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# THINK-PIECE ON RECENT TRENDS IN SERVICES NEGOTIATIONS AND ACP POLICY RESPONSES

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## LIST OF ABBREVIATIONS

| | |
|---|---|
| ACP | African, Caribbean and Pacific (States) |
| AfT | Aid for Trade |
| AG | Agriculture (negotiations) |
| BOP | Balance of Payment |
| BPO | Business Process Outsourcing |
| CTS | Council for Trade in Services (WTO) |
| DDA | Doha Development Agenda |
| EAC | East African Community |
| ECOWAS | Economic Community of West-African States |
| EP | European Parliament |
| EPA | Economic Partnership Agreement |
| ESM | Emergency Safeguard Mechanism |
| EU | European Union |
| INTA | Committee on International Trade (European Parliament) |
| LDC | Least Developed Country |
| MA | Market Access |
| MFN | Most-Favoured Nation |
| NAMA | Non-Agricultural Market Access |
| NT | National Treatment |
| PACP | Pacific ACP States |
| PTA | Preferential Trade Agreement |
| REC | Regional Economic Community |
| REC | Regional Economic Community |
| S&D | Special and Differential Treatment |
| SADC | Southern African Development Community |
| TIS | Trade in Services |
| TISA (TiSA) | Trade in Services Agreement |
| TPP | Trans-Pacific Partnership (Agreement) |
| TTIP | Trans-Atlantic Trade and Investment Partnership |
| UNCTAD | United Nations Conference on Trade and Development |
| WPDR | Working Party on Domestic Regulation |
| WTO | World Trade Organization |

# 1 INTRODUCTION

Services used to be an afterthought. In fact, for many in the trade policy world they still are. Services get their attention when other, purportedly more important, more immediate matters have been dealt with, such as agricultural and non-agricultural goods. Many publications of trade and other statistics still today routinely refer to "trade" as trade in goods only, often without even acknowledging that limitation save in a footnote. The services portfolio in ministries of trade and diplomatic missions is often pushed down the hierarchy, relevant units are often understaffed. Even trainings, books and discussions on trade policy, law and economics tend to get to services only once the GATT, SPS, TBT, trade remedies and other matters relating to trade in goods have been dealt with. The sorry fate of services negotiations in the DDA, a hapless hostage to the lack of progress on agriculture and NAMA for most of the past decade, is arguably also a reflection of that traditional, *de facto* secondary status.Not a single official from the Trade in Services Division attended the MC9 meeting in Bali, as services (apart from a stabilized, pre-agreed decision on the LDC Services Waiver) were simply not on the agenda!

This stands in stark, almost painful contrast to the actual importance of services in general and trade in services in particular. Services account for more than two thirds of world GDP, however measured, with national shares of GDP ranging from around 50% to around 90%. (Even those numbers, looked at closely, likely understate the role of services, as they reflect only arms-length transactions.) Services are significant factors for competitiveness and drivers of growth. Communication, transport and financial services, among others, are major inputs to virtually any economic activity.

But what about services in international trade?Aren't many services often simply "non-tradable" and hence local phenomena of limited importance for purposes of trade? Isn't real trade still primarily trade in goods?

Nothing could be farther from the truth. Indeed, until as recently as 2012 the WTO and others routinely reported the share of services in total world trade to be at just around 20%, much to the dismay of those who knew better.But that assessment has now seen a rather dramatic shift with a simple, long-overdue change in perspective: the look at value addition. The result is impressive and provides reason for a re-think: For 2008, for example, the OECD and the WTO now estimate that services account for around 45% of total trade, up from 23% in gross terms. But even those numbers seem to significantly understate the actual situation, as many services are further "embedded," "embodied" and otherwise included and hence hidden in goods (or goods prices) and other values, not least often because they are – at present – provided within or by (ultimately) goods-producing companies.

For many these observations are obvious, for many others not (yet). It is that dichotomy which we find reflected today in a rather striking picture of disconnects.

