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## **DISCIPLINES ON DOMESTIC REGULATION**

### **AFRICAN GROUP ELEMENTS FOR MINISTERIAL DECISION**

The following submission, dated 4 December 2017, is being circulated to the Working Party on Domestic Regulation, the Council for Trade in Services, the Council for Trade in Services in Special Session, the Trade Negotiations Committee and the General Council, at the request of the African Group.

#### **1 INTRODUCTION**

1.1. Since September 2016, discussions on domestic regulation have picked up pace in the WTO. The last notable negotiations on domestic regulation took place in 2009 and 2011 respectively. The 2009 negotiations ceased because developed countries could not agree to the development and Special and Differential Treatment provisions in the text. The 2011 negotiations ceased because the development provisions were significantly diminished, and developing countries were opposed to discarding the 2009 text.

1.2. With the renewed interest in domestic regulation, the African Group formally submitted thirty-seven questions contained in JOB/SERV/269 to the Working Party on Domestic Regulation (WPDR), requesting proponents to elaborate more to clarify our understanding on the proposed Article VI:4 regulatory disciplines in the General Agreement on Trade in Services (GATS). At the meeting of the WPDR on 2-4 October 2017, some proponents offered a response to some of our questions, the statements of which have been circulated in JOB/SERV/270.

1.3. We were encouraged to hear many new voices join the discussion and express similar views and concerns as the African Group on the impact of the proposed regulatory disciplines. Several Members, including from the African Group, provided substantive responses and reactions contained in S/WPDR/M/72 to the proponents' replies.

1.4. The recent discussions in the WPDR have been useful in some respects, but they have consistently highlighted Members' different perspectives and approaches to fulfilling the GATS Article VI:4 mandate to develop 'any necessary disciplines' on domestic regulation. These perspectives may be described as conceptual and rooted in fundamentally different policy perspectives and imperatives amongst Members.

1.5. This communication is an African Group contribution to the ongoing discussion on regulatory disciplines in the WPDR. It urges all Members, in particular the proponents, to acknowledge, and come to terms with the reality that there are serious concerns with the process, and significant divergences by the vast majority of Members persist on the proposed regulatory disciplines.

1.6. The African Group is interested in pursuing an inclusive and constructive discussion in order to build a common understanding on GATS Article VI:4, as they were intended. We believe that a discussion would give comfort to Members who highlighted important divergences in the current domestic regulation discussions.

## 2 HISTORICAL PERSPECTIVES

2.1. The African Group's perspectives on the development of multilateral regulatory disciplines have been described by some proponents as 'ideological' or 'politicizing the discussion'. In our view, 'domestic regulation', by the very nature of the proposed provisions is political; it triggers a number of issues relating to the state, and government policy-making. Of particular relevance to the WPDR, are concerns about: (i) the sovereign right to regulate; (ii) the direct involvement of foreign governments and interested persons in the domestic policy-making processes of Members'; (iii) bringing domestic policy-making processes under multilateral oversight and the WTO Dispute Settlement Mechanism; and (iv) prescribing a single regulatory model.

2.2. The African Group's perspectives are informed by a legacy of profound economic, political and social fragmentation, including the IMF and World Bank Structural Adjustment Programmes.

2.3. We learned lessons; a one-size-fits-all approach does not work.

- Little attention was given to the social dimension of development and to the institutional weaknesses of African countries.
- Standard economic prescriptions were placed on all African countries, irrespective of their stage and level of development.
- Overlooking the unique characteristics of African economies, i.e. the formal modern sector; and an even larger informal traditional sector.

2.4. The African Group have consistently stated that the proposed rules place too much emphasis on the institutional and procedural approach to domestic regulation. There is an underlying assumption that there is a one-size-fits-all approach or model to regulation. The proposed domestic regulation rules and so-called 'best-practice' model under the guise of 'good governance' would create a framework for regulatory action that would close off important options and space for legitimate policy and regulation.

2.5. We see this effort going beyond proponents' proposals in domestic regulation under the GATS to also include similar proposals in NAMA, and TBT. Most recently, this has also included similar rules for Investment Facilitation.

## 3 ARE THESE DISCIPLINES NECESSARY?

3.1. The African Group raised pertinent questions about the "necessity" of the GATS Article VI:4 disciplines, as is required by the GATS.

