This policy brief seeks to provide a birds-eye perspective on current and possible future developments on services domestic regulations in the context of the World Trade Organization. The Joint Ministerial Statement on Services Domestic Regulations (WT/MIN(17)/61) issued by 58 members at the WTO’s Eleventh Ministerial Conference in December 2017, provides new impetus on this topic while reaffirming the commitment to “advancing negotiations on the basis of recent proposals as set out in WT/MIN(17)/7/Rev.2 and related discussions in the WPDR [Working Party on Domestic Regulation] and future contributions by Members to deliver a multilateral outcome.” The brief presents the most salient issues around the organisation of these discussions on domestic regulations as well as possible options of relevance for the development of frameworks for international and multilateral rule-making in this area.

1. Introduction

The servicification of traditional industries, understood as “a process where non-services sectors in the economy buy and produce more services than before and sell and export more services, often as a package deal with the good” (Kommerskollegium 2015), has created a new regulatory landscape characterised by its complexity and range. Indeed, trade in goods and the operation of global value chains are dependent on the supply of enabling services, such as distribution, transport, retail, and marketing. Each of these sectors is regulated or governed by a given set of rules, largely administrated at the domestic level.

Regulatory environments influence business and investment decisions. Overly burdensome licencing procedures, qualifications requirements, or a lack of transparency on applicable technical standards for example, can determine whether a business venture will be carried forward or not in a certain jurisdiction. Indeed, services regulations can significantly influence the competitiveness of an industry, and even of an entire economy, given the package nature of contemporary business models which include a combination of goods, services, intellectual property, and embedded knowledge.

As services become an increasingly important component of the world economy, policymakers have turned their attention towards the development of regulations adapted to new economic ecosystems. Most noticeably, the digitalisation of the economy is creating multiple regulatory challenges—for example consumer protection for digital transactions, jurisdictional control over
content and data transfer—that are linked to the supply of services. These trends have not only created a demand to update and expand existing regulatory frameworks, but have also given rise to largely unregulated areas of activity—new financial services and data security are notable examples.

Services domestic regulations can be considered the new frontier in effective market access. Beyond the traditional at-the-border trade rules—national treatment and market access obligations—applied to foreign services and services suppliers, the vast universe of non-discriminatory regulations governing services sectors—for example licensing and qualifications requirement and technical standards—while necessary, amount to an additional layer of complexity for the conduct of cross-border trade in services. Effectively, domestic regulations are to services what technical barriers to trade and sanitary and phytosanitary measures are to trade in goods. Multilateral standards would increase regulatory coherence and thus facilitate cross-border trade in services.

At the World Trade Organization’s Eleventh Ministerial Conference in December 2017, 58 members sponsored a Joint Ministerial Statement on Services Domestic Regulations in which they reaffirm the commitment to “advancing negotiations on the basis of recent proposals as set out in WT/MIN(17)/7/Rev.2 and related discussions in the WPDR [Working Party on Domestic Regulation] and future contributions by Members to deliver a multilateral outcome.”

Taking into account this new development and the recent history of trade talks, this policy brief aims to contribute to the organisation of WTO-based discussions in framing more consistent approaches to domestic regulations with a view to increasing transparency and predictability. By reflecting on the purpose of the joint statement, briefly comparing relative progress on this issue at the multilateral and regional levels, and outlining possible options moving forward, the paper seeks to build on the statement and facilitate a pathway towards structured discussions in this important area of trade diplomacy in a manner that responds to sustainable development considerations.

**Figure 1. Value-added exports of goods and services as a percentage of total world value-added exports.**

![Figure 1](image_url)

Source: Adapted from World Bank (2017).

**2. International Trade Policy Frameworks on Domestic Regulations in Services**

In the international context, governments have approached the challenge of services domestic regulations in two ways. The negotiation of provisions on domestic regulations under regional trade agreements (RTAs), such as the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) and the New Zealand-Hong Kong, China Closer Economic Partnership, and through the existing WTO-based multilateral framework under the Council for Trade in Services.

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The scope of negotiations on domestic regulations under RTAs has been, for most cases, narrower than the equivalent multilateral mandate. They mostly focus on procedural transparency and administration of measures, leaving the development of additional disciplines—for example on technical standards and licencing requirements—or the development of further disciplines on professional services to future discussions at the WTO. As this brief will explain, there are exceptions to this general assessment but the challenge of a multilateral outcome on horizontal disciplines remains.

**Multilateral negotiations**

Through the General Agreement on Trade in Services (GATS), the WTO addresses the topic of services-related domestic regulatory frameworks. These are measures affecting trade in services, not covered by GATS articles XVI and XVII on market access and national treatment respectively. Hence, they fall within the realm of non-discriminatory measures. The GATS provides for a set of “criteria” to be considered in the design and administration of domestic regulations affecting trade in services. Such criteria include transparency, reasonableness, objectivity, impartiality, and the avoidance of burdensome regulations, amounting to a disguised restriction to trade in services.

