

Working Party on GATS Rules

**COMMUNICATION FROM BRUNEI DARUSSALAM, INDONESIA,
MALAYSIA, MYANMAR, THE PHILIPPINES AND THAILAND**

Further Thoughts on an Emergency Safeguard Mechanism

The following communication, dated 24 February 2004 from the delegation of Brunei Darussalam, Indonesia, Malaysia, Myanmar, the Philippines and Thailand is being circulated to the Members of the Working Party on GATS Rules.

I. INTRODUCTION

1. This document from Brunei Darussalam, Indonesia, Malaysia, Myanmar, the Philippines and Thailand is submitted for Member's consideration to further the discussion on a possible framework to govern the application of an "emergency safeguard mechanism" (ESM) for trade in services. It reflects the evolving thought of the aforementioned delegations based on the discussions had in the Working Party on GATS Rules since the submission of the ASEAN Non-Paper in October 2000 proposing a draft Agreement on Emergency Safeguard Measures for Trade in Services (Job No. 6830), as well as inputs received in various other fora. The notions reflected herein are strictly of a preliminary nature and are intended to be the basis for further discussions and submission(s) by these and hopefully other delegations. As such, this submission is being made without prejudice to the submitting Members' final position on the various elements herein discussed.

II. POLICY CONTEXT

2. Given the binding and largely irrevocable nature of services commitments, some form of ESM would be needed to address adverse consequences that may arise in the course of implementation of services commitments on a temporary and extraordinary basis.

3. Indeed, it is not improbable that there may arise situations where, by virtue of liberalisation commitments undertaken by a Member under the GATS¹, certain unintended or unanticipated consequences are borne by certain domestic private stakeholders in a particular sector or industry of that Member. These consequences, which may take the form of actual injury or threat of serious injury, may be manifested through the severe loss of profits or market share by the affected domestic service providers, closure of business, loss of employment and the like. Of course, in certain instances, these consequences may not necessarily be caused, directly or indirectly, by the commitments undertaken by a Member. Such cases must be clearly distinguished as these are not the situations intended to be addressed by an ESM.

4. However, even in emergency situations where there is actual injury or threat of serious injury attributable to commitments undertaken under the GATS, a few Members continue to question the appropriateness of recourse to a safeguard measure. The argument underlying this assertion suggests, among others, that the situation faced by domestic stakeholders may be addressed instead through regulatory measures rather than through the temporary withdrawal or modification of a Member's commitments. This particular suggestion however appears to assume that regulatory measures are of themselves unfailingly sufficient to redress the injury or threat thereof faced by domestic stakeholders, or are never scheduled as part of a Member's liberalisation commitments.

5. The same argument likewise suggests that whereas the nature of the redress offered by an emergency safeguard measure is temporary and applicable only for a relatively short period of time, the untoward situations faced by domestic stakeholders often arise from inherent inefficiencies which require longer-term structural adjustments. However, this assertion appears to suggest that all kinds of injury or threats thereof confronting domestic stakeholders are caused by deep-seated problems, such as those relating to the production, distribution or market structure of the sector or industry they operate in. At the least, discussions on this assertion leads to endless debates on what constitutes structural problems needing longer-term solutions, as distinguished from emergency situations which can be ameliorated through shorter-term safeguard measures. Moreover, this appears prone to a mistaken conclusion that safeguard measures are a stand-alone reprieve which precludes consideration or implementation of other complementary policy measures, regulations or solutions on the part of the invoking Member, or on the part of the affected private stakeholders themselves.

6. In sum, in the broad universe of situations which domestic private stakeholders face consequent to market liberalisation and regulatory reform bound under their respective Members' GATS' Schedule of Commitments, there exists a subset of

¹ As reflected in a Member's Schedule of Commitments

situations where these stakeholders suffer from injury or the threat of serious injury, for which an ESM provides a necessary element in the overall solution.