3.2. To date, we have still not obtained any satisfactory response on the necessity for these disciplines. Nor have the proponents been able to demonstrate the extent to which the existing provisions under the GATS are deficient under Article VI:1, VI:2 and VI:5.

3.3. At a recent discussion of the Council for Trade in Services on 6 October 2017 on the digital economy, proponents themselves acknowledged that the nature of the digital economy will require governments to regulate in novel ways. Indeed, digitalised delivery of services can also render ineffective the GATS Article XVI and XVII limitations in our schedules. Until we fully understand the changing business models, how digitalised services will be delivered differently, how we can operationalize our GATS Article XVI and XVII limitations in the digital environment, and address all unresolved issues such as the technological neutrality of the GATS - to bind ourselves to these domestic regulation rules today would simply limit governmental regulation for legitimate objectives, our GATS scheduled limitations, cybersecurity concerns and digital industrialization.

## 4 WHO WILL BENEFIT FROM RULES ON DOMESTIC REGULATION?

4.1. In assessing the economic rationale of the proposed rules, net services importers will not suddenly or automatically become net services exporters. Basic trade data reveals that in 2016, the total export of services for the EU, for example, was USD 2 trillion. This was more than 22 times the exports in services of the entire African continent. Japan as an individual economy had

exported more in services than the entire African continent combined (i.e. USD 0.18 trillion). For Australia, at its current level, its exports of services are close to the entire exports of the entire African continent.

4.2. It is not yet discernible whether outcomes on domestic regulation would deliver 'real benefits for all services suppliers – including for developing and least developed country (LDC) service suppliers'. Given that most developing countries and LDCs are net services importers, the obligations arising from the proposed rules to reduce red tape, streamline procedures and increase transparency, would have the added effect of benefitting services suppliers who already have first-mover advantage.

4.3. The application and scope of the proposed rules distort the balance in these negotiations because they are intertwined with the specific GATS commitments Members have undertaken. Some African Members have undertaken more commitments than developed countries, including proponents.

## **5 THE RIGHT TO REGULATE**

5.1. The ongoing discussions on disciplines on domestic regulation reveal that Members still have a long way to go to find common ground on the right to regulate. While we understand the objective of GATS Article VI:4 disciplines on domestic regulation to ensure that measures related to domestic regulation do not undermine commitments taken under GATS Articles XVI (market access) and XVII (national treatment), the proposed text on General Provisions, Transparency and Development of Measures in WT/MIN(17)/7 proceed to undermine the right to regulate.

5.2. Regulation is a function of democratic governance, and a tool by which a state seeks to achieve certain objectives. These regulatory goals and legitimate policy objectives may consider trade issues, but could be designed to achieve a range of other legitimate objectives such as to prevent market failures, address important domestic objectives in key sectors, or to prioritize social, community, health, safety, or even political objectives over trade ones.

5.3. Some pertinent questions include: Does the mere recognition of the right to regulate override the substantive obligations in the disciplines? What is the legal meaning of "recognize"? What is the precise relationship between the right to regulate and the disciplines on domestic regulation? Is the right to regulate as suggested in the text absolute, in which case would LDCs need an exemption from the disciplines; i.e. is it unlimited? If a regulation is put in place that is not the "least burdensome", or is not considered to be "objective", will Members be challenged under these disciplines in the DSB? In which case, is there a right to regulate? Does the right to regulate lie in the recognition of the right to regulate? Is "recognition" of the right the same as 'holding' and 'exercising' the right?

5.4. The proposed disciplines are further complicated by a separate section on the 'necessity test'. It is not entirely clear why there are different proponents for different sections of the WT/MIN(17)/7 text, and how a bracketed text among proponents could serve as a starting point for discussions on domestic regulation.

5.5. The necessity test encroaches on a government's sovereign right to regulate. Not only does this test shift the burden of proof on governments to demonstrate that a measure is necessary to achieve a domestic public policy objective, but the government has to also show that it was the 'least burdensome measure' that could have been taken. Some proponents of the necessity test have alleged that governments still have the last word. Yet, these proposals make it clear that this will require 'evidence-based' decisions. Read together with the Transparency provisions, it will also grant all interested persons, commercial interests and Members oversight on who, why and how measures are developed and implemented, and as a final resort subject that to multilateral dispute settlement.

5.6. The African Group have always approached domestic regulation from a perspective that gives paramount importance and affirmation to, amongst other things, the right to regulate and the interlinkages between regulations and broader domestic economic imperatives.

