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HONG KONG MINISTERIAL CONFERENCE: BOTTOM LINES FOR DEVELOPING COUNTRIES IN THE GATS NEGOTIATIONS

SYNOPSIS

In the lead up to the Sixth Hong Kong Ministerial Conference of the World Trade Organisation in December 2005, developing countries have an interest to define their outcomes for the General Agreement on Trade in Services (GATS) negotiations. For that purpose, this analytical note the achievements realised thus far in the GATS negotiations, considers the challenges and opportunities developing countries face in negotiations and presents final negotiating positions in line with developing country interests for the GATS negotiations on market access and GATS rules.

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HONG KONG MINISTERIAL CONFERENCE:

**BOTTOM LINES
for DEVELOPING COUNTRIES in the GATS
NEGOTIATIONS**

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I. INTRODUCTION

1. The services negotiations and informal meetings that are to take place now to the Sixth World Trade Organisation (WTO) Ministerial Conference in December 2005 will have a crucial impact on the outcomes for the General Agreement on Trade in Services (GATS) at the Ministerial Conference. Therefore, it is important to assess the achievements gained thus far in the negotiations, what more is to be achieved and what opportunities lay ahead for developing countries in the GATS negotiations on market access and GATS rules and domestic regulation.
2. This note presents “bottom lines” or final negotiating positions that developing country Members should not negotiate below for each area of the GATS negotiations. There is a similarity in the reasoning for bottom lines in the different areas of negotiations, which stem from two main reasons: 1) the fact that developing countries are not the main *demandeurs* of the GATS negotiations and therefore, logically, are not the first ones to provide concessions; and 2) the lack of compliance to the Guidelines and Procedures for the Negotiations on Trade in Services. The lack of compliance by the Council for Trade in Services (CTS) to the Guidelines and Procedures for Negotiations has resulted in a systemic problem in the overall conduct of negotiations whereby concessions are expected unduly by developing countries and without the necessary prerequisites, e.g. rules, in place. This note aims to assist developing countries to participate more actively in the upcoming negotiations and formulate positions in line with development objectives.¹

II. Negotiations on Specific Commitments

3. The Guidelines and Procedures for the Negotiations on Trade in Services under Paragraph 11 state the “main method of negotiation [to] be the request-offer approach.” These negotiations are to be undertaken through bilateral, plurilateral and multilateral negotiations.
4. The request-offer approach begins with a Member exchanging bilaterally with another a “request” for liberalisation in specific service sectors and modes of supply of their interest in hopes of receiving an “offer” (from the

¹ Please note that the South Centre has produced a separate paper focused on bottom lines for least developed countries titled “GATS and the Hong Kong Ministerial Conference: Bottom Lines in the Negotiations for LDCs”, SC/TADP/SV/AN/17, October 2005.

requested) of a multilateral commitment in the services and modes of supply and degree (i.e. full, partial/limited or no liberalisation) for liberalisation.

5. Flexibilities in line with the development levels of developing countries are to be in place in the negotiations on specific commitments. Such flexibility is provided by GATS Article XIX on Negotiation of Specific Commitments, where paragraph 2 calls for the process of liberalisation to respect national policy objectives and levels of development of individual Members both in overall and individual sectors. Developing countries, however, have raised concerns that the way in which the negotiations on specific commitments have been conducted thus far has been in a manner less flexible than the proponents of GATS claims it to be.

A. Responding to requests

6. The exchange of initial requests has taken place since 30 June 2002. Initial requests are exchanged bilaterally and followed by bilateral consultations where Members discuss the contents of the requests made and whether the requested offers are feasible.
7. Developing countries have expressed concerns of their received requests, which have been far from respecting the flexible approach and developmental considerations enshrined in GATS Article XIX: 2. It is important to recall again GATS Article XIX: 2, which provides flexibility for individual developing country Members to open fewer sectors, liberalise fewer types of transactions, progressively extend market access in line with their development situation and when providing market access to foreign suppliers to attach conditions² for achieving Article IV objectives.³ Developing countries have been requested to offer full market access and national treatment liberalisation commitments in areas of crucial importance and sensitivity to their development goals and objectives, such as financial, telecommunications, energy, and transportation services.
8. The request for fully open markets in such sectors would also go against fulfilling the objectives of GATS Article IV on Increasing Participation of Developing Countries, since complete open markets could lead domestic service suppliers who are not as advanced as developed country service providers in sensitive sectors (such as financial or transportation services)

² See Borrero, E. and Raj, G. *GATS Conditions to Achieve Developing Country Objectives*, T.R.A.D.E. Series Occasional Paper 13, March 2005.