Furthermore, Article VI of the GATS on domestic regulations contains a mandate for members to “develop any necessary disciplines” with a view to “ensuring that measures relating to qualification requirements and procedures, technical standards and licencing requirements do not constitute unnecessary barriers to trade in services.”

Historically, WTO negotiations on domestic regulations have been shepherded by a chairperson and conducted on the basis of a consolidated text prepared by the chair. Currently, there are two “Chair’s Texts” (2009 and 2011). They are the compendiums of all observations, consensus, and disagreements expressed by members throughout the process of negotiations.

**Figure 2. Timeline of action on domestic regulations at the WTO**

Despite significant efforts put into fulfilling the mandate contained in the GATS, members have yet to agree on the development of further disciplines applicable to all services sectors—i.e. horizontal disciplines. The “Gordian knot” in the process has been the implementation of the mandate under Article VI.4 of the GATS and its potential effects on the right of governments to regulate.

The provision, better known as the “necessity test,” mandates and frames the WTO’s work in this area:

> With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licencing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines.

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Such disciplines shall aim to ensure that such requirements are, *inter alia*:

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 licencing procedures, not in themselves a restriction on the supply of the service.¹

For some WTO members, developing disciplines on the necessity test implies subjecting their legitimate right to regulate to a set of ambiguous criteria, which would result in undermining their policy space. Some members, however, favour the development of additional disciplines on domestic regulations as they recognise the increasing significance that regulatory barriers have on effective access to services markets. In addition, some members argue that a negotiation on domestic regulations is— even if indirectly—a market access discussion, and thus intimately linked to the broader discussion encompassing services, agriculture, and non-agricultural products.

Concrete progress on domestic regulations at the WTO has only been possible in specific areas—i.e. sectoral disciplines. There are two examples. First, the Telecommunications Reference Paper,⁴ which “features a negotiated set of regulatory principles, including competition safeguards (to guard against the abuse of market power by dominant suppliers), interconnection guarantees, transparency in licensing, independence of regulators, competition-neutral universal service mechanisms, and fairness in allocating scarce resources such as radio spectra or rights of way” (Mattoo and Sauvé 2003). Second, the Disciplines on Accountancy adopted in December 1998, due to be integrated into the GATS, which “seek to ensure procedural transparency in matters of licencing and qualification” (ibid.). Moreover, the draft disciplines include a necessity test which requires that “measures relating to licensing, technical standards, and qualifications be no more trade restrictive than necessary to fulfil a legitimate public policy objective” (ibid.).

However important, these sectoral approaches remain exceptional and, as noted, have not resulted in the emergence of incentives for the development of horizontal disciplines on domestic regulations. This is a pending challenge in multilateral trade negotiations.

*Preferential agreements*

In parallel to multilateral discussions, WTO members have engaged in regional negotiations involving trade in services, and particularly disciplines on domestic regulations. Generally, RTAs with stand-alone services chapters or provisions deal with the issue of the necessity test by either: i) agreeing not to include a necessity test; ii) including a necessity test; or iii) enunciating the mandate contained in the GATS while conditioning the development of further disciplines to a multilateral outcome.

Most RTAs have taken either the first or third approach—for example the North American Free Trade Agreement and the CPTPP—while a minority have developed further disciplines on the necessity test and other aspects of regulatory practice, such as enhanced transparency through the publication of regulations, timeframes or deadlines for licencing procedures, or the determination of fees.

Among this latter set of agreements with deeper disciplines, the most notable is the aforementioned New Zealand-Hong Kong, China Closer Economic Partnership, which is generally considered the benchmark for disciplines on domestic regulations in services.⁵ The agreement provides for a basic set of GATS-like rules on domestic regulations and complements them with an annex. By including specific definitions and developing disciplines on licensing requirement and procedures, qualification requirements

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² The reference paper was agreed during the negotiation of the Basic Agreement on Telecoms in February 1997.
³ New Zealand-Hong Kong, China Closer Economic Partnership. Chapter 13, Trade in Services, Article 9, Domestic Regulations. Annex III to Chapter 13 (Trade in Services), Disciplines on Domestic Regulations. 2011 (entry into force).
and procedures, and technical standards, and developing further disciplines on transparency, the agreement fulfils the multilateral mandate and proves that a GATS-plus deal on domestic regulations is possible, at least among like-minded countries with comparable levels of dependence on international trade and services.

