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**ISSUES OF INTEREST TO LDCs IN THE WTO SERVICES NEGOTIATIONS  
SERIES NO 3: EMERGENCY SAFEGUARD MECHANISM**

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**I. INTRODUCTION**

1. The negotiations on Article X on an Emergency Safeguard Mechanism (ESM) of the General Agreement on Trade in Services (GATS) were initiated after the establishment of the GATS at the end of the Uruguay Round of negotiations in 1995. An ESM in services is a complex matter and presents many questions and challenges that have yet to be resolved. This note aims to raise awareness among least developed countries (LDC) of the main issues discussed within the ESM negotiations and their implications for LDCs.
2. After a brief background into the history and current status of negotiations, discussions of the legal, economic and political value of an ESM for LDCs is explored. This note ends with recommendations for LDC policymakers and negotiators for a successful completion of negotiations.

The South Centre has a *Project to Assist Developing Countries, and Especially the Least-Developed Countries, for their Better Participation in WTO Negotiations on Trade in Services*. In the years of implementing the project, the South Centre has come to realise that the LDC Group is faced with specific difficulties in understanding the implications of the General Agreement on Trade in Services for their economies and in participating in the current round of services negotiations taking place in the World Trade Organisation. In their efforts to assist these countries, the South Centre integrates an LDC-specific focus within the assistance provided to the larger group of developing countries. In an effort to further strengthen its outreach to LDCs in this particularly crucial phase of negotiations, the South Centre has begun producing papers and analyses specific to the LDC audience. In this regard, a series of primers focusing on specific services sectors and modes in addition to other areas of negotiations will be prepared with the aim of improving the capacity of LDCs in the GATS negotiations. This third in the series of primers focuses on the negotiations under GATS Article X on Emergency Safeguard Mechanism.

## II. BACKGROUND

3. Paragraph 1 under GATS Article X on ESM states:

*There shall be multilateral negotiations on the question of emergency safeguard measures based on the principle of non-discrimination. The results of such negotiations shall enter into effect on a date not later than three years from the date of entry into force of the WTO Agreement.*

4. This mandate has been discussed since the conclusion of the Uruguay Round and coming into force of the GATS in 1995. A Working Party on GATS Rules (WPGR) was established to hold discussions on furthering negotiations in this and other rules areas.
5. Article X of the GATS is a contractual agreement among WTO Members to negotiate on an ESM. Despite this agreement, however, some WTO Members (particularly developed countries) have interpreted Article X negotiations as leading to the *question* of an ESM and not a concrete outcome of negotiations. They also have led the debate on the “feasibility” and “desirability” of an ESM for trade in services. The views of opponents, mainly developed countries, also claim that GATS provides sufficient flexibility to handle import surges and that an additional safety valve is not needed. As discussed below, the legal, economic and political values of an ESM clearly point to the need of such a mechanism, and especially for LDCs. Despite the opposing interpretations against an outcome to negotiations, Article X clearly states “the results of such negotiations shall **enter into effect**” -- only an actual outcome of negotiations, i.e. a mechanism that can be implemented by Members, can enter into effect. Furthermore, an ESM is desirable by the majority of WTO members who, like in the case of trade in goods, are interested in having a safety net in the even GATS commitments lead to harmful domestic injury with dire consequences.
6. The push for an ESM had been led by a few developing countries (mainly the Association of South East Asian (ASEAN) nations). These countries have taken the lead in trying to put in place a safety valve to allow Members to temporarily suspend their bound commitments in the event of unforeseen and damaging impacts of import surges on their domestic service providers.
7. There is also scepticism on the part of some developing countries in the ESM negotiations. Part of the apprehension is due to the fear of being on the receiving end of an ESM. This fear is most salient with regards to mode 4 or the movement of natural persons. Some Members worry that an ESM could be applied easily on their temporary workers abroad. These worries have led to a lack of uncertainty and political will to find solutions to move negotiations forward. Discussions on an ESM are also quite technical in nature. As a result, some LDCs have found it difficult to engage in discussions and hence fully comprehend the proposals set forth by Members.