5.7. Overall, the General Provisions text on the right to regulate is not sufficient and does not address the African Group's concerns. In any case, the General Provisions text is made redundant by the substantive provisions that follow immediately thereafter, meaning therefore that the operative paragraphs in 2-6 negate or in other words are an exception to the recognition of the right to regulate in paragraph 1.2.

## **6 INDEPENDENCE**

6.1. In paragraph 3 of the text, it addresses the independence of the competent authority in reaching and administering its decision on whether a service supplier meets the relevant requirements. Independence is not synonymous with impartiality. An 'independent' decision requires that the decision-maker not have links (formal or informal) with individuals or corporations who have a stake in the case before it. Impartiality requires that the decision-maker is not biased against certain aspects relevant to the decision to be made. Therefore, the proposal refers to both decision-making of the measures and the administration of these measures, which expands the scope of the GATS.

## **7 THE CURRENT SITUATION IN AFRICA**

7.1. The discussions in the WTO has prompted Members to undertake a critical assessment of the status of domestic regulation at the national level. In the case of African countries, it has been observed that they lag behind in the development of regulatory frameworks. This is primarily associated with weak regulatory infrastructure and inadequate government resources and capacities. In addition, there is diversity in the development of regulatory frameworks across various services sectors. While some sectors have advanced in terms of building sound regulatory frameworks, others are much less developed and in several cases, lack any regulatory mechanism. For example, while licenses serve as an important mechanism for addressing consumer needs in the case of professional services, not all professions are currently licensed.

7.2. Another common feature in the regulatory management of services in African countries, is that they are dispersed among several Ministries or regulatory agencies with each one tasked with fulfilling a small portion of the overall regulatory oversight and processes. This lends itself to a complex system of functioning for administering the typology of rules under GATS Article VI:4.

7.3. Services suppliers and regulatory authorities in African countries are also faced with challenges in implementing technical standards for services trade. This is particularly in the case of technical standards that are developed by standard-setting bodies that African countries are not Members of, and therefore have not participated in developing these standards. There are also difficulties in meeting international standards since the participation of African countries has always been limited due to resource constraints. The standards developed by international standard-setting bodies do not therefore take into account the situation of these countries.

7.4. Services suppliers in African countries are also faced with onerous qualification and licensing requirements and procedures in their export markets. For example, providing information regarding qualification requirements that is not related to the provision of the service or applying for duplicated licenses from multiple levels of governments, as well as meeting requirements of resource-intensive technical standards that limit their ability to export.

## **8 THE AFRICA WE WANT**

8.1. Africa's vision is informed by the African Union's Agenda 2063: The Africa We Want. It places at the centre of our development agenda, the eradication of poverty through social and economic transformation of the continent. We aspire, through the structural transformation, economic diversification and industrialisation of Africa, to create shared growth, decent jobs and economic opportunities for all our people.

8.2. Africa is a continent with considerable growth potential and a simple data analysis without accounting for future exponential growth rate of Africa shows that the region requires policy space to achieve its industrial policy goals. Without preserving our policy space, and with stringent binding domestic regulation rules that would lock us in, Africa's development will be hampered.

8.3. We have raised our concerns about the scope of these disciplines. They apply to existing and future measures. They apply at every level of government at 'central, regional or local governments and authorities and non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities'. It covers every service sector where specific commitments are undertaken. It is still unclear what "relating to" and "affecting" trade in services means. A direct reading of the text suggests that domestic regulation rules may spill over to other sectors that simply affect trade in services. WTO jurisprudence has accorded a wide interpretation to the scope of the GATS, and almost any type of state intervention, to the extent that it affects trade in services, falls under it.

8.4. The scope of the proposed rules also distorts the balance in these negotiations because they are intertwined with how many GATS commitments Members have undertaken. Several African Group Members have undertaken substantial liberalisation in a number of services sub-sectors. These include African Members who have recently acceded, are landlocked Members, small island Members, and LDCs. Some of our Members have undertaken even more commitments than developed countries, including proponents. Furthermore, most African Members still have regulatory and institutional weaknesses that would make it onerous to comply with the proposed rules. The administration and compliance costs are also overlooked in any discussion on domestic regulation.