III. ESM AS AN ESSENTIAL SAFETY NET FOR SERVICES LIBERALISATION

7. Regardless of conflicting interpretations of Article X of the GATS, most Members, especially developing countries, see an ESM as an integral component of the overall balance sought to be achieved under the current round of GATS negotiations². In the sense that the rules-based component of the negotiations are perceived as an indispensable complement to the negotiations on specific commitments, a successful conclusion to the negotiations on an ESM may be seen as a condition *sine qua non* or at the very least likely to induce a positive outcome in the overall services negotiations.

8. From a pragmatic perspective, an ESM will help governments in developing country Members address some of their and their domestic constituents' concerns and anxieties over making services commitments under the GATS. More specifically, these Members are concerned that once commitments are made under the GATS, market liberalisation and regulatory reform are generally locked in with no possibility of modification, even in cases of emergency brought about by unforeseen circumstances relating to such bound liberalisation and reform, with the only exception being the permanent modification or withdrawal of commitments under GATS Article XXI procedures. Obviously, addressing cases of emergency or unforeseen circumstances might not necessarily warrant the permanent modification or withdrawal of commitments, particularly if a mechanism is in place to allow for temporary measures to countenance mere suspension of the operation of commitments. An ESM allows these Members some level of comfort in knowing that if they have somehow misjudged the extent or the pace of liberalisation or reform they ought to have committed to, or failed to anticipate certain consequences or other circumstances which may cause injury upon certain domestic private stakeholders, a safety net is available to them, even if only on a temporary basis.

9. In a sense, an ESM may be seen as filling the gap between a permanent commitment and a permanent withdrawal.

IV. LINK TO PROGRESSIVE LIBERALISATION IN MARKET ACCESS NEGOTIATIONS

10. Some delegations see the primary motivation for agreement to an ESM in the possible linkage to broader and deeper liberalisation and regulatory reform commitments

² In fact, it has been said that the expectation that an ESM will be established under the GATS Art. X negotiations was part of the balance struck under the Uruguay Round services negotiations which led developing countries to accept GATS commitments then.

by Members in the parallel negotiations on market access. While it remains for each Member to decide the extent to which it will undertake commitments in the current round, the safety net which an ESM provides is expected at the very least to encourage Members to consider certain requests for liberalisation and reform which would not otherwise have even merited consideration in the absence of an ESM. Certainly, the statements of a number of delegations, including among those traditionally perceived as *demandeurs* of this issue, that they can accommodate greater liberalisation and reform given the comfort level that an ESM affords should buttress this positive linkage.

11. In the case of autonomous liberalisation measures undertaken by Members which remain or are intended to be kept unbound (thus mitigating the value of legal certainty and predictability these measures would otherwise presumably provide), an ESM offers an incentive for Members to bind their autonomous liberalisation measures earlier, given the safety net that a possible recourse to such a mechanism provides.

V. POSSIBLE ELEMENTS FOR AN ESM

12. A number of Members have criticised the ASEAN draft ESM agreement as hewing too closely to the Agreement on Safeguards for trade in goods. Several elements have been alluded to in the course of the debates over the last three years as not susceptible of being conveniently transposed to the services model. Indeed, many Members have pointed to the need for a "more creative" approach. While wishing to heed such calls, we find however that certain elements – though likewise found in the goods model – remain essential if not indispensable for the services model to be workable, effective, not prone to abuse and at the same time protective of certain rights that foreign service suppliers might have acquired. Rather than dispensing with all the goods-based elements, it is perhaps more appropriate to lay down certain elements required in an ESM reflecting, where appropriate, the submitting Members' evolving thoughts thereon. These elements include, *inter alia* -

- (a) MFN – any measure taken under an ESM must be on an MFN basis, as there appears no cogent basis for imposing a safeguard measure on a non-MFN basis, when the problem to be addressed presumably arises from an MFN commitment. In any case, this is stipulated under GATS Article X.
- (b) Limited Window – it has been argued that any injury or threat thereof which could arise as a result of liberalisation or reform would presumably manifest itself within a concrete period of time after such a decision is implemented. If so, Members could consider a limited window of time during which the ESM could be invoked. Logically this should be linked to a certain period of time after the actual liberalisation or reform entered into force. But in reality it might be difficult to discern the actual timing of

liberalisation or reform. Possibly, the full entry into force of a Member's commitments would be a more well-defined benchmark particularly since the ESM is intended to apply only to liberalisation and reform which has been committed under a Member's Schedule of Commitments.