8. Despite these challenges and apprehensions LDCs more than other WTO Members require a safeguard mechanism in the event that bound GATS commitments lead to unexpected dire domestic consequences and the need to temporarily suspend commitments is crucial for the safety and sustainability of the economy. Without a legal framework on a safeguard mechanism, Members lack the guarantee on the risk they undertake through binding commitments in GATS. An ESM replaces the regulatory powers to limit foreign imports that LDCs lose through binding liberalisation commitments in the event of unexpected domestic injury or threat thereof. Additionally, given that an ESM would have important implications on market access commitments, a climate of uncertainty continues to cloud the overall future of GATS negotiations and commitments.
9. In the lead up to the Sixth WTO Ministerial Conference in Hong Kong in December 2005, the issue of an ESM must be taken seriously as it forms part of the Single Undertaking in the Doha Round of WTO negotiations. The African Union in its Cairo Declaration and Road Map on the Doha Work Programme declared a “call upon Members to expeditiously establish an emergency safeguard mechanism”.<sup>1</sup> Furthermore, the Modalities for the Special Treatment for LDC Members in the Negotiations on Trade in Services (the LDC Modalities) states under paragraph 11 that in developing multilateral rules and disciplines for an ESM, the specific interests and difficulties of LDCs is to be taken into account by Members. For all these reasons, LDCs must be aware of the importance of the ESM in GATS and to their economies, and engage in negotiations.

### III. THE PURPOSE OF AN ESM IN GATS

10. Given the low level of development and competitiveness of service industries in many LDCs, it is reasonable to assume that it is more likely for an LDC to experience a harmful import surge in trade in services than other more developed economies. An ESM is to be an instrument that provides shelter to domestic suppliers to recover from unexpected or unforeseen import surges from trade liberalisation.
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12. Additionally, an ESM would ensure national policy objectives for growth and development. More specifically, an ESM would ensure the fulfilment of the following points enshrined in the GATS Preamble and how:
  - *that trade promotes economic growth and development of developing countries* – an ESM would allow the temporary suspension of liberalisation commitments if trade hinders the promotion of economic growth and development

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<sup>1</sup> “Cairo Declaration and Road Map on the Doha Work Programme”, AU Conference of Ministers of Trade, 3<sup>rd</sup> Ordinary Session held on 5 – 9 June 2005 in Cairo, Egypt.

- *recognising the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right – an ESM would temporarily suspend liberalisation commitments if necessary for adopting or applying short-term regulations, such as for ensuring the viability of (new) domestic service suppliers or industries to maintain employment levels or restoring universal access to certain services by preventing or stopping serious injury*
  - *to facilitate the increasing participation of developing countries in trade in services and the expansion of their service exports including, inter alia, through the strengthening of their domestic services capacity and its efficiency and competitiveness – an ESM would allow countries to temporarily suspend foreign imports to allow domestic providers to strengthen their capacity and efficiency before being inadvertently out-competed from foreign suppliers*
13. Finally, an ESM buffers the risk a Member undertakes through binding commitments. When a Member binds a liberalisation commitment, it removes its ability to go back on its commitments except through costly modification procedures under GATS Article XXI or dispute settlement proceedings. Thus a Member undertakes a risky contract that requires a guarantee, through an ESM, against severe consequences.

#### IV. LEGAL VALUE OF AN ESM

14. Some Members, mainly developed countries, have held the view that the GATS has in place sufficient safety clauses to deal with harm caused by bound liberalisation commitments. A communication by a Member summarises this view in the following statement:

*“The mandate set out in Article X of GATS was not intended to allow Members to introduce new general exceptions into the GATS, to carry out structural adjustments or to protect infant industries. The GATS already has provisions dealing with general exceptions, which are set out in articles XIV and XIV bis of GATS. As regards structural problems, which are set out in extraordinary, and in particular the protection of infant industries, the bottom-up architecture of the GATS affords Members enough flexibility to fully take into account when undertaking commitments. Also the Agreements provides for a procedure to deal with situations whereby Members decide to modify or withdraw in whole or in part their commitments. (Article XXI of GATS).”<sup>2</sup>*

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<sup>2</sup> Communication from the European Communities and their Member States on “Scope for an Emergency Safeguard Mechanism”, (WTO Document Code: S/WPGR/W/41), 3 March 2003.

