

Outline of the U.S. Position on a Draft Consolidated Text in the GATS Working Party on Domestic Regulation (WPDR)

Article VI.4 of the General Agreement on Trade in Services (GATS) provides WTO Members with a mandate to develop any disciplines (i.e. new rules) on domestic regulation deemed necessary by the Membership. In the context of the current round of WTO negotiations, the mandate in GATS Article VI.4 is being pursued through the negotiations in the Working Party on Domestic Regulation (WPDR).

General Considerations:

- In general, the United States is seeking the clearest, most precise language for any new binding disciplines under the GATS. While we acknowledge the value of familiar text drawn from other trade agreements, we do not believe it is necessary or desirable to draw exclusively from such sources. In many ways, the proposed disciplines for domestic regulation of services are quite different from other WTO agreements, and we should remain open to language tailored to the specific context of services regulation and to the nature of the specific disciplines proposed.

Principles and Objectives:

- The United States supports a clear statement recognizing all Members' right to regulate and introduce new regulations to achieve domestic policy objectives, and also recognizing the specific needs of developing countries in that regard (i.e., capacity constraints, under-developed regulatory regimes, etc.). However, we do not support language in this regard that could be construed to establish a greater or lesser right to regulate for any Member or group of Members.
- The United States does not support any type of operational necessity test or standard in any new disciplines for domestic regulation. However, we share the concerns raised by many Members that the right to regulate should not be used in practice to avoid trade obligations. In that regard, we remain open to discussing non-operational language in the preamble, expressing that Members' objective in developing any new disciplines is to establish that principle.
- The United States supports a clear statement that any new disciplines for domestic regulation are in addition to, and do not derogate from, existing obligations and exceptions in the GATS, including the Annex on Movement of Natural Persons.

Scope and Application:

- The United States supports application of new disciplines where Members have undertaken specific commitments in their schedules.
- The United States has consistently taken the position that domestic regulation in services is extremely complicated and that developing a single set of disciplines to be applied to all services sectors poses particular problems. Our longstanding position has been that horizontal application (i.e., applying to all services sectors) would depend on the nature of the proposed

disciplines, and that strong disciplines for all elements of GATS Article VI.4 would not be feasible on a horizontal basis.

- The United States does not support application of any new disciplines to visa issuance and related measures, by which Members regulate the movement of natural persons into, or their temporary stay in, their territories.

Definitions:

- The United States has significant concerns about defining the elements of GATS Article VI.4 for any new disciplines, and this is an area that we feel will require a great deal of work in the future. In particular, we have strong concerns about a single definition of qualifications requirements for both natural persons (engaging in the professions) and juridical persons. The nature of the definition in this area will affect the type of disciplines we can support.
- We are also concerned about clarity in the definitions of licensing requirements and qualifications requirements. We are not convinced that the definitions proposed so far, which link the two, provide the necessary clarity to implement new disciplines effectively.
- We are also concerned that terms not be defined so broadly as to create legal uncertainty about coverage. With respect to qualifications requirements, for example, we would not want any confusion about application to academic or other qualifications that we feel should clearly be excluded from any GATS disciplines. We have similar concerns about the definition of technical standards.
- With regard to licensing requirements, the United States would not support a definition that could be interpreted to encompass forms of permission that might be termed “license,” but should clearly be excluded from GATS disciplines. For example, we would not want to see a definition that could be interpreted as covering certification or permits relating to the construction, operation or use of facilities, use of natural resources, or that serve to implement and enforce certain laws, e.g. food safety inspections, vehicle safety and emissions inspection, environmental protection, etc.

Licensing and Qualifications Requirements:

- Given the strong preference of some WTO Members for horizontal disciplines, the United States supports a very cautious approach in the area of requirements. This is an area that very quickly touches on the content of regulations and can impinge on Members’ right to set appropriate standards to ensure the quality of services, public health and safety, environmental protection, prudential financial practices, and other important policy objectives. Our ability to support disciplines in this area will depend greatly on the nature of the proposed disciplines, the clarity of their scope of application and flexibility in the level of compliance.

Licensing and Qualifications Procedures:

- This is an area where, in principle, the United States believes it is feasible to have more developed disciplines, since over time best practices have developed and been adopted on a regional or international basis.

Technical Standards:

- The United States takes a very cautious approach in this area. The concept of technical standards is not well-developed in the services sector, few countries have regulations in this area, and so far the proposed definitions for technical standards are very vague. In this area we can support general provisions related to transparency and public availability of any technical standards Members might adopt for the services sector.

Transparency:

- Transparency is the highest priority for the United States in these negotiations, and is the area we feel is best suited to horizontal application.
- We are seeking disciplines that adopt realistic and flexible standards of compliance, covering publication of regulations so that they are available to interested persons; operation of points of inquiry available to interested persons; provision, on a best endeavor basis, for prior publication of new regulations and a reasonable opportunity for interested persons to comment, as well as the expectation that substantive comments received will be taken into consideration by the regulator.
- We believe that transparency is fundamental to good governance and creating the environment of certainty and predictability that benefits both domestic and foreign service suppliers, and attracts foreign investment.

Development:

- The United States supports a realistic and practical approach to recognizing the different levels of development among Members, and one that is consistent with the mandate of GATS Article VI.4.
- In this regard we think the provisions suggested in the proposal from China and Pakistan, setting out phase-in periods for compliance with any new disciplines, contains interesting ideas.

Review Mechanism:

- The United States recognizes the value of some sort of mechanism to review the implementation of any new disciplines under GATS Article VI.4, and we remain open to discussing the possibility of some sort of new committee or other institution to conduct such a review.
- The United States does not support the creation of a new negotiating mandate for disciplines on domestic regulation at this time.