

NON-FINANCIAL SERVICES IN WTO DOHA ROUND AND FTAs

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A.INTRODUCTION

This paper is on the services negotiations at the World Trade Organization (WTO), focusing on non-financial services. It was written in response to a request by Ecuador to map out the issues in the negotiations and to point to some policy implications.

There are two main aspects to the WTO services negotiations – market access and the establishment of new rules (domestic regulations, government procurement, subsidies and emergency safeguards). The paper covers both aspects, although the main focus is on market access. Since there are also important trade and investment negotiations that cover services outside the WTO, the paper also deals briefly with bilateral free trade agreements, and bilateral investment treaties.

The paper begins with a brief discussion on services policies and development objectives. It then provides a background to services in the WTO. Section C traces the evolution of the market access Doha negotiations in the WTO, while Section D gives an account of the domestic regulations issues and other issues linked to rules. Section E provides a summary of the implications of the services provisions in free trade agreements (FTAs), taking mainly the Economic Partnership Agreements (EPAs) with the European Union (EU) as the model. Section F discusses some implications of bilateral investment treaties (BITs). Finally, Section G provides some conclusions and recommendations; it includes a brief discussion of the implications of the Constitution and the National Plan for Good Living (NPGL) for services policy in Ecuador.

B.SERVICES AND DEVELOPMENT: CONCEPTUAL BACKGROUND

Services constitute an important sector in the economy of developing countries. Often they constitute half or more than half of the gross national product (GNP) of developing countries. The sectors under services are comprehensive. A list of services under the WTO include the following¹:

- healthcare,
- education,
- water,
- electricity,
- gas,
- telecommunications,
- postal and courier,
- environmental services (including sewage, rubbish collection and sanitation),
- financial (including banking, insurance and investment banking/trading stocks etc),
- transport (whether by road, rail, air, sea, river, pipeline or in space),
- funeral services,
- tourism,
- entertainment services, radio, film and television, libraries and museums, sports,

¹ This is based on the classification used at the World Trade Organization (WTO) which is provided in WTO document MTN.GNS/W/120.

- construction,
- distribution (including petrol stations, supermarkets, shops and franchises),
- advertising,
- marketing,
- computer services,
- real estate,
- professional services (such as lawyers, doctors, architects, accountants, dentists, veterinarians, nurses, midwives, physiotherapists and engineers)
- services incidental to: mining, manufacturing, agriculture and fishing

The importance of an appropriate and supportive services policy for development

In most developing countries, services are a significant part of the economy and a large employer. Services also support other sectors such as manufacturing and agriculture. Therefore it is important to have an optimal services policy that suits the developing country's level of development. This services policy should be based on the country's development goals and plans and it should support and enable these development objectives, rather than being an end in itself.

The decision as to whether to liberalise services and investment should therefore only be made once this services policy is in place and the decision should be made in accordance with this services policy and development plan. Given the importance of the service sector, it is important that any decision as to whether to liberalise services (including in an EPA or at the WTO) is made on the basis of full information. Unfortunately, services are difficult to measure, even for developed countries. Therefore many developing countries may not have the services data required to make a fully-informed decision.

Does the degree of liberalization matter for national development?

One of the key policy issues in services is the extent to which a developing country should develop and expand its domestic services (public sector and private enterprises) and the extent to which it should open up to foreign participation and at what pace and in which ways the liberalization should be carried out. Developed countries advocate for developing countries the fastest and broadest liberalization in services. Institutions such as the World Bank also encourage or pressurize developing countries to liberalise services on the ground that they can become more efficient. However it is wiser for developing countries to take a cautious approach towards services liberalization.

There are several reasons why it is important for a developing country to maintain or expand beyond a certain degree of local participation (including ownership and control) over services. During the colonial period, the foreign firms were able to control a large and overwhelming share of the services sectors in many countries, including the financial and distribution sectors. Following independence, governments took measures to increase the share of citizens in services. There developed significant local ownership and control in banking, insurance, construction, wholesale and retail trade, transportation, professional services, etc. Governments tended to have monopolies in railways, telecommunications, water, postal services, energy and power resources. When these were privatized or partly privatized, or when private companies were allowed to compete in these areas, local companies were among those that took up local shares. The increased participation of local firms and persons usually developed with the assistance of the government, including preferential treatment to

locals and restraint over the growth of foreign companies.

Presently, services sector is in many developing countries the largest sector, and it is the area where local firms have larger participation and are better able to compete, as compared with the manufacturing sector. While it is important to upgrade technology and techniques, this can often be done by the local firms including through importing modern technology. It does not necessarily require that large foreign firms take over, in order for a country to have modern and efficient services. Some developing countries also encourage or require foreign firms to set up joint ventures with local service firms, to enable the sharing of benefits (such as profits and technology) with the national economy.

While there are benefits to foreign investment, there are also costs, and thus a balance is required. There are good reasons for this balance and for national-interest considerations.

First, there are good macro-economic reasons. This sector usually produces services that are “non-tradables”. Thus, there is significant foreign exchange loss associated with foreign service providers, as there is an outflow of profits, while most of the output is for local use. Many developing countries have a deficit in the services component of their balance of payments, indicating a net deficit in the flow of foreign exchange on account of services. It is wise for the balance not to have a large deficit, and to prevent it from becoming larger. Furthermore, FTAs with developed countries such as the EU often require countries to allow these profits to leave the country by prohibiting capital controls (without sufficient safeguards even for situations of financial crisis).²

For example, Ecuador already imports more than twice as many services as it exports and it has a large services deficit of US\$1.5 billion (as at 2009). Further services liberalisation at the WTO (or via FTAs) could be expected to worsen this deficit, since Ecuador cannot be expected to improve its services export capacity in the short term).³

Secondly, when the government spends money on services, the multiplier effect on the national economy tends to be higher if the expenditure is on domestic services, as the money tends to stay inside the domestic economy. On the other hand, government spending on foreign services usually has higher “leakage” to outside the economy due to outflow of foreign profits and foreign payments (for example, payments to headquarters for overheads, management and license fees) and imported inputs. This is especially an important point during recessionary conditions when the government may want to increase its expenditure to stimulate the economy.

Thirdly, for economically strategic reasons, it is also important that there be a certain minimum degree of local control over economically important services sectors, particularly financial services, which have a crucial role in the supply of funds to all other sectors, and which have an important bearing on channeling the volume and direction of financial resources throughout the economy and its various sectors and regions.

Fourthly, there should be a significant degree of national control (and also public sector control) over important utilities and infrastructure that are strategic to security including water, energy services, electricity and power supply, telecommunications, transportation etc.

Fifthly, services that are essential to meet basic needs, such as water, health, transport, education, and

² See for example www.twinside.org.sg/title2/par/CARIFORUM.Feb09.doc.

³ http://www.wto.org/english/res_e/booksp_e/anrep_e/trade_profiles10_e.pdf

distribution of food supply, should also be carefully guarded, with not only a significant degree of national control but also participation or ownership by the public sector.

Sixthly, there are services that are important to the cultural life of the country, and to dissemination of information. These include print media, audio-visual services (radio, television, video channels, cinemas, etc) and the new internet services. There should be a balance between national and public policy space on one hand and the right to public expression. The extent of local and foreign participation in these sectors is an important issue.

Need for a comprehensive national services plan or strategy

Developing countries need to have a comprehensive national services master plan, in order that there be a coherent policy framework. Based on such a plan and framework, the country can formulate positions to take in its national interests, whether in the WTO or in a possible FTA.

Among the issues to resolve in such a services plan is the degree of local and of foreign participation in the various sub-sectors, and the development of each sub-sector. Strategic and public consideration has to be given to key sectors such as finance, telecommunications, water, health services.

Many countries do not have such a comprehensive plan. At best they have a plan for some subsectors, such as financial services or health services.

Public concerns that provision of and access to social services will be adversely affected

There have been growing concerns from citizen groups and non-governmental organisations (NGOs) that recent international rules on services that increase the pressure for liberalization have affected the policy space for governments to provide social services, and that the public will have less access. In particular, there are concerns that the services Agreement in the WTO and free trade agreements that contain a services component are creating conditions which may adversely affect the public's access to social services such as health care, education, water supply and social welfare that traditionally have been provided by the public sector.

Several public organisations and individual analysts have carried out studies on the impact or potential impact of General Agreement on Trade in Services (GATS) rules and negotiations. According to Sinclair (2000), the GATS agenda has been directly shaped by powerful international commercial interests, without the benefit of broader public debate. He concludes that the GATS exposes government action affecting services to WTO oversight; those government actions that alter conditions of competition in favour of domestic service providers are exposed to challenge; GATS prohibits certain types of public policies and is hostile to public services (treating them as missed commercial opportunities, unfair competition or barriers to entry for foreign services or suppliers) (Sinclair 2000: p12).

One major concern is that under the GATS, governments would come under pressure to change the conditions under which public services are provided. There could be pressures for governments to privatise such services, or allow competition from the private sector and from foreign firms.

Many "public services" have traditionally been provided by the government, either at federal, state or municipal levels, or by agencies linked to government. There have been assurances by the WTO

Secretariat that under GATS countries are not "compelled" to liberalize and that they are bound by GATS disciplines only in sectors and sub-sectors they have agreed to liberalize and that public services need not be opened to foreign competition. (WTO 2001).

There is some ambiguity as to what extent government services are exempted from the coverage of GATS. According to Article I of GATS, the definition of "services" covered in the Agreement gives an exception to "services supplied in the exercise of governmental authority", and that term in turn means "any service which is supplied neither on a commercial basis nor in competition with one or more service suppliers." Thus, government services provided on a commercial basis are subject to GATS provisions, as are government services supplied in competition with any other suppliers. In many countries, there are many aspects of education, health care, housing and other social services in which the government as well as the private sector provides services, and it could be argued that in these aspects the government service is in competition with other suppliers, and thus fall under the GATS purview.

On the issue of whether governments are pressurised to privatise or open up public services activities to foreigners, the situation is also more complex in the case of developing countries. What has to be considered also is the role of the International Monetary Fund (IMF) and the World Bank and how they have been operating through structural adjustment conditions to get governments to privatise several formerly government-supplied services and infrastructural projects and schemes and also to pry open developing-country markets for foreign service suppliers (including participation in the privatisation schemes). Many developing countries have been required to privatize water supply and even sanitation and other services and to charge so-called "user fees" to bring in revenue, as well as open the field up for private entities to provide the service, whether in competition with or as a complement to the public service. (Raghavan 2001a, "GATS - Fact or Fiction at best a partial truth", SUNS 21 March 2001).

Once the public service is privatised, it ceases to be an exempted government service. Even in the case where privatisation is partial, or where the government still maintains its service but allows private entities to participate in supplying that service, in terms of Article I.3(c) of GATS, such a service would no longer qualify as a service "supplied in the exercise of governmental authority" (which, under Art. I.3(b), is excluded from the purview of GATS) and thus would be brought under GATS.

Thus, the roles of the IMF and World Bank on one hand, and the WTO on the other hand, are often complementary in generating the process by which public services are either commercialised, privatised, opened up for competition from private entities, or opened up to foreign service suppliers. Whilst the initial prompting for privatisation, commercialisation, competition and liberalisation could begin with IMF-World Bank conditionality, pressures could then build for the countries involved in these processes to then bind these decisions or policies in GATS.

Also, while in theory countries are not compelled to liberalize under GATS and developing countries are free to liberalize fewer sectors and apply limitations, pressure is in fact applied by the major trading entities, especially the US and the EU and their companies.

C. DEVELOPMENTS IN SERVICES NEGOTIATIONS IN DOHA ROUND: MARKET ACCESS

General

Before the Uruguay Round was launched, many developing countries had tried to resist the inclusion of new areas like trade in services and intellectual property rights as they believed agreements in these areas would be against their interests as they would not have the capacity to gain from them, whilst they and their local companies would stand to lose. Despite this reluctance, services became a part of the Round on the understanding that developing countries would gain in other areas, especially in enjoying more market access for their goods in agriculture, textiles and clothing and other areas in which they have comparative advantage and where their exports faced tariff and non-tariff barriers. The General Agreement on Trade in Services (GATS) was established together with other agreements when the WTO was set up. However, given the actual outcome especially in agriculture, the developing countries did not get their expected benefits.

In the meanwhile, there are many problems and potential problems associated with GATS, including the imbalances in the Agreement, the unequal outcome of benefits and costs, the continuous pressures (through successive rounds of negotiations) for developing countries to liberalise and the narrowing of options for governments to take measures in services, or in operating public services.

Lack of data, making an assessment of services liberalisation effects difficult

The Uruguay Round negotiations on services sector were conducted without the aid of data that could enable participants to understand the full implications and make some judgments of the costs and benefits of what was being negotiated. The area of services has lacked even the kind of rough data comparable to that on directions of trade in goods which is used to make a rough assessment of the value of concessions given and exchanged in negotiations in the goods sector. For most developing countries, therefore, when it comes to the services negotiations, it has been like a case of 'a blindfolded person in a dark room chasing a black cat'. (Raghavan 2000).

The issue of lack of data came up several times in the Uruguay Round negotiations, but up to now it has not been resolved. Yet the major countries have continued the push for further negotiations and binding commitments without countries being able to make a proper assessment of the costs and benefits of entering into further commitments (and obligations). Thus, there is a danger of developing countries being asked to make further commitments and agree to market openings without being sufficiently able to assess the implications.

The lack of data is also hindering the ability for a meaningful assessment to be carried out on the effects of the services Agreement on developing countries generally and on individual countries. The developing countries, however, are still not clear on how the assessment could be done and on what basis. Unfortunately, developing countries do not, individually or collectively, have the capacity even to undertake national-level assessments. Thus the issue of lack of data and of the need for proper assessments at both the international and national levels need to be resolved. Until these are resolved, there is little basis for demanding further liberalisation commitments from developing countries as there is no evidence that the previous round of liberalisation has been of benefit, nor that further liberalisation will be of benefit to them, whereas there is clear evidence of the imbalances.

Difficulty in identifying sectors that need to be protected

Since an area such as 'health' alone covers multiple modes and multiple sectors such as business and professional services (eg doctors, nurses, midwives, physiotherapists, dentists), communications, insurance (health or social security), construction and tourism,⁴ great care needs to be taken when scheduling any services liberalisation commitments as even the USA has made scheduling mistakes⁵. For example, Mode 2 commitments often specify that public medical insurance programs will not reimburse medical costs incurred abroad.⁶

Imbalances in services outcome, with no or little reciprocal benefits to South

In terms of the services framework, the liberalization of trade in services has benefited the industrialized countries and their suppliers but has yielded hardly any gains for the developing countries.

In the Uruguay Round, the GATS framework covered general obligations for all services sectors and specific obligations for sectors in which liberalisation commitments were made. After GATS came into force, there were intense and speedy additional negotiations on the financial services and telecommunications sectors, and agreements on further liberalization in these sectors were reached.

The GATS model is based on the "positive-list" approach, i.e., countries list their liberalization commitments in a particular sector or sub-sector (subject to limitations on most-favoured-nation (MFN), national treatment, etc) in their country schedules. Except for these, they retain autonomy (subject to GATS' general obligations).

There were, however, attempts in the Uruguay Round, in the beginning and again towards the end, to have a "negative-list" approach, i.e., everything would be liberalized in terms of market access, except where specific limitations or exceptions were listed in a country schedule. This approach would be more detrimental to developing countries. The proposal was not accepted. However some of the developed countries are now trying again to have this approach used in bilateral and regional free trade agreements.

