服務貿易的緊急防衛措施：現在該往何處?

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服務貿易規則工作小組

中文摘要

服務貿易規則工作小組(WPGR)在討論是否在服務貿易中納入緊急防衛措施(EMS)時，主要著重於可行性與需求性等技術性問題。服務貿易總協定(GATS)第十條要求對奠基於非歧視原則的緊急防衛措施的談判結論需在世界貿易組織成立後(1998 年)三年內生效。經過十年後，反對在服務貿易納入緊急防衛措施的國家認爲支持者尚未充分表明提出防衛措施的需求性（意願）與技術可行性（含法律與經濟的手段）。反對者宣稱支持者未能解釋清楚此一機制將會如何運作以及該機制所帶來的法律與貿易不確定性更將會阻礙外國投資。此外，考量到此一機制對現存服務貿易協議的安定性帶來的風險，反對緊急防衛措施的國家也質疑此機制是否有需要的必要。

本文作者認爲，不將防衛機制擴及服務業將最有利於單純經濟發展。然而在多邊談判中仍有其他因素的考量，例如政治經濟因素。否則，在貨品貿易中亦不會出現防衛保護機制。然而，本文作者仍認爲防衛保護機制對貿易自由化帶來的風險極高。即便將政治經濟因素納入考量，服務業的防衛保護機制仍須比目前在貨品貿易中的防衛保護機制受到更大的控制，以免淪爲保護主義的工具。

要打破目前對此議題的正反兩方意見帶來的僵局並不容易。本文作者認爲，對於強烈支持的國家來說(例如除了新加坡之外的東協國家、巴西與中國等國)，支持服務業防衛保護機制一但成功，會弱化世界貿易組織對國內改革的規範。要避免此結果，唯有更嚴格地限制防衛機制措施使用的時機。到頭來，對於這些現在支持的國家只會帶來少數的實際利益。

作者更建議世界貿易組織會員國將此一思考模式套用至貨品貿易，重新評估防衛保護措施對經濟利益的影響。當世界貿易組織的政治考量高於經濟因素的評估時，多邊架構會變的更笨重、更模糊，從而阻礙世界貿易組織對提升貿易自由化所做的努力。

Emergency Safeguard Measures on Services: Where to Now?

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Key Words: WTO，GATS，ESM，WPGR

Background

Discussions in the Working Party on GATS Rules (WPGR) relating to the GATS Article X negotiating mandate on whether to adopt emergency safeguard measures (ESM) for service have largely focused in Geneva on the technical question of feasibility

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and desirability.[2] After a decade, they have now stalemated with ESM demandeurs (the ASEANs now minus Singapore, supported by others, including Brazil and China) calling for conclusion of negotiations as per the mandate and opponents (a group of developed and developing countries) arguing that the supporters of an ESM have yet to adequately demonstrate desirability (willingness) and technical feasibility (legal and economic means) of issuing safeguards. They argue that demandeurs have failed to show how such a mechanism would work in practice, and stress that by creating legal and economic uncertainty ESMs may inhibit foreign investment. Furthermore, ESM opponents are not convinced that such a mechanism is desirable, given the risk that it would undermine the stability of existing services commitments. While discussions in more recent years have become more detailed and refined, diverging views over the various elements have become sharper and more glaring.

Deadlines for the ESM negotiation have been repeatedly extended, with the latest, March 2004, indefinitely postponed until the end of the Doha Round. In many respects it is unfortunate that due to the lack of any decisions on GATS rules, particularly ESM, these became embroiled with current services market access negotiations. Several ASEAN countries (Malaysia, Thailand, Brunei and the Philippines) and Brazil have made their initial offers conditional upon the "balanced outcome of the DDA negotiations, particularly progress made on Article X negotiations". In the absence of any multilateral agreement on

[2] Article X of the GATS called for "results of negotiations on the question of ESM based on the principle of non-discrimination" to enter into effect within three years from the commencement of the WTO i.e. by 1998.

services safeguards, some ASEAN Members have expressed the wish that services safeguard mechanisms be injected into Free Trade Agreements (Box 1).

Box 1: Coverage of ESMs for services in selected Free Trade Agreements

The Thailand Australia Free Trade Agreement (TAFTA) links the possibility of having ESM on services to any progress made on Article X (Emergency Safeguard Measures) in the GATS (Article 815). However, both parties must agree to incorporate any such changes under the GATS into TAFTA.

Under the Singapore Australia Free Trade Agreement (SAFTA) no safeguard action for services may be taken except in the event of serious balance of payments difficulties, serious external financial difficulties, or threat thereof.

The ASEAN Framework Agreement on Services (AFAS) permits a Member to modify or withdraw any scheduled specific commitments at any time after three years from when it entered into force (Article X), provided:

- that it notifies other Members and the ASEAN Secretariat of the intent to modify or withdraw a commitment three months before the planned date of implementation of the modification;
- that it negotiates with any affected Member to agree on necessary compensatory adjustments.

