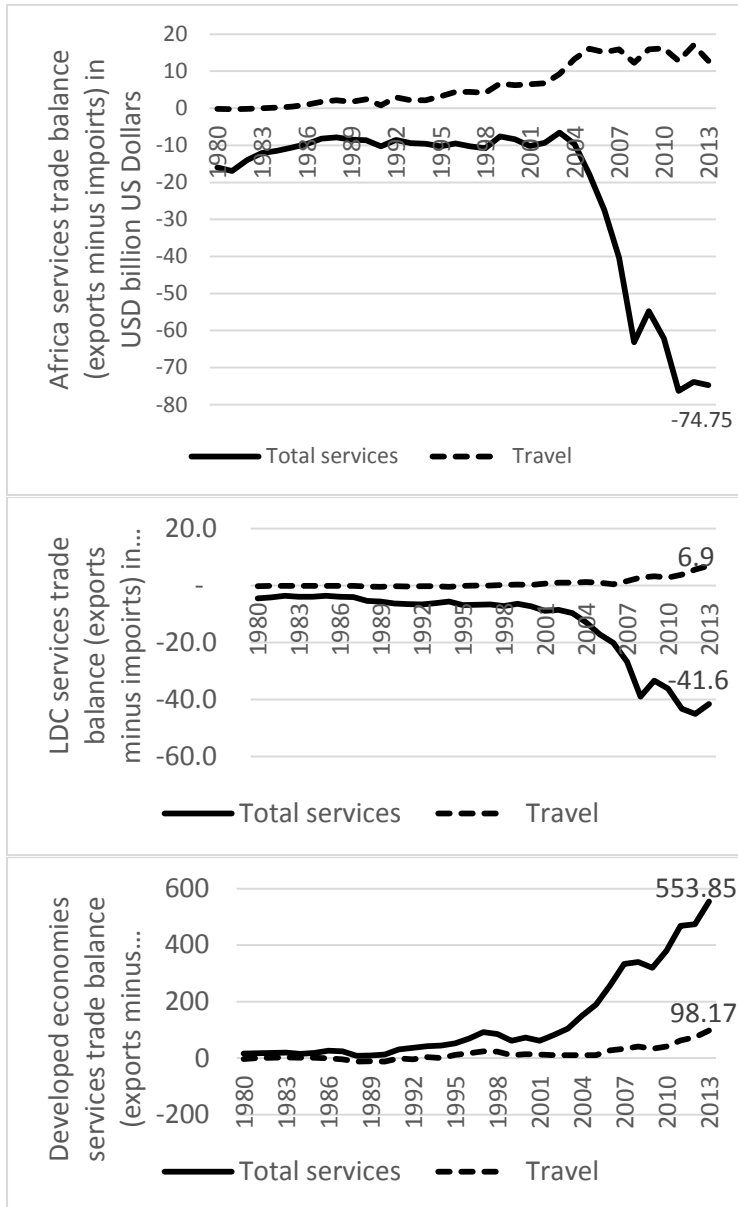
ii) DR rules now also cover market access for the manufacturing sector i.e. NAMA. Why? This is due to the ‘servicification’ of manufactured goods. Eg. Adidas shoes with sensors are sold as fitness services. Cars become self-driving transport services. Tractors become agricultural services providing real-time data. Thus, these rules will now cover a much bigger scope - the manufacturing sector - than was envisaged when the VI.4 Article was written. The significance of tariffs as a market access strategy tool will decrease with digital transmissions, and Members would be left with only domestic regulatory tools.

### 2. What is the benefit of these rules for developing countries when most are net services importers?

The costs and benefits for DR (market access) rules will depend on whether a Member is a services (and in the near future digital manufacturing) exporter faces various sorts of barriers entering others’ markets, or a net services importer.

Most developing countries are net importers. They stand to lose more and will have to open their markets more with these new disciplines, than if they were net exporters.





Source: UNCTADstat. Table 'Services (BPM5): Exports and imports by service-category, value, shares and growth, annual, 1980-2013'.

Note: The trade balance is calculated as exports minus imports, All figures in USD billion at current prices and current exchange rates (i.e. for the year in question)

**3. Balance? External (Agriculture) and Internal (Mode 4)**

External balance - Agriculture has been the issue that has traditionally set the level of ambition for services and NAMA. It seems as though the tables have already been turned, and now there is no movement in agriculture, but there an attempt to have an ambitious outcome in market access for services and NAMA (via DR rules).

