Trade negotiations on services in the World Trade Organization (WTO) and the commitments undertaken by Peru

Luis Castro Joo

The deepening of interdependencies is perhaps the most striking feature of our times. In the economic sphere, this dynamic is fueled by increasing degrees of liberalization of the flow of capital, goods, services and technology, leading to the integration of a global economy. The functioning of this global economy is being shaped by the trade and investment policies of states, by the investment and production location decisions of companies, as well as by the activism of civil society organizations on economic issues.

At the level of international policy, States are seeking to regulate this global economy on the basis of rules agreed by consensus. In the case of trade, the international trade regime was redefined in April 1994 with the signing of the Marrakesh Agreements, the outcome of complex multilateral negotiations that began in 1986 with the launch of the so-called "Uruguay Round". This improvement of the regime basically involved institutional strengthening and a broadening of its regulatory scope.

Indeed, the environment of relative legal ambiguity and provisionality derived from the General Agreement on Tariffs and Trade (GATT) of 1948 was overcome with the establishment of the World Trade Organization (WTO), an international body that as of 1995 administers binding multilateral[1] and plurilateral agreements[2] through which the subscribing governments establish : a) agreed rules for regulating international trade; b) mechanisms for monitoring the effectiveness of the agreements, including an effective dispute settlement mechanism; c) frameworks for

[1] Multilateral agreements are administered by the WTO and their provisions are enforceable against all 152 WTO Members.

[2] Plurilateral agreements, although administered by the WTO, are not binding on all WTO Members, but only on those that have expressly accepted them.

creating additional rules and mechanisms, as well as for negotiating progressive trade liberalization. The WTO has 29 legally binding agreements under its purview, including the reformed GATT (GATT 1994), the sectoral agreements of the Tokyo Round, and the Uruguay Round agreements.

The WTO multilateral trade regime is based on two fundamental principles: non-discrimination and transparency. Non-discrimination results from the "most-favored-nation" principle (no discrimination between foreign suppliers, so that the benefit granted to a given member must be extended to other WTO members); and "national treatment" (no discrimination between domestic and foreign suppliers, so that products from abroad must receive the same treatment in the domestic market as domestic products). Under transparency, members undertake to notify the WTO of government measures that may affect international trade or the validity of commitments made under the WTO. These notifications are very useful for economic and commercial agents to have updated and accurate information at the time of making decisions.[3]

On the other hand, transcending the traditional tariff and non-tariff approach to liberalizing and regulating international trade, the WTO began to move towards greater "universalization of its scope of regulation". This was reflected in the reincorporation into the GATT of old issues that had been treated exceptionally (agriculture and textiles), as well as in the inclusion within the WTO of issues other than trade in goods, such as trade in services, trade measures related to investment, and aspects of trade related to intellectual property rights.

In other words, it is only since 1995 that international trade in services has been regulated under rules agreed multilaterally at the WTO. This is interesting to note with respect to a sector whose world exports in 2006 represented the sum of US$ 2.8 trillion (UNCTAD 2007) and which includes

[3] It should be noted that there are exceptions to these principles, essentially to make customs unions, free trade areas and economic integration schemes compatible with the WTO. The normative basis for these exceptions is found in Article XXIV of the GATT and in Article V of the GATS.

such dynamic subsectors as "other business services"[4] that have been growing at an annual rate of 13% since 2000. (WTO 2007a: 115).

The purpose of this article is to outline the main characteristics of the negotiations on trade in services at the WTO, as well as the commitments undertaken by Peru in this forum, with a view to the current Doha Round negotiations.

1. What is negotiated in trade in services?

The incorporation of the issue of services in the Uruguay Round was promoted by a number of industrialized countries, most notably the United States of America (USA). At the time, these countries considered that the regulation of international trade in services was consistent with the long-term restructuring of both their national economies - given that services represent an increasingly high percentage of employment and gross national product in industrialized countries - and the world economy as a whole, considering that services, such as telecommunications and financial services, provide the infrastructure on which current economic growth depends (Abo 1986 : 3-23).

Initially, this proposal did not generate much enthusiasm among a number of developing countries, which felt that they had little to gain from it. However, agreement was finally reached by virtue of the incorporation of the promotion of development in its provisions, a proposal that was emphasized by countries such as Peru, Indonesia, Malaysia, India, Brazil, Singapore, Egypt, among others. In this regard, the Preamble, which states that the General Agreement on Trade in Services (GATS) aims to "promote the economic growth of all trading partners and the development of developing countries" through the expansion of trade in services, is quite illustrative.

