7
Liberalisation of Trade in Services

Introduction

The previous three chapters were devoted to the assistance provided to the members of the Group for their participation in the negotiations for the liberalisation of trade on agricultural products, agricultural commodity issues and on non-agricultural products. This chapter describes the assistance provided for participation in the negotiations in trade in services.

The General Agreement on Trade in Services (GATS) specifically provided that negotiations for future liberalisation of trade should be held periodically and the first of such rounds should start 'not later than five years from the entry into force of the WTO Agreement', that is before 1 January 2001. Because of these mandatory provisions it was decided to commence negotiations in trade in services, even though no decision could be taken on the proposal for launching a new round of negotiations covering a wide range of subjects, because of the failure of the Seattle Meeting in 1999. The 'Guidelines and Principles for the Negotiations in Trade in Services', which were adopted in March 2001, provided as follows:

- The negotiations should cover all sectors of service trade and special attention should be given to the removal of barriers in sectors of specific interest to developing countries.
- The negotiations should take place on the basis of 'request and offer procedures' (unlike trade in goods, where the modalities that should be adopted was left to be determined in the negotiations).
- Under these procedures, each participating country is expected to make requests to countries with which it wants to negotiate indicating the liberalisation measures it wants them to take. After examining the requests the countries involved table 'offers' indicating the specific liberalisation commitments they are prepared to make. The negotiations then take place among interested countries on a bilateral basis with the aim of securing improvements in the offers and with the participating countries also trying to ensure that estimated benefits to their trade broadly conform to the criteria of 'mutual advantage' laid down by the GATS.
- Special and differential treatment should be extended to developing countries allowing them to liberalise their trade in fewer sectors, and they should also be

given credit for 'autonomous liberalisation measures' taken by them prior to the launching of the negotiations. Subsequently these guidelines were complemented by modalities for special treatment of least-developed countries.

These principles and guidelines were later suitably incorporated in the Declaration launching the Doha Round of negotiations.

Simultaneous negotiations are also being held for incorporation of provisions on emergency safeguard measures and on domestic regulations. These negotiations are being held in pursuance of the specific provisions contained in GATS and not in pursuance of the mandate contained in the agenda for the Doha Development Round.

Taking into account these guidelines, a three-pronged approach was adopted for providing assistance to the member countries of the Group for their participation in this area of the negotiations. First, the papers prepared identified the sectors in which there was potential for the development of trade with developed countries and provided an assessment of the extent to which trade may be liberalised in the present Round. Second, guidance was provided on the relevant factors that developing countries should take into account in liberalising their trade in pursuance of the requests received by them. Third, some proposals were made on how they could obtain credit for the liberalisation measures taken by them on an autonomous basis, in determining the extent to which they should liberalise in the present ongoing negotiations. The main features of the assistance provided in each of the areas are discussed below.

Sectors with Potential for Developing Countries to Increase Trade

Four modes of trade in services

As noted in Chapter 1, while international trade in goods only takes place across borders from one country to another, trade in services takes place in four ways, as follows:

- Cross border trade (Mode 1);
- Consumers or users moving to the country where the service is available (Mode 2);
- Establishment of a commercial presence in the country where service is needed in order to provide service (Mode 3);
- Movement of natural persons to the country where service is needed with a view to providing service (Mode 4).

The ability of countries to develop trade through the cross-border mode (1) is greatly dependent on how far infrastructure for communication through international technology means has been developed. A large number of developing countries (except

for those at a higher stage of development) are likewise unable to develop trade in financial and other sectors by establishing subsidiaries and branches in other countries through Mode 3. They have, therefore, a competitive advantage in supplying services to developed countries through Mode 4, as in the movement of natural persons to provide a service in another country, or Mode 2 when users of services move to the country where the services are available. To assist the delegations in deciding on the approach they could adopt the Adviser prepared a paper that provided an assessment of how willing developed countries would be to liberalise trade that is taking place under these two modes (Rege 2003).

Competitive Modes of Trade for Developing Countries

Movement of natural persons (Mode 4)

Unskilled and semi-skilled workers

In a large number of developing countries a significant proportion of service export earnings comes from remittances made by unskilled and semi-skilled workers who have moved temporarily to other developing countries to work. For example, workers from Bangladesh, India, the Philippines and Thailand working in the countries in the Middle East or those from many countries in Africa and Latin America who are working in neighbouring states.