There is a vast differential between the supply capacity of the developed countries on the one hand and that of developing countries on the other. Most developing countries hardly have any supply capacity in the services sector for export to the developed countries. Thus the opportunities have really opened up mainly for the developed countries as the developing countries undertake the liberalization of services imports. There has been no effective commensurate benefit to the developing countries in the way of liberalization commitments by the developed countries in the areas of interest to developing countries (for example by opening Mode 4).

⁴ 'Strategic considerations for developing countries: the case of GATS and health services', Mashayekhi M, Julsaint M, Tuerk E, in 'International trade in health services and the GATS', Editors Blouin C, Drager N, Smith R, 2006, World Bank.

⁵ http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm

⁶ 'Trade in health services under the four modes of supply: review of current trends and policy issues', C Blouin, J Gobrecht, J Lethbridge, D Singh, R Smith, D Warner in 'International trade in health services and the GATS', Editors Blouin C, Drager N, Smith R, 2006, World Bank.

The Organisation for Economic Co-operation and Development (OECD) countries dominate global trade and investment in services, according to the United Nations High Commissioner for Human Rights.⁷ The influence of OECD companies can be seen in the EU⁸ and USA⁹ government positions in trade in services negotiations.¹⁰

Ecuador already imports more than twice as many services as it exports, prior to doing any further services liberalisation at the WTO (or via FTAs) which could be expected to worsen Ecuador's 2009 services deficit of US\$1.5 billion (since Ecuador cannot be expected to improve its services export capacity in the short term).¹¹

Moreover, it is now generally accepted that the opening of the capital account in the developing countries and premature liberalization of their financial sectors has been a major factor behind the financial crises that hit them from time to time, and that they should be wary of financial services liberalization.

Trade economists and institutions like the WTO and World Bank argue that liberalization of services helps developing countries and their economies with respect to the necessary availability of inputs. Even if this were so, developing countries can liberalize autonomously, without making binding commitments at the WTO or in an FTA. The disadvantage of making a commitment to open up service sectors under GATS is that if a country then finds that it has made a mistake and would like to take back its commitment, it would have to "compensate" for this, for example by making a new commitment or concession in another area. If the country does decide to unilaterally liberalise in a particular area but does not make a commitment in the GATS or an FTA, then if the liberalization turns out to have negative effects, it can reverse course without having to provide any compensation.

The GATS covers 4 modes of services: (1) supply of services from one country to another (Mode 1); (2) supply of services in a country to consumers of another country (Mode 2); (3) supply of services through commercial presence of the supplier of one country in another country; (4) supply of services through movement of labour.

Developed countries tend to be most interested in Mode 3, because of the interest of their companies to establish themselves in developing countries. Developing countries tend to be most interested in Mode 4, through which their professionals and workers could gain access to the labour markets in developed countries.

However the outcome of GATS has been tilted towards the interests of developed countries, as the focus of negotiations has been mainly on Mode 3, or on how developing countries can and should open

⁷ E/CN.4/Sub.2/2002/9

⁸ Jean Ziegler, UN Special Rapporteur on the Right to Food, interview March 2004, http://www.3dthree.org/pdf_3D/Guide-075Ch5.pdf

⁹ The Office of the US Trade Representative (USTR) has 700 official advisors (mostly from the private sector) because 'U.S. Government policy makers rely on our trade advisors to identify barriers and to provide advice on key objectives and bargaining positions for multilateral, bilateral, and regional trade negotiations, as well as other trade-related policy matters', <http://www.ustr.gov/about-us/advisory-committees/industry-trade-advisory-committees-itac>. This system 'was created to ensure that U.S. trade policy and trade negotiating objectives adequately reflect U.S. public and private sector interests', <http://www.ustr.gov/about-us/intergovernmental-affairs/advisory-committees>. The advisory committees include US multinational services companies such as Citigroup, Deloitte, FedEx, insurers and Wal-Mart, <http://www.ita.doc.gov/itac/committees/index.asp>.

¹⁰ See for example http://www.actionaid.org.uk/doc_lib/174_6_under_the_influence_final.pdf.

¹¹ http://www.wto.org/english/res_e/booksp_e/anrep_e/trade_profiles10_e.pdf

up their economies to investments from foreign banks, insurance companies, distribution companies, and companies in telecommunications, energy, utilities, etc. The developed countries meanwhile have been reluctant to open up their labour markets. The result has been that the developing countries have given concessions without effectively getting any in return.

Post UR services agreements have worsened the imbalance

The imbalances in the services Agreement are mainly twofold. Firstly, the Agreement favours the major services exporting countries that can take advantage of the liberalisation, whilst the developing countries do not have the capacity to benefit from the market access. Secondly, the Agreement specifically includes obligations towards liberalising the movement of capital but the same special treatment has not been given to the movement of labour.

Since the Uruguay Round, instead of measures to reduce these imbalances, the follow-up negotiations have further aggravated the imbalance. New agreements were finalised on a priority basis in sectors such as financial services and telecommunications services, which are primarily of importance to the developed countries. The developing countries have been pressured to make high levels of commitments in these sectors. These two sectoral agreements have tilted the balance further in favour of the developed countries, as they are the major providers of services in these sectors, and developing countries have hardly any supply or export capacity in these sectors. (Das 1998).

Supply constraints and barriers to services exports of developing countries

In the implementation of GATS, developing countries face structural problems hindering their ability to export services. As a United Nations Conference on Trade and Development (UNCTAD) study put it: "The efforts of developing countries to develop services as a major export item and contributor to development and to penetrate the world market for services have faced considerable barriers. These include barriers to market access and national treatment, as well as difficulties in market entry caused by anti-competitive practices, subsidies and so forth." (UNCTAD 1999: p9).

The obstacles facing developing countries in developing their domestic services include:

- ***Supply constraints*** that prevent the building of a competitive service sector in developing countries.
- ***Barriers to market access*** discouraging exports from developing countries from entering the developed countries including lack of commitments on movement of natural persons, prohibition of foreign access to service markets reserved for domestic suppliers; price-based measures; subsidies granted in developed countries that have an adverse impact on developing-country exports; technical standards and licensing with restrictive effects; discriminatory access to information channels and distribution networks; and practices of mega firms. (UNCTAD 1999a: p7).
- ***Anti-competitive structures and practices*** that also affect developing-country exports, since many markets for services are dominated by a few large firms from developed countries.

Limits to the benefits of the GATS architecture and challenges arising from attempts to change it

The architecture of GATS is more friendly to developing countries (compared to other agreements such as TRIPS) as the specific commitments apply only in sectors offered by the country (known as the "positive list" approach) and to the chosen extent of liberalisation as entered in each country's schedules. This theoretically allows each country to liberalise at its own chosen pace and at levels in the various sectors which they believe to be appropriate. There is the principle of "progressive liberalisation" rather than a minimum standard of liberalisation, and Article XIX inscribes "appropriate flexibility" for individual developing country Members for opening fewer sectors and liberalising fewer types of transactions." Despite these features of GATS, developing countries in reality face many problems and challenges.

Even if a commitment to liberalise is made on the basis of a "voluntary offer", once a developing country makes the commitment, it cannot be withdrawn or modified, without giving adequate compensation. Thus, if a country were to later find it has made a mistake in making some of its commitments, or it later decides it would like to develop the capacity of local firms in particular sectors in which it has made commitments, it would face serious difficulties in attempting to modify the relevant commitments. In other words the commitments in GATS are constraints to policy options in the future. The principle of "progressive liberalisation" also implies that a Member is obliged to increase its liberalisation commitments. Thus, countries are under pressure through new rounds of negotiations to "roll forward" their liberalisation commitments which are binding, but they are unable to "roll back" these commitments, except through a willingness to offer adequate compensation.

Although in principle developing countries should be able to liberalise their services according to their own chosen pace and sectors, in practice they generally and individually often face pressures to open up. For example, during the negotiations for a financial services agreement that ended in December 1997, major developed countries applied pressure on developing countries to offer higher levels of commitments. (Raghavan 1997: p2-4).

Case Study of Local Content in Audio Visual Services

If a developing country uses or plans to use local content regulations to support its film and television etc industries, these could be prohibited by the national treatment requirement, market access and perhaps other commitments if it liberalises the relevant services and/or investment sectors at the WTO or in a FTA or EPA. This can be seen for example in the legal opinion commissioned by the New Zealand government on whether they could introduce local content requirements once they had made equivalent commitments under the WTO's General Agreement on Trade in Services (GATS). The legal opinion 'concluded that compulsory local content quotas would clearly breach New Zealand's GATS commitments on market access by imposing a numerical restriction on the market and national treatment (non-discrimination) by giving preference to the domestic industry.'¹²

The legal opinion for the New Zealand government also found that four other options (support for programs about New Zealand, subsidies only to New Zealand producers, support for production of New Zealand produced material (without requiring it to be shown in New Zealand) and voluntary quotas) would all violate GATS commitments. These commitments can be in audiovisual, advertising, telecommunications (since radio and TV can now be obtained via mobile phone) etc sectors. In some

¹² <http://www.ppl.nl/bibliographies/wto/files/2294.pdf>

countries, foreign ownership of media is also sensitive due to media power, however limits on foreign ownership can also be prohibited by services liberalisation commitments at the WTO or in an FTA. In FTA negotiations with the EU, since it insists that Article V of GATS requires liberalisation of 80% of service sectors by the developing country, this makes it difficult to exclude all the sectors necessary to preserve the policy space to promote local culture, while also excluding other sensitive service sectors from liberalization.

GATS 2000 negotiations

The Uruguay Round mandated that there be a new round of services negotiations, which thus became known as part of the “in-built agenda” of that Round. After the WTO was established, a new round of services negotiations, started in 2000. The developed countries lost no time in pushing for ambitious levels of liberalisation, especially by developing countries. For example, the US proposal of 13 July 2000 for the "Framework for Negotiations," states that: "Our challenge is to accomplish significant removal of these restrictions (on trade in services) across all services sectors, addressing measures currently subject to GATS disciplines and potentially measures not currently subject to GATS disciplines, and covering all ways of delivering services." (United States 2000). The US also advocated "meaningful liberalisation", which appears to be in contrast to the concept "progressive liberalisation."

2001 Guidelines for Services Negotiations

However, the developing countries were opposed to so rapidly agreeing to further commitments to liberalise under the GATS. Subsequently a text on Guidelines and Procedures for the Negotiations on Trade in Services was adopted by the Services Council on 28 March 2001. The 2001 Guidelines contain several points that recognize the development dimension.

- It affirmed that the negotiations shall be conducted on the basis of progressive liberalisation as a means of promoting the economic growth of all trading partners and the development of developing countries, and recognized the right of Members to regulate, and to introduce new regulations, on the supply of services.
- It stated that the negotiations shall aim to increase the participation of developing countries in trade in services. There shall be appropriate flexibility for individual developing country Members, as provided for by Article XIX:2.
- It also stated that the process of liberalization shall take place with due respect for national policy objectives, the level of development and the size of economies of individual Members, both overall and in individual sectors. Due consideration should be given to the needs of small and medium-sized service suppliers, particularly those of developing countries.
- The negotiations shall take place within and shall respect the existing structure and principles of the GATS.
- Special attention shall be given to sectors and modes of supply of export interest to developing countries. There shall be appropriate flexibility for individual developing country Members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching to such access conditions aimed at achieving the objectives referred to in Article IV.

These Guidelines were meant to guide the services negotiations in its new phase. The adoption of the Guidelines meant that the “modalities” for services negotiations were determined long before the modalities for agriculture and NAMA, as they were adopted even before the Doha work programme was launched in November 2001. However, the developed countries were not satisfied with sticking to the Guidelines, and they were to attempt new principles and negotiating methods that threatened to undermine the development dimensions of the Guidelines and of GATS itself.

Attempts by developed countries in 2005 to pressure developing countries to liberalise under GATS

By 2005 it was clear that the developed countries have become impatient with what they perceived to be the slow pace of liberalisation by developing countries. In 2005, the EU suggested a new “benchmarking” approach in which countries would be required to liberalise in a certain number of key sectors. Other proposals are that developing countries would be required to bind in the GATS the present level of liberalization that they have, and then bring the liberalisation further. These proposed changes would, if accepted, affect the present architecture of the GATS Agreement, and violate the bottom-up and positive-list approach. Meanwhile, the developing countries claim that it is the developed countries that have been dragging their feet in not committing to liberalise “Mode 4”, the temporary movement of natural persons, which is what the developing countries can take advantage of.

The developed countries launched a joint offensive in 2005 to introduce new methods of getting developing countries to commit themselves to liberalising their services in the WTO, and to have these endorsed at the WTO’s ministerial conference in Hong Kong in December 2005.

Their proposals would alter the nature of the GATS and seriously erode the flexibilities that developing countries have to choose the extent of services liberalisation.

In September 2005, the developed countries (including the European Union, Japan, Switzerland, Australia and Korea) presented papers calling for additional ways to accelerate the pace of services liberalization.

The proposals were rejected by the developing countries for removing the policy flexibilities now available to the countries to choose their pace and degree of liberalisation in the various sectors.

Under the new proposed mechanisms, known under the euphemism of “complementary methods for services negotiations”, developing countries would have to commit to liberalise a significant number of sectors and to “deepen” the liberalisation by removing restrictions, under the GATS.

Particularly targeted was liberalisation of “commercial presence”, or Mode 3 of the GATS. The developing countries were asked to open up a minimum percentage of subsectors for participation of foreign service enterprises and providers. Some proposals called for developing countries to bind existing levels of actual liberalisation, and then go further by committing to liberalise even more deeply.

The proposals were counter to the principles and structure of GATS, which enables developing countries to select the degree to which they choose to make commitments in GATS, and in which sectors. The current “request and offer” system also means that countries can make requests to a member to open up in particular sectors, but the member has the option of choosing whether to

make an offer in response to the requests, and if so what kind of offer.

Originally called the “benchmarking approach”, and a “common baseline” approach, the current term used for changing the GATS negotiating modality is “complementary approaches”. By whatever name it is known, the proposed new multilateral and plurilateral methods, if accepted, would drastically change the GATS structure and architecture and its negotiating modality (which is now on a bilateral request-offer basis) and remove a large part of the flexibilities that developing countries presently have.

The ground for the joint offensive was prepared when the developed members complained that the services negotiations were in “crisis” due to what they said were poor offers made by developing countries. Many developing countries countered that poor offers were being made in Mode 4 (movement of natural persons) by developed countries.

Some developed countries, particularly the EU, then floated the concept of “benchmarking” but the idea was resisted by several developing countries. The EC’s paper proposes elements for putting into effect the plurilateral and multilateral methods for negotiations. Under the multilateral approach (“commitments to be undertaken by all members”), the EC proposed that members will agree to take commitments in a minimum number of subsectors within the services sectoral classification list

The EC also proposed the plurilateral approach where a higher level of commitments is made in a number of subsectors of interest to members in a critical mass of markets. They shall negotiate commitments that go beyond the multilateral approach with a view to securing agreement from a “critical mass” of countries to undertake such commitments. Interested members should agree on a core set of commitments for the subsector concerned, for example in the form of model schedules, that would have to be undertaken by all participants on the basis of a critical mass.

Japan proposed two modalities, a quantitative approach (specifying a minimum level of commitments for all members) and a qualitative approach (with targets for liberalisation on certain sectors) of interests. Under Mode 3, the target is that a minimum percentage of subsectors would be allowed more than 50 per cent of foreign equity participation. Targets are 60 per cent for developed countries, 40 per cent for developing countries and 20 per cent for LDCs.

