

## ***Services in a Development Round: “What is at Stake for Developing Countries”***

### *I. Does the Trade in Services need a magic wand?*

In the opening session of the Hong Kong Ministerial Conference, Mr. Lamy began his address by producing a large magic wand. He pointed out: “*I have kindly been provided with a magic wand but I’m afraid it’s not working well yet and it’s the type of magic wand that only works if everyone believes in it.*”

One could argue instead that in order for developing countries (DCs) to achieve sustainable development in the trade in services and ward off all the risks involving the liberalization of the sector there is no magic whatsoever. In reality, what one has to bear in mind is that prior to advancing in any liberalization process certain relevant conditions, among others, need to be met, to wit: (i) the maintenance of GATS original flexible structure; and (ii) the adoption of certain horizontal rules, such as the right to regulate (domestic regulation), subsidies and especial safeguard mechanism (ESM).

This article is intended to briefly discuss some of such essential conditions.

### *II. GATS: complexity and ambiguity*

The GATS is an extraordinary complex and ambiguous agreement containing many levels of obligations. It provides for an overarching commitment to successive future negotiations in order to increase its coverage, as well as general rules, such as most-favored nation treatment and commitments to transparency that apply to all services sectors.

Moreover, the GATS contains specific commitments to market access and national treatment that apply only to those services listed by its Members in their schedule to the agreement (“bottom-up” approach). It has sectoral annexes that set out rules for specific services sectors, such as financial services, air transport and telecommunications, among others.

The current round of GATS negotiations has been marked by huge tensions between the expansive business agenda demanded by international corporations, usually located in developed countries, and the right of least developed (LDCs) and DCs to regulate and promote national policy objectives according to their own degree of development (policy space).<sup>1</sup>

Thus, LDCs and DCs should be very cautious as regards further liberalization in the WTO, especially due to the fact that most of them have not carried out an assessment<sup>2</sup> of the deep effects

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<sup>1</sup> These rights are explicit in the preamble to the GATS.

<sup>2</sup> A report by the United Nations Conference on Trade and Development (UNCTAD) stresses that the lack of data about services trade is one of the main problems faced by developing countries while negotiating services. According to this study, “the inadequacy of data makes it difficult or impossible for developing

of such liberalization. Without a plan or a clear strategy, it would be difficult, if not impossible, for DCs to take the right decisions during the negotiations held within the WTO.

Additionally, although the GATS architecture is considered to be “development- friendly”, in reality DCs are faced with enormous commercial and political pressures to liberalize it, which means that, once they make commitments, they will not be allowed to step back unless they agree to offer compensation to affected Members.

It is crucial therefore to identify which are the actual advantages and disadvantages for DCs and LDCs to liberalize trade in services. It would seem that the ideal way for DCs to negotiate under the GATS would be to place negotiations in the context of a domestic reform agenda and to design a development strategy for each sector. In this way, DCs would be in a position to decide which commitments to make and under which conditions to achieve the main objectives of the Doha Round mandate: fair trade and economic development<sup>3</sup>.

### *III. GATS development- friendly structure x benchmarks and the reinforcement of plurilateral negotiations*

The Doha Round is on its fifth year, which is not uncommon since rounds traditionally take longer than anticipated. However, one has good reasons to believe that its development agenda will not be satisfactorily completed in light of structural deficiencies<sup>4</sup> in the nature of the bargain to be struck.

There is still a great reluctance from Members, such as the U.S, Japan and the European Union, among other developed countries, to pursue the necessary structural changes in their economies. In addition, the emerging of China and India as major global traders turn things more complicated.

On the other hand, DCs, such as Brazil, tend to switch from a constructive position, willing to negotiate, to a defensive position, since there is no progress in those areas in which they have a comparative advantage, such as agriculture.

In the services sector, some proposals to change the method of negotiations and, therefore, the GATS original architecture have been tabled. In effect, most of developed countries, including the QUAD members, have aggressively tried to impose the adoption of quantitative and qualitative benchmarks on services negotiations. These benchmarks would result in a substantial change to the GATS initial intention, based on a request-offer approach, by establishing a minimum degree of service negotiations.