³ GATS Article IV on Increasing Participation of Developing Countries calls on Members to undertake commitments that lead to increased supply of services by developing countries and LDCs, increase information flow to service suppliers of developing countries and provide special priority to LDCs in implementing these objectives as well as take into account LDCs' serious difficulty in accepting commitments.

to be out-competed and crowded out of the market. Developed countries are also requesting additional offers from developing countries without fulfilling the requests they have received from developing countries. Given that developing countries are not the main *demandeurs* in these negotiations, they cannot be expected to provide concessions first.

9. Further, the CTS has not completed an assessment of trade in services and review of progress in negotiations, which is called for by the Guidelines and Procedures for Negotiations thereby increasing the uncertainty of whether actual benefits will be realised for developing countries in this round of negotiations.

10. Therefore, based on the:

- a) flexibilities in GATS Articles IV and XIX: 2;
- b) lack of institutional capacity to engage fully in negotiations;
- c) fact that developing countries are not the main *demandeurs* in this round of negotiations;
- d) lack of strong domestic industries and regulatory frameworks to compete with foreign service providers; and
- e) the lack of assessment conducted by the CTS on the domestic costs and benefits of services liberalisation

➤ *Developing countries should not reply to requests before receiving concessions nor should they fulfil requests that do not respect the flexibilities in GATS or consider development goals and objectives.*

B. Submitting requests

11. Developing countries have clearly communicated their areas of export interest in requests. Mode 4 has been an important area of interest for many developing countries in this round of market access negotiations. However, the requests for mode 4 (among others) have not been met deeming the submittal of additional requests by developing countries unnecessary without fulfilment of earlier requests.

12. In the run up to and at the Hong Kong Ministerial Conference, developing countries should:

➤ *Not submit additional requests until Members have delivered on earlier ones without harmful tradeoffs or unfair concessions.*

C. Responding to offers

13. Developing countries have noted that offers made by developed countries do not provide beneficial market access commitments to them. South Centre analyses conducted on initial and revised offers submitted by developed countries show:

- a) no substantial and meaningful binding commitments from a horizontal and/or sectoral perspective, particularly in mode 4;
- b) Members going back on existing commitments;
- c) most offers are conditional on reciprocity from other Members (including developing countries) and conclusion of certain negotiations such as reclassification of sectors, etc.;
- d) that in cases where horizontal commitments and modifications were made in mode 4, they were limited to highly skilled workers mainly Intra-Corporate Transferees, and linked to mode 3;
- e) the use of new and modified classifications that have not been multilaterally agreed; and
- f) introduction of new MFN exemptions.

14. Given that mode 4 has been communicated as a main area of export interest to developing countries, the lack of meaningful offers in this area provide developing countries a great leverage point for conditioning their increased participation in market access negotiations to offers of meaningful mode 4 liberalisation. In this light and in the run up to the Hong Kong Ministerial Conference,

➤ *Developing countries should assert that they will not gain benefits from negotiations without satisfactory fulfilment of their mode 4 requests.*

D. Submitting an offer

15. In the run up to the Hong Kong Ministerial Conference, those developing countries who have not done so will continue to face pressure to submit initial and revised offers. The decision to submit initial or revised offers requires careful assessment of their impacts on the domestic economy and stakeholders and strategic considerations for the ongoing negotiations.⁴

⁴ Please see South Centre Informal Note *Preparing Offers: Some Suggestions for Developing and Least Developed Countries*, September 2004.

