



AFRICA REGIONAL WORKSHOP ON WTO NEGOTIATIONS

31 August – 2 September 2005

Cape Town, South Africa

GATS NEGOTIATIONS AND THE DOHA DEVELOPMENT AGENDA

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**HOSTED BY TRALAC AND COMMONWEALTH
SECRETARIAT**

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**Prepared for the Africa Regional Workshop on WTO Negotiations
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Introduction

With a little over three months left before the Sixth World Trade Organisation (WTO) Ministerial Conference to be held in Hong Kong, China from 13 to 18 December 2005, WTO Members are assessing the likely outcomes that may be reached based on how far negotiations have progressed and what more is needed to conclude this round of negotiations. This paper aims to provide assistance to African Countries by providing an assessment of the General Agreement on Trade in Services (GATS) negotiations. The paper provides an update on the progress in negotiations according to mandates provided by the Guidelines and Procedures for Negotiations² and July 2004 Package within the context of the Doha Development Agenda. With a focus on the challenges and opportunities African countries face in these negotiations, the paper analyses likely outcomes in negotiations and recommendations in the lead up to the Hong Kong Ministerial Conference based on their potential impacts on national development goals and objectives.

Services are essential for the human and economic development of countries. Implementing the United Nations Millennium Development Goals depends very much on the quality and assured provision of many basic or essential services, such as health, energy, and education services. Services are also important for infrastructure support for the functioning of an economy, such as construction, transport, financial and telecommunication services. Naturally, therefore, national development plans must include proper regulatory frameworks for the provision of quality services in a sustainable manner. Given that some countries may consider binding services trade liberalisation in GATS as policy options, the paper also generally discusses the benefits and costs of GATS liberalisation as an effective and sustainable policy option for meeting developing countries' development objectives.

Background on the General Agreement on Trade in Services

This first and current round of GATS negotiations began in 2000 as provided by Article XIX of the GATS. GATS came into force with numerous outstanding issues. The Council for Trade in Services (CTS) and different subsidiary bodies to it were created to handle these outstanding issues. A Working Party on GATS Rules was created as a

¹ This paper is written by Sabrina Varma and Gale Raj. The opinions expressed are those of the authors and should not be attributed to South Centre.

² WTO document S/L/93, 29 March 2001.

subsidiary body to hand negotiations for Article X on Emergency Safeguard Mechanism (ESM), Article XIII on Government Procurement, and Article XV on Subsidies. A Working Party on Domestic Regulation was created for negotiations on domestic regulation mandated by Article VI:4. Members established the Guidelines and Procedures for the Negotiations on Trade in Services in March 2001, which set the mandate and modalities for negotiations, together with time lines for their completion. From the start of the GATS round, negotiations began simultaneously on specific commitments (ie. market access) and rules and domestic regulation. The Guidelines and Procedures, however, mandate negotiations on rules and domestic regulation to be concluded before market access.

In November 2001, the GATS round of negotiations was incorporated into the Doha Round of negotiations and is to be completed as part of the single undertaking. Paragraph 15 on Services of the Doha Declaration recognised the right of governments to regulate and introduce new regulations and mainly reaffirmed the Guidelines and Procedures for Negotiations as the basis for continuing negotiations. The Declaration also recognised Members' submissions on Mode 4 and set deadlines for the submission of initial requests and offers, which were 30 June 2002 for and 31 March 2003 respectively (both of which were missed by the majority of Members).

After the failure of the Cancun Ministerial Conference, negotiations are following the mandate of the July 2004 Package. The July 2004 Package³ places a heavy emphasis on the market access portion of negotiations by calling on Members who have not submitted initial offers to do so as soon as possible, to establish a date for revised offers (May 2005), to ensure high quality of offers and in areas of export interest to developing countries with special attention to least developed countries (LDCs), and to aim for progressively higher levels of liberalisation, while noting developing countries' interest in Mode 4. The text does refer to other areas of the negotiations by calling on Members to conclude rules and domestic regulation negotiations in line with their mandates and by their deadlines. Finally, it calls for technical assistance to assist developing countries participate effectively and for the CTS to review progress in negotiations with the possibility of including recommendations.

Although GATS is often referred to as one of the more development-friendly agreements of the WTO, a critical analysis of the agreement and the services negotiations show that the developmental benefits that are stated to follow from GATS to developing countries are by no means obvious or easy to achieve. These challenges are due to:

- the ambiguities and difficulties in implementing various GATS articles of interest to developing countries in critical areas such as assessment;
- the fact that developing countries negotiate with stronger, better informed and more prepared developed trading partners leading to certain power imbalances;
- the need for proper regulatory frameworks to manage services liberalisation;
- low development level of domestic service providers; and

³ The July 2004 Package Annex C on Recommendation of the Special Session of the Council for Trade in Services.