Emergency safeguards on services are not included in NAFTA, although there was a transitional provision in the financial services chapter allowing Mexico to impose market share caps if foreign ownership thresholds (25 per cent for banks and 30 per cent for securities firms) until 2004. Mexico has never made use of these provisions even though it seems that the thresholds were exceeded.

Apart from these, there appears to be no other provisions on emergency safeguards for services in FTAs concluded between APEC Members, or between them and the EC.

Although formal contributions to the ESM negotiations have been made by many Members[3] the ASEAN (less Singapore) proposal of March 2003 has been the main focus of discussions.[4] This proposal differed slightly from their earlier one tabled in 2000[5], which included Singapore, by strengthening the criteria for initiating a safeguards procedure, linking ESM applicability to injury of a domestic industry, and shortening the application period of a safeguard measure to three years.[6] The current ASEAN proposal has been central to the discussions of the WPGR but there has been little progress with both the ESM demandeurs and opponents continuing to take opposite entrenched positions. A recent UNCTAD paper sympathetic to the ASEAN case of adopting ESM for services, entitled

[3] These are Australia (WTO document S/WPGR/W/5); Thailand (WTO document S/WPGR/W/6); Switzerland (WTO document S/WPGR/W/14); the United States (WTO document S/WPGR/W/17); Hong Kong China (WTO document S/WPGR/W/26); Singapore (WTO document S/WPGR/W/19); and Peru (WTO document S/WPGR/W/23).

[4] The WTO document containing the current ASEAN proposal has not yet been derestricted, but the proposal can be downloaded at http://www.ictsd.org/issarea/stsd/Resources/Docs/ASEAN_ESM.pdf.

[5] WTO document S/WPGR/W/30, 14 March 2000.

[6] Bridges Weekly, March 2003.

"Emergency Safeguard Mechanisms in the GATS: Beyond Feasible and Desirable" was discussed in the WPGR and although making a valuable and constructive contribution has not changed positions (Marconini 2005).

Australia tabled a general proposal in 2003 advocating one of two alternative models for reaching a compromise on an ESM for services depending on whether Members felt there was an absolute right for safeguards: a consensus-based mechanism, or a model which focused on procedural issues.[7] However, the Australian "core mechanism" paper did not examine the feasibility or desirability of an ESM; nor did it provide any guidance or criteria for choosing which model to adopt. Instead, the paper attempted to avoid over-prescriptiveness in ESM application, balance the rights and obligations of Members, and ensure predictability by arguing that any ESM should be short-term and targeted.

What is an emergency safeguard measure (ESM)?

An ESM is a specific measure that provides governments with a temporary "escape clause" to increase protection to relieve so-called "serious injury" caused (or threatened) to domestic producers from rising imports as a result of liberalizing commitments and obligations undertaken in trade agreements. The other main features of an ESM are that it targets a specific product so as to temporarily protect the "injured" domestic industry, is applied on an MFN basis, is of limited duration, is progressively liberalised over the application period and, in some cases, is subject to compensation demands from other

[7] WTO document Job (02)/8.

members adversely affected by the measure. The most obvious example of an ESM can be found on goods in GATT Article XIX and the related Agreement on Safeguards, but other similar sectoral-type arrangements are also found on goods, especially Article 5 of the Agreement on Agriculture and Article 6 of the Agreement of Textiles and Clothing.[8] Such measures also exist in numerous regional trade agreements, including the NAFTA and most EU Association Agreements. ESMs need to be distinguished from other general exceptions also found in the WTO (and other trade agreements), such as the Understanding on Balance of Payments that enables temporary restrictions on imports to protect against a serious deterioration in a country's balance of payments, or that allow for general exceptions to commitments, such as on goods to allow measures to protect, inter alia, public morals (GATT Article XX) and national security (GATT Article XXI), and corresponding provisions on services (GATS Article XIV).

The adoption of ESM for services should not duplicate existing "safeguard like"' features found in the GATS (Sauvé 2002). In particular, these include the positive list approach, Article XXI, the "carve out" of prudential measures from financial service commitments, balance of payments provisions

[8] However, such sectoral emergency safeguard measures differ from the generic ESM on goods (GATT Article XIX) and of the corresponding measures being considered for services in their degree of automaticity and the conditions needed to invoke them. For agriculture, pre-determined import thresholds operate whereby once exceeded injury to domestic producers is implicitly assumed and the safeguard measures may be invoked automatically.

and general exceptions.[9] In this regard, ESM opponents are quick to point out that safeguards on services are not needed because GATS already has substantial "in-built" flexibility when making commitments. However, while true, especially since market access and national treatment commitments apply only to a positive list of scheduled services and then only to the extent they are bound and restrictions not listed, proponents of ESM counter by arguing that such ex ante measures do not satisfy the same need as would a generic ESM that could be applied ex post to commitments being made using multilaterally agreed rules that would apply across all members and services.

Is an ESM for services justified on economic grounds?