15. The measures listed in the EC communication above, i.e. general exceptions, renegotiation of commitments, measures necessary to safeguard the balance of payments, and measures taken on prudential grounds, reflect the principle of state sovereignty and the ability of WTO Members to fully exercise their sovereign rights to govern and regulate within their territorial jurisdiction – subject only to those limitations they may have agreed to in the exercise of their sovereignty pursuant to a treaty (such as the GATS). Hence, a country's right to seek recourse to the GATS exceptions under Article XIV and XIV bis and a country's right to modify its schedules of commitments under Article XXI reflect this principle of state sovereignty. At the same time, however, these rights are circumscribed by the conditions indicated in these provisions on how they may be applied.
16. The scope of application of Article XIV on General Exceptions, XIV bis on Security Exceptions, and Article XXI on Modification of Schedules are different from the scope of an ESM under Article X. An Emergency Safeguard Mechanism under GATS would be an original mechanism granted by the agreement. Therefore, it would apply under a unique and extraordinary circumstance that is a direct result of the implementation of liberalisation commitments under GATS. In contrast, the application of measures under Articles XIV, XIV bis and XXI is brought about by internal factors such as maintaining public order or security, which are not linked to a Member's schedule of commitments. The fact that Article X provides for the negotiation of an ESM clearly indicates that Articles XIV, XIV bis, and XXI may not fully cover or be applicable to *all situations* in which countries may need to temporarily suspend or modify the implementation of their GATS commitments. It is a fundamental rule in treaty interpretation that all parts of a treaty must be put into effect. Hence, an ESM under Article X must be read as being applicable to a set of circumstances different from those covered by Articles XIV, XIV bis, or XXI. To interpret the relationship of Article X with Articles XIV, XIV bis, and XXI otherwise would render the existence Article X superfluous.
17. Although a country may temporarily suspend or not comply with its commitments under Articles XIV or XIV bis, or modify such commitments pursuant to Article XXI, the reasons for invoking these measures would not necessarily be those that would be applicable under an ESM. The ESM is designed to provide Members with a temporary remedy to suspend their commitments in order to shelter their domestic services sectors in cases of sudden harmful import surges caused by their GATS commitments. This is a situation that is completely different from those that may be contemplated under Articles XIV, XIV bis, or XXI.
18. Finally, negotiating an ESM is an obligation agreed upon under Article X that is legally binding on all WTO Members. Undermining this legal obligation would set a dangerous precedent for the ongoing negotiations. Moreover, the Guidelines and Procedures for the Negotiations on Trade in Services called for the completion of rules negotiations before the conclusion on specific commitment for market access.

## V. ECONOMIC VALUE OF AN ESM

19. The main concerns that have stalled negotiations are focused on the questions of feasibility of whether an ESM can be effectively put into practice given the complex nature of trade in services, and the desirability of countries to utilise an ESM against foreign providers that may discourage future foreign imports and investment. These concerns are discussed below:

### A. *Feasibility*

20. The nature of trade in services adds complexity to the technical aspects of an ESM. Unlike trade in goods, which permits a clear-cut quantification of imported products, a similar quantitative approach might be a challenging task for trade in services since imports do not necessarily cross a customs border control and hence may not always be recorded as an import. The different modes of supply (defined by under Article I of the GATS) challenge the traditional concept of an “import”.<sup>3</sup> Apart from mode 1 which is based on the traditional concept of cross-border trade, mode 2 - the supply of service by one Member to a consumer of another Member, mode 3 - the supply of service through commercial presence in the territory of another Member, and mode 4 - the supply of service through the presence of natural persons in the territory of another Member, require non-traditional and new approaches (different from safeguard measures applied to trade in goods) to safeguard measures. Under modes 2 and 4, an ESM would involve limiting physical persons, whether consumers or service suppliers, from crossing borders. Mode 3 introduces perhaps a greater challenge given its dual dimension to the importation issue, which are: 1) the establishment of a commercial presence in a host country, and 2) the sale or domestic operations of the *established* foreign supplier.<sup>4</sup>

