

**The WTO Trade in Services Negotiations: An Appraisal on their Status and on Issues of
Concern to African Countries**

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1. Introduction

Since the General Agreement on Tariffs and Trade (GATT) came into force in 1948, international trade rules have governed cross-border trade in goods, not services. This changed when the General Agreement on Trade in Services (GATS) came into force in 1995. For the first time, legally binding rules were set for trade in all "commercial services", such as engineering, communications, entertainment, construction, finance, retail trade, tourism and transport. Only two sectors are not covered by the GATS. These are air transportation and any "services supplied in the exercise of governmental authority," defined as those not provided in competition with other suppliers, nor on a "commercial" basis.

The services sector is the largest and fastest-growing sector of the world economy. It provides more than 60 per cent of global output and in many countries, an even larger share of employment. Studies show that Africa's share of world trade exports in services totals just about 2.1 per cent.¹ While Africa's participation in international trade in services is low, the domestic services sector is relatively large, contributing for instance, about 40 per cent to the gross domestic product (GDP) of Uganda and 50 per cent to that of Zambia. In Kenya, South Africa and Zimbabwe, tourism is an important foreign exchange earner. Benin, Côte d'Ivoire and Tanzania get revenue from shipments from neighboring landlocked countries transiting through their ports, while Ghana and Mali receive remittances from their citizens working in service sectors abroad. It is this huge, untapped domestic service market that the General Agreement on Trade in Services (GATS) seeks to open up to foreign competition and participation. The objective of the services negotiations in the World Trade Organization (WTO) is the "achieving a progressively higher levels of liberalization."²

Services liberalization is a complex and relatively new process and its benefits to economies, especially weak economies such as those in most of Africa is not clear-cut. For most developing countries, privatization by opening up to foreign companies is very much a 'natural' consequence of services sector liberalization, since the government, and local suppliers are not be able to withstand the competition. While there are positive examples, there have, undeniably also been many less successful outcomes of

¹ WTO Secretariat, International Trade Statistics 2001.

² GATS Article XIX: 1

liberalization and privatization in the various developing countries. In many cases, the goals of poverty reduction and development have not materialized, but have even been affected negatively.³ Accordingly:

Opening up essential services to foreign or domestic competition could have an adverse effect on the poor... If a country is a relatively inefficient producer of a service, liberalization and the resultant foreign competition are likely to lead to a decline in domestic prices and improvement in quality.⁴

In the course of the negotiations, WTO Members will have to make choices regarding the privatization of state-owned enterprises, the introduction of competition in hitherto monopolistic ventures, the opening up of markets to foreign investment and the establishment of effective regulatory structures. No country has gone the full length in all of these elements however attractive they may have been painted to be. A gradual process of liberalization on all fronts seems to be the preference of most governments. Hence, countries have introduced competition but limited the number of firms as a matter of policy, privatization has been done with a limit on foreign participation and separate regulators have been created but government participation, and control, is still evident. Arguably, this gradual liberalization process is better, at least from the perspective of most developing country governments.

2. The GATS

The GATS has two parts: the framework agreement containing the general rules and disciplines; and the national "schedules" which list individual countries' specific commitments on access to their domestic markets by foreign suppliers. Each WTO Member lists in its national schedule those services for which it wishes to guarantee access to foreign suppliers.⁵ All commitments apply on a non-discriminatory basis to all other Members. Members have the freedom to choose which services to commit. In addition to the services committed, the schedules may limit the degree to which foreign services providers can operate in the market.

³ Bayliss, K. 2000 "The World Bank and Privatization: A Flawed Development Tool", Public Services International Research Unit, University of Greenwich, November. See also Mkandawire, T. 1994 "The Political Economy of Privatization in Africa", in Cornia G and Helleiner G. (editors) "From Adjustment to Development in Africa: Conflict, Controversy, Convergence, Consensus?"

⁴ Aaditya Mattoo, 2001, *Trade in Services: Using Openness to Grow*.