- (c) Limited Duration – an emergency safeguard measure should be applied only for such period of time necessary to remedy or prevent serious injury or threat thereof and to facilitate adjustment of the domestic industry concerned. Based on discussions, it would appear that an application period of three years is a reasonable length of time for this purpose.

As a matter of special and differential treatment in favour of developing countries, a single extension of not more than three years may be granted, subject to prior review by the Council for Trade in Services confirming that reasonable grounds exist for continuing the application of the safeguard measures³.

Where a longer (i.e., beyond the 6-year maximum period for developing countries and the three-year period for developed countries) or even indefinite suspension of commitments is needed, the situation would probably lend itself to a permanent modification or withdrawal of commitments under Article XXI. In other words, any measure extending beyond the time limit should automatically lead to initiation of Article XXI procedures.

In any case, where the duration of the safeguard measure is over one year, the principle of "degressivity" should apply such that the measure in question would be progressively liberalised at regular intervals during the period of application.

Given the shorter timeframes and proposed streamlining of the procedures for invoking an ESM, provisional safeguard measures as initially proposed

³ It may be argued that subjecting the extension period to a review or approval process in the CTS somehow makes it more onerous vis-à-vis adopting Article XXI-like procedures, in the sense that in the first scenario, the burden for showing just cause for maintaining the safeguard measure arguably remains with the ESM-invoking Member, while in Article XXI-like procedures, the invoking Member can proceed to the modification or withdrawal of its commitments subject only to compensation of the affected trading partners, if any. Hence, in Article XXI-like procedures, the burden of proof – albeit solely for purposes of obtaining compensation – is on the affected Member, not the invoking Member. It may likewise be contended however that there is probably a precedent for following the route of the approval process – certain Members' experience under the Agreement on Trade-Related Investment Measures in requesting for an extension of the transitional period for phasing out exemptions to the requirements of that Agreement necessitated approval by the Council for Trade in Goods.

in the ASEAN draft agreement perhaps need not be an indispensable element of an ESM.

- (d) Acquired Rights – a major criticism levied against an ESM is that it erodes the legal certainty and predictability of market liberalisation and regulatory reform commitments undertaken by Members as a result of negotiations with other Members who themselves undertook commitments as part of a balanced exchange of concessions. Where an ESM is invoked, especially in Mode 3 where the supply of a service is inherently accompanied by capital investment (often of a substantial amount), concerns arise as to whether the foreign service suppliers will in fact be forced to disinvest.

Oft-repeated is the developing country position that whereas their governments virtually outbid each other for investments from developed countries, including through offering generous incentive packages which practically leave employment generation as the sole benefit derived from certain investments, it comes to reason that developing countries in particular would be most reluctant to consider applying safeguard measures which are tantamount to forcing disinvestments.

Nevertheless, the ASEAN draft sought to assuage such concerns by proposing three options which afforded rights in varying degrees to pre-established foreign service suppliers. The first option of protecting all the rights vested upon a foreign service supplier upon establishing commercial presence appeared favoured by a number of Members, notwithstanding concerns that the injury caused to domestic industry in all probability must have been caused by the same foreign service suppliers who will now benefit from full protection of their acquired rights. Additional concerns likewise arise on the corollary issue of possibly creating an anti-competitive environment in the sector or activity upon which the safeguard measure is applied.

Obviously in this situation, an ESM is intended merely to prevent further aggravation of the existing situation brought about by unregulated entry of foreign service suppliers, while presumably complementary policy measures or private sector-initiated solutions are implemented to address the injury or threat of injury already present.

The second and third options address the aforementioned concerns relating to the first option by limiting the acquired rights of foreign service suppliers to those existing at the time of the application of a safeguard measure; hence, expansionary activities of the service supplier of other

Members are proscribed as falling out of the sphere of acquired rights. Thus, not only is further aggravation from new entrants prevented, further injury or threat thereof which may arise from expansion or consolidation of operations by the pre-established foreign service suppliers is likewise avoided. The corollary issue of fostering an anti-competitive environment associated with the first option is likewise mitigated since mergers and acquisition could be disallowed.

