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

SYNOPSIS

This analytical note aims to assist least developed countries (LDCs) participate more actively in the General Agreement on Trade in Services (GATS) negotiations leading up to the Sixth Hong Kong Ministerial Conference of the World Trade Organisation in December 2005 by providing guidance on the final negotiating positions for LDCs in the GATS negotiations on market access and GATS rules in line with their development objectives.

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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 at the Ministerial Conference. Therefore, it is important to assess the achievements gained thus far in the GATS negotiations, what more is to be achieved and what opportunities lay ahead for least developed countries (LDCs) for each of the track of negotiations under market access and GATS rules and domestic regulation.
2. This note presents “bottom lines” or final negotiating positions that LDC Members should not negotiate below for each area of the GATS negotiations. This note aims to assist LDCs to participate more actively in the upcoming negotiations and formulate positions in line with development objectives.

II. NEGOTIATIONS ON SPECIFIC COMMITMENTS

A. Responding to requests

3. 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. It is important to recall again GATS Article XIX: 2, which provides flexibility for individual developing country (and LDC) 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 conditions¹ or achieving Article IV objectives.²

¹ Please see Borrero, E. and Raj, G. *GATS Conditions to Achieve Developing Country Objectives*, T.R.A.D.E. Series Occasional Paper 13, March 2005.

² 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, facilities to increase information flow to service suppliers of developing countries and provide special priority to LDCs in implementing these objectives as well as taking account of LDCs’ serious difficulty in accepting commitments.

4. LDCs 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. LDCs have been requested by developed country Members 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.
5. 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 in the sensitive sectors (such as financial or transportation services) who are not as developed as developed country service providers to be out-competed and crowded out of the market.
6. The request for full open markets in LDCs also does not respect the Modalities for the Special Treatment for LDC Members in the Negotiations in Trade in Services (LDC Modalities). It is worth recalling that the LDC Modalities paragraph 4, states “members shall take into account the serious difficulty of LDCs in undertaking negotiated specific commitments in view of their special economic situation, and therefore shall exercise restraint in seeking commitments from LDCs”. Further, paragraph 5 of the LDC Modalities states “there shall be flexibility for LDCs for opening fewer sectors, liberalising fewer types of transactions, and progressively extending market access in line with their development situation. LDCs shall not be expected to offer full national treatment, nor are they expected to undertake additional commitments ... on regulatory issues which may go beyond their institutional, regulatory, and administrative capacities”.
7. Based on the:
 1. flexibilities in GATS Articles IV and XIX:2;
 2. LDC Modalities paragraphs 4 and 5;
 3. lack of strong domestic industries to compete with foreign service providers;
 4. the lack of assessment of the costs and benefits domestically of services liberalisation; and
 5. lack of institutional capacity to engage fully in negotiations

► LDCs should not reply to requests that do not respect the flexibilities in GATS and the LDC Modalities or consider their development goals and objectives.

B. Submitting requests

8. LDCs have clearly communicated that Mode 4 in sectors of low skill occupations is the main mode and sectors of export interest to them in this round of market access negotiations.
9. The LDC Modalities paragraph 6 states that “special priority” is to be provided for effective market access in sectors and modes of supply of export interest to LDCs through negotiated commitments. Ways in which “special priority” in market access can be afforded to LDCs should be explored.
10. Thus, in the run up to and at the Hong Kong Ministerial Conference, LDCs should:

- ▶ *ensure that Members to deliver on their request on Mode 4 without tradeoffs.*
- ▶ *complement their request for commitments in Mode 4 by seeking ways of operationalising “special priority” for market access for LDCs (as called for by the LDC Modalities paragraph 6)³.*

C. Responding to offers

11. LDCs have noted that offers made by developed countries do not provide beneficial market access commitments to them. Furthermore, South Centre analysis conducted on the 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) that most offers are conditional on reciprocity in the offers from other Members, conclusion of negotiations (including negotiation to reclassify sectors), etc.;
 - d) that in cases where horizontal commitments and modifications were made in mode 4, they were limited to highly skilled workers and mainly as Intra-Corporate Transferees and linked to mode 3;
 - e) the use of new and modified classifications that have not been multilaterally agreed; and

³ See South Centre Informal Note *Operationalising the Modalities for the Special Treatment of LDCs in the Negotiations on Services: According “Special Priority” to LDCs*, August 2005.