⁵ GATS Article XVII.1

Just like the General Agreement on Tariffs and Trade (GATT), the core principle of the GATS is the most favored nation (MFN) principle.⁶ As indicated above, members however have the choice to list MFN exemptions on entry into force of the agreement. The GATS covers all measures imposed by Members that affect the consumption of services originating in other Members.⁷ A closer look at the elements of this definition reveals the wide domain of the agreement. It covers all internationally-traded services except services provided to the public "in the exercise of governmental authority", and, in the air transport sector, traffic rights and all services directly related to the exercise of traffic rights. The GATS also defines four ways in which a service may be traded, known as "modes of supply":

1. Mode 1: Services supplied from one country to another (e.g. international telephone calls), officially known as "cross-border supply";
2. Mode 2: Consumers from one country making use of a service in another country (e.g. tourism), officially known as "consumption abroad";
3. Mode 3: A company from one country setting up subsidiaries or branches to provide services in another country (e.g. a bank from one country setting up operations in another country), officially known as "commercial presence"; and
4. Mode 4: Individuals traveling from their own country to supply services in another (e.g. an actress or construction worker), officially known as "movement of natural persons".

3. The Services Negotiations

Article XIX of the GATS mandates the on going services negotiations. In material parts, Article XIX states as follows:

In pursuance of the objectives of this Agreement, Members shall enter into successive rounds of negotiations, beginning not later than five years from the date of entry into force of the WTO Agreement and periodically thereafter, with a view to achieving a progressively higher level of liberalization. Such negotiations shall be directed to the reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access. This

⁶ GATS Article II. For a good study of the MFN principle under GATS is Aaditya Mattoo, *MFN and the GATS*, presented at the World Trade Forum, Berne, 1998.

⁷ GATS Article I

process shall take place with a view to promoting the interests of all participants on a mutually advantageous basis and to securing an overall balance of rights and obligations.⁸

The main features of Article XIX can be summarized as: the need to give due respect for national policy objectives in trade in services; cognizance of the level of development of member countries, both overall as well as in individual sectors; the need for appropriate flexibility in order to allow individual countries to open up fewer sectors and liberalizing fewer sectors; the importance of attaching market access conditions aimed at achieving the objectives of Article IV of GATS, and the need to establish "negotiating guidelines"⁹ for further negotiations on trade in services.

The new negotiations on services were formally launched by a special session of the Services Council on February 25 2000. At that session, Members agreed that the negotiations would involve two phases: The "rules-making" phase during which Members will negotiate new rules for services on subsidies, safeguards and government procurement; and "request and offer" phase where Members will negotiate further market access. It was decided that work in the first phase was to be done in the existing services committees, mostly in the Working Party on GATS rules while the market access negotiations were set to take place in special sessions of the Services Council.

The negotiations gathered pace with the adoption of the *Negotiating Guidelines and Procedures*¹⁰ and the completion of the stocktaking exercise by the Special Session of the Services Council at its meeting of 28-30 March 2001. The *Negotiating Guidelines* are seen by many to be developing country-friendly. It is in the interests of African countries to exploit this friendliness to their advantage in making commitments and in their general participation in the negotiations. For instance the *Negotiating Guidelines* state:

There shall be *appropriate flexibility for individual developing country Members* for opening fewer sectors, liberalizing 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 aimed at achieving the objectives referred to in Article IV (emphasis added).

And further:

⁸ Id.

⁹ GATS Article XIX: 3

¹⁰ Hereafter, "*the negotiating guidelines*"

The Council for Trade in Services in Special Sessions shall continue to carry out an assessment of trade in services in overall terms and on a sectoral basis with reference to the objectives of the GATS and of Article IV in particular. This shall be an ongoing activity of the Council and negotiations shall be adjusted in the light of the results of the assessment. *In accordance with Article XXV of the GATS, technical assistance shall be provided to developing country Members, on request, in order to carry out national/regional assessments* (emphasis added).

