

**World Trade Organization  
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**Some analyses of domestic regulation disciplines –  
compilation for MC11<sup>a</sup>**

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**Introduction**

Domestic regulation disciplines on services are being negotiated in a number of trade agreements including at the World Trade Organization (WTO), in the Trade in Services Agreement (TISA)<sup>1</sup> and in other free trade agreements (FTAs) such as the Regional Comprehensive Economic Partnership (RCEP)<sup>2</sup> and those being negotiated by the European Union (EU)<sup>3</sup>.

It seems that domestic regulation disciplines (DRD) will also be negotiated at the Eleventh WTO Ministerial Conference (MC11) from 10-13 December 2017 in Buenos Aires, Argentina.<sup>4</sup> The European Union, Australia, New Zealand, Switzerland etc ('EU et al') released their DRD proposed text on 1 December 2017.<sup>5</sup>

These proposed DRD would restrict laws and regulations re services licensing etc, even non-discriminatory laws which apply to domestic and foreign companies equally. Yet, as United Nations Conference on Trade And Development (UNCTAD) staff note, services regulation is important for a number of reasons including: protecting consumers, ensuring universal access to essential services,

<sup>a</sup> Compiled by Sanya Reid Smith, Third World Network

cultural diversity, quality, safety, correcting market failures (eg: information asymmetry where the service provider has more information than the consumer, natural monopolies, negative externalities (eg environmental degradation from transport) where those not directly involved suffer costs).<sup>6</sup> After highlighting that many regulatory frameworks are still at an emerging stage in developing countries the UNCTAD staff conclude that ‘it is key for developing countries that international rules for services trade preserve the right to regulate (RtR) and grant the necessary policy space to experiment in the search for those policies that best suit individual countries’ specific, developmental needs.’ Given this, the UNCTAD staff note that ‘one would expect developing countries to take a cautious, rather than an offensive approach towards the development of these disciplines, with their main goal to preserve the RtR.’<sup>7</sup>

This compilation includes excerpts from existing analyses of the same DRD proposed in the WTO or in TISA.

### ***Scope and definitions***

As the EU et al proposed text makes clear,<sup>8</sup> these proposed rules 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.’

Assuming ‘measures’ in the DRD uses the definition from the WTO’s General Agreement on Trade in Services (GATS), this is a very broad, non-exhaustive definition meaning: ‘any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form’.<sup>9</sup> So circulars and directives etc could also be measures.

- ‘Qualification requirements and procedures – applying, for example, to doctors, nurses and nurse-aids, dentists, radiographers, vets, engineers and electricians, accountants, maritime crew, teachers and academics, transport and drilling operators, journalists, chefs, actors and musicians.
- Licensing requirements and procedures – which might apply to broadcasting, rubbish dumps, domestic water supply, mining, logging and other resource extraction, schools and universities, early childhood centres, hospitals and healthcare facilities, aged care homes, casinos, race-tracks, liquor stores, ferries, taxis and other transport operators.
- Technical standards for the characteristics of the service or how it is to be supplied – water quality, health and safety, zoning, school examinations, staff to patient ratios, adventure and eco-tourism, shipping lanes, engineering and construction, mining practices (for example, fracking), advertising rules, sales of alcohol and tobacco.’<sup>10</sup>
  - ‘The delegations are still debating whether technical standards include both mandatory government standards and voluntary government standards.’<sup>11</sup>
  - UNCTAD staff note 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.’<sup>12</sup>
- Is something a licensing requirement or technical standard? ‘Once a license is granted, the license holder is expected to “maintain” compliance with the standards by which the license was granted. Should those operational standards be classified as licensing requirements (the initial authorization to supply a service) or technical standards (which govern ongoing operations)? This distinction is especially relevant for essential services such as banking, utilities, pipelines, shopping centers, mining and drilling operations, etc.’<sup>13</sup>

### ***Measures must be based on objective and transparent criteria***

The EU et al text<sup>14</sup> proposes that new and existing measures relating to authorisation for the supply of a service must be based on objective and transparent criteria etc. This requires a complete review of all existing measures (broadly defined as above) and amendment of any existing measures to comply with this requirement as well as restricting all new measures to these criteria.

## **'based on'**

'The Appellate Body has interpreted "based on" to mean founded or built upon. This meaning is more flexible than conformity or compliance, but it is less flexible than "taking into account," which is too subjective. In other words, "based on" requires more than subjectively taking criteria into account (and perhaps rejecting them); it requires an observable relationship between a regulatory measure and some objective criterion that is external to the regulation. This formulation makes sense when a regulatory measure is "based on" a scientific body of knowledge (e.g., a risk assessment) or standard-setting (e.g., safety standards for electric power). However, unless clarified, "based on" is likely to conflict with regulations that require regulators to balance multiple criteria or use inherently subjective criteria.'<sup>15</sup>