Under the qualitative approach, liberalisation targets will be established for various sectors. For example, in Telecommunications services it had eight items as the negotiating targets and members should achieve five items.

Services decision in the WTO Hong Kong Ministerial, December 2005

The developing countries were able to block the developed countries’ proposals for multilateral “benchmarking” as mandatory commitments at the WTO’s Hong Kong Ministerial conference in December 2005. However the Ministerial Declaration adopted objectives for each of the four services modes, and most importantly it also adopted the plurilateral method of negotiations as a new method. These are contained in Annex C on Services of the Declaration.

Regarding the section on Objectives, Annex C is only in the form of “endeavour” rather than mandatory obligations. The “objectives” in general state: “In order to achieve a progressively higher level of liberalization of trade in services, with appropriate flexibility for individual developing country Members, we agree that Members should be guided, to the maximum extent possible, by the following

objectives in making their new and improved commitments”, followed by the objectives for each mode.

For Mode 3, the objectives text states:

- (i) commitments on enhanced levels of foreign equity participation
- (ii) removal or substantial reduction of economic needs tests
- (iii) commitments allowing greater flexibility on the types of legal entity permitted

In another section on “Approaches”, the text states:

“In addition to bilateral negotiations, we agree that the request-offer negotiations should also be pursued on a plurilateral basis in accordance with the principles of the GATS and the Guidelines and Procedures for the Negotiations on Trade in Services. The results of such negotiations shall be extended on an MFN basis. These negotiations would be organized in the following manner:

- (a) Any Member or group of Members may present requests or collective requests to other Members in any specific sector or mode of supply, identifying their objectives for the negotiations in that sector or mode of supply.
- (b) Members to whom such requests have been made shall consider such requests in accordance with paragraphs 2 and 4 of Article XIX of the GATS and paragraph 11 of the Guidelines and Procedures for the Negotiations on Trade in Services.
- (c) Plurilateral negotiations should be organised with a view to facilitating the participation of all Members, taking into account the limited capacity of developing countries and smaller delegations to participate in such negotiations.

At the final session of the Ministerial, when the Declaration was being adopted, Cuba and Venezuela registered their objections to certain aspects of Annex C on services, and requested that these be recorded as their reservations to the Declaration.

Plurilateral Negotiations after 2005

After the Hong Kong Ministerial, there have been many series of services meetings at the WTO, most of them in the new form of plurilateral negotiations that were mandated by the Hong Kong Declaration.

Negotiating groups were set up on a sectoral basis to conduct the plurilateral negotiations. Each group has a coordinator, a set of countries as “demandeurs” which are requesting the liberalization in that sector, and a set of countries that are “targets”, which the demandeurs are requesting to liberalise. The demandeurs list down those countries which they want to target. It is up to the “target countries” whether they want to participate in the group.

Most of the groups focus on Mode 3 (commercial presence) and the demandeurs are mainly the developed countries (the EC, the US, Japan, Australia and Canada are in almost all of the groups) while the target countries are mainly the middle-income developing countries (including Argentina, Brazil, Chile, China, Colombia, Egypt, India, Indonesia, Kuwait, Malaysia, Nigeria, Pakistan, Peru, Qatar, the Philippines, United Arab Emirates, South Africa, Thailand). In a few groups (cross-border services, Mode 4, and services for agriculture), some developing countries are the demandeurs while the

developed countries are mainly the target countries. Ecuador is a target country for architectural and engineering services and audio-visual services. It was also a “demandeur” in financial services.

The following groups (and their coordinating country) were set up:

Energy: Coordinator EC
Environmental Services: EC
Construction: Japan
Computer Related Services: Chile
Telecommunications: Singapore
Architectural and Engineering Services: Canada
Financial Services: Canada
Maritime Transport: Japan
Legal Services: Australia
Postal/courier including express delivery services: US
Audiovisual Services: Chinese Taipei
Education services: New Zealand
Air transport services: New Zealand
Logistics Services: HKC
Cross-border services (modes 1/2): India
Mode 3: EC
Distribution services: Japan/EC
MFN Exemptions: HKC
Online entertainment services: US
Mode 4: India
Services related to Agriculture: Brazil/Argentina

Another attempt at a multilateral approach in July 2008

In 2008, in the preparation for the WTO’s July Mini-Ministerial meeting, the developed countries initiated another attempt to obtain a multilateral understanding or text that obliges WTO members to liberalise their services. In mid-July, the Chair of the Services Council, Mexico’s Ambassador Fernando de Mateo issued a Report (in the form of a text) which stated that WTO members shall where possible make deeper and wider commitments to reflect current levels of market access and national treatment and provide new market access and national treatment in areas where significant impediments exist. However there was no agreement on its contents.

The report was entitled "Elements Required for the Completion of the Services Negotiations" and dated 17 July. The new draft had been agreed to at a meeting of Ambassadors of the so-called "Enchilada Group", comprising the US, EU, Japan, Canada, Brazil, India, China, South Africa, Pakistan, Philippines, Indonesia, Malaysia, Thailand and others.

However, the report was opposed by Venezuela, Bolivia and Cuba at a services meeting at the WTO on 17 July. They maintained their position that a text on services was unnecessary and inappropriate, since the "modalities" for services had already been concluded at the Hong Kong Ministerial meeting of the WTO in 2005.

The most significant part of the report is in Paragraph 4, which stated that members shall to the maximum extent possible respond to requests by offering deeper or wider commitments and such

responses shall, where possible, substantially reflect current levels of market access and national treatment and provide new market access and national treatment in areas where significant impediments exist. There were caveats in the paragraph, such as that the commitments shall be in line with levels of development and national policy objectives of developing countries.

Acceptance of such a paragraph would constitute a major concession on the part of developing countries. For a long period, a large number of developing countries had rejected the pressures from developed countries to accept a text stating that there be a comparable level of ambition in services as in agriculture and NAMA, and that developing countries should agree to bind their current actual level of liberalisation, as well as to offer more market access and national treatment commitments.

The reported agreement at the ambassador-level Enchilada Group meeting came as a surprise to observers, as well as to some expert-level delegates of developing countries, who had not seen the new paragraph 4 language before the meeting.

The Chair's report was only a draft, and had not been adopted at the informal services meeting held on 17 July. In particular, the three countries (Venezuela, Bolivia and Cuba) opposed the Chair's report. Venezuela said it strongly rejected the adoption of a single negotiating text (put forward by the Chair). It criticised the Chair for the lack of transparency and participation in the drafting of his report, which had taken the form of a text. The text clearly focused on the needs of developed countries to have more market access in areas of their interests. Bolivia said that the report should have reflected the views of various countries and not just give language the Chair had put forward. Some countries including Bolivia had rejected the need for a text but this was not reflected in the report.

At a formal services meeting on 23 July, the Chair presented his Elements report again, and it was again objected to by Bolivia, Cuba, Nicaragua and Venezuela. The countries argued that modalities of services negotiations have already been established in the Hong Kong Ministerial Declaration, and it is wrong to establish another text on services modalities. In their view, the Chair should restrict his report to providing a factual description of the views of members on the negotiations, and not to produce a "text" purportedly agreed to by members.

At the meeting on 23 July, the Chair put forward almost the same Annex, with the main change being a footnote stating that "The delegations of Bolivia, Cuba and Venezuela have placed a reservation on this text." This was objected to by the three countries, as well as Nicaragua. In a statement on behalf of the 4 countries, Venezuela's Vice Minister of Trade, Ms. Sohail Hernandez Parra, requested that the Chair's report include their views. The countries wanted the report to include a few paragraphs that state that there is no consensus for a new services text, and that several delegations considered that there is no mandate to agree on elements that go beyond the Hong Kong Ministerial declaration. They wanted to add that there does not exist any obligation to respond to requests "to the maximum extent possible." Sohail Parra said the 4 countries wanted these points to be included in the report and in the "roadmap" (i. e. the annex of the Chair's report which seems to be in the form of a text), and not in a footnote.

Venezuela said the four countries wanted the Chair to clarify the nature of the document he had circulated. They did not agree that their views be characterized as a "reservation" to the text but they instead reject the text as a whole. Bolivian Ambassador Angelica Navarro supported the Venezuelan statement, saying there is no mandate for a text in the report. In Hong Kong the modality for services negotiations had already been agreed. Bolivia wanted just a report, not a text. Navarro quoted from a letter of Bolivian President Evo Morales that basic services such as water are the subject of human rights and should not be an object of private business or liberalization rules. She wanted this to be reflected in the report, which she said should state that further discussion is needed on the subject of human rights and services as it is Bolivia's view that basic services related to human rights (including water, education and health) should be considered as a different category in the WTO and the country's

position is to exclude these services from the GATS.

Finally the Chair issued a report dated 28 July which noted the disagreement by the four countries with the text. It also contained the position of the four countries in the report as well as in a footnote of the Annex, which is as follows: “

"There is no consensus on a new text on services. Various delegations consider that there is no mandate to agree on elements that go beyond the points agreed by all Members in the Hong Kong Ministerial Declaration and that there is no obligation to make commitments at the highest possible level. Any language that modifies Members' current obligations has no binding force. However, there is total agreement on immediate implementation of any treatment in favour of the least developed countries and the small and vulnerable economies."

“Signalling Conference” on Services at Mini Ministerial, July 2008

During the Mini-Ministerial meeting of the WTO at the end of July 2008, a Services Signalling Conference was held on 26 July, with the aim of allowing Ministers to exchange indications on their own new and improved commitments as well as the contributions expected from others. This conference was also a compromise to satisfy those WTO members which wanted progress in services to accompany the negotiations on modalities for Agriculture and NAMA. The Conference was attended by 31 WTO members.

A report by the WTO Director General Pascal Lamy gave details of discussions on various sectors. Lamy indicated satisfaction with progress in “signals” of concessions or new offers by some of the Members in several sectors.

Representatives of several countries that took part expressed they were rather pleased with the meeting. However experts and some participants were not impressed by the promises that the US or the EU would improve their openings for Mode 4 (movement of natural persons), which the developing countries are most interested in.

More recent developments in negotiations

Since the failed Mini-Ministerial of July 2008, there have been further meetings on market access in services at the WTO. Meetings have continued on the groups on plurilateral sectoral negotiations. In 2010, an additional plurilateral group was set up, to deal with accounting services. This was demanded by developed countries, which have the advantage because these countries have big accounting firms that will benefit from liberalisation in developing countries.

Also, a new proposal was made by developed countries, especially Australia, to cluster together services that are closely-related to logistics and the supply-chain. This was done with the stated aim to add focus to the request/offer negotiations. However, it is a revival of previous proposals by developed countries to “cluster” together a set of services activities, as a tool to promote the demands of developed countries to have more widespread liberalisation across more sectors by developing countries. The Australian proposal is to form a “cluster” of activities or sub-sectors on logistics and supply chain. This is in the interests of the developed countries because the cluster includes courier and distributional services (eg supermarkets) where developed countries have an advantage because they have large companies in these activities and they have been trying to pry open developing

countries for a long time.

An understanding was announced by the G20 Summit held in South Korea in November 2010 that the countries will attempt to conclude the Doha Round by 2012, with a major breakthrough by 2011. This led to a revival of activities in the WTO at the end of 2010, and with the adoption of a timetable of work that will see many activities and an intensified negotiating schedule starting in January 2011. Negotiations on services will be part of this intensified negotiation schedule. Therefore it can be expected that developed countries will intensify their initiatives, including reviving previous attempts to establish multilateral “benchmarks” and general principles such as was tried in July 2008, or to push forward ideas such as “clustering of activities for commitments.” Developing countries should therefore be on guard and be prepared for these intensive negotiations.

Conclusions

The above account of the market access component of the Doha services negotiations shows that the developing countries succeeded initially in having the development dimensions of the GATS reaffirmed as being a central part of the principles and modalities of the post-Uruguay Round services negotiations, especially in the 2001 Services Guidelines. This would allow the developing countries to choose the pace and scope of their liberalisation, while sectors or activities of export interest to developing countries would be given prominence.

However, after the Doha Work Programme was launched in November 2001, the developed countries piled on the pressure on developing countries to get them to increase their commitments through various proposals, especially to get them to agree to liberalise (especially in Mode 3 on commercial presence) in a minimum significant number of sectors, and to bind their present level of liberalisation in various sectors under the GATS. These proposed new principles would contradict the 2001 Guidelines. So far these attempts have not succeeded, but there is a danger that new and more intense pressure will be placed on developing countries in 2011. Meanwhile, the developed countries succeeded in introducing a new negotiating method, the formation of plurilateral groups to negotiate liberalisation in many sectors.

It is important that the developing countries continue to insist on the development principles in the on-going negotiations, particularly that they have the policy space to choose which sectors to liberalise in, the extent and pace of liberalisation, and that these decisions can be in line with the countries’ development plans and objectives.

D.DEVELOPMENTS IN SERVICES NEGOTIATIONS IN DOHA ROUND: ESTABLISHING NEW RULES

Besides issues in market access, the current WTO negotiations on services are also focused on establishing new rules. These include rules on “domestic regulation” and on three other issues – subsidies, government procurement and emergency safeguards. These are dealt with below.

Domestic Regulations

The proposed¹³ disciplines on domestic regulation which are being negotiated in the WTO currently only apply to measures affecting trade in services where specific commitments are undertaken¹⁴. However it may be unwise to negotiate on the basis that this will be the final scope of the applicability of the disciplines as a number of WTO Members have argued that the disciplines should apply to all service sectors and will affect all countries whether or not they have made commitments in these sectors.

There is still no agreement on the form the disciplines will take (for example an Annex, an Understanding, a separate Agreement or a Reference Paper)¹⁵ and many of the key terms still have not been sufficiently defined (for example the overlap between qualifications, licensing and technical standards has not been clarified). Given this, negotiators are being asked to negotiate in the dark, disciplines of unclear scope¹⁶ which could restrict many of their regulatory powers according to analysis by lawyers, UNCTAD staff and other experts.¹⁷

Some countries (led by Hong Kong, Australia, New Zealand, Switzerland and others) have proposed stringent GATS disciplines to limit domestic regulation.¹⁸ Other nations (notably the United States, due to pressure from its state and local governments etc which wish to retain the right to regulate) have challenged the wisdom and vagueness of disciplines that would limit domestic regulations. Also, a number of developing countries want to be excluded from the disciplines.¹⁹

The proposed disciplines have a number of implications for development including:

- Loss of government revenue due to limits on the ability to raise revenue from licensing and qualification fees²⁰
- The March 2009 text requires measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards to be pre-established, based on objective and transparent criteria and relevant to the supply of the services to which they apply. Experts²¹ have expressed concern with each of these obligations, some of which are outlined below:
 - Open-ended requirements that allow for considerable bureaucratic discretion have been criticised as being **untransparent** at the WTO. Gould notes ‘honesty and integrity’ requirements as a possible example of regulations which may not be transparent.²²

¹³ This paper refers to the March 2009 Chair’s text as that appears to be the current basis for negotiations.

¹⁴ Paragraph 10.

¹⁵ Chair’s Annotated Text of March 2010.

