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Safeguards and Trade in Services

Characteristics of the GATS and identification of circumstances

Given the flexibility of the GATS in its present shape, it is not obvious whether circumstances can be identified under which inclusion of a specific safeguard mechanism in the GATS would be necessary. The principle of progressive liberalization of the GATS (Art. XIX), whereby specific commitments on market access and on national treatment are determined by successive negotiations, allows Members - while progressively liberalizing trade in services - to take into consideration the level of development and competitive strength of individual sectors of the domestic industry. This approach contributes to considerably reducing the later occurrence of situations that might induce Members to take measures in order to prevent undesirable effects, if they should occur, resulting from specific commitments in particular circumstances. In the area of trade in services such circumstances, if any, are mostly conceivable in relation to payments and transfers. This is obviously the case in the field of financial services, but it is also true for other services sectors, since trade in services normally involves payments and transfers, irrespective of modes of delivery. These types of difficulties, however, are already dealt with in article XII of the GATS.

Further flexibility is provided by article XXI of the GATS, allowing members to take specific action in circumstances that may require taking particular measures. While it is true that measures under article XXI may only be taken when some conditions are fulfilled (waiting period, prior notification, compensation if other Members request so), the mechanism available under article XXI lends itself to overcome difficulties arising from unforeseen effects of specific commitments. The conditions to be observed when taking recourse to article XXI prevent members from taking premature or overly burdensome measures, which might unduly modify the balance of benefits under the Agreement. Although article XXI does not make explicit reference to temporary modification of schedules, the Agreement does not exclude making use of article XXI in case a particular commitment needs to be modified on a temporary basis - if temporary modification of a commitment relating to trade in services is at all practically feasible (see below).

Engaging in negotiations on the design of a specific safeguard mechanism will only make sense if relevant circumstances not already cared for by existing provisions of the GATS have been concretely identified. Only then will the Members be in a position to sensibly decide whether or not to engage in negotiations on the design of a specific safeguards clause under the GATS.

Conceptual and practical problems relating to characteristics of trade in services

Emergency safeguard measures under the Agreement on Safeguards of the GATT are temporary measures a Member may implement in order to limit excessively increased imports causing, or threatening to cause serious injury to its domestic industry producing like or directly competitive products. For a

safeguard mechanism to function properly, key concepts like imports, domestic industry, injury, and like or directly competitive products have to be clearly defined. These terms pose a number of conceptual and practical problems resulting from specific characteristics of trade in services. In addition the implementation of any safeguard mechanism in the services area would encounter a range of practical problems related to the types of measures, to services sectoral classification, and to statistical and measurement difficulties.

Imports and domestic industry

While in the services context imports and domestic industry (and hence injury caused to the domestic industry) may be defined meaningfully in relation to modes 1 and 2, these concepts cause considerable difficulties in relation to mode 3 (and to a certain degree also in relation to mode 4). The definition of imports under mode 3 depends on the definition of domestic industry. If domestic industry includes all service providers established in a Member's territory, there are no "imports" (and hence no serious injury caused by increased "imports") under mode 3. If, however, service providers owned or controlled by foreign persons established in a Member's territory are excluded from the definition of its domestic industry, their services - although produced (and supplied) domestically - would be deemed "imports". This leads to the following dilemma: either there are no "imports" under mode 3 or, although established in the territory of a Member, service suppliers creating value-added and employment within the territory of that Member, would not be considered part of the domestic industry, depending on ownership or control of the established entity. If the latter approach were adopted, safeguard measures could be taken against services of suppliers established in the territory of the Member taking the measure. This would most probably increase injury to the domestic economy of the Member concerned instead of relaxing the problem, an effect, obviously, inconsistent with the purpose of any safeguard mechanism.

Like or directly competitive products

Application of the concept of like or directly competitive products might be more difficult in the field of services than in the field of goods, in particular with regard to modes of supply no. 1 and no. 2. Given the fact that services are in many cases produced and consumed at the same time and in direct contact of a supplier and a consumer, a service consumed abroad (mode 2), or supplied across the border (i.e. without the physical presence of the supplier, mode 1), is not necessarily like, or a close substitute to a "similar" service supplied at the location of the consumer by a producer established in the territory of the Member concerned. Even if the service, abstraction made from the location and the proximity of the supplier and the consumer, may look very similar from a technical point of view, the absence of the physical presence of the supplier, or the foreign location of the consumption respectively may make an important difference from an economic point of view, the latter being relevant for determining whether two services are like or directly competitive (i. e., in market terms, close substitutes). Due to the specific nature of services, determination of whether a service supplied cross-border is like or directly competitive to a similar service supplied domestically will in many cases be more difficult than in the case of trade in goods, and hence could give rise to considerable implementation problems. In addition services typically are differentiated and individualized to a higher degree than goods, rendering determination of like and directly competitive products more difficult in the context of trade in services, even when not having to compare services supplied under different modes of delivery.

