



THE STATE OF PLAY IN THE GATS NEGOTIATIONS: ARE DEVELOPING COUNTRIES BENEFITING?

Introduction

As with many of the other WTO negotiating areas, talks on “trade in services” present serious challenges to developing countries. One challenge is the fact that – whereas tariffs are a primary barrier to trade in goods – domestic laws and regulations are the primary barrier to trade in services.

Another challenge is the fact that most developing economies do not have a comparative advantage in the majority of tradable services. Therefore, they might frequently find themselves on the defensive side of the negotiating table. For instance, many of the service sectors in developing countries are still in a formative stage and, therefore, might not be able to compete successfully with international firms. Such a threat raises the stakes of the negotiations. Furthermore, the successful negotiation of arrangements for trade in services requires a detailed understanding of the intricacies of both the WTO General Agreement on Trade in Services (GATS) and the arena of domestic services sectors. Mastering these intricacies

is time- and resource-intensive. This policy brief provides a chronological review of the GATS mandates as well as a critique of the state of play of GATS negotiations and their impact on the interests of developing countries, including the least developed countries (LDCs), in the negotiations.

I. Chronological Review of GATS mandates

The objectives and mandate for this round of GATS negotiations were decided on 29 March 2001 with the adoption of the Guidelines and Procedures for the Negotiations on Trade in Services (herein after referred to as the Negotiating Guidelines). Of particular interest for developing countries are the stipulations that countries shall:

- Conduct negotiations on the basis of progressive liberalization, aiming to increase the participation of developing countries in trade in services, providing flexibility for developing countries and special priority to least developed country Members.

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- Respect national policy objectives during the liberalization process, taking account of their level of development and economic size. Respond to the needs of small- and medium-sized service suppliers, by respecting “the existing structure and principles of the GATS” (e.g. the “bottom-up” approach to scheduling and the four modes of supply).

Scope and timing of negotiations:

- Current schedules of commitments to liberalize particular sectors are the starting point for negotiations (rather than actual market conditions).
- Special attention shall be given to sectors and modes of export interest to developing countries.
- Negotiations on rules and domestic regulations must aim to conclude before negotiations on market access.

Modalities and Procedures:

- The Council for Trade in Services (CTS) is to continually carry out an assessment of trade in services with reference to increasing participation of developing countries in world trade and adjust negotiations accordingly. Developing countries are also to receive technical assistance to carry out national/regional assessments.
- The CTS is to review progress in negotiations to ensure developing countries increase their participation in world trade and utilize flexibilities in opening their markets.

Other key negotiating mandates and texts of the GATS negotiations are:

1. The November 2001 Doha Mandate:

As regards trade in services, the Doha Declaration stated:

“The negotiations on trade in services shall be conducted with a view to promoting the economic growth of all trading partners and the development of developing and least developed countries. We recognize the work already undertaken in the negotia-

tions, initiated in January 2000 under Article XIX (‘Negotiation of Specific Commitments’) of the General Agreement on Trade in Services, and the large number of proposals submitted by members on a wide range of sectors and several horizontal issues, as well as on movement of natural persons.

We reaffirm the Guidelines and Procedures for the Negotiations adopted by the Council for Trade in Services on 28 March 2001 as the basis for continuing the negotiations, with a view to achieving the objectives of the General Agreement on Trade in Services, as stipulated in the Preamble, Article IV and Article XIX of that Agreement. Participants shall submit initial requests for specific commitments by 30 June 2002 and initial offers by 31 March 2003.”

2. The July 2004 Package

After the September 2003 Cancún Ministerial Conference ended in deadlock, WTO members in Geneva began efforts to put the negotiations and the rest of the Doha work programme back on track. This led to a package of framework agreements known as the July 2004 Package. On trade in services, WTO Members reaffirmed their commitment to progress in this area of the negotiations in line with the Doha mandate. The tabling of revised offers was required by May 2005. Annex C of the July Package provided that *“with a view to providing effective market access to all Members and in order to ensure a substantive outcome, Members shall strive to ensure a high quality of offers, particularly in sectors and modes of supply of export interest to developing countries, with special attention to be given to least-developed countries.”*

3. December 2005 Hong Kong Ministerial Declaration and its Annex C

The Hong Kong Ministerial Declaration reaffirmed key principles and objectives of the services negotiations and called on members to intensify the negotiations with a view to expanding sectoral and modal coverage of commitments and improving their quality, with particular attention to export interests of developing countries. The Ministerial Declaration also established that least developed countries are not expected to undertake new commitments in the Round.

