

Briefing note on Services Domestic Regulation JSI text of 27 September 2021 (INF/SDR/1)

Jane Kelsey

A “Joint Initiative on Services Domestic Regulation. Reference Paper on Services Domestic Regulation. Note by the chairperson”, dated 27 September 2021, has been released. This text will impose new “disciplines” on how governments who adopt it can develop and administer their licensing standards and procedures, qualification requirements and procedures, and technical standards in relation to the services sector.¹

The proposed rules will restrict how governments can perform their public responsibilities, seek to remove discretionary considerations, open national law-making to influence by foreign corporations and other governments, and impose costly and onerous compliance requirements with no guaranteed assistance, while limiting fees that governments can charge.

These standards are already in place in many developed countries, so they will have to do little, if anything, new to comply. Developing countries, however, will have to meet those developed-country standards within seven years.

This briefing note addresses:

1. The systemic implications of the development of this text by a self-selected group of World Trade Organization (WTO) Members, in light of the lack of legal legitimacy of the process by which the text was produced and the means proposed for its adoption;² and
2. The negative impacts on developing countries, the lack of special and differential treatment, and the power asymmetries that are intrinsic to the proposed “disciplines”.

¹ Technical standards are far-reaching, including construction standards, advertising rules, zoning and port operations, water quality standards, performance standards for the internet, operating standards for schools, universities, hospitals or rest homes, ethics requirements for researchers or professions, quality controls and audit requirements, codes of conduct, health and safety rules, consumer protections, etc.

² For more detailed arguments on the JSIs’ lack of legality, see Jane Kelsey, [Why the Joint Statement Initiatives Lack Legal Legitimacy in the WTO](#), and Jane Kelsey, [Investment Facilitation Joint Statement Initiative: No home in the WTO](#).

Third World Network (TWN) is an independent non-profit international research and advocacy organisation involved in bringing about a greater articulation of the needs, aspirations and rights of the peoples in the South and in promoting just, equitable and ecological development.

Address: 131 Jalan Macalister, 10400 Penang, MALAYSIA **Tel:** 60-4-2266728/2266159 **Fax:** 60-4-2264505
Email: twn@twnetwork.org **Website:** www.twn.my

The contents of this publication may be republished or reused for free for non-commercial purposes, except where otherwise noted. This publication is licensed under a Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International License.

1. Systemic implications for the WTO

The negotiation and publication of a final text on services domestic regulation (SDR) disciplines by this sub-group of WTO Members is as significant for its systemic consequences as for its actual content.

Overriding existing mandated processes

This is the first concluded text from the so-called Joint Statement Initiatives (JSIs) launched by groups of Members at the 11th WTO Ministerial Conference in Buenos Aires in December 2017. Their ministerial statements followed the rejection by the WTO Membership as a whole of proposals to negotiate on several issues, including SDR, electronic commerce and investment facilitation. In other words, these negotiations have no mandate from the Ministerial Conference.

The SDR text cannot claim a mandate from anywhere else. In paragraph 1 of Section I, it states that the negotiations and resulting text are pursuant to paragraph 4 of Article VI of the WTO's General Agreement on Trade in Services (GATS). That cannot be so. GATS Article VI.4 says the WTO Council for Trade in Services shall develop any necessary disciplines. This text has not been developed by the Council for Trade in Services or the body established by the Council for that purpose, being the Working Party on Domestic Regulation. In fact, the process was designed to circumvent that mandate and the body authorised to oversee it.

If this text were to be accepted as legitimate by WTO Members, it would establish a precedent for any subset of WTO Members to set aside a formal mandate in a WTO Agreement and the institutional processes according to which that mandate must be pursued. Rules and decisions properly adopted under the rules of the Agreement Establishing the WTO (Marrakesh Agreement) or annexed agreements like the GATS could be rendered meaningless if some Members decide they do not wish to comply with them, or to seek a consensus to change those rules via an amendment under Article X of the Marrakesh Agreement. Power asymmetries in the WTO, and in services markets, mean developed countries are most likely to exploit that process.

Improper use of GATS schedules

Paragraph 7 in Section I of the SDR text proposes to use GATS schedules of specific commitments to adopt the rules set out in Section II of the text. They would be identified as Additional Commitments under GATS Article XVIII. This is an improper use of schedules which has clearly been devised as a means for adopting new rules without amending the GATS text, which requires consensus.

Section II of the SDR text contains new “disciplines” that are general rules. These properly belong in Part II of the GATS, which covers General Obligations and Disciplines. A paper published by the Chair of the SDR group in March 2020 confirms this, listing a number of provisions that relate to existing rules under Part II.³ Similarly, the agreed SDR text from September 2021 says in several places that it is expanding on rules in Part II: paragraph 13 of Section II is “further to Article III” of the GATS on Transparency, and paragraph 20 on Enquiry Points expressly provides additional points of recourse to those established in GATS Articles III and IV. Paragraph 11 on Recognition is an amendment to GATS Article VII on Recognition.

