

Working Party on Domestic Regulation**COMMUNICATION FROM THE ACP GROUP**Pro Development Principles for GATS Article VI:4 NegotiationsRevision

The following communication, dated 13 June 2006, from the ACP Group is being circulated to the Members of the Working Party on Domestic Regulation.

I. INTRODUCTION

1. The Hong Kong Ministerial Declaration has mandated Members to develop disciplines on domestic regulation pursuant to the mandate under Article VI:4 of the GATS before the end of the current round of the negotiations. Development is central to current negotiations and this communication from the ACP Group highlights some of the pro development principles to be incorporated into any possible future disciplines under Article VI:4 of the GATS. These development principles are important to Members of the ACP Group as well as other developing countries. As such, they are a reference point to ensure any necessary future disciplines meet the mandate of the Doha and Hong Kong Declarations by placing development as the primary objective of the negotiations. This communication, which highlights in particular pro-development and flexibility related aspects, aims to complement and support other proposals such as ones submitted by Brazil and the Small, Vulnerable Economies, in ensuring that future disciplines on domestic regulation fully reflect the needs and concerns of developing countries.

2. The ACP Members believe that incorporation of pro development principles into possible future GATS Article VI:4 disciplines can, among others, play a significant role in developing countries towards promoting appropriate domestic regulatory reform and institution building efforts as well as help exporters address regulatory barriers they face in foreign markets. More specifically, pro development principles can ensure and allow for proper timing and sequencing of regulatory reforms with liberalisation, with a view to promoting sound and sustainable regulatory practices in developing countries.

3. The main challenge for developing countries in the WPDR negotiations is how to create specific, precise and predictable disciplines that underpin Members' specific commitments while at the same time preserving the right to regulate and recognising the particular need of developing countries to resort to this right fully. The latter is particularly crucial in light of the fact that in many developing countries, regulatory and institutional frameworks are still at an emerging stage or at times non-existent. In this respect, regulatory developments, restructuring and reform is necessary to ensure that the participation of developing countries in international trade in services leads to development gains.

4. The pro development principles proposed focus on three main objectives: 1) ensuring adequate regulatory flexibility for developing and least developed countries; 2) ensuring possible future disciplines promote developing and least developed countries' export capacities and opportunities; and 3) setting the basis for technical assistance and capacity building to improve developing and least developed countries' abilities to meet Article VI:4 disciplines and for their

service suppliers to comply with Article VI:4 disciplines in export markets. Any possible future Article VI:4 disciplines must meet and not detract from or compromise these principles.

5. The pro development principles that ACP Members are proposing to be incorporated into possible future Article VI:4 disciplines include, among others, the following.

II. REGULATORY FLEXIBILITY

A. CLEAR AFFIRMATION OF THE RIGHT TO REGULATE

6. Developing countries require flexibility to maintain and introduce regulations. As economies develop the need for additional regulation becomes necessary. Therefore, it is important for developing countries to have flexibility to the fullest extent to allow for the design of regulations suited to individual development needs and objectives. In this respect, the existing right to regulate and to introduce new regulations must be clearly reaffirmed and explicitly stated so as to ensure that any possible future disciplines do not prescribe, prevent or constrain in any way the ability of a Member to regulate.

7. It is proposed to reflect these concerns in future disciplines as follows:

The preamble should reiterate the language of the preamble of the GATS, as follows:

"Recognizing 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,"

The first operative article or articles (General Disciplines or similar) should contain the following language:

"Nothing in these disciplines shall prevent a Member from exercising its right to regulate and to introduce new, or maintain or modify existing, regulations on the supply of services within its territory in order to meet national policy objectives."

B. TREATMENT OF NEW REGULATIONS VIS A VIS EXISTING ONES

8. Currently, many developing countries are undertaking reforms in their services sectors, frequently introducing numerous new laws and regulations. There is, therefore, concern among ACP Members that some of the existing WPDR proposals would discipline, and possibly constrain, new laws and regulations more strongly than existing ones. This could result in greater regulatory constraints and administrative burdens for those ACP Members that are introducing new regulations currently or in the future. A case in point is the prior comment requirement that has been suggested in some of the proposals for transparency related disciplines. ACP countries undergoing regulatory reforms would face a relatively greater burden in providing prior comment opportunities and responding to possible comments than those countries that have already undertaken or completed regulatory reforms. In this regard, any possible future domestic regulation rules should not discipline new regulations more strongly than existing ones. Therefore, in the case of transparency, any future disciplines must not contain prior comment requirements either in a legally binding or best endeavour form. This is also supported by the fact that such requirements may be contrary to constitutional structures and legal systems in many developing countries as well as result in granting foreign-service suppliers opportunities to exert undue pressure on domestic decision making process, which is the core of sovereignty.

9. It is proposed to reflect these concerns in future disciplines as follows:

"Members shall ensure the publication, through printed or electronic media, of newly adopted measures falling under these disciplines."

C. POSSIBLE FUTURE DISCIPLINES AND THE NECESSITY TEST

10. In the course of developing domestic regulations, regulators accommodate and balance the interests of various stakeholders, which do not always result in the least trade restrictive or least burdensome of all possible regulations. The adoption of a necessity test in possible future disciplines on domestic regulation would not guarantee enough flexibility to safeguard all national policy objectives and the different ways available to achieve them. This observation responds to the concern of regulators in many countries that a necessity test would constrain domestic regulatory prerogatives. In order to ensure developing countries have the full right to regulate and introduce new regulations to meet national policy objectives, they must not be subject to a necessity test in the Article VI:4 disciplines.

11. It is proposed to reflect these concerns in future disciplines as follows:

"Measures taken by a Member in the context of domestic regulation are not subject to a necessity test. Regulators have the full flexibility to choose the means by which they implement or further legitimate policy objectives."

D. FLEXIBILITY FOR INDIVIDUAL DEVELOPING COUNTRY MEMBERS IN THE APPLICATION OF DISCIPLINES

12. In addition, flexibility is to be granted, in terms of appropriate timing and sequencing of the application of disciplines, to developing countries individually. The timing and application of possible future disciplines must recognise that the development of regulatory regimes differs among Members and also within a Member's services sectors. The phase in period of application should not be tied to generalised time frames but based on an individual country's ability to comply with the disciplines. Developing countries should be responsible for determining, based on their state of domestic regulatory and institutional capacity, the timing of their compliance of possible future disciplines. Determination can be made on the basis of regulatory and institutional assessments conducted through technical assistance.

13. It is proposed to reflect these concerns in future disciplines as follows:

- (1) "Developing country Members shall not be required to apply these disciplines for a period of [x] years."
- (2) "In addition, developing country Members are entitled to postpone, and sequence, the application of all or individual disciplines in accordance with, and subject to, their individual developmental needs as well as financial and administrative capabilities. They will be bound by these disciplines in accordance with their respective schedules for the implementation of these disciplines. Members should differentiate in their schedules between sectors and sub-sectors in order to allow for the early implementation of these disciplines in suitable sectors."
- (3) "If a developing country Member deems it necessary to postpone implementation of these disciplines beyond the implementation periods stated in its schedule, it shall no later than [x months] before the expiry of any such period enter into consultations with [responsible WTO body], which shall, upon duly motivated request, accord appropriate extensions. This process may be repeated."

E. EXEMPTIONS FOR DEVELOPMENT OBJECTIVES

14. Careful attention must be given to the extent and manner to which any possible future disciplines apply to regulations aimed at fulfilling national development objectives. This would include inter alia regulations that ensure universal access to essential services and meeting human development goals. This could also include regulations aimed at ensuring transfer of technology, or any other non-discriminatory performance requirements which developing countries may consider appropriate to apply to meet development goals.

15. It is proposed to reflect these concerns in future disciplines as follows:

"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in these disciplines shall be construed to prevent the adoption or enforcement by a developing country Member of measures taken to pursue individual development objectives, including, but not limited to, universal access to essential services, human development and technological development."

F. TEMPORARY SUSPENSION

16. Developing countries must be given the opportunity to temporarily suspend their application of disciplines in cases where specific circumstances impose resource constraints and/or imperatives that require such suspension. Developing countries in such circumstances must be in a position to ensure the adequate reallocation of resources and enjoy regulatory and administrative flexibility. Relevant specific circumstances could include, for example, economic, civil and environmental crises or highly dynamic domestic reform processes.

17. It is proposed to reflect these concerns in future disciplines as follows:

"A Member may temporarily suspend the application of these disciplines if it considers that such suspension is required by circumstances resulting in resource constraints, or by other imperatives. [Such circumstances may include, but are not limited to, economic, civil and environmental crises or domestic reform processes requiring extraordinary temporary reallocations of human or financial resources.]"

G. TREATMENT OF THE LEAST DEVELOPED COUNTRIES

18. In light of Paragraph 11 of the LDC Modalities on Special Treatment, we agree that LDCs shall not be bound by any future disciplines, provided the concerned LDC determines that applying them will negatively affect its specific interests. This is particularly important given the general nature of the regulatory and institutional frameworks, which are not well developed or lacking altogether in LDCs.

19. It is proposed to reflect these concerns in future disciplines as follows:

"A least-developed country Member shall not be bound by these disciplines if it determines that applying them will negatively affect its specific interests".

H. SUBJECT TO THE GATS GENERAL AND OTHER EXCEPTIONS

20. Any possible future disciplines shall not prevent a Member from availing itself of the rights provided under Articles IIIbis, XII, XIV and XIVbis of the GATS. Similarly, disciplines shall not prevent a Member from taking measures for prudential reasons, including those set out in the Annex on Financial Services, qualifying examinations administered or offered by financial service regulators

or self-regulatory bodies, or other measures applied to ensure financial stability. Future disciplines must explicitly and clearly affirm these rights for Members.

21. It is proposed to reflect these concerns in future disciplines as follows:

"The rights for Members provided in the GATS as well as its Annexes, including those under GATS Articles III*bis*, XII, XIV and XIV*bis* and Article 2(a) and (b) of the Annex on Financial Services, apply to measures falling within the scope of these disciplines."