Based on discussions of the ASEAN draft, it appears logical to adopt an approach which respects acquired rights in accordance with the second option. Admittedly however the list of activities enumerated in the ASEAN draft as falling outside the ambit of acquired rights need to be further refined.

While some delegations appear keen to explore the applicability of acquired rights to all the four modes of supply, it would seem that the overriding economic (and political) justification for according a semblance of protection for acquired rights (or its equivalent) in modes 3 and 4 are clearer, if not stronger. In these cases, the supply of a service is preconditioned, among others, on the establishment of presence by the service provider, whether through commercial presence or through the temporary movement and stay of natural persons. On the other hand, the supply of a service in the other modes is not necessarily predicated on such presence. In a sense, the economically-destabilising (and politically-sensitive) concepts of forced capital disinvestments or labour deportation from the territory of the recipient Member do not lie in the other modes.

Obviously however, these issues could stand further, more in-depth examination especially as to how they relate to the effective operation of an ESM.

- (e) Conditions of Application – obviously, the onus of proving the need for the application of an emergency safeguard measure should rest with the Member choosing to invoke the ESM. While the prescriptive approach proposed in the ASEAN draft could be reconsidered in favour of a more streamlined approach, it would nonetheless appear that certain substantive elements remain fundamental to the integrity and credibility of an ESM. These include, *inter alia* -

- (i) the situation faced by the domestic industry concerned must result from the implementation of a Member's commitments undertaken under Part III of the GATS;
- (ii) there must be a sudden increase in the supply of the service by supplier(s) of another Member;
- (iii) injury or threat of serious injury must have been determined in the relevant domestic industry;
- (iv) causality between the injury or threat thereof and the increase in supply of the relevant service must be clearly established;
- (v) the situation must be of the nature of an emergency;

In terms of procedure, consistent with the desire to have a more simple and streamlined ESM, Australia's Model II approach proposed in its submission contained in JOB(02)/8 should provide a useful template⁴.

As Australia points out in its submission, in exchange for less prescriptiveness at the invoking Member's end, there could be more accountability to Members and a stronger surveillance role for the CTS. Hence, a Member should be allowed some latitude in conducting an investigation and suspending its commitment, akin to what is allowed under Article XXI (and Article XXVIII for that matter) for as long as the substantive elements aforementioned are duly established. If this threshold is met, the justification for invoking a safeguard action could form part of the notification submitted to the CTS, possibly through a "show just cause" report included in the notification, as suggested by Australia. The report could be guided by a checklist of issues which includes an indication not only of how the substantive elements were established, but also a number of "indispensable information" which Australia proposes should include the following, *inter alia*:

- who requested the action and why

⁴ A crucial premise underlying this approach is the recognition that it is every Member's right to modify or withdraw its commitments. Both the legal textual basis and experience with Article XXVIII for goods and Article XXI for services trade point to this inescapable conclusion, subject only to the obligation to maintain a general level of mutually advantageous concessions (for goods) or commitments (for services) not less favourable to trade vis-à-vis affected Members. Indeed, if the permanent modification or withdrawal of concessions/commitments is recognised as a right under both Articles XXVIII of GATT 1994 and XXI of GATS, then with greater reason should the mere temporary modification or withdrawal contemplated under an ESM be construed equally as a right. In the sense that the modification or withdrawal proposed is only temporary, the corollary obligation of maintaining a general level of mutually advantageous commitments should be waived, at least during the initial period of application.

