

COMMUNICATION FROM HONG KONG, CHINA

Autonomous Liberalisation

The attached communication has been received from the delegation of Hong Kong, China with the request that it be circulated to Members of the Council for Trade in Services.

1. Article XIX of the GATS stipulates that Members should “establish modalities for treatment of liberalisation undertaken autonomously by Members since previous negotiations”. This Council has been discussing this subject for some time. Hong Kong, China (HKC) wishes to contribute to the on-going discussion by building on our earlier informal paper Job No.7580 dated 27 November 2000, and putting forward some ideas on possible elements for criteria and modalities on the granting of credits for autonomous liberalisation. This paper is without prejudice to HKC’s position on the issue.

I. GENERAL CONSIDERATIONS

2. HKC suggested in Job No.7580 that the actual text of Article XIX provided mixed signals on the meaning of such concepts as “undertaken autonomously”, “previous negotiations”, “modalities” and “treatment”. But we believe there are some good reasons which support the development of different treatment for autonomous liberalization measures. These include the notion that voluntary concession deserves special recognition as such; the need to protect the negotiating position for those Members who have undertaken autonomous liberalisation; and the desirability of giving other Members the incentive to undertake autonomous liberalisation as well. In the ensuing discussion on possible elements of the criteria and modalities, we will bear in mind the need for any suggested criteria and modalities to reflect these considerations.

3. HKC believes that the criteria and modalities for the treatment of autonomous liberalisation are to be established for the purpose of negotiations of specific commitments under Article XIX. In accordance with the Negotiating Guidelines, “account shall be taken and credit shall be given in the negotiations of specific commitments to autonomous liberalisation measures, based on multilateral agreed criteria”. Thus any criteria and modalities developed should also recognise the need for them to complement the modalities for the negotiation of specific commitments as a whole.

II. MODALITIES AND CRITERIA: GENERAL PRINCIPLES

4. Given that the starting point of the negotiations of specific commitments is the existing schedules, we consider that all measures that would bring the liberalisation in relevant sector over and above the bound level of commitments of the liberalising Member should potentially be of value in the negotiations. And, in this context, the value of a certain liberalisation measure will be dependent upon the actual and/or potential level of trade that would be allowed to take place with the

introduction of such measures, as well as the legal certainty of that measure. The latter would be greatly enhanced with a readiness to bind it as specific commitments as part of the result of the current round of negotiations. The value of “de facto measures”, i.e. measures which are implemented in practice but not bound as specific commitments would be difficult to evaluate in the negotiating context. As suggested in our earlier statement in this Council, both the measures for which credit would be granted and the credit so granted should in our view be bound, so as to provide predictability, legal certainty, and fairness. If there should be no bound commitments for measures for which credit was requested, and granted, then the question would arise as to whether the credit should also be subject to withdrawal at later stage, especially if the measures in question were to be adjusted or invoked subsequently. Such a scenario would of course render any previous effort in determining the value of the measures and the corresponding appropriate credit futile.

5. Another principle that we would like to put forward is that the value of an autonomous liberalisation measure should be judged both in terms of the actual and/or potential commercial value of the measure to the liberalising Member’s trading partners, as well as its role in facilitating the economic development of the liberalising Member itself. For instance, a liberalisation measure undertaken in the telecommunications or other infrastructural sector of an individual Member may be of relatively little interest to its trading partners in general, but it could be of significant value to the economic development of the Member itself. In line with our general objective of promoting progressive trade liberalisation, account should be taken of this factor when determining the value of the measure.

6. Indeed, given that a fair amount of autonomous liberalisation measures might have been in force for sometime, they could be fairly well known to the liberalising Members’ trading partners, and may be accorded relatively low negotiating priorities in requests. These measures might not therefore be “requested” in the request and offer negotiations, or might even become the de facto starting point for negotiations in practice. Multilaterally agreed modalities and criteria should come in handy to deal with these situations.

