



Cordell Hull Institute

# Trade Policy Analyses

Vol. 8, No. 10

April 2006



On April 6, 2006, the Cordell Hull Institute held a Trade Policy Roundtable meeting on getting beyond traditional request-and-offer bargaining in the deadlocked Doha Round negotiations on trade in services.

The meeting was held in the Washington office of Akin Gump Strauss Hauer & Feld, attorneys-at-law, located near Dupont Circle (pictured above).

The meeting focused on the newly adopted plurilateral or collective approach to mobilizing a critical mass of support in each branch of the services sector for a particular set of proposals for opening markets.



Reproduced here is the paper by **Richard Self** (above) that was presented at the meeting.

## DOHA ROUND NEGOTIATIONS...

### Energizing the Negotiations on Services in the Doha Round

Richard Self

THE negotiations on trade in services in the World Trade Organization are dangerously behind schedule. There is little time remaining to complete the negotiations on the Doha Development Agenda (DDA) that are enormously complex and politically challenging. For all of the difficulties associated with securing agreement on the "modalities" for negotiations on agriculture and industrial products (NAMA), the services industries are arguably the more difficult to manage. To date, they have received little substantive attention in meetings among trade ministers, whose role is essential in providing top-down impetus to the negotiations.

Unlike industrial tariffs and agriculture supports, services do not lend themselves to negotiation by formula – which is also the case with non-tariff measures affecting trade in industrial products. Services represent widely different parts of nations' economies. They are governed by different regulatory measures aimed at addressing different sets of activities in the sector. This makes services a messy set of negotiations to manage, one reason why they have emerged as a step-child of the DDA, which enters what is likely to be its final year of negotiations. This presentation examines the challenges that face the services negotiations, outlines the accomplishments that have been achieved so far and suggests ways in which the negotiations may be successfully completed.

The services industries play an important role in all countries and, among industrialized countries, occupying between 60 and 70 percent of GDP. In the United States, 70 percent of the workforce is in services, while 90 percent of new jobs are found in these activities. Not all services are exported; part of the high proportion of GDP is attributable to government services. In industrialized countries there has been a clear, and frequently dramatic, shift to a services-based economy.

## About the Author

Richard Self is the principal associate for international trade policy at Nathan Associates Inc., development consultants, Arlington, VA.

A long-time trade official, beginning in the U.S. Department of the Treasury, he was closely associated as -deputy assistant USTR in getting trade in services on the OECD and GATT agendas before being posted to Geneva during the Uruguay Round negotiations, where as chief U.S. negotiator on services he played a key role in securing the General Agreement on Trade in Services (GATS).

## Trade Policy Roundtable

The Institute's Trade Policy Roundtable is sponsored by Akin Gump Strauss Hauer & Feld, Arnold & Porter, Hogan & Hartson, Miller & Chevalier, O'Melveny & Myers, Sidley Austin, Steptoe & Johnson and Wilmer Cutler Pickering Hale & Dorr

## About the Meeting

The meeting was chaired by **Hugh Corbet**, president of the Cordell Hull Institute.

Other speakers, besides Mr Self, were **Aaditya Mattoo**, a lead economist (trade policy) in the development research group at the World Bank, and **Sidney J. Key**, of the Boston University School of Law, who had just retired from the staff of the international finance division at the Federal Reserve Board, Washington, as well as **Robert Vastine**, president

A similar trend can be found among most developing countries, in particular those with relatively higher incomes. India is perhaps the most documented example, as it has taken advantage of its strengths in skills in information technology over the last ten years to become a major exporter of services. Generally, developing countries do not export their services on the scale of industrialized countries (India being a major exception), but the linkages between competitiveness in goods and a strong services infrastructure apply to all countries, regardless of their level of development.

For all of the complexities associated with negotiating trade agreements in these activities, the growing role of services in the world economy and in international trade is simply too significant for them to be ignored.

## The Negotiating Past

By way of brief history, the GATT ministerial conference at Marrakech, which in April 1994 formally concluded the Uruguay Round negotiations, called for renewed negotiations on agriculture and services in 2000, regardless of whether there was another round of multilateral trade negotiations. This acknowledged a left-over agenda in both areas. For services, most of the Uruguay Round negotiations had been consumed with putting together the text of the rules governing trade in these activities, which resulted in the General Agreement on Trade in Services (GATS). There was less time, and less political will, to negotiate a healthy package of specific commitments on market access. A very modest package emerged and this led to the decision to resume negotiations within six years.