- and the lack of consistent evidence that services liberalisation always results in development gains.

The schedule of negotiations for the remainder of the year includes formal services meetings in September, October and November. However, there have been more informal sessions and bilateral meetings taking place and this trend is likely to continue based on the current programmes of informal consultants. Although decisions will be taken at formal negotiating sessions, much of the legwork for negotiating positions are likely to take place in these informal settings, which often involve a small group of countries. Various mini-ministerial meetings outside of Geneva with a select group of invited countries have also been a prevalent consensus building/decision making fora and can influence the movement and outcomes of negotiations in Geneva.

Status of negotiations and key issues of concern for developing countries

In general, negotiations are moving in an unbalanced manner. Negotiations on market access are moving at a much faster pace than negotiations on rules and domestic regulation. This process of negotiation creates challenges since Members are not aware of what rights and obligations they will gain from the conclusion of the rules and domestic regulation negotiations and how their and other Members' market access commitments will be affected by them. This lopsided movement in negotiations creates uncertainty and lack of confidence in making binding commitments.

The discussion below provides a brief overview on the state of play of negotiations. Recommendations for African countries on moving forward on these areas in the lead up to the Hong Kong Ministerial Conference are provided in the following section.

Negotiations on Specific Commitments (market access)

The negotiations on specific commitments is mandated by Article XIX of the GATS which calls on Members to achieve progressively higher levels of liberalisation with respect for national policy objectives and development levels of Members. Developing countries are given exclusive flexibility to liberalise at a slower pace and attach market access conditions aimed at achieving objectives to increase the participation of developing countries in trade as enshrined by Article IV.

Since the July 2004 Package, Members who have not yet submitted their initial offers are facing increasing pressure to do so. According the recent report submitted by the Chair of the CTS to the Trade Negotiations Committee (TNC), since July 2005, there are 24 countries who have not yet submitted an initial offer – all developing countries (10 of which are African countries). There have been no initial offers submitted by LDCs and 24 Members have submitted revised offers with the passing of the May 2005 deadline for the submission of initial and revised offers⁴.

⁴ Report by the Chairman of the Council for Trade in Services, Special Session - to the Trade Negotiations Committee, TN/S/20, July 2005

The first round of initial offers by developed countries were weak in modes and sectors of export interest to developing countries. There was particular criticism on Mode 4 offers. Many developing countries and particularly LDCs identify their current export interest and advantage in Mode 4. However, Mode 4 offers by developed countries were void of lower skilled occupational levels.

Developing country Members have also raised concern with the administrative processes involved in the temporary movement of natural persons. Visa, work permit, security and other regulatory procedures have been identified as hidden and discriminatory barriers in Mode 4. Developed country Members have been requested to reduce these Mode 4 entry barriers in addition to increasing the types or categories of natural persons included in their commitments.

Turning to the revised offers, based on South Centre analysis⁵ they too have been disappointing as they have not extended any meaningful benefits in the areas of interest to developing countries, especially mode 4 where the same barriers remain and in every sector committed mode 4 remains 'Unbound' except as indicated in the horizontal section. Focus remains on the high skilled categories in cases where new categories are being introduced, although even this remains subject to certain conditions, such as qualifications requirements. The level of commitment tends to be lower than actual levels of liberalisation or reflect changes to national legislation. Therefore, in most cases commitments do not go beyond the status quo. There are also instances of going back on existing commitments; few existing sectors/sub-sectors being fully liberalized as a result of improvements to the revised offer; few offers in new sectors/sub-sectors for full liberalisation. In cases where new full or partial commitments are being offered, they tend to be conditional on a critical mass of commitments from other Members.

Developed countries similarly consider initial offers by developing countries of low quality. They raise concern with developing countries binding lower than their actual levels of liberalisation. However, as mentioned above, developed countries also fall into this practice. Developed countries are generally seeking market access in sectors such as telecommunication, distribution, financial, construction, transport, environmental and energy services.