The WPGR discussions have largely centred on the issue of feasibility and desirability, such that the economic debate on whether to have an ESM has been largely overlooked. However, the economic case for an ESM, whether for goods or services, is very weak and unconvincing, at best. Providing temporary import protection attacks the symptom of inefficiency and not the fundamental causes or problems confronting the industry. Such arrangements are anti-competitive and prone to be captured by protectionist interests; they amount to providing "needs based" assistance which only encourages inefficiency and greater need. Other reasons for not having an ESM include:

[9] GATS Article XXI provides a permanent safeguard for governments to use if for whatever reason they may wish to withdraw or modify a commitment, subject to negotiating acceptable compensatory adjustments with adversely affected trading partners.

- Temporary protection from an ESM, as for protection generally, is not costless; it imposes heavy costs on the economy through higher prices to consumers and other producers, and reduces economic efficiency by maintaining resources in assisted "injured" activities when they could be used more productively in unassisted or lowly assisted and more efficient activities – higher prices for "injured" products also penalise efficient producers using them as inputs;
- Given that services, such as transport, telecommunications and finance, are an essential input in producing other goods and services, including exports, restricting imports to protect domestic suppliers will have substantial adverse economy-wide effects;
- There is little empirical evidence in goods to show that domestic industries take appropriate adjustment to conditions of competition during the period of an ESM;
- An ESM is generally no substitute for having good regulatory policies that stimulate and safeguard competition in services and facilitate new entrants, whether foreign or domestic;
- Temporary assistance fails to recognize that industries unable to compete with imports have basic structural or competitive problems;
- An ESM could retard rather than facilitate adjustment, and effectively transfers the adjustment burden usually from inefficient to efficient industries, by rewarding producers that do not adjust and penalising those that do;
- An ESM can undermine the credibility of any economic reform program – it sends the wrong signals to other producers and gives inefficient industries another

opportunity to lobby the government against reforms; and

- There are far better ways to ease the costs of adjustment and to promote restructuring eg. gradually implementing reforms at a pace the economy can absorb, providing targeted adjustment assistance, including labour re-training etc;

Thus, an ESM would impose substantial economic costs in the services sector and the economy generally by increasing prices to consumers and downstream processors and effectively placing the adjustment on efficient service industries. Furthermore, any application of an ESM will impact on key infrastructural services such as transport, telecommunications and finance. It would be better for consumers and downstream producers, and hence to the economy's efficiency, to have cheaper and more efficient services even if it meant non-competitive domestic suppliers were "injured".

Are there any other grounds for justifying an ESM on services?

While the economic benefits of ESM on services are very doubtful and best dismissed, their possible political and social justification should not be overlooked. Some WTO Members strongly hold the view that the political value of safeguards is a very prominent feature of the Doha Round negotiations. Such "political economy" grounds would seem the only justification for applying an ESM to services. ESM proponents argue that by effectively providing affected Members with an "insurance policy" or "safety net" from scheduled services commitments to

temporarily protect domestic service providers from the adverse effects of a surge in imports, an ESM on services would fulfill an important "political economy" role, especially useful in services that are complex and involve many "behind the border" regulatory measures where the consequences of liberalization are uncertain.

The existence of an ESM may therefore temper domestic opposition against trade liberalisation and could help governments of WTO Members to sell regulatory reform programs at home to constituents. Knowing that an ESM "escape clause" exists to provide if needed breathing space for domestic industry to adjust to new market realities may allow Members to make more liberalising GATS commitments, thereby facilitating greater trade liberalisation, particularly in sensitive services. It also could be argued that given the relative newness of the GATS and the lack of jurisprudence to date, a safety net is needed for affected industries. It also seems reasonable to argue that if an ESM is accepted as desirable for 'political economy' reasons to promote more liberal commitments for goods, then ipso facto, the same should apply for services.[10]

UNCTAD supported such claims by stating that an "ESM would constitute a useful instrument to encourage progressive

[10] Some developed members that strongly oppose ESM for services would seem at the same time to support ESM on goods given their historical use of such measures. On the surface, it would seem inconsistent having an ESM on services and not goods. Thus, any decision not to extend ESM to services also raises questions of whether they should be continued for goods.

liberalisation, including through successive bindings of evolving regulatory situations" by helping to "sell" the logic of GATS liberalisation at home; and improving the overall functioning of the GATS Agreement (Marconini 2005).

There are, however, a number of negatives associated with applying an ESM to services:

- Any over-use of ESMs could already diminish the value of already weak GATS commitments;
- ESMs would be open to abuse as a means of protection; and
- If the ESM on goods is any indication, it is highly likely to be over-used and abused as a protectionist measure due to insufficient controls on use.