## **'Objective'**

- "Objectivity" can have a range of meanings. In a 2007 memo reviewing legal interpretations, Robert Stumberg identified five potential meanings that WTO dispute panel could give for "objective criteria". These alternative meanings all conflict with existing developing country regulations, as discussed below.
  - i. Not arbitrary: The Appellate Body has interpreted the term "arbitrary" in the context of GATT Article XX. They ruled that to impose a "single, rigid, and unbending requirement" and to enforce it with "rigidity and inflexibility" constitute "arbitrary discrimination". The Philippines has set fixed rates of return for water concessions, which might be defined as a "rigid and unbending requirement." The Philippines also requires private education institutions to allocate a fixed percentage of fee increases to staff salaries. These regulations may meet the transparency requirements of the disciplines because they are clear and provide certainty to service suppliers, but may be deemed to be arbitrary and therefore not objective.
  - ii: Not biased
    - The Appellate Body has ruled that an "objective" investigation requires an "unbiased" one, meaning that the "interests of any interested party, or group of interested parties" cannot be favoured. This definition of objective would conflict with affirmative action measures designed to redress historical injustices. South Africa's Broad-Based Black Empowerment Act could violate an objectivity requirement defined in this way because it establishes preferences in hiring and investment decisions.'<sup>16</sup>
    - 'This definition could conflict with any number of measures that are designed to express a preference in qualification requirements or preferences. Examples include small or medium-sized enterprises (SMEs), indigenous peoples, women-owned businesses, etc.'<sup>17</sup>
  - iii. Relevant to the ability to perform or supply the service
    - 'Objectivity may be interpreted to exclude considerations considered "external" to the satisfaction of consumers of the service. The only examples cited in the disciplines of objective criteria are "competence and ability to provide the service." Approvals for electricity licenses in Kenya include consideration of their impacts on the "social, cultural or recreational life of the community", criteria that may be deemed to be irrelevant to the supply of electricity services.'<sup>18</sup>
    - 'This definition could be drawn from the GATS article VI:4(a), which states that one purpose of disciplines would be to ensure that domestic regulations are based on objective criteria "... such as competence and ability to provide the service." If this inference is correct, the canon of interpretation, eiusdem generis, could be used to limit the definition of "objective" to measures "of the same class" of competence and ability. This class would exclude external regulatory criteria such as environmental, cultural or visual impact.'<sup>19</sup>

- iv. Not subjective
  - GATT dispute panels have contrasted “objective criteria” with “subjective” opinion and the exercise of “judgment”. The disciplines’ transparency requirements, however, appear to allow for the subjective opinions of the public to be considered in licensing decisions. Kenya’s utility regulations allow rejection of rate increases that are not “just and reasonable”, requiring subjective judgments on the part of regulators. South Africa’s national building standards authorize regulators to turn down development that is “unsightly and objectionable”, terms that require subjective interpretation.<sup>20</sup>
  - ‘This ordinary dictionary definition would conflict with delegation of plenary authority to utility regulators to set “just and reasonable” rates or to approve utility mergers based on balancing diverse or competing criteria such as interests of the consumer, interests of the utility company and impact on the environment.’<sup>21</sup>
- ‘v. Least trade restrictive
  - The WTO Secretariat has stated that international standards have a “perceived objectivity” since when Members apply them, they are presumed to have used the “least trade restrictive measure”. The Secretariat also said GATS Article VI.5(b) establishes international standards as a “benchmark for determining the objectivity of regulatory requirements.” However, Argentina’s adoption of Basel I standards has been criticized for creating a bias in bank lending. Basel II standards have been criticized as not objective, and are currently being revised. Given the problems in international banking, it would seem ill-advised to allow “objective” criteria to be equated with international standards or the least trade restrictive standards.<sup>22</sup>
  - ‘Based on international standards - The WTO Secretariat has described international standards as “objective” in the sense that (a) they require a measure to be the least-trade-restrictive alternative, and (b) such an interpretation would be in line with the purpose of GATS.’<sup>23</sup>
- ‘In general, all local government zoning, building permit, and business licensing decisions that give weight to public opinion could be considered to be based on non-objective regulatory criteria . . . It is common for alcohol licensing procedures to take into account concerns from neighbours, and their concerns could be defined as “non-objective” criteria for rejecting a license’<sup>24</sup>
- ‘can mean that ‘community or indigenous concerns, or that are precautionary due to the uncertainty of potential impacts, will be ‘subjective’ and hence invalid considerations;’<sup>25</sup>
- ‘could mean “not subjective.” It could overturn regulation based on a “public interest” standard or the subjective balancing required when there are multiple criteria for assessing the environmental, economic or community impact of a proposed oil drilling platform, power plant, mine, etc.’<sup>26</sup>

### **‘transparent’ criteria**

- ‘Transparent criteria have been contrasted at WTO compliance reviews with licensing requirements that “lack clarity”, are “open-ended”, create “uncertainty” for foreign suppliers, and allow for “considerable bureaucratic discretion.” However, governments sometimes allow for regulatory discretion in order to ensure critical objectives are met in key sectors. For example, Kenya allows applications for university status to be rejected if they are not “in the interest of university education in Kenya.” South Africa maintains “honesty and integrity” qualification requirements for financial service providers that enable regulators to consider “any information in possession of the Registrar or brought to the Registrar’s attention”.’<sup>27</sup>

- ‘suggests that relevant factors, and the weightings to be given them, 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.’<sup>28</sup>
- In developing regulations for a new type of business, Vancouver presumably deliberately included some discretion for the regulator to deal with unforeseen consequences. However, ‘Vancouver’s new regulations could also violate the requirement for “transparent” regulatory criteria, since the City has conferred discretionary authority on its Chief License Inspector. Under the regulations the Inspector may require fulfillment not only of specific conditions stipulated in the licensing application, but as well “other conditions as the Chief Licence 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>29</sup>