Negotiations on GATS Rules

Rules negotiations hold a great potential for cooperation among developing countries. Developing countries have more in common with each other than developed countries when it comes to the level of development of their service industries and the importance services play in furthering development in their countries. In general, developing countries are likely to hold a more defensive position, especially LDCs, in these

⁵ To date, preliminary analysis has been undertaken of the revised offers of Japan, Canada, US, EC (mode 4 and mode 1), Australia and Norway.

negotiations and therefore can negotiate based on similar domestic interests on a common platform.

Emergency Safeguard Mechanism (ESM)

The push for a possible ESM is currently being led by countries from the Association of South East Asian Nations (ASEAN). These countries have taken the lead in trying to put in place a safety valve to allow Members to temporarily suspend their bound commitments in the event of unforeseen and damaging impacts of import surges on their domestic service providers.

Negotiations, however, have been stalled by the inability to overcome two fundamental questions: 1) whether an ESM is desirable: and 2) whether implementing an ESM is feasible. These questions are mainly posed by developed countries who feel that GATS provides sufficient flexibility to handle import surges and that an additional safety valve is not needed.

Scepticism also exists with some developing countries. Part of the uncertainty is due to the fear of being on the receiving end of an ESM. Some developing countries fear that an ESM could be easily applied on their temporary workers. These worries have led to a lack of political will. Discussions on an ESM are also very technical in nature. As a result, some developing countries have found it difficult to engage in discussions and hence fully comprehend the proposals set forth. This lack of understanding and engagement may reinforce the fears and lack of political will. Deadline for negotiations has been extended and is to conclude anytime before the end of the round.

Government Procurement

There is no agreement among Members on the scope of the negotiating mandate for government procurement. Initial discussions had focused on disciplines for transparency in government procurement. The European Communities (EC), however, is a strong demandeur of negotiating market access in government procurement. Despite developing countries' strong resistance of the incorporation of modalities for Transparency in Government Procurement at the Cancun Ministerial Conference, the EC is of the opinion that GATS Article XIII on Government Procurement was in existence before the Singapore Issues arose and therefore are to be contended with on its own right.

Subsidies

Discussions on disciplines to avoid the trade-distortive effects of subsidies have also not moved far. The absence of a definition for "subsidy" or a "trade-distortive effect" continues to prevent progress. Additionally, Members consider that there is still too little information available on subsidies in the services sector to proceed with negotiations. An information exchange exercise was initiated with minimal outcomes. Some developing countries strongly feel that disciplines on subsidies should be negotiated since developed

countries often provide domestic subsidies that lead to unfair competition faced by developing country service suppliers.

Negotiations on Domestic Regulation

Negotiations on disciplines for domestic regulation has picked up pace in recent months. In addition to submissions by developed countries, a group of developing countries have submitted a horizontal proposal on elements for disciplines with a strong emphasis on the right to regulate based on national policy objectives. This emphasis aims to ensure policy space and flexibility within countries. The proposal also incorporates visa procedures to ensure disciplines on Mode 4 related requirements and procedures. The US has mainly proposed disciplines on transparency, stating that horizontal disciplines are not realistic for a wider scope of coverage. A few Members, from both developed and developing countries feel there is potential to reach agreement on certain aspects of these negotiations before the Hong Kong Ministerial Conference.

Other Areas under Discussion

Members are also currently dealing with a number of other important issues. They include conducting an assessment on trade in services, review of progress in negotiations, implementation of the Modalities for the Special Treatment of LDC Members, classification, Special and Differential Treatment, and capacity constraints. Below provides a brief discussion of each of these issues.

Assessment

The CTS is mandated by the negotiating guidelines and procedures 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 agreement and Article IV in particular. More importantly, negotiations are to be adjusted in light of the results of such an assessment. Technical assistance is to be provided to individual developing countries to carry out national or regional assessments. The CTS has not fulfilled this mandate. Although different international organisations such as the Organisation for Economic Development and the WTO Secretariat have conducted studies on trends of services trade and business risks and opportunities, however, there has not been a comprehensive study on the impacts of binding liberalisation on the right to regulate and meeting national policy objectives. This exercise is, however, a crucial one since developing countries would like to know the risks and opportunities of services trade before undertaking binding commitments.

Reviewing Progress in Negotiations

Paragraph 15 of the negotiating guidelines and procedures also mandates the CTS to conduct a review on the progress in negotiations considering the extent to which Articles IV and XIX: 2 are being implemented and suggesting ways and means of promoting the goal established therein. The CTS has not conducted such a review despite requests by developing country Members to do so. A group of developing countries took it upon

themselves to initiate a review process by assessing the commitments and offers made by Quad Members. Reviews were conducted on key sectors and modes of interest to developing countries to reveal whether developing countries' participation in services trade would increase with the commitment and offers made. These reviews were conducted on mode 4, tourism services and distribution services.