Internal balance – Mode 4 (Movement of Natural Persons)?

The missing elephant in the room is the issue of Mode 4. Developing countries' expectation to have gains from these negotiations have always been in this area. The rationale of Art VI disciplines is that where Members have committed to open their markets, they should not take DR measures that effectively close these markets. According to Markus Krajewski, 'There is no convincing reason, why an application to open a

*subsidiary (mode 3) should be processed following certain general standards of transparency and reasonableness, whereas the application for a visa (mode 4) should not*.<sup>13</sup>

He notes that *'Developing countries rightly point to the adverse effects of burdensome procedures required for the entry and temporary stay of natural persons. The Colombian contribution<sup>14</sup> highlights a number of administrative rules and practices, which can effectively impede the supply of a service through mode 4. Addressing burdensome visa procedures or other measures affecting entry and temporary stay thus follows the general logic of addressing domestic regulation in the GATS context'*.<sup>15</sup>

UNCTAD also highlights the importance of Mode 4 in relation to the Domestic Regulation rules for developing countries:

*'With respect to visa applications or entry permits, there is interest in discussing whether administrative procedures relating to visas could be part of possible Article VI.4 disciplines, or what alternatives exist (transparency being one such option). Given their potential to export via MNP (movement of natural persons), questions relating to where and how effectively visa issues are dealt with are particularly important for developing countries'*.<sup>16</sup>

UNCTAD also notes that in relation to transparency, *'In the case of professionals as service providers, some countries have suggested making readily available in a consolidated form (possibly electronically or on websites) details of all measures pertaining to the movement of natural persons, including relating to visa and work permit requirements and procedures'*.<sup>17</sup> Canada's submission gives a template of transparency in relation to Mode 4 (S/WPDR/W/33, 2005).

Already the text reflecting developing countries' Mode 4 concerns were very weak in the 2009 Chair's text. However, even the two paragraphs relating to residency requirements in Members' domestic regulations have been dropped by the proponents of the current proposals:

Para 16 under Licensing Requirements: *'Where residency requirements for licensing not subject to scheduling under Article XVII of the GATS exist, each Member shall consider whether less trade-restrictive means could be employed to achieve the purposes for which these requirements were established'*.

Para 29 under Qualification Requirements: *'Residency requirements, other than those subject to scheduling under Article XVII of the GATS (national treatment) shall not be a pre-requisite for assessing and verifying the competence of a service supplier of another Member'*.

In fact, the irony is that as these proponents are pushing for more transparency and objectivity in services regulation, some of the same countries have now taken measures to tighten up on Mode 4 (Australia, New Zealand, following the US's tighter conditions on H1B visas).

#### **4. Undermining digital industrialisation and regional market integration efforts**

These disciplines could be used to challenge countries when they take measures in order to promote their own digital industrialisation and data processing capabilities. US digital companies have a very clear digital trade agenda in order to 'maintain an open internet'.<sup>18</sup> Countries could be challenged using these DR disciplines (e.g. for not having objective measures) if they want to

- limit in some way the free flow of data
- have data localization rules (requirements to manage, store or process data locally or policies regarding the use of local infrastructure or local technologies or standards)

<sup>13</sup> Krajewski M 2005 'Presentation at the South Centre Workshop on Trade in Services' March 2005, Geneva.

<sup>14</sup> S/WPDR/W/29, 7 July 2004 'Examples of Measures Relating to Administrative Procedures for Obtaining Visas or Entry Permits', Communication from Colombia

<sup>15</sup> Krajewski M 2005 *ibid.*

<sup>16</sup> TD/B/COM.1/71 2005 'Trade in Services and Development Implications' Note by the UNCTAD Secretariat, 20 January.

<sup>17</sup> TD/B/COM.1/71 2005 *ibid.*

<sup>18</sup> See 'Modernizing NAFTA for Today's Economy' by Internet Association. <https://internetassociation.org/wp-content/uploads/2017/06/Modernizing-NAFTA-White-Paper.pdf>

- have technical standards that make online service providers liable for 3<sup>rd</sup> party content
- require access to encryption or source codes as a condition for technology imports into the country
- other ways to regulate online services – e.g. through what can be viewed as ‘complex and unnecessary’ licensing requirements.