21. Mode 3 poses an important challenge on the issue of defining who is a domestic industry. The physical commercial presence of foreign-service suppliers raises questions on whether “resident” firms are also considered part of domestic industry.<sup>5</sup> Thus, Members have discussed two definitions of domestic industry. The first is a definition based on a nationality criterion, i.e. only national suppliers. The second is a broader definition that includes foreign suppliers resident in the country. The latter definition introduces further questions on whether an ESM it to apply to a firm’s pre-establishment phase or post-establishment phase or both. Application of an ESM at pre-establishment phase would not impair foreign established suppliers, which are already providing services in the Member’s territory, while application of an ESM in a post establishment phase may involve the reversal or suspension of national treatment and market access commitments to companies already providing services in a Member’s territory.

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<sup>3</sup> Pierre Sauvé: Completing the GATS framework: Addressing Uruguay Round Leftovers Institut d'Etudes Politiques de Paris (Sciences-Po), *Aussenwirtschaft*, Vol. 57, No. 3, 2002.

<sup>4</sup> Ibid., page 312

<sup>5</sup> Some country legislations define commercial presence of foreign firms as part of domestic industry.

22. The objective behind deciding on the definition of domestic industry must be based on the development implications to LDCs. In this light, it would be appropriate that an ESM applied on mode 3 fulfils the goal of safeguarding domestic service suppliers from a surge of “imports” or services from foreign firms physically present in their countries. Thus, the definition of domestic industry should apply only to national firms.<sup>6</sup>

### ***B. Desirability***

23. Questions on the desirability of a safeguard mechanism in GATS have focused on whether an actual situation would occur warranting the use of an ESM. Discussions in the WPGR have not produced actual real world situations where a safeguard-like mechanism has been utilised by countries. Thus, more research and investigations are required particularly given that governments employ creative ways to safeguard and assist (e.g. through subsidies and tax breaks) their domestic industries from potential or actual harm.
24. However, given the low level of development and competitiveness of many services industries (compared to service industries in more developed countries) in LDCs, it is realistic to assume that import surges, as it occurs in trade in goods, could also occur in trade in services with binding liberalisation commitments. Furthermore, applying an ESM on a threat of serious injury provides an extremely important preventative mechanism that should be desirable to LDCs (if not all countries).
25. There are sensitivities with regards to Mode 4 amongst some developing countries. Concerns have been raised that Mode 4 presents the easiest case for employing an ESM. Members with such concerns should be reassured that, like all the other modes of supply, the show of cause of injury with negotiated criteria that prevents abusive use of an ESM would also apply to Mode 4. Therefore, Members must be assured that the application of an ESM on Mode 4 must not be discriminatory and disguised as protectionist measures. However, given that Mode 4 is a key area of export interest to many LDCs, it seems reasonable that LDCs would favour flexibility from being on the receiving end of an ESM on Mode 4. Such flexibility, for example through frequent reviews or shorter application of the ESM, could be captured through a special and differential treatment (SDT) mechanism. Alternatively, LDCs could request for an exemption from being on the receiving end of an ESM (see discussion below).
26. Finally, safeguard measures are not unheard of in the context of international trade in services. They are in place in regional and bilateral international trade agreements such as NAFTA (in financial services), CARICOM, ASEAN Framework Agreement on Services and ongoing negotiations in the Chile-

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<sup>6</sup> Countries who have signed Bilateral Investment Treaties (BIT) may have provisions that would not be allowed to apply a GATS ESM on established foreign firms. Countries must consult with their BIT agreements to assess the extent to which they can or cannot utilise a safeguard mechanism in GATS.



MERCOSUR and other bilateral negotiations in Latin America.<sup>7,8</sup> Thus, questions similar to those posed for an ESM in GATS are similar to those that have undergone the process in other negotiations. In short, the fundamental questions raised in the ESM negotiations for GATS are not impossible to answer and lessons learned from other arrangements should be utilised.