The key points to note in the guidelines are: the starting-point for the negotiations; the main method of negotiations; flexibility for developing countries; treatment of autonomous liberalization; and continuation of the assessment of services trade. Also noteworthy is reference to the size of economies and the needs of small-and-medium scale enterprises of developing countries in the negotiating guidelines. The guidelines also refer to the provision of technical assistance: review of progress in implementation of Article IV of GATS; due consideration of small service suppliers of developing countries; and evaluation of the outcomes of the negotiations.

4. The Doha Declaration and Services Negotiations

WTO Members were clear in the Doha Ministerial Conference last year that trade liberalization, and even economic growth, should not be ends in themselves. The GATS agreement specifically states that the negotiations “*shall take place with a view to promoting the interests of all participants on a mutually advantageous basis*” and “*with due respect for national policy objectives and the level of development of individual Members*”. Paragraph 15 of the *Doha Ministerial Declaration* stated as follows:

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 (emphasis added).

Negotiations on services were already almost two years old when they were incorporated into the Doha development agenda. As indicated before, negotiations started officially in early 2000 under the Council for Trade in Services. The *Doha Declaration* endorsed the work that had already been done, reaffirmed the *Negotiating Guidelines and Procedures*, and established some key elements of the timetable including, most importantly, the deadline for the conclusion of the negotiations as part of a single undertaking.

5. Technical Assistance

This is an important component in the services negotiations, particularly for African countries. According to the *Negotiating Guidelines*, "technical assistance shall be provided to developing country Members, on request, in order to carry out national/regional assessments." In 2002, the WTO says it received more than 60 invitations from developing and least developed countries to conduct services seminars and workshops. In addition, two symposia have been organized by the WTO in Geneva in the recent past. This is hardly enough to build the requisite capacity in various countries for the negotiations. Much more work is needed, especially knowing the disadvantaged position that African countries have had to begin from in the negotiations.

6. The Status of the Negotiations

55 WTO Member Governments have tabled written proposals, either individually or jointly (African Group, European Communities, Andean Community, and others). Among the sectors covered are: professional services (18 proposals representing 20 Members), tourism (14 proposals), telecommunications and transport services (12 proposals each), financial services (11 proposals) and distribution (10 proposals). Three of the proposals deal with the education sector. No proposal has been submitted yet on the medical and health services. The commitments currently submitted have focused mainly on tourism, business services, financial services, telecommunications, health services, education, and accountancy

African countries have submitted a number of proposals.

1. Communication From Cuba, Dominican Republic, Kenya, Nigeria, Pakistan, Senegal and Zambia (TN/S/W/3), 10 June 2002, on *Assessment of Trade in Services*.
2. Communication From Cuba, Pakistan, Senegal, Sri Lanka, Tanzania, Uganda, Zambia And Zimbabwe (S/CSS/W/131), 6 December 2001, on *Increasing Participation of Developing Countries in International Trade in Services: Effective Implementation of Article IV of GATS*.

3. Communication From Cuba, Senegal, Tanzania, Uganda, Zimbabwe And Zambia,_(S/CSS/W/132), 6 December 2001, on *Assessment of Trade in Services*
4. Communication From Cuba, Dominican Republic, Haiti, India, Kenya, Pakistan, Peru, Uganda, Venezuela and Zimbabwe, (S/CSS/W/114), 9 October 2001, on *Assessment of Trade in Services*.
5. Communication From Kenya (S/CSS/W/109), 26 September 2001, *Negotiating Proposal*.

7. Concerns of African Countries

African countries have interests in many services sectors including tourism, construction and financial services. However, tourism is the one sector in which their comparative advantage is most profound. According to the World Travel and Tourism Council, tourism is the world's largest employer, accounting for one in ten workers worldwide. The sector employs one in every ten workers worldwide. It is purported regulation under the GATS is therefore particularly crucial to many African countries with a large tourism industry such as South Africa, Kenya and Zimbabwe. African countries need to be wary however in making commitments because in spite of their relative comparative advantage in the tourism sector, the danger of continued domination by developed country-based multi-nationals is real. Currently, the four largest tour operators, Thompson, Airtours, First Choice and Thomas Cook, control 80 per cent of the world tourism market. The relative advantage of African countries in this sector dwindles even further because they do not possess the necessary conditions to build competitive tourism service sectors. There is a lack of appropriate technology and telecommunications infrastructure, coupled with the absence of regulations that enhance competition, government support for service firms and national strategies to export services.