### **‘Objective and transparent’ together**

- ‘Objectivity and transparency disciplines could also conflict with provisions based on aesthetic or other hard-to-quantify criteria.’<sup>30</sup>
- ‘The requirement to be based on “objective” criteria could also allow challenges to any criteria that are hard to quantify. California’s Financial Code, for example, states that in order to obtain a license to as a mortgage originator an applicant must demonstrate “such financial responsibility, character, and general fitness as to command the confidence of the community”, criteria that leave much to the discretion of the regulator and are arguably not objective and not transparent. New Zealand’s Education Act allows the New Zealand Teachers Council to register prospective teachers, and applicants are rejected if they cannot demonstrate “good character”. The Council defines good character by any “matters that it considers relevant”, which violates the transparency requirement.’<sup>31</sup>
- The new Turkish Law on the Regulation of Retail Trade requires “sufficient” playgrounds. The space to be allocated for playgrounds has to be “sufficient”, a requirement that could be judged as “not based on objective and transparent criteria” because “sufficient” is not defined in the regulations.’<sup>32</sup>
- In TISA, the US negotiators appear to be concerned about how a dispute panel might interpret the objective and transparent requirements. The US has ‘proposed a footnote suggesting that objective and transparent criteria includes not just competence to supply a service but health and environmental impacts as well: “Footnote 3. US propose: Parties understand that objective and transparent criteria may include, inter alia, criteria such as competence, ability to supply a service, or potential health or environmental impacts of an authorization decision, and that competent authorities may assess the weight to be given to such criteria.”’
  - This footnote suggests the enormity of the stakes involved, when it is feasible that dispute panels may discount all but exclusively commercial considerations in deciding whether regulatory criteria are objective and transparent. Through its footnote, the US also reveals its concern that the simple act of regulators using their judgment to weigh competing considerations could violate TISA’s objectivity standard.’<sup>33</sup>

### ***Procedures do not in themselves unduly prevent fulfilment of requirements***

The EU et al’s text also proposes that procedures do not in themselves unduly prevent fulfilment of requirements.<sup>34</sup>

Does an obligation to do an environmental/health/cultural/indigenous rights etc impact assessment before allowing a mine or fracking mean this ‘unduly prevents fulfilment of requirements’ since an adverse impact assessment could stop the mine/fracking from going ahead?

‘Vancouver’s new marijuana licensing regulations require applications for multiple permits and impose a three-stage review process, which could violate’<sup>35</sup> the TISA proposal that procedures do not

in themselves unduly **impede** fulfilment of requirements. (This EU et al proposal in TISA is more restrictive than the equivalent one at the WTO because merely impeding in a way that does not prevent fulfilment of the requirements could also violate the proposed rule in TISA).

Eg ‘The EU strategy document complains that the new Turkish retail regulations involve “excessive interference and cumbersome registration processes in establishing retail businesses.”<sup>36</sup> The TISA proposal that procedures do not in themselves unduly **impede** fulfilment of requirements ‘seems tailor-made to support a EU complaint about Turkey’s “cumbersome registration process.”<sup>37</sup>

### ***Procedures are impartial and decisions are reached and administered in an independent manner***

The EU et al’s text proposes that procedures are impartial<sup>38</sup> and decisions regarding authorisation for the supply of a service are reached and administered in an independent manner<sup>39</sup>.

#### **Impartiality**

- ‘‘impartial’ implies neutrality on its face, which counts against proactive moves to seek out opinions or support for those with fewer resources to participate in decision-making processes;<sup>40</sup>
- ‘This provision could make it a violation for governments to show “partiality” to particular categories of applicants such as non-profits, small businesses, or disadvantaged groups. For example, Florida’s Department of Business and Professional Regulation is required by state law to waive a variety of licensing fees for military veterans and to provide discounted fees for disabled veterans in particular.’<sup>41</sup>
- A licensing system such as Vancouver’s may not be impartial because it ‘is a two-tier one, biased towards non-profit “compassion clubs” over commercial operations. The latter automatically are assigned demerit points on their application for a license and have to pay thirty times as much for a license. Biases in any regulatory decisions and procedures that favour non-profits, minority-owned or small businesses could be challenged . . . as not impartial to all applicants.’<sup>42</sup>

#### **Reach its decisions in an independent manner**

- ‘decisions reached in an ‘independent’ manner potentially raises problems for consultation processes, commissioning of evidence and reports, and inquisitorial practices common to bodies considering applications for authorisations and licences, or when establishing environmental, health and safety or construction standards.’<sup>43</sup>

### ***Single window***

The EU et al text proposes that: ‘Each Member shall, to the extent practicable, avoid requiring an applicant to approach more than one competent authority for each application for authorisation. A Member may require multiple applications for authorisation where a service is within the jurisdiction of multiple competent authorities.’<sup>44</sup>

A hard requirement for a single window ‘would conflict with regulatory systems where different levels of government share jurisdiction for regulatory approvals. This is often the case for land development applications where local governments are responsible for reviewing local land use compatibility and senior levels of government are responsible for reviewing environmental and other impacts of broader concern.’<sup>45</sup>

‘At the WTO services negotiations, mere differences in requirements among states is on the list of examples of unacceptable regulatory barriers: “sub-federal licensing and qualification requirements and procedures are different, making a license or qualification recognition obtained in one state not valid in other states.”<sup>46,47</sup>

Perhaps because of concerns about the way this may restrict laws which require permission from subnational governments (eg for mines) as well as national governments, in TISA, the USA has

proposed a similar footnote: ‘For greater certainty, a Party may require multiple applications where a service is within the substantive competence or territorial jurisdiction of multiple competent authorities’<sup>48</sup>.

