

## COMMENTS ON THE WTO SERVICES CHAIR'S APRIL 2011 REPORT (TN/S/36)

### SYNOPSIS

The majority of developing countries do not have a comparative advantage in trade in services. Therefore, they frequently find themselves on the defensive side of the GATS (General Agreement on Trade in Services) negotiations. For instance, many of the service sectors in developing countries are still in a formative stage and, therefore, might not be able to compete successfully with international firms. The Note is a response to the Report by the Chairman of the Council for Trade in Services to the Trade Negotiations Committee titled *Negotiations on Trade in Services* (WTO Doc. TN/S/36, 21 April 2011). This Note provides a chronological review of the GATS mandates as well as a critique of the Chair's proposals for the way forward in the services negotiations and their impact on the interests of developing countries, including the least developed countries (LDCs), in the negotiations.

April 2011

Geneva, Switzerland

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## I. Executive Summary

1. The majority of developing countries do not have a comparative advantage in trade in services. Therefore, they frequently find themselves on the defensive side of the GATS (General Agreement on Trade in Services) negotiations. For instance, many of the service sectors in developing countries are still in a formative stage and, therefore, might not be able to compete successfully with international firms. The Note is a response to the Report by the Chairman of the Council for Trade in Services to the Trade Negotiations Committee titled *Negotiations on Trade in Services* (WTO Doc. TN/S/36, 21 April 2011). This Note provides a chronological review of the GATS mandates as well as a critique of the Chair's proposals for the way forward in the services negotiations and their impact on the interests of developing countries, including the least developed countries (LDCs), in the negotiations.
2. In paragraph 69 of the Chair's report, reference is made to a proposal by Australia that would provide for a core group of Members to (i) bind current levels of market access in priority sectors; (ii) remove significant impediments to mode 3 trade (in particular limitations on foreign equity and forms of commercial presence); and (iii) enhance market access for mode 4.
3. Binding current levels of market access means that any market opening is to be locked into Members' WTO schedule. This means that Members are expected to provide market access, particularly in sectors that have been closed to date. And since the demanders in the services negotiations are mostly the developed countries, the Paragraph basically calls for developing countries to make offers of interest to them. The proposal contradicts the existing structure and principles of the GATS which require members to conduct negotiations on the basis of progressive liberalization. In addition the Negotiating Guidelines provide that current schedules of commitments to liberalize particular sectors are the starting point for negotiations rather than actual market conditions. Finally, some delegations have stated that binding commitments at current levels of market access goes beyond the level of ambition established in Annex C of the Hong Kong Ministerial Declaration.
4. It is worth recalling that developing countries have in place a very important flexibility mechanism in GATS through Article XIX:2, which allows them to open fewer sectors, liberalize fewer types of transactions, progressively extend market access in line with their development situation and attach conditions to their market access which enable them to meet Article IV objectives (increasing participation of developing countries). Many developing countries simply cannot match the level of ambition expected by developed countries because, on the one hand, they generally do not have strong domestic service suppliers that are able to compete on an equal footing with developed country service suppliers and, on the other, retaining strong domestic service suppliers in key and sensitive sectors is an important development objective. Moreover, developed countries have not provided offers that are

meaningful to developing countries. This is mainly due to the lack of substantial mode 4 commitments by developed countries. The current obstacles to mode 4 trade are considerable. These include economic needs tests conducted in the absence of clearly defined criteria; vague definitions for the categories of persons included in schedules; the limited number of commitments for categories de-linked from commercial presence; the bias in favour of highly-skilled persons; the lack of recognition of certain qualifications and visa and requirements related to work permits.

