

Liberalisation in Services Trade Domestic Regulation Vs Market Access

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Introduction

- Average tariff reduction in 50 years of WTO-GATT: from 50 to 3.5 for developed, and over 200 to approximately 29 for developing countries
 - However, trade in services remain limited – World trade in commercial services (excl. extra-EU trade) in 2006 - \$4.0 trillion (largely driven in recent years by cross-border trade); but still a largely domestic focused sector
 - Trade in services an important part of the growth and development story in most economies; instrumental in India's global recognition, and now China's
 - Trade composition – non-factor services like travel, transportation; software services and business services (incl. BPO); medical tourism, clinical trials and R&D services, engineering and legal process outsourcing
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Regulatory Controls on Service Provision

- Service supply and quality is maintained by means of regulations that each country/industry sector determines to be necessary for consumer protection/risk management
- It is also important to note that well-designed regulations are important development tools, and lack of effective regulations create inefficiencies and welfare losses
- However, insofar as services are traded, domestic regulatory requirements often pose invincible market access barriers for service providers from other nations
- There appears to exist a case for Disciplines on Domestic Regulations – and generally undertaken through negotiations in WTO (Working Party on DR) & in the preferential/regional trade agreements, aimed at reducing inter-country differences in regulatory requirements

Current Services Negotiations in WTO

- Members negotiating (Art XIX) for more liberal schedules of commitments (market access) – bilateral and ‘plurilateral’ offers and requests (limited focus on elimination of restrictions on MA & NT commitments which add to DR barriers is cause for concern)
 - Services market access provided under GATS schedules may be nullified because of domestic regulations and other technical entry barriers in developed countries
 - Ongoing Negotiations on Rules
 - Domestic Regulation (Art VI.4)
 - Emergency Safeguard Mechanism (Art X)
 - Government Procurement (Art XIII)
 - Subsidies (Art XV)
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WTO Services Negotiations, contd...

- Pursuant to the Doha mandate, participants in the services negotiations have been exchanging bilateral initial requests since 30 June 2002
 - Since 31 March 2003, Members have submitted 69 initial offers; Since 19 May 2005, 30 Members have submitted revised offers
 - Additionally, 30-35 Members after the Hong Kong Ministerial started holding plurilateral group meetings. By February 28, 2006 twenty-one such “collective requests” had been tabled
 - Levels of ambition and internal balance: plurilateral mode preferred since multilateral offers have been poor
 - Sectoral coverage poor, duration of stay inadequate, ENTs still remain, absolute wage parity used
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WTO Services Negotiations, contd...

- In January 2008 Chair of the Working Party on DR floated a draft legal text for possible inclusion in an Services Agreement capturing the areas of convergence though wide differences remain; even ICs wary of disciplines
- Concerns of erosion of regulatory autonomy of Members vs depth of disciplinary action: entails obligations on federal and sub-federal levels, and quasi-government institutions
- DSB interpretations and wariness in making commitments by even developed countries: capacity building in impact analysis
- Concerns of exclusion – despite LDCs getting the round for free under plurilateral arrangements

GATS & Right to Regulate: US-Gambling

- The main issue here relates to the regulatory autonomy of the Member country, and the fear that such disciplines will compromise on sovereignty by requiring that trade considerations to prevail over legitimate national policy objectives
- National Right becoming a Disguised Barrier
- The Appellate Body by broadly interpreting the *per se* prohibited market access restrictions seem to have considerably expanded the reach of GATS prohibitions
- This narrowed the distinction between domestic regulation requirements and market access barriers, creating more inter-linkages and interpretational confusion

Service Trade & Regulatory Issues

- Gains from Doha GATS negotiations for developing countries are a function of net market access garnered for high-skill service providers: demographic dividend in developing countries
 - Do Regulatory Requirements frustrate Market Access potential? High costs often negate negotiated access.
 - Discussions on Art VI:4 on Disciplines in:
 - measures relating to qualification requirements and procedures, technical standards and licensing requirements
 - (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
 - Mode 4 access – for skilled professionals – versus immigration concerns
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DR Barriers Faced in Developed Countries

- Regulations relating to Visa requirements and work permits – economic needs tests, numerical quotas and duration/time limits for stay
- Discriminatory policies favoring domestic service providers – especially requirements relating to citizenship and residency (even for sitting examinations), and linkages with commercial presence requirements (mandatory legal registration in host countries limits mode 1 access the most)
- Non-recognition of professional qualifications and experience – issues of equivalence and accreditation of qualification and professional licenses

DR Barriers, contd...