Services negotiations in the WTO's DDA, ever since their almost unwitting climax in the "Signalling Conference" of 2008, have stalled completely, apart from slow-moving, low-ambition talks on domestic regulation disciplines.The GATS is approaching its 20th birthday, unchanged since its conception in a pre-internet age. As just stated, services were virtually absent from ministerial discussions at MC9.

Services were, however, vibrantly discussed at the "Trade & Development Symposium" and its sister "Doha Business Forum" across the street. No wonder – there was a lot to talk about. So far 23 WTO Members (counting the EU as one) have embarked on negotiations of what may well turn out to be the biggest preferential trade agreement outside the WTO: the Trade in Services Agreement (TISA). Meanwhile negotiations for several "Mega-RTAs" are under way, including in particular the multi-party Trans-Pacific Partnership (TPP) and the EU-US Trans-Atlantic Trade and Investment Partnership (TTIP), with services being a major component and target for far-reaching "21st century disciplines" that reach well beyond the GATS, prompting observers to speak of the possible emergence of a new "gold standard" for services agreements.

None of these three agreements involve – to date – any ACP member. While geography appears to exclude(or make rather unlikely) participation of most ACP countries in TPP and TTIP, TISA is in principle open to all, includingACP parties – a challenge however which none has taken up yet (although two have reportedly put out their feelers).

That does not mean, of course, that ACP countries are untouched by the services wave. All ACP Regional Economic Communities (RECs) include drives towards integration also in services, albeit with wide variations in intensity and reach. Again in stark contrast, however, services negotiations as part of the EPA processes have been a rocky, to date largely unsuccessful exercise, with the exception of the CARIFORUM-EU EPA already concluded in 2007.

It is against this rather mixed background that we were asked to prepare this think-piece. It is imperative that the ACP pause to reflect on how to safeguard and advance ACP interests in the context of recent multilateral, plurilateral, regional and bilateral developments in the area of trade in services.

This paper aims to make a humble contribution to that reflection on recent trends in the area of services trade with a view to facilitating ACP members' efforts to craft appropriate policy responses. Specifically, the Terms of Reference for this work ask for the following:

*(i) Review state of play in recent multilateral, regional and bilateral negotiations on trade in services including pertinent developments in major WTO Members;*

*(ii) Enumerate the major trends in those salient negotiations on trade in services from the perspective of ACP States;*

*(iii) Provide policy guidance to the ACP on the treatment of those new developments in trade in services negotiations;*

*(iv) Sketch an architecture for the expression of special and differential treatment supportive of enhanced market access and domestic regulatory capacity in ACP countries;*

(v) *Enumerate specific proposals on flexibilities and disciplines that can be advanced by ACP countries in various multilateral, regional and bilateral negotiations fora*.

The examination proceeds as follows. The following section 2 offers some fundamental observations on services, trade in services and services trade policy which we believe must feature in any meaningful assessment, and policy response, on trade in services for the ACP. Section 3 provides a review of the state of play in services negotiations, from the DDA via TISA to TTP, TTIP, the EPAs and the RECs, as well as the LDC Services Waiver, and adds a few observations on internal trends in some major WTO Members. Section 4 distils from these some major trends, from an ACP perspective, which should be taken into account when shaping ACP members' policy responses. On this basis section 5 offers some policy guidance for ACP members. Section 6 reflects specifically on the architecture for flexibilities, special and differential treatment (S&D), Aid for Trade in current and in particular future services agreements and arrangements and offers specific proposals on disciplines and flexibilities ACP members may wish to seek when engaging in negotiations. Section 7 concludes.

# 2 WHAT IS IT ABOUT SERVICES? SOME KEY OBSERVATIONS

## *2.1 "The Age of Access"*

There can be little doubt that we live in an age of major changes. Developments in information technology and transportation have enabled and are driving the re-organization – and sometimes re-scrambling – of personal, business and political life in a myriad ways. Many of these changes have a profound impact on our subject matter: services, and trade in services.