Modalities for the Special Treatment of LDC Members

The Modalities for the Special Treatment of LDC Members were agreed in September 2003. The LDC Modalities call on Members to consider the serious difficulty LDCs face with making commitments and their challenge to meet the services needs for sustainable development. LDCs have been provided greater flexibility in participating in negotiations based on their development, finance and trade needs. Additionally, other Members are to refrain from making negotiating demands that infringe on LDCs' priorities for development. The modalities mostly include best endeavour clauses with no binding obligations on Members and are focused on:

- LDC Members to identify their modes and sectors of export interest to be prioritised in market access commitments and those modes and sectors that present development priorities to LDCs to also be taken into consideration in negotiations;
- Members to develop mechanisms with a view to achieving full implementation of GATS Article IV: 3;
- Members to take measures to increase LDC participation in services trade; and
- Members to make commitments in Mode 4.

The LDCs submitted a proposal to operationalise paragraphs 6-9 which are the action orientated clauses which contain the above provisions, however have been met with little support from Members.

Classification

During the Uruguay Round many Members used the WTO W/120⁶ classification and corresponding United Nations Central Product Classification (UN CPC) in their schedules of commitments. Since then, some countries have found these classifications to not be accurate or present today's market reality for certain sectors. This is particularly felt in sectors that have undergone rapid technological advancement since the advent of GATS. Members have submitted many proposals to reclassify sectors such as environmental, energy and computer and related services. No multilateral agreements have been reached, however, to change existing classifications. Nevertheless, some countries have utilised the proposed new classification in their offers. This raises concerns of whether the use of different definitions and/or classifications may undermine, backtrack or impact in other ways current and offered commitments.

⁶[37] Document MTN.GNS/W/120.

The recent *US - Gambling* Appellate Body ruling adds to the complexity of issues surrounding classification. The Appellate Body found the W/120 to be a strong interpretative tool that can be utilised to assess unclear commitments. Thus, despite the US stating that it did not use it in its scheduling exercise, the W/120 was still relied on to analyse its commitments. This raises additional questions on using classifications that have not been multilaterally agreed, for example, whether the use of the W/120 as an interpretive tool will lead to favourable outcomes in the event of a dispute. This ruling has shown that it is in the best interest of all Members to be as clear as possible in their schedules and utilise the W/120, in conjunction with the UN CPC, and further specifications as necessary.

Special and Differential Treatment: Article IV

Article IV is considered to be the main SDT provision in GATS and this is an area which the Africa Group has been quite active. Article IV, however, has not been utilised or implemented. Some developing country Members, including the Africa Group, have called for mechanisms to implement Article IV as part of the Special and Differential Treatment portion of the Doha Work Programme. Proposals have been submitted in this regard to the CTS. It should be noted that much of these negotiations are taking place in an informal mode.

Capacity Constraints

Developing countries continue to face supply and negotiating capacity constraints. Even if developing countries were able to negotiate market openings in their trading partners' markets they may still not have the supply capacity necessary to take advantage of these export opportunities. Similarly, developing countries are unable to negotiate as desired due to the increasingly demanding agenda of the GATS complexities and technicalities, other areas of negotiations within the WTO as well as trade negotiations outside the WTO. There is seemingly an incessant provision of technical and financial assistance. However, negotiating plates are always too full for developing country negotiators. Tackling this problem may have to also require reforming the process of negotiations to reduce the workload and ensure equity and fairness in the degree of human and institutional capacity to negotiate.

Direction of Services Negotiations between now and the Hong Kong Ministerial Conference

As mentioned in the outset, The Chair of the CTS submitted a state of play report to the TNC in July. This report can be seen to set the tone and direction for the period between now and the Hong Kong Ministerial.

In terms of balance of representation of interests, the main body of the report is fairly accurate in describing the status of negotiations across the various areas. However, Annex 1 is unprecedented as this kind of sectoral and modal ‘assessment’ has not been provided in past years. Moreover, it is not clear whether the Chair had a clear mandate to undertake this type of analysis given it was prepared under his ‘own responsibility’.