The concerns of African countries throughout the services negotiations may be summarized as follows:

- Retaining the special and differential treatment measures already accorded to Least Developed Countries (LDCs);
- Incorporating S&D measures in the development of new rules, particularly on the built-in agenda such as subsidies, emergency safeguard measures and government procurement;
- Identify restrictions incorporated in the schedules of commitments of other WTO members (particularly developed countries) and negotiate their removal;
- Submit country schedules that contain transitional limitations designed to ensure the smooth integration of African countries in the global system;

- Negotiate specific commitments in strategic sectors/sub-sectors in accordance with GATS provisions;
- Identify specific sub-sectors where Africa has comparative advantage;
- Undertake systematic studies to identify emerging opportunities for African countries; and
- Negotiate for technical assistance programmes that should cover other areas such as infrastructural development, training of personnel and capacity building.

The key issues that arise include the following: what is the state of preparedness of African countries for the negotiation on trade in services; what are the strategies Africa has evolved so far for these negotiations; can Africa continue to maintain common group positions in these negotiations?

- The need to identify areas of interest and priority for African countries in trade in services;
- The need to address seriously the questions of assessment of trade in services as well as the treatment of "autonomous liberalization";
- The need to come forth with proposals capable of ensuring full implementation of Article IV provisions of the GATS, the movement of natural persons;
- The need to understand the implications of the various negotiation approaches now subsumed in disguised forms in the proposals of developed countries, such as model, formula, cluster approaches being suggested;
- The need to properly understand the implications of the "positive and Negative List" approaches to the negotiation of specific commitments;
- The need to critically examine proposals of developed countries in order to identify and ensure that the modes of supply being targeted are those of interest to developing countries; and
- The need to develop, as and when necessary, sub-regional and regional approaches to negotiations on trade in services.

8. Priorities of African Countries and The Way Forward

It is important for African countries to remember that although countries are not required to make commitments, not doing so may have negative impact on FDI flows. It is no secret that a company would prefer places where there are fewer restrictions on how it operates. Africa attracts about 3 per cent of the annual FDI to developing countries. Some countries are hoping to attract additional investment through the service sector. Nonetheless, the central plea in this paper is that African countries need to understand the issues at stake. Issues of contention include: classification issues particularly in tourism, commercial presence, anti-competitive practices of foreign suppliers, market access issues, and special and differential

treatment under Article IV of GATS, and transfer of technology to developing countries under Article IV of GATS and the TRIMS Agreement. African countries have the potential to become suppliers of certain services, such as health services (South Africa and Egypt for example), accountancy services as India does, construction services as well as education services. However, Africa's greatest potential remains in the expansion of the tourism industry. African negotiators need to train their sights on these issues. At every opportunity, it will be important to remind the rest of the WTO Members their particular concerns such as:

- The need to insist on staying with the spirit and letter of the *Negotiation Guidelines*, which have been described by some as "development friendly".
- The need for the negotiations to continue to be guided as well by the provisions of Article of XIX of GATS, particularly the approach to gradualism in the process of liberalization.
- The need to insist on due respect for national policy objectives and individual level of development and full recognition of flexibility for developing countries, for opening fewer sectors and liberalizing fewer types of transactions.
- The need to effect a full implementation of Article IV provisions of GATS, and especially of movement of natural persons, by lowering entry and other barriers which are deemed to be trade distorting.
- To insist on developed countries making commitments in those modes of supply and sectors, which are of export interest to developing countries.
- To ensure that the right to regulate the services sector is not in any way undermined.