5. The LDC Group tabled a draft waiver from MFN obligations. This is essentially a waiver from the most-favoured nation treatment clause (Article II. 1) in GATS to allow Members to provide preferential and more favourable treatment to services and services suppliers of LDCs. The waiver has been identified as offering the most satisfactory way of fulfilling this part of the negotiations. The Chair reports that two main issues had arisen in the draft text. Some Members stated that the types of preferences covered by the waiver, in order to be effective needed to go beyond market access measures; others stressed the importance of restricting the coverage of the waiver to market access measures. Limiting the scope to market access only would run contrary to the spirit of the Hong Kong decisions.
6. The Chair of the Working Party on Domestic Regulation went through the March 2009 draft text and divided the text into three broad categories: - paragraphs that are agreed from the 2009 text on an *ad referendum* basis; paragraphs that have one single alternative proposal with bracketed wording differences; and paragraphs that have multiple alternative proposals, presumably the ones that are the most problematic.
7. The Chair's characterization of the proposed disciplines into three broad categories does not reflect the actual dynamics in the domestic regulation negotiations. In the first category for example (paragraphs that are agreed from the 2009 text on an *ad referendum* basis), the Chair's perception is that material points have been agreed upon by a majority of the Membership and there are no proposals for alternative language in situations where Members are not in agreement. Some Members do not share this view of the process. They give as illustration - the fact that in Rev.2 of the Chairman's consultative note (RD/SERV/46/Rev.2), a number of language proposals have been presented and conclusive discussions on these options have not yet occurred.
8. The report reinstates the necessity tests in the disciplines in spite of arguments by some Members that the necessity test had already been rejected in the March 2009 draft text. The majority of developing countries have expressed opposition to the inclusion of necessity tests, which are employed to determine whether a trade restrictive measure is absolutely essential or if there are other less trade restrictive

ways to achieve a certain end. These tests can result in severe restraints to the “right to regulate.”

9. In addition there is no consensus on the other major themes namely “pre-established”, “technical standards” and the “development chapter”.
10. It is worth mentioning that the proposed domestic regulation disciplines stipulate that countries’ measures relating to licensing requirements, licensing procedures, qualification requirements, qualification procedures and technical standards should be based on ‘objective and transparent criteria’ and ‘relevant’ to the supply of the services. They should in principle not be ‘disguised restrictions on trade’; they should be ‘as simple as possible’ etc.
11. These rules can have an innumerable number of consequences. Countries’ stringent measures vis-à-vis the financial sector could be said to be unnecessarily burdensome or strict and should be relaxed. Doing so could have possible economy-wide consequences. Environmental regulations or those taking into account tribal sensitivities could be found, by a foreign construction company to be a ‘disguised restriction on trade’, not ‘objective’ or not ‘pre-established’. Since services regulation affects not only the economy, but also people’s well-being and access to essential/universal services; societal preferences and cultural norms, the potential effects of these disciplines under negotiations are far-reaching.

## II. GATS Mandates

12. The objectives and mandate for this round of GATS negotiations were decided on 29 March 2001 with the adoption of the **Guidelines and Procedures for the Negotiations on Trade in Services**.
13. Of particular interest for developing countries are the stipulations that countries shall:
  - Conduct negotiations on the basis of progressive liberalization, aiming to increase the participation of developing countries in trade in services, providing flexibility for developing countries and special priority to least developed country Members.
  - Respect national policy objectives during the liberalization process, taking account of their level of development and economic size.
  - Respond to the needs of small- and medium- sized service suppliers, by respecting “the existing structure and principles of the GATS” (e.g. the “bottom-up” approach to scheduling and the four modes of supply).
  - Current schedules of commitments to liberalize particular sectors are the starting point for negotiations (rather than actual market conditions).

- Special attention shall be given to sectors and modes of export interest to developing countries.

**14. Other key negotiating mandates and texts of the GATS negotiations are:**

**a. The November 2001 Doha Mandate:**

15. As regards trade in services, the Doha Declaration stated: *“The negotiations on trade in services shall be conducted with a view to promoting the economic growth of all trading partners and the development of developing and least developed countries. We recognize the work already undertaken in the negotiations, initiated in January 2000 under Article XIX (‘Negotiation of Specific Commitments’) of the General Agreement on Trade in Services, and the large number of proposals submitted by members on a wide range of sectors and several horizontal issues, as well as on movement of natural persons.*

