

Doha Mandate

“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 negotiations, initiated in January 2000 under Article XIX 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.”

(Paragraph 15 of the Doha Ministerial Declaration)

Trade in Services

Prospects for Cancun

The Doha Round negotiations under the General Agreement on Trade in Services (GATS) have focused largely on market access thus far. In contrast, little attention has been paid to the parallel discussions on horizontal and rule-making issues — both of which are of particular interest to developing countries. This imbalance is reflected in the draft Ministerial text for Cancun, in which great emphasis is placed on the market access negotiations dear to developed countries, while other issues find little mention. If the negotiations are to be given new impetus — particularly from a sustainable development perspective — this asymmetry must be addressed: ‘horizontal’ issues, such as assessment and least-developed country (LDC) modalities, and rule-making issues, such as emergency safeguards, subsidies, government procurement and domestic regulations, need to be advanced at Cancun.

In particular, ministerial guidance will be required to clarify the GATS mandate for conducting an assessment of the liberalisation process, as called for by developing countries that feel uncomfortable about entering into new services commitments without fully understanding the effects of prior ones. In the final days before the Cancun Ministerial, various developing countries have stepped up their efforts to balance out the strong emphasis on market access issues by proposing that the draft Ministerial text contain equal encouragement for the finalisation of the request-offer phase and the rule-making negotiations.

The modal coverage and depth of developed countries’ initial offers to developing countries have proven to be very limited. Virtually no developed country has offered commitments on the movement of natural persons (mode 4), an area of fundamental interest to developing countries. Against this background, Members might find themselves facing a round of negotiations where the issue coverage

is extensive, but the quality and content of potential commitments ends up being minimal. To address this situation, developing countries recently proposed including references in the draft Ministerial text on the need for countries to make concessions in services modes of particular interest to developing countries, such as mode 4.

Looking at the broader negotiating context, it is important to note that while some aspects of the GATS negotiations have advanced considerably, other crucial negotiations, such as those in agriculture or market access for industrial goods, are lagging behind schedule. This is a source of concern especially to the developing countries that do not see many potential benefits in the current services negotiations.

Background

Like the Agreement on Agriculture, the GATS contains a ‘built-in agenda’ mandating Members to initiate market access liberalisation negotiations on services by 1 January 2000. As provided for in GATS Article XIX:3, Members adopted “negotiating guidelines and procedures” (‘Guidelines’, S/L/93) for these negotiations in 2001.

The Doha Ministerial Declaration refers to these Guidelines as “the basis for continuing the negotiations” and states that the “negotiations shall aim to achieve progressively higher levels of liberalisation of trade in services through the reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access.” The negotiations “shall aim to increase the participation of developing countries in trade in services” and shall provide “appropriate flexibility for individual developing country Members.”

The Guidelines go on to mandate Members to continue negotiations on the ‘outstanding issues’, i.e. the establishment of an emergency safeguard mechanism (ESM) for services¹, possible disciplines on domestic regulation, as

The Guidelines and Procedures for the Negotiations on Trade in Services (S/L/93) state that the negotiations shall be conducted "pursuant to the objectives of the GATS, as stipulated in the Preamble and Article IV, and as required by Article XIX."

GATS Article XIX.3 reads: "For each round, negotiating guidelines and procedures shall be established. For the purposes of establishing such guidelines, the Council for Trade in Services shall carry out an assessment of trade in services on overall terms and on a sectoral basis with reference to the objectives of this Agreement, including those set out in paragraph 1 of Article IV. Negotiating guidelines shall establish modalities for the treatment of liberalisation undertaken autonomously by Members since previous negotiations, as well as for the special treatment of least-developed country Members under the provisions of paragraph 3 of Article IV."

Among the objectives listed in the GATS Preamble are the economic growth of all trading partners and the development of developing countries; the promotion of the interests of all trading partners on a mutually advantageous basis; securing an overall balance of rights and obligations, while giving respect to national policy objectives; and the right of Members to regulate [...] in order to meet national policy objectives and, given the 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.

well as disciplines on government procurement and subsidies.

Members decided on a request-offer approach as the main method of negotiating new 'specific commitments' on market access and national treatment while generally stating that "liberalisation shall be advanced through bilateral, plurilateral and multilateral negotiations."