Indeed, despite the Seattle debacle in 1999, the beginnings of another round of negotiations on services started early the following year, as part of the "built-in agenda" that emerged from Marrakech. While the early stages did not have the full environment of a trade negotiation, some useful preparatory work was undertaken in the form of "negotiating proposals", where interested countries set out their objectives in areas of interest to them, in most cases full of the necessary detail and specificity that is critical for a serious negotiation. When a comprehensive round of multilateral negotiations was inaugurated at Doha in November 2001, there were hopes that the DDA would take advantage of the early spade work in services and emerge with a dynamic negotiating environment. This was not to be.

Borrowing from the early paradigm of GATT rounds of multi-lateral negotiations, those on services followed the request-and-offer method of generating market-access commitments. Bargaining proceeds bilaterally on the basis of requests and offers that the two parties have exchanged. Deadlines were set for submitting initial, and improved, offers as well as requests. But not many

of the U.S. Coalition of Service Industries.

Discussion on the presentations was initiated by: **Sherry Stephenson**, acting director of the department of trade, tourism and competitiveness at the Organization of American States; **Stuart Brahs**, senior adviser at Principal International Inc.; and **Michael J. Smart**, an associate at Sidley Austin, attorneys-at-law.

countries produced offers or requests. When they did so, the offer was assembled to put forward the bare minimum in the way of obligations, to protect future negotiating leverage. By contrast, most requests called for free trade in services, requiring countries to remove practically all reservations to market access and national treatment in the four modes of supplying services.<sup>i</sup> Most requests, however, allowed for flexibility for developing countries in making commitments, in line with provisions in the GATS for the treatment of developing countries.

A pattern emerged early on that requests and offers were not to be taken seriously and yet this was the only negotiating technique that was in use during the first three years of the negotiations. Various like-minded countries or "friends" groups with an export interest in a particular industry gathered, on an informal basis, to discuss possible common agendas. A few produced "model schedules" that outlined the more specific obligations to market access and national treatment, setting a common agenda for a particular industry. For the first three years the efforts of these groups could not impart any real impetus to the negotiating process. As will be discussed later, this early plurilateral work was to be the seed for a more focused agenda coming out of the Hong Kong ministerial conference.

As a result, the services negotiations were going nowhere. They badly needed political impetus, but the frequent meetings of trade ministers and senior negotiators were devoted almost exclusively to the long-festering issue of agricultural subsidies and those on tariffs in industrial goods, to date the basis of the DDA. The negotiations on agriculture and non-agricultural market access (NAMA), for all their complexity, are essentially about agreeing to a formula on which subsidies and tariff cuts can take place. For agriculture and NAMA, agreement on the modalities for cutting subsidies and tariffs remains elusive, as with any meaningful progress on services. The difference is that there have been frequent and intensive negotiations at ministerial level on the grinding details of possible modalities on agriculture and industrial products. By contrast, the discussions among ministers on services have been limited to general calls for countries to improve their offers.

One reason for giving little time to services at senior levels is the scattered nature of the issues, by contrast to the formulaic result that could be attainable on agriculture and NAMA and agriculture. For a few ministers, it has been difficult politically to engage in the discussions on services, owing to resistance from powerful, turf-driven regulators in their own countries.

There was another reason why trade in services was kept off the policy-level menu and that was the resistance of several countries, led by Brazil, who insisted that the DDA should proceed in sequence. Under this scenario, the modalities on agriculture and

industrial products had to be agreed prior to taking up services. While not all developing countries agreed to the sequential approach (India, notably, was one of these), the Brazilian position simply led to further digressions in higher level discussions on the rightful place of services on the agenda.<sup>ii</sup> In any event, as the DDA entered its final year, the services negotiations were not making real progress and they were without the benefit of real top-down attention from policy-level officials at a time when it was needed.

### **Prelude to Hong Kong: Alternative Negotiating Proposals**

In the months preceding the WTO ministerial conference in Hong Kong in December 2005 it was clear that traditional negotiating techniques would not generate meaningful progress in the services negotiations. Inevitably, a number of participants began to seek alternative, perhaps more efficient, methods of achieving a meaningful breakthrough. Several delegations sought an agreed formula that would obligate all the parties, depending on their levels of development, to include a minimum number of service industries in their schedules of commitments. This proposal included obligations to bind certain levels of modes of supply to insure some level of quality in the level of commitments associated with the sector minimum.