At the heart of this struggle is whether or not developing countries can regulate the flow of their own data in order to create domestic and regional market opportunities for their own suppliers for example in retail, financial services, health services, insurance, professional services as well as in a whole range of manufactured goods that could be supplied as services.

#### **D. Important Technical Issues**

##### **1.Scope of the DR rules are extremely broad and can cover sectors and goods beyond the sectors which have been opened**

Australia et al’s paper ‘Administration of Measures’ (JOB/SERV/239/Rev.1, it says that ‘These disciplines apply to measures by Members relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards affecting trade in services where specific commitments are undertaken’.

‘Relating to LR, LQ, QR, QP’ and ‘TS affecting trade in services’ where specific commitments are undertaken may actually spill over to some sectors and measures that are not covered under Members’ schedules. (See para 76 of the 2010 Annotated Chair’s text).

For example, a Member may not have opened up in financial services, but could find that certain banking technical standards may be covered by these disciplines (e.g. how to move payments cross border) when undertaking a construction project (a sector which has been opened). Areas relating to services in computer and related services could include: labour, research and development support, protection of intellectual property rights, government procurement of information services, tariffs, technical standards on computer equipment etc.

##### **2.‘To the Extent Practicable’; ‘shall endeavour’ are obligations still requiring actions by Members**

These obligations used in some parts of these proposals should not be taken lightly. The WTO Secretariat has noted that there are obligations of means and obligations of results. ‘To the extent practicable’ would be an obligation of means. The Secretariat says that ‘Obligations containing the phrase ‘*to the extent practicable*’ are typically those that require a positive action’. I.e. it is still an obligation and the Member must be prepared to show that it has taken action.

Even the obligations ‘shall endeavour’ requires that a Member ‘shows that it endeavoured, even if unsuccessfully to do so’.<sup>19</sup>

##### **3. The Right to Regulate Language As Proposed is Misleading**

Language on the ‘Recognition of right to regulate’ has not been useful and in fact has been extremely misleading. For it to be effective, it must satisfy all of the following:

- (a) is in substantive text (not just the preamble); and
- (b) can override all relevant rules; and
- (c) is self-judging (eg security exception).<sup>20</sup>

Unless it can override the relevant rules, it could be interpreted to mean that Members have exercised their right to regulate through the adoption of the rules! (See panel reports in *China-Raw Materials* and *Argentina - Measures Relating to Trade in Goods and Services* cited earlier).

<sup>19</sup> Informal note by the WTO Secretariat

<sup>20</sup> Kelsey, J 2017 Presentation on Domestic Regulation

The panel in US Gambling notes that: “Members’ regulatory sovereignty is an essential pillar of the progressive liberalization of trade in services, but this sovereignty ends whenever rights of other Members under the GATS are impaired”.

#### **4. The DR rules could trigger BIT disputes**

Scholars have noted that these disciplines could strengthen the claims foreign investors may make against States in Bilateral Investment Treaty disputes. One approach is to use these disciplines as evidence of the minimum standard of treatment, including ‘fair and equitable’ treatment.<sup>21</sup>

### **E. Unanswered Questions to be Resolved Before Stepping into Negotiations**

#### **1. What is our Digital Industrialisation Strategy – nationally and regionally? What are the implications of these DR disciplines on our future industrialisation prospects?**

Before entering into negotiations, as these rules would impact very fundamentally on Members’ ability to regulate in the digital economy (data flows; data localisation; technological standards), Members first need to have an understanding of their national and regional digital industrialisation plans, and then decide on the appropriateness or not of these rules.

Failing which, there is a high possibility that these disciplines would impede Members’ ability to industrialise in the digital age.

#### **2. Question of Mandate: Are the VI.4 Disciplines Necessary At this Moment in Time?**

GATS Art VI.4 does not predetermine that negotiations must happen. It says that Members shall ‘develop any necessary disciplines’.

i) The digital economy is throwing up a whole range of disruptions and transformations. Proponents have not yet made the case or convinced others that these disciplines, which could prevent governments from taking regulatory action, are necessary at this moment.