III. POSSIBLE ELEMENTS FOR CRITERIA

7. We have put forward in paragraph 11(d) of Job No. 7580 a list of possible factors, which may be agreed multilaterally, to be taken into account during bilateral negotiations where autonomous liberalisation is raised. Building on that list, a possible set of elements for criteria could be as follows:

- (a) All liberalisation measures that were undertaken outside the context of all WTO negotiations leading to the current schedules of commitments should potentially be recognised as autonomously taken by Members since previous negotiations (in the present context this should mean the Uruguay Round and the extended negotiations).
- (b) Liberalisation taken over and above the existing schedules of commitments (i.e. potential AL measures which are recognizable for granting credit) could include (i) *de facto* measures over and above the existing binding; (ii) measures undertaken unilaterally by a Member as a result of domestic policy change; and (iii) measures undertaken by a Member as a result of FTAs and to be extended to all Members on an MFN basis in accordance with sub-paragraph (d).
- (c) For a measure to be recognised for credit, it must be susceptible of being scheduled or committed under GATS, i.e. those schedulable under Art. XVI, XVII and XVIII, or those leading to the elimination of MFN exemptions.
- (d) In line with the principle of MFN and non-discrimination, which is a fundamental tenet of the multilateral trading system, only AL measures which are applied on an

MFN basis should be recognised for credit under the criteria and modalities for treatment of AL measures. This should include extending measures which are currently applied on a non-MFN basis (in sectors where MFN exemptions have been undertaken) to all Members on an MFN basis.

- (e) AL measures which a Member is willing to bind at the end of negotiations should be recognised as eligible for credit.
- (f) The trading value of the AL measure to the trading partner concerned, having regard to actual and/or potential commercial interests. This may be considered in the light of, for example, the weighting of the sector or mode in which autonomous liberalisation is taken, to the GDPs of the relevant trading partners, subject to availability of credible statistics.
- (g) The significance of the AL measure in promoting the economic development of the liberalizing Member, having regard to its level of development.
- (h) The gap between the AL measure and the de facto level, if the AL measure for which credit is claimed is not the de facto measure.

IV. POSSIBLE ELEMENTS FOR MODALITIES

8. As regards possible elements for modalities, we consider that an AL measure may be used to claim credit either: (i) in making requests in respect of specific trading partners for liberalisation in general or in specific sectors; or (ii) in making offers either in response to requests in the same or a related sector. Here, the requesting Member should be responsible for providing information regarding the AL measure for which credit is sought, describing its significance to the Member's economic development, indicating a willingness to bind the measure by the end of the negotiations if credit is granted, and explaining its relevance to the requests being made (if applicable).

9. The trading partner(s) should evaluate the trading value of the AL measure put forward to it by the liberalising Member, having regard to its actual or potential commercial interests. Where it is considered that an AL measure is of little or no trading value, the trading partner(s) should provide information on the evaluation as early as possible to allow time for the liberalising Member to request consultation.

10. Where the liberalising Member, after consultation with the trading partner concerned, failed to gain credit for its AL measure requested for either in requests or offers, the Member may notify the Council for Trade in Services, Special Session and requests for a peer review of the AL measure and the credit sought. In other words, an oversight role is envisaged for the Council for Trade in Services, Special Session in order to ensure that the multilaterally agreed criteria are applied in an appropriate manner, in line with the understanding of the membership. We believe this is consistent with the function of the Council for Trade in Services, Special Session as the forum overseeing the conduct of services negotiations at Council and subsidiary level.

11. For the modalities of treatment for AL measures to be operational, notification and transparency of AL measures, for which recognition is sought and credit is granted in the negotiation process, would be necessary. Such notification and transparency should meet the same level of requirements as under Art. III. In particular, the notification should describe the measure and its significance to the Member's economic development, and indicate a readiness to bind the measure by the end of the negotiations, if credit is granted. Phased-in notification and transparency should be allowed to tie in with the negotiations process. A possible outline of notification procedures could be as follows :

- (a) If a Member wishes to claim credit for an AL measure from its trading partners for its requests, the AL measure should be inscribed alongside the Member's requests for its trading partners.
- (b) If a Member wishes to claim credit for an AL measure from its trading partners in its offers, the AL measure should be inscribed alongside the Member's offer.
- (c) Alternatively, a Member who wishes to claim credit for an AL measure may notify the Council for Trade in Services, Special Session at any time its intention to claim credit for that particular AL measure.
- (d) All AL measures for which credit has been claimed and is to be granted should be notified, if not already done under (c).

V. NEXT STEPS

12. This paper has not touched upon, *inter alia*, the important question of the nature and form of the credit to be granted for eligible autonomous liberalisation measures. We look forward to discussing the contents of this paper and other relevant issues with Members.
