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**WTO Negotiations on
Domestic Regulation:
Considerations for
Commonwealth Small States
in the Context of COVID-19**

Kim Kampel and R V Anuradha



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By Kim Kampel and R V Anuradha.

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For more information contact the Series Editor: Dr Brendan Vickers, b.vickers@commonwealth.int.

Abstract

The General Agreement on Trade in Services (GATS) recognises the right of WTO Members to regulate services within their territories, but also recognises that domestic regulations may impede trade in services. This may be due to regulatory divergences between countries, or trade restrictive domestic measures. Article VI:4 of the GATS, titled 'Domestic Regulations' (DR), provides the basis for development of disciplines for certain types of DR, such as qualification requirements and procedures, licensing requirements and procedures, and technical standards. In 1999, Members established the Working Party on Domestic Regulations (WPDR) to implement this mandate. While extensive discussions since 1999 resulted in ad referendum texts of disciplines up to 2011, consensus among Members at the multilateral level has been elusive. At the 11th WTO Ministerial Conference (MC-11) in Buenos Aires in 2017, a sub-group of WTO Members called for an intensification of these discussions and agreed to work on the DR disciplines under a joint initiative, with a view to achieving a multilateral outcome by the 12th Ministerial Conference (MC-12).

This paper evaluates the historical evolution of the DR discussions and explores relevant considerations for Commonwealth small states. It also considers the potential for services DR disciplines to support governments' recovery and resilience-building efforts, in the wake of the economic impact of the COVID-19 pandemic.

JEL Classifications: F10, F13, O14

Keywords: services trade, WTO, domestic regulation, Commonwealth small states, COVID-19

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Abbreviations and Acronyms

| | |
|-------|---|
| ACP | African, Caribbean and Pacific |
| CSS | Commonwealth small states |
| DR | domestic regulation |
| EU | European Union |
| GATS | General Agreement on Trade in Services |
| GDP | gross domestic product |
| IF | investment facilitation |
| JI | Joint Initiative |
| JI-DR | Joint Initiative on Domestic Regulation |
| JI-IF | Joint Initiative on Investment Facilitation |
| JMS | Joint Ministerial Statement |
| JSI | Joint Statement Initiative |
| LDC | least developed countries |
| LRP | licensing requirements and procedures |
| MC | Ministerial Conference |
| MFN | most favoured nation |
| MSME | micro, small and medium enterprises |
| QRP | qualification requirements and procedures |
| SVE | small, vulnerable economies |
| TS | technical standards |
| WPDR | Working Party on Domestic Regulation |
| WTO | World Trade Organization |

1. Introduction

The General Agreement on Trade in Services (GATS) recognises ‘the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right.’¹

At the same time, the GATS also recognises that domestic regulations in a country may operate in a manner that can act as impediments to realising the full benefits of commitments. A recent factsheet from the World Trade Organization (WTO) Secretariat notes that:

Services trade has grown considerably in the past decade and is estimated to now account for around half of global trade. At the same time, the 2019 WTO World Trade Report found that the costs of trading services are about twice as high as trade costs for goods. A significant portion of these costs are attributable to regulatory divergence, as well as opaque regulations and cumbersome procedures. (WTO, 2020a)

Article VI of the GATS titled ‘Domestic Regulation’ (DR), under paragraph 4, provides for the basis for the development of disciplines on DR, with a view to ensuring that these do not themselves become an impediment to the supply of services (see Box 1). The focus of GATS Article VI:4 is on a subset of DR that constitute qualification requirements and procedures (QR and QP or, collectively, QRP), licensing requirements and procedures (LR and LP or, collectively, LRP) and technical standards (TS).

The mandate on DR under GATS Article VI:4 received the immediate attention of WTO Members in 1995 when the Working Party on Professional Services (WPPS) was established

(replaced in 1999 by the Working Party on Domestic Regulation (WPDR)). The Decision on Domestic Regulation, adopted by the Council for Trade in Services in 1999 (WTO, 1999), established the WPDR with the following key features:

- Its mandate would be to develop disciplines to ensure that domestic regulations relating to QRP, LRP and TS do not constitute unnecessary barriers to trade in services;
- It was given the flexibility to develop generally applicable disciplines and also disciplines as appropriate for individual sectors or groups thereof.

There were extensive discussions at the WPDR between the time of its establishment in 1999 through 2011. The key developments during this phase, as reported in the public domain, can be summarised as follows:

- **2005:** Annex C of the Hong Kong Ministerial Declaration, titled ‘Services’, mandated Members to develop disciplines on domestic regulation before the end of the current round of negotiations, based on the proposals referred to in the Report of the Chair of the WPDR to the Council for Trade in Services (WTO, 2005).
- **2009:** The Room Document of March 2009, commonly referred to as the ‘Chair’s 2009 Text’, which provided the draft of the evolving DR disciplines, was circulated among WTO Members. The Informal Note by the Chairman of the WPDR introducing the Chair’s 2009 Text said that the draft revision ‘reflects drafting suggestions which I feel have enjoyed wide support by delegations’ (WTO, 2009).

Box 1. GATS Article VI:4

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.