- ii) The other major question is whether or not these rules are in fact suited for many developing countries. History shows that the way of doing regulation which the rules demand – of spelling out every single criteria in licensing or technical standard used – suits countries with more resources, and often when they have moved from monopoly-style state regulatory models towards more privatised models. For instance to provide completely ‘objective and transparent’ criteria for technical standards may simply not be within the regulatory capacity of many countries, nor may they require this if they use entry control instruments. What countries’ needs are, and the resources available to them, are not taken into account.
- Markus Krajewski, in his book ‘National Regulation and Trade Liberalization in Services’ notes that
- ‘Governments use regulation for different reasons. Regulation is partly aimed at correcting market failures and one of its main objectives is allocative efficiency. Many writers claim that this is all regulation should be aiming at and that other public goals should be pursued with other policies. However, often these other policies and the respective instruments are not feasible. For example, if a country lacks a sufficiently large revenue base, it is difficult to use incentive-based instruments. Similarly, a system of entry controls may be more feasible for some countries than standard setting, because resources for post-establishment controls are lacking. Sometimes, a country’s resources are so limited that any policy shift is not feasible. In cases like this it may be more suitable for the country to keep a particular regulatory system than changing it.
- ‘Governments pursue different goals with different policies in different historical, political and economic situations. The profound policy changes of regulatory reforms in many countries demonstrate that methods and instruments used in one particular situation may not be suitable in another situation. Even though the changes that took place during the last two or three decades seem to suggest a nearly universal trend towards less restrictive instrument, it is not guaranteed that this trend will last. For example, in the aftermath of the terrorist attacks of 11 September 2001

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<sup>21</sup> Stumberg R 2010 ‘GATS Negotiations on Domestic Regulation’.

<https://www.law.georgetown.edu/academics/academic-programs/clinical-programs/our-clinics/HIP/upload/Stumberg-Guide-to-GATS-Dom-Reg-5-19-10.pdf>. See also Samuelson and Ebers 2010 ‘Could a Foreign Investor Use GATS Disciplines in a BIT Claim?’

[https://us.boell.org/sites/default/files/downloads/Sweeney\\_MFT\\_Umbrella\\_MFN\\_5-18-10.pdf](https://us.boell.org/sites/default/files/downloads/Sweeney_MFT_Umbrella_MFN_5-18-10.pdf)

*and the reports about insufficient airport safety controls through private security companies, suggestions were made to renationalize airport security controls in the United States.<sup>22</sup>*

The proposed rules assume that all Members are more or less at the level of regulatory capacity, circumstances and needs as the developed country proponents. This is not the case.

A thorough evaluation of whether or not these rules are necessary must be undertaken before moving the discussions further.

### **3. Have we Agreed that Members' GATS Schedules are Not Technologically Neutral? Do we know the Scope of DR Disciplines?**

We do not actually know the scope of these Art VI.4 disciplines if they are agreed to. It is important for many Members that this question is answered so that Members can weigh what the impact of these disciplines might be. DR disciplines apply to the sectors that Members have opened. However, as noted earlier, it is not clear how Members' schedules would be read. Are Members' GATS schedules technologically neutral or not? Some Members had opened up quite liberally in Mode 1 (e.g. Seychelles, Lesotho, South Africa, Egypt, Kenya). If a technological neutrality reading is given to its schedules, such Members could well find that not only will its services markets be even more open than it had envisaged (with more services now supplied through Mode 1 eg. financial services), but parts of its manufacturing sector could even be covered by existing commitments.

### **4. What are the Benefits for Developing Countries?**

WTO agreements should be 'mutually advantageous arrangements' (Marrakesh Agreement Establishing the WTO. GATS also underscores the importance of 'promoting the interests of all participants on a mutually advantageous basis and at securing an overall balance of rights and obligations'.

Where are the advantages for developing countries, especially given that most are net importers of services? Furthermore, if Mode 4 benefits are not available, what do most developing countries get out of these rules? Are the proponents willing to beef up on the Mode 4 elements eg. rules on residency requirements as was in the 2009 text (and in the Accountancy Disciplines), and apply the objective and transparent requirements also to Mode 4 visas and permits?

### **5. Will these Disciplines Cover Government Procurement?**

The EU in the past (S/WPGR/W/52) has noted that these rules once adopted will also apply to government procurement contracts. Article XIII on Government Procurement explicitly states that Articles II, XVI and XVII do not apply to government procurement. No mention is made of Art VI.4. This issue needs clarification.

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<sup>22</sup> Krajewski M 2003 'National Regulation and Trade Liberalization in Services: The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy'