

New Discipline of WTO Services Domestic Regulation from the Perspective of Digital Economy

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Abstract: The entry into force of new disciplines on services domestic regulation was announced at the 13th Ministerial Conference (MC13) in Abu Dhabi on February 27. Though it, as a trade facilitation agreement in the service sector, does not directly relate to the opening of services market, the Reference Paper could impose sound regulation disciplines and improve the business environment for service sectors in the age of digital economy through strengthening the transparency of participating members on services domestic regulation measures, improving the service licensing and approval efficiency, reducing the cross-border transaction costs of service suppliers and other ways. To balance the regulatory autonomy of members and freedom of servicing, it did not incorporate the long-debated “necessity test”, which created space for further discussion. China has attached great importance to the development of the digital economy and trade in services in recent years and has actively contributed to the negotiations of the Reference Paper. The improvement of domestic regulation against the Reference Paper is conducive to the high-quality development of China's trade in services in the digital era.

Keywords: Reference Paper on Services Domestic Regulation (SDR Reference Paper), Trade in Services, Domestic Regulation, Digital Economy, “Necessity Test”, WTO

On February 27, 2024, the entry into force of new disciplines on services domestic regulation, announced at the 13th Ministerial Conference (MC13) in Abu Dhabi, is expected to lower trade costs by over USD 125 billion worldwide.¹ This development is of great significance to the WTO, which has been in trouble in recent years. On the one hand, the SDR Reference Paper

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This paper is a phase research result of the major project of National Social Science Foundation of China “The Belt and Road Initiative and Innovation of International Economic and Legal System” (Project Approval Number : 17ZDA144).

¹ WTO, New Disciplines on Good Regulatory Practice for Services Trade Enter into Force, https://www.wto.org/english/news_e/news24_e/serv_27feb24_e.htm (Last Visited on March 1, 2024).

will help participating members to further enhance the policy transparency in the field of services trade and improve the efficiency of service licensing and qualification approval, thus reducing the cross-border transaction costs of service suppliers and benefiting the faster development of international services trade in the era of digital economy; On the other hand, this open plurilateral negotiation model in the form of Joint Statement Initiative (JSI) helps to break the deadlock of WTO negotiations over the years, and makes an innovative attempt and landmark effort to revitalize the legislative function of WTO.²

The digital economy has put forward new standards and requirements for the domestic regulation of services trade.³ In the context of the rapid development of digital trade, how to balance the relationship between digital service suppliers, especially between giant technology enterprises and domestic regulation, which has triggered multi-level discussions on basic rights, privacy, competition, social and economic fairness, and sustainable development.⁴ Although the SDR Reference Paper reached through the JSI negotiation mode does not directly involve market access in the service sector, the organic integration of this achievement with the multilateral trading system in law will be conducive to promoting the facilitation of digital trade under the WTO framework.⁵ In this context, this study intends to analyze the origin and unique process of the SDR Reference Paper negotiation from the perspective of digital economy, and refine the core discipline of the SDR Reference Paper and its value and significance for the development of services trade. It also puts forward some suggestions to improve the domestic regulation and discipline of China's services trade by benchmarking against SDR Reference Paper, so as to promote the rapid development of China's services trade in the digital economy era.

2 Jingxia Shi, JSI/OPA as a Way to Reinvigorate the WTO Negotiation Function, *Studies in Law and Business*, No. 5, 2022, pp. 3–17.

3 Yuan Gao and Tao Wang, Focus Disputes and Development Trends of Digital Trade Negotiations under the TISA Framework, *International Business (Journal of the University of International Business and Economics)*, No. 1, 2018, pp. 149–156.

4 Burcu Kilic, Shaping the Future of Multilateralism – Digital Trade Rules: Big Tech's End Run Around Domestic Regulation, *Heinrich-Böll-Stiftung*, May 2021, pp. 4–20.

5 United Nations Conference on Trade and Development (UNCTAD), The Evolving Landscape of Digital Trade in Services: Note by the UNCTAD Secretariat, TD/B/C. I/MEM.4/26, May 10, 2022, pp. 7–8.

I. THE IMPORTANCE OF DOMESTIC REGULATION OF TRADE IN SERVICES AND THE WAY OF NEGOTIATION

A. Special Importance of Domestic Regulation for Trade in Services

The Uruguay Round, the last round of multilateral negotiations of the General Agreement on Tariff and Trade (GATT) from 1986 to 1994, included new topics on trade in services. This enabled GATT to expand from the traditional jurisdiction of trade in goods to trade in services, and successfully concluded the General Agreement on Trade in Services (GATS), which formally entered into force as a WTO package agreement on January 1, 1995. The service sector has now developed into the backbone of the global economy and the most dynamic component of international trade. Trade in services has been growing faster than trade in goods since 2011.⁶ However, compared with trade in goods, trade in services always faces higher transaction costs. This is due to the fact that services trade usually requires physical contact between suppliers and consumers, but more importantly, due to the sensitivity of service itself and the significant imbalance of development across countries, services trade is subject to more and more complex domestic regulatory measures. At the same time, given the intangible characteristics of services, barriers to trade in services are essentially regulatory or prescriptive in nature, basically in the form of “behind-the-border measures”, such as qualification, education, or training requirements for service suppliers. These measures are characterized by a high degree of heterogeneity and are difficult to reconcile at the international level.⁷

According to the comparison of the trade costs of the three industries by the WTO, the trade costs of services is much higher than that of agricultural products and industrial manufactured products. There are many factors affecting the costs of trade in services,⁸ with trade costs arising from domestic regulatory

⁶ WTO, World Trade Report 2019: The Future of Services Trade, 2019, p. 7.

⁷ See e.g., Bernard Hoekman and Michel Kostecki, *The Political Economy of the World Trading System: The WTO and Beyond*, Oxford University Press, 2001, p. 242. For more discussion of behind-the-border measures, see e.g., Thomas J. Bollyky and Petros C. Mavroidis, A Time for Action – The WTO Must Change to Promote Regulatory Cooperation, In Joseph Francois and Bernard Hoekman (Eds.), *Behind-the-border Policies – Assessing and Addressing Non-tariff Measures*, Cambridge University Press, 2019, pp. 299–338.

⁸ *Supra* n. 6, pp. 84–99.

barriers due to non-transparent regulatory policies, cumbersome licensing and approval processes, and unclear qualification requirements accounting for about 40 percent of the total cost of trade in services. This explains the importance and complexity of domestic regulation issues in trade in services. On the one hand, it is necessary for a country to regulate the service sector to achieve certain public interest objectives. On the other hand, domestic regulatory measures can be abused to cause discriminatory treatment of foreign suppliers and affect related services provisions,⁹ which is particularly evident in the case of digital trade. Therefore, the negotiation of services domestic regulation is of fundamental significance to promote or facilitate the development of services trade in the era of digital economy.

B. Starting Point for Negotiations on Domestic Regulation of Trade in Services: Article VI, Paragraph 4 of GATS

As the first set of multilateral principles and frameworks governing international trade in services in the world, the GATS rules have many original characteristics and need to be improved through continued negotiations. The GATS provisions themselves contain four embedded agendas,¹⁰ one of which is the negotiation of domestic regulation of trade in services based on Article VI, paragraph 4 of the GATS.¹¹ Article VI of the GATS (Domestic Regulation) contains six paragraphs, of which paragraph 4 provides that, with a view to ensure that measures relating to qualification requirements and procedures, technical standards and licensing 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. Such disciplines shall aim to ensure that such requirements are, *inter alia*: (i) based on objective and transparent criteria, such as competence and the ability to supply the service; (ii) not more burdensome than necessary to ensure the quality of the service; (iii) in the

9 Aaditya Mattoo and Pierre Sauvé (Eds.), *Domestic Regulation and Services Trade Liberalization*, The World Bank and Oxford University Press, 2003, pp. 1–6.

10 Three other embedded agendas include emergency safeguards, government procurement and service subsidies. GATS, Articles X, XIII & XV.

11 Panagiotis Delimatsis, *GATS Basics – Revisiting Some Basic Notions and Concepts of the General Agreement on Trade in Services*, Tilburg Law School Research Paper No. 01/2018, TILEC Discussion Paper No. 2018–003, 2018, p. 23.

case of licensing procedures, not in themselves a restriction on the supply of the service. This article is a mandate for multilateral negotiations on the issue of domestic regulation of trade in services.

It should be noted that Article XVI (Market Access) and Article XVII (National Treatment) of the GATS are specific commitments of WTO members, that is, members undertake positive list-based obligations in those service sectors or sub-sectors in which they have made access commitments.¹² The Market Access and National Treatment clauses and the corresponding commitment schedule reflect the specific obligations of WTO members in terms of services market access. But GATS negotiators are at the same time aware that licensing, qualification requirements and procedures granted to suppliers, and non-quantitative, non-discriminatory measures related to technical standards may also constitute real barriers or have adverse effects on trade in services. To this end, the negotiators incorporated the topic of domestic regulation into the GATS text as an embedded agenda.

This context helps to understand the purpose of negotiations and the disciplinary scope of the topic of domestic regulation of trade in services. For the purpose of the negotiations, in line with the specific commitments of Articles XVI and XVII of the GATS, the topic of domestic regulation is committed to seeking to establish good domestic regulation disciplines of trade in services, so as to help members better realize their service commitments and promote the growth of trade in services. The negotiations aim to establish any necessary discipline to ensure that measures relating to qualification requirements and procedures, licensing requirements and procedures and technical standards do not constitute unnecessary barriers to trade in services. Although the JSI Open plurilateral negotiations on domestic regulation of trade in services are different from the multilateral mandate of Article VI, paragraph 4 of GATS in legal nature, they inherit the unfinished multilateral negotiations of members in terms of negotiation purpose and disciplinary scope, and lay a

¹² Market access restrictions include quantitative restrictions, such as limits on the number of service suppliers, the total value of service transactions or assets, the total number of service operations, the total number of service outputs, the total number of people that can be employed, restrictions or requirements on specific types of legal entity or joint venture measures and restrictions on foreign equity. In contrast to domestic services and service suppliers, the national treatment obligation then prohibits discriminatory treatment of foreign services and service suppliers. GATS, Articles XVI and XVII.

necessary foundation for the smooth integration of the SDR Reference Paper into the GATS framework.

C. A Unique Negotiation Path from Multilateral to Open Plurilateral

1. Multilateral Negotiations on Domestic Regulation of Trade in Services

After the establishment of the WTO, the Council for Trade in Services authorized the adoption of the Decision on Domestic Regulation based on Article VI, paragraph 4 of the GATS,¹³ and started negotiations on domestic regulation issues. The multilateral mandate involves horizontal disciplines that applies to all services sectors, but the Council decided to start with professional services first and in 1998 adopted the Decision on Disciplines Relating to the Accountancy Sector.¹⁴ After that, the Council for Trade in Services established the Working Party on Domestic Regulation (WPDR) in 1999 to develop horizontal disciplines that are generally applicable to all service sectors, while developing special disciplines that apply to individual service sector as needed. Under the auspices of WPDR, by the end of 2011, more than 60 WTO members had submitted proposals on domestic regulation of trade in services.¹⁵ Since then, multilateral negotiations on domestic regulation of trade in services have progressed slowly due to the stalemate in the Doha Round.¹⁶

2. JSI Open Plurilateral Negotiations on Domestic Regulation of Trade in Services

The failure of multilateral negotiations on domestic regulation of trade in services to achieve final results is not only related to the complexity of the issue itself, but also a concrete embodiment of the overall stagnation and even failure of the WTO multilateral negotiations. Some members are considering how

13 WTO, Decision on Domestic Regulation, adopted by the Council for Trade in Services on 26 April 1999, S/L/70, April 28, 1999.

14 WTO, Decision on Disciplines Relating to the Accountancy Sector, adopted by the Council for Trade in Services on 14 December 1998, S/L/63, December 15, 1998.

15 WTO, Disciplines on Domestic Regulation Pursuant to GATS Article VI:4 – Chairman's Progress Report, S/WPDR/W/45, April 14, 2011.

16 The WPDR last met in March 2019, and the talks haven't been updated since then. WTO, WTO Negotiations on Domestic Regulation Disciplines, https://www.wto.org/english/tratop_e/serv_e/dom_reg_negs_e.htm (Last Visited on January 12, 2023).

to break the long-term deadlock in negotiations and reinvigorate the WTO's legislative function.¹⁷ Especially in the context of the rapid development of the digital economy, if the WTO rules cannot be updated in time, they will gradually lose their central position and even relevance in the international trading system.¹⁸ In this context, at the 11th WTO Ministerial Conference held in December 2017, some WTO members began to explore the launch of open plurilateral negotiations by means of JSI. Among them, 59 WTO members issued a joint statement initiative on the negotiation of domestic regulation on trade in services, and decided to continue to negotiate and formulate disciplines to reduce undue restrictions on trade in services caused by domestic regulation based on the previous work of Working Party on Domestic Regulation (WPDR). The negotiation content is basically the same as before, involving licensing requirements, qualification requirements and related procedures and technical standards for service suppliers.¹⁹ The negotiating members met regularly at the WTO, and as open plurilateral negotiations allow all WTO members to participate, more WTO members such as the United States and Singapore had joined in the negotiation process.

In September 2021, text-based negotiations were completed, and the results were reflected in the SDR Reference Paper.²⁰ More importantly, participating members intended to incorporate the SDR Reference Paper in their service commitment tables in the form of “additional commitments” under Article XVIII of the GATS, which was a key link in integrating the outcomes of the open plurilateral negotiations into the WTO's multilateral mechanism. In December 2021, 67 WTO members issued the Declaration on the Conclusion of Negotiations on Services Domestic Regulation, confirming the successful completion of the negotiations on the Joint Initiative on Services Domestic

17 Bernard Hoekman, Plurilateral Agreements, Variable Geometry and the WTO, In **Andreas Dür** and **Manfred Elsig** (Eds.), *Trade Cooperation: The Purpose, Design and Effects of Preferential Trade Agreements*, Cambridge University Press, 2015, pp. 533–535.

18 Patrick Low, The WTO in Crisis: Closing the Gap between Conversation and Action or Shutting Down the Conversations? *World Trade Review*, Vol. 21, Special Issue 3: WTO at a Crossroads: The WTR 20th Anniversary Issue, 2022, pp. 274–290.

19 WTO Ministerial Conference Eleventh Session, Joint Ministerial Statement on Services Domestic Regulation, WT/(MIN)17/61, December 13, 2017.

20 WTO, Joint Initiative on Services Domestic Regulation – Reference Paper on Services Domestic Regulation, Note by the Chairperson, INF/SDR/1, September 27, 2021.

Regulation. And they announced the formal conclusion of the SDR Reference Paper and decided to complete the domestic procedures within one year.²¹ The SDR Reference Paper is dedicated to improving the transparency, predictability and efficiency of the authorization process for service suppliers who wish to operate in other member markets.²² At the 12th WTO Ministerial Conference in June 2022, Georgia, Timor-Leste and the United Arab Emirates announced their accession to the Joint Initiative on Services Domestic Regulation. As the number of participants in the Joint Initiative has reached 70, accounting for 92.5% of the total global trade in services, the SDR Reference Paper has become a Critical Mass Agreement (CMA).²³

Since the 11th WTO Ministerial Conference in December 2017, the open plurilateral negotiations of the JSI have attracted a lot of attention and are considered as an important way to revitalize the negotiating function of the WTO.²⁴ The WTO has not clearly defined the JSI negotiations, which can be understood as open plurilateral negotiations initiated by some members on a specific issue or field without a consensus decision-making mechanism. Openness is a core element of the JSI negotiations, and WTO members can freely choose to participate in the negotiations or accept the results of the negotiations. If the participating members achieve critical mass coverage, the outcome of the negotiations may be extended to all WTO members on the basis of the MFN principle.²⁵ The participating members of the JSI negotiations on domestic regulation of trade in services have reached a critical mass, and the additional commitments based on the SDR Reference Paper are legally binding and will be applied to all WTO members in accordance with the MFN principle. In December 2022, 59 participants submitted to the WTO their Schedules of Specific Commitments for incorporation in the SDR Reference Paper in the form of additional commitments. At this point, the first negotiation

21 WTO, Declaration on the Conclusion of Negotiations on Services Domestic Regulation, WT/L/1129, December 2, 2021.

22 WTO, Joint Initiative on Services Domestic Regulation – Reference Paper on Services Domestic Regulation, INF/SDR/2, November 26, 2021.

23 The CMA is also known as a “critical mass agreement”. See Gary Winslett, Critical Mass Agreement: The Proven Template for Trade Liberalization in the WTO, *World Trade Review*, Vol. 17, No. 3, 2018, pp. 405–406.

24 Bernard Hoekman and Charles Sabel, Plurilateral Cooperation as an Alternative to Trade Agreements: Innovating One Domain at a Time, *Global Policy*, Vol. 12, No. 3, 2021, pp. 49–60.

25 *Supra* n. 2.

results obtained by the JSI open plurilateral model have been integrated into the WTO's multilateral trading system in a unique way, creating a historic precedent for the creation of new rules by this negotiation model. In this sense, the conclusion of the SDR Reference Paper is of symbolic significance for the revival of the WTO's negotiation function, and can provide important references for the negotiation of other JSI issues.

II. CORE CONTENT OF THE SDR REFERENCE PAPER AND "NECESSITY TEST"

A. Specific Disciplines of the SDR Reference Paper

The SDR Reference Paper includes three parts: general provisions, specific requirements and special rules for financial services, which contains a total of 53 clauses. Among them, the general provisions stipulate the basic purpose, mission and development orientation of the SDR Reference Paper. The specific disciplines on services domestic regulation are in Part II of the SDR Reference Paper. In terms of domestic regulation of financial services, participating members may choose to apply Part III of the SDR Reference Paper, which has only three minor differences from Part II.

1. General Provisions: Basic Purpose, Mission and Development Orientation

In its preamble, the general provisions of the SDR Reference Paper first mention that the objective of the negotiations is to elaborate upon more detailed domestic regulation and disciplines on trade in services according to Article VI, paragraph 4 of the GATS.²⁶ By sectoral coverage and scheduling modalities, the SDR Reference Paper further makes clear that its discipline applies to service sectors where participants have made specific commitments under Article XVI (Market Access) and Article XVII (National Treatment) of the GATS. The SDR Reference Paper is not applicable if members have not made specific commitments to the services sector or sub-sector based on Articles XVI and XVII of the GATS.²⁷ This indicates that the SDR Reference Paper is not directly

²⁶ SDR, para. 1.

²⁷ SDR, paras. 1–3.

concerned with services market access, but rather promotes trade facilitation in service sectors where members have committed to opening. At the same time, these disciplines will be inscribed in their Schedules through GATS Article XVIII (Additional commitments). Therefore, the plurilateral negotiation result of the SDR Reference Paper not only inherits the previous multilateral negotiation tasks,²⁸ but also integrates into the WTO multilateral framework in a unique way.

It is worth noting that the general provisions of the SDR Reference Paper reflect a development orientation in part, with particular attention to the specific difficulties that service suppliers, especially in developing and least developed members, may face in complying with measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards. To this end, the SDR Reference Paper notes the uneven development of services regulation among members and recognizes the right of participating members to introduce new measures to regulate services and suppliers in their territories to achieve their legitimate policy objectives. In terms of specific system, the SDR Reference Paper provides relatively lenient arrangements for developing and least developed members to apply the disciplines of the SDR Reference Paper. On technical assistance and capacity building, the SDR Reference Paper encourages members of the developed countries and some members of the developing countries to provide technical assistance to the least developed or some developing members to enhance their capacity to regulate trade in services on mutually agreed terms and conditions.²⁹ The development orientation is an important response to the doubts raised by India, South Africa and other members about the legitimacy of open plurilateral negotiations.³⁰ In the era of digital economy, imbalances among WTO members in the field of technological development and services trade may lead to a new digital divide, thus aggravating the concerns of developing and least developed members about accepting domestic regulation and disciplines of services

28 SDR, paras. 7–9.

29 SDR, paras. 10–12.

30 *Supra* n. 2.

trade.³¹ The SDR Reference Paper's emphasis on development orientation and related disciplinary arrangements not only pay attention to the needs of developing and least developed members, but also help these members to establish and improve their service regulatory capacity and governance in the long run, and promote the competitiveness of their services market and services trade.

2. Specific Disciplines of Domestic Regulation of Trade in Services

The second part of the SDR Reference Paper includes 22 clauses. These clauses detail the requirements for disciplines for the regulation of trade in services by participating members, including the scope of the disciplines, the application of service suppliers to provide services and the requirements of related procedures, the qualification assessment and recognition of service suppliers, the independence of service regulatory authorities and the transparency of regulation and discipline, etc.

Based on Article VI, paragraph 4 of the GATS, the domestic regulatory disciplines set out in the SDR Reference Paper applies to measures “affecting” trade in services taken by participating members “relating to” Qualification Requirement and Procedures (QRP),³² Licensing Requirement and Procedures (LRP)³³ and Technical Standards (TS)³⁴ in the service sectors to which they have committed. According to the jurisprudence developed by the WTO Dispute Settlement Body over the years, the term “affecting” used here shows the wide range of measures covered by the SDR Reference Paper.³⁵ In other words, even

31 Leonila Guglya and **Marilia Maciel**, *Addressing the Digital Divide in the Joint Statement Initiative on E-commerce: From Enabling Issues to Data and Source Code Provisions*, International Institute for Sustainable Development and CUTS International, Geneva, 2022, pp. 23–24.

32 For an interpretation of these measures, see WTO, Report on the Meeting Held on November 29, 2001, S/WPDR/M/14, 2002, para. 8.

33 See WTO, The Relevance of the Disciplines of the Agreement on Technical Barriers to Trade (TBT) and on Import Licensing Procedures to Article VI.4 of the General Agreement on Trade in Services, S/WPPS/W/9, 1996, para. 4.

34 Technical standards include requirements related to the characteristics of the service itself and the manner in which the service is provided, such as the code of conduct for lawyers. Voluntary standards in these areas also generally fall under such measures.

35 WTO, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, September 9, 1997, para. 220; *Canada – Certain Measures Affecting Automotive Industry*, WT/DS139/AB/R, May 31, 2020, pp. 158–160.

if a QRP, LRP or TS belongs to the field of trade in goods, it still falls under the jurisdiction of the SDR Reference Paper as long as it affects the provision of related services. Furthermore, the term “affecting” also implies that the SDR Reference Paper discipline applies not only to measures that directly regulate the committed service sectors of members, but also to measures that regulate other non-committed service sectors but affect committed ones. Moreover, the three categories of measures, QRP, LRP and TS, overlap in practice, for example, the requirements concerning competence apply to natural persons and companies. But does the competence requirement apply only to natural persons? Is the requirement for a company’s competence a qualification requirement or a licensing requirement? Once a license to provide the services is granted, the license holder shall maintain compliance with the standards under which the license is granted. Then in terms of the company’s operating standard, should it be classified as an initial authorization or licensing requirement that allows the provision of services, or as a TS that the company should maintain for ongoing operations? These distinctions are particularly relevant for important services such as banking.

Regulatory transparency is one of the important disciplines stipulated in the SDR Reference Paper, which is reflected in four clear requirements that regulatory authorities of member governments shall follow. First, regulatory measures such as laws, regulations and administrative rulings to be implemented need to be announced in advance; second, service suppliers should be given the opportunity to fully participate in the formulation of relevant policies; third, information on administrative approvals involving service suppliers should be made public in a timely manner; and fourthly, appropriate mechanisms for responding to enquiries shall be established.³⁶ In addition, the SDR Reference Paper requires participating members to ensure the independence of their competent authorities regulating trade in services and to conduct service licensing or qualification approval based on objective and transparent criteria. Through the footnote, the SDR Reference Paper further clarifies that the independence standard does not mandate a particular

³⁶ SDR, paras. 13–20.

administrative structure, but refers to the decision-making process and administering of decisions.³⁷

On the issue of TS, the SDR Reference Paper requires members to encourage their competent bodies to develop technical standards in an objective, impartial, open, transparent and non-discriminatory manner. If a participating member adopts or maintains measures related to the authorization of service provision, it shall ensure that such measures are based on objective and transparent criteria, including the competence to provide services and provide services in a manner that meets the member's regulatory requirements (such as health and the environment). The WTO Appellate Body interprets "based on" as "established on" or "built upon", which is somewhat more flexible than the term "complied with".³⁸ In other words, "based on" requires that there is a positive connection between the regulatory measures and some standards outside the regulation, that is, the regulatory measures should be "based" on the scientific knowledge system or objective standards. "Objective" means non-arbitrary, non-subjective, non-biased, considering the ability to provide services and based on international standards, etc.³⁹ The competent authority may assess the weight assigned to each criterion, but the procedure for developing such measures should be impartial. If there are specific requirements for the measures, there should be an opportunity for the applicant to demonstrate whether the requirements are met, etc.⁴⁰

In addition, the SDR Reference Paper includes for the first time provisions on gender equality of service suppliers, but the footnote specifies that reasonable, objective differential treatment aimed at achieving legitimate purposes and temporary special measures adopted by members at accelerating the realization of *de facto* equality between men and women, which shall not be regarded as discrimination within the meaning of this Article.⁴¹ This is a noteworthy new development in the WTO's efforts to support women's

37 SDR, para. 12; *Supra* n. 11.

38 WTO, EC – Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, WT/DS48/AB/R, January 16, 1998, para. 163; WTO, Mexico – Measures Affecting Telecommunications Services, WT/DS204/R, April 2, 2004, paras. 7.167–7.168.

39 WTO, Report on the Meeting Held on 22 November 2004, S/WPDR/M/28, January 25, 2005, para. 25.

40 SDR, paras. 21–22; *Supra* n. 17.

41 SDR, para. 22(d); *Supra* n. 18.

economic empowerment and link trade with the social value of gender equality.⁴²

3. Special Arrangements on Disciplines on Services Domestic Regulation for Financial Services

As the largest service sector by value, finance is critical to countries' economies and is often subject to stricter regulatory requirements.⁴³ At the same time, the development of the financial industry is greatly influenced by technology, and it has a closer relationship with other service sectors under the condition of digital economy, and even plays an important role in payment guarantee for other service sectors. Some of the biggest tech firms, such as Apple, Amazon, Tencent and Alibaba, get a growing share of their revenues from financial services.⁴⁴

Taking into account this particularity and sensitivity of financial services and regulatory measures, the participants decided to treat them with a more limited differentiation during the negotiation process. Section III of the SDR Reference Paper provides special financial service regulatory rules. This section is basically the same as the requirements of the second section, but does not include the provisions of the three paragraphs of "single window" approval, technical standard formulation and mutual recognition of industry qualifications, providing the participants with a moderate and flexible regulatory space in terms of financial services-related licensing and employee qualification application and approval.⁴⁵ The transparency obligations stipulated in Section II of the SDR Reference Paper will be retained, which may have a certain impact on the achievement of certain regulatory objectives by financial authorities of participating members or bring heavy administrative costs to developing members. Therefore, it is recommended that transparency obligations in the financial services sector be interpreted in a way that facilitates participating

42 Anoush D. Boghossian, Trade Policies Supporting Women's Economic Empowerment: Trends in WTO Members, WTO Staff Working Paper, No. ERSD-2019-07, 2019; WTO, Gender Equality, Women's Economic Empowerment and Sustainable Trade, Aid for Trade Global Review 2022, pp. 163.

43 Kern Alexander, The GATS and Financial Services: The Role of Regulatory Transparency, *Cambridge Review of International Affairs*, Vol. 20, No. 1, 2007, pp. 111-112.

44 See e.g., Insider Intelligence, Financial Services Industry Overview in 2022: Trends, Statistics and Analysis, January 6, 2022, <https://www.emarketer.com/insights/financial-services-industry/> (Last Visited on January 10, 2023).

45 SDR, Section III – Alternative Disciplines on Service Domestic Regulation for Financial Services.

members to exercise their supervisory autonomy in order to help members achieve their prudential supervision objectives.

B. Balance between Regulatory Rights and Liberalization: SDR Reference Paper and “Necessity Test”

Services domestic regulation is the issue on which some WTO members first achieved a major breakthrough through the JSI open plurilateral negotiation model. On the one hand, the SDR Reference Paper requires the participating members to follow the standards of transparency, opening, fairness and independent evaluation when implementing the three types of domestic regulatory measures on services trade, such as qualification requirements, licensing and technical standards, and make it as convenient as possible for suppliers to submit applications and quickly process applications. This is an important measure and guarantee to reduce the costs of services trade, and is conducive to ensuring that the effect of service commitments made by members will not be improperly impaired by domestic regulatory measures. On the other hand, the SDR Reference Paper recognizes that participating members have the right to introduce new regulatory measures to regulate the provisions of services in their territories in order to achieve their policy objectives. In other words, domestic regulatory disciplines should not be interpreted as imposing any specific regulatory requirement on members at the level of measure implementation, nor should it be interpreted as curtailing any obligations of members under the GATS.⁴⁶ This leads to the important question of how to ensure the regulatory autonomy of members over the services market while promoting facilitation of services provision. It is noteworthy that the SDR Reference Paper does not incorporate the “necessity test” standard that has long been debated in this field.

1. Core Meaning of “Necessity Test”

As a fundamental principle in the WTO legal system, the “necessity test” seeks to strike a balance between two important objectives. On the one hand,

⁴⁶ SDR, paras. 3, 5 & 6.

it preserves the freedom of WTO members to achieve their particular policy goals through regulatory measures; on the other hand, it prevents members from adopting or maintaining measures that cause undue restrictions on trade, namely, it requires members to choose measures that have the least trade-restrictive impact, thus avoiding the creation of unnecessary barriers to trade.⁴⁷ The “necessity test” requires that members should still employ economically efficient policy options when remedying market failures and pursuing non-economic regulatory objectives. For example, when a professional license is granted, the requirement may be considered an unnecessary burden on the supplier if the supplier is required to re-acquire a qualification. The key issue here is whether the supplier has the skills needed to supply the service, which can be addressed by a less burdensome competency test.

In the WTO legal system, the “necessity test” appears both in the exception provisions and in the obligation or rule provisions.⁴⁸ In provisions that are obligations or rules, “necessity tests” are usually combined with an exemplary list of policy objectives, while exception provisions generally contain an exhaustive list. Whether the “necessity test” is an obligation to be observed by members or an exception that can be invoked is decisive for the allocation of the burden of proof in dispute resolution.⁴⁹ For a long time, when dealing with cases invoking exceptions, the WTO Dispute Settlement Body usually uses the “necessity test” to delimit the boundary between legitimate regulation and trade protectionism, and judges whether the respondent’s measures conform to the “general exceptions” stipulated in Article XX of GATT or Article XIV of GATS. This aspect has developed a relatively mature jurisprudence and

47 Panagiotis Delimatsis, Determining the Necessity of Domestic Regulation in Services, the Best Is Yet to Come, *The European Journal of International Law*, Vol. 19, No. 2, 2008, pp. 365–366.

48 The “necessity test” provisions of the nature of obligations in the WTO agreements are provided in Article VI:4, Article V and Article XII:2(d) of the GATS, Articles 2.2, 3 and 5 of the TBT Agreement, Articles 2.2 and 5.6 of the SPS Agreement and Article 8.1 of TRIPS. The provisions of the “necessity test” that are exceptional in nature include: Article XIV of the GATS and paragraph 5(e) of the Annex on telecommunications; Articles XI:2(b) and (c), XX of the GATT; Article 3.2 and Article 27.2 of TRIPS; Article 23.2 of the Agreement on Government Procurement, etc.

49 Hoekman and Messerlin, Liberalizing Trade in Services: Reciprocal Negotiations and Regulatory Reform, In Pierre Sauvé and Robert M. Stern (Eds.), *GATS 2000: New Directions in Services Trade Liberalization*, Brookings Institution Press, 2000, pp. 487 & 493.

methods of argumentation.⁵⁰ If the exception clause is invoked, the respondent must show that the measures it has taken meet the “necessity test”. However, when the “necessity test” appears in the rules or obligatory clauses, it is up to the complainant to prove that its alleged measures of the respondent do not meet the “necessity test”.

2. Debate for the Incorporation of the “Necessity Test” in the Domestic Regulation of Services

Whether the “necessity test” can be imposed as a horizontal discipline on the domestic regulation of the services trade of members has long been controversial. According to the supporting view, the core task of domestic regulation negotiations on trade in services under the mandate of Article VI paragraph 4 of the GATS is to create meaningful and enforceable disciplinary standards to ensure that members’ regulatory measures related to qualifications, licensing, and technical standards do not restrict trade in services more than is necessary to achieve their legitimate policy objectives. Given that the “necessity test” is a key criterion for drawing the line between legitimate regulatory intervention and trade protectionism, the inclusion of the “necessity test” in domestic regulatory discipline is a prerequisite for fulfilling the mandate of Article VI, paragraph 4. Without the “necessity test”, the WTO Dispute Settlement Body will lack the benchmark for judging whether a measure at issue should be maintained or revoked, some barriers that may seriously hinder services trade will not be solved, and the domestic regulation and discipline of services trade will become worthless.⁵¹ The opposition points out that Article VI, paragraph 4 of the GATS authorizes WTO members to continue to negotiate domestic regulation and disciplines on trade in services, but its own language is “not more burdensome than necessary to ensure the quality of the service” and does not involve other regulatory objectives other than the quality of service. The paragraph therefore does not require members to adopt the “necessity test” in subsequent negotiations.

50 WTO cases involving exceptional invocation include: WT/DS58, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*; WT/DS149, *India – Import Restrictions*; WT/DS 285: *United States – Measures Affecting the Cross-border Supply of Gambling and Betting Services*; WT/DS297, *Croatia – Measures Affecting Imports of Live Animals and Meat Products*; WT/DS343: *United States – Measures Relating to Shrimp from Thailand*; DS 595: *European Union – Safeguard Measures on Certain Steel Products*, etc.

51 *Supra* n. 47, pp. 367 & 401.

3. Pluralistic and Diverse Legal Approaches to International Dispute Settlement

The “necessity test” as a measurement tool attempts to strike a balance between each member’s autonomy to regulate within its jurisdiction and the liberalization of trade in services. It applies the standard to the domestic regulation discipline, and the core of which requires members to ensure that domestic regulation measures related to licensing, qualification and technical standards do not constitute unnecessary barriers to trade in services. In effect, the “necessity test” has been incorporated in the first domestic regulatory discipline document mandated under Article VI, paragraph 4 of the GATS, the 1998 Disciplines on Domestic Regulation in the Accountancy Sector (Draft). The Draft requires members to ensure that the development, implementation or adoption of measures relating to licensing requirements and procedures, qualification requirements and procedures and technical standards in the service sectors specified in their GATS commitment lists do not restrict trade to a greater extent than is necessary to achieve their legitimate objectives. “Legitimate objectives” are then defined as consumer protection (all users of accounting services and the public generally), the quality of the service, professional competence, and the integrity of the profession.⁵²

In the negotiations on horizontal disciplines of domestic regulation of trade in services, although some members (such as Australia and New Zealand) advocated the inclusion of the “necessity test”, the United States, India and other members opposed the inclusion of this standard considering that domestic regulatory autonomy might be weakened.⁵³ Beyond the debate, the inclusion of the “necessity test” as a horizontal discipline applicable to all service sectors leaves a number of key issues unresolved. For example, even if the Disciplines on Domestic Regulation in the Accountancy Sector

52 Disciplines for Accountancy Sector, para. 2; Claude Trollet and John Hegarty, *Regulatory Reform and Trade Liberalization in Accountancy Service*, In Aaditya Mattoo and Pierre Sauvé (Eds.), *Domestic Regulation and Services Liberalization*, Oxford University Press, 2003, pp. 147–156.

53 See e.g., United States, Outline of the US Position on a Draft Consolidated Text in the GATS Working Party on Domestic Regulation (Disciplines and Principles), https://ustr.gov/archive/assets/Trade_Sectors/Services/asset_upload_file142_1037.pdf (Last Visited on January 14, 2023); Yan Zhang et al., Research on Domestic Regulation of Services Trade: From the Perspective of WTO Negotiation Model, *International Business Studies*, No. 2, 2022, 37–47.

defines “legitimate objectives” that apply only to the accounting sector, is it necessary and possible for negotiating members to develop a list of legitimate policy objectives that apply to all service sectors? As for the specific judgment criteria of the “necessity test”, how to define terms such as “minimum trade restriction” and “not exceeding the necessary limit”? As obligatory rules, to what extent can the interpretation of these terms draw on the exceptional jurisprudence developed by the WTO Dispute Settlement Body? How can the trade and policy implications associated with measures be considered at the legal level when interpreting whether the “necessity test” criteria are met? Due to the heterogeneous nature of the service sector, professional qualifications and access procedures developed by many countries are considered unique and therefore difficult to apply to foreign suppliers, resulting in a reluctance to assume specific obligations such as the qualification and licensing of professionals.⁵⁴ Thus, even if these technical issues can be resolved through negotiations, the obstacle to including the “necessity test” is the lack of political will on the part of some members, including the United States and Canada.⁵⁵

In view of the above considerations, the consensus reached among participating members in the negotiation of the SDR Reference Paper seems to be that, in addition to requiring the domestic regulation of services trade to be based on the standards of objectivity, transparency, fairness and non-discrimination, no stricter discipline will be imposed on the participating members, so the “necessity test” is not included. Firstly, much is made of the high degree of complexity involved in developing universally applicable horizontal disciplines in services trade, which covers so many sectors. Secondly, as cross-border supply of services becomes more common in the digital economy, countries attach greater importance to the exercise of regulatory autonomy in sensitive service areas and are therefore reluctant to commit to more mandatory obligations. Finally, as the outcome of JSI open plurilateral negotiations, the SDR Reference Paper should also consider whether it can be

⁵⁴ On the heterogeneous nature of services and the barriers to trade in services, See e.g., Henk Kox and Arian Lejour, *Regulatory Heterogeneity as Obstacle for International Services Trade*, CBP Discussion Paper, No. 49, September 2005, <https://www.cpb.nl/sites/default/files/publicaties/download/regulatory-heterogeneity-obstacle-international-services-trade.pdf> (Last Visited on January 10, 2023).