The fact that these disciplines apply only to services that Members have committed in their schedules does not alter their character as general rules. A number of rules in GATS Part II only apply to scheduled commitments, including Articles VI.1 and VI.5 (Domestic Regulation), Article VIII (Monopolies and Exclusive Service Suppliers) and Article XI (Payments and Transfers).

³ Joint Initiative on Services Domestic Regulation. Note by the Chairperson, INF/SDR/RD/6 (12 March 2020).

By contrast, schedules are covered by GATS Part III on Specific Commitments, which sets out three rules (market access, national treatment, additional commitments) that Members commit in relation to specific sectors in their schedules under Article XX in Part IV on Progressive Liberalisation. The SDR rules are not sector-specific commitments of this kind.

Purported precedents are not precedents

The use of schedules to adopt rules has been justified by reference to the post-Uruguay-Round negotiations on financial services and on basic telecommunications, whose outcomes were inscribed in Members' schedules. However, these are not precedents for unmandated negotiations, or for the adoption of general rules through Article XVIII within participating Members' schedules.

Both the financial services⁴ and basic telecommunications⁵ negotiations proceeded under multilateral mandates agreed by consensus at the conclusion of the Uruguay Round and set out in the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations 1994. The scope and processes for conducting the negotiations, the bodies nominated to oversee them, and the modalities for their implementation were specified through consensus decisions.

Further, the Financial Services Agreement adopted by the Fifth Protocol contains no regulatory content *per se*.⁶ While the Reference Paper on Basic Telecommunications does, its adoption via Members' schedules was part of the consensus-based mandate. Crucially, both instruments are sector-specific, as appropriate to schedules adopted under Part III and Part IV of the GATS.

Certification of schedules confirms their limited scope

Using GATS schedules to adopt these new rules is attractive to JSI proponents because of the limited and streamlined certification procedure that applies to modifying Members' schedules. That applies in particular to modifications that involve new (sectoral) commitments, improvements to existing ones, or rectifications or changes of a purely technical character that do not alter the scope or the substance of the existing commitments.⁷ Members can object, there are consultations, and if there is no resolution, the proposed modification can become subject to a longer process for resolving objections and, ultimately, arbitration.⁸

It is clear from the certification process that modifications to schedules are intended to be sectoral. The consultations over changes, and terms of reference for arbitration, involve a rebalancing or recalibration of sectoral commitments that were reached through request-and-offer negotiations and inscribed in the Members' original schedules.

The certification process clearly does not anticipate the use of schedules to adopt general rules, whether or not they adversely affect other Members' rights. To do so, as the SDR text proposes, is therefore a misuse of schedules. If, as seems likely, it is being proposed to circumvent the consensus-based amendment process under Article X of the Marrakesh Agreement, it constitutes bad faith on the part of the Members involved.

⁴ Decision on Institutional Arrangements for the General Agreement on Trade in Services, adopted on 15 April 1994, LT/UR/D-5/3; see also S/L/1 (4 April 1995), GATS Second Annex on Financial Services at [3], Fifth Protocol to the General Agreement on Trade in Services, S/L/45 (3 December 1997).

⁵ World Trade Agreement 1994, III. Ministerial Decisions and Declarations, 7(d) Decision on Negotiations on Basic Telecommunications, adopted 15 April 1994, LT/UR/D-5/4. See also Annex to the GATS on Negotiations on Basic Telecommunications, Fourth Protocol to the General Agreement on Trade in Services, S/L/20 (30 April 1996).

⁶ Armin Von Bogdandy and Joseph Windsor, Fifth Protocol to the GATS, in Rüdiger Wolfrum, Peter-Tobias Stoll and Clements Feinäugle (eds.), *WTO – Trade in Services*, 2008, Brill, 643.

⁷ Procedures for the Certification of Rectifications or Improvements to Schedules of Specific Commitments, adopted by the Council for Trade in Services on 14 April 2000, S/L/84 (18 April 2000).

⁸ Procedures for the Implementation of Article XXI of the General Agreement on Trade in Services (GATS), adopted by the Council for Trade in Services on 19 July 1999, S/L/80 (29 October 1999).

2. Development asymmetries and lack of special and differential treatment (SDT)

The “disciplines” in the SDR text reflect the positions that developed countries have taken over many years in the Working Party on Domestic Regulation, and in their various free trade agreements (FTAs), although some of the more extreme positions have been dropped.