The following specific observations can be made on the report:

- First, the emphasis on market access is clear and this is further magnified by the annex (Annex 1) mentioned above, together with an additional annex which identifies which countries have not submitted offers.
- Second, the presentation of a crisis scenario continues to prevail: ‘Most Members feel that the negotiations are not progressing as they should’ – this is again reinforced by focus on the market access track of negotiations.
- Third, and related to the above points, this paves the way for the use of some form of benchmarking in one form or another : ‘A considerable number of Members recognise that the request-offer method is not producing the desired results’. This is further taken up under ‘Future Work’, which includes examining ‘means of intensifying the request-offer process; use of complementary approaches as proposed by Members within the parameters of the GATS and the Negotiating Guidelines...’
- Fourth, despite highlighting the fact that ‘a number of members underlined the central importance they attach to a successful outcome on Emergency Safeguard Measures (ESM) and general lack of achievement in the rules negotiations, nothing is offered on the rules aspect of negotiations under ‘Future Work’.

Another aspect to the report relates to process issues which the Africa Group should take into account whilst considering negotiating positions:

- How will the report be used within the context of preparations of draft text for the Ministerial? In what form will the report be supplemented as indicated in paragraph 20 of the report?
- Annex 1 refers to positions or statements made by ‘one’ or ‘a number’ or ‘two’ or ‘three’ etc delegations. Are such statements and positions written submissions or oral or both? To what extent will these views form the basis of the direction in which progress in these sectors/sub-sectors and modes may take place? Is it adequate to reflect the overall concerns in these areas based on the input of just a few delegations?
- Following on from the previous point, if the annex is based on consultations, what was the criteria for deciding who to consult? In the context of on-going informal

consultations under 'Future Work', how will it be ensured that an adequate range of views are taken on board to reflect a broad representation of views and positions?

Benchmarking in market access

The Chairman's report is geared towards making the way for some form of benchmarking given the bulk of the report refers to the poor quality of offers and the need for exploring additional or complimentary modalities for increasing the pace and substance of market access negotiations. However, as reflected in Annex 1, there is progress taking place in the market access negotiations especially when compared to other parts of the Doha Work Programme (ie, agriculture and NAMA), especially when one considers the number of initial and revised offers on the table.

However in terms of quality, as discussed above, developed countries have not offered meaningful commitments for developing countries, as required by Article IV of the GATS. However, developing countries are also being asked to 'pay the price' for this low level of quality by undertaking further liberalisation commitments. As the primary demanders of market access negotiations, developed countries should be the leaders with regards to the level of ambition in offers.

The EC has been one of main proponents of benchmarking or using a 'common baseline' approach which would clearly change the change the nature of the GATS architecture. The idea behind the approach is to select certain sectors of the most interest and provide certain benchmarks for liberalisation, where commitments would have to reach in order to be acceptable. This issue has already been discussed in the June/July Cluster where developing countries expressed their opposition to such an approach. Some of the reasons for resisting such an approach to benchmarking include:

- It goes against the so called 'flexible' positive listing approach whereby countries make commitments based on the identification of sectors and of interest within the context of their national development objectives. This notion is featured in Article XIX:2 of the GATS. By introducing this type of benchmarking, it goes against these notions and transforms the negotiations into a pure numbers game.
- It needs to be recognized that there is already a mandated in-built system of 'benchmarks' in place. These lie within Article IV, which is reinforced by Article XIX of the GATS. These relate to increasing the participation of developing countries in world trade through strengthening their domestic services capacity; improving their access to distribution and information channels; and liberalisation of market access in sectors and modes of export interest to them. Moreover, paragraph 15 of the Negotiating Guidelines clearly states that the Council for Trade in Services (CTS) in Special Session shall consider the extent to which Article IV is being implemented when reviewing progress in negotiations.
- This approach to benchmarking is not consistent with the GATS nor the current Negotiating Guidelines which states the request and offer process as the main

method of negotiation for this round of negotiations. In other words, this form of ‘benchmarking’ can be seen as a way to significantly change the nature and course of negotiations, without making changes to the GATS or the existing negotiating guidelines, therefore setting a dangerous precedent for future rounds of negotiations.

- This form of benchmarking would work to exacerbate this imbalance by focusing all attention in this area whilst movement in the rules track of negotiations continue to stagnate.
- There are a range of classification issues yet to be resolved within the Committee on Specific Commitment (CSC) which deals with the definition and therefore coverage of the sectors in which commitments are made. These discussions are on-going and so far the approach has been adopted whereby Members unilaterally introduce their own definitions within the context of the request and offer process. This has implications in the context of benchmarking if countries undertake commitments in sectors/sub-sectors in which there may not be an agreed definition, thereby presenting a lack of clarity and certainty regarding the scope and coverage of the commitments.