As mandated by the GATS, the Guidelines request Members to develop criteria for granting 'credit' for autonomous liberalisation undertaken by Members since the previous negotiations, as well as to conduct an assessment of trade in services with reference to the objectives set out in the GATS (see below). Furthermore, the negotiations "shall be adjusted in the light of the assessment." Additionally, the Council for Trade in Services (CTS) shall review the efforts made to facilitate the increased participation of developing countries in international services trade, and conduct an evaluation of the results.

Mandated Deadlines

- 30 June 2002, Members were to submit initial bilateral market access requests to their trading partners;
- 31 March 2003, Members were to respond to the requests received with initial offers;
- 1 January 2005, the mandated services negotiations are to conclude as part of the single undertaking agreed to in Doha.

Regarding the ESM, the following 'deadlines' were established:

- 15 March 2003, the Chair of the Working Party for GATS Rules was to issue a report on the results of the work;
- Fifth WTO Ministerial Conference (September 2003) to take stock of progress; and
- 15 March 2004, conclusion of ESM negotiations.

Regarding other 'outstanding issues', the Guidelines provide that:

- Prior to the conclusion of the market access negotiations (i.e. 1 January 2005)
 - Members "shall aim to conclude" negotiations on GATS Articles VI:4 (domestic regulation), XIII (government procurement) and XV (subsidies). On the first two items, the Chair was to circulate a progress report by 30 June 2003, and ministers are to take stock of the negotiations at Cancun; and
 - an evaluation "shall be conducted" of the implementation of GATS Article IV

(on increasing developing countries' participation in the global services trade).

Members were also to establish modalities for 'credit' for autonomous liberalisation before the start of the negotiations on market access commitments.

Current State of Play

Bilateral Market Access Negotiations

In the current bilateral request-offer phase, virtually all WTO Members have received initial requests from some 62 mainly developed and larger developing countries. 30 countries have already made their initial services offers including the US and the EC. According to the CTS, the offers received thus far leave much to be desired in terms of coverage of different modes and sectors, as well as the depth of commitments. Many developing countries, such as India, are pointing to the failure of key developed countries to present substantive offers on mode 4 and have requested several developed countries to allow better access for service-providing natural persons.

Horizontal issues have also been addressed in several requests, including removing barriers to investment (i.e. economic needs-tests) in mode 3 (commercial presence). The US and the EC have requested "additional commitments" on services-related domestic regulatory measures — such as certain transparency (notification) and necessity requirements — imposed and/or to be imposed by trading partners. LDCs have not yet tabled any requests.

Some developing country Members are concerned about the process' lack of transparency and the large resource capacities required for the bilateral market access negotiations, as well as inequalities in bargaining power and the trend towards the 'bilateralisation' of horizontal issues, such as autonomous liberalisation, domestic regulation and classification. More generally, many developing countries continue to question whether they have anything to gain from further multilateral services liberalisation.

'Horizontal' Issues

Credit for autonomous liberalisation: Autonomous liberalisation measures refer to measures undertaken unilaterally by WTO Members to liberalise a services sector, as a consequence of their own national liberalisation processes or World Bank/IMF structural adjustment programmes since 1995. The negotiating mandate on autonomous

liberalisation under the GATS was oriented toward the recognition of negotiating credits (benefits in subsequent negotiations under GATS) for national-level efforts in this regard. In March 2003 and after more than two years of discussions, the CTS approved modalities for the treatment of autonomous liberalisation in the current negotiations (JOB(02)/35/Rev3). The new modalities for autonomous liberalisation indicate that the granting of credit will be determined by bilateral negotiations. This means that the modalities function as a predictable and transparent framework for bilateral procedures when seeking and consolidating credit, with some political control by the CTS on their general application. Nevertheless, it should be noted that the modalities neither create any legal obligation nor do they establish any automatic right to credit or recognition.

