Trade in Services

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 leastdeveloped 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)

The most significant – and controversial – recent development in the Doha Round services negotiations has been the strong push by certain WTO Members to establish mandatory minimum market access commitments (benchmarks). These initiatives are premised on the view that both the initial and the revised commitments offered so far leave much to be desired, and that the existing bilateral 'request-and-offer' negotiating modality is not sufficient to achieve the depth and scope of liberalisation commitments desired by these Members.

The proponents of benchmarks suggest complementing the bilateral request-and-offer approach by multilateral and plurilateral modalities, which reflect the 'collective level of ambition' for the negotiations. The multilateral approach is intended to widen the scope of liberalisation commitments, and involves setting numerical targets for the services sectors and sub-sectors that Members must commit to liberalise, with the provision that the targets will be differentiated between developed, developing and least-developed countries. The plurilateral approach seeks to enhance the depth of commitments by proposing that countries that form the 'critical mass' of the market or total trade in a services sector or sub-sector abide by an 'ideal' or 'model' schedule of commitments developed for that sector or sub-sector.

The main proponents of the benchmark approach are keen to improve market access for their services supplied cross-border (Mode 1) and through commercial presence (Mode 3). On the other hand, a number of developing countries remain disappointed with the lack of relevant and commercially meaningful offers in services supplied through the temporary movement of natural persons (Mode 4). With the exception of India, they are generally opposed to the notion of benchmarks. These countries argue that mandatory market opening commitments go against the very nature of the General Agreement on Trade in Services (GATS), which explicitly recognises countries' right to liberalise in accordance with their individual development situation. Further, rather than being complementary, they see benchmarks as supplanting the request-and-offer approach as the primary method for negotiating concessions (see Background below).

Meanwhile, work related to rule-making shows uneven progress. Negotiations on a proposed emergency safeguard mechanism (ESM), which would provide domestic industries time to adjust to increased competition following services liberalisation, remain mired in questions on its desirability and technical feasibility. Discussions on possible disciplines on subsidies in services trade suffer from some Members' reluctance to fully engage in the exchange of information that is supposed to be foundation for the development of such disciplines. Talks on government procurement are blocked over disagreement on the scope of the negotiating mandate, i.e., whether negotiations are limited to establishing rules on transparency in government procurement or, as the EU insists, encompass market access as well. The sole area of rule-making that has made significant strides since the last ministerial conference has been the negotiations on disciplines on domestic regulation.

Background

The General Agreement on Trade in Services provides a 'built-in agenda' requiring Members to enter into successive rounds of negotiations aimed at progressive liberalisation, the first of which was mandated to start in 2000. In March 2001, Members adopted the modalities for services trade negotiations, referred to as the 'Negotiating Guidelines and Procedures' ('Guidelines', S/L/93), which stipulate the request-and-offer approach as the main method of negotiating new 'specific commitments' on market access, national treatment 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 services, 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" with a view to achieving the objectives of the GATS. Among the relevant objectives for this mandate are the establishment of a framework of principles and rules for trade in services, the achievement of progres-

sively higher levels of liberalisation and the facilitation of increased developing country participation in trade in services and the expansion of their service exports. With regard to the latter objective, the GATS specifically provides that access in sectors and modes of supply of export interest to developing countries must be liberalised.

To pursue progressively higher levels of liberalisation of trade in services, negotiations shall be directed to the reduction or elimination of measures that impede effective market access (such as conditions for the establishment of commercial presence, restrictions on the entry of foreign workers) and discriminate against foreign service suppliers (such as prohibition against the ownership of land by foreigners) and thus generally make it more difficult for foreign services providers to do business.

The GATS recognises that the process of liberalisation must take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors. Thus, it states that there shall be appropriate flexibility for individual developing country Members for opening fewer sectors, liberalising fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching to such access conditions as will allow them to strengthen their domestic services capacity and its efficiency and competitiveness to withstand the consequences of entry of foreign service suppliers.

Mandated Deadlines

Market Access

- Negotiations on market access in services will conclude as part of the 'single undertaking' when the Doha Round does.
- The 'July Package' provided an indicative deadline of May 2005 for the submission of a new round of offers.