*We reaffirm the Guidelines and Procedures for the Negotiations adopted by the Council for Trade in Services on 28 March 2001 as the basis for continuing the negotiations, with a view to achieving the objectives of the General Agreement on Trade in Services, as stipulated in the Preamble, Article IV and Article XIX of that Agreement...”*

**b. The July 2004 Package**

16. After the September 2003 Cancún Ministerial Conference ended in deadlock, WTO members in Geneva began efforts to put the negotiations and the rest of the Doha work programme back on track. This led to a package of framework agreements known as the July 2004 Package. On trade in services, WTO Members reaffirmed their commitment to progress in this area of the negotiations in line with the Doha mandate. Annex C of the July Package provided that *“with a view to providing effective market access to all Members and in order to ensure a substantive outcome, Members shall strive to ensure a high quality of offers, particularly in sectors and modes of supply of export interest to developing countries, with special attention to be given to least-developed countries.”*
17. The Hong Kong Ministerial Declaration reaffirmed key principles and objectives of the services negotiations and called on members to intensify the negotiations with a view to expanding sectoral and modal coverage of commitments and improving their quality, with particular attention to export interests of developing countries. The Ministerial Declaration also established that least developed countries are not expected to undertake new commitments in the Round.
18. Annex C went beyond the objectives and mandate outlined in the Negotiating Guidelines by providing for the first time a more detailed and ambitious set of negotiating objectives to guide WTO Members. It established a framework for

offering new or improved commitments. Among other things, the Annex also urged members to intensify their efforts to conclude the rule-making negotiations under GATS Articles X (emergency safeguard measures), XIII (government procurement), and XV (subsidies). It states that Members shall devise methods for the full and effective implementation of the Modalities for the Special Treatment of Least-Developed Country Members. With respect to negotiating approaches, Annex C envisaged that the request-offer negotiations be pursued on a plurilateral basis and provided guidelines for the conduct of these negotiations. It stipulated that the results of such negotiations would be extended on an MFN basis.

**c. December 2005 Hong Kong Ministerial Declaration and its Annex C**

19. The Hong Kong Ministerial Declaration reaffirmed key principles and objectives of the services negotiations and called on members to intensify the negotiations with a view to expanding sectoral and modal coverage of commitments and improving their quality, with particular attention to export interests of developing countries. The Ministerial Declaration also established that least developed countries are not expected to undertake new commitments in the Round.
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**III. Critique of the Chair's Proposals for the Way Forward on Market Access**

21. In paragraph 69 of the Chair's report, reference is made to a proposal by Australia that would provide for a core group of Members to (i) bind current levels of market access in priority sectors; (ii) remove significant impediments to mode 3 trade (in particular limitations on foreign equity and forms of commercial presence); (iii) enhance market access for mode 4; and (iv) achieve other objectives such as commitments to adhere to the telecommunications reference paper.

22. In paragraph 69 of the Chair's report, reference is made to a proposal by Australia that would provide for a core group of Members to (i) bind current levels of market access in priority sectors; (ii) remove significant impediments to mode 3 trade (in particular limitations on foreign equity and forms of commercial presence); (iii) enhance market access for mode 4; and (iv) achieve other objectives such as commitments to adhere to the telecommunications reference paper.
23. Binding current levels of market access means that any market opening (deliberate or de facto because of the lack of sufficient regulation) is to be locked into Members' WTO schedule. This means that Members are expected to provide market access, particularly in sectors that have been closed to date. And since the demandeurs in the services negotiations are mostly the developed countries, the Paragraph basically calls for developing countries to make offers of interest to them. The proposal contradicts the existing structure and principles of the GATS which require members to conduct negotiations on the basis of progressive liberalization. In addition the Negotiating Guidelines provide that current schedules of commitments to liberalize particular sectors are the starting point for negotiations rather than actual market conditions. Finally, some delegations have stated that binding commitments at current levels of market access goes beyond the level of ambition established in Annex C of the Hong Kong Ministerial Declaration.
24. A further proposal on the way forward presented by Mexico provide for a core group of Members to undertake binding commitments of their applied levels of liberalization for the 119 subsectors covered by the plurilateral requests, except for an agreed number of sub-sectors. A larger number of exceptions would be agreed for developing country Members. Any Member wishing to request a higher level of liberalization could do so provided the request was accompanied by a reciprocal concession of similar value within services, or across other market access areas. Mexico emphasized that a key benefit of this proposal would be the ability to negotiate trade-offs across all the market access areas of the Round
25. In the GATS negotiations, developed countries have complained repeatedly that developing countries are not providing substantial offers for liberalization commitments. Their assessment is based on their requests, which have generally called for full liberalization of sensitive markets such as financial, telecommunication, energy and other sectors. It is worth recalling that developing countries have in place a very important flexibility mechanism in GATS through Article XIX:2, which allows them to open fewer sectors, liberalise fewer types of transactions, progressively extend market access in line with their development situation and attach conditions to their market access which enable them to meet Article IV objectives. Many developing countries simply cannot match the level of ambition expected by developed countries because, on the one hand, they

