

Note on **GATS** Domestic Regulation Disciplines and Education Services

Scope and Coverage of the Proposed Disciplines

- Annex C (paragraph 5) of the Hong Kong Ministerial Declaration calls on members to “develop disciplines on domestic regulation” before the conclusion of the current round. This would deepen and expand the coverage of existing rules in Article VI:4 (Domestic Regulation) of GATS.
- The proposed domestic regulation disciplines would cover measures related to **qualification requirements and procedures**, **technical standards**, and **licensing requirements**. However, these categories are being defined very broadly by many Members, leaving few service sector regulations untouched.
- **Qualification requirements and procedures** refer both to the educational credentials or professional/trade certification required to provide a specified service, and to the ways that the qualification of a service provider is assessed. This is intended to capture all regulations related to examinations, documentation requirements, and verification of qualifications.
- **Technical standards**, according to the WTO secretariat, refer not just to regulations affecting “technical characteristics of the service itself,” but also to “the rules according to which the service must be performed.” This is an extremely broad definition that would cover standards related to virtually all service sectors. In the area of education, it would apply to quality assurance requirements
- **Licensing requirements** could apply to not only professional licensing but also university accreditation as well as broadcast licenses, licensing of health facilities and laboratories, waste disposal permits, and municipal zoning procedures.
- There are two key elements to the proposed disciplines: **transparency** and **necessity**. Regulations covering qualification requirements, technical standard and licensing requirements must be “**based on objective and transparent criteria**” and must not be “**more burdensome than necessary to ensure the quality of the service**.”
- **Transparency rules** demand that regulatory requirements and procedures are publicized, known and readily accessible. However, some Members understand transparency in a broader sense to include prior notice of new regulations or regulatory changes and an opportunity for foreign governments and service providers to comment and lobby. This could weaken the ability of governments to respond quickly to emerging regulatory demands at national and local levels.
- The application of a “**necessity test**” would demand that governments, if challenged, would have to prove that regulations they have adopted are not more trade restrictive than necessary **and** that they are needed to achieve a specific public policy objective. WTO panels considering Article XX (General Exemptions) of GATT have applied a very high standard for the meaning of “necessary.” A member must show that “there were **no alternative measures** consistent with the General Agreement or less inconsistent with it.”¹
- All of these rules would apply to **non-discriminatory measures** and regulations governing services, including education. That is, even if measures – such as university and college accreditation requirements – are applied equally to domestic and overseas institutions, they could still be subject to domestic regulation disciplines if commitments have been taken in education services.

Domestic regulation and education services

- Education services are highly regulated in most countries in order to promote quality, protect students, and to ensure that domestic social, economic and cultural priorities are met. Most countries require both domestic and offshore education providers to obtain

¹ Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes, Report of the Panel adopted on 7 November 1990 (DS 10/R-37S/200). Available on-line at: http://www.wto.org/english/tratop_e/dispu_e/90cigart.wpf

accreditation to operate. In addition, providers commonly must meet specified quality standards in order to maintain their authorization to grant degrees and diplomas. If commitments are taken in education services, domestic regulation disciplines could apply to all of these rules and procedures.

- In the case of post-secondary or tertiary education, examples of licensing requirements and quality standards include:
 - o Administrative capacity – requirements that an institution must have the legal characteristics, governance structure, and administrative capacity to organize and manage a competent post-secondary institution;
 - o Faculty and staff – requirements that an institution must have appropriate policies in place with regard to the number and qualifications of academic staff and their appointment, evaluation, and employment conditions;
 - o Academic freedom and integrity – requirements that an institution must maintain an atmosphere in which academic freedom and intellectual independence exist;
 - o Ethical conduct – requirements that an institution have policies in place that uphold academic integrity and ethical conduct;
 - o Learning resources – requirements that an institution demonstrate that it has the appropriate learning resources, including laboratories, classrooms, and library holdings that support its academic programs;
 - o Financial stability – requirements that an institution show it has the financial resources necessary to ensure a stable learning environment;
 - o Quality audits – requirements that an institution undertake periodic external assessments of all its programs and operations
- Where domestic regulation governing education services are challenged, **the burden of proof would be on governments** and delegated authorities — such as accrediting boards and professional bodies — to demonstrate that their accreditation and quality assurance rules are transparent and objective and are not more burdensome than necessary. Even if these rules applied equally to foreign and domestic providers, they could still be challenged.
- If a Member's accrediting rules were challenged, domestic regulation disciplines would allow a WTO dispute panel to consider whether accreditation requirements were established to meet "legitimate objectives" and whether these objectives could be achieved in a less trade-restrictive manner. For instance, requirements that universities and colleges have properly constituted and independent academic councils/senates or that institutions must provide specified learning resources could be questioned.
- Adopting new domestic regulation disciplines would trigger an immediate review and expose to challenge government regulations affecting trade in education services and in all sub-sectors where a member has made commitments. In this way, existing GATS commitments on education services would be deepened.

Conclusion

- **Proposed domestic regulation disciplines would unduly interfere with the right of governments to enact regulations governing the provision of education. It is simply not acceptable that judgments about the quality of education be subject to second-guessing by WTO dispute panels.**
- **In general, applying a necessity test to domestic regulations ignores the reality of how educational regulations and regulations in all sectors are developed. Rules and standards are developed through compromises that impose neither the greatest burden nor the least burden on service providers. Requiring all regulations to be the least burdensome would limit both the content and the process for democratic decision-making.**
- **Requirements that regulations be based on objective criteria also raise important concerns. That's because many legitimate regulations are often based on "subjective" judgments about the quality of a service.**
- **All Members, but developing countries in particular, require flexibility to maintain and to extend their regulation of education services. As education systems develop, the need for additional regulation may arise. Therefore, it is important for Members to retain the flexibility to apply regulation suited to their developmental goals.**