This concept, known as “benchmarking”, had several variations. The European Union’s proposal established exact minimum numbers of service industries that developed and developing countries were to include in their schedules of commitments; it had similar numbers for the modes of supply. In doing so, the Union had arguably produced a formula of sorts for the services industries and it helped to complement their strategy of linking concessions they would have to make in agriculture supports to benefits of lowered tariffs and more open markets in services. The benchmarking proposal had considerable flaws, principally because the minimum industry coverage allowed countries to include non-tradable, unregulated services to meet their benchmark quota obligations, in place of service industries of export interest to other countries. For example, under the benchmark minimum coverage formula, wedding planning services counted the same as insurance. Developing countries immediately rejected the benchmarking idea in principle and it never had much chance thereafter.

The benchmarking effort, however, consumed endless amounts of time in the half year before the Hong Kong ministerial conference. It did have a useful purpose in at least two respects:

- (a) It served as a clear reminder that a successful DDA would have to include a balance of concessions in areas

of interest to all the parties. It underscored the importance of services in this equation, for no country having to make concessions on the scale being asked of the European Union on agriculture could sell such a package domestically without benefits to service industries where it has export strength.

(b) The benchmarking failure encouraged delegations to explore other means of generating some additional modality that would strengthen the stalled request-and-offer process. There was the strong feeling among most of the participants that the Hong Kong gathering had to produce something more than the usual call for improved requests and offers in order to give some impetus to the negotiations.

### **Plurilateral Negotiations and Collective Requests**

In the Uruguay Round negotiations, or subsequent to it, there were some efforts to develop collective proposals among a group of countries who had similar objectives. This occurred in financial services, telecommunications services and maritime services. The first model schedule was produced by the European Commission as a suggested template for possible obligations in that industry. It was more of a menu of obligations than a strict formula for all to assume, but it formed the basis for discussions among a group of thirty or more countries around a common set of ideas. For basic telecommunications, a group of about fifteen countries, including a number of telecoms regulators, produced what became known as the "reference paper" that outlined specific obligations of a non-discriminatory nature that addressed issues such as interconnection, cost-based pricing and the independence of regulators. The reference paper was closer to a formula of obligations interested parties were asked to assume and it proved to be a remarkable success. Some eighty countries incorporated the language of the reference paper as additional commitments along with obligations to market access and national treatment.

Similar efforts had been undertaken for a number of service industries in the DDA, including insurance, energy, logistics, telecommunications, computer and related services, express-delivery and courier services and environmental services. In all, there were thirteen "friends" groups which worked to establish common objectives in different service industries as well as the temporary entry of natural persons – the fourth mode of supply contained in GATS. Not all of the friends groups have been particularly successful in producing specific proposals. Indeed, some of the friends groups realized they had somewhat different priorities. Time limitations on delegates' schedules – always a problem in Geneva – frequently made it difficult to sustain the momentum necessary to produce a common product. Thus, while some useful ground work had been laid toward a complementary

plurilateral approach to the services negotiations, it was not clear whether this kind of approach would gather momentum and help to propel the negotiating process.

There are three advantages to the plurilateral approach:

(a) It can produce a certain discipline among the *demandeurs* of a particular industry to synthesize their inevitably varying objectives and provide a more sharply focused agenda being sought by a group of countries.

(b) It can yield a clearer and more focused set of proposals to which countries are asked to make commitments.

(c) It is ordinarily aimed at specified countries whose commitments in the topical area provide a basis for an acceptable outcome.

Thus, the object is not to bring around all 150 WTO members, but a smaller "critical mass" whose markets provide potential opportunities for services providers.

For regulators who may otherwise resist the endless menu of differing levels of obligations among differing *demandeurs* over the service industry they supervise, they may be more responsive to a single package of requests that is likely to satisfy the parties with the greatest interest in the industry or mode of supply.

In the best of circumstances, a disciplined and realistic package put forward by a group of countries increases negotiating leverage and provides greater efficiency to the negotiating process. There are important details of management, such as how to negotiate among groups of countries and the maintenance of the priorities contained in the collective proposal. Generally, it can be expected that concessions will continue to arise out of the bilateral request-and-offer process, but the case for plurilateral efforts is that concessions are more likely when they fulfil the needs of countries with the greatest export interest in the industry or mode of supply. That is why industry initiatives are always viewed as complementing the request-and-offer process in negotiations on services.