- how implementation of GATS commitments caused injury/damage (e.g., surge in supply or consumption abroad)
 - extent of injury/damage
 - (% of) sector/mode(s) affected
 - who was consulted during the investigation process
 - what less trade-restrictive options were considered and why were these deemed inadequate
 - how this approach will remedy the situation
 - duration required
 - phase-out plan, where appropriate
 - others
- (f) Definition of Domestic Industry – the ASEAN draft prescribed in accordance with Article XXVIII of the GATS which services suppliers should be deemed constituting domestic industry. While we believe that the relevant definitions referred to in Article XXVIII remain legally valid and binding as a general rule in the GATS, the reaction of many Members and the discussions which ensued as a result of ASEAN’s proposal lead to a conclusion that the determination of which entities should be considered domestic entities ought to be largely left to the national laws of each Member. In this regard however, to ensure transparency and predictability, Members may wish to consider undertaking a notification exercise which informs the membership, through the CTS, of Members’ respective definitions of "domestic industry."
- (g) Applicable measures – the principle that safeguard measures should only be applied to the extent necessary to prevent or remedy serious injury or threat thereof remains key. In the sense that the ESM is supposed to apply to bound commitments as they appear in a Member’s Schedule of Commitments, it appears logical that a safeguard measure should pertain to a temporary modification or withdrawal of specific commitments undertaken pursuant to Articles XVI, XVII or XVIII.

In concrete terms however straightforward restrictions against the further entry of service suppliers of other Members should to the extent possible be

a last recourse. The invoking Member must consider other less trade-restrictive options and avail of other trade policy tools, regulations and solutions during the application of the ESM.

Based on discussions had over the years, it still appears logical that an ESM should cover all four modes of supply. While it may appear more difficult to enforce a safeguard measure in certain modes of supply for particular sectors, full coverage should remain a principle if we are going to respect the integrity and architecture of the GATS.

While arguments remain supporting the cross-modal or cross-sectoral application of an ESM, and while Members should continue to reflect on this issue, there seems to be a preponderance of thought among many Members that a safeguard measure should at least be sector-specific and to the extent possible mode-specific.

- (h) Surveillance – this is a post-application element which requires further substantiation if an increased role will be accorded the CTS, as above indicated. Various submissions and interventions have alluded to the need for a mechanism to be set up to ensure that an ESM is credible and not subject to abuse. In this respect, the ASEAN draft probably needs to be revisited and revised.
- (i) Special and differential treatment for developing countries – given that many developing countries are increasingly dependent on and have identified the supply of services through the temporary movement of natural persons (mode 4) as a particular focus of their interest in services trade, it appears reasonable as a concession to special and differential treatment of developing countries that in case a quantitative restriction is used as a safeguard measure on Mode 4, such a measure should not reduce the number of mode 4 suppliers in the sector concerned below the level or average level of a recent representative period.

VI. OTHER ELEMENTS

13. On the other hand, without diminishing the need for Members to understand how certain elements relate to the feasible operation of an ESM, it is envisaged that it may not be possible to reach a clear definition of these elements for purposes of coming up with an ESM. Indeed, some Members may even deem that such elements might not be absolutely necessary for the effective operation of an ESM. These include, *inter alia*:

- (a) Situations Justifying a Safeguard – if the ESM is intended to address emergency and unforeseen circumstances, it is difficult to envisage how situations justifying a safeguard could be pre-defined and pre-determined. On the other hand, the burden of showing cause for invoking an ESM should reasonably rest on the invoking Member (as abovementioned), especially if the situations justifying a safeguard are not to be explicitly defined. Likewise, the same consideration should apply to indicators and circumstances (beyond those indicated in item no. 5 above) for substantiating the case for an ESM. Given the varying nature and characteristics of services trade across its different sectors and modes of supply, the foregoing elements are probably best left to WTO panels and the Appellate Body to adjudge on a case-to-case basis.
 - (b) Like services or directly competitive services – as with the rationale for the elements relating to the determination of situations justifying the application of a safeguard measure, it is perhaps more appropriate to leave to WTO panels and the Appellate Body the function of determining the existence of this element on a case-to-case basis. Obviously, the onus of showing "likeness" or the "directly competitive" nature of the services concerned should be on the Member invoking the ESM.
 - (c) Compensation – given the relatively short period of application of a safeguard measure, compensation may not be absolutely necessary for the effective operation of an ESM. If the approach suggesting CTS review or approval prior to the grant of an extension period is adopted, compensation may likewise not be required. Obviously, if an Article XXI-like approach is preferred, compensation would become a requisite condition for obtaining an extension to the initial period for applying a safeguard measure.
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