Annex C went beyond the objectives and mandate outlined in the Negotiating Guidelines or any such document by providing for the first time a more detailed and ambitious set of negotiating objectives to guide WTO Members. It established a framework for offering new or improved commitments at existing levels of market access on a non-discriminatory basis across sectors of interest to Members.

Among other things, the Annex also urged members to intensify their efforts to conclude the rule-making negotiations under GATS Articles X (emergency safeguard measures), XIII (government procurement), and XV (subsidies). It states that Members shall develop disciplines on domestic regulation pursuant to the mandate under Article VI:4 of the GATS before the end of the current round of negotiations and devise methods for the full and effective implementation of the Modalities for the Special Treatment of Least-Developed Country Members. With respect to negotiating approaches, Annex C envisaged that the request-offer negotiations be pursued on a plurilateral basis and provided guidelines for the conduct of these negotiations. It stipulated that the results of such negotiations would be extended on an MFN basis.

Finally, Annex C set new timelines calling for groups of Members to present plurilateral requests to other Members and to submit such requests by 28 February 2006. A second round of revised offers was to be submitted by 31 July 2006 with final draft schedules of commitments submitted by 31 October 2006.

4. July 2008 Services Chair's Text

The broadened objectives and mandate of Annex C are reflected in the Chair's text on the elements required for the completion of the services negotiations (WTO document TN/S/34). Paragraph 4 says that *services "negotiations must be driven by a high level of ambition and political will as reflected in the other areas of the DDA [Doha Development Agenda]. Accordingly, the negotiations shall aim at a progressively higher level of liberalization of trade in services with a view to promoting the economic growth*

of all trading partners, and the development of developing and least-developed countries."

It is worth emphasizing that the element of comparability between services negotiations and negotiations in the other areas of the Doha work programme has never been envisaged in the Doha Round. Paragraph 24 of the Hong Kong Ministerial Declaration directs trade officials to ensure that there is a comparably high level of ambition in talks on Non-Agricultural Market Access (NAMA) as well as market access for agriculture.. This ambition is to be achieved in a balanced and proportionate manner consistent with the principle of special and differential treatment. Adding services to this equation therefore goes beyond the Hong Kong mandate.

Paragraph 4 further requires Members to respond to requests by making offers beyond existing levels of market access and national treatment in areas where significant impediments exist. This means that members are expected to provide market access, particularly in sectors that have been closed to date. And since the demandeurs in the services negotiations are mostly the developed countries, the Paragraph basically calls for developing countries to make offers of interest to them.

II. Status of the Negotiations

There are three parallel tracks of ongoing negotiations in the area of services for the purposes of:

- i. Working out rules on subsidies, safeguards, government procurement and disciplines on measures relating to qualification requirements and procedures, technical standards and licensing requirements;
- ii. Making specific commitments in various services sectors through the request-offer route; and
- iii. Effectively implementation of some important provisions of the GATS relating to developing and least developed

countries.

Aspects of these three tracks are reviewed below.

A. Working Party on the Negotiation of GATS Rules

Negotiations on Article X on Emergency Safeguard Mechanism

GATS Article X calls on Members to negotiate emergency safeguard measures (ESMs). Many developing countries desire ESMs because – as with the case of trade in goods -- they, would the option of establishing a safety net in the event that GATS commitments lead to harmful import surges with dire consequences. Given the fact that many developing countries have low levels of development in their service industries and lack competitiveness, it is reasonable to assume they are more likely than developed countries to experience import surges. The delegations of Brunei Darussalam, Cambodia, Indonesia, Malaysia, Myanmar, the Philippines, Thailand and Vietnam have taken the lead in pushing these negotiations forward. The proposals by this group of countries discuss the political considerations of developing an ESM and outline possible elements for a mechanism. These elements deal with meeting the Most Favoured Nation (MFN) obligation, a limited window and conditions for invoking an ESM, and a limited duration for applying an ESM. In addition, the delegations are identifying, the impacts an ESM would have on acquired rights, a definition of domestic industry, applicable safeguard measures, surveillance to prevent abuse, and special and differential treatment provisions [1].

In general, there is a polarization of views between a group of developed countries which challenge the desirability and feasibility of an ESM and a group of developing countries in favour of an ESM. The group of developed countries resist negotiating an ESM on the basis that its use would create a chilling effect and deter foreign service providers from entering into markets. These countries raise this theory

to question the desirability of an ESM. They also claim that the ESM is not feasible in the context of trade in services. The latter claim can be refuted easily since an ESM exists in other trade agreements – both bilateral and regional in nature [2].