- Requests to developing countries. Several developing countries are receiving requests from developed countries. A major concern is preparation of an appropriate response and manner of processing the requests from developed countries. This is important because the requests will be the basis of the services negotiations.
- Considerations in the preparation of responses to requests could include.
- Special and Differential Treatment for developing countries.
- Development objectives in Articles 4 and 9, which have been included in the negotiating guidelines.
- The positive list approach of GATS, on the basis of which Members reserve the right to select sectors in which to make commitments (liberalize) and the terms on which to make the commitments. Such terms include approach limitations and conditions.
- The experience so far with liberalization programs world-wide, which shows that it is important to carefully sequence any liberalization, so that pace matches the domestic capacity of the economy to adjust and the right of Members to protect and ensure important public policy objectives.
- The strategies for the responses are important. Some of the considerations in preparing the method of responding could include.
- The need for protecting and ensuring the priorities of the country
- But given the weak bargaining position of small economies, it would be desirable to have a collective and co-coordinated response, say at the Africa Group level. In this regard, COMESA and other regional economic communities could assist in facilitating the development of appropriate responses.
- Concerted Preparation of responses.

- It is important to have a standing forum for COMESA member states to regularly convene brainstorming workshops as and when issues arise and when it is appropriate. Such a standing forum could additionally facilitate regular briefings to keep current on developments and prepare broad and concerted guidelines for the way forward.
- Such a forum could include participation by other organizations such as UNCTAD and SADC, and regional civil society organizations such as SEATINI.
- The various approaches espoused by the different viewpoints are fairly well known now. It would therefore be important at this stage in the development of the debate to minimize distractions and overly divergent views that would contribute little or no value added to the discussions particularly in developing concrete and specific positions. In this regard, such a forum would have to be convened on the basis of carefully selected resource persons. Participants would be drawn from capitals and Geneva Missions.
- Capacity building for the negotiations.
- Delegations will continually need to enhance their skills and knowledge of specific issues relating to the negotiations. However, capacity building now needs a new approach, with emphasis being given to the development of domestic capacity or a base in capitals or at least in the regions, to be established institutions for providing continuous and domestically relevant training. Seminars and workshops will still be relevant, but priority needs to be given to establishing a regional base to provide training.
- In this regard, one could envisage the establishment of courses in domestic universities or the designation of certain institutions as regional centers. In doing this, it would be important to ensure that the process is not hijacked. The courses would have to be given by local professors and lecturers, and integrated into domestic concerns and priorities. Where such professors and lecturers are considered lacking, further training for conversion of skills could be provided to faculty in the universities. In practice, skills conversion usually requires only short courses, or courses that are not longer than one year.

- General priorities in the services negotiations
- From the requests so far made to developing countries, it appears that developed countries are seeking to completely open up the services sectors of developing countries. Their specific objectives target: no limitations on commercial presence and the unlimited movement of company staff; no limitations on establishment including no limitations on shareholding and access to domestic credit and property; no limitations in consultancy in a wide selection of areas such as law and management, construction, public services including education and health, environmental services, finance and banking.
- These areas touch on important public policy in developing countries, such as: the absolute need to sequence any liberalization, the importance of preserving a role for government in the provision of public utilities and environmental services at least to ensure proper regulation and the availability of such services even when their provision would not be commercially attractive for the private sector, provision of employment, ensuring a sustained rate of economic growth, promotion of long term investment, development of depressed areas and sectors.
- These priorities need to be viewed and operationalized in the broad context of the development objectives stated in the GATS. Developing countries are entitled to support from the international community and to derogation from certain straight-jacket disciplines including the reciprocity principle in negotiations, to ensure that they progressively strengthen their domestic services sectors and acquire a growing share in the global trade in services. On this basis, therefore, the development programs and priorities of developing countries should be factored in the services negotiations.
- Modalities for Crediting Autonomous Liberalization in Developing Country Members

The basis for recognizing autonomous liberalization undertaken by Members is Article 19.3 of the GATS, which requires that negotiating guidelines for successive liberalization of trade in services “shall establish modalities for the treatment of liberalization undertaken autonomously by Members since previous negotiations”. The guidelines adopted for the current services negotiations, in

paragraph 13, state that “based on multilaterally agreed criteria, account shall be taken and credit shall be given in the negotiations for autonomous liberalization undertaken by Members since previous negotiations”.