16. Developing countries are not the main *demandeurs* in the GATS negotiations. The offensive interests developing countries have in mode 4 are still lower in trading value and capacity to provide services in comparison to the offensive trading interests of developed countries in mode 3 and large services sectors such as telecommunications, financial and energy services. Therefore, strategically, developing countries should consider offering commitments only *after* they have received commitments in areas of export interest to them, rules negotiations are completed and the call by the Guidelines and Procedures for Negotiations on Trade in Services for the CTS to carry out an assessment of trade in services and review of the progress in negotiations (see discussion below) are completed. Providing offers without the complete assurance of receiving real benefits in this round of negotiations would be a major concession on the part of developing countries.
17. Recently acceded countries have undertaken substantially more commitments than any other WTO Member. Countries that acceded after 1995 scheduled on average 104 sub-sectors. That is extremely high compared to the Uruguay Round commitments where developing countries and LDCs committed on average to 44 and 20 sub-sectors respectively.⁵ The schedules of commitments of these new Members provide far greater liberalisation commitments than other Members. With regards to the give and take nature of the GATS negotiations, newly acceded Members have already given more than others and deserve to receive an equal or higher amount of concessions from their developed trading partners.
18. Further, the outcome of the negotiations on GATS rules and domestic regulation (which have not been concluded) will impact the value and regulatory parameters of market access liberalisation commitments. Logically therefore the Guidelines and Procedures for Negotiations on Trade in Services call on Members to conclude negotiations on rules and domestic regulation *before* the conclusion of market access negotiations.
19. Finally, it is important to recall here that GATS Article XIX: 2 provide additional important flexibilities *only* for developing countries allowing them to commit to liberalisation at a slower pace in line with their development levels and goals.
20. Paragraph 14 of the Guidelines and Procedures for Negotiations calls for an overall and sectoral assessment of trade in services with reference to GATS Article IV objectives. Importantly, negotiations are also to be adjusted in light of the results of such an assessment. Technical assistance is also to be provided for undertaking national/ regional assessments. Paragraph 15 of these guidelines calls for the review of the progress in

⁵ Evenett, SJ and Braga, C. *WTO Accession: Lessons From Experience*, The World Bank Group Trade Note 22, 6 June 2005.

negotiations to ensure effective implementation of GATS Articles IV and XIX: 2 as well as suggestions on ways to better promote the goals in Article IV. The CTS is also to conduct an evaluation of the results of the Article IV objectives before completion of the negotiations. These important mandates for an assessment and review, which can provide benefits to developing countries, have not been undertaken.

21. The submission of an offer for binding commitments is a complex process involving necessary prerequisites. In general, developing countries should be able to answer “yes” to *all* of the following questions *before* being submitting a second (or first) offer:

- a) Have you submitted a request?
- b) Do offers by other Members provide benefits to you by fulfilling your requests?
- c) Do offers by other Members meet the objectives of GATS Article IV on Increasing Participation of Developing Countries in world trade?
- d) Have you undertaken a domestic assessment on the impact of offering binding commitments on your economy and domestic stakeholders?
- e) Do you have the capacity to produce an offer?
- f) Are the rules and domestic regulation negotiations completed?
- g) Has the CTS conducted an assessment of trade in services and review of progress in the negotiations to ensure GATS Article IV objectives on Increasing Participation of Developing Countries are being met, so that the results can be considered in your offer?

Submitting an offer without meeting the conditions above would be a major concession on the part of a developing country Member.

22. Thus, based on the:

- a) fact that developing countries are not the main *demandeurs* in the market access negotiations;
- b) lack of meaningful commitments, in response to submitted requests, from the *demandeurs* of GATS;
- c) lack of domestic assessment on the impact of binding liberalisation commitments;
- d) unfinished negotiations on rules and domestic regulation;
- e) the fact that developing countries have not received meaningful concessions on liberalisation commitments from developed countries;

- f) lack of assessment of trade in services and review of the progress of negotiations as called for by the Guidelines and Procedures for the Negotiations on Trade in Services; and
- g) flexibilities in GATS Article XIX: 2

➤ *There are no valid justifications for developing countries to submit additional offers.*

E. Changes to the request-offer process

23. Some WTO Members have proposed new approaches to the GATS negotiating modalities. The idea of “benchmarking” the market access negotiations or utilising complementary approaches has been initially introduced by the EC, who has become one of the major advocates for the idea. The EC proposal would be the equivalent in services to the adoption of a formula approach applied in the market access negotiations for agriculture and NAMA, which aim to bind Members to minimum market access commitments. Additional proposals have also been submitted, which threaten to remove GATS flexibilities (found in Article XIX: 2) that allow developing countries to liberalise at a slower pace that is conducive to their levels of developments.