The United Nations Conference on Trade and Development (UNCTAD) has undertaken a study on the desirability and feasibility of an ESM. In the paper titled “Emergency Safeguard Measures in the GATS: Beyond Feasible and Desirable” [3], the author argues that, in a purely academic case in which adjustment costs are non-existent, classical economic theory rejects the notion of trade restrictions such as safeguard measures. Further, given that a Member country’s regulatory framework governs trade in services more than trade in goods, there is a compelling argument for establishing a safeguard measure in GATS. This argument holds that the uncertainty relating to the outcomes of services liberalization (e.g., unforeseen import surges) calls for flexibility in dealing with outcomes, including by relaxation of regulations. These concerns lead to caution among Members about making binding liberalization commitments in GATS negotiations in the absence of safeguard measures.

Proponents of an ESM insist that work toward its realization is a crucial precondition for the completion of the Doha Work Programme.

Negotiations on Article XIII on Government Procurement

Negotiations on government procurement may be the most contentious for developing countries. The main *demandeur* of negotiations is the European Communities (EC). The EC has interpreted Article X as allowing for negotiations on market access. The majority of developing countries are not in favour of these types of negotiations. The most recent proposal by the EC is to add an Annex to the GATS titled “Government Procurement in Services” [4].

The primary interest of the EC is to liberalize government procurement in GATS. The EC is explicit about this objective by stating that “the un-

derlying principle [of their proposal] would be that each WTO Member would have the possibility to undertake relevant government procurement commitments in the sectors it wishes to open to international competition and according to the specifications it would set in order to fulfill its public investment and development needs."

The EC proposal discusses issues such as:

- 1) Defining the scope of the rules to be applied to government contracts for the primary purpose of procuring services and specifying that procuring entities should include central, regional or local governments and authorities and non-governmental bodies (in line with GATS 1 (a)).
- 2) Applying rules to all Members' procurement contracts over a minimum threshold value.
- 3) Scheduling national treatment commitments as they apply to laws, regulations or requirements governing procurement in services - essentially ignoring Article XIII:1 which states that GATS Article XVII on National Treatment shall not apply to laws, regulations or requirements governing the procurement of services.
- 4) Scheduling MFN commitments in procurement, which contradicts the text of Article XIII:1, stating that the MFN clause does not apply to government procurement of services.
- 5) Designing rules on the valuation of contracts, provisions on technical specification and qualification requirements, standard procurement methods, time periods, documentation requirements and evaluation criteria.

The majority of developing countries are not in favour of opening their government procurement markets in GATS. This is due to the important role of government procurement of services in achieving development goals and objectives, particularly as they relate to the equitable and sus-

tainable provision of services for domestic consumption. This is in line with the reading of GATS Article XIII on Government Procurement where paragraph 1 explicitly states that the provisions of "Most Favoured Nation Treatment, Market Access and National Treatment do not apply to laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes." This paragraph clarifies the fact that GATS liberalization negotiations do not apply to government procured markets. Paragraph 2 of Article XIII on Government Procurement states "*there shall be multilateral negotiations on government procurement in services...*". Despite these clear parameters of the negotiations, the EC continues to insist on negotiations on market access in government procurement of services.

Negotiations on Article XV on Subsidies

According to this Article, Members are to develop disciplines necessary to avoid the trade-distorting effects of subsidies. Negotiations are also to address the appropriateness of countervailing procedures. However, it is essential to recognize the need for the selective and flexible use of subsidies by developing countries in order to achieve their development objectives.

Compared to all other GATS rules, Members have paid little attention to the topic of subsidies. Discussions amongst Members have focused on the exchange of information and a provisional definition for what constitutes "subsidies" in services. Without an agreed definition of "subsidies" in the arena of trade in services, Members are unable to move to defining their trade-distorting effects. Nevertheless, WTO Trade Policy Reviews have noted the prevalence and scale of subsidies that some countries provide to their service suppliers. Some developing countries are especially concerned about the distortions created as developed countries bailout their financial institutions to the tune of billions or trillions of dollars. Developing countries believe that such

bail-outs erode existing liberalization commitments. Therefore, it is critical for Members to examine the effects of such subsidies on competitiveness and economic growth.

There is insufficient progress in the information exchange exercise because some of the most important players are concerned that, as they reveal their subsidies, they may open themselves to claims that these measures are distorting trade..