Movement of unskilled workers from developing countries to developed countries is somewhat limited. The exceptions are women from countries like the Philippines and Thailand moving to European countries and Japan to work as housemaids.

Some of the developed countries do allow entry to a limited number of workers from other developed countries to do menial work that their nationals are not willing to do because of the prevailing high standards of living. However, most of these developed countries are witnessing dramatic changes in the demographic composition of their populations. Because of the fall in the birth rate and the rise in life expectancy, the proportion of the non-working population (60 years and above) is steadily on the increase. As the number of people available for work continues to decline in the coming years these countries will need to recruit more and more workers, mostly unskilled and semi-skilled, from overseas.

Some analysts have therefore argued that most of the developed countries may not have any alternative but to establish ‘quotas’ under GATS rules permitting unskilled and semi-skilled workers to work in their countries on a temporary basis. But this seems unlikely in the present round. Some of the developing countries, particularly the least developed ones, have made proposals requesting developed countries to allow such movement but there has been a general reluctance on the part of developed countries to accept legally-binding commitments to provide entry of unskilled and

semi-skilled workers on a 'most favoured nation' basis. However, as the work force available in their territories becomes insufficient to cope with work in areas like construction, repairs and maintenance, office cleaning and garbage disposal, it is possible that the number of unskilled and semi-skilled workers coming to developed countries to work for temporary periods may increase. The developed countries may wish to maintain a certain degree of discretionary authority in choosing the countries such workers could come from, taking into account factors like similarity of culture and religion and the preferences of their people, and allow such movement under bilaterally negotiated arrangements. They may further insist that workers speak the national language and have minimum educational standards.

Professionals and skilled workers

The attitude of most of the countries to the movement of skilled workers or professionals is somewhat more favourable. In the Uruguay Round and in the negotiations that were held soon afterwards, some of the developed countries gave commitments permitting such movement for providing limited types of services. However, in most cases the issue of temporary visas required for such movement is subject to 'economic needs' criteria. Most notable among these is the requirement that companies proposing to employ such professionals must establish that similarly qualified persons are not available locally. One of the demands of the developing countries is that the developed countries giving such commitments should not apply the 'economic needs' criteria.

It has been possible for some of the developing countries to develop trade through movement of natural persons among nurses and other hospital professionals and software and other information technology specialists. In relation to the latter, the serious shortage of software engineers and other information technology experts has led countries like Germany, Japan and the US to establish special quotas for visas for highly skilled workers. A number of such experts from India, the Philippines and other developing countries were able to take up these temporary visas during the 1990s technology boom, when the economies of the developed countries were expanding. The situation may change in future years as trends towards a slowing of economic activity become noticeable in these countries. In fact, there was increasing evidence to show that some of the professionals and skilled workers who had moved to developed countries in the boom years were returning to their countries. This drift is likely to be accentuated by the practice that is being adopted by companies to outsource some aspects of production to some of the developing countries, in order to take advantage of the prevailing low wages.

Another issue for developed countries is that local people who are losing their jobs are attributing their problems to workers coming from abroad on temporary visas. There is an increasing pressure from trade unions and other labour groups in these

countries for either discontinuing special quotas for highly skilled workers or for reducing their numbers. In light of these factors there are serious doubts as to whether in the present round, significant progress could be made by developed countries to permit movement of professionally qualified persons, by increasing the size of quotas for visas granted for this purpose or by removing the economic needs criteria. It is likely that improvements made would be superficial in nature and may not provide any meaningful advantage.

Consumers and users moving to the country where the service is available (Mode 2)

Tourism services

Under the GATS definition, tourism activities cover hotels and restaurants, travel agencies, tour operator services and tourist guides and services. Expansion of tourism is an important policy objective of a number of developing countries so they had taken measures to liberalise the sector even before the Uruguay Round. The measures were taken on an autonomous basis and have been bound by commitments in the Uruguay Round. In fact, the overall level of commitment made by the developing countries in this sector is far greater than in any other service sector.

Recent developments have shown that export earnings from tourism fluctuate with the changes in par value of currencies. Other factors contributing to the decline in tourist traffic are increasing threats of terrorist attacks and the spread of viruses. As a result of the decline the number of people employed in the sector has fallen in a number of countries that are dependent on tourism for a large proportion of their export earnings.