- **2011:** The Chairman of the WPDR produced a Progress Report on 14 April 2011 (WTO, 2011a), which was attached to the Report by the Chairman of the Council on Trade in Services to the Trade Negotiations Committee (WTO, 2011b). This is popularly referred to as the ‘Chair’s 2011 Text.’ Several clauses in this are indicated as having ‘agreement reached on ad referendum basis’, while there are others where single and multiple alternatives were provided to the suggested provisions of the proposed disciplines.
- **2013:** At the Bali Ministerial Conference in 2013, the annual report submitted by the WPDR Chair highlighted that discussions and information exchange were ongoing on various aspects of domestic regulation, such as verification and assessment of qualifications, identification of deficiencies of qualifications, examinations, technical standards, general provisions and development-related aspects of the disciplines (WTO, 2013a). Furthermore, based on the Secretariat Note on ‘Regulatory Issues in Sectors and Modes of Supply’ (WTO, 2012), a provisional schedule organising the discussions was also arrived at, addressing architectural services, construction and related engineering services, legal services, accountancy services and Mode 4 (WTO, 2013a). On the subject of development, the Secretariat circulated a supplementary Note on ‘Services-related regulatory challenges faced by developing countries’, in respect of which Members exchanged views on the importance of regulatory issues for services trade, national experiences with regulatory reform and capacity building and the specific challenges faced by developing countries (WTO, 2013b).
- **2015:** The Report by the Chair of the Council for Trade in Services noted the overall disappointment among delegations at the lack of progress (WTO, 2015). It stated that some delegations suggested that a text on transparency in services could offer a pragmatic deliverable for the Nairobi Ministerial (MC10), whereas other delegations cautioned that a result in services could only be agreed under certain conditions, including overall balance of a Nairobi

outcome, linkage to a post-Nairobi outcome and internal balance on development priorities. Most delegations also noted that a result on transparency, if any, must not be interpreted to exhaust the GATS negotiating mandate in Article VI:4.

In the run up to the 11th WTO Ministerial Conference (MC11) in Buenos Aires in 2017, some Members introduced papers on specific thematic elements of DR at the WPDR, ranging from transparency to development and administration of measures. These were subsequently consolidated into a text of draft disciplines, which was based on the language of the Chair’s 2011 and 2009 Texts. At MC11 in December 2017, 59 WTO Members expressed the view that they would work on the consolidated text under a Joint Initiative on Domestic Regulation (JI-DR). In May 2019, a second Joint Statement re-affirmed the commitment to continued work with a view to incorporating the outcome in their respective schedules of specific commitments by MC12 (WTO, 2019a). The practical impact of this shift from multilateral to plurilateral negotiating mode has been that the work in the WPDR has practically come to a standstill and discussions in the last three years have been dominated by the JI. The group of 59 has grown to 63 participants, with Thailand becoming the most recent Member to join.

It was perhaps the slow pace and contentious nature of negotiations in the multilateral forum that led the sub-group of 59 WTO Members to shift the discussions from the WPDR to the umbrella of a JI.

Part 2 of this paper evaluates the progress in the discussions since MC11 to date, while Part 3 provides an overview of the key issues comprising the draft DR text that are in the public domain. Part 4 then looks at the considerations relating to DR frameworks in terms of CSS’ level of competitiveness in services exports more generally, their unique areas of interest and priority in the multilateral negotiations and in the sphere of the ongoing negotiations under the JI-DR.² The overall context of the economic impact of the COVID-19 pandemic as a backdrop for these negotiations, and recovery therefrom moving forward, is elaborated in Part 5.

2. Negotiations and updates: 2019 to 2020

The Joint Initiative on Domestic Regulation (JI-DR), initiated at MC11, was endorsed by 59 WTO Members including the European Union (EU). The JI-DR group includes seven Commonwealth States: Australia, Canada, Cyprus, Malta, Mauritius, New Zealand and the United Kingdom, three of which are also members of the EU. Cyprus, Malta and Mauritius are Commonwealth small states (CSS). As of November 2019, the JI-DR group has 63 members representing more than 70 per cent of the global services trade, according to a recent assessment by the WTO Secretariat (WTO, 2020a). The key timelines and developments in relation to the JI-DR are summarised in the Annex.

After MC11, regular meetings among the JI participants in the plurilateral format were held throughout 2018 and into 2019. Negotiating momentum was stepped up, especially pursuant to high-level political commitment following the Paris Joint Ministerial statement in May 2019 (WTO, 2019a).³ Before the 2019 summer break, the Chair of the JI had circulated a Draft Reference Paper, in response to a request from participants to transform the latest draft negotiating text into that format. It had been accepted by participants that the disciplines

would be scheduled as additional commitments under Article XVIII of the GATS, the modality by which the group would give legal effect to them (WTO, 2020a). Accordingly, following the conclusion of negotiations, participants would inscribe the final Reference Paper into their respective schedules of specific commitments as additional commitments.⁴ By the end of 2019 and early 2020, the discussions appeared to be proceeding at pace along a timeline towards the 12th Ministerial Conference (MC12), then scheduled for June 2020. Despite a period of interruption due to the COVID-19 pandemic and pursuant lockdown, a revised ‘close-to-final’ Reference Paper was circulated on 18 December 2020 representing a ‘far advanced’ text (WTO, 2020b). JI-DR participants are expected to work towards finalising this along with advancing further exchange of draft schedules in the run up to MC12, currently tentatively slated for December 2021. It is also expected that current participants will upscale their outreach activities to elicit the support of new participants, as well as resolve remaining outstanding technical issues with a view towards a final outcome in the coming months (WTO, 2020b).

3. Overview of key issues

While the discussions of the Joint Initiative are open to any interested Member, the documents are restricted for circulation and not freely available on the WTO online database.⁵ The recent WTO factsheet on this subject provides a snapshot of the proposed disciplines, which are shown in Box 2 (WTO, 2020a).