24. In fact, there is already a mandated in-built system of ‘benchmarks’ in place for GATS, which is found in Article IV (and reinforced by Article XIX: 2 and 3). The in-built benchmarks in Article IV relate to increasing the participation of developing countries in world trade through strengthening their domestic services capacity; improving their access to distribution and information channels; and liberalisation of market access in sectors and modes of export interest to them.

25. The benchmarking or complementary approaches would significantly alter the architecture of the GATS framework and remove a large part of the flexibility provided in GATS Article XIX: 2. The possibility to change the modalities of negotiations and alter the negotiated Guidelines and Procedures for Negotiations at this point in negotiations would set a negative precedent for future negotiations.

26. Therefore, in the run up to the Hong Kong Ministerial Conference:

➤ *Developing countries should carefully evaluate proposals on or relating to benchmarking the process or utilising complementary approaches in negotiations and oppose any removal of the in-built benchmarks provided by Article IV and flexibilities of Article XIX: 2.*

III. NEGOTIATIONS ON GATS RULES AND DOMESTIC REGULATION

27. The negotiations on rules and domestic regulation are to be concluded before the negotiations on specific commitments as called for by the Guidelines and Procedures for Negotiations on Trade in Services. However, quite the opposite has been occurring throughout this round of GATS negotiations. A greater emphasis has been placed on market access creating uncertainty on how the eventual conclusion of rules and domestic regulation negotiations will impact liberalisation commitments. Additionally, the greater movement in market access negotiations could prejudice the final outcomes of rules negotiations as Members' interests in rules may be biased with what has or has not been offered thus far in schedules of commitments.

A. Emergency Safeguard Mechanism (ESM)

28. GATS Article X negotiations on ESM has received a great deal of discussion and debate. Negotiations on an ESM are complex and technical but with the proper level of political will are not insurmountable.⁶ Given that there is no clear evidence that liberalisation results in increased foreign direct investment, an ESM is particularly important for developing countries that may be more vulnerable to import surges (given their relatively lower levels of development of their services industries compared to those of developed countries) when they choose to enter into the risky venture of binding liberalisation commitments.

29. For these reasons,

➤ *Developing countries should insist on the completion of ESM negotiations before the conclusion of market access negotiations.*

B. Subsidies

30. Of all the rules negotiations, progress on Article XV on Subsidies has been the slowest. The lack of progress is mainly due to the difficulty in defining and quantifying subsidies for services trade and the unwillingness to share information where they exist. However, developing countries have both offensive and defensive interests with regards to the way subsidies in services trade are disciplined in GATS. Further, Article XV also calls for negotiations to recognise the role subsidies play in development programmes and the need to provide flexibility in this regard. Therefore, developing countries have in place the opportunity to balance their offensive and defensive interests in

⁶ See South Centre Analytical Note *Issues of Interest to LDCs in the WTO Services Negotiations Series No. 3: Emergency Safeguard Mechanism*, SC/TADP/AN/SV/15, August 2005.

disciplines if the special treatment for the use of subsidies for development purposes is respected. Moreover, as part of the rules that set the parameters for specific commitments, negotiations on subsidies must conclude *before* negotiations in market access.

31. Thus,

➤ *Developing countries should insist on the completion of negotiations on subsidies before the conclusion of market access negotiations.*

C. Government Procurement

32. There is no agreement among Members on the scope of the negotiating mandate for government procurement. As was seen with developing countries' lack of interest in including government procurement disciplines for trade in goods (as part of the "Singapore Issues"), the same reasoning applies to trade in services. Public procurement is utilised to meet multiple development goals and objectives by providing equitable and sustainable public services to people as well as supporting important and necessary domestic service suppliers, thereby deeming government procurement undesirable to be negotiated for liberalisation commitments. Despite these clear objections, some Members (particularly the EC) continue to push for market access opening in government procurement in services through the GATS.

