

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**Developments since Cancun**

The Doha Round services negotiations have focused almost exclusively on market access and more specifically on the bilateral request-offer exercise, which continues to advance irrespective of the political ups and downs of the Round. Nevertheless many observers consider the depth and quality of the offers to be far from satisfactory. The 'July Package' largely reaffirms existing deadlines, the Doha mandate and pre-Doha negotiating guidelines, but emphasises the importance of concluding the initial request-offer phase and calls for a new round of offers.

Initial offers show limited ambition in terms of both their depth and their coverage of the four modes of supply. For example, with the exception of the European Union, virtually no developed country has offered new liberalization on the movement of natural persons (mode 4) — an area of fundamental interest to developing and least-developed countries (LDCs). Against this background, Members might find themselves with an outcome where a broad range of issues are covered, but the quality and content of potential commitments is minimal.

While the request-offer process has proceeded slowly, almost no progress at all has been made in the parallel discussions on the so-called "horizontal" and "GATS rules" issues. Horizontal issues include, among others, the assessment of services liberalization, disciplines on domestic regulation, credit for autonomous liberalization, S&D for LDCs and classification of services sub sectors. GATS rules issues include negotiations on an emergency safeguard mechanism (ESM), disciplines for services subsidies and government procurement. Both sets of issues are of particular interest to developing countries and to national regulatory authorities.

From a sustainable development perspective, the new phase of negotia-

tions must address horizontal and GATS rules issues alongside market access issues. For instance, countries must receive credit in the request-offer process for unilateral or 'autonomous' liberalisation measures taken outside the WTO. The modalities for the treatment of LDCs adopted just before Cancun in September 2003 are meaningless unless translated into concrete offers. Regarding the GATS rules issues, the July Package exhorts Members to "intensify their efforts to conclude the negotiations on rule-making under GATS Articles VI:4 ,X, XIII and XV in accordance with their respective mandates and deadlines". Various proposals have been made on GATS rules issues by both developed and developing countries, but differences remain wide and many technical questions unanswered.

Looking at the broader negotiating context, some aspects of GATS negotiations have advanced while negotiations on agriculture or market access for industrial goods are way behind schedule. This is a source of concern particularly to developing countries, which see few potential benefits in the current services negotiations if other market access issues are not going to be addressed simultaneously. The lack of concrete results at the multilateral level has given rise to several new bilateral trade agreements that have incorporated GATS-plus (and sometimes GATS-minus) standards, thus calling into question the integrity of the GATS framework.

Background

Like the Agreement on Agriculture, the General Agreement on Trade in Services contains a "built-in agenda" mandating Members to initiate progressive liberalisation negotiations on services by 1 January 2000. In March 2001, Members adopted "negotiating guidelines and procedures" ('Guidelines', S/L/93) for these negotiations as provided for in GATS Article XIX:3, adopting a request-offer approach as the main method of negotiating new "spe-

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.

cific commitments" on national treatment, market access and additional commitments. The Guidelines also 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, and disciplines on government procurement and subsidies.

The Doha Ministerial Declaration subsequently referred to these Guidelines as "the basis for continuing the negotiations" to pursue the GATS Article XIX objective of "progressively higher levels of liberalisation of trade in services" by reducing or eliminating measures (such as limitations on capital flows and the establishment of commercial presence) that make it harder for foreign services providers to do business. The Article also aims to increase the participation of developing countries in trade in services, specifying that "there shall be appropriate flexibility" for developing country Members, including the freedom to "open fewer sectors" and "progressively extend market access in line with their development situation."

As mandated by the GATS, the Guidelines request Members to conduct an assessment of trade in services with reference to the objectives set out in the GATS. This mandate has only been carried forward through regional and national assessments but not through a multilateral one.

Mandated Deadlines and the July Package

Offer and request exercise:

- Members that have not yet submitted their initial offers must do so as soon as possible.
- A date for the submission of a round of revised offers should be established as soon as feasible.
- The mandated services negotiations are supposed to conclude on 1 January 2005 as part of the single undertaking agreed in Doha Ministerial Declaration.
- For the purpose of the Sixth Ministerial meeting, the Special Session of the Council for Trade in Services shall review progress in these negotiations and provide a full report to the Trade Negotiations Committee, including possible recommendations.

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

- The ESM should be agreed by the conclusion of market access negotia-

tions (i.e. 1 January 2005, if not extended).

