"Domestic Regulation" Rules in the World Trade Organization (WTO)

A dangerous corporate agenda is behind the effort to have new rules limiting domestic regulation of services, within the General Agreement on Trade in Services (GATS) of the WTO. WTO Members agreed years ago to develop any "necessary" disciplines on these measures – but most developing countries are doubtful as to whether such rules are "necessary." In fact, this was never decided in the WTO – but countries have been making proposals in 2017 with the goal of having binding rules agreed by the upcoming WTO Ministerial in Buenos Aires in December 10-13, 2017 (MC11). This agenda had been stagnant for years until the participants in the (suspended) negotiations towards a proposed Trade in Services Agreement (TiSA) brought it back to the WTO.

"Domestic Regulation" (DR) rules would restrict the types of rules that governments can make even if the rules are applied the same to foreign and domestic companies. They would even apply to *domestic* (non-traded) services (like construction) as well as services that are traded (like air travel). The proposed rules would apply to private companies as well as to public services not covered by the narrow public services exception.

While proponents argue that the "right to regulate" would still be safeguarded, the WTO has ruled in the past 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." Thus the "right to regulate" ends where the WTO rules begin.

To which levels of government would the proposed rules apply?

- If the rules follow current GATS rules which state that national governments shall take such "reasonable measures as may be available to it" to ensure their observance by regional and local governments and authorities, the current proposals would apply to all levels of government, but the national government would not have to "force" provincial & local governments to comply if provinces and local governments have legal autonomy on these issues.
- The rules would probably only apply to service sectors liberalised at the WTO.
- The current proposals would mandate that the rules would apply to *existing* laws and regulations, as well as new ones in the future! This means that countries would have to review all existing laws, measures, regulations, etcetera and actually change those that do not comply with these WTO rules.

What are the types of regulations that would be disciplined by the proposed new rules?

- **Qualification requirements and procedures** for professional services providers. These are the requirements that professional need to obtain to provide a service, such as a requirement that a doctor must have a medical degree and take exams in order to have qualify to practice, and the procedures to obtain the qualification.
- **Licensing requirements and procedures** for companies. These involve the requirements that companies must meet in order to obtain a license to provide a service, for example the amount of capital a bank must have or requirements to do environmental impact assessments before opening a mine.
- **Technical standards** required. These are the standards that must be complied with in the provision of the service, once the individual obtains the qualification requirements and/or the company obtains the license. This would involve, for example, how clean the water must be that is supplied by the water company; the safety procedures in nuclear power stations; nurse to patient ratios in hospitals; etcetera.

What are some of the main disciplines being proposed on these domestic regulation measures?

- The licensing requirements and procedures, qualification requirements and procedures, and technical standards must be: "**not more burdensome than necessary**" to ensure the quality of the service. However this is very difficult to satisfy and could impinge upon the regulatory ability of governments.
    - Could a country ban free samples of milk powder being given in hospitals with maternity wards because it discourages breastfeeding? Or is it enough just to have posters in the hospitals encouraging breastfeeding?
    - Could a country require convenience stores to sell fruit for health reasons?
    - Could a government require fast food restaurants to indicate the number of calories on the menu?
- The licensing requirements and procedures, qualification requirements and procedures, and technical standards must be: "**objective**". Objective can mean:
    - that the measures cannot be fixed, so potentially a government or regulatory agency could not set a maximum price for electricity or water or health care to make sure it is affordable.
    - "not biased" which could prevent affirmative action policies such as lower licensing fees for disadvantaged groups such as women or ethnic minorities or the disabled or veterans.
    - not subjective (eg where regulators need to balance various criteria.)
    - laws and regulations cannot be stronger than international standards (eg in financial regulation or tobacco control).

- There are also proposals to regulate the licensing fees that governments may charge. Some proposed provisions would require that the fees that governments demand for licensing services are "**reasonable**," and "**don't restrict the supply of the service**."
    - In some levels of government licensing fees are a main source of revenue.
    - Some local governments may use licensing fees as their main source of revenue. In some countries, local government uses licensing fees to pay for police and fire departments, health clinics, street lighting and rubbish collection. So, requiring them to follow the above rules would result in a tax cut for corporations which would need to be made up from another source.
    - Some governments use them to dissuade activity they want to reduce, such as using high licensing fees for casinos to reduce gambling.
    - The definition of licensing fees is unclear. Eg would contributions to bank bailout funds be licensing fees?
    - The proposals do have exceptions for licensing fees for natural resources (such as mining/forestry), mandated contributions for universal service protection and auctions such as of 4G phone spectrum.
- Procedures must be "impartial" in the **administration** of measures. If the state were to put more emphasis on investigating for-profit banks than non-profit banks, they could be accused of being not "impartial!"
- Considerable burdens would be placed on the regulatory authorities in the administration of the above measures, such as creating a "single window" for applications; helping applicants fill in incomplete information; creating electronic application windows; helping applicants re-apply, if rejected, etcetera.
- Licences granted must take effect without undue delay (subject to its terms and conditions). This means if the government changes its mind due to new information, a new political party coming to power, or a referendum etc, the licence (eg for a nuclear power station) must still take effect without delay.
- Governments would be obligated to publish proposed measures in advance and **provide foreign corporations with the opportunity to input** in the decision-making process of the legislature or regulatory body.

How would the proposed DR negotiations interact with the proposals on e-commerce and the digital economy?

- The challenges posed by the emerging digital economy will require governments to regulate in new ways to respond to: abuse of dominant market power by the biggest digital companies; their advantage of benefiting from first mover network effects and economies of scale; the fact that they own the latest technologies to process big data; the disruptions to traditional suppliers posed by platforms; the automation of production and services which the world is only now seeing the beginnings of. These generalised DR rules would stand in the way of the ability of building domestic supply side capacities in services in the digital era.

What about development issues in the Domestic Regulation negotiations?

- Mode 4 in the GATS is the movement of natural persons, an interest of developing countries that want to export services professionals. The initial intent of the mandate for DR rules, Article VI.4, was to address concerns about Mode 4, so that market access commitments would not be undermined by domestic regulatory measures. However, proponents have now changed the entire structure of the DR text. They have taken the elements they prefer from the TiSA and submitted these to the WTO. As such, what is on the table is highly imbalanced and is not in the interests of developing countries.
- The costs and benefits for DR (market access) rules will depend on whether on balance, a Member is a services exporter facing various 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.
- The African Group has noted that in DR negotiations, they prioritize "the right to regulate and the interlinkages between regulations and broader domestic economic imperatives" and that the current proposals "would significantly constrain African Members' right to regulate for legitimate public policy objectives."

What is the state of play in the Domestic Regulation negotiations in the WTO as of the fall of 2017?

- Proponents of domestic regulation disciplines include: Argentina; Australia; Canada; Chile; Colombia; Costa Rica; the EU; Hong Kong, China; Iceland; Israel; Japan; Kazakhstan; the Republic of Korea; Liechtenstein; Mexico; the Republic of Moldova; New Zealand; Norway; Switzerland; Taiwan; Turkey; and Uruguay.
- Opponents include the African Group, and particularly South Africa, Uganda, Zimbabwe, Cameroon, Rwanda, Kenya, and a few South American countries such as Venezuela and Cuba among others have steadfastly opposed the conclusion of DR negotiations in MC11.
- China is not a proponent but has voiced support for a conclusion at MC11, while India and Bangladesh favor continued negotiations after the December 2017 Ministerial and the U.S. voiced opposition in November to concluding in Buenos Aires.

Our world is not for sale.
STOP corporate globalization.