¹⁶ Which a law professor notes would make it likely that ambiguous terms will be interpreted strictly given the drafting history, http://www.boell.org/downloads/Stumberg_-_Guide_to_GATS_Dom_Reg_5-19-10.pdf

¹⁷ See for example ‘The draft GATS domestic regulation disciplines – potential conflicts with developing country regulations’, Analytical Note, SC/AN/TDP/SV/12, October 2009, www.southcentre.org; ‘GATS negotiations on domestic regulation, a developing country perspective’, M Mashayekhi and E Tuerk, [The World Trade Organization and Trade in Services](#), Kern Alexander and [Mads Andenas](#) (Apr 30, 2008) and Trade and Investment Policy Papers 2, 1, 4, 5 at <http://www.boell.org/web/134-564.html>.

¹⁸ http://www.boell.org/downloads/Stumberg_-_Guide_to_GATS_Dom_Reg_5-19-10.pdf

¹⁹ http://www.boell.org/downloads/Stumberg_-_Guide_to_GATS_Dom_Reg_5-19-10.pdf

²⁰ Paragraph 26 March 2009 Chair’s text.

²¹ See for example ‘The draft GATS domestic regulation disciplines – potential conflicts with developing country regulations’, Analytical Note, SC/AN/TDP/SV/12, October 2009, www.southcentre.org; ‘GATS negotiations on domestic regulation, a developing country perspective’, M Mashayekhi and E Tuerk, [The World Trade Organization and Trade in Services](#), Kern Alexander and [Mads Andenas](#) (Apr 30, 2008) and Trade and Investment Policy Papers 2, 1, 4, 5 at <http://www.boell.org/web/134-564.html>.

²² ‘The draft GATS domestic regulation disciplines – potential conflicts with developing country regulations’, Analytical Note, SC/AN/TDP/SV/12, October 2009, www.southcentre.org

- The ‘**objective**’ requirement may require regulations not to be rigid, ie to have discretion.²³ Yet to satisfy the transparency criteria, regulations cannot have discretion according to the analysis above. It is therefore unclear how any regulation can satisfy both criteria and so be permitted. Furthermore, at least one delegation recognises that the ‘objective’ requirement may be problematic ‘since statutes often provided discretion to regulators, who necessarily used such discretion in a subjective manner’.²⁴ Law Professor Stumberg noted that:
 - Regulatory goals such as preservation of cultural values are inherently subjective.²⁵
 - Of the five possible meanings of ‘objective’, four would conflict with existing laws, even in the USA.²⁶ For example if ‘objective’ means:²⁷
 - ‘not biased’, it could prevent laws like small business preferences or affirmative action designed to overcome historical disadvantages or market failure.
 - ‘relevant to the ability to supply the service or the quality of the service’, this could jeopardise many traditional standards that are based on the external impact that a service has on the local environment or community
 - ‘not subjective’, this could mean there is no room for discretion. Discretion is commonly required in laws, for example where balancing of multiple criteria is required (for example in what rates to set for utility services).
 - ‘least trade restrictive’, which could mean domestic laws must comply with international standards. (Yet Gould notes that international standards such as Basel II have been criticised for not being objective).²⁸
- At least one delegation wishes to define ‘**relevance**’ to ensure that only criteria related to service quality and consumer protection can be used.²⁹ This would mean that criteria to support other government policies, such as the Constitutional requirement to ensure the general welfare of the community prevails in the use of the radio spectrum frequencies may not be permitted. Stumberg gives other examples of regulations that may fail the relevance requirement such as: protecting the environment and local community from mining operations, preserving local culture, promoting development through financial services regulation and ensuring universal access to essential services.³⁰ There appears to still be disagreement amongst delegations as to what the ‘relevant’ criteria would permit.³¹
- A number of legal experts have expressed considerable concern over the possible limitations on the ability to regulate from the ‘**pre-established**’ obligation.³² The possible interpretations include that governments cannot change regulations once a service supplier invests. The 2010 Chair herself recognised that a standstill on regulation could be a significant limitation on the right of Members to modify their regulations.³³ This is

²³ ‘The draft GATS domestic regulation disciplines – potential conflicts with developing country regulations’, Analytical Note, SC/AN/TDP/SV/12, October 2009, www.southcentre.org. For example fixed rates of return on water concessions were raised as a possible requirement that is too rigid in Gould’s paper. Therefore requirements to provide service for free could also be found to be so unbending a requirement as to be arbitrary and therefore not objective.

²⁴ Annotated Chair’s text, 14 March 2010.

²⁵ http://www.boell.org/downloads/Stumberg_-_Guide_to_GATS_Dom_Reg_5-19-10.pdf

²⁶ <http://www.forumdemocracy.net/downloads/Allen%20-%20Memo%20GATS%20DR%20objective%206.pdf>

²⁷ <http://www.forumdemocracy.net/downloads/Allen%20-%20Memo%20GATS%20DR%20objective%206.pdf>

²⁸ ‘The draft GATS domestic regulation disciplines – potential conflicts with developing country regulations’, Analytical Note, SC/AN/TDP/SV/12, October 2009, www.southcentre.org

²⁹ Annotated Chair’s text, 14 March 2010.

³⁰ http://www.boell.org/downloads/Stumberg_-_Guide_to_GATS_Dom_Reg_5-19-10.pdf

³¹ Annotated Chair’s text, 14 March 2010.

³² See for example Trade and Investment Policy Papers at <http://www.boell.org/web/134-564.html>.

³³ Chair’s Annotated Text, March 2010.

obviously concerning in the light of the new, tighter regulations being widely recommended as a result of the lessons learned from the current financial³⁴ and climate crises. In addition to these regulatory changes required due to an external event,³⁵ developing countries in particular need to be able to amend their regulations because they: a) have less data on services so are more likely to need to adjust their regulations as they get more accurate data; b) as developing countries industrialise, the type of regulation that suits their economy and society changes (eg competition laws that allow national champions to develop may be needed early on, whilst later a greater level of competition may be more helpful); c) developing countries have fewer of the regulations they need compared to industrialised countries (for example many may not yet have water, air and noise pollution regulations); d) as the capacity of developing country governments improves, more complicated regulations can be written and implemented. Therefore the developing countries will feel the restrictions of the ‘pre-established’ requirement more than developed countries.

- There have still been no clear limitations to the meanings of these terms.
 - The apprehensions of parliamentary bodies about their loss of regulatory policy space under the proposed disciplines can be seen for example in the letter from the California State Senate to the US Trade Representative in 2003 expressing its concern about the proposed domestic regulations disciplines and the challenge they could pose to nurse-to-patient staffing ratios, laws preventing health insurance companies from discriminating on the basis of genetic characteristics, restricting governments’ ability to regulate waste incineration, oil drilling, drinking water standards, pesticide use standards, toxic waste laws and renewable energy laws.³⁶
- Licensing procedures must also be as simple as possible.³⁷ This makes simplicity the overriding goal, even in sensitive and complex sectors such as banking and it is likely to make existing requirements in a number of WTO Members illegal.³⁸ Law Professor Stumberg has expressed concern that because complex regulatory decisions require complex procedures, there are many areas of potential conflict, such as requirements to have: expensive environmental impact statements, scientific texting or public hearings.³⁹ Many of these procedures are required by Ecuador’s 2008 Constitution.
 - Additional administrative requirements (such as promptly publishing a long and non-exhaustive list of information⁴⁰) are also in the proposed disciplines which developing countries are concerned will be burdensome and costly to implement.
 - The requirement to endeavour to provide opportunities for service suppliers to comment on proposed measures is more likely to be used by companies from developed countries (as they have more capacity, time and resources to take part in such processes) than those from developing countries. Africa, Caribbean and Pacific countries said that this would grant foreign-service suppliers opportunities to exert undue pressure on the domestic decision making process and

³⁴ Such as those by the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System, http://www.un.org/ga/econcrisissummit/docs/FinalReport_CoE.pdf.

³⁵ This includes technological changes such as the internet which has permitted many more services to be traded through Mode 1 than could have been imagined in 1995.

³⁶ ‘[Limits to Privatization: How to Avoid Too Much of a Good Thing: A Report to the Club of Rome](#)’, Ernst von Weizsäcker, Oran Young, and Matthias Finger, May 2005, Earthscan Publications

³⁷ Paragraph 17, March 2009 Chair’s text.

³⁸ ‘The draft GATS domestic regulation disciplines – potential conflicts with developing country regulations’, Analytical Note, SC/AN/TDP/SV/12, October 2009, www.southcentre.org

³⁹ http://www.boell.org/downloads/Stumberg_-_Guide_to_GATS_Dom_Reg_5-19-10.pdf

⁴⁰ Paragraph 13 of the March 2009 Chair’s text.

therefore a prior comment requirement should not be in the disciplines in either a legally binding or best endeavour form.⁴¹

While some developing countries may hope that the domestic regulations disciplines will enable their workers' qualifications to be recognised in developed countries and thus increase the effectiveness of their Mode 4 market access, this is unlikely to succeed for a number of reasons. Firstly, enhanced recognition of qualifications is of no use if Mode 4 market access is not also provided and developed countries are very reluctant to increase their Mode 4 market access, as can be seen in the Doha Round negotiations. Secondly, even if increased Mode 4 commitments are made by developed countries, if visas are not granted, there is no effective market access and developed countries have been especially unwilling to grant visas. Thirdly, even if Mode 4 market access and visas are granted, there may be other barriers to developing country workers, for example some developed countries require workers to be citizens before they can work in certain professions and citizenship is certainly not being offered in the Doha Round. Fourthly, the proposed domestic regulations disciplines are too weak to significantly improve the recognition of qualifications from developing countries (they merely require 'due consideration' of various factors).

Whilst there is a development section⁴² in the proposed text, it is inadequate because⁴³:

- It merely provides a fixed transition period
- There is a possibility, however it is not a guarantee, that the Council for Trade in Services may extend this period.
- It appears to only grant one extension of the transition period⁴⁴
- There is no requirement for developed countries to provide: reduced administrative fees for service suppliers from developing countries, longer phase-in periods or technical assistance⁴⁵.

Conclusions

Since Ecuador has little to gain from disciplines on domestic regulation, it may be to its advantage if there would be no disciplines on domestic regulation. This is legally possible as GATS⁴⁶ only requires the Council for Trade in Services to 'develop any **necessary** disciplines'. It can be argued (and has been without coming to a conclusion on it in the past) that no disciplines are necessary because the existing GATS obligations are sufficient.⁴⁷ Politically, this can be reopened by noting that:

- the discussion in the past of this issue did not come to a conclusion and it should be settled before the Doha Round is concluded
- since the financial crisis, it is prudent to relook at limits on the ability to regulate in the light of the lessons learned from the financial crisis and the reregulation recommendations of eminent experts such as the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System. Some may claim that the prudential

⁴¹ WTO document JOB(06)/136, 2006

⁴² Chapter X, March 2009 Chair's text.

⁴³ Apart from for least-developed countries which do not have to apply the disciplines.

⁴⁴ Because it refers to 'before the end of this transitional period' an extension can be applied for.

⁴⁵ Because it requires mutually agreed terms and conditions

⁴⁶ Article VI.4.

⁴⁷ Law Professor Jane Kelsey advised (in a personal communication with the author) that if WTO Members concluded that no domestic regulations disciplines were necessary, the interim disciplines on domestic regulation (pending the entry into force of disciplines developed under Article VI.4) under Article VI.5 of GATS would also become redundant. Otherwise there would be a nonsensical situation of WTO Members deciding that no disciplines were necessary and yet being bound by interim disciplines of the same kind in perpetuity.

defence in the GATS Annex on Financial Services means that financial reregulation can still be carried out, however:

1. the form (eg an amendment to GATS? Or an Understanding, Annex or Reference Paper etc) of the proposed domestic regulations disciplines has not yet been decided,⁴⁸ therefore it is unclear if existing provisions such as the prudential defence will override any domestic regulations disciplines.
2. Even if the prudential defence did override any domestic regulations disciplines, concerns have been expressed⁴⁹ as to the efficacy of this defence.

Alternatively, if there are to be disciplines on domestic regulation, there should be a sufficiently strong exception for developing countries:

- Ideally, the exception would reduce all the obligations for developing countries, for example to mere 'endeavours'.
- If this is not possible, a transition period that corresponds to the actual time when developing countries are developed and/or have the capacity to implement the disciplines should be the minimum exception. This could be determined on the basis of objective indicators such as gross domestic product per capita, or some or all of the United Nations Development Program's human development index indicators, or reaching a certain share of the world services market with its services exports, or reaching a certain regulatory capacity. This type of development benchmarking has been proposed by a number of developing countries in their FTA negotiations with developed countries.⁵⁰ There is some indication that these considerations are being taken into account by WTO Members, as can be seen by the criteria in the Chair's March 2009 text for possible extension of the transition period (factors to be taken into account are the level of development, size of the economy, regulatory and institutional capacity).
- An exception which is merely a transition period for a fixed number of years is insufficient, because at the end of the transition period, Ecuador may still be a developing country with the need to change and adapt regulations and have relatively lower capacity to implement the disciplines.
- Unfortunately, the USA may not agree to differential treatment for developing countries. This would prevent a strong development exception since the Doha Round requires consensus.⁵¹ In such a situation, then the choices become: tough disciplines on all countries or no disciplines on any countries.

Government procurement

Government procurement (GP) can account for 15-30% of gross national product in some countries and when directed at local products and suppliers, this can provide an important stimulus in times of recession, offer an important market for local suppliers and products and can assist disadvantaged communities within the country.⁵²

⁴⁸ See for example Chair's annotated text of 14 March 2010.

⁴⁹ See for example the summary in the financial services paper in this collection.

⁵⁰ An African Minister of Trade has pointed out that studies show that trade agreements between countries at different levels of development have negative impacts on the less developed party. Therefore he has proposed indicators to be met before any such agreements are concluded which would ensure the countries are at comparable levels of development.

⁵¹ Article IX.1 Agreement Establishing the World Trade Organization and this is being used in the Doha Round, see for example http://www.wto.org/english/tratop_e/dda_e/meet08_org_e.htm.

⁵² See for example www.twinside.org.sg/title2/par/CARIFORUM.Feb09.doc.

Ecuador is not party to the optional Agreement on Government Procurement⁵³ and as of 2005, offered no preferential treatment in government procurement to suppliers from any other countries⁵⁴. Therefore Ecuador currently has the legal right to preserve all of its government procurement for local suppliers, services and products. This is a substantial amount of purchasing power; in 2003, it was \$2100million⁵⁵. In 2005, the Law on Government Procurement did not guarantee national treatment for foreign bidders and the procuring committee could decide whether to allow non-resident bidders to participate.⁵⁶

Liberalisation of government procurement to allow foreign companies to supply Ecuador's Government with goods and services can occur in a number of ways. To support regional integration, Ecuador could choose to open its government procurement (or provide price preferences) to the countries that the Constitution and NPGL prioritise integration with. This has been done by some African countries, such as those in the Economic and Monetary Community of Central Africa (CEMAC) and the West African Economic and Monetary Union (WAEMU).⁵⁷ However, this method of regional integration would be undermined (due to dilution with competitors from outside the region) if Ecuador opened its GP to countries outside the region, for example through one of the methods below.