Back office services

Providing 'back office' services to companies in developed countries is becoming an important service industry in some of the developing countries. The development of information technology has made it possible for service companies from developed countries (e.g. banks, insurance companies and airlines) to get some of their functions performed in developing countries like India, where the electrical and telecommunication infrastructure is well developed and a well educated and trained workforce, fluent in English, is available. Other developing countries that are gearing up to take advantage of this opportunity include the Philippines and Thailand in Asia; Ghana, Kenya, Mauritius and South Africa in Africa; and some of the small economies in the Caribbean and in the Asia Pacific region.

The main factor influencing this trend towards outsourcing is the fierce competition in world markets that is forcing companies to reduce costs in order to remain competitive. Outsourcing enables companies located in developed countries to obtain

services from developing countries at half the cost or less due to the differences in the wage levels between developed and developing countries. These companies are getting a wide array of functions performed in countries where costs are lower including accounting and finance, processing of administrative operations, contact support, and call centre and hospital transcription services (involving doctor's reports on patients). The general pattern is for contracts to be awarded to local firms in developing countries, which is expected to greatly reduce migration of software and other experts from developing to developed countries. This suits the companies in the developed countries; there are no cost-savings when foreign experts work in the country for short periods as in most cases they are obliged by law to pay the same salary as that paid to local employees.

One of the consequences of outsourcing is the reduction in the number of people employed by the companies locally. Amid growing concerns that such migration of jobs could lead to higher unemployment, trade unions are increasing pressures on companies against outsourcing. Already, in countries in Europe where national laws require representation of workers on supervisory boards, worker representatives are pressing that companies should be run not only in the interest of the shareholders but also of the workers and should resort to outsourcing work to firms in foreign countries only in exceptional cases.

An Approach Developing Countries Could Adopt in Liberalising Trade

Assessment of the benefits

Each of the developing countries would have to decide on the approach that should be adopted in deciding on the contribution they could make by taking further liberalisation measures. These countries should also assess how far the developed countries show willingness to improve their offers for liberalisation in the sectors where developing countries have a competitive advantage, taking into account the situation described above, which may require a cautious approach in accepting further liberalisation commitments.

Regulatory mechanism

A related factor they should consider is whether an effective mechanism for regulating service industries after liberalisation exists in the country. As many industries provide services that are essential for the well being of its people, governments have found it necessary to regulate the activities of these firms. Traditionally, the main sectors that were regulated were banking and insurance. In recent years, as the governments both in developed and developing countries have been handing over to private enterprise those services previously provided by public enterprises (public utilities as they are

often called) in such sectors as telecommunications, gas, electricity and water, it has become essential to regulate their functions. In the UK for instance, the government has established separate regulatory bodies: OFTEL to regulate activities in the telecommunications sector; OFGAS for the gas industry; OFEL for electrical industries; and OFWAT for the water industry.

Broadly speaking, the primary aim of such regulatory bodies is to ensure that the producing companies in each sector, which in many cases enjoy monopoly positions, do not use their dominant positions to exploit the market. This is achieved by creating conditions for sustainable competition, which guarantees that services are provided to consumers at reasonable prices while ensuring that firms make enough profits that to keep shareholders happy and to agree to long term investment. See Box 12 for an overview of the purposes for which regulatory mechanisms are adopted by governments in various service sectors.

Box 12: Overview of regulatory systems adopted

Telecommunications

The Uruguay Round recognised that the process of liberalisation and privatisation may not always lead to efficiency and lower costs to the consumer as private firms providing basic telecommunication facilities would be able to exercise monopolistic control, due to the structure and nature of the industry. Thus, in taking liberalising measures it is important that countries establish regulatory frameworks to ensure users can access these basic facilities on fair terms. The following principles and rules guarantee access to the market for new entrants by prohibiting existing firms from adopting anti-competition practices:

- The establishment of independent regulatory authorities;
- The adoption of competitive safeguards;
- Measures to ensure interconnection;
- Transparent and non-discriminatory licensing practices; and,
- Universal service obligations.