Emergency Safeguard Mechanism

- Negotiations on the ESM should conclude by the time the market access negotiations do.

Other Outstanding Issues

- Prior to the conclusion of the market access negotiations 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). No such evaluation has been undertaken so far.

Current State of Play

Market Access – Benchmarks

The strongest backers of the benchmark approach are Australia, the US and the EU. Indeed, the latter has linked its agricultural tariff reduction offer to the membership's acceptance of mandatory market opening commitments in services. In contrast, the overwhelming majority of developing countries remain fiercely opposed to any kind of benchmarks.

The 3 November 2005 draft Hong Kong ministerial text on services – proposed by the Chair of the Council for Trade in Services Special Session under his own responsibility (JOB (05)/262/Rev.1) – incorporates both multilateral and plurilateral approaches to enhance liberalisation. The multilateral approach focuses on two modalities: (i) through numerical targets and indicators, and (ii) through an exhortation for Members to bind their existing levels of liberalisation in Modes 1 and 2 and to increase the current level of allowable foreign equity participation, as well as permit greater flexibility in the types of legal entity allowed under Mode 3, and improve commitments on Mode 4, particularly in the categories of workers 'de-linked' from the establishment of commercial presence.

The text's suggested plurilateral approach also seeks to focus on two modalities: (i) a procedure on the submission by any Member or group of Members of requests or collective requests on other Members for purposes of entering into plurilateral negotiations, and (ii) sectoral and modal objectives as expressed by Members and summarised by the CTS-SS Chairman in an Annex to the text, which are intended to guide negotiations.

The latest version of the text does not provide details on what or how numerical targets or indicators would be used in the services negotiations, nor does it elaborate on how guidance will be provided by the sectoral and modal objectives contained in the Annex. These proposed provisions in the text remain extremely controversial. Argentina and Brazil are among the most vocal opponents to the inclusion of benchmarks in the draft ministerial text.

Bilateral Market Access Negotiations: Virtually all WTO Members have received initial requests from some 90 developed and developing countries. At least 69 WTO Members (counting the European Union members states as one) have submitted their initial offers. As negotiations move more deeply into the revised offer stage, at least another 40 revised offers (in addition to the 26 already submitted) will need to be prepared and presented by WTO Members. While some developing countries have delayed the submission of their initial and revised offers for tactical reasons, others genuinely do not have the necessary technical and institutional capacities to identify their offensive and defensive interests, or to analyse how trade liberalisation in certain sectors may hinder or facilitate the achievement of national sustainable development.

Members have generally indicated disappointment with the results thus far. In his report to the Trade Negotiations Committee in July 2005, the Chairman of the CTS-SS stated that "notwithstanding the fact that the number of offers has improved since my last report, it was widely acknowledged that the overall quality of initial and revised offers is unsatisfactory. Few, if any, new commercial opportunities would ensue for service suppliers. Most Members feel that the negotiations are not progressing as they should. It is clear that much more work will be necessary in order to bring the quality of the package to a level that would allow for a deal." This statement subsequently became the basis for the alternative approach of benchmarks previously discussed above.

What Has Happened to Mode 4?: For many developing countries, the 'movement of natural persons' (Mode 4) represents one of the few areas that offers concrete benefits from services liberalisation.

India has led a group of 18 developing countries — including Brazil, China and other Latin American and Asian WTO Members – in advocating modalities for reflecting improvements in commitments in Members' schedules. Despite such efforts, an April 2004 review of

the initial offers from trading partners led the group to state that there had not been "any real improvement" in developed countries' Mode 4 commitments. This group also pointed out that most of the new Mode 4 offers remained linked to commercial presence (Mode 3), providing only for movement of intra-corporate personnel and other highly-skilled workers. In this, as well as subsequent submissions, they called for 'de-linked' Mode 4 offers, accompanied by the elimination of pre-employment conditions, economic needs tests, quota restrictions on visas, discriminatory tax treatment and undue restrictions on the duration of stay for purposes of supplying a service, as well as the recognition of qualifications.