From a perusal of the WTO factsheet, it appears that these obligations are similar to those in the text accompanying the Joint Ministerial Statement (JMS) of 2017, which was in turn derived from the WPDR Chair’s Text of 2009 and 2011. The key difference and additionality, however, is a clear recognition that each of these obligations is qualified with the phrase ‘To the extent practicable and in a manner consistent with each Member’s legal

system’. This qualifying phrase, the factsheet notes, provides ‘built-in flexibilities to preserve space for differences in WTO Members’ regulatory capacity and approaches’.⁶

A recent presentation by an official of the WTO Secretariat notes that ‘around 2/3 of all provisions contain language such as “to the extent practicable”, or “encourage” Members to take action; or ask them to “endeavour” to do something, or to do something “in a manner consistent with its legal system for adopting measures”, or “taking into account competing priorities and resource constraints”’ (WTO, 2019c). The presentation also notes the ongoing deliberation among Members participating in the JI-DR on the applicability of the disciplines to financial services.⁷

Box 2. Services Domestic Regulation: Factsheet

Transparency, and public consultation in drafting of measures dealing with QRP, LRP and TS

- Publish and make available information required to comply with requirements and procedures for authorisation, including through electronic means;
- Establish appropriate mechanisms for responding to enquiries from service suppliers;
- Engage stakeholders by publishing proposed laws and regulations, providing opportunity for comments from interested persons and considering comments received.

Legal certainty and predictability

- Establish indicative timeframes for processing applications;
- Process applications in a timely manner;
- Provide information on the status of applications;
- Allow applicants to correct minor deficiencies in incomplete applications and identify additional information required;
- Inform applicants of reasons for rejection of applications and allow resubmission;
- Allow authorisation once granted to enter into effect without undue delay;
- Allow reasonable time between publication of laws and regulations and date of required compliance by service suppliers;
- Hold examinations at reasonably frequent intervals

Regulatory quality and facilitation

- Require applicants to approach only one competent authority to obtain authorisation;
- Permit submission of applications at any time throughout the year, or at least allow reasonable periods of time for submission;
- Accept electronic applications and authenticated copies of documents;
- Ensure that authorisation fees are reasonable, transparent and do not in themselves restrict the supply of service;
- Support professional bodies wishing to establish dialogues on issues relating to recognition of professional qualifications;
- Ensure that competent authorities reach their decisions in a manner independent from services suppliers;
- Consolidate relevant information on a single online dedicated portal;
- Develop technical standards through open and transparent processes;
- Base measures relating to authorisation on objective and transparent criteria;
- Ensure that procedures are impartial, adequate and do not unjustifiably prevent fulfilment of authorisation requirements;
- Ensure that authorisation measures do not discriminate between men and women.

Special and differential treatment

- Developing economies participating in the negotiations can delay the application of specific provisions in sectors in which they face implementation difficulties. The use of transitional periods would allow them to make any necessary adjustments to their domestic regulatory frameworks.
- Least-developed countries participating in the negotiations are not required to apply the disciplines until they graduate from LDC status and can opt for transitional periods at that time.

3.1 Applicability of Article VI:4 disciplines to financial services

As indicated in the presentation by the WTO secretariat referenced above, the JI-DR participants appear to be considering the applicability of the disciplines on DR for financial services. One possible reason for considering financial services separately is the greater need for policy flexibilities in this sector, recognised in the GATS architecture.

The GATS Annex (and the Understanding) on Financial Services complement and/or modify certain provisions of the Agreement, reflecting the need for specific rules and

disciplines to cater for the particular features of financial services (WTO, 2010). Article VI:4 thus needs to be read with the Annex, which is also an integral part of the GATS. It applies to ‘measures affecting the supply of financial services’ and is divided into five sections dealing with the scope of the GATS with regard to financial services, domestic regulation, recognition, dispute settlement and definitions.

Paragraph 2 of the GATS Annex on Financial Services is given in Box 3.

Para 2(a) of the Annex on Financial Services is also referred to as the ‘prudential carve-out’

Box 3. Annex on Financial Services, GATS

2. Domestic Regulation

- a. Notwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement.
- b. Nothing in the Agreement shall be construed to require a Member to disclose information relating to the affairs and accounts of individual customers or any confidential or proprietary information in the possession of public entities.

as it essentially allows a Member to breach its obligations or specific commitments in respect of financial services provided the measures are 'not used as a means of avoiding' commitments or obligations under the GATS. As noted by

the WTO Secretariat in its Background Note on Financial Services, the prudential carve-out overrides the requirements for domestic regulation in Article VI of the GATS (WTO, 2010).

4. Considerations for Commonwealth small states (CSS)

4.1 Historical interests in multilateral negotiations

CSS interests in the WPDR negotiations until 2017 were spearheaded through various groups actively tabling submissions, notably the African, Caribbean and Pacific (ACP), small, vulnerable economies (SVE) and least-developed countries (LDC) groupings. They had consistently argued that domestic regulation was an essential complement to commitments on market access to address onerous procedures and requirements for licensing and qualifications that may have undermined such market access and facilitate delivery of professional services by developing country, LDC and SVE service suppliers (WTO, 2015). At the same time, they recognised that any forward progress in these negotiations had been contingent on several priorities. These included recognising the right to regulate and a robust chapter on special and differential treatment, including technical assistance and capacity-building; self-designation of transition periods by developing countries themselves; a clear linkage between implementation obligations and acquisition of capacity; and circumscribing the administrative burdens facing developing countries and LDCs. SVES further argued that

in light of their having many services sectors with under-developed or no regulatory frameworks, they required policy space so that any future disciplines did not hamper the evolution of these regulations. Finally, they argued that any final outcome should not preclude obtaining a result on the remainder of DR measures post any agreement.