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

- Prior to the conclusion of the market access negotiations (i.e. 1 January 2005, if not extended) Members "*shall aim to conclude*" negotiations on GATS Articles VI:4 (domestic regulation), XIII (government procurement) and XV (subsidies).
- An evaluation "shall be conducted" of the implementation of GATS Article IV (on increasing developing countries' participation in the global services trade). Thus evaluation has not been undertaken in a multilateral manner.

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 90 developed and developing countries. More than 47 countries have also made their initial services offers including Argentina, Australia, Brazil, Bulgaria, Canada, Colombia, Chile, Dominican Republic, El Salvador, Fiji, Guatemala, India, Israel, Japan, Jordan, Kenya, Malaysia, Mexico, New Zealand, Paraguay, Poland, Peru, Singapore, Sri Lanka, Switzerland, Thailand, the United States, and Uruguay. LDCs have not tabled many requests and are yet to present their offers. Members have generally signalled their disappointment with the results thus far. While developed countries focused their criticism on the low number of offers, most developing countries stressed that the quality of the offers made was unsatisfactory.

According to the Committee on Trade in Services, the offers received to date leave much to be desired in terms of both the depth and coverage of different modes and sectors. Many developing countries, including India and Brazil, 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 individuals ("natural persons").

Horizontal issues have also been addressed in several requests, including removing barriers to investment in mode 3 (commercial presence). Some developed countries have requested additional commitments on services-related domestic regulatory measures,

such as the notification of proposed regulations even before they become law. Various developing countries are concerned about the “process inequalities” in bargaining power and the trend towards the ‘bilateralisation’ of the request and offer process of some horizontal issues such as autonomous liberalisation, LDC modalities, domestic regulation and classification.

What has happened to mode 4?

Many developing countries question whether they still have something to gain from further multilateral services liberalization, especially if developed countries persist in not liberalising mode 4. For them, the ‘movement of natural persons’ represents one of the few areas that offers them clear gains from services liberalisation. An April 2004 statement by 18 developing countries said that there has not been “any real improvement” in the mode 4 commitments made by developed countries. This group of developing countries also pointed out that the new mode 4 offers that developed countries have made were linked to commercial presence (mode 3), providing only for movements such as intra-corporate personnel transfers. The statement called for “de-linked” mode 4 offers, accompanied by the elimination of pre-employment conditions, economic need tests, quota restrictions on visas, discriminatory tax treatment and restrictions on duration, as well as the recognition of qualifications.

Immigration and security issues are two of the main political barriers to mode 4 liberalisation in developed countries. However, a recent conference on mode 4 organized by the International Organisation for Migration and the World Bank acknowledged that immigration forms only a small part of global migration flows, and that most of the mode 4 flows are currently occurring among developing countries.

Regional trends: GATS plus and GATS minus

While the Doha round has slowed down since Cancun, the trend towards regional and bilateral agreement (RTAs) has gained more ground. Most of these RTAs contain services provisions. The majority of the services obligations in these new generation RTAs are “GATS-plus”, e.g., negative-list commitment schedules. However, some of them contain “GATS-minus” rules’ that are less far-reaching than GATS obligations, including limited definitions of modes 2 and 4, carve-outs for subsidies in services, the separation of certain services from the

12 sectors covered by the GATS (i.e. the creation of special chapters on e-commerce) and broader security exemptions, etc. A trade expert has observed that US bilateral trade “agreements concluded to date reflect the US trade agenda, including GATS-plus obligations where these are in its interest (financial services, telecommunications, specific obligations with regard to express delivery, the protection of local distributors and transparency). In other areas the agreements mostly replicate existing obligations under the GATS or are even more limited in scope.”² The proliferation of RTAs with services provisions could eventually render the GATS irrelevant. Furthermore, GATS-minus rules could potentially put these RTAs into conflict with WTO law.

‘Horizontal’ Issues

Credit for autonomous liberalisation and LDC modalities

“Autonomous liberalisation” refers to measures undertaken unilaterally by WTO Members to liberalise a services sector since 1995, as a consequence of either their own national liberalisation processes or World Bank/IMF structural adjustment programmes. The GATS’ mandate on autonomous liberalization aims to give Members ‘credit’ for such liberalisation — this would have other countries make them offers without extracting offers from them in return. The modalities for the treatment of autonomous liberalisation in the current negotiations agreed to by the CTS in March 2003 (JOB(02)/35/Rev3) outline a procedural framework for the bilateral negotiations that will determine the amount of ‘credit’ granted. They do not, however, establish any automatic right to credit or recognition. Observers have affirmed that their actual effect on the offers made has been minimal.