### **Services Results at Hong Kong**

The Hong Kong ministerial conference outlined the following objectives for the services negotiations:

(a) Improved commitments in all modes of supply and the removal of exemptions to the most-favored-nation rule;

(b) Resolution of outstanding institutional issues, such as whether to include an emergency escape-clause mechanism;

(c) Development of regulatory disciplines that would improve transparency and, only when necessary, meet legitimate regulatory objectives;

(d) Fulfillment of a set of modalities for least-developed countries (LDCs) adopted earlier in the DDA that would allow them to undertake fewer obligations and the “meaningful integration of integration of LDCs into the multilateral trading system”. This included the call for “targeted” technical assistance and capacity building for these countries, in part to allow them to participate more effectively in the services negotiations. In all, one third of the services text was devoted to provisions affecting least-developed countries.<sup>iii</sup>

It outlined negotiating approaches that underscored the request-and-offer procedure, “which shall remain the main method of negotiation”, but endorsed negotiations on a plurilateral basis, stressing that any such negotiations should be organized to facilitate the full participation of all WTO member countries. This addressed the concern of small delegations that would difficulty managing their participation in plurilateral negotiations.

Finally, the ministerial text outlined an ambitious timetable for the completion of the services negotiations in 2006, requiring the submission of all plurilateral requests not later than the end of February, with a second round of revised offers to be submitted by July 31 and final schedules of commitments to be submitted by October 31.

The Hong Kong ministerial declaration was noteworthy for giving ministerial endorsement to plurilateral/collective requests as a specific means of pursuing commitments in a somewhat different way. This forced the finalization of work among the friends groups in putting together their service-industry proposals by the initial deadline of February 28. The declaration’s ambitious timetables were necessary to impart urgency to the negotiating process. In sum, it was the very most that could be accomplished in light of the differing agendas in services that preceded the ministerial conference and, further, in the shadow of the issues of agriculture and NAMA in the months preceding the Hong Kong meeting.

### **Work after Hong Kong and Beyond**

Twenty-three collective requests were deposited with the WTO Secretariat in February. These covered a range of service industries as well as proposals governing the cross-border mode of

supply and the temporary entry of natural persons. It reflected hard, focused work among the participants and is an encouraging first step at meeting the schedule set by ministers. The initial round of meetings among delegations centering on the collective requests will have concluded the first week of April and their results could be an early sign as to whether it is worthwhile pursuing market-access commitments through group negotiations. Not much more can be said at this stage, except that the content of the proposals is generally strong, full of the level of detail necessary to provide countries with a clear idea of the precision of industry coverage as well as the level of obligations peculiar to each industry.

Meanwhile, at the World Economic Forum in Davos, Switzerland, a group of trade ministers agreed that the Doha Round negotiations were now to proceed "in concert", underscoring the importance of proceeding with talks on agriculture, NAMA and services in parallel. While the deadline of April 30 for agreeing to modalities in agriculture and tariffs keeps these items at center stage at ministerial talks, it will be critical for trade ministers, in their frequent, informal gatherings, to spend more time on the services brief than they have in the past. This sort of top-down guidance becomes critical in the latter stages of a trade negotiation and it is important that ministers work to establish some core principles that would govern the outcome of the services negotiations.

These might include the following:

- (a) Make national treatment the rule for all sectors and modes of supply, and discuss those specific areas where such an obligation is clearly difficult.
- (b) Permit services to be supplied on a cross-border basis and identify those limited areas where it is not possible, for regulatory and other reasons.
- (c) Allow foreign services suppliers to have the choice to establish either as a subsidiary, a branch or as a joint venture; and
- (d) Develop a common approach to commitments on the temporary entry of natural persons, including some common understanding of the skill levels that would be addressed by such obligations;
- (e) Insure greater transparency in regulations by first soliciting comments on regulations in proposed form and allowing an interval of time before they enter into legal force

While there are a number of other important issues in the services negotiations that require greater attention on the basis of sector,



an agreement to these five principles would help establish a framework for a successful outcome.

### Developing Countries

Developing countries have played a stronger and more active role in all aspects of the DDA, far surpassing their participation in previous rounds of multilateral trade negotiations, and so it is no coincidence that a large part of the Hong Kong declaration addressed developing-country interests. Generally, developing countries have pressed for the opening of markets in industrialized countries in goods and agriculture. They take a more defensive position in the negotiations on services and are less certain as to their export strengths in these industries. A notable exception is that of mode four, where persons from developing countries entering countries on a temporary basis can provide services at more competitive rates.