In February 2005, India led a group of developing countries[1] in proposing a common categorisation of Mode 4 service suppliers, based on how some Members had scheduled commitments during the Uruguay Round. This coincided with a similar submission by the EU, Bulgaria, Canada and Romania which used the same 'common categories'.

The categories are:

- contractual service suppliers;
- independent professionals;
- intra-corporate transferees;
- business visitors; and
- others.

While this common categorisation, together with improved transparency in relation to regulations affecting the entry and stay of Mode 4 service suppliers, are seen possible 'deliverables' for certain key host countries, the question remains whether these sufficiently address the kind of Mode 4 movement that many developing countries, and the least-developed in particular, engage in.

In June 2005, LDCs informally submitted a negotiating proposal on Mode 4, which identified specific categories of workers (in much more detail than the 'common categories' tabled by the EU- and India-led groups) for whom they wished to see improved market access. By all accounts, key trading partners' reactions in bilateral meetings were not encouraging. This has reinforced many LDCs' doubts as to whether they will reap any benefits at all from these multilateral negotiations.

The draft ministerial text of 3 November appears to direct Members to schedule Mode 4 commitments in line with the 'common categories'. Paragraph 4 of the text exhorts Members to "strive to ensure" new and improved offers of commitments on the categories of (i) contractual service suppliers and (ii) independent professionals, de-linked from commercial presence, and (iii) intra-corporate transferees and (iv) business visitors.

The text also calls for, on a best endeavour basis, the removal or substantial reduction of economic needs tests, and the indication of prescribed duration of stay and possibility of renewal, if any.

If these categories will indeed be the classification model used for scheduling commitments in Mode 4, some developing countries, especially LDCs, have said that the criteria used for determining 'contractual service suppliers' should be broadened to accommodate the kind of movement they are advocating, i.e., non-high skilled service suppliers.

'Horizontal' Issues

Assessment of Trade in Services: As a prerequisite to the negotiations, the GATS mandates that Members carry out an assessment of trade in services in overall terms and on a sectoral basis with reference to the agreement's objectives (see Background above). Cuba, Kenya, Nigeria, Pakistan, the Philippines, Senegal and Thailand called for the Council for Trade in Services (CTS) to conduct and conclude the multilateral assessment before the start of the market access negotiations, as required under the GATS, while the US, Canada, the EU, Switzerland and Japan, argued that it was up to each Member to conduct a national assessment which would in turn be the basis for the broader assessment exercise. They further maintained that the data on services trade at the international level was insufficient for the overall assessment envisioned. Although the multilateral assessment exercise was eventually commenced, developing countries agreed – as a political and practical concession – at the time the Guidelines were drafted in 2001 to carry out the assessment of trade in services on a continuing basis throughout the negotiations and that the "negotiations shall be adjusted in the light of the results of the assessment."

While Members have since focused on the conduct of national assessments of trade in services in order to prepare their requests and offers, even this exercise has been constrained by the lack of resources and technical capacity of developing countries. Some observers have pointed out the direct link between the lack of a multilateral assessment and the quality of offers, noting that without information on the possible impact of liberalisation commitments, many developing countries have opted for caution in their offers.

Modalities for LDCs: The GATS provides for special and differential treatment (SDT) for developing country Members, with particular priority given to least-developed countries (LDCs). Article XIX.3 specifically mandates the establishment of modalities for SDT for LDCs, and in September 2003, the Council for Trade and Services adopted such modalities. These have been looked at as a way to translate SDT 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.

Subsidiary Bodies – Outstanding Rule-making Issues

Emergency Safeguard Mechanism (ESM): Various developing country Members led by the members of the Association of Southeast Asian Nations (ASEAN) have, since the conclusion of the Uruguay Round, advocated the establishment of an ESM for services trade. They argue that such a mechanism would provide symmetry with goods trade, where a safeguards clause exists. Moreover, it would provide Members the necessary safety net when undertaking new liberalisation commitments, and could thus give them an incentive to undertake new market access commitments.