Assessment of trade in services

GATS Article XIX.3 mandates the CTS to “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 such assessment constitutes an “ongoing activity of the CTS,” and that the “negotiations shall be adjusted in the light of the results of the assessment.”

The debate on assessment has posed developed country Members against developing countries, such as Cuba, Kenya, Nigeria, Pakistan, Philippines, Senegal and Thailand. The developing countries are calling for the CTS to conduct an overall assessment before

the start of new market access negotiations, while the 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/multilateral assessment of services liberalisation, which some consider to be a direct violation of the mandate of GATS Article XIX and the Guidelines. However, no action has been taken to ensure that such an multilateral assessment actually takes place.

Modalities for special and differential treatment of LDCs

GATS provides for special and differential treatment (S&D) for developing country Members, with particular priority given to LDCs. Article XIX.3 mandates the establishment of modalities for S&D for LDCs. The services Guidelines also exhort Members to promote the increased participation of developing and in particular least-developed countries. In September 2003, the special session of CTS adopted modalities for the special treatment of LDCs. These modalities have been looked at as a way to translate S&D into actual market access commitments, and are summarised as follows:

- Members shall take into account the difficulties of LDCs in undertaking specific commitments, and shall exercise restraint in seeking commitments from LDCs;
- Members shall help LDCs to increase their participation in services trade, in part by according them effective market access in sectors of interest, including categories of natural persons identified by LDCs in mode 4 services requests;
- LDCs do not have to offer national treatment, may open fewer sectors, and are not expected to undertake additional commitments on regulatory issues which may go beyond their institutional, regulatory, and administrative capacities;

Many points made by Zambia on behalf of the LDC group (TN/S/W/13) were taken into account during the negotiation of these modalities. Nevertheless some observers fear that like the modalities on autonomous liberalisation, the LDC modalities will not be adequately reflected in bilateral requests and offers. In case studies recently undertaken by ICTSD on Bangladesh and Tanzania, experts have reiterated the need to translate these modalities into actual market access

commitments in the WTO for LDCs to benefit from liberalisation.

Subsidiary bodies – outstanding rule-making issues

Emergency safeguard mechanism (ESM)³

Various developing country Members led by the countries of the Association of Southeast Asian Nations (ASEAN) favour the establishment of an ESM for the services sector. They argue that such a mechanism would give developing countries an incentive to enter into new market access commitments. On the other hand, most developed countries and some Latin American developing countries remain rather sceptical, with the EU and the US questioning the mechanism's feasibility and/or desirability. Australia tabled a proposal in 2002 with two possible options for reaching a compromise on an ESM: a consensus-based mechanism, or a model that only focuses on procedural issues. The proposal, however, did not discuss feasibility. Overall, Members are split on the need for an ESM, as well as on whether it should apply across the board, or only on a sector- and mode-specific basis.

In March 2004, a group of ASEAN members circulated a revised proposal on an ESM in services.⁴ Procedurally, it suggests that the affected country should implement an ESM only after submitting a report to the CTS as to why they need such a safeguard. The right to decide on this need will rest with WTO Members. This suggestion came in response to an Australian proposal that would require Members seeking the ESM to show "just cause" of the injury and a multilateral evaluation of such just cause by the CTS. The ASEAN also noted that some countries would not agree to any services final offer/request agreement if an ESM proposal was not negotiated beforehand. In any event, WTO Members agreed in early 2004 that the deadline for achieving results in this area is by the conclusion of current market access negotiations.

The Brazilian delegation recently argued for linking the ESM to the "necessity tests" in Members' commitment schedules. They said that these "tests," which allow governments to keep a sector closed to liberalisation if they decide that it is adequately serviced by existing service providers, had effectively become the safeguard mechanism of certain countries. In consequence, they proposed two options: either create an ESM that everyone can use, or give up the use of necessity tests as well as the ESM.

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 (originally scheduled for end-2004). The discussions in the Working Party on GATS Rules (WPGR) are, however, still immature. Only a handful of Members have so far responded to the WPGR chair's questionnaire about their domestic services support programmes. As a result, little debate has 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.