The recognition of the differences between the nature of goods and services, as well as the identification of the various modalities in which

[4] In the statistics prepared by the WTO, this category includes commercial services other than transport, tourism, telecommunications, insurance and information technology.

trade in services is carried out, are the main factors that explain the particularities of the regulatory framework contained in the GATS, in relation to the GAIT that regulates trade in goods, and those that justify a different regulatory body for the case of services.

The GATS does not define what a "service" is. However, the criterion commonly used by academics to distinguish a service from a good is that the service is intangible, indivisible and cannot be stored.[5] This means that, in general, the proximity of the supplier and the consumer (e.g. a surgical operation) is required for a service transaction to occur.

In addition, it became clear as early as the Uruguay Round negotiations that services were more regulated internally than goods. This is due to the fact that there are certain services that do not have economic objectives, but social, cultural and security objectives (e.g. health, education and police services). Regulation also exists to protect consumers from possible monopolistic suppliers, as in the telecommunications and transportation sectors; or to avoid fraudulent practices in sectors such as financial services, insurance, or even professional services (OAS 2005: 18-19). (OAS 2005: 18-19).

In addition to this strong government regulation of services, there was also a strong state presence in the ownership of service providers. In the case of Peru, State ownership was notorious in activities such as finance, postal services, transportation and telecommunications (WTO 2000: 84).

On the other hand, unlike the international trade in goods that materializes only through the physical movement of a good across national borders, the international transaction of services can occur through 4 different modalities identified by the GATS.[6] Indeed, a service can be provided via i)

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[5] Graphically, it is often stated that "service is anything that doesn't hurt if you drop it on your foot"

[6] Article 1.2 of the GATS reads: "For the purposes of this Agreement, trade in services is defined as the supply of a service:

(a) from the territory of one Member into the territory of any other Member;

(b) in the territory of one Member to the service consumer of any other Member;

(c) by a service supplier of one Member, through commercial presence in the territory of any other the cross-border movement of services (e.g. a bank transfer from Bangkok to London via the internet); ii) the consumption of services abroad (e.g. Norwegian residents going on vacation to Cusco); (iii) the establishment of a commercial presence in the territory where the service is to be provided (e.g., AT&T's foreign investment in Jamaica to provide telecommunications services); (iv) the temporary movement of natural persons to another country (e.g., Indian doctors moving temporarily to work in hospitals in Canada).

In this situation, the Uruguay Round negotiators realized that the mechanisms used by governments to protect the domestic industry producing goods were inadequate in the case of services. Indeed, while in the case of goods it is possible to require the payment of tariffs when the goods cross the border of a given national territory, this measure cannot be fully applied to services, since this is an intangible product. Moreover, as we have seen, many services are supplied through modalities that are different from cross-border trade (ITC 1999).

Consequently, negotiations for the liberalization of trade in services are not focused on the issue of tariff reductions (as in the case of goods) but rather on the way in which the participation of foreign service suppliers in the domestic market is regulated, and -more specifically- the way in which foreign investment in services is regulated.

2. The General Agreement on Trade in Services

These particularities of trade in services, as well as the nature of the negotiations for its trade liberalization, are reflected in the provisions contained in the GATS. The GATS is composed of: a) a normative framework containing the general concepts, principles and rules that apply to measures affecting trade in services; b) the Annexes to the Agreement that establish certain provisions applicable to specific services sectors; c) the schedules of specific commitments undertaken by each WTO member to

Member;

(d) by a service supplier of one Member through presence of natural persons of a Member in the territory of any other Member".

liberalize trade in services in the sectors listed in each of these national schedules.

The GATS regulatory framework includes the following general principles applicable to all WTO members: most-favored-nation treatment, whereby no discrimination may be made between foreign service suppliers (Article II); transparency of regulations and measures affecting trade in services (Article III); measures to promote the increased participation of developing countries in trade in services, such as the establishment of contact points (Article IV); rules applicable to monopolies and exclusive service suppliers (Article VIII); consultations to eliminate trade practices that may limit competition (Article IX).