Financial

This sector, one of the basic elements of an economy, is considered essential for development. Thus, regulatory policies and frameworks are seen as necessary for the correction of perceived market failures, the reduction of systemic risk, and for the maintenance of a safe and sound financial system. Government interventions take the form of:

- Macroeconomic policy management;
- Prudential regulations; and,
- Non-prudential regulations to pursue various public policy objectives.

The intermingling of the activities of various financial services and the elimination of the distinctions between different types of financial institutions, observed in many industrialised countries, has led to re-regulation and deregulation at the national level. As different financial/non-financial institutions enter markets hitherto reserved for certain types of

financial entities, there is a need for domestic regulation to ensure that various players entering the market do not distort competition amongst them.

Energy (gas and electricity)

Most countries regard this sector as crucial to economic and social development, which had resulted in the states taking responsibility for production and supply of utilities like electricity and gas. Countries that are privatising the state monopolies are finding it necessary to regulate the industry to ensure competition and reasonable prices as well as consumer protection, continuity of supply, universal service, environmental protection, and health and safety.

Health

As the health sector straddles both the public and private spheres it is subject to a variety of aims that are not always compatible, so a potential for misallocation may exist within it. When liberalising trade in services, the challenge for health authorities will be to define a consistent set of policy objectives, and then to create a regulatory framework for promoting efficient resource utilisation in respect of these objectives. The framework has to take into account changing policy priorities, which are evolving over time, as well as the emergence of new communication technologies that could gradually undermine geographical barriers to information, co-ordination and competition. The types of regulation that most directly affect supply and demand of medical and health services are:

- Licensing and qualification requirements for individual health professionals;
- Approval requirements for institutional suppliers (e.g. clinics or hospitals);
- Rules and practices governing reimbursement under mandatory insurance schemes (public or private); and,
- Rules governing supply of medicines via telecommunications channels ('tele-medicines').

Education

The role of education is crucial in fostering economic growth, and personal and social development, and in reducing inequality. These services are primarily traded through:

- Consumption abroad (Mode 2) entailing student mobility across borders;
- Commercial presence (Mode 3) involving the establishment of facilities abroad (e.g. local branch campuses, subsidiaries), or twinning arrangements in which domestic private colleges offer degree courses overseas;
- Movement of natural persons (Mode 4) focusing mainly on scholars offering their services abroad; and,
- Cross border supply (Mode 1) facilitated by new technologies creating new possibilities for distance learning.

Due to the importance of 'consumption abroad' and the gradual opening of markets through 'cross border supply' and 'commercial presence', the regulatory systems adopted must take national objectives into account, particularly where the entry of foreign educational institutions may impact policies for providing financial support to national institutions to keep down costs for higher education.

The establishment of regulatory bodies and ensuring their effective operation is a difficult task for developed countries, and much more so for most of the developing countries. The establishment of such bodies requires personnel with the knowledge and technical expertise to understand and appreciate the technological developments taking place, which many developing countries may find difficult. Regulatory bodies also require substantial running costs. These may put an additional burden on the limited financial resources available to the governments and require them to divert financial resources earmarked for economic development. Additional problems could be expected in co-ordinating the activities of different regulatory bodies, with respect to each other and with the agency that is responsible for the implementation of competition policy.

The suitability of the regulatory mechanisms adopted by developed countries in relation to the situation prevailing in developing countries needs analysis and research on certain issues. For instance, how suitable is it for developing countries to adopt the concept that 'regulatory bodies' should be independent of government control in evolving pricing policies when public opinion favours that such policies should take into account social objectives like the need to provide such services to the poorer sections and in rural areas at lower prices.

Regulatory mechanisms in such sectors as banking, insurance and telecommunications exist in most of the developing countries. In most cases, however they are far from effective and need improvements and strengthening. This includes developing capacities to keep themselves abreast of the rapid changes that are occurring in the institutional arrangements used in providing new financial services and new products that are being introduced. In other service sectors such as telecommunications, energy, health and education, a large number of developing countries have not as yet developed regulatory mechanisms.

Against this background it would be necessary for the governments of developing countries to be extremely cautious regarding liberalisation of trade in service sectors where regulatory bodies have not been established. In sectors where regulatory bodies already exist such measures should be taken only after the regulatory mechanism has been overhauled to meet the new situations created by privatisation. These considerations are particularly relevant for liberalisation in sectors like electricity and water, where in many of the developing countries responsibility for providing services rests with state-owned enterprises, and in health and education where services are provided directly by the state.