The push for developing countries to open their lucrative GP markets to developed country products and suppliers occurs in the context of a failed attempt by developed countries to negotiate mere transparency (not market access) for GP at the WTO.⁵⁸ This attempt failed due to widespread opposition from developing countries (including those from the Caribbean and Central America).⁵⁹ Firstly, Ecuador may face pressure to join the plurilateral (optional) Agreement on Government Procurement (GPA) which covers goods and services. However most developing countries do not wish to join the GPA according to UNCTAD staff because of concerns that by opening their GP to foreign suppliers, foreign companies will capture a significant part of their domestic business, without their own companies being able to gain access to foreign GP markets due to financial and technological weaknesses as well as other barriers.⁶⁰ The UNCTAD staff note that GP is used to promote domestic industry and support SMEs and that developing countries fear losing GP as a tool for pursuing social and development objectives as well as the high cost of implementing such an agreement.⁶¹ These concerns apply to other agreements liberalising GP such as those outlined below. Therefore it is not surprising that the only developing WTO Members which have joined the GPA are those with gross national incomes per capita more than five times greater than Ecuador's.⁶²

Secondly, the EU is proposing to require the liberalisation of government procurement in services (and

⁵³ http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm#parties

⁵⁴ WT/TPR/S/148/Rev.1

⁵⁵ WT/TPR/S/148/Rev.1

⁵⁶ WT/TPR/S/148/Rev.1

⁵⁷ See for example the WTO Secretariat's Trade Policy Reviews for Cameroon and Niger.

⁵⁸ Transparency in GP and other 'Singapore issues' were dropped from the Doha Round on 1 August 2004, WT/L/579.

⁵⁹ See for example <http://www.twinside.org.sg/title2/t&d/tnd33.pdf>.

⁶⁰ 'Strategic considerations for developing countries: the case of GATS and health services', Mashayekhi M, Julsaint M, Tuerk E, in 'International trade in health services and the GATS', Editors Blouin C, Drager N, Smith R, 2006, World Bank.

⁶¹ 'Strategic considerations for developing countries: the case of GATS and health services', Mashayekhi M, Julsaint M, Tuerk E, in 'International trade in health services and the GATS', Editors Blouin C, Drager N, Smith R, 2006, World Bank.

⁶² World Bank 2009 GNI per capita statistics and http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm#parties.

goods up to 50% of the value of the contract) in negotiations under Article XIII GATS.⁶³ Their 11 page complete text to add an Annex to GATS also includes detailed administrative requirements, but has no meaningful special and differential treatment for developing countries that would enable them to continue to use government procurement as a tool for development. In response to this, countries such as Egypt⁶⁴ have stressed the importance of limiting commitments in government procurement to transparency issues only and other delegations⁶⁵ have reiterated their views that the negotiating mandate does not include market access in GP.

Thirdly, Ecuador may be asked to liberalise government procurement in goods and services in any FTA negotiations with a developed country such as the EU. The EU has obtained liberalisation of government procurement in both the government procurement and competition chapters in its FTA with CARIFORUM countries.⁶⁶

Subsidies

According to UNCTAD staff,⁶⁷ developing countries feel negatively affected by subsidies that developed countries provide to their service suppliers because they cannot match these subsidies and therefore there is unfair competition. For example, Australia alone provided assistance to services exporters amounted to \$1.35 billion between 1997 and 2002 (to almost every services sector through direct financial assistance, funding to institutions and tax expenditures available to exporters).⁶⁸ Therefore they tend to be in favour of limiting subsidies for services. However, developing countries also wish to preserve the right to subsidise their service suppliers where they feel it is necessary.⁶⁹

Emergency safeguard measures (ESM)

An ESM for services would allow countries to adapt to changing circumstances by temporarily suspending their obligations under GATS or adopting positive measures in favour of domestic suppliers.⁷⁰ The Association of Southeast Asian Nations (ASEAN) minus Singapore⁷¹ have been leading several developing countries in proposing safeguard measures that can be used to backtrack from GATS commitments when a country's national services enterprises are threatened by foreign competition.

However, the developed countries are opposed to such a mechanism, which they consider neither desirable or feasible.⁷² Some developing countries are also concerned about the way an ESM could also be used in Mode 4 and thus threaten the potential benefits from any labour market access⁷³ (although the ASEAN minus Singapore proposal attempts to deal with this)⁷⁴.

⁶³ S/WPGR/W/54

⁶⁴ TN/S/M/35

⁶⁵ TN/S/M/21

⁶⁶ See for example www.twinside.org.sg/title2/par/CARIFORUM.Feb09.doc

⁶⁷ 'Strategic considerations for developing countries: the case of GATS and health services', Mashayekhi M, Julsaint M, Tuerk E, in 'International trade in health services and the GATS', Editors Blouin C, Drager N, Smith R, 2006, World Bank.

⁶⁸ <http://www.twinside.org.sg/title2/twninfo200.htm>

⁶⁹ See for example <http://www.twinside.org.sg/title2/wto.info/2010/twninfo100209.htm>.

⁷⁰ See for example ASEAN minus Singapore's 2007 proposal, <http://www.twinside.org.sg/title2/wto.info/twninfo520.htm>

⁷¹ See for example S/WPGR/M/65.

⁷² <http://www.twinside.org.sg/title/twninfo50.htm>

⁷³ <http://www.twinside.org.sg/title/twninfo50.htm>

⁷⁴ JOB(07)/155

ESM negotiations were supposed to have been concluded by 1998, but the deadline was repeatedly extended and then replaced with an open-ended decision.⁷⁵ Developing countries have said that their service suppliers are particularly vulnerable, lack experience with liberalised markets and are usually small and medium enterprises.⁷⁶

E.SERVICES IN FTAS AND EPAS

Besides the WTO, services negotiations are taking place in FTAs, which are conducted especially by the US and European Union. Developed countries have been frustrated by what they perceive as the slow movement by developing countries in the WTO. The reason for their frustration is that services now comprise the largest sector, and their big services enterprises are pushing to have access to the markets of the developing world. The developed countries are now seeking to use the FTA mechanism to accelerate the liberalization process in developing countries. These FTAs do not recognize the development dimensions of the GATS, nor the principles in the WTO's 2001 Services Guidelines, and in many ways operate in an opposite way.

In the typical US FTA, the more development-friendly architecture of GATS is abandoned. Instead of the GATS' positive list approach, the US FTA (for instance with Singapore and Chile) adopts the negative list approach, in which all sectors are committed for liberalisation, except those that have been put on the "negative list", with reservations as to which category of liberalization is being exempted. This reduces the policy space for developing countries, as there is increased pressure to liberalise, since in this approach the country has committed to liberalise unless it specifically places an exception in the schedule in the annex. It is difficult for a country to be able to list all the possible exceptions that it seeks. If due to ignorance or lack of foresight, a country mistakenly does not inscribe the sector or activity in the annex, it would be a costly error indeed. Furthermore, a country may in future want to develop local industry in a particular sub-sector which it at present has not planned for, and thus did not place the sub-sector as an exception. Moreover new industries may emerge in future which are not known at present and these are thus not listed as exceptions, for example the internet would not have been listed as an exception in the 1980s as it would develop only later.

In the European Economic Partnership Agreements, the services component is very comprehensive. A good idea of its contents can be obtained by analyzing the CARIFORUM-EU EPA, because its services chapter is a template for the EU's EPAs.

In the CARIFORUM-EU EPA, the services aspect is integrated into Title II on Investment, Trade in Services and E-Commerce. This is unlike the US FTAs in which investment is a separate part. Title II has 6 chapters (on (1) general provisions; (2) Commercial presence; (3) Cross-border supply of services; (4) Temporary presence of natural persons for business purpose (5) Regulatory Framework, containing general provisions, and sections on financial services, computer services, courier services, telecommunications, tourism; international maritime transport services; (6) Electronic Commerce. These chapters cover Articles 60 to 124 of the EPA, having perhaps the most numerous set of articles in the Agreement.

⁷⁵ http://www.wto.org/english/tratop_e/serv_e/cbt_course_e/c4s2p1_e.htm

⁷⁶ 'Strategic considerations for developing countries: the case of GATS and health services', Mashayekhi M, Julsaint M, Tuerk E, in 'International trade in health services and the GATS', Editors Blouin C, Drager N, Smith R, 2006, World Bank.

By combining services and investment into one Title, the EPA extends the “commercial presence” and right to establishment aspects of services into all other sectors, including manufacturing and agriculture. On the other hand, the provisions on free transfer of funds and capital (which are usually in the investment chapter) also apply to services.

Law Professor Jane Kelsey (University of Auckland) has done detailed analysis of the regulatory implications of Title II.⁷⁷ This document is important for pointing out both the services and investment aspects of the EPA, and the analysis below (as well as in the investment section) draws significantly on it.

As Kelsey points out, the EU has used the CARIFORUM EPA to secure rules and commitments under Title II that it has not been able to achieve at the WTO in relation to both services and investment. According to Kelsey: ‘Some of the rules in Title II impose obligations on CARIFORUM states that are even more onerous than those that Tonga had to accept in its WTO accession. The development rhetoric in GATS and the Cotonou Agreement, especially the promises of flexibility and asymmetry, are diluted or absent from most operational parts of Title II. The level of sectoral commitments made by CARIFORUM states in the EPA exceeds the controversial benchmarks proposed by the EC in the GATS 2000 negotiations: “more developed” CARIFORUM countries have promised to liberalise 75% of their services sectors and the LDCs 65%.’

Among the major points made by Kelsey, in relation to services:

- Obligations under Title II apply to policy and regulation on services, investment and e-commerce at all levels of decision making: central and local government, local communities and NGOs. The rules and commitments apply to the entire range of policy measures, from formal legislation to administrative decisions.
- The disciplines under Title II are supported by enforcement mechanisms in the EPA. These disciplines are expected to take precedence over a country’s national considerations and objectives when there is a conflict.
- The main objective of Title II is to establish enforceable rights to foreign investors and services firms. These rights often contradict the aspirations stated in other parts of the EPA.
- Title II will adversely affect the CARIFORUM’s own regional integration plans. Although the EPA states the pace of regional integration is to be determined by CARIFORUM states, this is “without prejudice” to the commitments undertaken in the EPA. Title II includes issues not yet settled under CARICOM’s internal single market or not yet fully implemented. These include financial and other services, investment, government procurement, e-commerce etc. The EPA provisions will now drive regional integration and pre-empt a more considered assessment of their implications and whether they are appropriate to the region’s needs.
- The government’s right to regulate is severely curtailed by the EPA. The EPA does state that governments retain the right to regulate. But the primary purpose of the EPA is to restrict the ability of governments to choose how they regulate services and foreign investment.
- The EPA has narrowed the right to regulate further than GATS by saying that regulation must be to meet ‘legitimate policy objectives.’ ‘legitimate’ is not defined. A similar phrase has been rejected in the GATS negotiations on domestic regulations (aside from the disciplines on accountancy).

⁷⁷ ‘Legal analysis of services and investment in the CARIFORUM-EC EPA: Lessons for other developing countries’, Jane Kelsey, July 2010 at www.southcentre.org

- The EPA has narrowed the scope of temporary presence of service workers (Mode 4 in GATS) in a GATS-minus way to cover only the managerial elite, professionals, technical experts and a limited category of contract service suppliers. The temporary entry of foreign service workers in lower value jobs falls outside the legal scope of the EPA and remains an immigration (not trade) matter. There are also many restrictions on the eligible service workers. Regarding quota-free right of entry for Caribbean entertainers, the Caribbean Cultural Industries Network have said that major artists have little difficulty entering Europe and refer to new requirements for a regional registration and certification regime that would have made famous artists like Bob Marley ineligible for entry.
- In the special sections on courier, finance, telecommunications, maritime, e-commerce, the wording of these sections mirrors (often word for word) the EC's sectoral proposals in the GATS 2000 negotiations. These texts are aggressively GATS-plus. For example, the EPA contains language from the WTO reference paper on basic telecommunications and the Understanding on Financial Services that WTO members can choose whether to adhere to; with similar language in the EPA, CARIFORUM members effectively have agreed to adhere to these two documents.
- The sections on courier and telecommunications services require appropriate measures to prevent anti-competitive practices, defined as the behaviour of the firms "materially affects the terms of participation in the relevant market." This anti-competitive provision is aimed by the EU to satisfy their companies that complain that public monopolies or local companies restrict their access to the markets of developing countries. The telecommunications section also defines anti-competitive practice to include cross-subsidisation that has a material effect. This is intended to prevent a firm from using revenues from a monopoly to subsidise another commercial activity.
- The EPA says a government can define the kind of universal service obligation for post and telecommunications that it wants, but it imposes conditions, that the way it is administered must be non-discriminatory and competitively neutral, which means local companies cannot be given a preference or advantage.
- If a government has made full commitments on telecommunications, it cannot require investment through a joint venture or limit foreign shareholdings. It could thus become totally dependent on a European telecommunications firm.
- The financial services section is based on the GATS Annex on Financial Services and the Understanding drawn up by and largely for OECD countries with advanced financial services industries. Its extreme liberalisation provisions can generate risks to financial stability.
- The sectoral rules on tourism are portrayed as a win for CARIFORUM. However, in contrast with other sectors, this section is very soft. A commitment to use appropriate measures to control anti-competitive practices of big tourism wholesalers, and travel agencies is important, but 'appropriate' is very subjective and the EC may have little influence on firms that operate on a global basis and largely through information technology networks. Other promises to support tourist development and to encourage compliance with environment and quality standards are aspirational and will rely on monitoring and review, rather than enforcement.
- The scope and classifications used to make commitments and the format of schedules are different from GATS, creating new uncertainties.
- The EPA maintains the GATS scheduling approach of a positive list of commitments. This is favourable for developing countries as they are not deemed to have made a commitment unless explicitly done in the schedule. This is in contrast to the 'negative list approach' in which the

country is deemed to have committed to liberalisation and national treatment, unless explicitly stated in the schedule. Title II requires three sets of schedules, for investment, cross-border services and movement of business people.

- The EPA also contains provisions on labour and environment standards, which had been rejected in the WTO. Moreover, countries cannot lower their laws and standards on domestic labour, environment or occupational health and safety or cultural protection or diversity, aimed at attracting foreign investment. This would prevent governments from promoting free trade zones or development zones that offer less restrictive regulations.
- The driving objective of Title II is to secure rights for foreign investors and service firms. No enforceable obligations are imposed on them in return.

F.SERVICES IN BILATERAL INVESTMENT TREATIES

Bilateral investment treaties (BITs) and FTAs with some developed countries (such as the USA) often include a variety of investor protection provisions including requirements to provide fair and equitable treatment and compensation for expropriation. These can usually be enforced by the investor suing the host government at an international tribunal for cash compensation (investor-state dispute settlement, or ISDS). (In an FTA, the outcome of ISDS itself can be enforced by state-state dispute settlement which is usually ultimately enforceable via raised tariffs on the exports of the losing party). These investor protections can prevent a number of policies that Ecuador may wish to implement or be required by its Constitution and NPGL to implement. Some examples are provided below.