33. Given the clear objections,

➤ *Developing countries should resist any attempt to negotiate government procurement as a market access issue.*

D. Domestic Regulation

34. GATS Article VI: 4 negotiations on disciplines for domestic regulation has picked up pace in recent months. A group of developing countries have submitted a horizontal proposal on elements for disciplines with a strong emphasis on the right to regulate based on national policy objectives.⁷ Members both developed and developing countries feel there is potential to reach agreement on the elements for disciplines on domestic regulation at the Hong Kong Ministerial Conference.

35. An important issue will be ensuring that developing countries and LDCs are able to retain their right to exercise regulatory authority for

⁷ Communication from Brazil, Colombia, Dominican Republic, Peru and The Philippines: Elements for Draft Disciplines on Domestic Regulation, 26 April 2005.

development goals and objectives. Developing countries and LDCs must be able to exercise qualification requirements and procedures, licensing requirements and procedures and technical standards with the objective of fulfilling development ends primarily. The level of institutional and administrative capacity of developing countries must also be taken into consideration when implementing disciplines.

36. Developing countries should continue to engage in these negotiations, which includes consulting with domestic regulators on the implications of potential disciplines, to ensure their interests are considered and incorporated in agreements.

37. In this light,

➤ *Developing countries should ensure their right to regulate based on national policy objectives is a necessary condition for fulfilling disciplines on domestic regulation.*

➤ *Developing countries should insist on the completion of negotiations on domestic regulation before the conclusion of market access negotiations.*

IV.CONCLUSION

38. There are many parallel tracks of negotiations in GATS that developing country Members are engaged in. Coupled with the human and financial resource constraints faced by developing countries, keeping abreast of these negotiations is indeed difficult and challenging given the large agenda of the overall Doha Round of WTO negotiations. Recognising these difficulties, this note aimed to offer a brief snapshot of the status of negotiations and the bottom lines in negotiations developing countries can consider taking in the run up to and during the Hong Kong Ministerial Conference.

39. The note has shown that a systemic problem exists in the process of negotiations, which stems from the in-compliance of the Guidelines and Procedures for Negotiations on Trade in Services - namely the faster pace of negotiations in market access compared to rules negotiations, and unfulfilled call for assessment and review of negotiations - in addition to the lack of adherence to the flexibilities provided for developing countries in the GATS. These failures provide the main justification for the bottom lines for negotiations presented in this note.

40. For ease of reference, a summary of the negotiations and their bottom lines are presented below.

Table 1. Summary of each area of GATS negotiation and bottom lines for developing countries.

NEGOTIATING ISSUE	BOTTOM LINE FOR DEVELOPING COUNTRIES
Responding to requests	<ul style="list-style-type: none"> • are not obligated to reply to requests that do not respect the flexibilities in GATS and do not consider development goals and objectives of developing countries.
Submitting requests	<ul style="list-style-type: none"> • not submit additional requests until Members have delivered on earlier ones without harmful tradeoffs or unfair concessions.
Responding to offers	<ul style="list-style-type: none"> • assert that no benefits will be afforded to developing countries from negotiations without satisfactory fulfilment of their mode 4 and other requests.
Submitting an offer	<ul style="list-style-type: none"> • recognise that without fulfilment of requests made by developing countries and other obligations under the Guidelines and Procedures for Negotiations, there are no valid justifications for developing countries to submit additional offers.
Changes to the request-offer process	<ul style="list-style-type: none"> • evaluate proposals on or relating to benchmarking the process of negotiations or utilising complementary approaches and oppose any removal of the in-built benchmarks provided by Articles IV and flexibilities of Article XIX: 2.
Emergency Safeguard Mechanism	<ul style="list-style-type: none"> • insist on the completion of ESM negotiations before the conclusion of market access negotiations.
Subsidies	<ul style="list-style-type: none"> • insist on the completion of negotiations on subsidies before the conclusion of market access negotiations.
Government Procurement	<ul style="list-style-type: none"> • resist any attempt to negotiate disciplines in government procurement as a market access issue.
Domestic Regulation	<ul style="list-style-type: none"> • ensure the right to regulate based on national policy objectives is a necessary condition for fulfilling disciplines on domestic regulations. • insist on the completion of negotiations on domestic regulation before the conclusion of market access negotiations.

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