Article XV calls for negotiations to recognize the role subsidies play in development programmes and the need to provide flexibility in this regard. As a result, developing countries have the opportunity to balance their offensive and defensive interests in disciplines if the special treatment for the use of subsidies for development purposes is respected.

B. Working Party on Domestic Regulation (WPDR)

GATS Article VI:4 calls on Members to develop disciplines to ensure that a range of measures (i.e., those relating to qualification requirements and procedures, technical standards, and licensing requirements and procedures) do not constitute unnecessary barriers to trade. These disciplines are to ensure that these types of domestic regulations are:

- a. based on objective and transparent criteria, such as competence and the ability to supply the services;
- b. not more burdensome than necessary to ensure the quality of the services; and
- c. in the case of licensing procedures, not in themselves a restriction on the supply of the service.

In 1999, the Council for Trade in Services established the Working Party on Domestic Regulations (WPDR) and, ever since, its members have produced various drafts and position papers to facilitate negotiations. The latest draft, 'Disciplines on Domestic Regulation Pursuant to GATS Article VI: 4' is dated March 20, 2009.

It was prepared under the auspices of the WPDR's Chairperson with the proviso that it does not address "issues on which differences persist."

The two major themes of negotiations on domestic regulations are the right to regulate and the issue of "necessity tests."

i. The right to regulate

Developing countries have sought inclusion of strong "right to regulate" language in the disciplines. Protection of the "right to regulate" is especially important for developing countries given their need to advance development goals through regulation and to strengthen their regulatory frameworks. The March 2009 draft of the disciplines reiterates the statement in the GATS Preamble that would protect the "right to regulate". At the request of some developing countries, the March 2009 draft includes the statement: "*These disciplines should not be construed to prescribe or impose particular regulatory approaches or any particular regulatory provisions in domestic regulation.*"(paragraph 3). Particular regulatory approaches and provisions, however, are prescribed by a number of the disciplines, including the requirement to base measures on objective and transparent criteria (paragraph 11), the requirement that measures be pre-established (paragraph 11), and the requirement to take existing international standards into account in formulating technical standards.

ii. Necessity tests

The majority of developing countries have expressed opposition to the inclusion of necessity tests, which are employed to determine whether a trade restrictive measure is absolutely essential or if there are other less trade restrictive ways to achieve a certain end. These tests can result in severe restraints to the "right to regulate." The March 2009 draft of the disciplines does not mention necessity tests. However, it does include a number of provisions that could operate as the equivalent of necessity tests including those prohibiting disguised restrictions on trade (paragraph 2) and those requiring that licensing and qualification procedures be as simple as possible

(paragraph 17).

In general, developing countries are grappling with the challenge of ensuring that the rules on domestic regulation strengthen their “right to regulate” while, at the same time, allowing them to challenge those developed countries which utilize domestic regulations with a “protectionist” tendency, especially on Mode 4 (Movement of Natural Persons).

C. Negotiations on Specific Commitments

The negotiations to liberalise trade in services have moved much farther along than the negotiations on rules and domestic regulation disciplines. Negotiators have sought to advance the negotiations of such disciplines through bilateral and plurilateral talks aimed at clarifying ministerial signals, requests and offers.

Developed countries have complained repeatedly that developing countries are not providing substantial offers for liberalization commitments. Their assessment is based on their requests, which have generally called for full liberalization of sensitive markets such as financial, telecommunication, energy and other sectors. Developing countries have in place a very important flexibility mechanism in GATS through Article XIX:2, which allows them to open fewer sectors, liberalise fewer types of transactions, progressively extend market access in line with their development situation and attach conditions to their market access which enable them to meet Article IV objectives. Many developing countries simply cannot match the level of ambition expected by developed countries because, on the one hand, they generally do not have strong domestic service suppliers that are able to compete on an equal footing with developed country service suppliers and, on the other, retaining strong domestic service suppliers in key and sensitive sectors is an important development objective. Moreover, developed countries have not provided offers that are meaningful to developing countries. This is mainly due to the lack of substantial mode 4 commitments by developed coun-

tries. The current obstacles to mode 4 trade are considerable. These include economic needs tests conducted in the absence of clearly defined criteria; vague definitions for the categories of persons included in schedules; the limited number of commitments for categories de-linked from commercial presence; the bias in favour of highly-skilled persons; the impact of domestic regulatory measures; the lack of recognition of certain qualifications and visa and requirements related to work permits. Therefore, in this game of market access negotiations, developing countries do not have an incentive to open their markets without getting anything in return.