Concerns have been raised over a phrase that is similar to ‘to the extent practicable’ (‘where possible’) because it can mean that ‘a developing country that has in place information technological capacity could be obliged to process applications in electronic format even if such resources would be better spent in other areas to fulfil development goals and objectives’<sup>49</sup>

## ***Timeframe***

### **Shall finish processing complete applications within a reasonable period of time**<sup>50</sup>

‘Europeans who are concerned about fracking would want their governments to give priority to thorough regulatory assessments whereas companies like Chevron, which has shale interests in Poland, Romania, and other European countries, are interested in getting licensing approvals as soon as possible. From a corporate perspective, moratoria on fracking, such as the ones imposed by Romania and Germany, quite obviously cause “undue” delays, do not afford “reasonable time-frames” for regulatory decisions and thus would be clear violations of the’ proposed rules.<sup>51</sup>

### **and ensure that an authorisation once granted enters into effect without undue delay subject to the applicable terms and conditions**<sup>52</sup>

After a licence is granted for a controversial service such as a casino, mine, toxic waste dump, hydropower dam etc, public concerns may cause delays in allowing the licence to take effect. For example Austria built a nuclear power plant, but before it was switched on, a referendum was held and the majority voted against the nuclear power plant, so it was never switched on.<sup>53</sup>

## ***Fees must be reasonable and do not in themselves restrict the supply of the service***<sup>54</sup>

‘Should the cost basis for qualification fees (processing of initial applicants) be treated separately from licensing fees (ongoing supervision and regulation)? Some delegations think the two should be combined into one fee. At issue is whether unsuccessful applicants should bear the cost of post-licensing supervision’<sup>55</sup>

UNCTAD staff noted that a requirement that fees ‘do not in themselves restrict the supply of the service’ is close to a necessity test and refers to concepts which have or could be used in the application of a necessity test.<sup>56</sup> Some examples of the widespread concerns about the necessity test are below.

This proposed restriction on authorisation fees has given rise to concerns that this would prevent certain regulatory practices including the charging of fees for legitimate policy objectives and the Africa Group noted that fees serve important regulatory functions including provision of public funds.<sup>57</sup> An earlier version of the WTO Chair’s text stated that ‘developing country Members are not precluded from charging fees utilised to meet national policy objectives’,<sup>58</sup> however this is not in the EU et al’s proposal.

### **‘reasonable’:**

- ‘Vancouver is imposing marijuana dispensary licensing fees of \$30,000 for commercial operators. While City officials claim this fee only covers the cost of administration, it is the highest fee charged for any business license – a cost that consequently could be judged “unreasonable”. In addition, the City’s mayor is on record as saying the licenses are intended to curtail the proliferation of dispensaries. Existing operators have said they will have to shut down because of the high licensing fee, so the supply of the service will end up being restricted.’<sup>59</sup>
- when used in a different DRD, an expert noted that ‘it is hard to think of a more subjective term than ‘reasonable’ – to whom, measures against what standards and criteria, considering what

range of competing factors, in the context of which and whose legal and administrative traditions;<sup>60</sup>

### **'Do not restrict the supply of the service'**

- 'Any amount charged for a license could be considered a restriction on the unlimited supply of a service, especially with licensing fees for operations like casinos reaching into the millions.'<sup>61</sup>
- 'Since any fee restricts the supply of a service more than having no fees would, this provision would create pressures on governments to lower fees to the maximum extent possible.'<sup>62</sup>

'The Small, Vulnerable Economies proposal had argued that in some countries, regulators utilised income from fees for part of their regulatory budgets. This practice, however, is not restricted to developing countries. The EC, for example, utilises administrative fees from electronic communication service providers to cover the costs of national regulatory authorities for managing the general authorisation system, assigning rights of use, policing competition and ensuring universal service provision.'<sup>63</sup>

If licensing fees are restricted, 'how will governments - particularly at the local level – cope with the loss of revenue? Business license revenue can play a significant part in paying for a range of city services. California's City of Santa Ana, for example, states on its website that "business license revenue is used to pay for Police, Fire, and Safety expenses as well as other general operating costs of the City".'<sup>64</sup>

### ***Necessity test***

Some of the WTO Members in the EU et al text are proposing a necessity test (that measures adopted or maintained relating to authorisation for the supply of a service are **not more burdensome than necessary to ensure the quality of the service**).<sup>65</sup>

This can mean that:

- 'least-burdensome' means that decisions start by considering no regulation or self-regulation, then co-regulation that relies on private mechanisms, disclosure and external monitoring, with an active regulator as the last resort;
- 'necessary' sets the criteria for deciding which of these options to adopt – essentially, the most light-handed approach that can achieve the regulatory goal. The shifting interpretations of 'necessity' by WTO dispute panels has produced a complex, multi-faceted test that has almost always failed when governments have tried to argue it. On any reading, it is virtually impossible to adopt a precautionary and multi-purpose approach to regulation that reflects community concerns and priorities;
- the 'quality' of a service is the only regulatory goal that is recognised here. The GATS provision from which this is drawn gives 'the competence of the supplier' as an example of quality, a narrow consumer-based criteria that excludes broader social considerations.'<sup>66</sup>
- This 'would create wide scope for regulations to be challenged. For example, the public consultation processes that are required for urban development are about ensuring development is acceptable to the community rather than "ensuring the quality" of construction services. They would fail the necessity test as more burdensome than necessary to ensure the quality of the service. Environmental bonds that mining and pipeline companies are required to post in case of spills and other environmental disasters are another licensing requirement that would not meet the test of being necessary to ensure the quality of the service.'<sup>67</sup>
- 'For example, qualification standards for New Zealand nurses require them to be able to "demonstrate ability to apply the principles of the Treaty of Waitangi/Te Tiriti O Waitangi to nursing practice", a criterion that could be argued is more burdensome than necessary to ensure the quality of the service.'<sup>68</sup>



Many developing countries have opposed a necessity test, including the Africa Group, the African, Caribbean and Pacific (ACP) Group, the Small and Vulnerable Economies (SVEs) etc.<sup>69</sup> For example, the ACP Group noted that ‘The adoption of a necessity test in possible future disciplines on domestic regulation would not guarantee enough flexibility to safeguard all national policy objectives and the different ways available to achieve them. This observation responds to the concern of regulators in many countries that a necessity test would constrain domestic regulatory prerogatives. In order to ensure developing countries have the full right to regulate and introduce new regulations to meet national policy objectives, they must not be subject to a necessity test in the Article VI:4 disciplines.’<sup>70</sup>

In addition, Brazil, Canada and the USA jointly criticised the necessity test, see Annex 1.

UNCTAD staff note that there are concerns that a necessity test ‘may unduly constrain domestic regulatory choices, for example by granting trade dispute settlement tribunals the right to balance trade with other national policy imperatives.

See also [https://www.southcentre.int/wp-content/uploads/2013/08/AN\\_SV11\\_The-Development-Dimension-of-the-GATS-Domestic-Regulations\\_EN.pdf](https://www.southcentre.int/wp-content/uploads/2013/08/AN_SV11_The-Development-Dimension-of-the-GATS-Domestic-Regulations_EN.pdf).

### ***Other***

Other DRD which may be proposed include requirements to: allow comment on proposed laws/regulations including by foreign companies, be: relevant, as simple as possible, pre-established, take account of international standards etc. Some analysis of these and many examples of laws that could conflict with DRD in various sectors are available at:

- [http://www.southcentre.int/wp-content/uploads/2013/08/AN\\_SV12\\_The-Draft-GATS-Domestic-Regulation-Disciplines\\_EN.pdf](http://www.southcentre.int/wp-content/uploads/2013/08/AN_SV12_The-Draft-GATS-Domestic-Regulation-Disciplines_EN.pdf)
- [https://www.southcentre.int/wp-content/uploads/2013/08/AN\\_SV11\\_The-Development-Dimension-of-the-GATS-Domestic-Regulations\\_EN.pdf](https://www.southcentre.int/wp-content/uploads/2013/08/AN_SV11_The-Development-Dimension-of-the-GATS-Domestic-Regulations_EN.pdf)
- <http://us.boell.org/2010/05/25/series-policy-papers-trade-and-investment>
- ‘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.

### ***Conclusion***

Many WTO Members have raised concerns about these proposed DRD as noted above. See for example the Africa Group’s comments of 4 December 2017.<sup>71</sup>

***Annex 1: Brazil, Canada, US opposition to necessity test***

**WORLD TRADE  
ORGANIZATION**

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**Working Party on Domestic Regulation**

Original: English

**COMMUNICATION FROM BRAZIL, CANADA AND  
THE UNITED STATES**

Views on the Issue of the Necessity Test in the Disciplines on Domestic Regulation

The following communication dated 22 March 2011 from the delegations of Brazil, Canada and the United States is being circulated to the Members of the Working Party on Domestic Regulation with a view to contributing to the debate on the necessity test in the disciplines on domestic regulation under Article VI:4 of the GATS.

This communication is made without prejudice to the final positions of the co-sponsors on the other aspects of the negotiations of disciplines on domestic regulations, including possible alternatives to the necessity test.

1. The co-sponsors of this paper have highlighted on several occasions that they support negotiation of clear and effective disciplines on domestic regulation of services under Article VI.4 of the GATS. They have also emphasized the importance that they attach to the right of Members to regulate in order to meet national policy objectives, which is clearly recognized in the preamble to the GATS. Since the right to regulate is a sovereign right, the disciplines on domestic regulation must not unduly undermine that right. The co-sponsors are concerned; however, the necessity test may have this precise effect.

