

Working Party on Domestic Regulation**COMMUNICATION FROM CHINA, PAKISTAN AND SWITZERLAND****Questions on "Disguised Restrictions on Trade in Services" in relation to the
GATS Negotiations on Domestic Regulation**

The following communication, dated 10 December 2009, from the delegations of China, Pakistan and Switzerland is being circulated to the Members of the Working Party on Domestic Regulation.

I. INTRODUCTION

1. In the Room Document dated 12 March 2008, the Chairperson of the Working Party on Domestic Regulation (WPDR) presented some outstanding issues for discussion, which include three issues pertinent to "disguised restrictions on trade in services":

- (1) the meaning of this term;
- (2) whether it should be part of the disciplines;
- (3) its placement in the disciplines.

2. The term of "disguised restrictions on trade in services" has been introduced into the second revised Chairperson's draft of 20 March 2009:

"The purpose of these disciplines is to facilitate trade in services by ensuring that measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards are based on objective and transparent criteria, such as competence and the ability to supply the services, and do not constitute disguised restrictions on trade in services."

3. The present communication intends to seek clarity on the term of "disguised restrictions", taking into account the existing WTO provisions and jurisprudence. A few questions have been raised without prejudice to China, Pakistan and Switzerland's final position on this issue in the Negotiations on Domestic Regulation pursuant to Article VI:4 of the GATS.

II. SOME WTO PROVISIONS CONCERNING DISGUISED RESTRICTIONS

4. On 26 October 2007, the Chairperson of WPDR circulated the Note *Disguised Restrictions on Trade in Services* which provided an overview of the notion of "disguised restrictions" as contained in some of the WTO agreements and to the extent it has been interpreted in WTO jurisprudence. As implied by this Note, some WTO agreements on trade in goods have explicitly prohibited Members from imposing "disguised restrictions", and similar language has appeared in three different parts of GATS (see examples in Annex attached).

5. In China, Pakistan and Switzerland's view, these provisions have some notable characteristics:

- (1) They all target at the manner in which the measures are applied;

- (2) In most cases, the notion of "disguised restrictions" is accompanied with the notion of "arbitrary or unjustifiable discriminations". The Informal Note *Excerpts of Dispute Settlement Reports Addressing the Notion of "Disguised Restriction"* provided by the Secretariat on 18 April 2007 also revealed that in some cases "disguised restrictions" are linked with the discriminatory actions against international trade;
- (3) According to Article XX of the GATT and Article XIV of the GATS, one of the prerequisites for Members to resort to General Exceptions is that such measures are not applied in a manner which would constitute a disguised restriction on international trade/trade in services. The purpose of prohibiting Members from imposing "disguised restrictions" under these provisions is to prevent Members from abusing the right of recourse to General Exceptions.

6. China, Pakistan and Switzerland take note that in the dispute settlement cases covered by the above-mentioned Informal Note, neither the Panel Reports nor the Appellate Body Reports gave a full definition to "disguised restrictions" or illustrate its meaning in an exhaustive way. It appears that the meaning of this notion should be interpreted in a case by case manner.

III. HOW TO DEFINE DISGUISED RESTRICTIONS ON TRADE IN SERVICES

7. To address the issue whether the term of "disguised restrictions on trade in services" should be part of the disciplines, it is necessary for Members to discuss the meaning and coverage of this term. Bearing this in mind, China, Pakistan and Switzerland would propose to discuss the following questions:

- (a) Under the existing WTO agreements, what does the term of "disguised restrictions" mean? Does this term cover only the manner in which the measures are applied, or also measures themselves?
 - (b) What kind of measures may be considered as "disguised restrictions"? Assuming that a measure constitutes an unnecessary restriction on international trade, would this measure be regarded as a *prima facie* disguised restriction on international trade?
 - (c) In the future disciplines on Domestic Regulation, should the term of "disguised restrictions on trade in services" cover "measures" or the manner in which the measures are applied? Or both?
 - (d) Assuming that the term of "disguised restrictions on trade in services" in the future discipline of Domestic Regulation is aimed at disciplining the manner in which the measures are applied, should the findings in relation to "disguised restrictions" in the Panel Reports or Appellate Body Reports be applicable to the field of trade in services? In addition, what are other possible circumstances in the field of Domestic Regulation where "disguised restrictions on trade in services" might emerge?
 - (e) If it is to be assumed that provisions on "disguised restrictions on trade" are usually found in the context of exceptions (see paragraph 5(3) above), respectively of departures from non-discriminatory treatment (see paragraph 5(2)), what would be the implication and purpose of such a provision if it were included in the text of disciplines as according to the structure presently contemplated?
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Annex :

EXAMPLES OF PROVISIONS ON "DISGUISED RESTRICTIONS" IN WTO INSTRUMENTS

(All emphasizes are added)

GATS :

Article VII

Recognition

1. For the purposes of the fulfilment, in whole or in part, of its standards or criteria for the authorization, licensing or certification of services suppliers, and subject to the requirements of paragraph 3, a Member may recognize the education or experience obtained, requirements met, or licenses or certifications granted in a particular country. Such recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously.