## **VI. POLITICAL VALUE OF AN ESM**

27. Behind the legal and economic aspects, a political aspect is also at stake for an ESM in GATS. It has been shown through existing safeguard measures in other WTO agreements that they (regardless of their use) are a determinant factor to negotiations. Their importance depends more on their availability than on their potential use. An equally important aim of negotiations is to develop a complete and comprehensive package of rules and parameters for GATS that is acceptable at the national level. A liberalisation commitment is a crucial decision that will impact a country's future at all levels ranging from infrastructure development to consumer behaviour. An ESM assures domestic stakeholders that a policy space option is available. Without the completion of negotiations on an ESM, Members may refrain from committing to further liberalisation given that an ESM would affect the parameters of government control over international trade and national policy goals and objectives.

## **VII. HORIZONTAL VS. OTHER MODELS FOR A GATS ESM**

28. There are currently two main proposals under consideration in negotiations. The first is a horizontal approach proposed by the ASEAN group which would apply an ESM to all modes of supply and sectors. The second, proposed by Australia presents two models differing on whether an absolute right is given to Members for invoking an ESM. A brief description of the proposed approaches and their benefits and costs to LDCs are presented below.

### **A. *Horizontal Approach***

29. The horizontal approach proposed by the ASEAN group does not exclude any mode of supply or sector from its scope of application.<sup>9</sup> In their proposal, an

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<sup>7</sup> "The Relationship Between Regional Trade Agreements and the Multilateral Trading System: Services", OECD, TD/TC/WP(2002)27&FINAL, 9 October 2002.

<sup>8</sup> Abugattas, L. "Safeguards in Agreements to Liberalize Trade in Services: Issues for Consideration of CARICOM Member States of the WTO, the FTAA and in Application of Article 47 of the Revised Treaty of Chaguaramas", prepared for the CRNM/IBB project, August 2002.

<sup>9</sup> Various proposals have been submitted by the ASEAN group of Member countries. The first was a Non-Paper on a "Draft Agreement on Emergency Safeguard Measures for Trade in Services" submitted on 31 October 2000 to the WPGR. Since this initial proposal, the ASEAN group has submitted additional communications with the most recent modification of its proposal found in JOB(04)/Communication from Brunei Darussalam, Indonesia, Malaysia, Myanmar, The Philippines and

ESM would apply generally to situations in which service suppliers of one Member are suffering injury or a threat of injury from an import surge by another Member as a result of GATS commitments. It is a broad-based mechanism, which would accommodate the heterogeneous nature of services, diverse modes of supply and sectors, and different regulatory policies and frameworks of countries. Given the low level of services development and regulatory frameworks for services in many LDCs, the horizontal approach would provide an approach that encompasses all types of situations and hence offer a large safety net.

30. The ASEAN negotiating proposals support the following main elements:

- The ESM is to be applied on an MFN basis
- There is to be a limited window of time after the entry into force of a Member's commitments in which an ESM can be invoked
- The application period of the ESM will be limited to three years (with possibility of renewal), with the possibility of extension as part of a Special and Differential Treatment measure
- The definition of a domestic industry based on GATS Article XXVIII or based on national law
- An ESM on mode 3 would limit the expansion of acquired rights by prohibiting expansion of business activity and capital investment<sup>10</sup>
- The injury or threat thereof must be a result of the implementation of specific commitments and caused by an import surge, be sudden and cause an emergency situation, and be shown through proper investigation procedures
- SDT for developing countries and LDCs on mode 4 that prohibits the reduction of mode 4 suppliers in the sector concerned below the average level of a recent representative period

31. What an actual safeguard mechanism would look like on the ground, whether through subsidies, taxes or quantitative restrictions, is not specified in the proposal. These mechanisms, rightly so, are to be determined by Members and conducive to their level of development and regulatory and infrastructural capacity.

32. The main cost of this approach is the application of the principle of reciprocity among all countries. However, Members could negotiate the adoption of SDT for LDCs that exempts them from being on the receiving end of an

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Thailand on "Further Thought on an Emergency Safeguard Mechanism", February 2004. The discussion of the ASEAN group proposal presented in this note reflects their most recent position in negotiations as reflected in the latter WTO Communication.