⁵⁵ Gilles Muller, *The “Necessity Test” and Trade in Services: An Unfinished Business?* *Journal of World Trade*, Vol. 49, No. 6, 2015, pp. 951–967.

accepted by more members to a certain extent, so as to lay a good foundation for its smooth integration into the GATS multilateral trading system.⁵⁶ These factors may explain why the SDR Reference Paper does not include the “necessity test”. However, from the perspective of further developing domestic regulation and discipline of services trade, the “necessity test” is still an important issue that requires continued attention by WTO members.

III. ANALYSIS ON THE VALUE AND SIGNIFICANCE OF SDR REFERENCE PAPER FROM THE PERSPECTIVE OF DIGITAL ECONOMY

A. New Challenges Faced by Services Domestic Regulation in the Context of Digital Economy

The WTO’s World Trade Report 2019: The Future of Services Trade explores why services globalization is taking place and its implications for the world economy, and focuses on where members need to update their policies and approaches to services regulation. In particular, the report points out that with the development of digital technology, a considerable part of services trade no longer requires face-to-face contact between suppliers and consumers, but is carried out through cross-border supply methods through the Internet, such as distance teaching, medical consultation and even surgery, which greatly reduces the costs of international services trade and benefits the service supply of developing countries and micro, small and medium-sized enterprises. Trade in services has become an important driver of globalization in the 21st century, which will gradually change the world’s economic pattern.⁵⁷ In fact, observing the development process of international services trade can fully perceive the far-reaching impact of technological progress in this field. Digitalization is fundamentally changing international trade, and both trade methods and objects show obvious “digitalization” characteristics.⁵⁸ From the supply-side

56 Bernard Hoekman, *Facilitating Trade in Services*, World Bank Group Policy Research Working Paper No. 9228, May 2020, pp. 18–19.

57 *Supra* n. 6, pp. 10–11.

58 China Academy of Information and Communication Technology: *Annual Observation Report on Global Digital Economic and Trade Rules (2022) (Jizhi White Paper)*, No. 202211, July 2022, pp. 1–4.

perspective, as digital technologies become more widely used, more services can be supplied across borders. This changes the existing international labor division system and impacts the income and distribution pattern of global value chains to a certain extent. On the demand side, digital trade blurs the distinction between the trade in goods and the supply of services, offering consumers a wider range of choices but posing unprecedented regulatory challenges.⁵⁹

The GATS rules were formed in the early 1990s, when the Internet was in its infancy. With the rapid development of internet technology and the advent of the digital economy era, the GATS rules, including Article VI domestic regulation provisions, have significantly lagged behind the needs of global digital trade. In view of the fundamental changes brought about by technological development in services trade, there is still much room for improvement in the breadth and depth of market opening in e-commerce related sectors, such as information and communication technology (ICT) services. At the same time, in the context of digital economy, countries are facing more complex problems in the domestic regulation of services trade. While it is relatively easy for WTO members to regulate foreign suppliers of services through Mode III, “commercial presence”, it is more difficult to regulate cross-border service supply through other modes. Members restrict foreign suppliers for reasons such as privacy protection, personal data and network security, resulting in stricter regulatory policies and barriers to trade in services.⁶⁰ These measures may either manifest themselves as substantive issues such as market access and non-discriminatory treatment affecting suppliers, or constitute barriers to trade in services through licensing, qualification and related procedural requirements. Most services trade barriers increase the operating costs of foreign suppliers, offset the convenience and low costs of service supply brought by technological progress, and especially increase the trade burden of service suppliers of micro, small and medium-sized enterprises. Therefore, in the era of digital economy, it is very important for WTO members to expand services trade by improving domestic regulation to reduce the costs of international services trade.

59 Chunming Zhao and Lei Wen, Logic and Policy Suggestions of Digital Economy Boosting Services Trade, *Opening Herald*, No. 6, 2021, pp. 38–46.

60 WTO, Adapting to the Digital Trade Era: Challenges and Opportunities, WTO Chairs Program, Edited by Maarten Smeets, 2021, pp. 339–341.

B. Complementarity between Services Market Opening and Domestic Regulation and Discipline

Although technology has contributed to the rapid expansion of international trade in services, it is not the only factor that facilitates or influences its development, and technological innovations that make it easier for service suppliers to access global markets also expose previously protected domestic service sectors to increased international competition. To some extent, the development of digital trade has blurred the distinction between manufacturing and services, goods trade and service supply, and a country may develop more domestic regulatory measures affecting services trade.⁶¹ As mentioned above, policy barriers to trade in services are inherently more complex than those to trade in goods. Measures that affect trade in goods, such as tariffs and quotas, are relatively explicit, while those that affect service supply, such as qualification requirements, licensing procedures, and personalized service standards, are relatively implicit and difficult to address.

In addition to their negative effects on trade, poorly designed domestic regulatory measures may also harm the market dynamism of the overall service sector, thus placing a heavy burden on service suppliers and consumers.⁶² Therefore, the services market opening alone is not enough, and must be accompanied by good domestic regulation and discipline of services trade to enable members to obtain full trade benefits. In other words, technological development promotes the digital transformation of the service sector, while good domestic regulation and disciplines help to reduce the costs of services trade. In most service sectors, market opening needs to be supported and strengthened by appropriate domestic regulatory measures, and stronger regulation and governance are necessary for trade opening to realize its potential economic benefits.⁶³ Only by organically combining domestic regulation and discipline reform with services market opening negotiations can the great potential of services trade development be fully harvested in

61 OECD, *The Impact of Digitalization on Trade*, Trade Policy Brief, October 2019; Hallward-Driemeier, M. and Nayyar, G., *Trouble in the Making? The Future of Manufacturing-led Development*, Washington, DC: World Bank Group, 2018.

62 *Supra* n. 6, p. 164.

63 *Supra* n. 6, pp. 159–160.

the era of digital economy. And until further opening of services markets can be negotiated, members should do their best to ensure that the actual effectiveness of those commitments is not undermined by the improper exercise of domestic regulatory measures. This is a fundamental requirement for the complementarity of services market opening and domestic regulatory reform.

C. SDR Reference Paper Is An Important Achievement of Services Regulation Cooperation in the Digital Economy Era

To evaluate a country's service industry governance level, it is necessary to break through the traditional trade theory and consider the diversity of service supply modes and the unique domestic regulatory measures that produce trade protection effect in the service field. With the continuous development of technology-driven services trade, domestic regulatory measures and quality play a more important role in ensuring the benign growth and inclusive development of services trade. This explains to a large extent the intrinsic motivation for countries to cooperate in the discipline of domestic regulation of trade in services. However, due to the sensitivity and complexity of domestic regulation of services trade, it is difficult to reach an agreement on domestic regulation among 164 WTO members at the same time. Benefiting from the multilateral negotiating work basis authorized by Article VI, paragraph 4 of the GATS, some members have cooperated in a number of regional or bilateral trade agreements on reducing barriers to trade in services and improving regulatory measures, and reached procedural clauses on enhancing transparency, granting qualifications and granting licenses, which have facilitated the cross-border supply of services.⁶⁴ This has laid a good foundation for some members to negotiate JSI domestic regulation issues and reflects the interaction and influence among regional, plurilateral and multilateral agreements. However, the participating members of the SDR Reference Paper include China, the United States and Europe and other global services trade powers, whose influence and radiation effect far exceed regional or bilateral agreements, and the SDR Reference Paper is a significant result in services regulation cooperation in the era of digital economy.

64 Tianyou Xia and Ying Liu, WTO Agreement on Domestic Regulation of Trade in Services: Development, Comparison and Response, *International Economic Review*, No. 1, 2023.