Opponents argue that an ESM for services is not needed given GATS flexibility, such as national treatment and market access being conditional commitments applied only to scheduled commitments, allowing MFN exceptions (Article II), and there already existing several forms of de facto safeguard provisions and other measures similar to an ESM. These include scheduled Economic Needs Tests (ENTs) by many Members, especially under modes 3 (commercial presence) and 4 (temporary movement of people). ENTs are often non-transparent by not specifying the criteria or the detail of the restriction, frequently stating no more than entry is conditional on there being an "economic need". They substantially weaken the value of GATS commitments, and constitute a safeguard without any disciplines on application (Marconini 2005). Proponents argue that having an ESM with transparent rules applicable across all sectors would be preferable to heavy reliance on ENTs, which

raises the question of whether having an ESM could be justified if Members' agreed to removing ENTs. However, the idea of making such a trade off, even if valid, has not been seriously considered in the WTO negotiations. Some developing countries have argued that it may not be politically feasible to remove ENTs in return for the application of an ESM for services. .

It should also be noted that the GATS has significant scope for *ex ante* scheduling of limitations in a way that it is not possible to schedule in goods. For instance, in the GATS there is greater scope to write into schedules certain circumstances that would trigger government intervention – an example is what Mexico has done in financial services under NAFTA.[11] Governments may also schedule progressive liberalization on services thereby implicitly building an adjustment element in their commitments and possible lessening the need for an ESM.

The ASEAN Model

The ASEAN proposal is the main blueprint for applying ESM to services. It uses the same standard as applied to goods for establishing proof of injury to domestic industry for all four modes of supply. It would require showing that the injury, or threat thereof, to the domestic supplier is caused by increased services from foreign suppliers (Sauvé 2002). The latest ASEAN proposal considerable improves their earlier model by dropping compensation provisions (seen as inconsistent with the temporary modification of schedules), covering all supply modes and more importantly aiming to protect acquired rights of foreign investors against the application of any ESM. For

[11] WTO document S/WPGR/W/24, 3 September 1997, p. 8.

instance, a foreign service provider with an established commercial presence (post-establishment) in the market will be considered a domestic firm and will not be required to divest, but may nevertheless according to the ASEAN proposal have its activities curtailed by allowing ESMs to be applied to so-called "expansionary rights".

This paper argues that even if the political economy rationale for an ESM is accepted, the ASEAN proposal falls well short of providing sufficient checks on use and risks therefore bringing too many of the economic problems associated with an ESM on goods to services. Because application of an ESM is likely to be economically costly, these need to be addressed in designing an acceptable ESM for services. Thus, the case for an ESM on services may be more acceptable if the current goods model could be improved, but unfortunately the ASEAN proposal fails to address these weaknesses. It would make much more sense if any discussion of adopting ESM for services also canvassed possible improvements rather than simply transferring an ESM for goods to services "warts and all".

The ASEAN proposal's greatest weakness in addressing ESM mis-use is that it proposes no "national public interest or economic test". Thus, like for goods, the proposed ESM for services would be biased in favour of domestic suppliers of affected services, rather than having an economy-wide focus to ensure that the ESM actually improved national welfare (rather than simply the welfare of the service providers receiving additional temporary protection, which may increase while national welfare falls). The "national public economic interest" is much broader than the interests of suppliers benefiting from

the increased import protection provided by the ESM. Most importantly, it takes into account the economic inefficiencies from having resources used in supplying services (or goods) that could be imported more cheaply, as well as the additional costs through higher prices imposed on consumers, including downstream processors using affected services (or goods) as inputs. These broader national welfare effects are not captured in any assessment of 'injury' to domestic producers used to invoke ESM. For instance, raising fees or widening margins on financial services would increase the cost for all businesses and consumers. Failure to have a national interest test indicates a number of inherent weaknesses in the proposal. There is increased scope for abuse as is the case for goods, and the broader interests of consumers and other downstream producers, will not be taken into account in any decision on ESM. Finance ministers may also want to have a say as to whether the application of a safeguard measure makes sense in the context of an economic stabilisation plan aimed at promoting competition and controlling inflation (Marconini 2005). While the ESM for goods has no "national public interest test", and countries always have the option of introducing such as test if so desired (nothing in the WTO rules would preclude this), experience with goods shows this is most unlikely to happen. Thus, having such a test incorporated as part of the WTO rules based on multilaterally agreed guidelines would seem to be by far the preferred outcome.

Despite several clarifications it is still unclear who the ESM would protect and for what purpose. The ASEAN proposal also does not remove doubts about the desirability and feasibility for an ESM on services. Underlying doubts remain about the

availability and reliability of data and this is likely to be a major problem in determining injury, causation and import surge. The official trade statistics for services of most countries still do not permit import surges to be identified in many services because of their high level of aggregation, timeliness (with long intervals between releases) and a lack of comparability. Therefore, it may be necessary to rely on data from affected firms or from industry associations, which may lack objectivity, particularly as the least efficient firms are most likely to initiate safeguard action. Nor would statistics of the exporting countries from where imports are claimed to have surged be of much use since they are also likely to be equally deficient. While demandeurs of an ESM for services claim that the data problems are exaggerated, difficulties proving causality between 'injury' (and threat of) and imports for goods where trade and industry data is much better suggests that these deficiencies will be far worse in services.