Taiwan recently presented, in an informal note (JOB(04)78), a list of hypothetical cases of governmental subsidies programmes designed to serve as a basis for identifying some of the elements of a working definition of a services subsidy. Elements identified included the existence of a financial contribution, the benefit to the supplier of a service, the distortiveness of the programme, and the existence of a particular recipient ("specificity"). Most of these match the current definition of "subsidies" in the Agreement on Subsidies and Countervailing Measures. Many believe that the absence of a specific definition of services subsidies should not preclude discussions toward the establishment of multilateral disciplines for them.

The lack of a multilateral definition of and disciplines on services subsidies has started to work against weaker partners in the request-offer process. Many developing countries find themselves at a clear disadvantage, unable to assess the competitiveness or market prospects of domestic providers vis-à-vis potentially subsidised foreign providers.

Government procurement

The scope of the mandated negotiations remains the main issue here. Most developing countries are of the view that GATS Article XIII.1 excludes government procurement of services from GATS disciplines on non-discrimination, national treatment and market access issues, and that only issues linked to transparency and due process should be addressed in the WPGR. Many developed countries disagree, arguing that GATS Article XIII.2 provides for negotiations on government procurement in services, including related issues of non-discrimi-

nation, national treatment, and market access.

The July Package launched negotiations on trade facilitation, freezing work on the other Singapore issues, including transparency in government procurement. The cessation of activity by the Working Group on Transparency on Government Procurement is likely to focus new attention on the talks on government procurement in services.

Work on domestic regulations

The negotiations on possible horizontal disciplines on domestic regulatory measures for services have so far been driven mainly by the EU and Japan. They believe objective criteria and transparency requirements are required 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 facilitate trade in services as per Article VI.4 of the GATS, which provides for the creation of disciplines to ensure that measures relating to licensing, qualification requirements and procedures, and technical standards do not constitute unnecessary barriers to trade in services. The EU presented a proposal in July 2003 setting out a transparent regulatory framework for licensing procedures, also under Article VI.4 of the GATS (S/WPDR/W/25).

Developing countries have become increasingly interested in a multilateral approach to disciplines on regulatory measures because market access requests from trading partners such as the US and the EU have requested far reaching "additional commitments" on certain regulatory issues. They have also expressed concerns over the above-mentioned proposals regarding the phrasing of the "necessity test" for regulations and the existence of burdensome procedures as well as the fact that the proposed disciplines would not apply to mode 4 and visa procedures. As a follow-up to these concerns, Colombia presented an informal document (JOB(04)/84, June 2004) which included a typology of administrative measures relating to procedures for obtaining and renewing visas or entry permits that represent potential or actual obstacles to trade. The typology developed by Colombia is based on a survey that concluded that most visa procedures make it difficult and even impossible for Colombian enterprises and nationals to compete in international services markets, and thus constituted a barrier to trade in services supplied through mode 4.

Colombia also observed that the GATS strictures about ensuring that the "trade-restrictiveness" and burdensome nature of measures not become unnecessary barriers to trade also apply to mode 4. The Colombian informal paper generated mixed reactions among WTO Members. Most developing countries reaffirmed that GATS should not limit their full sovereign right to establish visa procedures. Developing countries replied that while visa issuing is closely linked to the right to regulate, the examples identified by Colombia clearly showed that visa procedures could become *de jure* and *de facto* obstacles to trade.

The impact of the latest dispute settlement cases

The US-Antigua-Bermuda gambling case

In November 2004, a WTO panel released its final report to the public on the US-Antigua-Bermuda gambling case. The report ruled in favour of Antigua and Barbuda and found that restrictions on internet gambling at both the federal and state levels violated US market access commitments under the GATS. Trade experts described this WTO ruling — the first to address Internet trade — as a landmark decision that could serve as a precedent with regard to WTO Members' GATS commitments. Trade sources have indicated that this decision has created some uneasiness in the US. There are doubts that the US will fully implement the ruling, raising concerns about the effectiveness of the current dispute settlement system when huge power differences exist among the parties.

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.

Endnotes

- 1 See GATS plus and GATS Minus in US Free Trade Agreements by Luis Abugatas Puentes. Bridges Monthly November, 2004.
- 2 Idem.
- 3 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.
- 4 Document not yet derestricted, downloadable at http://www.ictsd.org/issarea/stsd/Resources/Docs/ASEAN_ESM.pdf. The new proposal slightly differs from an earlier ASEAN ESM proposal tabled in 2000 (S/WPGR/W/30)

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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