- Transparency - inadequate information available, or information not readily available, to non-governmental market participants about new or proposed regulations; arbitrary administration of domestic laws
- Examples of some onerous requirements and barriers:
 - heterogeneous federal and sub-federal licensing and qualification requirements and procedures, which makes a license or qualification recognition obtained in one state not valid in other states
 - necessity to obtain/renew the same license in every regional government; short effective period of licence
 - overly complicated qualification and licensing requirements onerous licensing requirements and restrictions on registration (e.g. residency requirements), which prevents foreign engineers from signing off on drawings and managing projects

DR Barriers, contd...

- to be licensed as a professional, there is a requirement or pre-requirement in certain sectors for membership of an affiliate professional organization which while having no regulatory authority over the profession (i.e. union, country club), but to be a member of this organization, the licensee must be a resident of the territory or have lived in the territory for the past six months
- requirement of indemnity insurance or bonds prior to licensing
- licensing fees are prohibitive; multiple licenses needed
- cumbersome authorization requirements; permit required for every project
- restrictive regulations relating to zoning (in favor of the local suppliers)
- long delays and procedural complications and also for verification of applicant's qualifications acquired in the territory of another Member

DR Barriers, contd...

- specific requirements vis-à-vis composition of Board of Directors
 - non-transparent registration procedures and regulatory environment
 - excessive administrative costs not reflecting fees charged
 - unpredictable and long timeframe for registering process: viz. arising out of requirements like all important documents must be certified by local Public Notary
 - local standards requirements: in some federal system Members, the sub-federal governments maintain different technical standards from one another
 - long delays when government approval is required, and, if approval is denied, no reasons or information given
 - lengthy censorship procedures; too many censoring agencies with different criteria
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What would WTO DR Disciplines entail?

- Mandate is to discipline DRs in sectors in which Members have taken specific commitments, at all levels of govt
- However, there is also the requirement that these regulations are not 'more trade restrictive than necessary' and are 'least burdensome'
- Disciplines will therefore be aimed at ensuring that the regulations do not constitute 'unnecessary' barriers to trade – necessity test issues (based on contentious case law priors; levels of development commensurate with burdensomeness; lack of international standards to base restrictiveness analysis on; S&DT needed for capacity building and discipline commitments on transparency)
- Inter-linkages of Domestic Regulation (Article VI) with Market Access (Article XVI) and National Treatment (Article XVII) obligations

India's stand on DR Disciplines (QRP)

- India supports the need for reaching an agreement on Disciplines on DR in the interest of enhancing market access in Services, in particular Mode 4 access
- India, supported by Chile, Mexico, Pakistan and Thailand, has submitted a proposal to WPDR on disciplining qualification requirements and procedures (QRP)
- Stringent qualification norms for various professional services act as a big restriction in the movement of service providers from developing countries: requirements and procedures should be transparent, pre-established, publicly available and objective
- Explore Mutual Recognition Agreements for educational qualifications and licensing requirements and procedures

Some Concluding Thoughts

- Effective service sector liberalisation requires concurrent efforts at strengthening regulatory regimes and institutions in conjunction with the institution of appropriate regulatory disciplines (and necessity tests?)
- Works similarly for developing and least developed countries as for developed countries
- Caution and careful cost-benefit analysis needed before taking stand on Article VI:4 negotiations – for alternative to DR Disciplines seem tortuous and costly litigation if developing countries seek redress on market access issues
- ASEAN countries should shed fears and be proactive in the WTO, since multilateral MRAs not easy to negotiate

Thank You