Far-reaching scope

The scope of the SDR text reaches deep into the heart of countries’ regulatory regimes. Section II applies to “measures” (laws, regulations, rules, procedures, decisions, administrative actions, or any other forms) that relate to licensing and qualification requirements and procedures and to technical standards (not defined in the text) that have an effect on trade in services. In these days of the “servicification” of everything, these rules would apply with respect to services suppliers that run mining, fisheries, forestry and agriculture, the digital domain, as well as more traditional services like retail, professions, tourism, education, health, transportation, energy, water, utilities and more.

No real SDT

Section I of the SDR text “recognises” the difficulties confronting developing countries in complying with measures relating to licensing, qualifications and technical standards, and “recognises” the existence of development asymmetries. Despite these admissions, there is no real SDT in the rules themselves.

There are only transition periods for part or whole of the rules to a maximum of seven years. It is unclear whether scope and duration of the transition period are subject to negotiation, but it should be assumed that developing countries will be pressured to minimise any such deferrals.

Extension beyond seven years would require either a formal waiver by the Ministerial Conference, which under the Marrakesh Agreement requires “exceptional circumstances” and is not expected to exceed one year, or modification of schedules under Article XXI of the GATS, which other Members can stall or for which they can demand new concessions in return.⁹

Asymmetrical obligations

Substantive rules in the text that seem neutral on their face will have serious development asymmetries in practice. Developed countries already meet most, if not all, of the requirements in these rules. They would not have agreed to them otherwise.

Where developed countries want to retain flexibility, the language is to “encourage” (e.g., paragraph 13 of Section I on Technical Assistance and Capacity Building; paragraph 21 of Section II on Technical Standards) or “consider supporting” (paragraph 11 of Section II on Recognition). Notably, Section III on financial services leaves out a number of the restrictions that apply to services generally.

A number of rules that will impact particularly on developing countries have no such flexibilities, beyond the transitional period for those rules the developing country has designated.

⁹ When Bolivia tried to amend its schedule in 2008 in relation to hospital services, the US objected and prolonged the consultation process until a subsequent government withdrew the request. Council for Trade in Services, Report of the Meeting Held on 5 December 2008 (7 February 2009); Committee on Specific Commitments, Application of Procedures under Article XXI, JOB/SERV/123 (26 November 2012), [25]-[27]; Council for Trade in Services, Termination of the Procedures under Article XXI of the GATS. Communication from the Secretariat, S/L/432 (3 February 2020).

Government administration

Some rules will require developing countries to make significant changes to their government administrations, as well as to their administrative procedures.

For example, if governments require authorisation to deliver a service, then paragraph 12 of Section II says the decisions of competent authorities must be made independently from any supplier of that service. In many developing countries the postal, broadcasting, telecommunications, aviation, transportation, education, health, water and sanitation services are operated by the same government entity that authorises private suppliers. This rule does not require them to create a separate entity, but they will have to establish a firewall through a separate decision-making process. Notably, this requirement for “independence” is omitted from Section III on financial services.

Publishing information

Paragraph 13 of Section II requires a Member to promptly publish a list of information, including technical standards, fees, appeal procedures, opportunities for public involvement and indicative time frames, where such information exists. Other provisions require much of that information to exist.

Criteria for authorising supply of a service

Under paragraph 22 of Section II, a government must ensure that measures relating to authorisation to supply a service are based on “objective and transparent criteria”. Those criteria were traditionally treated as very narrow under GATS Article VI.4 and VI.5, and attracted strong criticisms from civil society as undermining social and public interest considerations.

Footnote 17 of the SDR text now says those criteria may include competence and the ability to supply a service, including in a manner consistent with a Member’s regulatory requirements, such as health and environmental requirements. The footnote does not refer, however, to other criteria of importance to developing countries, including development objectives, equitable and physical access to services, regional development, and other sustainable development goals.

This extended definition is omitted from the equivalent provision on financial services (Section III, paragraph 19).

Fees

Countries whose governments adopt the SDR text will have to ensure that authorisation fees are “reasonable, transparent, based on authority set out in a measure, and do not themselves restrict the supply of the service” under paragraph 9 of Section II. Developed countries do not rely on fees for revenue in the same way as developing countries do.

A footnote exempts fees for use of natural resources, payments for auctions, tendering or other *non-discriminatory* means of awarding concessions, or compulsory contributions to universal services provision. But other fees, such as those involving professional services, transportation, couriers, operators of ports, shipping and other infrastructure, would be subject to this rule.

Yet again, the rule on limiting fees is different for financial services, where the Member is merely required to provide applicants with a schedule of fees or information on how fee amounts are determined.