The SDR Reference Paper is similar in nature to the Trade Facilitation Agreement in the field of goods trade. In the era of digital trade, the SDR Reference Paper can optimize the licensing and approval process of members in the field of services trade and reduce the operating costs of service suppliers. Also it can improve the business environment of global services trade and contribute to the development of digital economy of all participants and increase the scale of services trade.⁶⁵ According to a joint brief by the WTO and the Organization for Economic Cooperation and Development (OECD), the entry into force of the SDR Reference Paper will save about USD 150 billion a year in costs for global enterprises to participate in international trade in services,⁶⁶ especially benefiting the service supply of small and medium-sized enterprises (SMEs) and services such as finance, commerce, communication and transportation. Meanwhile, benchmarking against the OECD Services Trade Restrictiveness Index (STRI) database shows that all WTO members that accept the SDR Reference Paper obligation will have on average 11 percent lower barriers to trade in services and essentially eliminate most barriers in sectors such as computer services, commercial banking, and telecommunications services (all - 16%). These service fields are important pillars of the digital economy, so the implementation of SDR Reference Paper is conducive to promoting the growth of digital trade among WTO members.⁶⁷

With the rapid development of the global digital economy, digital trade rules have become a common concern of multilateral systems and regional organizations. The current JSI negotiations on e-commerce or digital trade, which involve 87 WTO members, address disciplines such as services market opening and cross-border data flows and are complementary in content to the SDR Reference Paper.⁶⁸ In addition, 112 WTO members substantially concluded negotiations on the JSI text of the Investment Facilitation for Development Agreement on December 16, 2022. The agreement aims to reduce red tape in the investment sector and simplify and speed up investment approval

⁶⁵ *Supra* n. 60.

⁶⁶ WTO & OECD, Services Domestic Regulation in the WTO: Cutting Red Tape, Slashing Trade Costs, and Facilitating Services Trade, OECD-WTO Trade Policy Brief, November 26, 2021, p. 1.

⁶⁷ *Ibid.*, p. 3.

⁶⁸ Jingxia Shi, WTO E-commerce Plurilateral Negotiations under the Background of Digital Economy: Latest Development and Focus Issues, *Oriental Law*, No. 2, 2020, pp. 170-184.

procedures. By providing more transparent and predictable legal frameworks for foreign investment, it can help increase trade in services by WTO members through Mode III (“commercial presence”). On the whole, the SDR Reference Paper will play a synergistic role with these negotiation results in the future, which will greatly promote the smooth development of services trade in the digital economy era.⁶⁹

IV. SDR REFERENCE PAPER AND DOMESTIC REGULATION REFORM OF SERVICES TRADE IN CHINA

With the introduction of the first cross-border services trade list of Hainan Free Trade Port and the promotion of the introduction of the pilot free trade zone version and the national version of the negative list of cross-border services trade, China has been committed to further relaxing services market access in recent years.⁷⁰ In view of the close complementary relationship between domestic regulation and market opening mentioned above, only by accelerating the requirements of SDR Reference Paper, improving the domestic regulation and discipline of services trade and perfecting the level of services trade supervision would it lay a solid foundation for China’s services market opening in the era of digital economy.

A. Significance of SDR Reference Paper to the Development of Digital Economy and Services Trade in China

The rapid development of digital economy and services trade and the mutual promotion between the two are one of the outstanding performances since China’s accession to the WTO more than 20 years ago. From 2021 to 2022, even in the face of complex and severe domestic and international situations, China’s digital economy has achieved good results on the whole, and has become the core force and key driving impetus of China’s economic

⁶⁹ Henry Gao, E-Commerce Governance: Back to Geneva? Center for International Governance Innovation, February 14, 2022; Douglas Lippoldt, Regulating the Digital Economy: Reflections on the Trade and Innovation Nexus, Center for International Governance Innovation, February 14, 2022.

⁷⁰ Jingxia Shi, Annual Review of China’s International Trade in Services, *Beijing Arbitration*, No. 1, Total No. 119, 2022, pp. 1–30.

development.⁷¹ Regulation and discipline reform is of key significance to the sustainable development of services trade, and China has played a key role in the negotiation of SDR Reference Paper. As an initial member, China worked with other participants to develop programs during the negotiation, and submitted two drafts on the specific service commitment schedule in time at the final stage, making important contributions to the smooth conclusion of the negotiation on the text of the SDR Reference Paper. In December 2022, China completed the domestic approval process on time and took the lead in submitting the improved GATS commitment schedule. As the second largest country in services trade, China has continuously promoted the implementation of the SDR Reference Paper with concrete actions and practical measures. The SDR Reference Paper will become a treaty obligation of participating members under the framework of WTO/GATS after it officially comes into force, so as to reduce the costs of China's service suppliers entering the international digital trade market. It can be easier for China's suppliers to set up business entities overseas, obtain business licenses and relevant qualifications, or supply services through cross-border methods. If the Chinese supplier finds that the service regulatory authority of the participating party fails to fulfill its obligations, it can raise trade concerns through the Ministry of Commerce under the WTO Council for Trade in Services and other mechanisms, urge it to fulfill its SDR Reference Paper obligations, and even initiate dispute settlement procedures if necessary, so as to protect the legitimate rights and interests of the Chinese service supplier.⁷² In this sense, the negotiation of SDR Reference Paper has a guarantee effect on China's service suppliers going global at the regulatory level.

B. Strengthening Top-level Design and Improving the Facilitation Mechanism for Trade in Services

The SDR Reference Paper is a facilitation agreement in the field of trade in

71 In 2021, the scale of China's digital economy reached 45.5 trillion yuan, up 16.2% year on year in nominal terms, accounting for 39.8% of GDP. The average annual growth rate since 2012 has been 15.9%, significantly higher than the GDP growth rate in the same period. See China Academy of Information and Communication Technology: China Digital Economy Development Report (Ji Zhi White Paper), No. 202209, July 2022, pp. 5–6.

72 Xinhua News Agency, The Ministry of Commerce Interprets Negotiation Results on the WTO Joint Statement Initiative on Services Domestic Regulation, http://www.gov.cn/xinwen/2021-12/08/content_5659345.htm (Last Visited on December 8, 2021).

services in nature. Since the WTO Trade Facilitation Agreement (TFA) came into force in 2017, China, as the world's largest goods trading country, attaches great importance to the goal of trade facilitation, and as a result has made a lot of progress in optimizing the trade environment. For example, it has simplified the requirements of trade documents, reduced the trade process, developed a single window and reduced the fees and charges, etc. These measures have enhanced the stability, transparency and predictability of China's trade policy and reduced the costs of cross-border trade.⁷³ Although the experience of goods trade facilitation has laid a good conceptual and practical foundation for China to benchmark the SDR Reference Paper and improve the domestic regulation of trade in services, it should be recognized that there are essential differences between the regulation of trade in services and trade in goods. Therefore, in order to implement the requirements of SDR Reference Paper, it is first necessary to improve the top-level system design and supporting mechanism construction.

In order to implement the Opinions on Accelerating the Development of Trade in Services issued by the State Council (Guo Fa (2015) No. 8), China established the inter-ministerial joint conference system of trade in services under the State Council in August 2015, which is composed of 39 departments and units including the Ministry of Commerce, the Ministry of Foreign Affairs and the Council for the Promotion of International Trade to coordinate the development of trade in services and the opening up.⁷⁴ However, in practice, the role of the joint conference is relatively limited, and there is a lack of top-level design in services trade facilitation. Considering the diversity of the service sector and the particularity of the market, it is necessary to focus on how to better play the coordinating role of the joint conference in improving the domestic regulation and discipline of services trade. It may be considered to integrate the inter-ministerial joint conference system of the State Council for trade facilitation and chemical industry to supplement its function of services

73 For the progress of China's goods trade facilitation, please refer to Beijing Ruiku Trade Security and Facilitation Research Center. The 2023 Annual Report on China's Trade Facilitation, <https://www.re-code.org/upload/file/20230112/1673497920575078109.pdf> (Last Visited on January 20, 2023).