- f) introduction of new MFN exemptions.
15. Given that mode 4 and in services of lower skill qualifications has been communicated as the area of export interest to LDCs, the lack of offers in these areas provide LDCs with a great leverage point for conditioning their increased participation in market access negotiations to offers of meaningful mode 4 commitments. In this light and in the run up to the Hong Kong Ministerial Conference,

► *LDCs should assert that they will not gain benefits from the negotiations without satisfactory fulfilment of their mode 4 requests.*

D. Submitting an offer

16. LDCs have not submitted initial offers. In the run up to the Hong Kong Ministerial Conference, LDCs will most likely continue to face pressure to submit initial offers.
17. The decision to submit an offer requires careful assessment of their impacts on the economy and strategic considerations for the ongoing negotiations.⁴ LDCs are also not demandeurs in the GATS negotiations. Strategically, LDCs should consider offering commitments only *after* they have received commitments of export interest to them first, rules negotiations are complete and assessments conducted.
18. Further, GATS rules negotiations and domestic regulation have not been completed. The outcome of these negotiations will impact the value and regulatory parameters of liberalisation commitments. This is particularly so for negotiations on an ESM, which can provide an important mechanism to prevent and ensure domestic recovery from negative impacts of open markets. 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. In general, LDCs should be able to answer “yes” to *all* of the following questions *before* being submitting an initial offer:⁵
- a) Have you submitted a request?
 - b) Do you have the capacity to submit a request?
 - c) Do you know what to request?

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

⁵ Partly based on a presentation by Joy Kategekwa of the Permanent Mission of the Republic of Uganda, titled “State of Play of GATS Negotiations – LDC Perspective” from the South Centre Workshop on Trade in Services in February 2005.

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- d) Do offers by other countries provide benefits to you?
 - e) Do you have the capacity to submit an offer?
 - f) Are the rules and domestic regulation negotiations completed?
 - g) Has an assessment on the impacts of binding commitments been conducted?
20. GATS Article XIX: 2 and the LDC Modalities paragraphs 4 and 5 (discussed above) provide additional important flexibilities for LDCs to commit to liberalisation in line with their development levels and goals.
21. Recently acceded countries have undertaken substantially more commitments than any other WTO Member. The two LDCs that acceded after 1995, Nepal and Cambodia committed to 76 and 93 sub-sectors respectively. That is extremely high compared to the Uruguay Round commitments by LDCs which is 20 sub-sectors on average.⁶ 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.
22. The Guidelines and Procedures for Negotiations in paragraph 14 calls for an overall and sectoral assessment of trade in services with reference to Article IV objectives. 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 assessment. Paragraph 15 of these guidelines calls for the review of the progress in negotiations to ensure effective implementation of Articles IV and XIX: 2 (discussed above) and suggestions on ways to better promote the goals in Article IV. The Council for Trade in Services (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 have not been undertaken.
23. Based on the:
- a) flexibilities in GATS Article XIX: 2 and the LDC Modalities;
 - b) lack of domestic assessment on the impact of binding liberalisation;
 - c) unfinished negotiations on rules and domestic regulation;
 - d) 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

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

- e) fact that LDCs are not demandeurs in the market access negotiations

► *there are no valid justifications for LDCs to submit an offer.*

E. Changes to the request-offer process

24. 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 least developed countries to liberalise at a slower pace that is conducive to their levels of developments.
25. In fact, there is already a mandated in-built system of ‘benchmarks’ in place, which is found in GATS Article IV and is reinforced by Article XIX: 2 and 3. These benchmarks 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.
26. The initial proposal by the EC on benchmarking exempted LDCs, however, future proposals are on the horizon and care must still be taken with ideas that change the modalities of the market access negotiation process. 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.
27. Therefore, in the run up to the Hong Kong Ministerial Conference:

► *LDCs should carefully evaluate proposals on or relating to benchmarking the process or utilising complementary approaches in negotiations and oppose any removal on the flexibilities provided by GATS Articles IV and XIX: 2 and the LDC Modalities.*

III. NEGOTIATIONS ON GATS RULES AND DOMESTIC REGULATION

28. 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. However, quite the opposite has been occurring throughout this round of GATS negotiations. A greater emphasis has been placed on market access creating a sense of insecurity on how the eventual conclusion of rules negotiations will impact market access commitments. The greater movement in market access negotiations could also prejudice the final outcomes of rules negotiations as Members' interests in the rules negotiations may be biased with what has or has not been offered thus far in schedules of commitments.
29. It should also be noted that the LDC Modalities in paragraph 11 states that "In developing any multilateral rules and disciplines, including under GATS Articles VI: 4 (Domestic regulation), X (Emergency safeguard measures), XIII (Government procurement) and XV (Subsidies), Members shall take into account the specific interest and difficulties of LDCs". This paragraph refers to the lack of resource capacity in LDCs to effectively engage in rules negotiations and the low capacity of their domestic service providers to engage in international trade that furthers national development goals and objectives.