The ASEAN proposal has also not addressed the question of enforceability and the applicability of the ESM to the different modes of supply. In the authors' view enforceability and applicability of an ESM to remedy injury will vary across supply modes. For instance, the enforcement of an ESM on mode 1 (cross-border trade) will differ considerably with the type of enforcement required for mode 3 (commercial presence). Mode 1 supply approximates an import situation similar to goods, while mode 3 involves domestic trade exclusively. Do the same rules apply for legal advice provided via facsimile, phone and internet compared with a foreign lawyer who has established a commercial presence?

The ASEAN proposal largely leaves the process in the hands of the authorities of the importing country. In goods, this has often led to concerns about objectivity and fairness, and the more amorphous nature of services may give even greater discretion to the importing country. As the Australian paper noted the real challenge would be to find the optimum balance between the rights and the obligations of invoking and affected Members, and between the need to have a mechanism to assist Members in genuine emergencies and the need to avoid abuse or a proliferation of cases.[12]

Given the temptation to misuse an ESM for protectionist purposes, this paper suggests that any ESM proposal should be linked to liberalising commitments, and not to the status quo and/or autonomous liberalisation undertaken since the Uruguay Round. ESM should apply only to liberalising commitments made in the Doha Round, distinct from bound commitments made under the Uruguay Round or the binding of autonomous liberalisation measures undertaken since then. In other words, an ESM should only apply to new commitments bound under the Doha Round (Maljuf 2002). ESM also should only be available if commitments bind either at or above the status quo. The case for allowing an ESM where countries have bound below the status quo is weak as it is difficult to argue convincingly that the surge in imports resulted from a liberalization measure. Access to any safeguard mechanism should also be conditional on Members removing all ENTs from their schedule of commitments or making an ESM only available to sectors/mode where no ENTs apply. It has been argued that initial Uruguay Round commitments were negotiated at the same time as the

[12] WTO document Job (02)/8.

GATS and consequently there was a tendency to build self-contained safeguards into the initial list on the expectation of their removal in subsequent negotiations.[13] In this regard linking removal of ENT's to an ESM on services may offer advantages.

What are the particular problems with the ASEAN Model?

While the ASEAN model protects the acquired rights of foreign service suppliers having established commercial presence to those existing at the time of the safeguards' application, it does so by distinguishing them from "expansionary rights" and permitting ESM to be applied to curtail foreign investors from expanding operations.[14] However, this raises many practical considerations, such as what rights fall within each category, and the ASEAN model does not convincingly prove the durability or workability of this distinction. Acquired and expansionary rights are closely related and the need to protect acquired rights acknowledged in the ASEAN proposal in reality would also seem to apply to expansionary rights. Curtailing a foreign firm's merger activities through a safeguards measure as advocated by the ASEAN proposal may prevent rationalization and result in continued losses and closure. Moreover, denying profitable foreign firms merger opportunities may be to the detriment of less efficient domestic firms that can no longer be pursued as merger possibilities. Any ESM aimed at curtailing

[13] Submissions to the WPGR by Hong Kong China (WTO document S/WPGR/W/18), US (WTO document S/WPGR/W/37), and papers by the WTO Secretariat (WTO documents S/WPGR/W/1 and S/WPGR/W/15).

[14] ASEAN Paper, paragraph 12(d).

expansionary rights will also severely reduce economic activity, prove to be anti-competitive and create investor uncertainty. For example, a safeguards measure applied to expansionary rights of a foreign insurance company may disrupt policy holders insurance cover, interrupt the flow of personal contributions and threaten the prudential standing of a local insurance subsidiary by hindering new business. There is also no certainty that limiting expansionary rights of foreign firms under an ESM would be effective in reducing injury to domestic suppliers, and such a measure may therefore impose substantial economic disruption without achieving the intended results.

Curtailing expansionary rights that are likely to severely affect foreign-owned firms' operations in the market will also encourage them to exploit loopholes in the regulatory regime to increase market share through other means. For instance, a foreign retailer that finds his competitive conditions altered by an ESM, such as restrictions imposed on floor space, may pursue other means to expand operations, like buying or renting supermarket space from domestic companies. There also could be operational problems involved between the Head Office based in another jurisdiction and its overseas branch/subsidiary if expansionary rights are subject to ESM. For instance, curtailing expansionary rights may affect the global business expansion plans of a company's Head Office.

Applying ESM restrictions on expansionary rights may also have the same implications under existing Bilateral Investment Treaties (BITs) as not protecting acquired rights. Just as forced divesture may expose the Member applying the ESM to compensation claims, any ESM measure applied on an MFN

basis to restrict other rights of locally invested foreign entities may also infringe benefits and preferential access granted under a BIT. Furthermore, if committed in a BIT to grant national treatment to foreign investors, then a Member's safeguard measure might give the right to pursue the matter before the courts designated in the BIT as the competent authority for resolving disputes.