generally do not have strong domestic service suppliers that are able to compete on an equal footing with developed country service suppliers and, on the other, retaining strong domestic service suppliers in key and sensitive sectors is an important development objective. Moreover, developed countries have not provided offers that are meaningful to developing countries. This is mainly due to the lack of substantial mode 4 commitments by developed countries.

26. The current obstacles to mode 4 trade are considerable. These include economic needs tests conducted in the absence of clearly defined criteria; vague definitions for the categories of persons included in schedules; the limited number of commitments for categories de-linked from commercial presence; the bias in favour of highly-skilled persons; the lack of recognition of certain qualifications and visa and requirements related to work permits. Therefore, in this game of market access negotiations, developing countries do not have an incentive to open their markets without getting anything in return.

#### **IV. Implementation of LDC Modalities (LDC Waiver)**

27. The Modalities for the Special Treatment of LDC Members were agreed in September 2004. These modalities call on Members to consider the serious difficulties faced by LDCs in terms of making commitments that meet their needs for sustainable development. The LDC Modalities also provide action-oriented mandates to increase the participation of LDCs in services trade. To facilitate this process, LDC Members are asked to identify their modes and sectors of export interest, emphasizing development priorities in terms of market access commitments and particular modes and sectors. In turn, other Members are expected to:

- Give special priority to providing LDCs with effective market access in areas of their export interest;
- Develop mechanisms with a view to achieving full implementation of GATS Article IV: 3;
- Take measures to increase LDC participation in services trade; and
- Make commitments in Mode 4.

28. The LDC Group tabled a draft waiver from MFN obligations. This is essentially a waiver from the most-favoured nation treatment clause (Article II. 1) in GATS to allow Members to provide preferential and more favourable treatment to services and services suppliers of LDCs. The waiver has been identified as offering the most satisfactory way of fulfilling this part of the negotiations.

29. The Chair reports that two main issues had arisen in the draft text. Some Members stated that the types of preferences covered by the waiver, in order to

be effective, needed to go beyond market access measures; others stressed the importance of restricting the coverage of the waiver to market access measures.

30. Limiting the scope to market access only would run contrary to the spirit of the Hong Kong decisions. This waiver was only one of the elements of the LDC modalities. Paragraph 9 of Annex C of the Hong Kong Declaration identified the other areas that were to be expeditiously implemented. They included:

- (a) Developing appropriate mechanisms for according special priority including to sectors and modes of supply of interest to LDCs in accordance with Article IV:3 of the GATS and paragraph 7 of the LDC Modalities.
- (b) Undertaking commitments, to the extent possible, in such sectors and modes of supply identified, or to be identified, by LDCs that represent priority in their development policies in accordance with paragraphs 6 and 9 of the LDC Modalities.
- (c) Assisting LDCs to enable them to identify sectors and modes of supply that represent development priorities.
- (d) Providing targeted and effective technical assistance and capacity building for LDCs in accordance with the LDC Modalities.