To these provisions must be added the provisions on special and differential treatment for developing countries, particularly Articles 4 and 19, in order that the manner of crediting autonomous liberalization does not run counter to the principles of special and differential treatment, and such a result could well happen if for instance developing country Members were required to bind their current levels of liberalization without appropriate safeguards and flexibility relevant for their development needs, or if the crediting happened in a manner that did not fully take into account the objectives set out in Article 4 of GATS for ensuring the increasing participation of developing country Members in services world trade. In this regard, any formula adopted as part of the modalities, should fully take these considerations into account; and these considerations should be part and parcel of the formula.

Article 4 requires that other Members assist in increasing the participation of developing and least developed country Members through “negotiated specific commitments”. These commitments may relate to:

- (i) Strengthening the capacity, efficiency and competitiveness of service suppliers of developing country Members for instance through access to technology;
- (ii) Improving access of developing country service suppliers to distribution channels and information networks; and
- (iii) Liberalization of market access in sectors and modes of supply of export interest to developing country Members.

Article 19 in paragraph 1 requires that the negotiations should promote,

“The interests of all participants on a mutually advantageous basis and (secure) and overall balance of rights and obligations”.

Paragraph 2 then specifically highlights the treatment of developing country Members. It states:

“The process of liberalisation shall take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors. 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

market access to their markets available to foreign service suppliers, attaching such access conditions aimed at achieving the objectives referred to in Article IV”.

Accordingly, in crediting autonomous liberalization undertaken by developing country Members the following elements should be included in the modalities:

(a) Developing country Members should only make bindings relating to autonomous liberalization at levels that they determine to be appropriate, taking into account their development needs, domestic capacity in the sectors, and the competitiveness of their suppliers. The bindings do not necessarily have to reflect the full extent of current liberalization. They may be selective as to sector or mode of supply.

(b) In scheduling their commitments or bindings, developing country Members may attach appropriate conditions and limitations. Such conditions and limitations should not be considered as adversely affecting the liberalization of trade in services, but as mechanisms to achieve the objectives of Article IV and implement the provisions of Article 19 on negotiations.

(c) In this regard, assessments of previous liberalization should be available to assist in the determination of conditions and limitations relating to sequencing of liberalization and to identification of sectors and modes of supply where commitments would be advantageous to developing country Members.

(d) The basis of crediting autonomous liberalization is a clear and undoubted recognition in general terms of the fact of deep liberalization programs undertaken by developing country Members. The basis is not a minute and detailed determination of the extent of liberalization in specific sectors and modes of supply, with a view to binding the current levels of liberalization, and that binding being the condition for giving any credit. Such a basis would proceed on the premises that there is to be full reciprocity between developing country and developed country Members in concessions, which would be in breach of the principle of special and differential treatment. In this regard, it needs to be borne in mind that special and differential treatment requires that developing country Members do not have to make reciprocal concessions for concessions made by developed country Members.

As a practical matter it would be appropriate developing country Members to give some indication of sectors they have undertaken autonomous liberalization in. This however should not amount to a requirement to tabulate econometric valuations of the liberalization, as a basis for seeking reciprocal liberalization. One developing country Members have indicated and described sectors they have undertaken autonomous liberalization in, they should on that basis alone be entitled to credit for the liberalization.

The credit should be accorded to them through:

- (a) Not requesting any further liberalization in those sectors as part of the negotiations, but Members may still make offers in those sectors
- (b) Considering the autonomous liberalization to be offers or commitments
- (c) Developed country Members and other Members making offers and commitments taking into account the offers and commitments constituted by the autonomous liberalization, as well as any requests that developing country Members may make in the negotiations and the objectives in Article IV of GATS.