Credit to Developing Countries for Autonomous Liberalisation Measures Already Taken

Relevance of autonomous liberalisation measures

It is important to note that in the Uruguay Round almost all developed countries only 'locked in' commitments to liberalisation measures they had already taken on an autonomous basis. By making such legally binding commitments they thus agreed to maintain a standstill on the imposition of new restrictions. The Round did not generally result in the removal of new barriers to trade by these countries.

Like the developed countries, the developing countries had also been taking measures to liberalise trade on autonomous basis. There were, however, two essential differences between the two groups of countries in the way the process of liberalisation developed. First, in the case of developing countries the process of liberalisation in the service sector started much later than in the case of developed countries. Second, while the motivation for liberalisation in the developed countries was provided by service industries that were seeking external markets, in the case of developing countries the liberalisation policies were by and large government induced. Whether acting under their own policy or under IMF and World Bank structural adjustment programmes, the governments have encouraged foreign suppliers to enter the market by removing restrictions on foreign investment with a view to improving the speed and quality of the services provided in the domestic market.

As in the case of developed countries, in the Uruguay Round the developing countries bound some of the autonomous liberalisation measures taken by them by making commitments. In so doing, the developing countries took into account the provisions of Article XIX of GATS, which permit them to open 'fewer sectors' and liberalise 'fewer transactions' in multilateral trade negotiations. Further, most of them have been able to limit the extent of liberalisation by specifying in their schedule of commitments conditions that could limit the freedom of action of the foreign suppliers or enterprises.

It is also important to note that, by and large, the commitments made by developed countries only resulted in making the autonomous measures they had already taken binding under the WTO system. This was not always the case with the developing countries as many of the commitments they made resulted in further liberalisation measures being taken.

As noted earlier, the rules adopted for negotiations in this area envisage, that in considering requests from developing countries for liberalising trade in sectors of trade interest to them the developed countries should 'give credit' for the autonomous liberalisation measures they have already taken or have shown willingness to take. The paper prepared under the project suggested that there might be greater willingness on the part of developed countries to give credit for such autonomous liberalisation if

the developing country taking such measures agrees to list them in its schedule (Rege 2003). For this purpose, it could be agreed in the negotiations that the GATS schedule of each country be divided into two parts: Part A listing all commitments given in pursuance of Article XVI of GATS for improved market access and for extension of national treatment under Article XVIII of GATS, and Part B listing autonomous measures for which the developing country concerned does not accept any binding obligation. The only obligation on a country listing such measures would be to notify the WTO if in exceptional situations modifications are made that adversely affect the trade of other countries. Such notifications would not give any rights to countries that consider their interests are adversely affected. If any consultation obligations are provided they could be similar to those assumed by developed countries, in case of modifications in their generalised system of preferences.

Adoption of such an approach would overcome the concerns that many of the developing countries appear to have about making legally binding commitments, leading to their improved participation in the ongoing multilateral negotiations on trade in services. The transparency resulting from the listing of autonomous measures in Part B of the Schedule would also enable their trading partners to take advantage of the liberalisation measures in further developing trade. However, there should be no pressures on these countries to bind the autonomous liberalisation measures listed in Part B except in the context of any future multilateral trade negotiations in the area of trade in services launched by 'explicit consensus'.

Even though there was broad support for these proposals, particularly on the part of some of the least-developed countries, they were not pursued in the negotiations as it was subsequently agreed that these countries need not make any contributions in the Doha Round.

GATS Provisions on Emergency Safeguard Measures

Lack of progress

Another area in which assistance was provided covered negotiations for inclusion of provisions in the text of GATS that would permit countries to take 'emergency safeguard measures' to restrict imports of services that were causing injury to the domestic industry. When GATS was being adopted no agreements could be reached on the inclusion of such a provision in the text so it was decided that the negotiations for this purpose should commence immediately after it became operational and be completed within a period of two years. But even though a number of years have elapsed since these negotiations commenced in a working group that was constituted for this purpose, very little progress has been made. Apart from the differences amongst delegations on the complex technical issues involved in the application of safeguard measure in trade in services, the main reasons for the lack of progress are political.