Although it is highly desirable to protect acquired rights from an ESM, doing so also has serious implications for the application of MFN under the GATS. It necessarily implies a much weaker application of MFN since it means that incumbent foreign investors will be treated more favourably than new overseas investors, including from the same country. The adverse implications for services trade liberalization of such a diminution of MFN could be significant. It is also unclear whether this weak interpretation of MFN would be consistent with GATS Article X requiring that any ESM be applied on a non-discriminatory basis.[15]

A related major problem with the ASEAN model is the approach to defining domestic industry.[16] This is important for mode 3 (commercial presence); it doesn't arise for other modes

[15] For example, it could enable governments to use ESM or other measures to discriminate against new foreign entrants in favour of foreign incumbents, which could undermine market contestability and competitiveness by offering inferior conditions for new foreign entrants. This could therefore weaken the liberalization effectiveness of the MFN principle since it facilitates policy backsliding by not requiring governments to apply the same de-liberalizing measures to foreign incumbents as well as new foreign entrants.

[16] ASEAN Paper, paragraph 12(f).

since in modes 1 (cross-border) and 2 (consumption abroad) the foreign service providers are outside the country, while under mode 4 (temporary movement of people) domestic industry would refer to all service providers with residency rights. A preferable conceptual position would be to take the residency rather that nationality approach, since there is little sense in differentiating between national and foreign service suppliers in a particular market, as once foreigners established, they like national suppliers add value to the national economy, engage in foreign trade, generate employment, pay taxes etc (Marconini 2005). There is also the question of the violation of the national treatment principle, if the rights of locally established foreign firms are not protected. This problem would be overcome if locally established foreign firms were categorised for the purposes of invoking an ESM as "domestic service suppliers" (Lee 2003).

The ASEAN proposal notes that irrespective of the definition of domestic industry used in GATS Article XXVIII, determining which entities to consider as domestic entities should be left to the national laws of each Member. UNCTAD (Marconini) has suggested a similar approach provided the interpretation was objective, comprehensive and transparent. Adopting this approach would, however, imply that the potential use of any ESM to mode 3 would vary among Members and this is likely to be a cause of concern for foreign investors. Moreover, practical problems are likely to arise with several Members already indicating that their domestic legislation does not allow the two categories of suppliers to be distinguished and both would be considered to be part of the domestic industry.[17]

[17] WTO document Job (01)/122, p. 5.

While obtaining a standard definition of what constitutes the domestic industry would be difficult, it would limit confusion and improve the ASEAN model substantially if some standard benchmarks for defining domestic industry were adopted. For instance, are subsidiaries, branches and representative offices of foreign firms to be regarded as part of domestic industry? Also, would a firm with 49% foreign interest be considered a domestic firm, particularly if the country, as in the case of Thailand, had scheduled horizontal restrictions limiting foreign investment levels in most service sectors to 49%? Stringent information and justification requirements would be needed in support of any definition to be adopted by Members invoking an ESM.

Another major drawback with the ASEAN proposal is the suggested duration of an ESM. Three years with no extension for developed countries should be the maximum because any longer would suggest that a temporary import surge is not the domestic industry's main problem.[18] The main problem with the ASEAN proposal, however, relates to the duration of any ESM by developing countries. It suggests that special and differential (S & D) treatment be granted to allow them to extend an ESM for a further three (3) years, "subject to prior review by the Council for Trade in Services (CTS) confirming that reasonable grounds exist for continuing the application of the safeguards measure[19], and if justified would lead to indefinite

[18] This is, however, an improvement on goods, where an ESM measure may be taken for four years, with one 4-year extension permitted should another investigation conclude that the restrictions are still required.

[19] ASEAN Paper, paragraph 12(c).

suspension of commitments along the lines of GATS Article XXI. Although ASEAN strongly supports such S&D treatment, the authors believe that such provisions are not in the long-term economic interests of developing economies, since it risks slowing down trade liberalization by facilitating the capture of ESM by protectionist interests and their use as a means of protection. ASEAN should consider dropping the S & D provisions from any ESM so that they apply for a maximum period of three years with no renewal for all countries, irrespective of stage of development. If any measure were to apply beyond three years, there should be a provision similar to Article 7 of the Safeguards Agreement that provides for a mid-term review. The investigations and publication of findings should also be required for the mid-term review to ensure that transparency applies (Lee 2003).

The UNCTAD Proposal – Does it go beyond feasibility and desirability?

The UNCTAD paper argues that an ESM for services would help governments sell trade reforms domestically and thereby would encourage progressive liberalisation and improve the overall functioning of the GATS. This political economy role of an ESM is seen to be even more useful in services than goods because of their special features (difficulty to predict impact, services prone to unexpected developments and sensitivities to domestic regulation). However, these assertions are not supported by any empirical evidence, and are in any event difficult to prove or disprove. While it may have some basis, it entails large domestic policy and risks for trade liberalization and a country's economic efficiency. There are also more

effective ways of promoting trade liberalisation at home without incurring such risks than having an ESM, such as governments promoting domestic transparency and public scrutiny on the economic costs of protection to support trade reforms, both unilaterally and multilaterally. The UNCTAD paper itself acknowledges that there are "real" concerns that ESM is services would be abused or over-used to by-pass liberalisation, and argues that a services ESM would need to be designed to attenuate these concerns by making Members "think twice" before applying an ESM.