The LDC group also argued that future negotiations should place no obligations on them to implement any resulting disciplines and should include special provisions that facilitated their exports. They further urged consideration of issues of special interest to their services exports, per their Services Waiver Collective Request for reduction of fees, paperwork and onerous procedures and requirements for visas, work permits and residence permits, facilitating the creation of a better enabling environment for recognition of LDC institutions, degrees and qualifications (WTO, 2014).⁸ Accordingly, it is evident that the multilateral discussions on domestic regulation were of tangible importance for CSS, as represented in the developing country, LDC and SVE groupings, prior to the evolution of the JI-DR. Therefore, a key issue for consideration for CSS going forward will be the extent to which the JI-DR

will accommodate their interests and priorities, previously raised in the WPDR.

With this negotiating background, the sections below explain some of the overall context of services trade for CSS, and how these considerations would need to be factored in for any decision on whether or not to join the JI-DR.

4.2 Services trade

There are 32 Commonwealth members that are classified as small states – that is, countries with a population size of 1.5 million people or less and larger member states that share similar vulnerability-based characteristics – and 14 of them are least-developed countries (LDCs). When compared with developing countries in general, small states have been found to face higher trade-related costs owing to their geographic remoteness (being islands or land-locked countries) and other factors that can undermine their economic competitiveness, including lack of economies of scale, high exposure to exogenous shocks, including natural disasters, and high debt-gross domestic product (GDP) ratios.

Trade in services is essential for the competitiveness of many Commonwealth small states (CSS), with more than half (i.e., 18) trading more services than goods. Services trade is

becoming increasingly important for CSS, with imports of total services reaching US\$42.2 billion and exports US\$59.3 billion in 2019, representing a 58 per cent growth in imports and exports since 2005. Moreover, CSS trade in services as a percentage of GDP was 52 per cent on average in 2019, compared to 13 per cent globally (Commonwealth Secretariat, 2020).

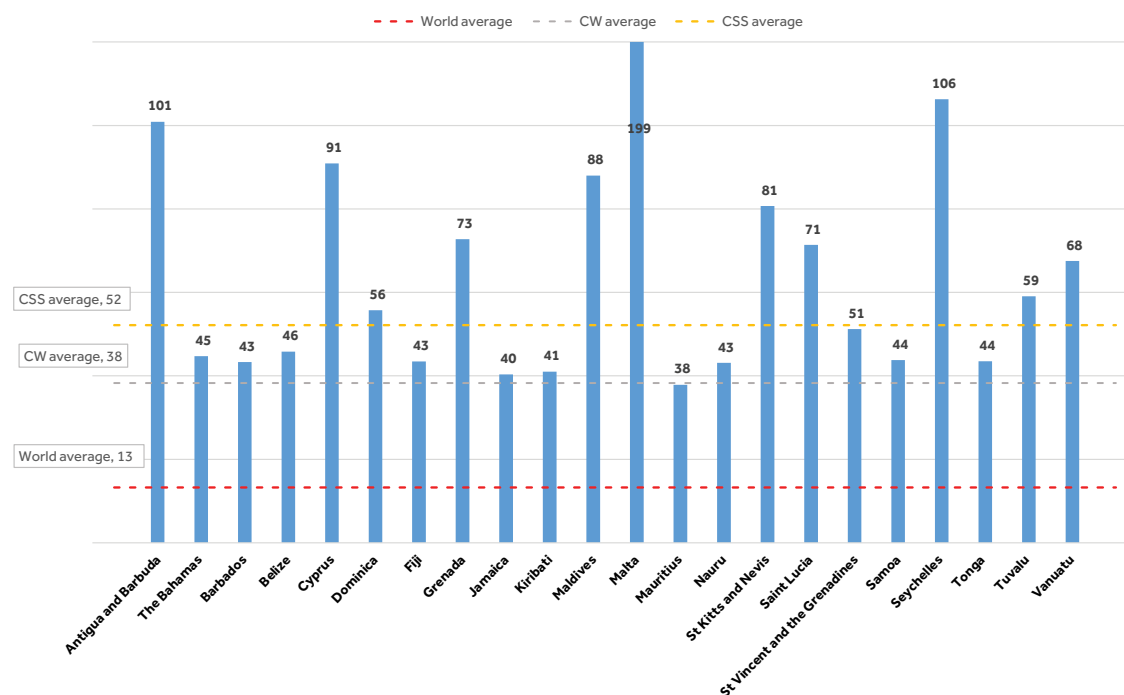
Figure 1 illustrates the countries that depend heavily on trade in services. For Malta, this stands at almost 200 per cent of GDP, followed by the Seychelles (106 per cent), Antigua and Barbuda (101 per cent) and Cyprus (91 per cent).

CSS are competitive in travel and transport services as well as banking and financial services.⁹ There is further huge potential for developing CSS to expand their competitiveness in trade in digitally deliverable services, including in insurance, business processes and financial services, to bridge the geographical distance many face being remotely situated from major markets (Gonzales, 2019; Commonwealth Secretariat, 2020). This is especially so as CSS look to diversify, sophisticate and reboot their economies to recover from the economic fallout of the COVID-19 pandemic.