3. Mapping of Issues in Negotiating Disciplines on Domestic Regulations

3.1 Process

In view of the widening gap in rule-making activity between multilateral and regional arrangements on domestic regulations, and acknowledging the growing relevance that domestic regulatory frameworks have on effective access to markets, a group of 28 WTO members have been working on a possible way forward on domestic regulations at the multilateral level. Such work is the main driver behind the 2017 joint statement, and represents the latest platform for negotiations. The document (WT/MIN(17)/7/REV.2 or WT/GC/190/REV.2) focuses the discussion on a subset of less controversial trade-facilitating elements within the broader agenda on domestic regulations, without preventing interested members from expressing their views on contentious issues such as the necessity test. It is conceived by its sponsors as a pragmatic approach designed to maximise the probability of reaching consensus.

The proposal covers topics such as the submission and processing of applications; criteria applicable to timeframes; acceptance of electronic applications; establishment of enquiry points; enhanced transparency mechanisms; necessity test; and a new section on development. Some of the provisions reflect the position of clearly identified subgroups of members, for instance paragraph 6.2 on women’s economic empowerment and paragraph 6.3 on the necessity test.

The joint statement calls for the continuation of a multilateral process on domestic regulations without any explicit reference to the possibility of initiating an open plurilateral process, as contemplated in the 2017 Joint Statement on Electronic Commerce. This is a delicate matter, as the transition may result in some signatories to the joint statement not following up, and thus, undermining the initiative’s viability.

Alternatively, individual members may consider amending their existing GATS schedules of specific commitments through the mechanism provided under Article XVIII, Additional Commitments:

Members may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII, including those regarding qualifications, standards or licencing matter. Such commitments shall be inscribed in a Member’s Schedule.

This mechanism provides for a clean and simple approach for the enhancement of the operational value of specific commitments, through an essentially unilateral action. Indeed, any WTO member can schedule additional commitment on domestic regulations at any time, unilaterally. However, because such additional commitments would be subject to the application of MFN, this alternative is unlikely to become the vehicle for the implementation of the joint statement.

3.2 Scope of Disciplines

A second issue relates to the scope of the disciplines to be included, particularly the question over the inclusion of a necessity test. Eventually, members will have to make a final decision on the feasibility of such a provision. To date, only a handful of members support it, with the majority of members actively against. This would suggest that a multilateral outcome including a necessity test is unlikely. A middle

6 WT/MIN(17)/7/REV.2 or WT/GC/190/REV.2. Disciplines on Domestic Regulations. 13 December 2017.
7 Joint Statement on Electronic Commerce, WT/MIN(17)/60. Eleventh Ministerial Conference, World Trade Organization. 13 December 2017. “We, as a group, will initiate exploratory work together toward future WTO negotiations on trade-related aspects of electronic commerce. Participation will be open to all WTO Members and will be without prejudice to participants’ positions on future negotiations.”
ground alternative would be not to include a necessity test, but to insert a reminder (paragraph) of the existence and validity of the GATS mandate. While this would not advance the agenda on the necessity test, it would prevent any member from arguing that such a mandate is no longer in force.

Other than the discussion over developing further horizontal disciplines on a necessity test, members still have to determine the scope of the remaining issues to be addressed. Indeed, this may include not just enhancing transparency (publication and information available, enquiry points, opportunity to comment on information before entry into force) and the administration of measures (timeframes, fees, interval of examinations, electronic applications, etc.), but also clarification on the concept of “independent competent authority” or the development of further disciplines affecting the supply of professional services (Decision on Professional Services).

3.3 Legal strength of the disciplines

A third issue will be to determine which of the new obligations will be drafted as hard law, and which as best endeavours or soft law. Since many of the (trade facilitating) obligations are linked to administrative or procedural matters, and considering that an agreement at the WTO would comprise a membership with different levels of economic and institutional development, this determination could influence the overall level of participation in the initiative, as well as the real trade value of the agreed obligations.

3.4 Development dimension

Finally, members will have to decide on the inclusion of a comprehensive section on “development” inspired by the principles governing the Trade Facilitation Agreement that recognises the centrality of incorporating an effective system of assistance into multilateral trade negotiations.

Indeed, the proposal reflecting the positions of 55 members contained in document WT/MIN/(17)/7/REV.2, Disciplines on Domestic Regulations, includes a section on development.° By keeping it, and perhaps even reinforcing it, the initiative could become more attractive for developing and least developed countries, and thus enable enlarged participation (Mattoo 2015). Furthermore, by keeping this section, WTO members would begin drawing a more explicit link between trade obligations and the achievement of the Sustainable Development Goals through greater inclusion and participation. In contrast, were the section to be removed or rendered less ambitious, it would dilute the incentives for developing and least developed country participation and increase the risk of regulatory marginalisation.

Further, a TFA inspired cooperation scheme would also have to acknowledge and reflect on the built-in flexibilities of the GATS, and avoid falling back into a one-size-fits-all development approach. Since the undertaking of commitments under the GATS is a tailored exercise, presumably, a system of cooperation would have to be consistent with such an approach.