2. The co-sponsors understand that the objective of the disciplines on domestic regulation is to avoid a situation in which measures related to domestic regulation undermine commitments taken under Articles XVI and XVII of the GATS. However, the necessity test, as proposed by various Members, aims at assessing the need or merit of a certain measure to achieve a domestic public policy objective, irrespective of whether it has any effect on these commitments or even any effect on trade in services. This means that the regulator could be told to choose a less burdensome measure if any other Member believes that the approach taken was not "necessary" to fulfil this objective. This threatens the crucial discretion that regulators must maintain to enable them to adequately take into account legitimate policy objectives in their own jurisdiction.

3. A measure can be adopted for a number of legitimate reasons, many of which pertain to non-trade concerns, generally linked to societal norms and rules. 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 achieve the same policy objective. In such disagreements, the argument would come down to the legitimacy of the non-trade concern and how the regulator chose to address it rather than whether or not that measure undermines market access or national treatment commitments (which can already be addressed under GATS).

4. This situation is particularly untenable because it applies not to discriminatory measures (which would be captured by Article XVII) but to *non-discriminatory* measures, which are applied equally to foreign and domestic services or foreign and domestic suppliers. We emphasize that discriminatory measures are already disciplined under Article XVII (National Treatment); the proposed necessity test would only apply when a Member requires the same regulatory steps of its domestic service suppliers as it requires of foreign service suppliers.

5. Moreover, as indicated in the Secretariat's summary of the necessity test jurisprudence in the WTO (S/WPDR/W/27/Add.1), there is no single interpretation of "necessary" in the WTO; the interpretation varies depending on the purpose and context. This makes it difficult to determine, in advance, how a panel will interpret the test, and it makes it risky to rely on interpretations grounded in other contexts. All we know, with certainty, is that the meaning would be determined by a panel or Appellate Body; this means that it is, above all, a jurisprudential creation with the potential to seriously circumscribe domestic policy choices.

6. For these reasons, the existence of necessity test language in other WTO Agreements should not be used as a justification for its inclusion in the disciplines on domestic regulation for services. Each agreement has its own context and purposes, which does not necessarily fit the reality of the regulation of trade in services. For instance, concerning the TBT and SPS agreements, Members are frequently able to use scientifically tested evidence underpinning standards for the products covered by these agreements. In the area of services, it is not possible to apply the same type of scientific testing to service suppliers, i.e. human beings. Regulators of services need broader discretion to make judgments about the applicants appearing before them, balancing factors such as ensuring both the quality and availability of the service in light of societal norms and values. Furthermore, even where "necessary" is used elsewhere in the services context (i.e. in the GATS), it applies much more narrowly to a more specific sub-set of issues, so the implications cannot be said to be the same.

7. Finally, it is important to bear in mind that the mandate of Article VI of the GATS does not require a necessity test. Members are asked to develop "any necessary disciplines" but the outcome is not pre-determined by Article VI. The list of elements mentioned in Article VI:4 only establishes the "aims" of the disciplines; so long as the specific disciplines negotiated meet these aims, the Article VI:4 mandate is fulfilled. Moreover, the list of objectives is not exhaustive, and the reference to necessity only pertains to the quality of the service ("not more burdensome than necessary to ensure the quality of the service": Article VI:4(b)).

8. For all of these reasons, the co-sponsors believe that the necessity test is inconsistent with the broader objective of developing clear and effective disciplines on domestic regulation. In our view, the necessity test would be both a vague and unpredictable standard, ultimately defined by a panel rather than WTO Members, which would open the door to second-guessing experienced regulators about some of the most sensitive policy choices made by Members. The co-sponsors also believe that a necessity test is simply not necessary in the broader context of the GATS. In our view, strong specific procedural disciplines negotiated in the WPDR, combined with existing GATS requirements for national treatment and reasonable administration of all measures, gives Members all the legal tools they need to address regulatory practices they view as inappropriate. Should the proponents of the necessity test, however, continue to believe in the need for some sort of additional standard, they could propose, for consideration, other alternatives bearing in mind the concerns we have set out above.