Regulatory divide

Developing countries in Asia, Africa and the Caribbean, which include CSS, have fewer

Figure 1. Significance of trade in services as a percentage of GDP for small states (2019)



Source: Commonwealth Secretariat (calculated using World Bank – World Development Indicators data).

regulations in every sector of the 160 services sector that are included in the Services Sectoral Classification List (Chaitoo, 2008). However, CSS in these regions typically encounter a 'regulatory divide' and imbalance in terms of trade in professional services, facing a myriad of non-transparent regulatory barriers, exclusionary entry conditions and standards when exporting professional and business services to developed countries due to the number and complexity of public and private regulations (including licensing requirements and procedures) faced in these markets. In contrast, foreign service suppliers would typically encounter fewer entry barriers in CSS liberalised service sectors through all four modes of supply. Anecdotal evidence shows that in some CSS, the level of domestic regulation in certain services sectors such as engineering provides much more flexibility for foreign engineers (for example, in Trinidad and Tobago) than in their developed country counterparts (such as Canada) (Chaitoo, 2008).

Additionally, for some CSS, taking on DR commitments for committed services sectors could entail substantial domestic regulatory and administrative reforms (including amendments, streamlining of domestic laws and procedures or establishment of regulatory or institutional mechanisms), which would translate into significant domestic adjustment and administrative costs for already capacity-constrained countries (Chaitoo, 2008). This would also necessitate expending much political capital to enlist support for adopting such reforms, entailing extensive domestic consultations with a multitude of agencies and licensing authorities in committed sectors.

Moreover, the pandemic has also illustrated the global gaps among developing countries that lack digital capacities. A majority of CSS, in particular, still lack the capacity to participate in digitally deliverable services trade, especially commodity-dependent CSS, due to the relative immaturity of their digital eco-systems (Commonwealth Secretariat, 2020). Many CSS are looking to implement digital strategies to address these capacity constraints. One key prong of such strategies is to develop critically needed regulatory and legislative frameworks in the digital space. Therefore, with respect to the development of future digital and data regulation frameworks, CSS would be keen to maintain adequate policy space to develop

regulatory measures for digitally enabled sectors to future-proof these sectors with a view to making them competitive.

Notwithstanding the regulatory divide for most CSS, some developing country Members, including small states, do have sound regulatory frameworks in place already and recognise the importance of enhancing their domestic regulations to maintain their countries' competitiveness. These countries may therefore be well placed to implement the light regulatory reform obligations required by the disciplines under discussion.

Offensive market access interests and behind-the-border regulatory measures

From an offensive standpoint, good regulatory practices can benefit services exporters from CSS, especially services exporters that are micro, small and medium enterprises (MSME). The types of domestic regulatory barriers habitually faced by CSS professional services exporters are clustered around QRPs and LRPs. These may range from eligibility for licences being conditioned on graduation from a developed country university; a specified period of work experience being required in that country; passing a professional practice or competency examination; specific language requirements; residency and local presence requirements for practice under a permanent license; exorbitant licensing or qualification fees; restrictive, unspecified approval/ licensing practices and requirements; and non-transparent practices preventing the assessment of the impact of new regulations (Chaitoo, 2008).¹⁰ Furthermore, Mode 4 market access barriers have featured prominently for CSS, notably LDC Members that, as evidenced in their collective services waiver request, have sought commercially significant disciplines for the services suppliers and professionals working abroad, especially relating to QRP, including recognition of third country qualification requirements, verification and assessment of such qualifications, identification of deficiencies and aspects related to entry and temporary stay (WTO, 2003).

Domestic regulation disciplines may not be the panacea to all the issues faced by CSS services exporters. For instance, non-discriminatory DR market access measures facing CSS may fall under GATS Articles VI:1 or VI:2 more broadly, not being limited strictly to the

sub-set of measures envisaged to be disciplined by Article VI:4 (Chaitoo, 2008).

Nevertheless, streamlining measures that facilitate the delivery of professional services, including behind-the-border regulations, and addressing barriers such as regulatory red tape, onerous qualification requirements, licensing costs and procedural delays in export markets, may greatly benefit CSS services exporters, who would otherwise typically lack the networks and scale that large firms have, to procure market intelligence, bridge information asymmetries and address regulatory restrictions in their potential export markets. Furthermore, adhering to international disciplines could consolidate and provide an impetus to regulatory reforms domestically, which in turn would enhance CSS service providers' competitiveness and reduce the lack of predictability and costs of doing business in their territories, attracting much-needed investment into services sectors and the economy at large. This is especially critical now, as CSS grapple with mitigating and recovering from the COVID-19 pandemic as well as still remaining on target to meet the Sustainable Development Goals (SDGs).

4.3 Joint Initiative on Domestic Regulation

Against the above backdrop of services-related interests and realities of CSS, it would be useful to consider the key specific issues that emerge with regard to the Joint Initiative on Domestic Regulation. Some tentative considerations can be discerned from the factsheet circulated in November 2020.

Scope

The disciplines are applicable to sectors where specific commitments are undertaken. In addition, however, there is the possibility for Members to voluntarily expand the application of the disciplines to additional sectors (WTO, 2020a). It would be instructive to see the extent to which some participants would be prepared to apply the disciplines to additional sectors to those committed in their GATS schedules.