Most of the developed countries, and the developing countries that have been able to advance substantial trade in services, are not enthusiastic about securing in the immediate future a legally enforceable mechanism at international level for the application of safeguard measures in trade in services. They are apprehensive that if such clause is adopted it may be used arbitrarily by countries thereby resulting in increased conflicts and disputes.

Only a few developing countries that are planning on developing trade in the service sector are making these demands. These countries are also under considerable pressure from their developed country partners to give commitments to further liberalise further their trade because they provide potential markets for service products. In this group would fall the member countries of the Association of Southeast Asian Nations (ASEAN) Group and some of the countries of Latin America. It is important to note in this context that the draft submitted by the ASEAN Group for an Agreement on Emergency Safeguard Measures has provided the main basis for discussions in the WTO Working Group. The low income and least-developed countries and small economies of Africa, Asia and the Caribbean have not taken an active interest in these discussions. However, in their statements at the political level they have emphasised the importance they attach to the adoption of rules on the emergency safeguard measures and maintained that their ability to table offers for further liberalisation in the services sector is dependent on the adoption of such rules.

The main thrust of the negotiations in this area is to examine how far the principles and rules on safeguard measures and other trade remedy measures such as anti-dumping and countervailing measures that are applicable to trade in goods, could be adapted for application of emergency safeguard measures in trade in services. The papers prepared by the Adviser suggested that in developing rules for the application of safeguard measures, it may be possible to use the same basic principles for applying trade remedy measures as used in trade in goods – namely, increase in imports that cause injury to the domestic industry and the relationship between the increase in imports and serious injury. This approach was reflected in proposals tabled by the ASEAN countries suggesting that emergency safeguard measures in trade in services should be permitted where it has been determined in the investigations carried out by an independent governmental body that as a result of the commitments undertaken in Part III of GATS (relating to market access [Art. XVI], national treatment [Art. XVII], and additional commitment [Article XVIII]):

- An emergency situation has been created due to an increase in supply of the service concerned either in absolute terms or relative to domestic supply.
- Such an increase in supply or consumption thereof is causing or threatening to cause injury to the domestic industry.

Following are summaries of some related issues raised in the background papers prepared by the Adviser.

How should information on increased supplies be collected?

Collection of statistical data to establish that supplies have increased, particularly those from foreign firms, is far more difficult in trade in services than in trade in goods. In the case of the latter, required data can be gathered from the statistics on imports collected by customs or those on foreign exchange payments collected by the Central Bank. In the case of trade in services, a national level mechanism for the collection of the disaggregated statistical data needed to establish that increased supplies are injuring a particular sector or sub-sector of the service industry, has not been as yet well developed. In most cases the data needed has to be collected from various sources, which could vary from sector to sector. For instance, in financial services the main source of information on the developments of supplies could be data on value added tax or other taxes on financial transactions while certain other relevant information may be available with the Central Bank; in the case of telecommunications the needed statistical information may have to be collected from the regulatory authorities.

Given the difficulties that are likely to be encountered by the affected service industry in collecting the statistical and other information needed to substantiate claims that increased supplies by foreign firms are causing it injury, it would be necessary for the proposed Agreement to recognise governments may have to play a role in either collecting information themselves or in assisting the affected industries to so do. Though the Agreement on Safeguards does not contain any specific provisions covering this matter, some developed countries, notably the EU, have established a mechanism for surveillance of products (and their prices) for which imports are increasing, as a preparatory step towards imposing safeguard action. Such surveillance is triggered by the EU Commission either on its own initiative or at the request of member states.

In terms of the likely difficulties in collecting statistical and other information on the supply of services in order to establish a sudden increase in supply, the proposed Agreement on Emergency Safeguard Measures should contain provisions authorising governments, if they so wish, to establish an inter-ministerial committee to monitor trends in the supply of services and their prices and identify the sources from which the required information may be collected. The committee would consist of representatives of ministries with responsibilities for subject areas covered by GATS (e.g. ministries of finance, education, health, water and electricity, telecommunications, public works, aviation and railway).

Information on trends in the supply of services and their prices may be collected separately for services originating in other countries and for services supplied by foreign established service enterprises (FESEs) in cases where the problems of the domestic service industry may be due to an increase in services supplied by such enterprises.