D. Modalities for the Special Treatment of LDC Member

The Modalities for the Special Treatment of LDC Members were agreed in September 2004. These modalities call on Members to consider the serious difficulties faced by LDCs in terms of making commitments that meet their needs for sustainable development. The LDC Modalities also provide action-oriented mandates to increase the participation of LDCs in services trade. To facilitate this process, LDC Members are asked to identify their modes and sectors of export interest, emphasizing development priorities in terms of market access commitments and particular modes and sectors. In turn, other Members are expected to:

- Give special priority to providing effective market access in areas of export interest;
- Develop mechanisms with a view to achieving full implementation of GATS Article IV: 3;
- Take measures to increase LDC participation in services trade; and
- Make commitments in Mode 4.

The consultations on LDC modalities are advancing among a small group of delegations led by Norway and Tanzania. The purpose of the consultations is to flesh out a draft waiver from the obligations of Article II: 1 of the GATS in respect of preferential treatment benefitting all LDC Members. The waiver has been identified as offering the most satisfactory way of fulfilling this part of

the negotiations.

E. Special and Differential Treatment

Article IV of the GATS provides for the increasing participation of developing countries in world trade in services through: 1) the strengthening of their domestic services capacity and its efficiency and competitiveness, 2) access to technology on a commercial basis; and 3) the improvement of their access to distribution channels and information networks. This Article provides for Special and Differential Treatment (SDT) of Members as called for by GATS. It however has not been utilized or implemented in the course of GATS negotiations. However, developing country Members have called for mechanisms to implement Article IV as part of the Special and Differential Treatment portion of the Doha Work Programme.

F. Classification Issues

During the Uruguay Round, most Members utilized the WTO W/120 list classification and corresponding United Nations Central Product Classification (UN CPC) in their schedules of commitments. Some countries now find some of these classifications inaccurate or not in line with today's market reality for certain sectors, particularly those with rapid technological advancements.

It is worth noting that there is no mandate or legal obligation relating to the application of any particular classification system under the GATS. As a consultative document, W/120 is not legally binding. What is legally binding on a Member is what the Member enters in the sectoral column of its schedule. Only when a Member enters a CPC number in its schedule, would the corresponding CPC definition become binding on that Member. Therefore, a Member might change the classification of a given sector in its schedule.

G. Assessment of Trade in Services

Paragraph 14 of the negotiating guidelines mandates the preparation of an assessment of the costs and benefits of trade in services in

overall terms as well as on a sectoral basis with reference to the objectives of the GATS agreement and in Article IV, in particular. Negotiations are to be adjusted in light of the results of such an assessment. Technical assistance is also to be provided to individual developing countries to carry out national or regional assessments. The CTS has not fulfilled this mandate. Without a comprehensive assessment, developing countries are unable to assess the benefits and costs of GATS liberalization.

III. Conclusion

Developing countries may wish to explore options for creating a negotiating context which is supportive of their needs in the current GATS negotiations. Even if efforts to shape the negotiating context may not pay off in the immediate future, steps to create a more favourable context in the future should be taken now. In addition to monitoring how their negotiating partners influence the negotiating context, immediate steps developing countries may wish to take include:

- Utilizing the pro-developing country context created by the rhetoric surrounding the so-called Doha Development Agenda. This can be used both within the WTO negotiations as well as in public relations and media work outside the WTO community to generate an economic policy context and, more generally, public opinion that is supportive of developing country goals;
- Countering mainstream, pro-liberalisation research and literature with analysis supportive of developing country positions. Options include research generated by IGOs, NGOs and other think-tanks. Developing countries may wish to actively engage these organizations, both by helping to identify necessary areas of research, as well as by disseminating the eventual outcomes, including to relevant WTO bodies.
- Being aware of developments in regional and bilateral trade negotiations and identifying consequences for WTO negotiations on trade



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in services;

- Highlighting that technical assistance efforts will take time to bear fruit and that current efforts will not immediately overcome the disadvantages experienced by developing countries.

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Endnotes:

- [1] WTO Doc. JOB(07)/155
- [2] WTO Doc. S/WPGR/W/4/Add.2 Safeguard-type Provisions in Economic Integration Agreements
- [3] M. Marconini, Emergency Safeguard Measures in the GATS : Beyond Feasible and Desirable, UNCTAD/DITC/TNCD/2005, March 2005
- [4] WTO Doc. S/WPGR/W/54

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