Furthermore, the disciplines will complement the existing specific commitments undertaken by participating Members in their respective GATS schedules. They will not affect any existing rights and obligations under the

GATS or any other WTO Agreements (WTO, 2020a). Accordingly, market access and national treatment limitations would remain, which would provide comfort for retaining some regulatory flexibility but also at the same time offer less assurance to those CSS whose services suppliers still face persistent market access and national treatment barriers.

Preferential treatment conferred by MFN

Once the domestic regulation disciplines are agreed through GATS Article XVIII commitments inscribed in participants' schedules, this would only imply obligations for JI participants, on a most favoured nation (MFN) basis, with no obligations implicated for non-participants. Accordingly, the benefits of the new disciplines would be applied to the service providers of all WTO Members on a MFN basis (WTO, 2020a). The proposed JI-DR disciplines are beneficial for CSS service suppliers insofar as they mandate good governance, heightened levels of transparency and scrutiny of DR measures behind the border – including with respect to fees, qualification, licensing procedures and requirements in services export markets – that have hitherto impeded CSS countries' services exporters from being able to discern and navigate the myriad of public and private regulatory barriers they face in services export markets. Furthermore, it has been noted that these good governance services disciplines will become a meaningful reference point for countries aiming to undertake domestic regulatory reforms (WTO, 2020a). For CSS seeking to join the JI-DR, an in-depth cost-benefit analysis of participation would be merited, as opposed to merely relying on MFN treatment as a non-participant.

Innovative provisions for women's economic empowerment

The proposed text further adopts provisions mandating that authorisation measures do not discriminate between men and women. The objective, as explained in the WTO Factsheet, is to create new, inclusive services trade opportunities for suppliers of all sizes and women entrepreneurs (WTO, 2020a). Such a provision could well serve as a driver for domestic political imperatives for CSS seeking to proactively increase the participation of and empower women through more inclusive trade and economic policies.

Level of ambition of obligations

As discussed above, the disciplines provide built-in flexibilities to preserve space for differences and diversity in WTO Members' regulatory capacities and approaches through soft law obligations (WTO, 2020a). This implies that there is a degree of room for manoeuvre for Members taking on these obligations (WTO, 2020b). Several provisions contain flexibility language such as 'to the extent practicable', 'endeavour to' or 'in a manner consistent with Members' legal systems', etc. (WTO, 2020a). The text therefore seeks to achieve a balance between ambition and workability by allowing regulators the requisite policy space, with the emphasis being on the 'practicability' of particular obligations. However, notwithstanding caveated language, these obligations may inevitably mandate some threshold of action or demonstration of effort, if challenged and brought under WTO dispute settlement review. While terms such as 'to the extent practicable' or 'endeavour' provide a higher degree of flexibility as to how a Member seeks to implement its obligations, it would still require demonstration of efforts to implement the same. Closer inspection as to the legal implications of such language, based on existing WTO jurisprudence, will be merited as the negotiations progress.

Development-related provisions

Developing economies participating in the negotiations can delay the application of specific provisions in sectors in which they face implementation difficulties through the use of transitional periods that allow them to make any necessary adjustments to their domestic regulatory frameworks. Least-developed countries participating in the negotiations are not required to apply the disciplines until they graduate from LDC status and can opt for transitional periods at that time (WTO, 2020a). Together with built-in flexibilities to preserve regulatory flexibility among Members, the text would seem to go some way towards preserving the development aspirations expressed during the multilateral negotiations. As for other CSS concerns to mitigate obligations undertaken, ensure preservation of regulatory autonomy, limit administrative burdens and address Mode 4 DR barriers, closer inspection of the detail of any further development provisions that are framed in the text, once finalised, would be

necessary. Clearly, the overall development dividend, balanced against required obligations, would have to be favourable to incentivise more CSS to join the initiative.

Coverage of Mode 4-specific issues by the JI-DR disciplines

These practical procedures are aimed particularly at ensuring ease of supply of services by skilled professionals, an area of offensive interest for developing and LDC Members (i.e., Mode 4). This mode of supply of service, however, has been a pariah in trade in services negotiations, with commitments by Members historically being rather shallow (WTO, 2009). Issues related to verification and assessment of qualifications of foreign service suppliers, affording adequate opportunities for examinations, offering processes to address deficiencies in qualifications and recognising developing country qualifications and relevant professional experience of such suppliers, as a complement to educational qualifications, have previously been highlighted as important to achieve commercially significant results in the area of Mode 4 (WTO, 2019b). For developing countries and LDCs, this has significant consequences since, as noted by the WTO Secretariat, developing countries have a perceived comparative advantage in the area of the movement of persons unrelated to a commercial presence abroad (WTO, 2009). The WTO Secretariat also notes that if developed countries were to raise their quotas on the inward movement of temporary workers from developing countries to 3 per cent of their labour force, an overall yearly gain of US\$150 billion would be realised, with the largest benefits, for both origin and destination countries, coming from the movement of lower-skilled workers (WTO, 2009). A perusal of the WTO Factsheet suggests the JI disciplines have addressed some of these issues (WTO, 2020a). Going forward, non-participating developing and least developed WTO Members, including CSS, will no doubt be looking for adequate outcomes in this area.