When Jeremy Rifkin in 2000 proclaimed "the age of access,"[1] his thesis that we are witnessing a fundamental shift from ownership (in goods) to access (to experience) seemed far-flung for many. Fourteen years later, with Facebook, Google, Twitter, Amazon and Apple (a major service supplier) dominating headlines of both the political and the business pages, and featuring among the highest values companies worldwide, many if not most of us, in developed and developing countries alike, would at least begin to agree.

[1] Rifkin, *The Age of Access* (2000).

This has obvious implications for trade in services, many of which are being experienced by companies and consumers alike. Books (formerly traded as goods) now often come as downloads (services), including cross-border; machines and sometimes entire production processes are not only installed, supported, serviced and sometimes operated partly or wholly from abroad, but also often leased from foreign providers, rather than owned; physical goods are, and many more will, be generated through 3D printers and "faxes", which may receive their input from abroad (Are the resulting goods foreign or domestic?). The implications are felt both locally and internationally – in fact, often the distinction appears almost obsolete, with businesses and consumers not knowing where their data are stored, from where a film is downloaded, where the call center they are calling is located, where their medical dictations are being typed, where their online design software is located or where their management advice comes from. Clearly, old trade policy perspectives relying on categorizations of goods and services, on sharp distinctions between domestic and foreign and on mercantilist silo mentalitiesare today barely explainable to the generation of digital natives who are going to be tomorrows voters, politicians and businesspeople (and are often already today's).

What precisely follows from this for trade policy is debatable. However, what is clear is that responses are needed, and are needed fast. What is equally clear is that while there may be a few years or months of time lag, the above applies today, and will certainly apply tomorrow, almost indistinguishable to developed and developing country societies and economies. ACP countries are obviously part of these developments, and sometimes find themselves even at the forefront – the invention and fast emergence of mobile phone-based M-Pesa as Kenyan's payment mechanism of choice. Clearly, assumptions that may have been valid a few years ago, for example at trade (in services) policy junctures such as the Doha Declaration 2001, the Hong Kong Ministerial in 2005 or even the "Signalling Conference" in 2008, must be fundamentally (and continuously) revisited.

### *2.2 Deconstructing Value Chains, or: Everything is a Service!*

The above and the below means that the recent efforts to consider much more closely than before *value chains*, rather than just (gross) cross-border transactions, is inevitable. This has led to a fundamental recognition of key relevance for our topic: much of what we considered production of goods is in fact composed of a myriad of services; and much of what we thought was (local or international) trade in goods is in fact, for business and thus also policy purposes, better understood as (also) trade in services. The value of services going as inputs into the processes of production and marketing of goods is often a multiple of the value of actual production; and many payments for goods in fact include payments for multiple after-sales services.

Many of these "embedded" and "embodied" services[2] have become more visible as businesses outsource and insource services formerly performed in-house. As arms-length transactions they now start to appear in statistics, and thus gain the chance of reaching policy makers' attention.

However, today's arms-length services transactions are just the tip of tomorrow's iceberg. Many goods-producing and goods-selling businesses have only started to conceptually segment their production and marketing processes (and, by extrapolation, their national and international value chains), and are likely to do so much more in the future. The same applies, of course, to services-producing and services-selling businesses. This means that opportunities for service provision and consumption, and hence also international trade in services, are set to continue to grow exponentially.

In fact, even the production process itself is often already traded as a service – locally or internationally. Contract manufacturing – a service covered by the GATS! – is on a steady march forward, with tricky implications for non-aligned policies and treaty disciplines on trade in goods and services.[3]

The value of almost any good, at any point in its lifetime, can be broken down into a multitude of services, apart from the actual production process. These include functions that may previously have been perceived as core inalienable operations of the company, such as administration and management, beyond the standard business process outsourcing (BPO).