Domestic regulation

In contrast to liberalisation of trade in goods, which is mainly brought about by reduction of tariffs and removal of other barriers at the border, liberalisation of trade in services almost exclusively is done by modification of domestic regulation, in many cases applied to foreign and domestic suppliers alike. Tariffs and other measures applied at the border are rarely applicable to trade in services due

to the intangible nature of services output. In the context of trade in services, measures taken "at the border" could at best relate to payments and transfers, or to movement of consumers or suppliers of services. Control of trade in services by preventing people from crossing the border would in many cases be practically difficult, and measures relating to payments and transfers are already covered by art. XII of the GATS.

Even if a limited range of border measures were available, safeguard measures in relation to trade in services would in the vast majority of cases incontestably have to rely on temporary modification of domestic regulation. However, practicability of timely and temporary modification of domestic laws and regulations is in most cases very doubtful, where indeed timely and temporary action is fundamental to any safeguard mechanism. Even if timely and temporary modification of domestic regulation were possible in some cases, it would not be desirable, because temporary change of domestic laws and regulations tends to undermine stability and foreseeability of the legal system, not only detrimental to foreign but also to domestic suppliers. Even if Members were prepared to accept resulting negative implications on the national economy, such action would still not be acceptable from the point of view of the stability of the trading system, particularly in relation to "acquired rights" in the context of commercial presence.

Classification of services sectors

In services, targeting safeguard measures to specific activities is considerably more difficult than in the case of trade in goods, where the harmonised system is much more detailed than the sectoral classification under which specific commitments relating to trade in services are typically inscribed. Together with the fact that safeguard measures would have to be applied, in any particular sector, in strict conformity with the principle of MFN (GATS, article X, paragraph 1), this implies a considerable risk of unravelling. A safeguard measure would almost necessarily affect a wide range of suppliers, possibly originating from a great number of Members, irrespective of the origin of the difficulty triggering the safeguard measure.

Statistical difficulties and measurement problems

Further practical difficulties related to implementation arise due to statistical and measurement problems. First, the invisibility of most services makes it difficult to measure trade flows and hence "increased quantities", the proper identification of which is a necessary prerequisite for a safeguard action to be triggered (and reviewed) by objective standards. The fact that services are provided under four modes of supply makes the task even more difficult. Second, to be able to evaluate the impact of increased imports on the domestic economy, reliable and sufficiently detailed data on production and employment are necessary. This is also true in view of proper review of any safeguard action. Statistical data need to be available on a sub-sectoral level or even on the level of single products, for four modes of supply, and on a quarterly or monthly basis. Existing statistics for trade in services do not normally fulfil these requirements. Typically, available statistics on services lack international comparability, and measurement concepts frequently are inconsistent even on the national level, e. g. between modes of supply, or between trade and domestic production. Even if a great effort were put into statistical work, it is hardly conceivable that sufficiently detailed and reliable data could be made available in the foreseeable future.

Conclusions and options for future work

Further examination clearly seems to be necessary. The question has to be answered whether, in relation to trade in services, circumstances that make a safeguard mechanism desirable can be concretely identified. Should a safeguard clause prove to be desirable, in principle, possible benefits and practicability still remain doubtful, given the present state of knowledge.

Considering that implementation problems, due to specific characteristics of trade in services, would make proper monitoring and effective review of safeguard measures difficult, the risk of undermining basic principles of the GATS is rather high. If the concepts of imports and injury may be reasonably defined for trade in services under modes 1 and 2, the application of the concept of like and directly competitive products might cause, for these two modes, considerably greater difficulties than in the context of trade in goods. On the other hand, while the concept of like and directly competitive products may reasonably be applied to modes 3 and 4, in the context of these modes this seems to be rather doubtful for the concept of "imports", and hence of injury to the domestic industry. In addition, for all modes of supply, domestic regulation, measurement problems, and sectoral classification pose difficulties.

These difficulties are not merely of practical importance, but are fundamental for the effectiveness and the well functioning of any safeguard mechanism not undermining the balance under, and basic disciplines of the Agreement. If these difficulties cannot be overcome, developing a safeguard clause remains a theoretical exercise without prospect of reasonable application.

If examination of these issues should take longer than the time frame foreseen in article X, paragraph 2, extension of the deadline foreseen in article X, paragraph 3 could be considered. Allowing for sufficient time to carefully examine relevant issues would also allow to consider the question of emergency safeguard measures in the context of extended experience relating to the functioning of the still rather young GATS and to ongoing progressive liberalisation.