Assessment of trade in services:

The debate on assessment has seen disagreement between developed country Members and several developing countries, such as Cuba, Kenya, Nigeria, Pakistan, Senegal and Thailand, on whether the CTS should conduct an assessment of services liberalisation or whether individual Members should carry out their own national and/or regional assessments. According to GATS Article XIX.3, the CTS "shall carry out an assessment of trade in services on overall terms and on a sectoral basis" for the purpose of establishing negotiating guidelines for each subsequent round of negotiations. The Guidelines state that carrying out an assessment is an "ongoing activity of the CTS and negotiations shall be adjusted in the light of the results of the assessment."

While developing country Members have consistently called for an overall assessment to be carried out before the start of new market access negotiations, some developed countries argue that the Guidelines provide for national assessments to be conducted by Members themselves. They also maintain that the data available is insufficient for an overall assessment. So far, nothing has been achieved with regard to an overall assessment of services liberalisation at the multilateral level. Some consider the lack of results in this area to be a direct violation of the mandate of Article XIX of the GATS and the Guidelines.

Special treatment for LDCs: Under the GATS, special and differential treatment (S&D) shall be accorded to developing country Members, with particular priority given to LDCs. The Guidelines also indicate that services negotiations shall promote the

increased participation of developing and in particular least-developed countries in trade in services. In order to address these requirements, the CTS has been discussing LDC modalities since the approval of the Guidelines. Negotiations on these modalities seek ways of granting S&D during the market access negotiations in services. In March 2003 Zambia, on behalf of the group of LDCs, tabled a formal proposal on negotiations modalities for the special treatment of LDCs (TN/S/W/13). This proposal suggested that LDCs should not be required to offer national treatment to foreign service providers, and that they should not be requested to make 'additional commitments' (GATS Article XVIII) on regulatory aspects that would "go beyond their institutional, regulatory and administrative capacities." Zambia further proposed that "preferential market access mechanisms" should be established so as to create effective market access for LDCs.

In May 2003, the WTO Secretariat and the US proposed alternative language on LDC modalities (Jobs (03)/127 and 133). These proposals alter the language of Zambia's proposal from binding to best endeavour, taking away much of the legal weight of Zambia's proposal. Some observers fear that the discussions on LDC modalities will see unsatisfactory outcomes similar to those experienced for autonomous liberalisation modalities.

A final decision on modalities for LDCs has not yet been reached. Nevertheless, the CTS is continuing its efforts to finalise a possible compromise package prior to Cancun.

Subsidiary bodies – outstanding rule-making issues

Emergency safeguard mechanism: A majority of developing country Members, spearheaded by the countries of the Association of Southeast Asian Nations (ASEAN), seem to favour the establishment of an ESM for the services sector. They argue that such a mechanism would create an incentive for developing countries to enter into new market access commitments. In contrast, most developed countries and some Latin American developing countries remain rather sceptical, with the EC and the US generally questioning the mechanism's feasibility and/or desirability. Australia has tabled two possible options for reaching a compromise on an ESM: a consensus based mechanism, or a model that only focuses on procedural issues, but does not touch on feasibility. Overall, Members are split on the need for an ESM, as well as on whether it should

apply horizontally, or only on a sector- and mode-specific basis.

As the latest report of the Working Party on GATS Rules (WPGR) indicates, it is unclear whether the ESM negotiations can be finalised in time for the March 2004 deadline. Although discussions on the feasibility and desirability of an ESM as well as its possible elements have been going on for several years now, fundamental differences continue to divide Members. These differences have so far stalled the ESM debate and, ultimately, the preparation of a draft text. If Members continue to lack sufficient political will, the WPGR seems unlikely to finalise negotiations under Article X of the GATS. This failure would also affect other rule-making efforts in the areas of subsidies and government procurement. A group of 15 developing countries has proposed the inclusion of text in the draft Ministerial text urging Members to finalise safeguards negotiations by the deadline of 15 March 2004.

Subsidies in services: According to the Guidelines, WTO Members "shall aim to complete" negotiations on the necessary multilateral disciplines for subsidies in services prior to the conclusion of the market access negotiations (end-2004). The discussions in the WPGR are, however, still very immature. For example, only four Members have so far responded to a questionnaire circulated by the WPGR Chair in which Members were requested to provide information on their domestic services support programmes. As a result, no substantive debate has yet taken place on issues such as the definition of subsidies in the field of services, the role of subsidies in the pursuit of public policy objectives, the need for S&D for developing countries or the appropriateness of a countervailing mechanism.

