

TALKING POINTS

BOOK LAUNCH: "WTO DOMESTIC REGULATION AND SERVICES TRADE: PUTTING PRINCIPLES INTO PRACTICE", WEDNESDAY 7 MAY 2014

Thank you Deputy-Director General Yi.

Welcome everyone to this book launch. It has been a long journey since we had the idea of putting together this book on domestic regulation and services trade, and we have many people to thank.

This book could not have been done without the excellent contributions from the authors of the respective chapters. A few of them are here with us today, and we will be hearing from them later on their case studies. They all very enthusiastically contributed to our project from day one and cooperated in making sure all deadlines were met.

We are highly appreciative of the support received from Cambridge University Press throughout the process, and of colleagues in WTO's editing/publication team and Trade in Services Division. Finola O'Sullivan, Anthony Martin, Ross McRae, Heather Sapey-Martin, Elizabeth Debayle and Jean-Marie McAdams, we owe you a big thanks.

Last but not least, we appreciated very much the support from my Director, Hamid Mamdouh and for the kind foreword in the book from Director-General Roberto Azevêdo.

Before briefly explaining the objective and content of our book, we want to stress that we speak in our personal capacity.

Although "domestic regulation disciplines" is part of the unfinished business of the GATS and has been in negotiation for some time, it is not a subject that is well known.

Yet, the role and impact of regulation in services markets is of essential importance. In the absence of tariffs affecting trade in services, it is in fact regulation that constitutes the main – maybe the only – impediment to international trade of services.

The General Agreement on Trade in Services (GATS) already contains disciplines in the form of prohibitions to adopt specific market access restrictions (specified in Article XVI) and an obligation of national treatment (Article XVII), subject to limitations.

However, outside the scope of these articles, there are no further substantive disciplines of the type found in the TBT Agreement with respect to non-discriminatory "domestic regulation".

Yet, Article VI of the GATS contains a mandate to negotiate any necessary disciplines on licensing and qualification requirements and procedures, and technical standards. And this has been the preoccupation of Members in the Working Party for some time.

Article VI is thus a "sleeping beauty" that intends to avoid that certain types of domestic regulation constitute "unnecessary barriers to trade in services", to use the language of paragraph 4 of Article VI.

The central question is to what extent domestic regulation can and should be disciplined under a trade agreement. How can protectionism be distinguished from the pursuit of legitimate public policy objectives? There are no obvious answers. Yet, the interplay between the push for liberalization and the demands for domestic regulation is not going to go away. To the contrary, we believe that services trade agreements in the 21st century will increasingly have to deal with this challenge.

First, as market access restrictions faced by foreign services continue to be lowered, the overall domestic regulatory environment becomes increasingly more significant. In other words, the more the six types of market access restrictions listed in Article XVI:2 are removed (which are mainly quantitative maximum limitations) and discriminatory treatment is eliminated, the more other types of impediments to services trade become obvious.

Second, today's economic system is characterized by global value chains in both goods and services with suppliers linked across many countries. Such production depends on the fast and seamless flow of intermediate services and products across borders. Regulatory differences can raise the costs of compliance and affect participation in value chains.

Our experience in the Working Party on Domestic Regulation was that clear and detailed examples of regulatory approaches significantly enhanced discussions on the potential role of disciplines on domestic regulation.

At the same time, we also realized that asymmetries in knowledge and experience – the negotiators are generally trade officials rather than people from regulatory departments – lead to unequal participation. We thus sought to improve understanding of regulatory issues by

documenting significant experiences or accounts of how governments have dealt with services liberalization and regulation.

We have not sought to distill "best practices" out of the essays and case-studies collected in this book. However, we did find that while many of the concerns and regulatory practices are specific to the context of the individual case-study, the issues raised appear to have wider significance either for all services sectors or for certain sub-sectors.

These recurring issues illustrate well the challenges of managing services liberalization and domestic regulation, and can be grouped under the following six themes:

- First, liberalization needs re-regulation and not deregulation: as services markets open to international competition, new regulation to ensure regulatory quality and efficiency, transparency, as well as appropriately mandated regulatory bodies becomes even more critical.
- Second, market access and national treatment commitments are not sufficient to address regulatory impediments to trade: as we already said, even when the types of market access restrictions listed in Article XVI of the GATS or discriminatory measures are removed, trade flows may still be hampered by lengthy procedures, duplication of reviews, or even mere lack of clarity and uncertainty on the applicable rules and procedures to obtain an authorization to supply a service.
- Third, development of new services is challenged by fragmented regulation and supervision: as new services emerge, for instance mobile payment services via cell phones or online health services, it becomes clear that traditional sectoral services regulation gets challenged. In the case of mobile payment services, both

telecommunications and financial services regulation and supervision are relevant. There are also new issues of consumer data protection and cross-border data flows to consider. Disciplines of domestic regulation need to realise that, even where sectoral approaches would appear preferable, sectors necessarily overlap.

- Fourth, recognition and role of international standards: stimulating the reliance on international standards, developed outside the WTO by specialized, sectoral international bodies, can greatly help to reduce regulatory diversity. Yet, negotiators should always be aware of national specificities and different levels of development that may make international standards inappropriate.
- Fifth, importance of transparent, reasonable, objective and impartial rule-making and supervision: All too often, uncertainty exists on the existence and content of relevant regulations to obtain an authorization to supply a service. Nonetheless, the need for transparent and reasonable, objective and impartial rule-making and supervision has to be reconciled with the need to maintain flexibility in case-by-case applications.
- Sixth, ensuring that regulatory requirements are relevant to the objective and not more burdensome than necessary to the service supplier: this last theme is probably the most contentious and a “necessity” test for services regulation has yet to emerge from the negotiations. On a more positive note, it was striking to see that regulatory principles such as transparency, objective, criteria-based decision making, predictability, impartiality and procedural efficiency share much in common with GATS objectives on domestic regulation disciplines. Building on areas of commonality might help reduce tension.

Lastly, we reflect on some ideas on the way ahead. We see three areas that might be worth pursuing further.

- Firstly, much attention has been given to reducing costs and delays for goods trade through measures that provide predictability, simplicity and uniformity in customs and other border procedures. No such instrument exists in services trade. Could a case be made for a package of measures aimed at "services trade facilitation"? And if yes, it would seem that many of the elements are already in the draft domestic regulation disciplines.
- Secondly, how could any disciplines on domestic regulation be incorporated into the GATS? If negotiators know in advance how the disciplines will become part of the GATS, they may be more ready to decide on certain substantive approaches. One option is that any eventual disciplines would be integrated into GATS as an Annex. Another option is to use GATS Article XVIII, which allows WTO members to schedule additional commitments on any regulatory matter. Since members decide individually to undertake additional commitments, there is considerable flexibility. Could such an approach provide a model of variable geometry which would be more pragmatic ?
- Thirdly, apart from what can be negotiated at the WTO, there is the question of what more can be done to improve cooperation and awareness between regulators and the trade policy community. For some developing countries, there is a need to strengthen the ability of regulators to identify, design and implement policies which are market and trade conducive.

Initiatives such as "Aid for Trade" could make interesting inroads in this direction but it has so far been underutilized

In order to give you some further insight in the practical case studies, we would like to give the floor to two of our contributors.