It should be noted that the Uruguay Round agreed on the possibility of maintaining exemptions to the most-favored-nation obligation under Article II. In principle, such exemptions should not exceed a period of 10 years.[7] On the other hand, it should be noted that, unlike trade in goods, the principle of "national treatment" in is not a general principle that applies automatically, but is a matter for negotiation (Article XVII).

The GATS Annexes contain additional rules to address the specific particularities of the following services sectors: air transport (the GATS does not cover traffic rights or services directly related to the exercise of such rights); financial services (recognizes members' authority to take prudential measures to ensure the integrity and stability of the financial system); telecommunications; and maritime transport services.

When it became clear that the liberalization negotiations in certain services sectors could not be completed before the deadline set by the Uruguay Round, Decisions were agreed to mandate the continuation of certain sectoral negotiations. Thus, pursuant to these Decisions, after the Uruguay Round, the WTO conducted negotiations aimed at further liberalization of the movement of natural persons supplying services (Protocol II Annex to the GATS, October 1995); basic telecommunications services (Protocol IV

[7] To date, the lists of exemptions to Article II (most-favored-nation principle) remain in force and are the subject of ongoing negotiations on services as part of the Doha Round negotiating package.

Annex to the GATS, April 1997); and financial services (Protocol V Annex to the GATS, February 1998).

The results of the negotiations on services, both those of the Uruguay Round and those of the successive sectoral negotiations on services, are contained in the so-called Schedules of Specific Commitments. According to the standard format of these schedules, each member enters in them: a) the services sectors for which it undertakes liberalization commitments; b) the conditions under which it grants access to its market; c) any limitations to the principle of national treatment; d) other additional commitments; e) any exemptions to the "most-favored-nation" principle.

The reading of each schedule is not entirely straightforward as it may cover a maximum universe of 12 different services sectors and 155 subsectors, according to the classification of services prepared by the WTO Secretariat. Likewise, commitments in each sub-sector can refer to each of the four modes of supply of services.

In sum, through the Uruguay Round negotiations, and the subsequent sectoral negotiations on basic telecommunications services and financial services, the main features of the WTO services negotiations have been established. Namely:

a) The universe of services[8] negotiated comprises 12 sectors:[9]

- Business services (including professional services, computer services, real estate)
- Communications services (including postal services, telecommunications, audiovisual services)
- Construction and related engineering services.
- Distribution services (including franchising, wholesale and retail trade services)

[8] To clarify the universe of services in the WTO, it should be borne in mind that the GATS and the negotiations do not cover services "supplied in the exercise of governmental authority", meaning services that are not supplied on commercial basis nor in competition with one or more service suppliers (such as central banks). These services are outside the scope of the GATS, as it is clear from Article 1.3.b of the GATS.

[9] List of sectoral classification of services, document MTN.GNS/W120, dated July 10, 1991.

- Education services
- Environmental services
- Financial services (including banking and insurance services)
- Health and social services
- Tourism and travel-related services
- Recreational, cultural and sports services
- Transportation services
- Other services

b) The scheduling of liberalization commitments in "positive schedules" called national schedules of specific commitments in at least one of these 12 services sectors. In other words, unlike the "negative list" approach, under which it is assumed that all service sectors are liberalized unless otherwise listed,[10] in the WTO, liberalization commitments undertaken by a country include only those sectors expressly listed. This approach used in the WTO is consistent with the spirit of the GATS, which envisages progressive liberalization of trade in services while respecting national policy objectives and recognizing existing asymmetries in the degree of development of services regulations in the various countries.[11] Furthermore, Article XIX.2 of the GATS recognizes the right of developing countries to liberalize a smaller number of transactions, to progressively extend market access in accordance with their level of development and to set conditions for the access of foreign service suppliers to their domestic market.

c) The negotiation of market access for foreign service suppliers on a "most-favored-nation" basis. Once a WTO Member decides to grant access to its market to foreign service suppliers, it may define the conditions under which it grants such access. For this purpose, it must take into account Article XVI of the GATS, which provides that -unless otherwise stated in its Schedule of Specific Commitments- the WTO Member may not maintain or adopt limitations: on the

[10] The negative list approach is often used, inter alia, in the Free Trade Agreements signed by the United States of America.