How should safeguard measures be applied in the service sector?

Broadly speaking, it may be possible for a country to apply safeguard measures to services supplied by Modes 1 (cross-border trade), 2 (consumers/users move to country where the service is available) and 4 (movement of natural persons to another country to provide services needed). These measures may include imposing taxes or applying quantitative restrictions.

The decision on whether to apply such measures to a particular mode of supply shall be made by the country after establishing a causal link between increase in supplies and injury to the industry. Such measures may also be applied to services supplied by modes that are not responsible for causing injury if it is considered that the application of such measures is necessary to prevent or remedy injury, and in assisting industry to adjust to competition. Illustrative examples of how such measures could be applied under Modes 1, 2 and 4, the difficulties that may be encountered in applying them, and the possible special treatment that could be extended to developing countries are outlined in Box 13.

Box 13: Examples of emergency safeguard measures that can be applied under Modes 1, 2 and 4

Cross border trade (Mode 1)

Measures applied could take the form of taxes and/or quantitative restrictions. However, a number of analysts are sceptical about the possibility of applying either measure to cross border trade in services, particularly where the transactions are conducted via telephone, fax or electronic means. In most cases, it might not be possible to achieve effective application that is equitable to services supplied from different countries may. Another view is that new technologies would open possibilities for applying such limits on cross border trade.

Consumption abroad (Mode 2)

In certain situations, the local industry providing services (e.g. tourism, health, education) may be adversely affected because of the increase in the number of nationals moving to other countries to obtain services. It may be possible for the government to temporarily restrict trade under this mode by imposing a special tax on nationals visiting other countries as tourists, or by introducing a quota on the number of exit visas that may be granted to persons going abroad for tourism or educational purposes. To discourage residents from going abroad for medical treatment, the government could prohibit insurance companies from marketing particular new policies (e.g. reimbursement of expenditure on treatment received in hospitals in other countries) during the period for which safeguard measures are applicable.

Movement of natural persons (Mode 4)

In the case of natural persons moving to another country to provide needed services, the countries allowing such movement could apply emergency safeguard measures. These could include establishing quotas for visas granted to professionals and other workers, and levying high fees for obtaining temporary work visas.

Rules governing use of quantitative restrictions to suppliers under Modes 1, 2 and 4

The rules on quantitative restrictions in trade in services, as in trade in goods, should provide that the quotas allotted shall not restrict the supply of services (e.g. in relation to quantities supplied, number of transactions or visas granted) to levels that are less than those reached in the previous representative three-year period.

The quotas allotted (both overall and among supplying countries) should provide for annual growth rates, with higher rates on those allotted to developing countries. The use of growth rates would ensure that the safeguard measures applied are gradually loosened during the period of their application. The relevant provisions in the now terminated Agreement on Textiles and Clothing could provide a model for adopting rules on how annual growth factors could be developed and carried forward to subsequent years, if certain portions of the quotas allocated are not utilised during the year.

It would be necessary to examine whether the rules relating to 'quota modulations', which are similar to those in the Agreement on Safeguards, should be included in the proposed new rules on emergency safeguard measures. Under these rules quotas for countries where exports have increased 'in disproportionate percentage in relation to total increase in imports', are permitted to be fixed at levels below those reached in the previous representative period of three years. If any such provisions are included in the new EMS rules, it may be desirable to provide that those relating to quota modulations would not be applied to services supplied by developing countries to developed countries and to other developing countries.

The matter becomes more complex in relation to the application of the safeguard measures to Mode 3, under which foreign suppliers provide services by establishing a commercial presence in the country. At issue is whether a country should be entitled to take emergency safeguard measures to restrict the local activities of foreign enterprises, if these activities are causing injury to the domestic industry consisting of national enterprises. The opinion on this issue is widely divided.

The GATS defines national enterprises as those in which nationals of the country where they are established own more than 50 per cent of the equity or have the power to name the majority of directors or otherwise to legally direct operations. Enterprises that do not meet these criteria are to be treated as foreign established service enterprises (FESEs). But even those delegations in favour of applying safeguard measures to FESEs concede that a cautious approach may be necessary in order to avoid their disinvesting or shifting the service units to another country. To ensure such situations do not arise they have proposed that the rules governing application of the emergency safeguard measures should recognise that in applying such measures countries must respect the acquired rights of the FESEs. Such rights include those conferred on the FESEs as a result of the measures taken by the country for liberalisation of external and internal trade and for the attainment of other policy objectives. The safeguard measures should not require the FESEs to modify or withdraw actions they may have taken in pursuance of such acquired rights but only aim at restraining or prohibiting further exercise of these rights.