In the CTS Chairman’s report, the approach to benchmarking has been ‘softened’ given that under ‘Future Work’ of the report, the Chairman refers to examining ‘means of intensifying the request-offer process; use of *complementary approaches* as proposed by Members within the parameters of the GATS and the Negotiating Guidelines...’ Based on this, it is clear that the push to put in place some form of benchmarking will continue but in different forms and therefore the Africa Group need to be vigilant of this important development in negotiations.

It is no surprise that the proposed programme of future work of the CTS is based on reaching consensus on benchmarking through the informal consultant process. Specifically the focus will be on:

- Identification of expectations of Members in all areas of negotiations (which can be understood to include rules, domestic regulation, classification, assessment and review)
- Means for intensifying the request-offer process
- Use of complimentary approaches
- Implementation of the Modalities for LDCs
- Consideration of S&D provisions
- Technical assistance

Considerations for the Hong Kong Ministerial Conference

Clearly, there is an over abundance of issues to consider in the lead up to the Hong Kong Ministerial Conference. As discussed above, these can be organised into categories of 1) market access negotiations, 2) domestic regulation negotiations, 3) rules negotiations, and 4) other issues. Developing countries make up the majority of WTO membership and their collective strength in numbers should be always utilised in negotiations. Thus, where possible, developing country Members should negotiate with common positions and the Africa Group plays an important role in this context.

Market Access and considerations for submitting an initial offer

There is an overemphasis on market access negotiations. Since the July 2004 Package, there has been heightened pressure to submit initial offers on countries who have not yet done so. This pressure ignores the flexibility developing countries have in Article XIX: 2 for liberalising at a pace reflective of their levels of development.

Unlike developed countries, most developing countries may not be in the best position to undertake binding liberalisation commitments under GATS because they have not undergone the decades of experimentation with regulations to manage foreign competition, provide for development of their people and economies and develop their domestic service industries to a point where they have the competitive and supply capacity to export.

If considering submitting an initial offer, developing countries can take into account the following:

- Offers involve the identification of sectors and modes where domestic supply capacity and institutional/regulatory frameworks can sustain the introduction of foreign competition. Therefore, it is important to ensure that appropriate policy and regulatory frameworks for developing supply and export capacity as well as achieving other national policy objectives are in place domestically before considering liberalisation. Liberalisation should reflect national policy priorities and not go beyond the national regulatory and policy frameworks.
- Prior to submitting an initial offer, at the national level there should be a review of the existing schedule from the Uruguay Round; assessment of any autonomous liberalisation; review of the requests to determine the extent to which the offer should respond and identification of what can be offered on a sector/sub-sector and modal basis in terms of market access, national treatment and additional commitments (this includes consultations with stakeholders and determination of country's 'bottom line').

- Developing countries can open fewer sectors; liberalise fewer types of transactions; only progressively extend market access; and attach certain conditions to whatever market access is granted. Examples of conditions include⁷:
 - Requirement for joint ventures
 - Foreign companies required to establish subsidiaries
 - Nationality requirements for suppliers of services
 - Set percentage of locally engaged workforce
 - Requirement to train local staff
 - Research and development
 - Use of latest technology requirements

Other broader issues which need to be taken into account when considering whether to submit an initial offer include:

- Given the submission of offers can trigger further requests, followed by revised offers, it is advisable that initial offers do not present the full commitment which the country is willing to undertake, in order to allow space for improvement and enhance the negotiating position.

- Once binding of commitments take place at the WTO, they are reinforced by the dispute settlement mechanism and therefore it is difficult to go back on these commitments regardless of the circumstances (GATS Article XXI procedures would have to be initiated which is a cumbersome process requiring compensation to affected Members). Therefore developing countries should retain as much flexibility as possible by offering less than or equal to the status quo (if appropriate). It has already been mentioned that developed countries often reflect the status quo of liberalisation in their countries rather than go beyond - this to also retain some degree of flexibility.

- Importantly, given that rules on subsidies, a possible safety net measure such as an emergency safeguard, or disciplines on domestic regulations have yet to be developed, as previously mentioned retaining a degree of flexibility is even more critical for the future.

- Offers can also be used for providing technical clarity and refinement to a country's schedule of commitments so as to increase transparency and predictability - which can also contribute to the value of the offer.