[11] See the Preamble to the General Agreement on Trade in Services.

number of service suppliers; on the total value of service assets or transactions; on the number of service operations; on the total number of natural persons that may be employed in a given service sector; on specific types of legal persons; on the participation of foreign capital expressed as a maximum percentage limit on the holding of shares.

d) The negotiation of whether or not to provide "national treatment" to foreign service suppliers, as provided for in Article XVII of the GATS;

e) The use of up to 4 modalities for the provision of services for which the agreed concessions on market access and national treatment may be applied.

3. Commitments undertaken by Peru on trade in services at the WTO

In April 1994, at the end of the Uruguay Round of multilateral trade negotiations, the Peni signed the Marrakesh Agreement containing the results of those complex negotiations. Thus, our country became one of the founding members of the World Trade Organization (WTO). The Congress of the Republic ratified this international instrument by means of Legislative Resolution No. 26407 of December 18, 1994.

In this context, in 1994, Peru assumed a list of specific commitments on market access and national treatment for foreign suppliers of commercial services.[12] Subsequently, in April 1997, Peru assumed new commitments derived from its participation in the negotiations for the liberalization of basic telecommunications services[13] . These obligations are part of the IV Protocol Annex to the General Agreement on Trade in Services, which was accepted by Peru on June 6, 1997, in accordance with Supreme Resolution No. 129-97-RE.[14] In December 1997, Peru made additional commitments within the framework of the negotiations for the liberalization of financial services, which were included in the V Protocol Annex to the General

[12] Document GATS/SC/69, dated April 15, 1994.

[13] Document GATS/SC/69/Suppl. 1, dated April 11, 1997.

[14] R.S. 129-97-RE, dated May 07, 1997.

Agreement on Trade in Services. Peru accepted this international instrument on June 23, 1998, in accordance with Supreme Resolution No. 255-98-RE.[15]

Peru's schedule of specific commitments contains two horizontal commitments, i.e. applicable to all sectors. The first concerns the movement of natural persons supplying services (mode 4). Under this commitment, Peru allows the entry of foreigners for a period of no more than three renewable years, provided that their number does not exceed 20% of the total number of servers employed by and working for a given company, and their remuneration does not exceed 30% of the total amount of the payroll.

The second relates to investments in services (mode 3). Under this commitment, Peru guarantees foreign investors and companies the same rights and obligations as domestic investors and companies, in accordance with the Constitution and Legislative Decree No. 662.

As for sectoral commitments, our country's commitments in the WTO cover -to a greater or lesser degree of openness- 7 of the 12 sectors that make up the services universe, i.e. a coverage of less than 60%. Our market access liberalization and national treatment commitments -with various nuances- cover the following sectors: business services; communications services; distribution services; financial services; tourism and travel-related services; recreational, cultural and sporting services; and transport services.

Within these seven sectors, our commitments are heterogeneous in terms of the number of subsectors, segments and modes of supply covered. Roughly speaking, the ranking from highest to lowest degree of opening of our market according to our legal commitments in the WTO would be: i) communications services (essentially, basic telecommunications); ii) financial services; iii) distribution services; iv) business services; v) leisure, cultural and sports services; vi) tourism and travel-related services; vii) transport services. In general, the pattern of our commitments in these sectors refers to the liberalization of mode 3, i.e. foreign investment in

[15] R.S. 255-98-RE, published on June 3, 1998 in "El Peruano".

services. Liberalization of mode 1 (cross-border supply) and mode 2 (consumption abroad) is only scheduled for some subsectors in basic telecommunications and financial services.

Peru has not made commitments of any kind in: (i) construction and related engineering services; (ii) education services; (iii) environmental services; (iv) social and health services; and, (v) others not specifically included in the classification. In other words, WTO rules do not apply to these sectors in our country.

It should be noted that the sectors in which Peru has not made commitments correspond to services whose supply is considered a primary responsibility of the State, such as health and education, or related to public infrastructure works. In the case of construction and related engineering services, it could also be interpreted that the absence of liberalization commitments implies a protection to stimulate the competitiveness of a promising sector of the national economy. Regarding the absence of commitments in environmental services, this may be due to the technical and complex nature of this area, as well as to the lack of a proper evaluation aimed at identifying the eventual benefits for our country. The complexity of this issue is illustrated by the current debate in the WTO on classification issues in this sector.