In March 2004, ASEAN revised its EMS model[2] – largely based on the goods safeguards agreement, albeit adjusted to take into account the characteristics of services trade – to include, *inter alia*, prospective application to new commitments, protection of 'acquired rights', a shorter period for applying safeguards and a limited time frame within which a Member may use the mechanism, reckoned from the time its liberalisation commitments for the relevant sector comes into full force and effect.

Most developed countries and some Latin American developing countries remain rather sceptical, with the EU and the US questioning the mechanism's desirability and feasibility. ASEAN has noted that some countries might not agree to any final services offer/request outcome without an ESM negotiated beforehand. In any event, WTO Members agreed in early 2004 to extend the deadline (originally set for 1998!) for achieving results in this area by the conclusion of current market access negotiations.

Brazil has argued for linking the ESM to the 'necessity tests' in Members' commitment schedules. Such tests allow governments to keep a sector closed to liberalisation if they decide that it is adequately serviced by existing providers, and thus effectively amount to a safeguard mechanism for certain countries. In consequence, Brazil 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.

However, the discussions in the Working Party on GATS Rules (WPGR) remain tentative. Only a handful of Members have so far responded to the WPGR 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 SDT for developing countries, or the appropriateness of a countervailing mechanism.

Taiwan recently presented a list of hypothetical cases of governmental subsidy programmes designed to serve as a basis for identifying some of the elements of a working definition of a services subsidy (JOB(04)78). 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 pre-eminent issue in these discussions. 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. Some developed countries, and the EU in particular, disagree, arguing that GATS Article XIII.2 provides for negotiations on government procurement in services, including market access and national treatment.

The 3 November draft ministerial text does not appear to provide sufficient guidance or impetus to concluding the rule-making aspect of negotiations as part of the single undertaking. For instance, the proposed directive for an ESM merely instructs Members to engage in more focused discussions on the technical and procedural questions relating to the operation and application of a possible ESM. Some observers have noted, however, that this is exactly what Members have been doing over the last five years.

The draft text's directive on subsidies mandates Members to intensify their efforts to expedite information exchange and engage in more focused discussions on proposals by Members, including the development of a possible working definition of subsidies. Again, apart from fulfilling the mandate on information exchange, the reference to focused discussions seems to echo what has been going on anyway in the Working Party on GATS Rules.

On the other hand, South Africa has criticised the draft text's mandate on government procurement for accommodating the proposal for specific market access commitments in government procurement, rather than recognising the continuing differences on the scope of the mandate contained in the GATS.

Disciplines on Domestic Regulation: The debate on disciplines on domestic regulation appears to have gained the most traction among the various rules issues, and many anticipate concrete results at the end of this services round of negotiations. Some suggest that the Hong Kong Ministerial outcome could be a list of elements as a basis for further work, or at the very least a specific directive from ministers to conclude an agreement on disciplines on domestic regulation by a date certain.

Nevertheless, a number of issues continue to pose significant challenges to the membership. Foremost of these is the continuing lack of sufficient understanding on the part of many Members of the various substantive technical issues and the potential repercussions of choosing any particular option.

The most fundamental – and politically contentious – issue is whether, and the extent to which, new disciplines on domestic regulation would qualify (some say impinge on) a Member's right to regulate. In the sense that the right to regulate is recognised in the GATS Preamble, and is generally regarded as a sovereign right, it is suggested by some that the right cannot be diluted by any new disciplines.

Nonetheless, many Members think that the trade-facilitating benefit of such disciplines would offset any possible impinging qualities. The obvious and undisputed benefits accrue to service suppliers who would be regulated on the basis of transparent and objective criteria, and have the assurance that these regulations are not more burdensome than necessary to assure the quality of a service. However, Members have obviously had to grapple with how these elements should be operationalised with greater specificity in legally binding form.

Moreover, there is a negotiating dynamic, where Members try to nudge the outcome in the direction of the sectors or modes of supply of interest to them. For instance, the EU has proposed disciplines on licensing procedures, which are widely seen as the type of regu-

lation that most impedes the supply of services through the establishment of commercial presence (Mode 3), the main mode through which the EU and other developed countries supply services to the world economy. India, Chile, Pakistan and Thailand on the other hand have only proposed disciplines on qualification requirements and procedures, which are regarded as the regulatory measures that most often hinder the ability to supply professional services, whether through the temporary movement of natural persons (Mode 4), or through cross-border trade (Mode 1).

