

Approaches to Advance Special and Differential Treatment in the Multilateral Context

6.1 Reference paper

The importance of providing SDT in services to developing countries in the multilateral context is discussed in several key WTO documents, reviewed in Chapter 2 of this paper and reproduced in the annexes. These include articles of the GATS legal text itself (Articles IV, V, XV, XIX and XXV, as well as paragraphs of the *Telecommunications Reference Paper*), the Doha Ministerial Declaration (WT/MIN01/DEC/1, 10 November 2001), the *Modalities for the Doha Development Round of Services Negotiations, Guidelines and Procedures for the Negotiations on Trade in Services* (S/L/93, 29 March 2001), the *Modalities for the Special Treatment for Least-developed Countries in the Negotiations on Trade in Services* (TN/S/13, 5 September 2003), the Hong Kong Ministerial Declaration, Annex C on Services (WT/MIN/DEC, 22 December 2005) and, most recently, the *Elements Required for the Completion of the Services Negotiations* (TN/S/34, 28 July 2008). There is no dearth of agreed texts that have included references to the need to offer SDT to developing and/or least developed countries to help promote their services trade, exempt them from the requirement of reciprocity expected in the Doha Round services negotiations and urge developed WTO members, as well as the WTO Secretariat, to provide the necessary technical assistance.

However, it is clear that the admonitions about SDT contained in these documents have so far not produced the desired results. It seems that a different approach is now needed. We suggest the elaboration of a reference paper on special and differential treatment in services for developing WTO members containing guidelines and commitments that, once adopted by individual developed country members, would be binding on them (much like the *Telecommunications Reference Paper*).⁸⁹

Such a reference paper could be elaborated and proposed by a group of developing countries such as Commonwealth members and be open to voluntary adoption by developed and developing WTO members, either independently or as a part of the ongoing Doha Round services negotiations. The obligations of the reference paper relating to technical assistance would apply to all developing WTO members below a certain income level, as determined by the World Bank indicators, and would include the categories of least developed, low-income and low-middle-income countries. Special provisions in the reference paper would apply to LDCs.

The reference paper would set out the parameters for technical assistance by developed countries and benchmark this assistance by linking it to implementation of agreed liberalisation commitments by developing countries. Thus there would be a commitment on both sides, but developing countries would only be expected to give

the market access that had been negotiated after technical assistance had been provided to them in a given sector. As discussed in section 4.3 of this paper, a precedent for such an approach exists in a proposal by the Ministerial Council in the 'July 2004 Package' in connection with trade facilitation. This precedent could be built upon by the proposed reference paper. Developing countries might initially request this technical assistance from the WTO developed country trading partner with whom they have the greatest volume of trade, but they could also seek it from other sources.

As stated above, the reference paper would be binding on the individual WTO developed country members once they had accepted it. It could be made more attractive to WTO members by having an advocacy group of a large number of developing countries backing such an initiative. For example, the support of the Commonwealth group or all of the ACP group of countries would lend major backing for serious consideration of a reference paper. Although the guidelines would be general and apply to all developed WTO members who adhere to the document, the commitments could be elaborated with respect to the requests of individual WTO developing country members. Such a schedule of technical assistance commitments would be attached in an annex to the reference paper for each adhering member, and these commitments could be modified annually, depending on the requests made for specific technical assistance and their successful delivery. Thus the developing countries who would benefit most from the reference paper would be those who could articulate their needs and priorities in a convincing manner. The possibility of secretariats of regional groupings requesting commitments to giving technical assistance on behalf of their members should also be advocated, as this would save negotiating time and effort.

6.2 MFN waiver with respect to LDC service exports

In March 2006, the LDC group submitted to the Council for Trade in Services a proposal calling upon the developed countries (and those developing countries in a position to do so) to grant non-reciprocal special access to services from LDCs (see TN/S/W/59, 28 March 2006). Paragraph 9 of the 'Elements Required for the Completion of the Services Negotiations', annexed to the 28 July 2008 report by the Chairman of the Council for Trade in Services (TN/S/34), states that of the various mechanisms identified to achieve this result:

Members are of the view that a waiver, available to all Members, from the obligations of Article II, paragraph 1 of the GATS [MFN] in respect of preferential treatment benefiting all LDC Members offers the most satisfactory outcome of this negotiation.

The Council has been working on this approach,⁹⁰ and it appears to be close to agreement on a draft decision for such a waiver, pending resolution of some outstanding issues. These include: whether the waiver should apply only to GATS Article XVI (market access) or to Article XVII (national treatment) as well; and the development

of rules of origin that would reduce the risk of circumvention.⁹¹ WTO Director General Pascal Lamy included an MFN waiver on services on products from LDCs as part of a ‘three-speed search’ for an outcome to the Doha Round in December 2011, with a package of measures for LDCs (including the services waiver) as part of the fast-track priority or top speed, for an achievable outcome in the short term, with other issues to be taken up in a mid- to long-term perspective.⁹²

A waiver from the MFN obligation, allowing developed country members to permit access to service imports from LDCs alone, with respect to particular service sectors and modes of supply, would clearly be of benefit to the LDCs. Of course, developed countries would be free to pick the sectors and modes of supply in which they granted preferential access, and it is possible that, as with the GSP applicable to trade in goods, products of particular interest to the LDCs would be excluded. Nevertheless, a programme that was limited to LDCs would be less threatening to domestic producers, and therefore less likely to generate protectionist pressure, than the GSP programme, which applies to developing countries generally (with individual country exclusions based on GDP and other factors). The developed countries might therefore be less inclined to exclude services of interest to LDCs.

In what modes of supply could LDCs take advantage of such a preference? Mode 1 is largely unrestricted, in practice even if not always scheduled, and Mode 2 is rarely restricted, so that they would offer little scope for preferential access. As we have noted, the poorer countries rarely have firms large enough to be able to invest abroad, so that they could not take advantage of preferential Mode 3 access. The focus would therefore be on Mode 4. This would raise a number of issues. Would the developed countries allow access only to higher skilled individuals from LDCs, or would they grant entry, perhaps subject to quota, to lower skilled workers, where the LDCs have comparative advantage?⁹³ Would minimum wage laws and regulations continue to apply, which might make it more difficult for workers from LDCs to compete in developed country markets?⁹⁴

It would be useful to conduct analytical research to assist LDCs in the compilation of an illustrative list of measures that should be covered by the MFN waiver.

6.3 Other approaches

Some of the approaches discussed with respect to RTAs in Chapter 4 of this paper could also be followed in the multilateral context. The most important of these are the delinking of Mode 1 commitments from commercial presence, as called for by Annex C to the Hong Kong Ministerial Declaration (WT/MIN(05)DEC, 22 December 2005) (see section 4.1.1); the various improvements to Mode 4 access discussed in section 4.1.2; and the granting of non-reciprocal access to the government procurement markets of the developed countries (section 4.4). The latter might be accomplished through amendment of the plurilateral Government Procurement Agreement. Additionally, sectors and modes might be identified where least developed countries

could benefit from making partial commitments in the plurilateral bargaining process, should this be taken up again in the Doha Round. Such areas might include joint venture and training requirements.