31. It is important for the LDC Group to benefit from the full and effective implementation of the LDC Modalities. Particular account would have to be taken of the serious difficulties of LDCs in undertaking specific negotiated commitments, in view of their special economic situation and their development, trade and financial needs. This also warrants targeted and coordinated technical assistance and capacity building programmes in order to strengthen LDCs' domestic services capacities, build institutional and human capacity. Technical assistance is also necessary to carry out national assessments of trade in services with reference to the objectives of the GATS and Article IV in particular.

## **V. Domestic Regulation Disciplines**

32. The Working Party on Domestic Regulation (WPDR) following the mandate in Article VI:4 of the GATS is charged with developing disciplines on licensing requirements, licensing procedures, qualification requirements, qualification procedures and technic standards. Domestic regulation disciplines adopted will be applied by all members as long as countries have opened and 'bound' at the WTO certain services sectors and modes of supply. Therefore their burden on developing countries must be evaluated and proper consideration of special and differential treatment must be secured.

33. One of the most important considerations in the domestic regulation negotiations for developing countries is the presence of both defensive and offensive interests.

The proposed disciplines could help countries in advancing their offensive interests to some degree. For example, Mode 4 (movement of natural persons) market access openings are limited by nontransparent qualification requirements. Arbitrary or burdensome entry requirements for companies could also make it difficult for Mode 3 (commercial presence) suppliers from developing countries to actually operate in overseas markets, despite scheduled market openings in those markets.

34. Yet at the same time, most developing countries are defensive when it comes to services trade. Apart from certain areas such as tourism and Mode 4 (movement of natural persons), most developing countries import more services than they export. Developing countries have an interest in being able to increase their supply of services – at least for starters, within their own countries.
35. In those sectors where developing countries have taken market opening commitments, these disciplines will limit countries' regulatory freedom and are likely to make it more difficult for developing countries to experiment and formulate their regulations according to their contexts, their institutional constraints, and their need to increase the local supply of services. Using these disciplines, foreign companies seeking greater market access could challenge developing countries' measures and regulations. The analysis contained here approaches the issue of domestic regulation disciplines more from this latter viewpoint, focusing on the need to maintain the policy space of developing countries so that they can have the type of regulations that are most suited to their particular situation.
36. The Chairman's report provides a factual overview of the consultations. The WPDR Chair went through the March 2009 draft text and divided the text into three categories - paragraphs that are agreed from the 2009 text on an *ad referendum* basis; paragraphs that have one single alternative proposal with bracketed wording differences; and paragraphs that have multiple alternative proposals, presumably the ones that are the most problematic.
37. The Chair's characterization of the proposed disciplines into three broad categories does not reflect the actual dynamics in the domestic regulation negotiations. In the first category for example (paragraphs that are agreed from the 2009 text on an *ad referendum* basis), the Chair's perception is that material points have been agreed upon by a majority of the Membership and there are no proposals for alternative language in situations where Members are not in agreement. Some Members do not share this view of the process. They give as illustration - the fact that in Rev.2 of the Chairman's consultative note

(RD/SERV/46/Rev.2) where a number of language proposals have been presented, conclusive discussions on these options have not yet occurred.

38. There is no consensus on the major themes namely 'necessity tests', 'pre-established', 'technical standards', and 'development chapter'.
39. **The report reinstates the necessity tests in the disciplines** in spite of arguments by some Members that the necessity test had already been rejected in the March 2009 draft text. The majority of developing countries have expressed opposition to the inclusion of necessity tests, which are employed to determine whether a trade restrictive measure is absolutely essential or if there are other less trade restrictive ways to achieve a certain end. These tests can results in severe restraints to the "right to regulate."
40. **The definitions of "licensing requirements and procedures (LR, LP)", "qualifications requirements and procedures QR, QP)" and "technical standards (TS)" have raises several issues.** For example measures can sometimes fall into more than one of the categories to be disciplined. This can cause confusion as to the exact commitments taken. For instance, a licensing requirement could also be a technical standard, such as capital requirements for banks. The problem is that these categories overlap in practice, and the question on the table is, how the WPDR can clarify the definitions so that the categories do not overlap. It is therefore important that the dividing line between the categories LR, LP, QR, QP and TS should be as clearly spelt out as is possible.
41. **The United States in addition has proposed to add the definition of the word 'authorization' to the chapter on definitions.** The US proposes that:
- "Authorization" is a measure permitting a natural or legal person to engage in the supply of a service in the territory or a regional subdivision of a Member, and includes a license or a determination that such a person is qualified to supply a service. "Authorization" does not include measures:
- (a) governing the general conduct of a business, including locations, times of operation and similar conditions;
  - (b) governing the safety or the impact on human, animal or plant life or health of the service or of construction or engineering activities associated with the service; or
  - (c) concerning government procurement.