Fair and equitable treatment

There has been wide variation in investor-state tribunal decisions on the content and extent of this obligation. Some interpretations⁷⁸ of decisions such as *Tecmed v Mexico*, *Enron v Argentina*, *CMS* and *PSEG v Turkey* are that governments cannot affect the basic expectations the investor had when it made the investment, ie that changes in the legislative environment are contrary to the need for the stable and predictable business environment required by the BIT. Such interpretations of fair and equitable treatment (FET) would it difficult to introduce new regulations (for example to implement the requirements of the 2008 Constitution or carry out financial reregulation (for example due to a change in external circumstances, such as the financial crisis, which showed the need for new regulations)). These possibilities are not remote as UNCTAD notes that ‘The debate regarding the fair and equitable treatment clause in Chapter 11 of NAFTA, and more recently in some BIT disputes, has evidenced the risks of including unqualified language in IIAs. The wording of such a clause could be broad enough to apply to virtually any adverse circumstance involving an investment, thus making the fair and equitable treatment provision among those provisions most likely to be relied upon by an investor in order to bring a claim under the ISDS proceedings.’⁷⁹

Expropriation

‘Investment’ is usually broadly defined in BITs. It can include profits, market share etc. If a tribunal interprets ‘expropriation’ to be the reduction of profits, this is likely to cause many regulatory measures (including financial reregulation) to be found to be expropriation because for example the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System notes that ‘By definition, regulations

⁷⁸ http://www.unctad.org/en/docs/iteiia20073_en.pdf, http://www.unctad.org/en/docs/iteiia20083_en.pdf,

⁷⁹ http://www.unctad.org/en/docs/iteiia20073_en.pdf

reduce profits because they restrict potentially profitable actions.’⁸⁰

For example, under the North American Free Trade Agreement a tribunal has found that failing to allow a toxic waste dump was expropriation⁸¹ and the Canadian Government has been deterred from implementing tobacco control measures by mere threat of being sued by a tobacco company under NAFTA⁸².

The expropriation provision in BITs may mean that a number of measures that have been proposed as a result of this financial crisis would be found to be expropriation and thus require the compensation stipulated in the BIT. These measures could include those recommended by the Commission.⁸³ Furthermore, some BITs explicitly state that expropriation includes the ‘levying of arbitrary or excessive tax on the investment’.⁸⁴

G.CONCLUSIONS AND RECOMMENDATIONS

Imbalances in the WTO Services Agreement

Those developing countries that were relatively active during the Uruguay Round initially resisted the inclusion of services in the Uruguay Round itself and later in the WTO. However they eventually gave way. Developing countries have been at a disadvantage in services because developed countries have the capacity of large service firms, which are able and eager to enter developing countries, whereas most developing countries like Ecuador have small service firms that are unable to establish themselves in developed countries, nor can they compete well if the big foreign firms enter their home markets.

Because of this, developing countries tend to have deficits in their services account of the balance of payments. According to the WTO secretariat, Ecuador recorded a deficit on its international services trade averaging around US\$570 million between 1999 and 2003, with exports of services during this period averaging roughly US\$850 million, and imports US\$1,420 million. By 2009 the services deficit had risen to US\$1.5 billion.⁸⁵

Thus, Ecuador has to be cautious about further liberalisation in services as it is already a net services importer with a deficit which is contributing to its existing balance of payments problems, and it cannot be expected to increase its services exports significantly in the short term.

Developing countries could benefit in services if the developed countries liberalise in Mode 4 (labour movement) but this has not been the case and the likelihood is that there will in future be tighter control rather than relaxation of their labour market.

Ecuador, together with some countries, may wish to undertake deeper analysis on the imbalances in the services agreement and make some proposals on how to rectify the situation.

⁸⁰ http://www.un.org/ga/econcrisissummit/docs/FinalReport_CoE.pdf

⁸¹ <http://www.citizen.org/documents/Chapter%2011%20Report%20Final.pdf>

⁸² <http://www.citizen.org/documents/Chapter%2011%20Report%20Final.pdf> and <http://www.ftamalaysia.org/article.php?aid=61>

⁸³ http://www.un.org/ga/econcrisissummit/docs/FinalReport_CoE.pdf

⁸⁴ See for example the Netherlands-Kuwait 2001 BIT.

⁸⁵ http://www.wto.org/english/res_e/booksp_e/anrep_e/trade_profiles10_e.pdf

Make Use of Development Flexibilities in GATS and Doha Round

Nevertheless, the developing countries succeeded in putting a number of development dimensions and safeguards in the GATS that allowed developing countries the policy space to choose the sectors and the extent they would like to commit to liberalise.

In the new round of services negotiations, many developing countries have attempted to make use of the flexibilities in GATS, to choose their own pace and sectors to liberalise. They have been cautious about increasing their binding commitments in the WTO, as (1) they are worried about the possible consequences, especially since it is difficult to backtrack even if the commitment turns out to be an error; (2) they are unable to benefit from the liberalization of other countries, due to supply constraints (and due to continued protection of the labour market in the North) and thus if they were to themselves liberalise, they would have more costs than benefits; (3) they are within their rights to choose whether to liberalise, in which way, and in which sectors, if at all.

Ecuador should analyse all the existing flexibilities in GATS and the Doha services negotiations and make full use of these flexibilities for its development objectives.

Be on Guard Against New Attempts to Pressure Developing Countries in GATS liberalisation

Developed countries were unhappy about what they perceive as the slow movement by developing countries in the WTO as their large services firms have been eager to get entry into the developing countries' markets. They have continuously made attempts to introduce new principles and methods, to get developing countries to commit to liberalise in a significant portion of the services sectors. These attempts include "benchmarking", liberalizing in "clusters" of sectors, and binding the present actual levels of liberalization of various sectors as commitments under GATS.

These attempts have so far largely failed, but Ecuador and other developing countries should be on their guard to prevent new attempts along similar lines. Ecuador may join other countries in resisting such fresh attempts, keeping in mind that Bolivia, Cuba, Venezuela and Nicaragua had opposed the attempt in July 2008 to adopt a Chair's text on services.

Position on WTO Plurilateral Services Negotiations

On the methods of negotiations, the normal bilateral request-and-offer method has now been supplemented by the plurilateral approach, in which demandeurs and target countries form groups to negotiate to liberalise in various sectors. Over 20 such groups have been formed.

However, Ecuador and other countries can continue to insist that participation in such groups are on a voluntary basis, and that no country should face pressures to become a target country or to participate in any of the plurilateral groups.

Negotiations on Rules

The proposals for establishing new rules in services (domestic regulations, government procurement, subsidies and emergency safeguard measures) may alter the conditions under which national

regulations are made. They could have negative or positive effects. Developing countries therefore have an important stake in these negotiations.

Ecuador should play an active role in these negotiations and join with other like-minded developing countries to protect its interests, especially its policy space. It should also analyse the implications of the proposed rules for the implementation of its Constitution and its National Plan for Good Living. (See Annex 1 tables for a preliminary assessment of these implications.)

Avoid FTAs or EPAs with Services or Investment Components

Impatient with the development dimensions and the architecture in the GATS, developed countries have placed services and investment at the centre of bilateral and plurilateral FTAs and EPAs. The principles and provisions of the services component of these FTAs are counter to development principles.

Developing countries like Ecuador should avoid such FTAs or at least insist on excluding services and investment from an FTA or EPA involving a developed country as a partner.

This is well within what the WTO allows, as an FTA can involve only trade in goods, and does not have to include any other issue. In fact if services are to be included in a FTA, the GATS requires that a substantial number of sectors have to be included, and this will be to the disadvantage of the developing country.

Formulate National Services Policy

Developing countries like Ecuador should as a matter of priority have a National Services Policy, in the same way that many countries have an Industrial Policy or an Agriculture Policy. Such a Policy is necessary to guide the position that Ecuador is to take with regard to trade or investment negotiations (whether multilateral or bilateral).

Such a Services Policy would have to incorporate the country's needs and policy objectives, its productive capacity and ability to compete with large foreign companies, and its need for regulation and for participation of the domestic firms and agencies (public and private) in the various sectors. Consideration should be given to critical services that are important to the economy (finance), to security (telecommunications, energy, power and electricity, water), to public needs (water, education, health, food distribution) and to information and culture (audio-visual services etc), so that a critical minimum of local participation (and public sector participation) is secured.

Distinguish Between Actual Liberalisation and Liberalisation Commitments under GATS or an FTA

In such a policy, it is important to distinguish between actual liberalization and a commitment to liberalise under the WTO or an FTA.

It may be useful for a country to liberalise in order to obtain some benefits from foreign participation in certain areas, but refrain from making a binding commitment of this liberalisation; thus, if the country

wants to reverse that policy later, it has the policy space to do so. Whereas once a commitment is made in the WTO or FTA, compensation has to be provided if a policy reversal is needed.

Implications of Ecuador's Constitution and National Plan for Good Living for Services Policy

For Ecuador, the policy should take into account its Constitution and the National Plan for Good Living.

The implications of these two key documents for a national services policy will be very important. An attempt to show some of these is the Table in Annex 1 which provides details of some of the provisions of the Constitution and the National Plan, and how these have implications for Ecuador's positions in trade and investment negotiations in various fora.

Ecuador's Constitution (2008) and the National Plan for Good Living (NPGL), 2009-2013⁸⁶ must be complied with⁸⁷ and they provide the principles, objectives and policy guidelines for any services or investment liberalisation. Therefore where the Constitution and NPGL establish requirements for Ecuador's position on services or investment, Ecuador may not compromise on these positions during bilateral, regional or international negotiations in any fora.

Some of the ways in which the Constitutional and NPGL provisions can be translated into services liberalisation or investment liberalisation or protection principles, objectives and policy guidelines are set out in the Tables in Annex 1 and 2. These include analysis of the ways in which services liberalisation may make it difficult to implement tobacco control and provide free health care sustainably.

The Constitution also requires priority to be given in public procurement to domestic goods and services. This makes it clear that Ecuador cannot agree to the current negotiations to liberalise government procurement at the WTO or in an FTA.

The Constitution clearly prohibits:

- the application of international trade instruments from undermining directly or indirectly the right to health or services
- Ecuador's entry into treaties that allow investor-to-state dispute settlement

The National Plan for Good Living (NPGL) prohibits the negotiation of agreements resembling free trade agreements (FTAs).

The NPGL requires foreign direct investment to be provided with transfer of technology. This requirement would need to be listed as a national treatment limitation in any services and investment commitments and the Tables discuss other possible restrictions on technology transfer requirements that Ecuador would need to avoid.

The domestic regulations disciplines being proposed at the WTO, if agreed and applicable, may also make it difficult to comply with a number of the social (including labour law), cultural, environmental and economic requirements set out in the Constitution and NPGL as the Tables in the Annex indicate.

⁸⁶ Only the summarized version (120 pages) was available to the author.

⁸⁷ For example Article 280 of the Constitution and: public standards and acts which do not conform to the Constitution are not legally binding, Article 424 of the Constitution.

Annex 1: Constitutional and National Development Plan requirements

Ecuador's Constitution (2008) and the National Plan for Good Living (NPGL), 2009-2013⁸⁸ must be complied with⁸⁹ and they provide the principles, objectives and policy guidelines for any services liberalisation. Therefore in addition to complying with these in its domestic laws and policies (for example in any regulations or unilateral services liberalisation), where the Constitution and NPGL establish requirements for Ecuador's position on services, Ecuador may not compromise on these positions during bilateral, regional or international negotiations in any fora.

Some of the ways in which the Constitutional and NPGL provisions can be translated into services liberalisation principles, objectives and policy guidelines are set out in the tables below. For example, the UN High Commissioner for Human Rights reminds States that 'certain services are entitlements, not privileges, and should be guaranteed by the State. . . Given the various issues that arise in the liberalization of trade in services, the commitments made to opening markets could have fundamental consequences for States' ability to meet their obligations under human rights law.'

The Tables also do not have space to consider the interlinkage between different human rights, because as Article 32 of the Constitution points out, the fulfillment of the right to health is linked to other human rights such as the right to food and water. For example, experts note that 'Several GATS sectors have profound public health implications, notably health, education, and water and sanitation services'.⁹⁰

These Tables do not include all environmental regulations required by the Constitution and NPGL as it is assumed that the environmental exceptions in Article XIV GATS (and its equivalent in any FTAs) will be sufficient to protect some of Ecuador's environmental measures. In practice, the equivalent environmental exception in Article XX of the General Agreement on Tariffs and Trade (GATT) has proven very difficult to use successfully because there has to be no alternative measures possible that could be reasonably expected to be used and that cause less violation of GATT, even if the alternatives are administratively difficult.⁹¹

These Tables assume that developing countries will not obtain an effective development exception to the domestic regulations disciplines for the reasons outlined in the domestic regulation section of this paper.

These Tables do not consider the impact of a non-violation complaint under GATS or some FTAs on Ecuador's ability to implement the requirements of the Constitution and NPGL as it is difficult to predict the kinds of non-violation complaints which will be brought and succeed. Nevertheless, Ecuador should factor the possibility of non-violation complaints into its consideration before making any services commitments in an FTA or at the WTO. (Non-violation complaints are where even if Ecuador complies with all of its GATS/FTA commitments, it can nevertheless be sued if another party to the treaty considers that any benefit it could reasonably have expected to accrue to it under a

⁸⁸ Only the summarized version (120 pages) was available to the author.

⁸⁹ For example Article 280 of the Constitution and public standards and acts which do not conform to the Constitution are not legally binding, Article 424 of the Constitution

⁹⁰ <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2566018/>

⁹¹ http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_07_e.htm#article20C3aiii

specific commitment of Ecuador's under Part III in the case of GATS (or the services chapter of USFTAs) is being nullified or impaired as a result of the application of any measure which does not conflict with the provisions of GATS (Article XXIII.3 GATS) (or the FTA).

Due to limited space, these Tables do not consider the impact of investment protection provisions (such as fair and equitable treatment, expropriation and investor-to-state dispute settlement) as these are not directly included at the WTO or in EU FTAs at the moment. The bilateral investment treaty section of this paper has some discussion of the potential impacts of such provisions.

Since space is limited and the authors are not sufficiently familiar Ecuador's economy, society and laws, this is only a preliminary indication of some of the areas that need to be investigated further with wide consultation of all affected Ministries and sectors (for example including patients in rural areas etc) and careful consideration of the implications of Ecuador's current services commitments at the WTO and in BITs etc and its proposed commitments in current negotiations (eg in any EU FTA and the Doha Round).

Table 1: Some Constitutional requirements and their implications for services policy

Article of the Constitution	Provision of the Constitution	Services policy required to implement this Constitutional provision
3.1, 11.8, 32, 39, 43, 45, 46.1, 66.2, 359	The State's prime duties are to guarantee rights including the right to health	<p>Services liberalisation⁹² may lead to increased foreign private investment which according to the Report of the UN High Commissioner for Human Rights⁹³ can lead to:</p> <ul style="list-style-type: none"> (a) The establishment of a two-tiered service supply with a corporate segment focused on the healthy and wealthy and an underfinanced public sector focusing on the poor and sick; (b) Brain drain, with better trained medical practitioners and educators being drawn towards the private sector by higher pay scales and better infrastructures; (c) An overemphasis on commercial objectives at the expense of social objectives which might be more focused on the provision of quality health, water and education services for those that cannot afford them at commercial rates; (d) An increasingly large and powerful private sector that can threaten the role of the Government as the primary duty bearer for human rights by subverting regulatory systems through political pressure or the co-opting of regulators. <p>The proposed domestic regulations disciplines (if they apply to this sector) may not allow the recouping of the costs to Ecuador's Government of educating (especially given the Constitution's commitment to free education, including the third-level of higher education) health professionals who go overseas to work through higher licensing etc fees.</p> <p>Other ways in which services liberalisation can affect health include through its limitations on tobacco control measures.⁹⁴ Tobacco use kills more than 5million people in a year⁹⁵ and countries like Malaysia spend almost half the</p>

⁹² References to 'services liberalisation' in these Tables means 'services liberalisation without any relevant scheduled limitations'. The EU and other developed countries have been asking developing countries to remove the limitations on their services commitments in the current Doha Round negotiations at the WTO, so it may be unlikely that they would agree for Ecuador to add meaningful limitations to any services liberalisation commitments it makes.