74 State Council, Reply to the Establishment of the State Council Inter-ministerial Joint Conference System for the Development of Trade in Services (Guo Han (2015) No. 143), August 29, 2015.

trade facilitation.⁷⁵ To standardize with international economic and trade rules and promote high-level opening-up, China has approved 21 free trade zones including Hainan Free Trade port in recent years. The six freedoms committed to the free trade zone or port, including investment freedom, financial freedom, trade freedom, freedom of personnel and employment, freedom of digital flow and freedom of goods flow, are all related to services trade facilitation to a large extent and conform to the spirit of SDR Reference Paper. Therefore, it is suggested to take advantage of the pilot advantage of China's free trade zones or port to explore the institutional innovation of domestic supervision of services trade, and enhance the global attractiveness of China's digital economy industry and trade.

C. Concrete Suggestions on Improving Domestic Regulation of Services Trade in China

The core discipline of the SDR Reference Paper is to require transparency, predictability and convenience in the licensing requirements and procedures, qualification requirements and procedures and technical standards related to trade in services implemented by members.

1. Improving the Transparency of Services Regulation Measures

In terms of transparency, the SDR Reference Paper requires WTO members to publish all service licensing requirements and authorization procedures. At the same time, they are required to establish an appropriate mechanism to facilitate enquiry by service suppliers, consult relevant suppliers and fully consider their opinions when publishing relevant laws and regulations on service industries. According to the transparency requirements, China should announce the proposed laws, regulations, administrative rules and other domestic regulatory measures related to services trade in advance, and give foreign suppliers the opportunity to fully participate in the discussion of policy making. The administrative approval information involving service suppliers shall be made public in a timely manner, and the enquiry and feedback mechanism for service

⁷⁵ State Council, Reply to the Establishment of the Inter-ministerial Joint Conference System of The State Council on Trade Facilitation (Guo Han (2016) No. 59), March 27, 2016. After the WTO Trade Facilitation Agreement came into force, the external name of the joint meeting was "China National Trade Facilitation Committee".

suppliers shall be established and improved as soon as possible. At present, China has improved the uniformity, systematicness and timeliness of services trade information disclosure, but some specific contents are not released and updated in a timely manner. Some government websites involve the coverage and timelines of service supervision content, which may affect the transparency index. Although some regulatory authorities have English versions of their websites, they usually contain little content and are not updated in time, and the English versions of practical content such as regulations and policies are not comprehensive. While maintaining the stability of information disclosure, regulatory authorities should increase the scope and intensity of relevant information disclosure, and provide English translation of laws and regulations in a timely manner.

China has established a relatively complete system at the national level in terms of the advance announcement of legislation and soliciting opinions, including the Legislation Law⁷⁶ and the Foreign Investment Law.⁷⁷ The National People's Congress and the State Council set up a column online to solicit opinions on draft laws, but need to further institutionalize and standardize their operation. It is suggested that the regulatory authorities of trade in services and service suppliers establish a regular consultation mechanism, adopt a flexible and pragmatic approach in terms of participation representatives and consultation topics, and maintain effective information feedback channels and problem-solving mechanisms. Regarding the construction of services trade enquiry points, the Ministry of Commerce and other institutions responsible for cross-border trade management have provided some information related to services trade through the internet, covering legislation, import and export management, authorization and licensing, but China's services trade

76 For example, Article 67 of the Legislation Law stipulates that in the drafting of administrative regulations, opinions of relevant organs, organizations, deputies to the people's Congress and the general public shall be widely heard. The hearing of opinions may take various forms such as seminars, argumentation meetings and hearings. Draft administrative regulations shall be published to the public to solicit opinions.

77 For example, according to Article 10 of the Foreign Investment Law, when formulating laws, regulations and rules related to foreign investment, the opinions and suggestions of foreign-invested enterprises should be solicited in an appropriate way. The normative documents and judgment documents related to foreign investment shall be published in a timely manner according to law. Article 7, Article 9 and Article 11 of the Regulations on the Implementation of the Foreign Investment Law provide more detailed transparency requirements such as the publication of regulations.

consultation points have not been formally established. Based on the WTO/FTA enquiry website opened by the Ministry of Commerce, it can be considered to integrate the “Comprehensive Service Platform for Trade in Services” built by China Association of Trade in Services. In addition to the online enquiry, the enquiry and reply of various channels such as telephone and email can also be regularly summarized and published to the public, so as to continuously improve the efficiency and quality of services trade policy enquiry.

2. Ensuring the Certainty and Predictability of Services Regulation Measures

In terms of the certainty and predictability of the application for service provision, the SDR Reference Paper requires the establishment of an indicative timeframe for application processing, provision of information on the processing of applications for licenses, timely determination of the completeness of the supplier's application materials and correction feedback, and allowing the applicant to correct minor errors in the application materials or provide further information, etc. Accordingly, China's competent authorities should, to the extent practicable, provide an indicative timeframe for the processing of applications for the provision of services. Upon request, the authorities should provide information about the status of the application and determine the integrity of the application, etc. Within a reasonable time after the submission of the application by the supplier, the competent authorities shall process the application as soon as possible and inform the applicant in writing of the processing decision, etc. If the supplier's application is considered incomplete and cannot be processed, the applicant shall be notified within a reasonable time and feasibly to complete the application materials and provide corresponding assistance as needed. If an application is rejected for incompleteness, the applicant shall be notified within a reasonable time of the reasons for rejecting his or her application and the procedures for resubmitting his or her application, etc. In terms of the certainty of domestic regulatory measures, although the transparency of China's policies on qualification certification has been improved in recent years, the frequent adjustment of certification standards may make it difficult for foreign suppliers to adapt. It is suggested to strengthen the implementation of services regulation policies to

improve stability and continuity.

3. Improving the Convenience of Services Regulation Measures

The SDR Reference Paper provides for the qualification assessment and related authorization and recognition of service suppliers by competent authorities,⁷⁸ aiming to reasonably reduce the costs of services suppliers and the administrative burden of the procedures involved in providing services. In terms of convenience, the SDR Reference Paper requires that applications only go through one competent authority, accepting electronic applications and copy materials, etc. With respect to application time, it should ensure that its competent authority allows suppliers to submit applications at any time throughout the year as far as practicable.⁷⁹ These requirements first relate to the construction of a “single window” for international trade facilitation measures, that is, to the extent feasible, the authorities should avoid requiring applicants to contact multiple competent authorities for each authorization application. China’s 2017 “Government Work Report” requires the promotion of a single window for international trade. At present, the established single window for international trade is operating well, but the window is mainly to promote the facilitation of trade in goods, and rarely involves the content of services trade, only sporadic content about cross-border e-commerce and financial services.⁸⁰ In general, the regulation of trade in goods mainly involves customs at all levels, and the single window management is relatively easy. However, trade in services involves a large number of sectors, and if it is built on existing foundations, consideration needs to be given to how to integrate existing resources and incorporate the special needs of more service sectors and industries. In addition, in accordance with the SDR Reference Paper, to facilitate suppliers’ application for services, China’s competent authorities should accept electronic applications and certified copies of documents to the extent possible, and be flexible in the time allowed for the submission of applications.

78 SDR, paras. 7–11.

79 SDR, paras. 4–6.

80 China’s International Trade Single Window, <https://en.singlewindow.cn> (Last Visited on on January 23, 2023).

V. CONCLUSION

The Report to the 20th National Congress of the Communist Party of China proposed to strengthen the opening up of modern service industry, develop the mechanisms of services trade, in order to accelerate China's transformation into a trader of high quality. In the context of the digital economy, compliance with good domestic regulation and discipline plays an increasingly important role in ensuring the actual effect of the commitment to opening up the services market. The SDR Reference Paper timely responds to the actual needs of members on the domestic regulation reform of services trade, which is of landmark significance for promoting services trade facilitation in the era of digital economy. In order to fulfill the disciplinary requirements of the SDR Reference Paper, China should continuously optimize the licensing and approval process related to trade in services. It should improve the transparency and convenience of domestic regulatory measures and reduce the costs of foreign suppliers entering China's services market, thereby providing a good regulatory practice and business environment for the development of international trade in services in the digital economy era.