2. A Member that is a party to an agreement or arrangement of the type referred to in paragraph 1, whether existing or future, shall afford adequate opportunity for other interested Members to negotiate their accession to such an agreement or arrangement or to negotiate comparable ones with it. Where a Member accords recognition autonomously, it shall afford adequate opportunity for any other Member to demonstrate that education, experience, licenses, or certifications obtained or requirements met in that other Member's territory should be recognized.

3. A Member shall not accord recognition in a manner which would constitute a means of discrimination between countries in the application of its standards or criteria for the authorization, licensing or certification of services suppliers, or a disguised restriction on trade in services.

5. Wherever appropriate, recognition should be based on multilaterally agreed criteria. In appropriate cases, Members shall work in cooperation with relevant intergovernmental and non-governmental organizations towards the establishment and adoption of common international standards and criteria for recognition and common international standards for the practice of relevant services trades and professions.

Article XIV

General Exceptions

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 this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

(a) necessary to protect public morals or to maintain public order;¹
[...]

¹ The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

GATS :

ANNEX ON TELECOMMUNICATIONS

5. *Access to and use of Public Telecommunications Transport Networks and Services*

(c) Each Member shall ensure that service suppliers of any other Member may use public telecommunications transport networks and services for the movement of information within and across borders, including for intra-corporate communications of such service suppliers, and for access to information contained in data bases or otherwise stored in machine-readable form in the territory of any Member. Any new or amended measures of a Member significantly affecting such use shall be notified and shall be subject to consultation, in accordance with relevant provisions of the Agreement.

(d) Notwithstanding the preceding paragraph, a Member may take such measures as are necessary to ensure the security and confidentiality of messages, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade in services.

GATT 1994 :

Article XX

General Exceptions

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 the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(a) necessary to protect public morals;
[...]

Agreement on Trade-Related Aspects of Intellectual Property Rights :

Article 3

National Treatment

1. Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection² of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits. In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement. Any Member availing itself of the possibilities provided in Article 6 of the Berne Convention (1971) or paragraph 1(b) of Article 16 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for TRIPS.

² For the purposes of Articles 3 and 4, "protection" shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement.

2. Members may avail themselves of the exceptions permitted under paragraph 1 in relation to judicial and administrative procedures, including the designation of an address for service or the appointment of an agent within the jurisdiction of a Member, only where such exceptions are necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement and where such practices are not applied in a manner which would constitute a disguised restriction on trade.

Agreement on the Application of Sanitary and Phytosanitary Measures :

Preamble

Reaffirming that no Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health, subject to the requirement that these measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Members where the same conditions prevail or a disguised restriction on international trade;

Article 2

Basic Rights and Obligations

1. Members have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provisions of this Agreement.
2. Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.
3. Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.

Article 5

Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection

1. Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.
2. In the assessment of risks, Members shall take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment.
3. In assessing the risk to animal or plant life or health and determining the measure to be applied for achieving the appropriate level of sanitary or phytosanitary protection from such risk, Members shall take into account as relevant economic factors: the potential damage in terms of loss

of production or sales in the event of the entry, establishment or spread of a pest or disease; the costs of control or eradication in the territory of the importing Member; and the relative cost-effectiveness of alternative approaches to limiting risks.

4. Members should, when determining the appropriate level of sanitary or phytosanitary protection, take into account the objective of minimizing negative trade effects.

5. With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade. Members shall cooperate in the Committee, in accordance with paragraphs 1, 2 and 3 of Article 12, to develop guidelines to further the practical implementation of this provision. In developing the guidelines, the Committee shall take into account all relevant factors, including the exceptional character of human health risks to which people voluntarily expose themselves.

Agreement on Technical Barriers to Trade :

Preamble

Recognizing that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement;

Agreement on Government Procurement :

Article XXIII

Exceptions to the Agreement

1. Nothing in this Agreement shall be construed to prevent any Party from taking any action or not disclosing any information which it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defence purposes.

2. 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 the same conditions prevail or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures: necessary to protect public morals, order or safety, human, animal or plant life or health or intellectual property; or relating to the products or services of handicapped persons, of philanthropic institutions or of prison labour.