42. Some Members feel that it is unnecessary to define 'authorization'. However, the US has taken this opportunity to carve out some areas from the disciplines – e.g. construction and engineering activities, and also government procurement. It may be a good idea not to define 'authorization' the way the US is requesting, but to secure for developing countries certain sectors or areas that could be carved out from the disciplines, such as: services relating to natural resources (including water); public services and government procurement.

43. **Paragraph 11 of the March 2009 text stipulates** that *“measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards shall be pre-established, based on objective and transparent criteria and relevant to the supply of the services to which they apply”*. The problems here are the general obligations that measures be *“pre-established, objective, transparent and relevant”* It is unclear what *“pre-established”* means.

44. In the Chair's report a new alternative paragraph is proposed in an attempt to clear the ambiguities in the paragraph above. The alternative paragraph provides that:

*Measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards shall be:*

*(a) based on objective<sup>[1]</sup> and transparent criteria<sup>[2]</sup> and*

*(b) clearly related to the objectives of the measure at issue and to the service being regulated.*

*Applications for licensing and/or qualifications shall be examined under measures in force at the date of application. Where pending applications are to be examined under amended or replaced measures, the Member shall promptly inform all applicants and provide reasonable time to such applicants to adapt their applications to such amended/new measures.*

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[<sup>1</sup> Members understand that objective criteria include criteria that may not be quantifiable, such as competence, ability to supply the service and environmental, social and health effects.]

[<sup>2</sup> Members understand that in reaching decisions a competent authority may balance competing criteria.]

45. In this new paragraph the word *“pre-established”* has been eliminated. However some Members feel that the second part of the alternative paragraph which states

that “*applications for licensing and/or qualifications shall be examined under measures in force at the date of application*” still maintains the spirit and intent of the word “pre-established” albeit limiting to measures in force at the date of application. Some members would want the second part deleted. Attempts are also made in the new alternative paragraph to clarify “objective and transparent criteria” in the footnotes.

46. **One point to note about the transparency language in the Chair’s report** - there is still the same absurdly long list but it is qualified by saying the information only has to be published "where it exists". Hopefully this would not place the same burden on developing countries as the previous draft did.

47. **Paragraph 27 (qualification requirements) of March 2009 text provides that:**

*Where a Member imposes qualification requirements for the supply of a service, it shall ensure that adequate procedures exist for the verification and assessment of qualifications held by service suppliers of other Members. In verifying and assessing qualifications, where the competent authority finds it relevant, it shall give due consideration to relevant professional experience of the applicant as a complement to educational qualifications. Where the competent authority considers that membership in a relevant professional association in the territory of another Member is indicative of the level of competence or extent of experience of the applicant, such membership shall also be given due consideration.*

48. The Chair in his report provides two alternative proposals:

*Where a Member imposes qualification requirements for the supply of a service, it shall ensure that adequate procedures exist for the verification and assessment of qualifications held by service suppliers of other Members. In verifying and assessing qualifications, where the competent authority considers it relevant, it shall give due consideration to professional experience [as a complement to educational qualifications,] and to membership in a professional association in the territory of another Member.*

*Where a Member imposes licensing or qualification requirements for the supply of a service, it shall ensure that adequate procedures exist for assessing an applicant's fulfilment of such requirements, including procedures for verification and assessment of qualifications.*