A. Emergency Safeguard Mechanism (ESM)

30. 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. Opponents' questions on the feasibility and desirability of an ESM as well as arguments that existing GATS flexibilities are sufficient for countering domestic injury from liberalisation commitments are not widely accepted.⁷
31. An ESM undoubtedly would provide an important safety net allowing temporary relief to domestic service providers. An ESM is particularly important for LDCs as they are more vulnerable to import surges given the relatively lower levels of development of their services industries compared to those of developed countries.

⁷ 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.

32. For these reasons,

► *LDCs should insist on the completion of ESM negotiations before the conclusion of market access negotiations.*

B. Subsidies

33. 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. However, LDCs have both offensive and defensive interests with regards to the way subsidies in services trade are disciplined in GATS. Article XV also calls for negotiations to recognise the role subsidies play in development programmes and the need to provide flexibility in this regard. LDCs thus have in place the opportunity to receive special treatment for the use of subsidies for development purposes. Moreover, as part of the rules that set the parameters for specific commitments, negotiations on subsidies must conclude *before* negotiations in market access.

34. Thus,

► *LDCs should insist on the completion of negotiations on subsidies before the conclusion of market access negotiations.*

C. Government Procurement

35. There is no agreement among Members on the scope of the negotiating mandate for government procurement. As was seen with the negative sentiment of the inclusion of government procurement disciplines for trade in goods (as part of the "Singapore Issues") by LDCs, the same reasoning applies to trade in services. Public procurement is utilised to meet development goals and objectives in providing equitable and sustainable public services to people, 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.

36. Given the clear objections by LDCs,

► *LDCs should resist any attempt to negotiate government procurement as a market access issue.*

D. Domestic Regulation

37. GATS Article VI:4 negotiations on disciplines for domestic regulation has picked up pace in recent months. A group of developing countries⁸ have submitted a horizontal proposal on elements for disciplines with a strong emphasis on the right to regulate based on national policy objectives. This emphasis aims to ensure policy space and flexibility within countries. Members both developed and developing countries feel there is potential to reach agreement on the elements for domestic regulation disciplines at the Hong Kong Ministerial Conference.
38. An important issue will be ensuring that developing countries and LDCs are able to retain their right to exercise regulatory authority for 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 least developed countries must also be taken into consideration when implementing disciplines.
39. LDCs should 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. These negotiations provide LDCs with opportunities to preserve their right to regulate based on national policy objectives and ensure proper SDT measures that respect their levels of regulatory frameworks.
40. In this light,

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

► *LDCs should insist on the completion of negotiations on domestic regulation before the conclusion of market access negotiations.*

IV. CONCLUSION

41. There are many parallel tracks of negotiations in GATS that LDC Members are engaged in. Keeping abreast of these negotiations is indeed difficult and challenging given the large agenda of the overall Doha

⁸ Communication from Brazil, Columbia, Dominican Republic, Peru and The Philippines: Elements for draft disciplines on Domestic regulation, 26 April 2005.

Round of WTO negotiations coupled with the human and financial resource constraints faced by LDCs. Recognising these difficulties, this note aimed to offer a brief snapshot of the status of negotiations and the bottom lines in negotiations LDCs can consider taking in the run up to and during the Hong Kong Ministerial Conference. For ease of reference, a summary of the negotiations and their bottom lines are presented below.

Table 1. Summary of each area of GATS negotiations and bottom lines for LDCs.

NEGOTIATING ISSUE	BOTTOM LINE FOR LDCS
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 the LDC Modalities and that do not consider development goals and objectives of LDCs.
Submitting requests	<ul style="list-style-type: none"> • ensure that Members to deliver on their request on Mode 4 without tradeoffs. • complement the LDC Group Mode 4 request by seeking ways of operationalising “special priority” for market access for LDCs (as called for by the LDC Modalities paragraph 6).
Responding to offers	<ul style="list-style-type: none"> • assert that no benefits will be afforded to LDCs from negotiations without satisfactory fulfilment of the Mode 4 request.
Submitting an offer	<ul style="list-style-type: none"> • recognise that without fulfilment of requests made by LDCs 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. • consider ways to counter benchmarking or similar proposals with alternatives based on development objectives.
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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