I. APPLICATION OF WTO DISPUTE SETTLEMENT FOR DEVELOPING COUNTRIES

22. In the course of any WTO dispute settlement process, in the interpretation and application of provisions of any future disciplines, the level of development and administrative capacity of an individual developing country Member must be taken into account.

23. It is proposed to reflect these concerns in future disciplines as follows:

"In the interpretation and application of these disciplines, in particular with respect to measures taken by developing countries, full account shall be taken of the asymmetries existing with respect to the degree of development of services regulations and institutional capacities in different countries, and of the particular need of developing countries to regulate, including to introduce new, or maintain or modify existing, regulations. Full account shall further be taken of a Member's overall level of development and factors resulting from the size of its economy."

III. PROMOTING EXPORT CAPACITIES IN LINE WITH DEVELOPMENT OBJECTIVES

24. Any possible future disciplines on domestic regulation should facilitate increased services exports by developing and least developed countries. In that context, it is important to bear in mind that the difficulties in meeting domestic regulations may differ according to the level of development of the exporting Member. Therefore, any future disciplines should provide for Members to assist developing and least developed countries to increase their services exports by implementing the disciplines in a manner supportive of such exports.

25. These concerns should be reflected in provisions such as the following:

(1) Concessional fees

"Members may grant service providers from developing countries concessional fees. If a Member chooses to exercise this option, it may, when setting fees to be charged from other service providers, take into account the need to compensate for losses sustained as a result of charging concessional fees."

(2) Qualification Requirements

"Members shall provide for effective mechanisms for service providers from developing countries to demonstrate a sufficient level of competence for the relevant service, through experience or otherwise, in lieu of required formal qualifications."

(3) Information and Advice for Developing Country Service Providers

"Developed country Members, and developing country Members declaring themselves in a position to do so, shall provide, through public or private bodies, free comprehensive advice

on compliance with regulations falling under these disciplines to service providers from developing countries wishing to provide services in their markets."

(4) Building Supply Side Capacities

"Developed country Members, and developing country Members declaring themselves in a position to do so, shall provide, through public or private bodies, free comprehensive assistance to developing country Members for purposes of assisting their service providers in building their supply capacity and in complying with domestic regulation in their export markets. Such assistance may also be provided directly to the respective service providers. If the relevant export market is the market of the Member from whom such assistance is requested, this Member shall use its best endeavours to provide the required assistance."

IV. FINANCIAL AND TECHNICAL ASSISTANCE

26. Many Members lack the necessary financial resources or government budgets for developing regulatory frameworks. There are concerns that proper implementation of any future disciplines may place further stress on limited budgetary and human resources. Developing countries shall not be obliged to fully implement the disciplines beyond their existing resources and abilities.

27. It is proposed to reflect these concerns in future disciplines as follows:

"Developing country Members shall not be obliged to implement these disciplines beyond their financial and human resources and their capabilities."

28. Members should ensure that financial and technical assistance to help developing country Members establish and build effective regulatory frameworks is guaranteed. Given that individual Members are best placed to understand their regulatory needs, they (the Member receiving assistance) must determine what type of assistance is needed and appropriate, e.g. the amount of financial assistance, technology transfer in the form of computer-based administrative functions, etc.

29. It is proposed to reflect these concerns in future disciplines as follows:

"Members and the WTO Secretariat shall, if requested, advise, and grant technical and financial assistance to, other Members, especially developing country Members, for purposes of establishing, maintaining and upgrading of regulation, as well as for purposes of establishing, maintaining and upgrading private and public sector standardizing bodies."

30. In addition to assisting regulators comply with Article VI:4 disciplines, financial and technical assistance can also assist service suppliers from developing and least developed countries comply with challenging domestic regulatory measures in export markets. Financial and technical assistance can be utilised to build human resource and organizational capacity of service suppliers in developing countries and least developed countries to meet regulatory requirements and procedures in export markets. These concerns should be reflected as proposed above under Paragraph 25 (3) and (4).

31. Along these lines, future disciplines should ensure that technical assistance and capacity building results in concrete improvements in domestic regulatory capacities as well as enhancement of developing country exports in receiving Members.

V. ADDITIONAL ISSUES

32. Further to the above matters addressed in principle in a previous version of this submission, the following issues should be reflected in the future disciplines.

33. The coverage of the disciplines should be limited strictly to matters and situations arising under the coverage of a Member's specific commitments. It is proposed to reflect this in the disciplines as follows:

"These disciplines shall apply only to domestic regulation affecting sectors, sub-sectors and modes of supply in which a Member has made specific market access commitments, and only to the extent that services and service suppliers covered by those commitments may be concerned."

34. There should further be a review mechanism mandating a comprehensive review of the operation of the disciplines after a certain period of time. It is proposed to reflect this in future disciplines as follows:

"The operation of these disciplines shall be reviewed, in particular with regard to their development implications, by the Council for Trade in Services no later than [five] years from the date of their adoption."