4.4 Systemic considerations

The systemic implications of the Joint Initiative are also likely to come more sharply into focus as the negotiations move closer to finality. The first consideration in this regard is that there is

already a built-in mandate for domestic regulation negotiations under Article VI:4 of the GATS and the WPDR, which reports to the Council for Trade in Services. The question then going forward would be the extent to which outcomes or additional DR rules could still be achievable in this multilateral forum. JSI participants do not consider that an outcome in the JI-DR would automatically exhaust the built-in mandate on DR under the GATS, citing potential opportunities to build on this, for example, with respect to further horizontal disciplines or by going into more detail in sectoral disciplines if appropriate (WTO, 2015). Mode 4-related DR barriers would be obvious candidates to deepen discussions on DR in the WPDR or explore developing generally applicable disciplines on market entry barriers that still plague many CSS. However, if an alternative set of DR disciplines were subsequently developed under the WPDR, legal questions as to how areas of overlap and inconsistency with the JI-DR would be treated, would merit close consideration.

Relatedly, a second key systemic consideration is the relationship of any future plurilateral JI-DR disciplines with existing GATS

disciplines. The JSI participants view the JI-DR disciplines as complementary to GATS obligations, noting that they will not affect any existing rights and obligations under the GATS or any other WTO Agreements (WTO, 2020a). However, at a minimum, there may be areas of overlap between the GATS and the JI-DR final text, which could create confusion as to the relationship between the two sets of disciplines, particularly when it comes to implementation. Furthermore, there are already substantial overlaps with the JSI on Investment Facilitation for Development (JSI-IF) discussions in that the JI-DR disciplines apply to sector-specific commitments, whereas the JSI-IF text is proposed to apply cross-sectorally, regardless of commitments undertaken in Members' schedules of services commitments. Potential overlaps would need to be further and more closely examined once all outstanding issues in both sets of plurilateral negotiations are finalised. Similarly, whilst there appears to be clarity on the legal outcome of the DR disciplines (in the form of GATS Article XVIII Additional Commitments), the legal outcome on IF is yet to be crystallised.

5. Way forward in a COVID-19 reality

The COVID-19 pandemic has brought the importance of facilitating transparent, unencumbered services trade into sharp focus, especially if trade measures can be made more transparent and requirements and procedures simplified. As they seek to recover from the impact of COVID-19, all WTO Members, including some CSS, will look to diversify into promoting services exports or expanding the scope of digitalised services exports as a way of building resilience, making these disciplines more relevant for them (especially where such services can be delivered digitally via Mode 1). Where their service providers seek entry into other markets, notwithstanding market access and national treatment commitments in schedules, CSS will want clear rules to ensure that behind-the-border regulatory measures do not impede or nullify this access. At the same time, policy space would be required to develop regulatory frameworks in new and emerging sectors.

Disciplines on domestic regulation can also foster inclusivity. Recovery from the economic onslaught of the pandemic will be particularly important for MSME and women-owned businesses in CSS; accordingly, inclusive WTO rules encouraging the participation of women service suppliers in services trade, especially in sectors where CSS have a competitive interest, such as tourism, have to be commended and highlighted in any economic recovery. The WTO has noted, in the context of the pandemic's impact on the travel and tourism sector, that tourism exports, as an internationally provided service, depend on home and host country domestic regulation rather than border-enforced tariffs or standards that, in light of the increasingly digital nature of services trade and cross-border electronic services, should be evaluated with a view to enhancing value creation and employment growth (Barkas et al., 2020). The new DR disciplines could potentially enhance transparency

of such regulations, impacting travel and tourism-related restrictions. However, their value in the removal of restrictive measures, such as travel advisories, may be limited since governments would typically predicate such advisories based on an assessment of public health-related justifications.

Facilitating the delivery of professional services through the easing of qualification requirements and procedures, as well as licensing requirements and procedures, will count more than ever in a post-COVID-19 context. Recognition of the need for a ready supply of services providers in essential sectors has perhaps highlighted the importance of more flexible professional qualification requirements and procedures in times of crisis and emergency. The WTO reports that, with the onset of the pandemic, many Organisation for Economic Co-operation and Development (OECD) countries already reliant on foreign health workers implemented additional measures to ease their entry and the recognition of their professional qualifications to ensure a sufficient supply of medical personnel to deal with significant COVID-19 case surges. This has precipitated calls for greater international collaboration on imports and exports of health services to help mobilise a pool of health professionals that could fight emerging health issues and alleviate capacity constraints (WTO, 2020c).

Post-COVID-19, CSS face a range of competing domestic priorities and demands. DR across regions are vastly heterogeneous and diverse and CSS are at differing levels of regulatory development, with some having implemented more advanced regulatory frameworks. An over-arching consideration for CSS who ultimately decide to join the Joint Initiative will be the extent to which future disciplines overall are likely to significantly address their offensive concerns regarding the complex domestic regulatory market barriers facing their services exports in specific markets, whilst preserving their regulatory autonomy. This would include what transition periods and other flexibilities might be appropriate to ease the implementation burden, in light of existing services commitments under GATS schedules while, at the same time, preserving their regulatory autonomy to develop future regulatory measures. Striving for a reasonable balance between DR measures' predictability, certainty and regulatory autonomy will be critical to ensure that the new disciplines appeal to as wide a range of WTO Members as possible. At the same time, CSS should monitor the evolution of these disciplines to evaluate, perhaps in the WPDR, what useful elements could be extracted or built upon to fit their domestic context and realities.