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countries to assess the effects of past or future liberalization.” *In: Developing countries cautioned against services liberalization commitments in GATS. Report on the UNCTAD Commission on Trade Meeting in Geneva 3-6 February 2003.* Available at <[www.unctad.org](http://www.unctad.org)>

<sup>3</sup> See Doha Round Mandate. Available at <[www.wto.org](http://www.wto.org)>

<sup>4</sup> See: IISD-International Institute for Sustainable Development. *Where are we in the Doha Round?* (Report prepared at the request of the Swiss Agency for Development and Cooperation). Canada, August 2005. Available at <<http://www.iisd.org>>

A number of DCs, including Brazil, Argentina, Indonesia and South Africa, have strongly opposed the idea of benchmarks to the extent they would represent a serious loss of the GATS original flexibility.

The benchmark proposal was, at least for the moment, left out of the negotiations. The Hong Kong Ministerial Declaration reaffirmed the respect for the economic situation of LDCs and the appropriate flexibility for individual DCs, as provided for in Article XIX of the GATS.

However, the Ministerial Declaration also reinforced the idea that, in addition to bilateral negotiations, the request-offer method should be pursued on a plurilateral basis in accordance with the GATS and the Guidelines and Procedures for the Negotiations on Trade in Services. Under the plurilateral negotiations any Member or group of Members may present requests or collective requests to other Members in any specific sector or mode of supply, identifying their objectives for the negotiations in that sector or mode of supply. Moreover, plurilateral negotiations should be organized with a view to facilitating the participation of all Members, taking into account the limited capacity of DCs and smaller delegations to participate in such negotiations.

The question remains – and definitively gives rise for some concern – as to whether and to what extent under the plurilateral negotiations the DCs will be again under heavy pressure on the part of the developed countries to liberalize sectors that are not yet prepared to foreign competition. It would seem that the emphasis placed on the plurilateral negotiations is far from being a positive result for the DCs.

#### IV. *Horizontal Rules*

##### *i- Domestic Regulation*

This issue relates to subjecting to disciplines categories of regulatory or legislative authority exercised by governments or their representatives. Such categories include licensing requirements, commercial zoning requirements and requirements to government authority over environmental protection, among others.<sup>5</sup> The Hong Kong Ministerial Declaration reaffirmed the objectives and principles stipulated in the GATS, the Doha Ministerial Declaration and the Guidelines and Procedures for the Negotiations on Trade in Services adopted by the Special Session of the Council for Trade in Services on March 28, 2001, among others. Pursuant to such objectives and principles, the negotiations on trade in services shall proceed to their conclusion with a view to promoting economic growth of all trading partners and the development of DCs and LDCs, and with respect for the right of Members to regulate.

This means that the sovereign right to regulate cannot be diluted by any new disciplines, which must confine themselves to regulate based on transparent and objective criteria and may not be more burdensome than necessary to assure the quality of service.

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<sup>5</sup> *Trade Observatory*. The impact of GATS on agriculture. In: *Sailing close to the wind- navigating the Hong Kong Ministerial Conference*, Page 35. Available at: [www.tradeobservatory.org/library.cfm?refid=77538](http://www.tradeobservatory.org/library.cfm?refid=77538).

The question remains though as to how to make these objectives and principles operational and effective.

Within the disciplines themselves one highly controversial issue is by all means the notion of a “necessity test”. What is the limit within which the necessity of a regulatory measure could be justified: by ensuring the quality of a service? In line with a proposal presented by Philippines and Brazil one could suggest that domestic regulation should not be more burdensome than necessary to pursue national policy objectives.

*ii- Subsidies*

The Negotiating Guidelines and Procedures<sup>6</sup> also mandate Members to negotiate possible disciplines on subsidies related to trade in services.<sup>7</sup> In spite of this, not much progress has been noted in the Working Party on GATS Rules (WPGR) discussions on the role of subsidies in the pursuit of public policy objectives. According to the Hong Kong Ministerial Declaration, Members should intensify their efforts on subsidies to expedite and fulfill the information exchange required for the purpose of such negotiations, and should engage in more focused discussions on proposals by Members, including the development of a possible working definition of subsidies in services.

The absence of a multilateral definition of disciplines on services subsidies is unfavorable to DCs in the request-offer process. DCs are in a very disadvantageous position as they are unable to properly assess the competitiveness or market prospects of domestic providers in the face of potentially subsidized foreign providers.

Such disciplines for services could therefore help DCs sustain their comparative advantage in some services sectors.

Theoretically, there are two possible ways of negotiating services subsidies, to wit: (i) to adopt the same structure of subsidies of the Agreement on Agriculture (AoA), which means a standstill/reduction model; or (ii) to adopt the concept of subsidization of the Agreement on Subsidies and Countervailing Measures (SCM), focusing on the definition of “serious prejudice”.