<sup>10</sup> In its original proposal, ASEAN had provided three options to be negotiated on the application of an ESM on mode 3. These options were: 1) To restrict new entrance and guarantee acquired rights to established suppliers, 2) to limit expansion of acquired rights by prohibiting expansion of business activity and capital investment, and 3) to restrict new commercial presence and limit business acquired rights.

ESM.<sup>11</sup> Moreover, a SDT measure would be in line with paragraph 7 of the LDC Modalities, which calls on Members to consider the specific interests and difficulties of LDCs in Article X negotiations. SDT should be made available for LDCs on as many elements necessary to ensure that an ESM fulfils its goal of shielding LDCs from domestic injury or threat thereof as a result of commitments and fulfilment of the development goals and objectives enshrined in the GATS Preamble, Article IV and the LDC Modalities.

33. Benefits of a horizontal approach to LDCs includes its guaranteed right of an ESM available to all modes of supply and sectors. Additionally, a SDT is also proposed which can be further developed for the specific circumstances and interests of LDCs.
34. Furthermore, questions have been raised by some Members on whether one set of uniform rules can apply to all modes of supply.<sup>12</sup> Given that each mode of supply has its own characteristics it is realistic to presume that different types of safeguard measures would be used for different modes of supply. This concern is legitimate and requires further research to feed into negotiating eventual disciplines for each mode of supply.

#### **B. Other Approaches**

35. Another proposal discussed proposes negotiations on whether an ESM should be a rights-based model or not.<sup>13</sup> Two ESM models have been presented by an Australian proposal, one assuming Members *do not* have an absolute right to invoke an ESM and the other *does* assume Members have such an absolute right.
36. Each of the two models proposed have in place the same elements except for the procedures related to the right to invoke an ESM. The first model, which does not assume an absolute right to invoke an ESM, calls on Members to submit a report showing the cause of injury to the Council of Trade in Services (CTS) and at an earlier stage given the need for approval by all WTO Members. The CTS must agree that the report is satisfactory before the injured Member can invoke an ESM. The second model, which does assume an absolute right to invoke an ESM, calls on Members to notify the CTS before invoking an ESM provided that the guidelines and procedures for the application have been followed.
37. The main elements supported in both models are:

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<sup>11</sup> Discussion on possible elements for Special and Differential Treatment in the paper by Marconini, M. "Emergency Safeguard Measures in the GATS: Beyond Feasible and Desirable", UNCTAD/DITC/TNCD/2005/4, 9 March 2005.

<sup>12</sup> See Communication from the EC on "Modal Application of an Emergency Safeguard Measure", S/WPGR/W/38, 21 January 2002.

<sup>13</sup> Informal discussion paper submitted by Australia on "Elements for a Possible 'Core Mechanism' for Temporary Suspension or Modification of Commitments", JOB(02)/8, 13 February 2002.

- Temporary and extraordinary suspension or modification of a commitment that has been in place for one year
  - Injury must be caused by a sudden surge in imports and cause severe hardship
  - An ESM can be in place for a maximum of two years, with possibility of extension
  - Apply the principle of non-discrimination and transparency
  - Provision of a phase out plan and progress reports required
38. The main cost of this proposal is its application only after injury has occurred. Unlike the ASEAN group proposal, this proposal does not allow for the application of an ESM on the threat of injury. This omits an important preventative mechanism for Members.
39. This proposal is also void of SDT to LDCs, which is a key element given the low level of development of service industries and hence increased risk of import surges in LDCs.
40. There have also been discussions on approaching negotiations on a sector-by-sector basis whereby Members inscribe an ESM for individual sectors in their schedules of commitments. Negotiating individual disciplines for sectors would require establishing a priority list of sectors. This approach would privilege developed countries that have greater resources and capacity to undertake sector-specific assessments for negotiations. Moreover, given the large number of services listed under the W/120 and the conflict of interests and priorities that would take place among Members, a long and complex process of negotiations would result requiring a great amount of effort, expertise and time that LDCs may not have the capacity for. Furthermore, Members may not choose to liberalise in those sectors that do not have an ESM in place.
41. An important aspect that must be taken into consideration of any proposal is the administrative burden it places on LDCs. This is particularly true with regards to the amount of information required to show injury and its causal link to a Member's specific commitments. The disciplines for an ESM should be negotiated with a balance of preventing the ability to abuse and discriminate ESM applications with ensuring it can be invoked when needed and applied effectively, i.e. that requirements are not too stringent.