49. It should be noted that beyond the process of formal qualification assessment, there are issues involved in credential recognition, including not only the recognition of an individual’s paper credentials, but of their language and communication skills, workplace competencies and experience, and even national origin. Hence, these negotiations should provide an opportunity for developing

mechanisms that ensure that disciplines become effective tools for facilitating the international movement of professionals from developing countries and for adding commercially meaningful movement through the negotiations of new trade issues such as visa procedures, mutual recognition, amongst others. Some countries have declared that disciplines related to visas fall outside the scope of the five categories covered by Article VI:4 (e.g. the US). Colombia and the African Group have suggested they are not questioning the actual fact of requiring a visa. The main concern revolves around the administrative procedures involved in obtaining a visa or entry permit which could nullify or impair the benefits accruing to a Member. There is no reason not to be ambitious in this regard.

50. **In addition, regarding Mode 4**, India submitted a paper (30 March 2005) suggesting that progress in mutual recognition is one of the crucial elements for effective market access. In the Chair's report, Members have agreed on an *ad referendum* basis to include the following paragraph in the chapter on qualification procedures:

*Members note the role which mutual recognition agreements can play in facilitating the process of verification of qualifications and/or in establishing equivalency of education.*

51. The above paragraph is however merely a statement of note and not a binding standard.
52. **On S&D for developing countries**, the March 2009 text was limited to a transition period. In the Chair's report some alternative proposals are presented. In one of the proposals, in addition to the transition period of [5 to 7] years for developing countries before they begin applying the disciplines, there is also an automatic extension of the period granted to developing countries to implement the disciplines simply by notifying the Council for Trade in Services if a developing country member still faces difficulties which impair its ability to implement the disciplines.
53. A second alternative proposal states that a developing country Member shall not be required to apply these disciplines as they pertain to QR, QP, LR and LP for a period of 1 year from the date of entry into force of these disciplines. All other provisions of these disciplines, including general provisions, shall apply to all Members from their entry into force. This proposal then goes ahead to allow developing countries at the end of this transitional time period, and upon request, to have the Council for Trade in Services extend the time period for implementation of these disciplines for up to two additional years. However, the granting of such extension is subject to tough procedural conditions. For instance, a Member that maintains authorization practices not in compliance with the disciplines shall initiate consultations with the Council for Trade in Services in respect of an extension for such authorization practices, on the basis of

documentation to be submitted to the Council not later than three months after entry into force of these disciplines. This documentation shall consist of (i) an identification by the requesting Member of those authorizations for which it is seeking an extension under these procedures; (ii) a statement that the extension is necessary in light of the regulatory and institutional capacity of the requesting Member and the competent authority; and (iii) a statement, for each authorization for which it is seeking an extension under these procedures, identifying the paragraphs of these disciplines with which such authorization is not in compliance. And (b) not later than six months after entry into force of these disciplines, the requesting Member shall submit to the Council for Trade in Services a notification providing detailed information about the authorization for which extension is being sought, including a detailed description of the manner in which that authorization is not in conformity with the disciplines. In addition, one year following the grant of such extension, the requesting Member shall file with the Council an updated notification describing any changes in the extended authorization, and steps being taken by the requesting Member to bring the authorization into full conformity with these disciplines. Failure to file such an updating notification shall terminate the extension. Such requirements will simply make it difficult for developing countries to extend the transitional period.

54. Taken as a whole, the draft text would impose disciplines that exceed the institutional capacity of many developing countries. Moreover, some of the proposed disciplines would conflict with constitutional rights and mandates, as well as regulatory schemes to implement legislated policy objectives. It is for this reason that Bolivia and Ecuador proposed language which takes into consideration countries' constitutional rules.
55. For many developing countries where regulations have not yet been adequately put in place, and are still being developed, these disciplines can easily be used to challenge their existing regulations. Developing countries simply do not have the institutional maturity to be adopting the kinds of regulations developed countries have (e.g. based on standards or market-based criteria, and which arguably are therefore more 'objective'). Such developed country regulatory approaches are not necessarily appropriate for developing countries. Most developing countries still use entry-based types of regulations which are the most effective if there are no robust post-establishment checks.

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