The least-developed countries, however, have been more explicit in their call for continued protection of their markets by not having to make commitments in service industries and providing the “policy space” their development needs are believed to require. Other countries accepted this at Hong Kong. There is little private-sector interest in doing business in least-developed countries and so it was an easy concession for developed countries to make.

The question remains, though, whether continued protection of LDC services markets retards or helps facilitate development. Least-developed countries need more robust service industries to improve their overall level of development and be more competitive in global markets, especially for industries such as transport, logistics, finance and telecommunications that form the infrastructure of an economy. Efficient and competitive services that meet traders’ needs require considerable capital and technology, which is something that LDCs generally do not possess. The presence of foreign services providers would help meet these vital needs and contribute to the development of an indigenous services industry that is competitive. In most LDCs, however, there are single stakeholders with monopoly rents who have little incentive for competition, especially foreign competition. Some external pressure might be necessary to break this cycle and this is where the WTO could play a role.

Market-opening commitments would help create a regulatory environment that eventually would interest foreign services providers, the result of which would facilitate development through better services. In most sectors, LDCs would need the sort of targeted technical assistance called for at Hong Kong that would provide the capacity to regulate foreign services providers. Indeed, their commitments could be staged over a specific time frame and conditioned on the receipt of regulatory technical assistance during that time frame. At this stage of the DDA,



**The mockingbird** is the state bird of Tennessee. Cordell Hull represented a district of Tennessee in the Congress of the United States, and was elected a senator from there, before becoming U.S. Secretary of State (1933-44).

“The mockingbird is known for fighting for the protection of his home – falling, if need be, in its defense. Mockingbirds are not intimidated by animals larger than themselves and have been known to attack

eagles”

– Diana Wells, *100 Birds and How They Got Their Names* (Chappell Hill, NC: Agonginn, 2002)

### Trade Policy Analyses

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generating any such LDC services commitments is sort of a luxury the participants cannot afford and will not seek. This is an issue for further discussion that must address the value of continued protection of services markets in least-developed countries in the face of overall development needs.

### The End Game

The Hong Kong ministerial declaration and the agreement by trade ministers to negotiate services in concert with agriculture and NAMA has given a modest boost to the services negotiations. The weeks and months ahead will determine whether plurilateral initiatives will have traction, or whether the negotiating proposals alone provide greater clarity and a sense of direction, even if negotiated bilaterally through the request-and-offer process. Nevertheless, there can be little doubt that the services negotiations have little chance for success without a breakthrough in the long-standing search for agreed modalities in agriculture supports and industrial tariff formulas. The Hong Kong declaration calls for agreement to these modalities by no later than April 30. If there is still no sign of breakthrough by that date, the WTO negotiations will be in a crisis mode and are likely to face a loss of momentum in all areas as participants begin to hedge their positions on whether there will be an outcome at all.

What underscores the importance of the Hong Kong timetables is the likelihood that the DDA has entered its final year. Unlike the Uruguay Round negotiations, where extensions became necessary and were feasible, there is considerably less chance, should there be further attempts to extend the DDA, that the United States can gain a new trade promotion authority, for the current authority expires in June 2007. Without the participation of a country the size of the United States, the DDA will collapse. Thus the deadlines set by ministers at Hong Kong are real ones. They may slide by a few months, but not much more. There is a real danger that any missed deadline, absent some assurance that a solution is near or certain, could mark the beginning of the unravelling of the entire negotiating process. Multilateral trade negotiations have a history of achieving breakthroughs when all appears lost, as countries holding to rigid positions make needed concessions to save the round. It will be interesting to see if Doha repeats that history.

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<sup>i</sup> One request, in particular, appeared to be entirely computer generated, thus demonstrating any lack of thought or level of sincerity behind the request. Using identical language in each instance, it called for the removal of literally every reservation that is listed in countries’ schedules of commitments, with no distinction made between industries, modes of supply or differences in treatment among countries.

<sup>ii</sup> The services negotiations include other issues that must be addressed and resolved by all of the parties. These are: whether to include an emergency safeguard mechanism, as

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well as rules on government procurement and subsidies. But very little progress has been made in these areas. To date they have not affected the progress in the market access negotiations.

<sup>iii</sup> WT/MIN(05)DEC; Annex C (December 22, 2005)