However, as noted previously, the one distinct difference between the two approaches is that the ASEAN proposal does not contain the national (economic) test that is needed to help curb protectionist mis-use of an ESM for services. This is seen as "critical" to UNCTAD's proposal and its exclusion from the ASEAN model is a serious weakness. While neither the ASEAN nor UNCTAD proposal restricts an ESM to liberalising commitments, the UNCTAD model also suggests a limited but unspecified window of time from making the commitments to invoking an ESM.

There are a number of similarities between the UNCTAD and ASEAN proposals. They both favour the following: horizontal ESM; mode specificity; coverage of all four modes; permitting Members to define industry for mode 3 specific measures; protecting acquired rights that exclude expansionary rights; no compensation; and S & D provisions, including for mode 4.

How could the ASEAN proposal be improved?

The ASEAN proposal falls well short on several fronts in ensuring that there are sufficient checks on applying an ESM to services based on the goods model. What would it take to make an ESM on services more workable or defensible economically, that would most importantly improve on the goods model by striking a balance between having an ESM for "political economy" reasons but also ensuring that it is not used as a "legalized" means of backsliding on commitments and protecting domestic industries? This paper suggests this would require that:

- The ASEAN proposal would need to contain a national interest clause – without this any proposal would be economically flawed;
- Any services ESM should incorporate the requirement that domestic industry initiates an adjustment program as a pre-condition for invoking an ESM;
- There is a need to link any ESM to liberalising commitments, namely those at or above the status quo, and that these go beyond autonomous liberalisation undertaken since the Uruguay Round;
- Restricted to a maximum duration of three years with no extensions for developed or developing countries;
- Eliminate S & D provisions for developing countries – application of an ESM for six years is too long and risks weakening disciplines for developing countries to sustain trade liberalisation. Moreover, requiring developed countries to exclude ESM from mode 4 is counter-productive as it would strengthen their resistance

to scheduling liberal commitments in this mode, which is so important for developing countries. In addition S & D provisions will also be increasingly used by developing countries to discriminate against services imports from other developing countries;

- An ESM be introduced on the proviso that Members eliminate all ENTs and other quantity restrictions on market access. The elimination of ENTs would send the message that it would be better to have a solid body of disciplines that prevents abuse rather than the vague and imbalanced approach that currently exists;
- A tighter definition of injury – for instance, the ASEAN proposal needs to stress transparency and consultation and provide more details as to who would be consulted during the investigation process; and
- Any ESM should not be more trade restrictive than necessary and applied only to the extent necessary to prevent or remedy serious injury and the threat thereof, and to facilitate the adjustment of domestic industry.

Other Available Options?

Members may modify their services commitments permanently after three years subject to negotiated compensation with trading partners (GATS Article XXI). Some Members have argued this offers sufficient flexibility to react to emergency situations. The authors believe, however, the permanent withdrawal of commitments to meet temporary measures is undesirable and if an ESM on services was to be applied it should be for a maximum of three years without compensation. Thereafter if the injury persists Members may

permanently re-negotiate their commitments subject to compensation. Such re-negotiation has not yet occurred, and whether it will be feasible to use Article XXI to modify commitments will depend upon the practicalities of agreeing on compensatory adjustments. Indications based on the EC's Article XXI re-negotiations with affected Members in the context of EU enlargement are that agreeing on mutually acceptable compensation is cumbersome, difficult to use and protracted. While on the one hand this may support an ESM in services, it should be stressed that the difficulties arising in reaching agreement on compensatory adjustments raises very similar problems of measurement and other conceptual difficulties involved in the implementation of a safeguards measure (Sauvé 2002).

One possible viable alternative to the ESM proposal for services is to enable Members to adopt a waiver to temporarily withdraw services commitments should an emergency-type situation arise (Article IX of the Marrakesh Agreement Establishing the World Trade Organization). In "exceptional circumstance", Members may request a waiver from an obligation imposed on it by any of the Multilateral Trade Agreements, including the GATS. Any such waiver from GATS is to be granted by the General Council based on a report from the Committee on Trade in Services (CTS)[20]. The waiver provides Members with the unconditional right to suspend a commitment by consensus, or failing that, by three-fourths of the

[20] Although Article IX states that waivers are to be granted by the Ministerial Conference, the General Council conducts this function between biennial meetings of the Conference (Article IV(2) of the Marrakesh Agreement Establishing the World Trade Organization).

Membership.[21] In practice, however, waivers have been granted by consensus and never by a vote so that potentially a single affected Member could prevent a waiver from being granted.[22]

Waivers are not to be open-ended and must specify a termination date. If longer than one year they are to be reviewed annually by the General Council to see if the "exceptional circumstances" still exist, and the waiver may be extended, modified or terminated. Waivers to commitments on goods are not uncommon, but there has only been one case in services. This was granted to enable Albania to suspend commitments on international public voice mail services covering their exclusive used by Albtelecom. Despite major efforts to privatize Albtelecom, Albania requested the waiver based on "external factors, including the war in Kosovo during 1999, the terrorist acts of 2001, the recent global recession and the shift of interest of many global operators towards capital investments in third generation services, which has led to the lack of interest and resulted in several failed attempts to privatize Albtelecom."[23]

The General Council granted the short term waiver to Albania until the end of 2004 based on the "exceptional circumstance" of the war in Kosovo. However, the terms of the waiver also

[21] Any decision to grant a waiver on any obligation subject to a transitional period or a period of staged implementation that has not been met by the requesting Member must be taken by consensus.