Resource constraints

The fiscal realities of developing countries are only recognised for two peripheral issues. The obligation to accept applications for authorisation to supply a service in electronic form under paragraph 6 of Section II

“takes into account” the “competing priorities and resource constraints” of the competent authorities, who should “endeavour” to accept such applications.

When examinations are required for authorisation, governments are “encouraged” (in paragraph 10 of Section II) to accept requests in electronic form and “consider, to the extent practicable,” using electronic means for other parts of the examination process, “having regard to the cost, administrative burden, and the integrity of the procedures involved”.

The absence of similar references to resource constraints in equally and more significant and burdensome rules is ominous. Many of the obligations, such as those on processing of applications, are “to the extent practicable”. The dictionary meaning of “practicable” is “able to be done or put into practice successfully”. However, WTO jurisprudence suggests narrow criteria for practicability, being the “availability” and “suitability” of the proposed approach.¹⁰

In the absence of explicit development flexibilities, and of references to resource constraints, the costs and burdens of compliance on developing countries and competing priorities for resources may not be accepted as valid considerations in terms of “practicability”.

Technical assistance

The only form of SDT apart from the transition period is a vague and unenforceable “encouragement” for developed countries and other developing countries to provide specific technical assistance and capacity building, in paragraph 13 of Section I. This support is targeted to four specific purposes which relate to the regulation of services more generally, including establishment of technical standards, not just implementing the SDR Reference Paper.

This assistance has to be requested from specific donors and will be subject to mutually agreed terms and conditions. Strings attached are likely to include the adoption of OECD (Organisation for Economic Cooperation and Development)-style hands-off regulatory practices and conditions relating to the substance, as well as procedures, for regulating services.

Input into national laws by foreign states and corporations

Developed countries’ underlying agenda for these rules is most obvious in paragraph 14 of Section II on Opportunity to Comment and Information Before Entry into Force. Governments must publish the texts, or detailed documents, of proposed laws and regulations that fall within the scope of the Reference Paper so that other WTO Members and “interested persons” (corporations) can comment on them before they are adopted. Their comments must be considered. Governments are “encouraged” to extend this to procedures and administrative rulings of general application to services sectors or services overall.

This requirement reflects what the OECD terms “best regulatory practice” and already exists in a number of FTAs involving developed countries. The compliance element of this rule alone will be extremely onerous for developing countries, especially as it covers regulations as well as laws, and potentially procedures and administrative rulings.

But the anti-development impacts are more insidious. Prior comment favours wealthy governments and their corporations. Multinational firms are most likely to be concerned about new laws in developing countries, who will face pressure to act on those views. Developed countries are much less likely to worry about comments from large developing-country firms, let alone from small and medium enterprises. This prior comment provision is, in effect, a lobbying charter for foreign investors and corporations and their parent states, who have the potential to threaten state-state disputes and disruption to aid or investor-initiated disputes under bilateral investment treaties.

¹⁰ EC – Bananas III (Ecuador) (Article 22.6 – EC), see [68] to [76].

The provision has two limiting phrases, which are not as flexible as they might appear. One is “to the extent practicable”, a phrase discussed above. This remains a positive obligation and the burden of proof rests with the government to justify non-compliance.

The second phrase allows Members to comply “in a manner consistent with its legal system for adopting measures”. That phrase does not mean a government can avoid this obligation by having a legal system that is not consistent with this process. There is a positive obligation on governments that adopt the SDR Reference Paper to comply. Footnote 13 makes it clear that the two options provided in paragraph 14 of Section II – to publish in advance the actual laws and regulations a government proposes to adopt, or to publish documents that give sufficient details about proposed new laws or regulations to allow interested persons and Members to assess if and how their interests might be significantly affected – reflect what are considered to be different legal systems.

Least-developed countries (LDCs)

Paragraph 11 of Section I suggests that LDCs can sign up to the SDR Reference Paper but do not need to comply. On its face, that may encourage LDCs to think they have nothing to lose – unless and until they “graduate” from their LDC status. Then the seven-year maximum period for compliance will kick in. As LDCs who have graduated are aware, WTO transition periods pass by very quickly.

Paragraph 11 also foreshadows pressure on LDCs who do sign up to the Reference Paper to comply voluntarily, even without an obligation.

In considering these specific implications of the SDR Reference Paper, both developing countries and LDCs would be well-advised to accord priority to the broader systemic consequences of putting their names to this process in relation to services domestic regulation.

Jane Kelsey is a Professor of Law at the University of Auckland, New Zealand, where she specialises in international economic regulation. She is an adviser to a number of governments, inter-governmental bodies and international non-governmental organisations on trade in services, investment and electronic commerce. She holds an LLB(Hons) degree from Victoria University of Wellington, BCL from Oxford University, M Phil from Cambridge University and PhD from the University of Auckland.