8.5. The African Ministers of Trade Declaration on WTO Issues<sup>1</sup> of November 2016 (AMOT Declaration) stressed that 'the work we undertake in multilateral trade and rule-making support Africa's continental integration agenda and, at a minimum, not undermine it.' The AMOT Declaration restated that 'any outcome on GATS Article VI:4 disciplines on domestic regulation does not involve implementation of new and/or onerous administrative requirements or requirements that intrude into the domestic policy-making processes'.

8.6. Hence, the WTO negotiations in services should play a role in promoting the development of regulatory reform and institutional building efforts as well as contribute to the development of supply-side capacity through addressing regulatory barriers faced by exporters from African countries. This reform should be in line with our development objectives, and we should be cognizant of the implications of prescribing one specific approach or model to regulation. Any negotiations should ensure adequate flexibility for African countries necessary for fulfilling their national policy objectives.

## 9 WAY FORWARD

9.1. In building the Africa we want, the African Group places great importance on having much more clarity from the proponents in the development of future disciplines on domestic regulation.

9.2. In the short time that is left in the lead-up to, and at MC11, it is not possible to bridge these sensitive matters because no amount of best endeavour language or transition periods being characterized as Special and Differential Treatment can make up for diminishing African governments' sovereign right to regulate, or imposing particular regulatory approaches that would constrain our governments' ability to pursue development-driven regulations.

9.3. The African Group's questions and concerns can only be addressed through a holistic discussion on the right to regulate and the interlinkages between regulations and broader domestic economic imperatives. We propose that at MC11, Ministers initiate a discussion on the nexus between domestic regulation and trade, with a view to exploring options for more constructive work post-MC11 that meets our developmental objectives.

9.4. All discussions on the development of domestic regulatory disciplines always come back to one very important question: Which disciplines do you think are necessary, and why?

9.5. After MC11, discussions should focus on how disciplines on domestic regulation shall:

- Respect the spirit, purpose and intent of GATS Article VI;

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<sup>1</sup> WT/L/1004

- Address the real needs of developing countries, in particular on Mode 4 related-issues;
- Provide absolute protection to the right to regulate. This will include language on the 'right to regulate' which will form part of the operative provisions of any outcome, and not under the preamble or General Provisions section;
- Ensure that all exceptions and exemptions under the GATS shall apply to the provisions of any future agreement;
- Establish and utilize operational and effective provisions for special and differential treatment;
- Preserve the policy space for all African countries as they pursue development-driven regulation. African countries require flexibility to maintain and introduce regulations. As our economies develop, the need for additional regulation becomes necessary. This is particularly important, nationally, regionally and continentally as we seek to build the Africa we want;
- Reserve and preserve all flexibilities to the fullest extent to allow for the design of regulations suited to their individual needs and objectives. This will ensure and allow for proper timing and sequencing of regulatory reforms with liberalization aimed at promoting sound and sustainable regulatory practices in African countries;
- Include a mechanism in any potential future disciplines that assesses: the validity, appropriateness and impacts of the disciplines, as well as the extent to which the disciplines have met the national policy objectives, have achieved the international development goals of the GATS, the Doha Work Program, and more broadly, the SDGs, and whether any modifications are required to better achieve these objectives.

## 10 CONCLUSION

10.1. The African Group have explained in great detail why we consider the proposed rules as being incompatible with Agenda 2063: The Africa We Want, and we have demonstrated how the proposed rules do not adhere to the GATS Article VI:4 mandate. We have also expressed in detail our concerns on the inclusion of the necessity test, and the fact that Transparency and Gender have no mandate. We do not agree that the formulation of the Development of Measures proposal is within the meaning of GATS VI:4; the scope of the proposed rules, the necessity of developing these rules, interpretative issues, regulatory capture, preservation of policy space, regulatory models, regulatory autonomy and the overarching concerns on the intrusions to our domestic policy-making processes.

10.2. The African Group states upfront that the WT/MIN(17)/7 text has not addressed most of our concerns. These views and concerns are systemic; it points to the need for a deeper, more fulsome, conceptual discussion on GATS Article VI:4.

10.3. In view of this, and taking note of the work done by the WPDR pursuant to Article VI:4 of the GATS, and acknowledging that important divergences still persist, the African Group states that a consensus-text cannot be presented to Ministers at the MC11 for adoption, and we will not subscribe to any obligations on domestic regulation at the MC11.

10.4. The African Group will be prepared to continue the discussion on domestic regulation on the basis of the views expressed above on the understanding that other issues of interest to us, in other areas are also pursued similarly in a post-MC11 work program.