In practice this would mean that countries could not require foreign banks or insurance companies to close existing branches but only prohibit them from opening new branches during the period of the application of safeguard measures. It may be also possible to provide that foreign companies could not increase their sales beyond the level reached in the previous representative period or introduce in the country new types of services that they are marketing in other countries. However, it would not be open to countries to prohibit FESEs from marketing services they have already introduced in the market. In many ways the concept of acquired rights is analogous to the principle in the Agreement on Safeguards that where safeguard measures are applied through quantitative restrictions they should not lead to imports being restricted to levels below those of the previous representative period.

Those who are opposed to the proposal argue that in practice it would be difficult to divide domestic services industry into the two categories of FESEs and national suppliers. Moreover, the division might produce inequitable results, for example, an enterprise where 51 per cent of the equity is owned by persons in the country would be treated as a national industry but it would be treated as an FESE if the national share in equity is 49 per cent, just 2 per cent less. They therefore argue that safeguard measures should only be applicable to services originating from outside countries, and that it should not be open to a country to apply safeguard measures

to FESEs on the grounds that their increased activities are causing injury to the national service suppliers.

State of Play in the Negotiations

Negotiations in this area have centred on offers tabled by some countries in response to requests made on them by other countries for liberalisation of trade in sectors of export interest to them. All developed countries and a significant number of developing countries have made liberalisation offers covering a wide range of service sectors. The developing countries include those that have made significant progress in developing trade in services and a number of countries from Latin America and Asia that consider they have the potential for development of trade in services. By and large, countries from Sub-Saharan Africa have remained on the sidelines.

In the initial period, as noted above, the least developed and other low income countries, had shown some interest in pursuing proposals on how they could be given credit for the liberalisation measures previously taken by them on an autonomous basis. However, after the Hong Kong Ministerial meeting took a decision to exempt least-developed countries from undertaking in this round 'new commitments for liberalisations' in trade in services, they considered that in the changed situation it may not be necessary for them to pursue their proposals to obtain credit for autonomous liberalisation measures they have taken.

The Declaration adopted at the Hong Kong Ministerial meeting also introduced a new element into the negotiations – provision for countries to make requests on a plurilateral or group basis. As a result of this a number of plurilateral requests, targeted at a number of countries, have been made and discussed subsequently in plurilateral meetings.

Although this plurilateral approach has been useful in identifying sectors and areas that are of interest to a large number of countries, the overall quality of the offers made is far from promising. Anecdotal evidence would suggest that the developed countries are offering only marginal improvement on the commitments they already made. With respect to services in which developing countries have a significant trade interest, particularly those provided by Mode 4 (movement of natural persons), most of these countries consider that qualitatively the offers made by developed countries have been way below their expectations. Regarding the extent to which further liberalisation would be achieved in future negotiations, it is important to note that the service negotiations are part of the wider package so the final offers made would be greatly influenced by what happens in the negotiations in other areas of the Doha Round, particularly those on agricultural and non-agricultural products.

In the rule-making areas, it remains uncertain whether any agreements on the incorporation of the emergency safeguard provisions in GATS would be reached in

the near future given the wide differences in the negotiating approaches. In the area of domestic regulations, on which negotiations are seeking clarification of the relevant GATS provisions, it would appear that the financial crises, at the national and international levels, would greatly influence future negotiations on the draft text that has emerged.

References

Malboo, A, R Stern and G Zamnini. 2007. *A Handbook of International Trade in Services*. Oxford UK and New York USA: Oxford University Press.

Rege, V. 2003. Treatment of Autonomous Liberalisation in the Negotiations on Trade in Services: Some tentative suggestions on the approach that could be adopted. 4 July.

— 2007. Adoption of Rules for the Application of Emergency Safeguard Measures (ESM) in Trade in Services and Abridged Version.

— 2007. Overview of the Main Issues Raised in the Paper on the Adoption of Safeguard Measures.