Members urge that a definition of subsidies on services be established as soon as possible. Some Members maintain that the concept should reflect the subsidies trade distortive effects and must have a correspondent countervailing procedure; others take the view that disciplines should prevent those distorting effects by establishing a kind of “Development Box” (following the “Boxes Model” adopted in the Agreement on Agriculture), which would allow for certain types of subsidies in specific service sectors, especially those strictly dependent on national policy objectives, such as environmental, health, transport, etc.<sup>8</sup>

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<sup>6</sup> Guidelines and Procedures for Services Negotiations. Geneva, 28 March, 2001(S/L/93). Available at: [www.wto.org](http://www.wto.org)

<sup>7</sup> Article XV of the GATS.

<sup>8</sup> ICTSD Roundtable on Trade in Services and Sustainable Development. *Towards pro-sustainable development rules for subsidies in trade in services*. Geneva, March, 2003. Available at: [www.ictsd.org](http://www.ictsd.org)

*iii- ESM*

A number of developing countries led by ASEAN countries have been for long supporting the need for the establishment of an ESM for services trade. Such mechanism would provide symmetry with goods trade, which contains safeguards clause. Additionally, it would confer upon the required safety when undertaking new liberalization commitments and work as an incentive to undertake new market access commitments.

In summary, this mechanism would introduce the option for Members to temporarily remove some of their GATS commitments should the latter have some unexpected adverse effects.

The Hong Kong Ministerial Declaration encourages Members to engage in more focused discussions in connection with the technical and procedural questions relating to the operation and application of any possible emergency safeguard measures in services.

*V. No magic but essential conditions to negotiate market access. The case of environmental services*

The maintenance of GATS original flexible structure is by all means essential for DCs to continue to negotiate market access. The plurilateral negotiations reinforced by the Hong Kong Ministerial Declaration should not serve as a by-pass to such DC's friendly architecture, such that the latter could be under heavy pressure on the part of the developed countries to liberalize sectors that are not yet prepared to foreign competition.

The negotiations on trade in services shall proceed to their conclusion with a view to promoting economic growth of all trading partners and the development of DCs and LDCs, and with respect for the right of Members to regulate, as reaffirmed by the Hong Kong Ministerial Declaration. Domestic regulation should not be more burdensome than necessary to pursue national policy objectives.

The definition of subsidies on services allowing for certain types of subsidies in specific service sectors, especially those strictly dependent on national policy objectives, such as environmental, health, transport, etc, is also crucial for the DCs to definitively embark on scheduling new commitments.

Not least important is the establishment of an ESM in order to introduce the option for DCs to temporarily remove some of their GATS commitments should they have some unexpected adverse effects.

Unless these conditions are fully observed, one cannot affirm that sustainable development in the services sector is on the way.

In particular, sectoral negotiations should not take place before such a normative framework for services trade is completed. This framework is all the more needed to balance the costs and benefits of certain sensitive negotiations in course, such as those related to environmental services.

Environmental services are poised to become one of the fastest-growing services sectors in the future. They involve activities, such as water distribution and wastewater treatment that reduce environmental risk, minimize pollution and enable resources use. While liberalization of environmental services is the subject of a specific mandate in the Doha Declaration, water should not be perceived solely as an economic good, since access to it would be determined purely upon market forces without regard to equity or need. The concept of water as an economic good must be limited by the concept of water as a human right in order to assure its equitable distribution. DCs and LDCs must make sure, at a minimum, that the right to water is protected at a level and in a manner consistent with the human rights standard. This approach requires that DCs and LDCs implement permitting procedures or other regulatory systems to control private-actor behavior that might interfere with the right to water.

Most DCs have received requests to undertake specific commitments in all environmental services especially from developed countries. The European Union proposal on including “water for human use” has given rise for some concerns regarding control of water as a resource, as well as issues related to equitable access to clean water among the poorer sections of the population. DCs must adopt a very cautious approach in connection with such a proposal in order not to ending up undertaking commitments that would implicitly include any service that has an environmental “end-use”, such as engineering, construction, etc.

DCs must fully understand the various implications of services liberalization in this sector particularly for “regulatory policy space” prior to making any formal binding commitments. The reach, the meaning and the nature of sustainable development problems, such as to clean water and sanitation must be carefully assessed.

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