



Australian Government
Department of Foreign Affairs and Trade



Domestic Regulation, Business and Professional Services in the WTO context

Seminar 2: “Key Sectoral Issues and Domestic Regulation”

Aik Hoe LIM, WTO
“Domestic regulation disciplines in the GATS”
WTO Building, Room B
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Overview of presentation

1. Mandate for negotiations
2. Negotiations –overview
3. Elements in the draft disciplines
4. Most difficult issues to be resolved

Mandate for negotiations (1)

Why **need** for disciplines?

→ Even if a Member has made a full **Market Access and National Treatment** commitment for the sector and mode of supply at stake (without relevant limitation) - **measures of domestic regulation may still hinder a supplier to provide services in another WTO Member**

Trade Barriers & Domestic Regulation



Trade Barriers

Market Access

(Article XVI)

Mainly quantitative
restrictions

National Treatment

(Article XVII)

Discriminatory measures

Domestic Regulation

Article VI

Qualitative requirements
Regulatory autonomy of
Members subject to GATS
rules aimed at containing
trade restrictive effects

Mandate for negotiations (2)

Article VI:4 GATS:

*With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements **do not constitute unnecessary barriers to trade in services**, the Council for Trade in Services shall, through appropriate bodies it may establish, **develop any necessary disciplines**. Such disciplines shall aim to ensure that such requirements are, *inter alia*:*

- (a) based on **objective and transparent criteria**, such as competence and the ability to supply the service;
- (b) **not more burdensome than necessary** to ensure the quality of the service;
- (c) in the case of **licensing procedures**, **not in themselves a restriction on the supply of the service**

Mandate for negotiations (3)

Article VI:5 GATS (applies in the interim):

(a) *In sectors in which a Member has undertaken specific commitments, **pending the entry into force of disciplines** developed in these sectors pursuant to paragraph 4, the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which:*

(i) *does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c); and*

(ii) *could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made.*

→ Criteria in Article VI:4 (objectivity, transparency, necessity) **already apply** to all new measures of domestic regulation (adopted after or not foreseen at end of 1994 or at moment accession of new Member)



Negotiations overview (1)

What has been negotiated, so far..

- ***Guidelines for Mutual Recognition Agreements in the Accountancy Sector (1997)***
- ***Disciplines on Domestic Regulation in the Accountancy Sector (1998) (S/L/64,17 December 1998)***

Negotiations overview (2)

- Working Party on Domestic Regulation mandated to develop “horizontal disciplines” applicable to all services sectors, as well as for individual or groups of sectors.
- **Annex C of Hong Kong Ministerial Conference** (2005) instructed negotiators to develop disciplines on domestic regulations and to adopt text for adoption before the end of the Round.
- Work on “horizontal disciplines” has resulted in a Chairman’s text: **Chair’s March 2009 text**
- Further work also undertaken to develop a bracketed text: **Chairman’s Progress Report 2011**

Elements in Draft Disciplines (1)

Scope

- Licensing requirements; Licensing procedures; Qualification requirements; Technical Standards

General Provisions

- Not apply to limitations subject to scheduling under Article XVI or XVII
- Measures to be pre-established, based on objective and transparent criteria and relevant to the supply of the service to which they apply
- Right to maintain or introduce universal service provisions

Elements in Draft Disciplines (2)

Transparency

- Publication of measures through printed or electronic means
- Illustrative list of information to be provided, i.e: criteria, terms, conditions, procedures for verification, normal processing timeframe and fees
- Mechanisms to respond to enquiries
- Publication before adoption of proposed measures of general application relating to Article VI:4 elements
- Opportunity for comments on proposed measures
- Address collectively and in writing substantive issues in comments received

Elements in Draft Disciplines (3)

Licensing Requirements

- Consider using less trade restrictive means than residency requirements

Licensing Procedures

- As simple as possible
- Impartial and decisions by independent authorities
- Single window for application (in principle)
- Applications possible at any time, (except where licenses limited in numbers)
- Permit that applications be submitted in electronic format and allow authenticated copies instead of originals.
- In case of incomplete applications: inform, identify missing information and provide opportunity to correct
- Reasonable timeframe and fees

Elements in Draft Disciplines (4)

Qualification requirements

- Consideration of professional experience as complement to educational qualifications
- Identify deficiencies in the applications and means to correct them in home, host or other jurisdiction
- Prior residency not a prerequisite

Qualification procedures

- Idem to licensing (simple, single window, etc.)
- Examinations at reasonably frequent intervals
- Information on reasons for rejection and appeal timeframe
- Processing within reasonable timeframe
- Fees commensurate to the administrative costs

Elements in Draft Disciplines (5)

Technical standards

- maximum transparency of relevant process relating to development of technical standards
- Take into account international standards, except if ineffective or inappropriate

Development

- Non-application for LDCs
- Phase-in implementation for developing countries
- Reduced administrative fees service suppliers from developing countries
- Technical assistance for developing countries and developing countries service suppliers

Most difficult issues (1)

Flexibility language

- Many provisions are phrased in ‘best endeavour’ language (using ‘should’, ‘may’, ‘to the extent feasible’ ...).
- Overall ambition of text = modest. Some Members wish to have more ambition.

Definitions

- Some Members approach definitions from own domestic definitions, ignoring that the definitions do not themselves impose legal obligations.

“Necessity test” and “disguised restrictions”

- Necessity test unacceptable to some Members, while others see need to balance right to regulate with avoiding barriers to trade in services (notion of “disguised restrictions” proposed by Chairman in the “Introduction”)

General provisions

- Meaning of obligation that requirements shall be ‘pre-established’ and ‘relevant to the supply’.

Most difficult issues (2)

Licensing and qualification procedures

- Scope of disciplines on licensing fees.

Development

- Transition periods for developing countries while disciplines themselves only impose weak obligation?
- Disagreement among developing countries on criteria for extension of transition periods

Structure of Disciplines

- A group of Members has suggested to 'streamline' the four separate chapters on licensing requirements and procedures and qualification requirements and procedures into two chapters ((a) licensing and qualification requirements and (b) licensing and qualification procedures)

Legal form of Disciplines

- Annex to GATS, Decision or Reference Paper?

Thank you

hoe.lim@wto.org