Another overarching issue is whether the disciplines should apply horizontally, that is, across all services sectors, or on a sector-specific basis. All the proposals currently discussed at the Working Party on Domestic Regulation seek horizontal application. Some WTO Members, however, are bent on sector-specific disciplines. Australia, for instance, has recently tabled a proposal for disciplines on legal services. While this has the obvious advantage of having a specific correlation with the kinds of regulatory measures existing in the targeted sectors, for a great number of developing countries this raises concerns over the proliferation of specific disciplines.

Within the disciplines themselves, the substantive issue of greatest controversy is the notion of a 'necessity test', or more specifically, the extent to which any disciplines should require that regulatory measures not be more burdensome than necessary 'to ensure the quality of a service.' Some WTO Members question whether 'ensuring the quality of the service' is the limit within which the necessity of a regulatory measure could be justified. In this regard, a proposal made by Brazil, Colombia, the Philippines, et al. seeks to expand the necessity test as formulated in GATS Article VI by suggesting that domestic regulation should 'not be more burdensome than necessary to pursue national policy objectives.' The disciplines proposed by this group would necessarily have to accord deference to a wider scope of regulatory measures, and as such respond to concerns expressed about a necessity test's potential impacts on the policy space needed by governments.

The key proponents of domestic regulatory disciplines in the WTO, including Hong Kong, Japan, Switzerland, India, Mexico, the EU, the Philippines, Colombia and Brazil, among others, have over the last few months began intensive negotiations to try and find the threads of convergence in the various proposals. At the time of wring, the WPDR was negotiating draft ministerial text relating to domestic regulation (left blank in the Chair's 3 November draft).

Work Programme Post-Hong Kong

The 3 November draft ministerial text draws up the following timeline with a view to concluding the negotiations by the end of 2006:

Any outstanding initial offers shall be submitted as soon as possible.

Groups of Members presenting plurilateral requests to other Members should submit such requests by [February 2006] or as soon as possible thereafter.

Members shall notify the Special Session of the Council for Trade in Services by [date] of the sectors in which they intend to engage in plurilateral negotiations.

A second round of improved revised offers shall be submitted by [date].

Final draft schedules of commitments shall be submitted by [date].

The bracketed dates are expected to be filled in the revision to the draft text, or at the Hong Kong conference itself.

The US-Antigua & Barbuda Gambling Case

In April 2005, the WTO Appellate Body issued its report on the 'gambling dispute' launched by Antigua and Barbuda - population 67,000 - against the United States. The dispute is significant as it provides an indication of how schedules of commitments will be interpreted in future disputes and the need for precision in inscribing commitments.

The Appellate Body found that the US had, by not explicitly excluding gambling from its commitments under the 'other recreational services' sector, assumed full market access and national treatment commitments on such activities

Perhaps more importantly, the Appellate Body ruled that the US prohibition on internet gambling, particularly as applied to foreign service suppliers, amounted to a 'zero quota' which fell within the scope of limitations on market access under GATS Art. XVI. Since the US is deemed to have undertaken full commitments on gambling services, it is not permitted to have a measure that amounts to, or has the effect of, applying a 'zero quota' on the foreign supply of this service.

Critics of the decision note that a legitimate, non-discriminatory regulatory measure, which in any way results in a limitation on the number of service suppliers that may supply a market, may henceforth be deemed as a market access limitation of the type listed under Art. XVI. These critics argue that the decision unduly expands the scope of Art. XVI-type measures and thereby narrows the scope for domestic regulation.

Endnotes

1 Argentina, Bolivia, Brazil, Chile, Colombia, India, Mexico, Pakistan, Peru, the Philippines, Thailand and Uruguay.

2 Document not yet derestricted, downloadable at http://www.ictsd.org/issarea/stsd/Resources/Docs/ASEAN_ESM.pdf. The new proposal may be compared to the earlier ASEAN ESM proposal tabled in 2000 under the document number S/WPGR/W/30.

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