⁹³ E/CN.4/Sub.2/2002/9

⁹⁴ See for example <http://www.takingontobacco.org/trade/tobacco.trade.v02.backgrd.pdf>.

⁹⁵ <http://www.who.int/mediacentre/factsheets/fs339/en/index.html>

Article of the Constitution	Provision of the Constitution	Services policy required to implement this Constitutional provision
		<p>Ministry of Health’s budget on treating tobacco-related disease⁹⁶. According to the World Health Organization (WHO), bans on tobacco advertising, promotion and sponsorship can reduce tobacco consumption.⁹⁷ Ecuador is a party to the WHO Framework Convention on Tobacco Control which came into force in 2005.⁹⁸ This Convention requires a number of tobacco control measures, including a comprehensive ban on all tobacco advertising, promotion and sponsorship.⁹⁹ If Ecuador makes liberalisation commitments (including market access) in the relevant service sectors at the WTO or in an FTA, it may not be able to ban tobacco advertising etc.¹⁰⁰ Similarly, the bans on breast-milk substitute advertising that the International Code of Marketing of Breast-milk Substitutes (adopted by the World Health Assembly) requires,¹⁰¹ may be prohibited by services liberalisation (including market access) commitments at the WTO or in FTAs. If the domestic regulations disciplines have a ‘least trade-restrictive’ requirement (which could be incorporated via the ‘objective’ criteria, see domestic regulation discussion) which United Nations Conference on Trade and Development (UNCTAD) staff have questioned whether it should apply to health policies and pointed out that it appears to be particularly problematic for developing countries, including because they need to carefully decide whether they want to spend their scarce resources minimizing negative</p>

⁹⁶ <http://www.ftamalaysia.org/article.php?aid=61>

⁹⁷ <http://www.who.int/mediacentre/factsheets/fs339/en/index.html>

⁹⁸ http://www.who.int/fctc/signatories_parties/en/index.html

⁹⁹ Article 13.2, <http://whqlibdoc.who.int/publications/2003/9241591013.pdf>, available in Spanish at <http://whqlibdoc.who.int/publications/2003/9243591010.pdf>

¹⁰⁰ Eg <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1766197/pdf/v014p0ii19.pdf>, unless the health exception in Article XIV GATS (and its equivalent in any FTAs) is sufficient to protect Ecuador’s health measures. In practice, the equivalent health exception in Article XX of GATT has proven very difficult to use successfully because there has to be no alternative measures possible that could be reasonably expected to be used and that cause less violation of GATT, even if the alternatives are administratively difficult, http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_07_e.htm#article20C3aiii.

¹⁰¹ Article 5.1, <http://whqlibdoc.who.int/publications/9241541601.pdf>. This is clearly a health issue because babies which are not breastfed are 25 times more likely to die and those who were breastfed as babies have better health even in adult life http://whqlibdoc.who.int/publications/2008/9789241594295_eng.pdf.

Article of the Constitution	Provision of the Constitution	Services policy required to implement this Constitutional provision
		effects on trade when it can also be administratively more burdensome. ¹⁰² They note that a requirement for hospitals to provide some of their services on a non-profit basis is not the least trade-restrictive method of achieving the aim and so may violate domestic regulations disciplines. If Ecuador intends to offset some of the cost of providing free public health care by requiring all hospitals to provide some services free or on a non-profit basis, this may not be possible if domestic regulations disciplines are adopted for this sector.
3.1, 12, 66.2 (including the right to environmental sanitation)	The State's prime duties are to guarantee rights including the right to water	In discussing the Cochabamba case, the Report of the UN High Commissioner says that the government's decision to restore the water system to public ownership 'is consistent, under the circumstances, with the Government's obligation to ensure access to an adequate supply of safe drinking water as a component of the right to health.' ¹⁰³ When Manila privatised its water, water prices tripled which directly caused spending on children's food to be cut and other children to be withdrawn from schools in order to save on expenses such as school meals, and sometimes children dropped out of education permanently. ¹⁰⁴ The UN Special Rapporteur on the Right to Food has said that the higher water prices due to privatisation have deprived the poorest people of affordable drinking water. ¹⁰⁵ If Ecuador commits to liberalising water and related sectors at the WTO or in an FTA and it wishes to renationalise privatised water companies, it is not possible without providing compensation ¹⁰⁶ . Professor Carlos Correa and others ¹⁰⁷ provide the example of a government

¹⁰² 'Strategic considerations for developing countries: the case of GATS and health services', Mashayekhi M, Julsaint M, Tuerk E, in 'International trade in health services and the GATS', Editors Blouin C, Drager N, Smith R, 2006, World Bank.

¹⁰³ E/CN.4/Sub.2/2002/9

¹⁰⁴ http://www.3dthree.org/pdf_3D/Guide-075Ch5.pdf

¹⁰⁵ http://www.3dthree.org/pdf_3D/Guide-075Ch5.pdf

¹⁰⁶ Eg under Article VIII GATS.

¹⁰⁷ 'Making commitments in health services under the GATS: legal dimensions', Fidler DB, Drager N, Correa C, Aginam O in 'International trade in health services and the GATS', Editors Blouin C, Drager N, Smith R, 2006, World Bank.

Article of the Constitution	Provision of the Constitution	Services policy required to implement this Constitutional provision
		that decides to renationalise its privatised water to reverse the higher water prices the private company implemented and to increase equity in water distribution. This implementation of a monopoly when a market access commitment has been made in that sector would require negotiations for compensation. The Special Rapporteur on the Right to Health ‘questions the appropriateness of the requirement of compensatory adjustments if a decision to modify or withdraw a commitment is linked to the existence of a negative impact on the enjoyment of the right to health.’ ¹⁰⁸
15	The State shall promote in the public and private sectors the use of environmentally clean technologies	If the proposed domestic regulations disciplines apply to these sectors, this may not be possible, see domestic regulation discussion
15	Prohibition of activities such as marketing, importation, transport and storage of chemical, biological and nuclear weapons, highly toxic persistent organic pollutants, internationally prohibited agrochemicals and experimental biotechnologies and agents and genetically modified organisms that are harmful to human health or that jeopardise food sovereignty or ecosystems as well as the introduction of nuclear residues and toxic waste	This would probably need to be listed as a limitation to any services liberalisation commitments Ecuador makes in the relevant sectors at the WTO or in FTAs
16.2	Universal access to information and communication	Experts have raised concerns about the impact of the EU FTA services template on the ability to ensure universal service ¹⁰⁹

¹⁰⁸ E/CN.4/2004/49/Add.1

¹⁰⁹ See Legal analysis of services and investment in the CARIFORUM-EC EPA: Lessons for other developing countries,

Article of the Constitution	Provision of the Constitution	Services policy required to implement this Constitutional provision
	technologies	
17.1	The State shall make sure that the general welfare of the community prevails in use of the wireless free bands and/or ¹¹⁰ radio spectrum frequencies	If this is implemented via a licensing or qualification requirement or procedure or technical standards and the proposed domestic regulations disciplines apply, the ‘general welfare’ requirement may not be ‘transparent’, ‘objective’ or ‘relevant’ as the proposed disciplines require, see discussion of domestic regulation
19	The law shall foster the creation of spaces for the dissemination of independent national production	If Ecuador wishes to ensure that locally made programs and content appear in its media, this can be forbidden if it liberalises the relevant services and investment sectors at the WTO or in an FTA, see local content discussion
37.1 (see also 38)	The State guarantees the elderly specialised healthcare free of charge and free access to medicines	If domestic regulations disciplines apply to this sector(s), preventing service suppliers from charging fees may violate the disciplines (as concerns have been raised about fixed fees not being objective as the disciplines require ¹¹¹). This applies wherever the Constitution requires service provision free-of-charge
50	The State shall guarantee free care to all people with disastrous or highly complex diseases	If domestic regulations disciplines apply to this sector(s), preventing service suppliers from charging fees may violate the disciplines (as concerns have been raised about fixed fees not being objective as the disciplines require ¹¹²). This applies wherever the Constitution requires service provision free-of-charge
57.4	Indigenous lands are exempt from paying fees or taxes	If Ecuador grants national treatment (without sufficient exceptions) in the relevant sectors in a trade agreement, it would also have to exempt foreign investors from paying fees or taxes on land
57.7	Indigenous communes, communities, peoples and nations have the right to participate in the	If the proposed domestic regulations disciplines applied to these sectors, these requirements (to participate in the profits and be compensated for damage) may not comply

by Law Professor Jane Kelsey, July 2010 at www.southcentre.org

¹¹⁰ As the English translation is not clear whether the general welfare of the community applies only to the free bands for use of wireless networks or also to the use of the radio spectrum frequencies.

¹¹¹ ‘The draft GATS domestic regulation disciplines – potential conflicts with developing country regulations’, Analytical Note, SC/AN/TDP/SV/12, October 2009, www.southcentre.org

¹¹² ‘The draft GATS domestic regulation disciplines – potential conflicts with developing country regulations’, Analytical Note, SC/AN/TDP/SV/12, October 2009, www.southcentre.org

Article of the Constitution	Provision of the Constitution	Services policy required to implement this Constitutional provision
	profits earned from prospecting, producing and marketing non-renewable resources on their lands and to receive compensation for social, cultural and environmental damages caused to them	with the current requirement for criteria to be objective, transparent and relevant, see domestic regulation discussion
57	All forms of extractive activities are forbidden in territories of peoples living in voluntary isolation	Therefore Ecuador cannot open these territories to these activities in any services or investment liberalisation negotiations
61	Ecuadorians benefit from the right to be consulted	Ecuadorian positions on services liberalisation for bilateral and multilateral negotiations must therefore be based on consultations with Ecuadorians. For there to be meaningful consultation, negotiating texts and the negotiating history ¹¹³ would need to be released so that Ecuadorians can provide informed and relevant feedback in the consultations.
66.3(d)	Prohibition of the use of genetic material and scientific experimentation that undermines human rights	Prohibited activities that Ecuador cannot be confident would be covered by the usual exceptions in GATS ¹¹⁴ or FTAs should not be liberalised in WTO, FTA or BIT negotiations
66.7	The right of all persons wronged by information broadcast by the media to immediate mandatory and free corresponding correction, reply or response in the same broadcasting slot or time	If the proposed domestic regulations disciplines applied to these sectors, these requirements (for a right to reply) may not comply with the current requirement for criteria to be objective, transparent and relevant, see domestic regulation discussion
72 (also in 276.4)	The State shall adopt adequate measures to	If Ecuador requires use of environmentally clean technologies etc, if the proposed

¹¹³ According to Article 32 of the Vienna Convention on the Law of Treaties (VCLT), the preparatory work of the treaty can be used to interpret the treaty obligations. (Article 32 VCLT codifies customary international law, eg according to the International Court of Justice in *Libya v Chad*, ICJ Repts (1994) page 4 para 41 and so is binding on all countries, even if they are not party to the VCLT). African Governments ensured civil society were informed about FTA negotiations and the negotiating history by including them on the government negotiating delegations (eg for EU FTA/EPA negotiations) so that they were in the negotiating room, see for example <http://www.abcburkina.net/en/nos-dossiers/vu-au-sud-vu-du-sud/762-380-ouagadougoun-une-semaine-de-negociations-sur-les-ape-pour-rien>.

¹¹⁴ Eg Article XIV

Article of the Constitution	Provision of the Constitution	Services policy required to implement this Constitutional provision
	eliminate or mitigate harmful environmental consequences	domestic regulations disciplines apply to these sectors, this may not be possible, see domestic regulation discussion
73	The introduction of organisms and organic and inorganic material that might definitively alter the nation's genetic assets is forbidden	Prohibited activities that Ecuador cannot be confident would be covered by the usual exceptions in GATS ¹¹⁵ or FTAs should not be liberalised in WTO, FTA or BIT negotiations
85 (see also 100, 137)	Participation of persons, communities, peoples and nations in the drafting of public policies shall be guaranteed	In the preparation of any national services, health or other policy that is affected by services liberalisation, participation is required. For this participation to be meaningful, if international treaties set the requirements for these policies (eg by setting limits on regulations through services commitments at the WTO or in FTAs etc), then participation is also required in the negotiation of these treaties. (Otherwise the treaties that dictate the public policy are negotiated without public participation and the public participation only begins at the stage when the only choice left is how to implement the treaty – which already determines the substantive obligations).
171	The State shall guarantee that the decisions of indigenous jurisdiction are observed by public institutions and authorities	Ecuador should therefore ensure that its services policy (and any policies (such as health etc) that involve services) and any bilateral/international agreements it enters into regarding services do not conflict with decisions etc of indigenous justice.
264.4	Municipal governments have the exclusive jurisdiction (without detriment to others established by law) to provide the public services of drinking water, sewerage, wastewater treatment, solid waste management, environmental remediation and other services as established	If this means that municipal governments have monopolies in any or all of these service sectors, then Ecuador cannot make liberalisation commitments at the WTO, in FTAs or BITs etc in these sectors (unless they are listed in the schedules as limitations).

¹¹⁵ Eg Article XIV.

Article of the Constitution	Provision of the Constitution	Services policy required to implement this Constitutional provision
	by law	
277.6 (see also 284.2, 350, 351, 385.1, 385.3, 387.2 (foster scientific and technological research)) 58	-The State's duties include to bolster science and technology - investment in research and development	If Ecuador intends to do this by providing subsidies, if it has made national treatment commitments in the relevant sectors, then it must provide these subsidies to like foreign services and service suppliers located in Ecuador as well. ¹¹⁶ This applies wherever Ecuador provides subsidies that it only wants to give to its nationals
282	There shall be equitable access of campesinos to land and the land concentration and large estate farming is forbidden	This means Ecuador must maintain exceptions for these land use policies in any services liberalisation commitments it makes
282, 318	Privatisation of water is forbidden	See discussion under right to water above
284.6, 326.1	The economic policy shall aim to foster full employment and the State shall promote full employment	To help achieve this, if Ecuador wanted to require foreign companies to hire locals, this would have to be listed as a limitation to any relevant services liberalisation commitments ¹¹⁷
288	Priority in public procurement shall be given to domestic products and services	This make it clear that Ecuador cannot agree to liberalise government procurement at the WTO or in an FTA, see government procurement discussion
312	Financial entities/groups cannot possess permanent holdings in non-financial companies and financial entities/groups (and their legal representatives, board members and shareholders) cannot have any shares in controlling capital/ investment/ assets of the media	If Ecuador makes services liberalisation commitments in the relevant sectors, it may need to include these restrictions as exceptions to these liberalisation commitments
313	The State has the right to administer, regulate and manage strategic sectors following the principles	If these sectors are covered by the proposed domestic regulations disciplines, this type of regulation may not be possible, see domestic regulation discussion

¹¹⁶ WTO document S/L/92.

¹¹⁷ See for example Bisset R et al, 'Sustainability impact assessment of proposed WTO negotiations: environmental services', 2003.