## VIII. RECOMMENDATIONS

42. It is important that LDCs work together and share their views, interests and concerns with regards to an ESM in order to advance a common position in the negotiations. In this light, the following recommendations, based on the objectives of national development, are proposed to help aid discussions among LDCs:

- advocate for a systemic and manageable work programme with multiple phases for carrying out negotiations effectively
- advocate the horizontal approach by raising awareness of the detrimental effects of the sectoral approach on all components of the domestic market from suppliers to consumers and the unfair advantage developed countries will have in setting the priority of sectors in negotiations.
- highlight the gap of a safeguard measure (that also allows for the meeting of certain domestic policy objectives) that only an ESM can fulfil
- advocate for and/or assist in the understanding and development of non-traditional and new approaches to safeguard measures (that are different from safeguard measures applied to trade in goods) for the different modes of supply in GATS
- adopt the nationality criterion for the definition on domestic industry for its narrower scope of application covering only domestic suppliers which is more conducive to a safeguard instrument for infant industry, consumer welfare and market stability
- advocate for a strong SDT for LDCs to: 1) exempt them from being on the receiving end of an ESM or at minimum for mode 4, 2) apply an ESM for a longer period of time, and 3) receive technical assistance for investigations to show cause of injury and longer time frame for such investigations
- allow for a provisional safeguard measure before conclusion of the investigations to show cause of injury
- advocate for application of an ESM based on clear economic and social criteria such as:
  - a) If domestic market share/activity in a service sector falls by a certain percentage a year or does not grow by a certain percentage a year
  - b) If job losses in the sector reach a certain percentage a year
  - c) Development objectives enshrined in the GATS Preamble
- submit proposals in coalition with other negotiating groups, such as the Africa Group and ASEAN, for strength in numbers in negotiations

## IX. CONCLUSION

43. Because LDCs do not have in place competitive domestic services industries, reliable local markets and sophisticated consumers, an ESM is more so desirable. Moreover, the main priority for LDCs is for national development.

An ESM is one of the instruments that would provide LDCs with the opportunity to prevent (and recover from) an unexpected injury or threat thereof in their domestic and local markets. From an LDC perspective, such a measure would generate market stability thereby improving the market position of their domestic suppliers and moderate prices for their consumers.

44. Similar to the safeguard mechanism available in trade in goods, an ESM would replace the regulatory authority that Members give up when they have bound commitments. Before Members were party to GATS, a threat or onset of a harmful import surge would be curbed through the regulations that reduce or stop imports to prevent serious damage to domestic service providers. After binding commitments in GATS, Members are not guaranteed the right to exercise such regulations unless willing to risk dispute settlement proceedings or undertake Article XXI to permanently modify their schedule of commitments with compensation to affected Members. An ESM replaces some of the lost rights Members had for curb imports before undertaking binding commitments.
45. The ideal outcome of the negotiations on ESM would be to reach an agreement on a useful instrument that would provide a safety net to countries when their liberalisation commitments cause or threaten to cause dire domestic injury. Negotiations on an ESM are very technical and will require several phases whereby Members agree on objectives and basic concepts initially before moving on to more complex issues of how to develop disciplines for each mode of supply. A focused work programme is crucially needed in order to move discussions in a systematic, efficient and successful manner.
46. The challenge expressed by those opposing an ESM should not discourage any efforts to push forward negotiations. On the contrary, LDCs should attach a greater importance to ESM (and the other rules areas) before market access negotiations. Members should have a clear focus on the objectives which should be based on elements found in the Preamble, which provide Members, particularly LDC Members, the right to regulate and ensure growth and development.