Peru also has a list of MFN exemptions in force.[16] This list establishes a horizontal exemption (i.e., applicable to all service sectors) relating to the movement of natural persons supplying services (mode 4). Under this exemption, nationals of countries with which Peru has entered into labor reciprocity or dual nationality agreements are not subject to limitations on the hiring of foreign workers. Additionally, the list contains exemptions relating to specific sectors such as land transportation, maritime transportation, recreational, cultural and sports services, intended to cover the preferences agreed in regional or sub-regional integration schemes such as the Andean Community. Likewise, Peru has listed an exemption related to financial services, on the basis of reciprocity, taking into account

[16] Peru's final list of Article II (MFN) exemptions is contained in WTO documents GATS/EL/69 of 15 April 1994 and GATS/EL/69/Suppl 1 of 26 February 1998.

the provisions of Article 63 of the Political Constitution.[17] In general, the limitations consist either in the requirement of reciprocity, or in the establishment of a quota of personnel that must be of Peruvian nationality.

4. Peru and the Doha Round services negotiations

Negotiations on services within the framework of the WTO Doha Round have not made significant progress. There is a strong tendency to maintain a parallelism between progress in services and progress in agriculture. A number of delegations even advocate maintaining a double parallelism, since this would not only involve a parallelism between the degree of progress in the negotiations on services and agriculture, but also between progress in the negotiations pending under GATS rules and the negotiations on specific commitments in services. In this regard, it should be borne in mind that the GATS establishes a mandate to negotiate rules on emergency safeguards (Article X); subsidies (Article XIII); and government procurement (Article XIII), which have not yet been able to make much progress.

With a view to Peru's participation in the current negotiations on services within the framework of the Doha Round, any negotiation strategy and national position should take into account four elements: the current situation of national legislation on services, the economic reality of the services sector, negotiations on services in other forums, and the scope of negotiations on services in the WTO.

There is currently a gap between current domestic market access legislation on services and our WTO bound commitments. Our country, in practice, has an open regime that goes beyond its WTO commitments. The gap between current national services legislation and our WTO commitments constitutes the space reserved for implementing national trade policy options in the area of services. This space can also be interpreted as a source that can provide a bargaining chip to "pay" or "exchange" concessions that our country requires from other members,

[17] Article 63 of the Constitution establishes in its first paragraph: "National and foreign investment are subject to the same conditions. The production of goods and services and foreign trade are free. If another country or countries adopt protectionist or discriminatory measures that harm the national interest, the State may, in defense of the national interest, adopt analogous measures."

whether in the same area of services or in other areas of negotiation such as, for example, agriculture.

The reality of trade in services in Peru should also be taken into account. Its development has been very strong between 1995 and 2005, a period in which its value doubled. In fact, during that period, our country's exports of services increased from US$ 1,131 million to US$ 2,289 million. In 2006, Peruvian exports of services reached a value of US$ 2,451 million (UNCTAD 2007). In the "other business services" sector, Peru has registered an average growth rate of over 30% between 1995 and 2000, a phenomenon highlighted in World Bank studies related to the services export capacity of developing countries (Mattoo 2006: 168). Foreign investment in the service sectors, especially telecommunications and financial services, has shown a similar dynamism.

But as the OAS reminds us, it is true that trade liberalization can help countries grow faster and more efficiently. But in the case of services, such liberalization must be complemented by a strengthening of regulatory institutions *and* policies. Otherwise, there is a risk that liberalization may "even be counterproductive and detrimental to the poor" (OAS 2005: 20).

In this context, it is necessary to strengthen the institutional capacity and the role of INDE- COPI, as well as that of the regulatory agencies including OSIPTEL, OSINERGMIN, OS1TRAN. For example, in the period 2000-2006, INDECOPI's Free Competition Commission conducted investigations for alleged infringements of free competition in sectors such as health services (hospital activities); storage and warehousing; electricity generation and distribution; legal services; business activities; insurance; telecommunications; road freight transport; maritime transport; rail transport; air transport; wholesale of food, beverages and tobacco; wholesale of construction materials; wholesale of other products (WTO 2007: 54). (WTO 2007: 54).

A third element to take into account is given by the negotiations on services in other forums and the commitments that our country has been acquiring in frameworks other than the WTO. For example, within the Andean Community of Nations, and in the Free Trade Agreement with the United States of America.

Finally, it should be kept in mind that trade agreements do not oblige the privatization of services, but rather that such a decision is made in the context of national economic policy. Nor do trade agreements oblige the government to renounce its participation in national economic activity (OAS 2005:24).

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