Article of the Constitution	Provision of the Constitution	Services policy required to implement this Constitutional provision
	of environmental sustainability, precaution, prevention and efficiency	
314	The State shall be responsible for the provision of public services of drinking and irrigation water, sanitation, electricity, telecommunications, roads, seaport and airport facilities and others established by law	If these are being provided as monopolies, these sectors cannot be liberalised in services negotiations (or if those sectors are liberalised, the monopoly will have to be listed as an exception to market access). ¹¹⁸
315	The share of state enterprises in companies where the State shall always have the majority shareholding for participation in the management of strategic sectors and the provision of public services shall be specified by law	If Ecuador makes liberalisation commitments in these sectors, it will need to include these requirements as a broadly enough worded limitation on market access
318	The management of water shall be exclusively public or community-based. The public service of sanitation and the supply of drinking and irrigation water shall be provided only by legal entities of the State or communities	If these services sectors are liberalised, these restrictions must be included as limitations on the services liberalisation commitments
326-332	Labour laws and protections	If the proposed domestic regulations disciplines apply to these sectors, they may not permit these types of protections (such as the basic wage requirement), see domestic regulation discussion
334.3 (see also 385.1, 387.3 and 423.2 for scientific and	The State's duties include to boost and support the development	If Ecuador intends to do this by providing subsidies, if it has made national treatment commitments in the relevant sectors, then it

¹¹⁸ 'Ten steps to consider before making commitments in health services under the GATS', J Nielson in 'International trade in health services and the GATS', Editors Blouin C, Drager N, Smith R, 2006, World Bank.

Article of the Constitution	Provision of the Constitution	Services policy required to implement this Constitutional provision
technological knowledge)	and dissemination of knowledge and technology for production processes	must provide these subsidies to like foreign services and service suppliers located in Ecuador as well. ¹¹⁹
339	The State shall give priority to domestic investment	If this means that the State will prioritise Ecuadorian ownership of Ecuadorian land and companies etc rather than ownership by foreign investors, Ecuador should therefore not bind itself to allowing foreign investors (Mode 3) into any sectors in WTO, FTA or BIT negotiations
343, 345, 347	Requirements to in education to: - enable the generation and use of wisdom, arts and culture -incorporate an intercultural vision -provide free social services and psychological support -provide education in citizenship, sexuality and the environment -have the main language for education as the language of the respective nation -ensure the teaching of at least one ancestral language	If the proposed domestic regulations disciplines apply to this sector, these requirements may not be permitted, see domestic regulation discussion ¹²⁰
352	Higher education institutions (whether public or private) are not-for-profit	If Ecuador liberalises this sector(s), it would need to list this as an exception to market access
364	The State shall control and regulate advertising for alcohol and tobacco	Depending on how this is done, this may need to be listed as an exception to any services liberalisation commitments in relevant sector(s), see also tobacco discussion above
365	For no reason shall public or private institutions or healthcare professionals refuse	If Ecuador commits to liberalising the relevant sectors, presumably this requires ensuring that any limitations on liberalisation still allow the provision of emergency care by these

¹¹⁹ WTO document S/L/92.

¹²⁰ ‘The draft GATS domestic regulation disciplines – potential conflicts with developing country regulations’, Analytical Note, SC/AN/TDP/SV/12, October 2009, www.southcentre.org

Article of the Constitution	Provision of the Constitution	Services policy required to implement this Constitutional provision
	emergency care	institutions and professionals. If the proposed domestic regulation disciplines apply to this sector(s) then this requirement may not meet their criteria, see domestic regulation discussion
367	The social security system cannot be privatised	If Ecuador commits the relevant service sector(s), then this should be a market access limitation
398	Each player in the process of production, distribution and marketing of services shall accept direct responsibility for preventing any environmental impact, for mitigating and repairing the damages caused, and for maintaining an ongoing environmental monitoring system	If the proposed domestic regulation disciplines apply to this sector(s) then this requirement may not meet their criteria, see domestic regulation discussion
405	Foreigners and foreign companies cannot acquire land deeds or concessions in areas of national security or protected areas	If Ecuador makes commitments to liberalise relevant sector(s) and mode(s), this will need to be listed as a national treatment limitation
407	Activities for the extraction of non-renewable natural resources are forbidden in protected areas and in areas declared intangible assets, including forestry production (with certain exceptions)	If Ecuador makes commitments to liberalise relevant sector(s), this may need to be listed as a market access limitation
414	The State shall adopt adequate measures for the mitigation of climate change by limiting greenhouse gas emissions and air pollution	If Ecuador requires use of environmentally clean technologies etc, if the proposed domestic regulations disciplines apply to these sectors, this may not be possible, see domestic regulation discussion
416.11 (see also 423)	It advocates as a priority the economic integration	This means that any services liberalisation commitments by Ecuador should be prioritised

Article of the Constitution	Provision of the Constitution	Services policy required to implement this Constitutional provision
	of the Andean Region, South America and Latin America	to be those for service suppliers from these regions to promote regional services champions and networks to increase economic integration of these regions
421	The application of international trade instruments shall not undermine directly or indirectly the right to health or services	See above for some of the ways in which services liberalisation commitments can undermine the right to health. Commitments at the WTO or in FTAs that undermine universal access to services are therefore forbidden
422	Treaties where the Ecuadorian State yields its sovereign jurisdiction to international arbitration entities in disputes involving contracts or trade between the State and natural persons or legal entities cannot be entered into	This means that Ecuador cannot agree to investor-to-state dispute settlement in FTAs or BITs etc. This also means that Ecuador cannot agree to most-favoured-nation treatment provisions that would extend the investor-to-state dispute settlement in any existing agreements (eg remaining BITs) to new parties

Table 2: Some¹²¹ National Development Plan provisions and their implications for services policy

Page ¹²²	Requirement	Services policy required to implement this
Eg 7, 56-59, 68, 85, 87, 104	Promote community-based eco-tourism	This does not require any binding services liberalisation at the WTO or in an FTA as Ecuador can allow tourists without liberalising any services and it is not clear that binding services liberalisation brings more tourists. If Ecuador made national treatment commitments in relevant sectors, it could not require that all tour guides were citizens (for example to preserve jobs for locals, to maintain cultural heritage and to ensure the tourism was appropriate and respectful).
16 (see also 65)	Direct State resources towards education, health, scientific and technological research	If Ecuador intends to do this by providing subsidies, if it has made national treatment commitments in the relevant sectors, then it must provide these subsidies to like foreign services and service suppliers located in Ecuador as well. ¹²³ This applies wherever Ecuador provides subsidies that it only wants to give to its nationals
22	Citizen participation and public deliberation in decision-making processes must be allowed in a democratic State	Therefore in the preparation of any national services, health or other policy that is affected by services liberalisation, participation is required. For this participation to be meaningful, if international treaties set the requirements for these policies (eg by setting limits on regulations through services commitments at the WTO or in FTAs etc), then participation is also required in the negotiation of these treaties. (Otherwise the treaties that dictate the public policy are negotiated without public participation and the public participation only begins at the stage when the only choice left is how

¹²¹ These Tables do not include indirect effects. For example if liberalization of financial services leads to less access to credit for production for Ecuador’s small farmers and micro, small and medium enterprises and this means that these workers have less income to spend on their children’s education (especially for any aspects not provided free by the state, for example textbooks or uniforms), then financial services liberalization indirectly hampers the objectives of increased access to education.

¹²² This refers to the Summarised Version in English

¹²³ WTO document S/L/92.

Page ¹²²	Requirement	Services policy required to implement this
		to implement the treaty – which already determines the substantive obligations).
23 (and 25 requires affirmative action)	The principles for good living include space for specific policies of affirmative action to mend the historic advantages enjoyed by certain groups	One way to do this that other developing countries (such as Malaysia and South Africa) have successfully used is to set aside government procurement for these disadvantaged groups. This is less possible if Ecuador liberalises government procurement (to allow foreign products and companies (including service companies) to supply the government) at the WTO or in FTA negotiations, see government procurement discussion
45, 61 62, 79, 105	-Prioritise South-South integration -Prioritise UNASUR, ALBA and OELAC integration	This means that any services liberalisation commitments by Ecuador should be prioritised to be those for service suppliers from the South/those regions to increase economic integration with other developing countries
45	‘The negotiation of agreements resembling free trade agreements must be prevented’	This is a clear prohibition on certain types of agreements (FTAs).
52	The new approach could begin to give importance to the idea that, historically, investment financing has essentially comprised national capitals and domestic savings, and not external savings and the transfer of capitals from rich countries	If this means that the State will prioritise Ecuadorian ownership of Ecuadorian land and companies etc rather than ownership by foreign investors, Ecuador should therefore not bind itself to allowing foreign investors (Mode 3) into any sectors in WTO, FTA or BIT negotiations
52	The new government has expressed its implicit will to expand the State’s ability to control the conditions set by multinational institutions and transnational corporations	It is unclear whether the proposed domestic regulations disciplines (or the market access and national treatment requirements if services liberalisation commitments are made) would allow this increased regulation
62	Subsidies, duties and safeguards for the selective substitution of imports, within the framework of international agreements, may also play an important role	This shows the importance of Ecuador retaining the right to subsidise its services sectors in the current discussion of disciplines on services subsidies at the WTO and the importance to Ecuador of obtaining effective emergency safeguard measures for services in the current WTO negotiations

Page ¹²²	Requirement	Services policy required to implement this
63 (and 57: transfer of applied technology)	Foreign direct investment must also be provided together with technology and knowledge	<p>Full national treatment commitments in services liberalisation at the WTO or in FTAs prevent Ecuador from requiring technology transfer (or from requiring its citizens to be on boards of directors (to facilitate transfer of technology and knowledge to locals)).¹²⁴</p> <p>Full market access commitments in services liberalisation would prevent Ecuador from requiring joint ventures, another way that countries have successfully obtained technology transfer.¹²⁵</p> <p>Even if Ecuador sought to include limitations to market access and national treatment commitments to require technology transfer/joint ventures, the EU has been asking developing countries to remove these requirements in current negotiations at the WTO.¹²⁶</p> <p>Some BITs also explicitly limit the extent to which technology transfer can be required of foreign investors.¹²⁷</p>
64	Promote renewable energy projects	If Ecuador requires use of environmentally clean technologies etc, if the proposed domestic regulations disciplines apply to these sectors, this may not be possible, see domestic regulation discussion
67 (see also 78)	Implementation of environmental mitigation measures	If Ecuador requires use of environmentally clean technologies etc, if the proposed domestic regulations disciplines apply to these sectors, this may not be possible, see domestic regulation discussion
68	It is crucial to prevent and confront the levels of land,	If the proposed domestic regulations disciplines applied to these sectors, it is

¹²⁴ http://web.me.com/jane_kelsey/Jane/Pacific_Trade_EPA_files/RP31%20Jane%20Kelsey%2019%20July%202010.pdf.

¹²⁵ See for example http://www.policyalternatives.ca/sites/default/files/uploads/publications/reports/docs/TradeInvest_First%20Do%20No%20Harm.pdf.

¹²⁶ European Commission, “GATS 2000: Request from the EC and Its Member States To The People’s Republic of China”, 2002, available at: <http://www.esf.be/pdfs/countries/China%202003.pdf>; European Commission, “GATS 2000 request from the EC and its Member States — Brazil”, 2002, available at: <http://www.esf.be/pdfs/countries/Brazil%202003.pdf>, <http://www.gatswatch.org/docs/offreq/EUrequests/Brazil.pdf>, and “GATS 2000 request from the EC and its Member States — Tunisia”, available at <http://www.esf.be/pdfs/countries/Tunisia.pdf>.

¹²⁷ See for example the US Model BIT 2004.

Page ¹²²	Requirement	Services policy required to implement this
	water and atmospheric pollution, in urban, rural and marine arenas.	not clear that they would allow these environmental measures
79	Goal: reduce urban poverty	If reducing unemployment helps reduce poverty, then Ecuador may wish to require foreign companies to hire locals, but this would have to be listed as a limitation to any relevant services liberalisation commitments ¹²⁸
79	Recovering the sovereignty of the radio-electric spectrum in order to promote sovereign cultural production with content compatible with the new plurinational and intercultural State, is essential	If this includes plans to require or encourage local content, see discussion below. If this is intended to prevent foreign media ownership, Ecuador cannot make commitments to liberalise this sector(s) at the WTO or in FTAs
80 81	-Policies include: to ensure compliance with labour rights, to promote fair wages, to promote safe and healthy work conditions -goals include to decrease the percentage of people who receive less than the minimum vital wage by 27% by 2013	If the proposed domestic regulations disciplines apply to these sectors, they may not permit these types of protections (for example because they are irrelevant), see domestic regulation discussion
80 81	-Policy: to promote the reduction of unemployment -goals include to reduce youth unemployment by 24% by 2013	To help achieve this, Ecuador may wish to require foreign companies to hire locals, but this would have to be listed as a limitation to any relevant services liberalisation commitments ¹²⁹
85	Actions such as privatisation are paramount	If Ecuador makes or has a commitment to liberalise the relevant service sectors and it then wishes to renationalise the entire sector, it will have to negotiate possible compensation
86	State purchases, contracting and hiring of services in order to create the appropriate productive conditions	If this means directing state procurement to Ecuadorian products and suppliers, this is less possible if Ecuador liberalises government procurement at the WTO or in FTA negotiations, see government procurement discussion
86	Goal: to increase the	If this means directing state procurement

¹²⁸ See for example Bisset R et al, 'Sustainability impact assessment of proposed WTO negotiations: environmental services', 2003.

¹²⁹ See for example Bisset R et al, 'Sustainability impact assessment of proposed WTO negotiations: environmental services', 2003.

Page ¹²²	Requirement	Services policy required to implement this
	proportion of the role of small and medium-size companies (SMEs) in the State's purchasing of goods and services to 45% by 2013	to Ecuadorian SMEs, this is less possible if Ecuador liberalises government procurement at the WTO or in FTA negotiations, see government procurement discussion
86	Policies include to foster the endogenous generation of knowledge and technology as a public good	If Ecuador intends to do this by providing subsidies, if it has made national treatment commitments in the relevant sectors, then it must provide these subsidies to like foreign services and service suppliers located in Ecuador as well. ¹³⁰
86	Policies include to implement clean production technologies	If Ecuador requires use of clean production technologies etc, if the proposed domestic regulations disciplines apply to these sectors, this may not be possible, see domestic regulation discussion
97	The need to expand the fixed telephone network and the access to internet nationwide has been identified	If Ecuador allows private telecommunications suppliers, the services provisions that the EU requires in its FTAs make it more difficult to ensure universal access to telecommunications. For example, 'the World Bank has noted that liberalization could increase prices of some services and threaten the provision of transport and telecommunications services to the poor.' ¹³¹ If an EU FTA 'threatens "cross-subsidization" or other policies guaranteed to ensure universal service supply or raises prices of services for the poor, ¹³² the reduction in quality and quantity of services to the poor, isolated or vulnerable might result in de facto discrimination under human rights law.' ¹³³ (The Constitution prohibits discrimination, including on the grounds of socio-economic condition). ¹³⁴

¹³⁰ WTO document S/L/92.

¹³¹ World Bank, "Global Economic Prospects", 2001, p. 80.

¹³² World Bank, Global Economic Prospects, op. cit., p. 80 states "Frequently, the prices before liberalization are not determined by the market but set administratively, and are kept artificially low for certain categories of end-users and types of services products. Thus rural borrowers may pay lower interest rates than urban borrowers, and prices of local telephone calls and public transport may be kept lower than the cost of provision. This structure of prices is often sustained through cross-subsidization within public monopolies, or through government financial support. Liberalization threatens these arrangements."

¹³³ UN High Commissioner for Human Rights, E/CN.4/Sub.2/2002/9.

¹³⁴ Article 11.2 Constitution.

(Paper prepared for the Government of Ecuador, 2011.)