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- <sup>1</sup> Eg see <https://www.bilaterals.org/?tisa-draft-annex-on-domestic-32464>
- <sup>2</sup> <https://www.bilaterals.org/?rcep-services-chapter-negotiating>
- <sup>3</sup> Eg see <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1395>
- <sup>4</sup> [https://www.wto.org/english/news\\_e/spra\\_e/spra201\\_e.htm](https://www.wto.org/english/news_e/spra_e/spra201_e.htm) and [https://www.wto.org/english/thewto\\_e/minist\\_e/mc11\\_e/mc11\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/mc11_e/mc11_e.htm).
- <sup>5</sup> WT/MIN(17)/7 from [https://www.wto.org/english/thewto\\_e/minist\\_e/mc11\\_e/documents\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/mc11_e/documents_e.htm)
- <sup>6</sup> ‘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.
- <sup>7</sup> ‘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.
- <sup>8</sup> Art 1bis1
- <sup>9</sup> Art XXVIII GATS, [https://www.wto.org/english/docs\\_e/legal\\_e/26-gats\\_02\\_e.htm#articleXXVIII](https://www.wto.org/english/docs_e/legal_e/26-gats_02_e.htm#articleXXVIII)
- <sup>10</sup> [https://wikileaks.org/tisa/analysis/Analysis-of-20150220\\_Annex-on-Domestic-Regulation/](https://wikileaks.org/tisa/analysis/Analysis-of-20150220_Annex-on-Domestic-Regulation/)
- <sup>11</sup> <https://us.boell.org/2010/05/20/plain-language-guide-gats-negotiations-domestic-regulation>
- <sup>12</sup> ‘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.
- <sup>13</sup> <https://us.boell.org/2010/05/20/plain-language-guide-gats-negotiations-domestic-regulation>
- <sup>14</sup> Art 6.1a)
- <sup>15</sup> <https://us.boell.org/2010/05/20/plain-language-guide-gats-negotiations-domestic-regulation>
- <sup>16</sup> [http://www.southcentre.int/wp-content/uploads/2013/08/AN\\_SV12\\_The-Draft-GATS-Domestic-Regulation-Disciplines\\_EN.pdf](http://www.southcentre.int/wp-content/uploads/2013/08/AN_SV12_The-Draft-GATS-Domestic-Regulation-Disciplines_EN.pdf)
- <sup>17</sup> <https://us.boell.org/2010/05/20/plain-language-guide-gats-negotiations-domestic-regulation>
- <sup>18</sup> [http://www.southcentre.int/wp-content/uploads/2013/08/AN\\_SV12\\_The-Draft-GATS-Domestic-Regulation-Disciplines\\_EN.pdf](http://www.southcentre.int/wp-content/uploads/2013/08/AN_SV12_The-Draft-GATS-Domestic-Regulation-Disciplines_EN.pdf)
- <sup>19</sup> <https://us.boell.org/2010/05/20/plain-language-guide-gats-negotiations-domestic-regulation>
- <sup>20</sup> [http://www.southcentre.int/wp-content/uploads/2013/08/AN\\_SV12\\_The-Draft-GATS-Domestic-Regulation-Disciplines\\_EN.pdf](http://www.southcentre.int/wp-content/uploads/2013/08/AN_SV12_The-Draft-GATS-Domestic-Regulation-Disciplines_EN.pdf)
- <sup>21</sup> <https://us.boell.org/2010/05/20/plain-language-guide-gats-negotiations-domestic-regulation>
- <sup>22</sup> [http://www.southcentre.int/wp-content/uploads/2013/08/AN\\_SV12\\_The-Draft-GATS-Domestic-Regulation-Disciplines\\_EN.pdf](http://www.southcentre.int/wp-content/uploads/2013/08/AN_SV12_The-Draft-GATS-Domestic-Regulation-Disciplines_EN.pdf)
- <sup>23</sup> <https://us.boell.org/2010/05/20/plain-language-guide-gats-negotiations-domestic-regulation>
- <sup>24</sup> [https://wikileaks.org/tisa/analysis/Analysis-of-20150423\\_Annex-on-Domestic-Regulation/](https://wikileaks.org/tisa/analysis/Analysis-of-20150423_Annex-on-Domestic-Regulation/)
- <sup>25</sup> [https://wikileaks.org/tisa/analysis/Analysis-of-20150220\\_Annex-on-Domestic-Regulation/](https://wikileaks.org/tisa/analysis/Analysis-of-20150220_Annex-on-Domestic-Regulation/)
- <sup>26</sup> <https://us.boell.org/2010/05/20/plain-language-guide-gats-negotiations-domestic-regulation>
- <sup>27</sup> [http://www.southcentre.int/wp-content/uploads/2013/08/AN\\_SV12\\_The-Draft-GATS-Domestic-Regulation-Disciplines\\_EN.pdf](http://www.southcentre.int/wp-content/uploads/2013/08/AN_SV12_The-Draft-GATS-Domestic-Regulation-Disciplines_EN.pdf)
- <sup>28</sup> [https://wikileaks.org/tisa/analysis/Analysis-of-20150220\\_Annex-on-Domestic-Regulation/](https://wikileaks.org/tisa/analysis/Analysis-of-20150220_Annex-on-Domestic-Regulation/)
- <sup>29</sup> [https://wikileaks.org/tisa/analysis/Analysis-of-20150423\\_Annex-on-Domestic-Regulation/](https://wikileaks.org/tisa/analysis/Analysis-of-20150423_Annex-on-Domestic-Regulation/)
- <sup>30</sup> [http://www.southcentre.int/wp-content/uploads/2013/08/AN\\_SV12\\_The-Draft-GATS-Domestic-Regulation-Disciplines\\_EN.pdf](http://www.southcentre.int/wp-content/uploads/2013/08/AN_SV12_The-Draft-GATS-Domestic-Regulation-Disciplines_EN.pdf)
- <sup>31</sup> [https://wikileaks.org/tisa/analysis/Analysis-of-20151010\\_Annex-on-Domestic-Regulation/](https://wikileaks.org/tisa/analysis/Analysis-of-20151010_Annex-on-Domestic-Regulation/)
- <sup>32</sup> [https://wikileaks.org/tisa/analysis/Analysis-of-20151010\\_Annex-on-Domestic-Regulation/](https://wikileaks.org/tisa/analysis/Analysis-of-20151010_Annex-on-Domestic-Regulation/)
- <sup>33</sup> [https://wikileaks.org/tisa/analysis/Analysis-of-20150423\\_Annex-on-Domestic-Regulation/](https://wikileaks.org/tisa/analysis/Analysis-of-20150423_Annex-on-Domestic-Regulation/)
- <sup>34</sup> Art 6.1c)
- <sup>35</sup> [https://wikileaks.org/tisa/analysis/Analysis-of-20150423\\_Annex-on-Domestic-Regulation/](https://wikileaks.org/tisa/analysis/Analysis-of-20150423_Annex-on-Domestic-Regulation/)
- <sup>36</sup> [https://wikileaks.org/tisa/analysis/Analysis-of-20151010\\_Annex-on-Domestic-Regulation/](https://wikileaks.org/tisa/analysis/Analysis-of-20151010_Annex-on-Domestic-Regulation/)
- <sup>37</sup> [https://wikileaks.org/tisa/analysis/Analysis-of-20151010\\_Annex-on-Domestic-Regulation/](https://wikileaks.org/tisa/analysis/Analysis-of-20151010_Annex-on-Domestic-Regulation/)
- <sup>38</sup> Art 6.1b)
- <sup>39</sup> Art 3.1
- <sup>40</sup> [https://wikileaks.org/tisa/analysis/Analysis-of-20150220\\_Annex-on-Domestic-Regulation/](https://wikileaks.org/tisa/analysis/Analysis-of-20150220_Annex-on-Domestic-Regulation/)
- <sup>41</sup> [https://wikileaks.org/tisa/analysis/Analysis-of-20151010\\_Annex-on-Domestic-Regulation/](https://wikileaks.org/tisa/analysis/Analysis-of-20151010_Annex-on-Domestic-Regulation/)
- <sup>42</sup> [https://wikileaks.org/tisa/analysis/Analysis-of-20150423\\_Annex-on-Domestic-Regulation/](https://wikileaks.org/tisa/analysis/Analysis-of-20150423_Annex-on-Domestic-Regulation/)
- <sup>43</sup> [https://wikileaks.org/tisa/analysis/Analysis-of-20150220\\_Annex-on-Domestic-Regulation/](https://wikileaks.org/tisa/analysis/Analysis-of-20150220_Annex-on-Domestic-Regulation/)

