“Domestic Regulation” Rules in the World Trade Organization (WTO)

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A dangerous corporate agenda is behind the effort to have new rules limiting domestic regulation of services, within the General Agreement on Trade in Services (GATS) of the WTO. WTO Members agreed years ago to develop any “necessary” disciplines on these measures – but most developing countries are doubtful as to whether such rules limiting public oversight over services corporations are necessary. In fact, this has never been decided in the WTO. Yet countries made proposals throughout 2017 with the goal of having binding rules agreed by the recent WTO Ministerial in Buenos Aires in December 10-13, 2017 (MC11). This agenda had been stagnant for years until the participants in the (suspended) negotiations towards a proposed Trade in Services Agreement (TiSA) brought it back to the WTO.

Fortunately, a catastrophe was averted when the African Group pushed back hard against the neoliberal proponents, and the talks were left unconcluded at the last WTO ministerial. However, as global services corporations seek to use trade agreements to achieve the deregulation and limiting of public interest regulations that they could not achieve through normal democratic channels, the issue is sure to arise in the WTO again in 2018 and beyond. These little-known negotiations could have major impacts on regulation of services around the world.

“Domestic Regulation” (DR) rules would restrict the types of rules that governments can make even if the rules are applied the same to foreign and domestic companies. They would even apply to *domestic* (non-traded) services (like construction) as well as services that are traded (like air travel). The proposed rules would apply to private companies as well as to public services not covered by the narrow (almost non-existent) public services exception.

While proponents argue that the “right to regulate” would be safeguarded, the WTO has ruled in the past that “Members’ regulatory sovereignty is an essential pillar of the progressive liberalization of trade in services, but this sovereignty ends whenever rights of other Members under the GATS are impaired.” Thus the “right to regulate” ends where the WTO rules begin.

Under recent proposals, DR rules would apply to all levels of government, but the national government would not have to “force” provincial and local governments to comply if they have legal autonomy on these issues. The rules would probably only apply to service sectors liberalised at the WTO. The current proposals would mandate that the rules would apply to *existing* laws and regulations, as well as new ones in the future! This means that countries would have to review all existing laws, measures, and regulations, and actually change those that do not comply with these WTO rules.

What are the types of regulations that would be disciplined by the proposed new rules?

- **Qualification requirements and procedures** for professional services providers. These are the requirements that professional need to obtain to provide a service, such as a requirement that a doctor must have a medical degree and take exams in order to have qualify to practice, and the procedures to obtain the qualification.
- **Licensing requirements and procedures** for companies. These involve the requirements that companies must meet in order to obtain a license to provide a service, such as the amount of capital a bank must have or requirements to conduct environmental impact assessments before opening a mine.
- **Technical standards** that must be complied with in the provision of the service, once the individual obtains the qualification requirements and/or the company obtains the license. This would involve, for example, the safety procedures in nuclear power stations, or nurse to patient ratios in hospitals.

These five areas were written to include most measures that regulate how services are provided in any country.

What are some of the main rules being proposed on these domestic regulation measures?

- The licensing requirements and procedures, qualification requirements and procedures, and technical standards must be: "**not more burdensome than necessary**" to ensure the quality of the service. However this is very difficult to satisfy and could impinge upon the regulatory mandate of governments.
    - Could a country ban free samples of milk powder being given in hospitals with maternity wards because it discourages breastfeeding?
    - Could a country require convenience stores to sell fruit for health reasons?
    - Could a government require fast food restaurants to indicate the number of calories on the menu?
- The licensing requirements and procedures, qualification requirements and procedures, and technical standards must be: "**objective**". Objective can mean:
    - that the measures cannot be fixed, so potentially a government or regulatory agency could not set a maximum price for electricity or water or health care to make sure it is affordable.
    - "not biased" which could prevent affirmative action policies such as lower licensing fees for disadvantaged groups such as women or ethnic minorities or the disabled or veterans.
    - not subjective (eg where regulators need to balance various criteria.)
    - laws and regulations cannot be stronger than international standards (eg in tobacco control).
- Some proposed provisions would also require that the fees that governments charge for licensing services are "**reasonable**," and "**don't restrict the supply of the service**." However, in some levels of government licensing fees are a main source of revenue, such as local governments that use licensing fees to pay for police and fire departments, health clinics, street lighting and rubbish collection. Reducing licensing fees would result in a tax cut for corporations. Some governments use them to dissuade activity they want to reduce, such as using high licensing fees for casinos to reduce gambling.
- There are also additional proposals, including that procedures must be "impartially" administrated; that the government's application procedures and timing must adhere to international standards; and that legislative or regulatory bodies would be required to provide foreign corporations with the opportunity to give input in the sovereign decision-making process.

Citizens need governments to be able to respond to changes in our economies by developing appropriate new regulations, such as in the area of technology. The challenges posed by the emerging digital economy will require governments to regulate in new ways to respond to issues such as the abuse of dominant market power by the biggest digital companies; the disruptions to traditional suppliers posed by platforms; the increasing contractualization of labor; and more. The proposed DR rules would stand in the way of proper oversight in this, but also every other, services sector.

Additionally, there are development concerns with the DR negotiations. The initial intent of the mandate for DR rules was to address barriers to migrant service providers. Instead, the current proposals would give new rights to services exporters – which are more likely to be companies in developed countries – at the expense of the regulatory sovereignty of services importers – which are more likely to be developing countries. The proposals debated in advance of the MC11 were highly imbalanced and were not in the interests of developing countries.

As the power of global services corporations increases along with their size in many economies, the talks will likely restart in 2018. Given that all of us utilize services on a daily basis, the public should be more aware of the dangers of these proposed handcuffs on public regulations and work to limit the WTO's intrusion into the sovereign functions of governments.

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