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° This section is referred to in Table 1 as section 7.
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<tr>
<th>ISSUE</th>
<th>SCENARIO</th>
<th>ADVANTAGES</th>
<th>DISADVANTAGES</th>
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<tbody>
<tr>
<td>Process</td>
<td>Continue multilateral work on the basis of existing proposals (WT/MIN/(17)/7/REV.2)</td>
<td>Strengthens the WTO negotiating function. Creates momentum for other areas of negotiation to be re-engaged. Better opportunity for developing and least developed countries to participate. Creates an incentive for inclusion and enhancement of a TFA-inspired development dimension.</td>
<td>Probably a slow process, with a first horizon set at the next Ministerial Conference, MC12. Difficult to succeed, due to consensus. It would be easy to block the process.</td>
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<td>Higher level of specificity and extent of commitments. Expectation of multilateralisation.</td>
<td>Multilateralisation may be more difficult to achieve. Shifting to plurilateral may result in losing some of the existing support, and perhaps not being able to add significant additional support.</td>
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<td>Can be done by unilateral action, without pre-negotiation, and through a clean-cut notification procedure at the WTO Secretariat by the interested member(s). Enhancement of the operational value of specific commitments. Support from industry, as it advances the international trade agenda.</td>
<td>Additional commitment would be subject to the application of MFN, which gives rise to the issue of free riding. Probably attract a small number of delegations willing to notify unilaterally.</td>
</tr>
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<td>Scope of disciplines</td>
<td>Exclusion of a necessity test. Focus on trade-facilitating measures.</td>
<td>Allows for greater participation of all types of countries. Allows advancing the agenda and breaking deadlock. Strong support from industry.</td>
<td>Reinforces the idea that necessity test is not necessary. It marginalises the issue. It reduces the effect of the benefits of a multilateral understanding on domestic regulation in assuring effective access to markets for all members.</td>
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<td>Seeks to fulfil the mandate of GATS VI.4 as originally agreed by WTO members. Enhancement of effective access to services markets by avoiding unnecessarily burdensome regulations. Avoid regulatory protectionism. Would create greater coherence among multiple domestic regulatory systems based on guiding principles.</td>
<td>Unlikely to reach consensus. Entrenched debate, which could result in blocking other discussions under the domestic regulations agenda. It creates an “all or nothing” dynamic which takes away momentum from other discussions under the domestic regulations agenda, and even beyond. Opens a new avenue for possible differences to arise among members, which could result in the establishment of Panels under the Dispute Settlement Understanding.</td>
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<td>Legal strength of disciplines</td>
<td>Mainly agreed as best endeavours (soft law).</td>
<td>More flexibility. Less disruptive of policy space. Possible greater participation of sceptical developing and least developed countries.</td>
<td>Limited trade value. Limited improvement of regulatory practices. Limited enhancement of regulatory coherence. Less support from industry. Less attractive for developed and advanced developing countries.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Mainly agreed as binding obligations. Higher level of ambition. Strong support from industry. Increases regulatory coherence.</td>
<td>Less flexibility and more disruptive of policy space. Possible lower participation of developing and least developed countries.</td>
</tr>
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</table>
Conclusions

Increased servicification of the global economy has put domestic regulations for services at the centre of trade policy discussions. The Joint Ministerial Statement on Services Domestic Regulation issued in 2017 marks a new starting point for future developments in services trade rule-making at the WTO. It does not call for an open plurilateral process; rather it reaffirms the validity of the multilateral path.

The current proposals on domestic regulations for services at the WTO focus on trade-facilitating aspects. This approach could allow for synergies between this initiative and the implementation of the Trade Facilitation Agreement. It does not preclude addressing the most difficult issue related to domestic regulations, namely the necessity test.

Members have a number of options for advancing an agenda on services domestic regulations including multilateral, plurilateral, and unilateral alternatives. Each is subject to a particular set of considerations and potential benefits and costs.

Given the variety of options available and the increasing relevance of regulatory frameworks as enablers of value chains and international trade, the advancement of an agenda on services domestic regulations is likely to continue.

In general, regional agreements only address segments of a more comprehensive agenda on the development of further disciplines on domestic regulations as provided under GATS Article VI. This leaves space not just for WTO members to improve the quality of RTAs, but also for further ingenuity in WTO based negotiations and processes.

The development of robust services-related domestic regulatory frameworks has significant potential impact on economic inclusion and sustainable development. It affects the ability of countries to engage in international trade while taking fuller advantage of the potential benefits, particularly in relation to value addition generated in new transnational models of production and commercial exchange.

Although the challenge ahead remains significant, the joint statement could represent an inflection point for a significant share of the WTO membership to advance a multilateral trade agenda in times when consensus seems evermore elusive, but nonetheless necessary.
References

Kommerskollegium (National Board of Trade of Sweden). 2013. *Just Add Services - A Case Study on Servicification and the Agri-Food Sector*.