- In light of the above, offers should also be submitted on a conditional basis dependent on a number of things including the evolution of the negotiations generally, the offers that will be presented by the other WTO Members, progress in other areas in the GATS negotiations (i.e. GATS rules) and not prejudiced by outcomes of discussions on classification issues. It should also be indicated that the country reserves the right to

⁷ Using GATS Conditions to Achieve Developing Country Policy Objectives, Occasional Paper 13, South Centre, March 2005.

modify, add on or remove all or part of the offer in the future and reference could also be made to the fact that developing countries are entitled to special flexibility provided by the GATS as discussed earlier

LDCs

Further, LDCs have in place the Modalities, which call on Members to refrain from requesting deep market access commitments of LDCs and give LDCs flexibility to open less than other Members. Although LDCs will be coming under increasing pressure to submit an initial offer, they can exercise the right to not submit an initial offer in this round of negotiations. LDCs have submitted a joint request on mode 4 given because they have come to identify mode 4 and low skilled workers as an export interest in GATS. This will provide a good basis for LDCs to assess the offers of other Members in this particular mode of interest.

One of the key features of the Modalities relates to granting LDCs ‘special priority’ in market access for modes and sectors of export interest to LDCs. However, there is no legal mechanism through which this ‘special priority’ can be accorded to LDCs as a way in which to provide effective market access, as is the case in goods through the Enabling Clause. In GATS, even if a Member wishes to accord preferential market access to LDCs, there is no direct or automatic legal basis for that. In this light, the Modalities (specifically paragraph 7) can be seen as an opportunity for developing a preferential market access mechanism giving priority to LDCs.

The current scenario is one where even if LDCs identify their specific sectors and modes of export interest, and if Members take these into account, once Members undertake binding commitments, they are extended to all Members on an MFN basis and any such ‘special priority’ to LDCs is reduced, if not lost given they have to compete with other Members for market access on the same basis. Clearly, this does not translate into effective market access for LDCs.

In light of all of the above, the Africa Group has already called for the rebalancing between rules and domestic regulation with that of market access negotiations, ensuring the Guidelines and Procedures for the negotiations continue to remain the basis for the negotiations, together with calling for improvements in modes and sectors of export interest to African countries and implementation of the Modalities⁸. In addition, the Africa Group can consider focusing on the following issues within the context of these positions in the lead up to the Hong Kong Ministerial Conference:

⁸ Cairo Declaration and Road Map on the Doha Work Programme, 5-9 June 2005, AU Conference of Ministers of Trade, Cairo, Arab Republic of Egypt; Fourth LDC Trade Ministers’ Meeting, 25-26 June 2005, Livingston, Zambia.

- continue to identify areas of interest and priority for African countries in trade in services;
- critically examine revised offers of developed countries in sectors and modes of export interest to identify whether Article IV is being implemented;
- analyse proposals on benchmarking and their implications for African countries;
- resist benchmarking proposals which alter or threaten developing country flexibilities;
- consider proposing development orientated benchmarks as an alternative;
- if submitting initial offers, do so on a conditional basis, based on national development objectives and priorities, plus ensure proper classification and utilise development conditions;
- LDCs should not submit to pressure for initial offers in this round and focus on implementation of the modalities and the rules aspect of negotiations; and
- LDCs should consider options for implementing ‘special priority’ in market access under the Modalities.

Domestic Regulation Negotiations

These negotiations along with rules should logically be placed at a higher level of priority for Members than market access negotiations. WTO Members are in the midst of discussing possible elements for disciplines on domestic regulations. There may be enough momentum for an agreement such on elements before the Hong Kong Ministerial Conference. In this light and consistent with the Africa Group’s position to conclude work in this area, the Africa Group can specifically consider:

- ensuring strong and binding obligations on the right to regulate based on national policy objectives;
- incorporating strong and proper SDT measures including for difficulties in implementing disciplines;
- carefully analysing any forms of necessity test provisions to ensure no infringement on the right to regulate; and
- consult with domestic regulators on the feasibility and implications of possible elements throughout the negotiating process.

Rules Negotiations

The Africa Group has called for intensifying the work in rule-making. Rules negotiations are stuck on fundamental issues and are moving at a crawl pace. Negotiations on emergency safeguard mechanism have come the farthest relatively, however, lack of political will, uncertainty of the opportunities and risks of the eventual system and the highly technical nature of discussions is preventing further movement.