This lack of multilateral disciplines on subsidies has started to work against weaker partners in the request-offer process. Indeed, many developing countries find themselves at a clear disadvantage, unable to assess the competitiveness or market prospects of domestic providers vis-à-vis foreign providers to whom subsidies might be granted. The situation is such that no readily available information exists today on the incentive schemes used by OECD countries or others to promote their services providers.

Government procurement: The main issue here remains the scope of the mandated negotiations. Many developed countries believe that negotiations under GATS Article XIII cover disciplines on non-discrimination, national treatment

and market access, whereas related transparency issues should be dealt with by the WTO Working Group on Transparency in Government Procurement. In contrast, most developing countries are of the view that non-discrimination, national treatment and market access issues are excluded from the GATS mandate and that only issues linked to transparency should be addressed in the WPGR. Members will need to await the outcomes of Cancun to see whether or not broader negotiations will be launched on transparency in government procurement as one of the 'Singapore Issues'. Only once this decision is taken can Members decide on where and how issues related to government procurement in services would be discussed most appropriately.

Work on domestic regulations:

The negotiations on possible horizontal disciplines on domestic services-related regulatory measures have so far been driven mainly by the EC and Japan. They believe that there is a need for objective criteria and transparency requirements for measures such as technical standards and licensing procedures. In March 2003, Japan presented a proposal for a new GATS annex on domestic regulation (JOB/(03)/45). The proposal seeks to develop the content of Article VI.4 of the GATS and to facilitate trade in services by ensuring that measures relating to licensing, qualification requirements and procedures, and technical standards do not constitute unnecessary barriers to trade in services. The EC has also presented a proposal on 10 July 2003 on licensing procedures, which sets out a transparent regulatory framework for licensing procedures under Article VI.4 of the GATS (S/WPDR/W/25). Developing countries have become increasingly interested in a multilateral approach because trading partners such as the US and the EC have requested far reaching "additional commitments" on certain regulatory issues in their

market access requests. Nevertheless they have expressed concerns over the Japanese and EC proposals regarding the way the 'necessity test' has been phrased, the existence of burdensome procedures, and the fact that the proposed disciplines would not apply to mode 4 and visa procedures.

Implementation Issues

The main outstanding implementation issue in the services field is facilitating the participation of developing countries in the global services trade (GATS Article IV). According to paragraph 15 of the services Guidelines, the CTS is instructed to review the implementation of Article IV and to make suggestions on promoting its objectives, as well as to undertake an overall evaluation before the completion of the services negotiations. Recently a group of 18 developing countries made a joint statement in the CTS on possible ways to implement Article IV (TN/S/W/16). The countries indicated that the best way to assess whether the services offers were fulfilling the mandate contained in Articles IV and XIX.2 was to establish a set of questions that could facilitate the analysis of the initial offers and streamline discussion to achieve concrete objectives of the GATS. These questions would be related to the quality and technical analysis of the offers, and the evaluation of the economic and commercial importance of the commitments proposed. No decision has so far been taken on this proposal.

Endnote

- 1 An ESM is a temporary measure that would be taken if the implementation of GATS commitments by a Member had the unforeseen consequence of services imports occurring in such increased quantities that domestic suppliers of like services would find themselves threatened with serious injury. Such ESMs are already included in other agreements, such as the GATT and the Agreement on Agriculture.

GATS Article IV.1 states that "increasing participation of developing country Members in world trade shall be facilitated through negotiated specific commitments [...] relating to: (a) the strengthening of their domestic services capacity and its efficiency and competitiveness, inter alia through access to technology on a commercial basis; (b) the improvement of their access to distribution channels and information networks; and (c) the liberalisation of market access in sectors and modes of supply of export interest to them."

Proposals on market access negotiations can be searched at http://www.wto.org/english/tratop_e/serv_e/s_propnewnegs_e.htm

Proposals tabled at the four subsidiary bodies of the CTS can be searched at http://www.wto.org/english/tratop_e/serv_e/s_coun_e.htm

Several GATS offers and further information on international trade in services and sustainable development can be found at the new services section on the ICTSD website at <http://www.ictsd.org/issarea/services/index.htm>.

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