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- <sup>44</sup> Art 2.1
- <sup>45</sup> [http://www.southcentre.int/wp-content/uploads/2013/08/AN\\_SV12\\_The-Draft-GATS-Domestic-Regulation-Disciplines\\_EN.pdf](http://www.southcentre.int/wp-content/uploads/2013/08/AN_SV12_The-Draft-GATS-Domestic-Regulation-Disciplines_EN.pdf)
- <sup>46</sup> WTO Secretariat, “Examples of Measures to Be Addressed by Disciplines under GATS Article VI.4”, 12 July 2002.
- <sup>47</sup> [https://wikileaks.org/tisa/analysis/Analysis-of-20150423\\_Annex-on-Domestic-Regulation/](https://wikileaks.org/tisa/analysis/Analysis-of-20150423_Annex-on-Domestic-Regulation/)
- <sup>48</sup> [https://wikileaks.org/tisa/document/20150423\\_Annex-on-Domestic-Regulation/20150423\\_Annex-on-Domestic-Regulation.pdf](https://wikileaks.org/tisa/document/20150423_Annex-on-Domestic-Regulation/20150423_Annex-on-Domestic-Regulation.pdf)
- <sup>49</sup> [https://www.southcentre.int/wp-content/uploads/2013/08/AN\\_SV11\\_The-Development-Dimension-of-the-GATS-Domestic-Regulations\\_EN.pdf](https://www.southcentre.int/wp-content/uploads/2013/08/AN_SV11_The-Development-Dimension-of-the-GATS-Domestic-Regulations_EN.pdf)
- <sup>50</sup> Art 2.4c) EU et al proposal
- <sup>51</sup> [https://wikileaks.org/tisa/analysis/Analysis-of-20151010\\_Annex-on-Domestic-Regulation/](https://wikileaks.org/tisa/analysis/Analysis-of-20151010_Annex-on-Domestic-Regulation/)
- <sup>52</sup> Art 2.5 EU et al proposal
- <sup>53</sup> <http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2010-8740&language=PL>
- <sup>54</sup> Art 2.6 EU et al proposal
- <sup>55</sup> <https://us.boell.org/2010/05/20/plain-language-guide-gats-negotiations-domestic-regulation>
- <sup>56</sup> ‘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.
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- <sup>63</sup> [https://www.southcentre.int/wp-content/uploads/2013/08/AN\\_SV11\\_The-Development-Dimension-of-the-GATS-Domestic-Regulations\\_EN.pdf](https://www.southcentre.int/wp-content/uploads/2013/08/AN_SV11_The-Development-Dimension-of-the-GATS-Domestic-Regulations_EN.pdf)
- <sup>64</sup> [https://wikileaks.org/tisa/analysis/Analysis-of-20151010\\_Annex-on-Domestic-Regulation/](https://wikileaks.org/tisa/analysis/Analysis-of-20151010_Annex-on-Domestic-Regulation/)
- <sup>65</sup> Art 6.3
- <sup>66</sup> [https://wikileaks.org/tisa/analysis/Analysis-of-20150220\\_Annex-on-Domestic-Regulation/](https://wikileaks.org/tisa/analysis/Analysis-of-20150220_Annex-on-Domestic-Regulation/)
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- <sup>71</sup> WT/MIN(17)/8 from [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S001.aspx](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S001.aspx).