Notes

- 1 Preamble to the GATS, paragraph 4.
- 2 Since negotiations are ongoing, definitive conclusions regarding the overall legal implications and balance in the text would be premature at this stage.
- 3 On 23 May 2019, the supporters of the Joint Initiative issued a second Joint Statement in Paris (WT/L/1059).
- 4 The latter allows Members to 'negotiate commitments with respect to measures not subject to scheduling under Articles XVI and XVII including those regarding qualifications, standards, and licensing matters'.
- 5 Furthermore, the Draft Reference paper is still subject to negotiation, which prevents definitive conclusions regarding the overall legal implications and balance in the text.
- 6 Ibid.
- 7 Ibid.
- 8 Though visa requirements have been said not to fall within the purview of Article VI:4 DR measures, WTO Members have identified that sometimes visa requirements may be barriers. This includes, for example, the requirement that a precondition for providing/maintaining licence is a two-year working period, which may be difficult to obtain in the context of, say, the construction sector (Chaitoo, 2008).
- 9 Banking and financial services are predominantly skewed in favour of developed CSS Members, Cyprus and Malta.
- 10 Residency requirements are restrictive regulations frequently cited in the context of Article VI:4 since they may act as a pre-condition for services providers being licensed or registered in certain jurisdictions for the purpose of practicing there. If discriminatory, residency requirements need to be scheduled under the national treatment limitation. The Scheduling Guidelines have clarified that if the residency requirement is not discriminatory, it would be subject to the disciplines of Article VI:5 (and therefore VI:4 also).

- 11 WTO, 2017. Delegations of Albania; Argentina; Australia; Brazil; Canada; Chile; China; Colombia; Costa Rica; European Union; Hong Kong, China; Iceland; Indonesia; Israel; Japan; Liechtenstein; Mexico; former Yugoslav Republic of Macedonia; Montenegro; New Zealand; Norway; Peru; Republic of Korea; Republic of Moldova; Russian Federation; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Turkey; Ukraine; and Uruguay.
- 12 Note by Chairperson, Services Domestic Regulation Meeting, 7 March 2019.
- 13 WTO, 2019a. Delegations of Albania; Argentina; Australia; Brazil; Canada; Chile; China; Colombia; Costa Rica; El Salvador; European Union; Hong Kong, China; Iceland; Israel; Japan; Kazakhstan; Liechtenstein; Mexico; Montenegro; New Zealand; Nigeria; North Macedonia; Norway; Paraguay; Peru; Republic of Korea; Republic of Moldova; Russian Federation; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Turkey; and Uruguay.
- 14 WTO, 2020d.
- 15 WTO, 2020e.
- 16 Ibid.
- 17 This information is based on the various news items and updates on the JI-IF as published by the WTO.

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- WTO (2019a) "Joint Statement on Services Domestic Regulation". WT/L/1059, 23 May.

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Annex. Timeline of the Joint Initiative on Domestic Regulation negotiations

| Date | Progress | Brief description |
|--|---|---|
| 13 December 2017 | Joint Ministerial Statement on Services Domestic Regulation at MC11, WT/MIN(17)61 (JMS-DR); Draft Text for DR, WT/MIN(17)/7/Rev.2, was also circulated (JMS-DR Text). ¹¹ | The JMS-DR Text was supported by 59 WTO Members. It called for a multilateral outcome by the twelfth Ministerial Conference (MC12) and asked Members to intensify discussions on the basis of WT/MIN(17)/7/Rev.2, the JMS-DR Text and 'related discussions at the WPDR and future contributions of Members' towards such an outcome. |
| 2018-2019 | JMS discussions progressing on the basis of the JMS-DR Text. | The Chairperson of the JI-DR, in a note dated 18 March 2019, summarised the progress of the negotiations as follows: ¹² <ul style="list-style-type: none"> – The discussions have been open-ended and inclusive; – The invitations and documentation is sent to all Geneva delegations; – Eight working meetings were held in 2018, as a result of which the text has developed (although no elements are agreed as of now); – In terms of scheduling modalities, transition periods and flexibility of approaches through incorporating these as 'Additional Commitments' under the Member's schedule of specific commitments is being considered. |
| 23 May 2019 | Joint Statement on Services Domestic Regulation: This was a second statement circulated by over 60 WTO Members. ¹³ | This second Joint Statement from the JI-DR group welcomes the progress made in negotiation of DR disciplines since the Joint Statement adopted at MC11. Other key highlights of the Statement are: <ul style="list-style-type: none"> a. A commitment to continue working on outstanding issues with a view to incorporating the outcome in each Member's respective schedules of specific commitments by MC12. b. Bearing in mind the multilateral mandate of Article VI:4 of GATS, a commitment to encourage all WTO Members to participate in order to improve the regulatory environment for trade in services globally. |
| 19 July 2019 | Chair issues Draft Reference Paper on Services Domestic Regulation (INF/SDR/W/1). | Per request of participants, Chair translates the current draft text into a reference paper format. |
| October-November Plenary meetings 2020 | WTO News Updates | Jl participants make further progress on the draft text and the Chair notes advanced stage of negotiations, stressing the participants' objective of finalising the negotiating text by the end of the year. ¹⁴ He stressed that 'stabilising the text will send a positive signal to the WTO membership and beyond, and will allow the negotiations to focus on the next procedural steps and on how to best engage Ministers for the conclusion of these negotiations'. ¹⁵ <p>At the November meeting, the Chair highlighted the 'good progress' made at the meeting, with most of the outstanding drafting issues resolved.¹⁶</p> <p>The participating Members are reportedly considering adopting the approach of incorporating the disciplines as part of their schedule of specific commitments as 'Additional Commitments' under GATS Article XVIII. A total of 30 draft schedules (representing 57 WTO Members) have reportedly been submitted so far.</p> |