[22] The ACP Bananas waiver was extended until the end of 2005 on the basis of consensus at the Doha Ministerial Conference in 2001.

[23] WTO document S/C/M/69, p. 4.

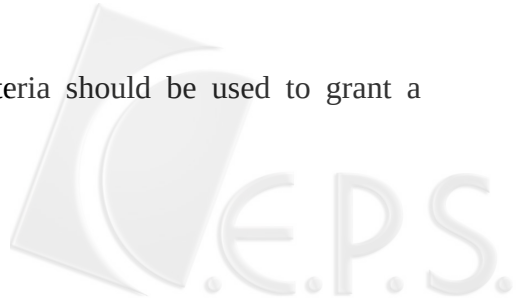
required Albania to promptly enter, upon request, consultations with any Member that felt its benefits under the GATS unduly impaired by the waiver with the possibility of satisfactory adjustment being agreed.

However, for this option to work several issues would have to be clarified, most importantly legally defining that an emergency-type situation of a domestic industry being injured by an import surge would be covered by "exceptional circumstances". For instance, does it only cover "adverse political or natural shocks affecting domestic industry" or would it be applied to lesser circumstances such as:

- Adverse government policies affecting the competitiveness of domestic firms e.g. restrictions on monetary policy which leads to increases in interest rates and an appreciation of currency;
- A shift in domestic preference for services by foreign service providers, especially if the latter had a comparative advantage;
- Adverse political and natural shocks e.g. civil disorder or natural disasters that lead to the damage of domestic industry.

Members may wish to examine the merits of applying an Article IX waiver as a compromise between having and not having an ESM in services. Members will need, however, to look at this in the context of:

- Workability – what criteria should be used to grant a waiver?



- Desirability – is it appropriate to use waivers in such situation?
- Applicability – could "exceptional circumstances" be akin to "unforeseen developments"?

The waiver route would need it seems to be supported by agreed guidelines on how it would be used in such circumstances. The problem is that the more specific and detailed these guidelines become, then the more likely that they will encounter the same problems incurred in trying to negotiate whether to have and if so the form of an ESM.

Conclusions

The most economic sensible outcome would be to have no ESM for services. However, multilateral negotiations involve other considerations; otherwise there would be no ESM for goods. Although there may be a political economy role for such measures, the authors remain unconvinced of its value and believe that the risks for trade liberalization of such a measure are large. If an ESM was to be introduced for services more liberal commitments than those offered to date in the Doha Round would be needed. Moreover, even if the political economy advantages were accepted, any such ESM would need to have greater controls on use than currently exist for goods, such as having an effective national public interest or economic test, so as to reduce the very real risk that such measures would be captured by protectionist interests and be used as a backdoor means of providing protection, as has happened for goods. Sensibly, there are no anti-dumping provisions in services and

this is a strength of the GATS, unlike the GATT where such action has undermined trade liberalization in goods by being used even more than safeguards to protect inefficient domestic industries. This increases the likelihood, however, that an ESM for services would be captured by protectionist interests, particularly given the inevitable scope for empirical and conceptual uncertainties surrounding their application.

Breaking the impasse in the negotiations will not be easy. The ASEANS (without Singapore) in particular seem to be strongly supportive of an ESM in services. While their position is to some extent understandable, a danger for them is that they may expend a lot of negotiating effort to achieve something which, even if successful, brings with it large risks in weakening WTO disciplines on domestic reforms unless also accompanied by more stringent controls on use, and at the end of the day is likely to be of little practical use in addressing their concerns given the nature of services. For example, although the Asian financial crisis badly affected several of the ASEAN countries, it is very unclear how access to an ESM would have changed the policy responses. Indeed, taking such measures most likely would have only prolonged their recovery.

Governments should also assess the economic merits of having domestic safeguard policies. If not having an ESM for services is seen as economically sound then Members may also wish to re-consider whether the same applied to goods, both multilaterally, or in setting their own domestic trade policies that at the end of the day should be based not necessarily on WTO compliance but on what constitutes good economic policy, including for developing countries. While ever the two

coincide there will be no difficulties. However, the gap between the two appears to be widening as political outcomes in the WTO increasingly dominate economically sensible solutions, such that the multilateral rules themselves risk becoming cumbersome, more ambiguous and less transparent. This in turn is likely to undermine the effectiveness of the WTO in promoting trade liberalization and providing good economic disciplines for members to adopt, thus again reinforcing the need for unilateral reforms, especially in services, as the mainstay of domestic trade policies.

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