However, similar to the importance of a safeguard mechanism for trade in goods, it is logical that similar importance be placed for trade in services. Additionally, the difficult nature of going back on bound commitments combined with the relatively young and inexperienced (and hence) vulnerable service sectors in developing countries points to a strong case for having in place an emergency safeguard mechanism. Realistically, substantial movement in negotiations before the Hong Kong Ministerial Conference would be quite challenging and require changes in perceptions and opinions. The Africa Group has already called for the establishment of a safeguard mechanism which is of important political value. In addition, the Africa Group can go further by considering to:

- study the ASEAN proposal and where Members find weaknesses in terms of how it might be implemented to submit proposals on ways to strengthen it;
- ensure there is strong SDT measures, particularly on mode 4 and for LDCs; and
- support having in place an ESM as a condition for more offers.

On subsidies, negotiations will also unlikely gain significant movement before the Hong Kong Ministerial Conference. However, these negotiations are to be concluded before the end of the negotiations on market access. How subsidies on services are disciplined in GATS can have major implications on market access commitments undertaken both by developed and developing countries. Furthermore, developing countries have a defensive interest and an offensive interest in this area. Defensively, it is in the interest of developing countries to ensure they are able to apply subsidies to build their services industries and build capacity to meet development goals and potentially grow for exports. Offensively, developing countries may be facing unfair competition due to subsidised services providers in developed countries. In addition to these issues, the lack of data on services subsidies continues to prevent substantive discussions on the matter. Some countries may also be reluctant to reveal their services subsidies - in the event they become disciplined! Given the complex and sensitive nature of this subject, Members may question whether completing negotiations by the end of 2006 (which some have speculated for when the Doha Round will end) is realistic. If these negotiations are pushed into another round or beyond 2006, then market access negotiations must also be pushed further. Developing countries should keep this in mind when contemplating on timelines for the completion of the GATS round of negotiations. Nevertheless, the Africa Group can consider the following in the lead up to the Hong Kong Ministerial Conference:

- declare the importance of disciplining subsidies and the need to conclude these negotiations before the negotiations on market access and
- develop a realistic plan of action and outline terms and conditions that developing countries desire based on collective defensive and offensive interests.

Negotiations on government procurement may relatively be the most problematic given that the EC is strongly pushing for the inclusion of market access in negotiations for disciplines. Given the rejection of the Singapore Issue on government procurement in addition to existence of the plurilateral Government Procurement Agreement (which covers services trade), the consensus by the majority of WTO members at the Cancun

Ministerial Conference on this topic still remains. Substantial movement in negotiations is unlikely and perhaps dangerous while the EC insists for market access in disciplines. The primary focus for developing countries should be to resist any push for market access. Thus, the Africa Group can consider to:

- continue resisting market access in government procurement in services by citing Article XIII on Government Procurement, which states that the MFN, market access, and national treatment obligations do not apply to laws, regulations or requirements governing the procurement by governmental agencies of services.

Other Issues

There are a whole host of other issues, outside of the market access and rules negotiations, which Members must contend with. These other issues, which include assessment, review, LDC Modalities, Article IV on Increasing Developing Country Participation in Trade, and capacity constraints, have major implications for the types of decisions Members make in negotiations and the Africa Group and LDCs have considered positions on most of these. These should be emphasised through:

- insisting on the completion of a comprehensive assessment on services trade with reference to the objectives of Article IV, receive technical and financial assistance to conduct national and regional assessments, to identify the costs and benefits GATS liberalisation poses for development – this should be a condition for moving forward on market access negotiations;
- insisting on the CTS to review the progress in negotiations based on Articles IV and XIX: 2. Incorporate findings from the review conducted by a group of developing countries on mode 4, distribution services and tourism services in positions and statements;
- insisting on the full implementation of the LDC Modalities, particularly the action oriented paragraphs 6 through 9; and
- strongly communicate ongoing and systemic supply and negotiating capacity constraints.

Conclusion

The underlying driver of decision-making in negotiations should be answering the question of whether GATS liberalisation, among other policy options, is an efficient and sustainable tool for meeting parts of national development plans. This should be accompanied with the question on whether governments have in place proper regulatory frameworks to ensure benefits.

The Doha Round of negotiations places GATS in a comprehensive package of other negotiations. Developing countries may be interested in conditioning movement in these negotiations with movement in other negotiations, such as agriculture or implementation of WTO Agreements, or efforts to strengthen SDT provisions. Tradeoffs must be

carefully assessed with consideration of the offensive and defensive positions of key developed country Members. One must also keep in mind the multiple parts of these negotiations, which can themselves be considered separate agreements in their own right, e.g. the different sectors. A key negotiating tool for developing countries is putting forth common positions. Developing countries should find commonalities where they exist and take advantage of those opportunities to stand together.

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