A frozen chicken on the shelves of a supermarket in Barbados 'contains' among many others veterinary, agricultural extension (consulting), slaughtering, financial, legal, transport, wholesale, storage, freezing, and retail services. The actual "producer" – the chicken farmer – accounts for a small fraction of the price the consumer (or even the supermarket, at the wholesale level) will pay. A pharmaceutical product sold to a hospital in Germany (where it then gets embedded in a medical service) at that point already contains, among others, research and development, design, IP-adminstration, distribution and (significant) marketing services many of which today may be provided in-house by the Pharmaceutical company whose trademark they carry. Tomorrow, however, some of these services may be outsourced, others insourced (transforming the former goods producer into a service provider). A 2010 case study of a Swedish multinational tooling company found that the firm used 40 distinct services in its supply chain, in addition to twelve more in the course of customer delivery.[4]

In many cases many of these services, of course, will continue to be supplied within the company or outsourced locally, as efficiency and/or expediency so dictate. However, it is

[2] Like Patrick Low, we find the terminology illustrative but also misleading.
[3] See Adlung,
[4] See references and further details in Low (2013), p. 67.

not difficult to see that in a growing number of cases, as separate service provision becomes possible, many will and should be sourced internationally to ensure quality, efficiency and cost-efficiency.

Often the most efficient delivery of such services will be in the form of bundles, or tasks. This "modularization", obvious for example in the case of express delivery services which include transport, tracking, customs processing and multiple other services, thus leads to a "trade in tasks." It poses an obvious challenge for the design of services commitments and other policy making as these bundles often transcend classical categories of service classifications.

Under the existing architecture of services agreements this can be addressed by negotiating commitments on clusters of services, as was proposed, for example, in the DDA plurilateral requests on logistics and postal, courier and express delivery services. However, this approach remains inflexible as the relevant bundles needed may change over time as businesses and technical possibilities evolve. While positive and negative list approaches are in principle equivalent as long as the negotiators know what they want (and what they don't want), a negative list approach may in the longer run often be more suited to accommodate such changes.

### *2.3 Distance and Cost – Old Development Foes Emasculated*

An obvious, but key development of particular relevance to trade in services, and hence trade in services policy making, is caused in particular, but not only, the evolution of ICT and transportation. Distance and cost which for many countries pose an often insurmountable obstacle to the development of trade in agricultural and manufactured goods, today often simply do not apply to the delivery and the consumption of services.

This is obviously the case for services which can be exported through internet and telephone lines, from software development to legal services, from translation to medical services, from call center to architectural design services, from entertainment to education services. From a development perspective often even more important is the easier consumption of services not available locally. Important services inputs become available or more affordable which, for example reduce quality problems (*e.g*. through training, certification or advice), streamline processes (*e.g*. through software tools or advice) or provide information (e.g. price or weather information for farmers). Sometimes (in fact: often) both apply, as service providers (*e.g*. app developers) buy services inputs (e.g. programming software) from abroad before exporting their products.

A second factor are investment costs. Unlike the production and delivery of most goods, the production and delivery of many services for export requires comparatively minimal investments. A young app developer in a landlocked country or far-flung island needs just a

laptop, access to the internet and a reliable channel for receiving payments, and can start exporting tomorrow.

### *2.4 Borders Matter Less, but Do not Disappear*

That said, it is important to recognize that as distance disappears or is reduced, for many services and service providers borders (not just different regulatory regimes) remain important obstacles. For the supply of road transport services the ability of trucks and truckers to cross the border is essential, yet often problematic. The movement of people generally – service providers (mode 4), but also service consumers (mode 2) – is often a major challenge.

It is in these areas that, perhaps not surprisingly, the 20-year old GATS commitments are the weakest as they reflect the novelty of the GATSand the resulting insecurity of negotiators, and more recent preferential trade agreements only succeed in making some limited incremental progress, if any.[5]

### *2.5 Services Statistics: Just because we don't measure it doesn't mean it's not there!*

Services trade statisticsare weak virtually everywhere, but often nearly non-existent in developing countries. This reflects both the objective difficulties in collecting and collating the relevant information and the secondary attention accorded to services trade in the past (and sometimes present).

- The first challenge is that unlike in trade in goods usually no physical commodity crosses the border, and hence can be observed, counted, measured.Balance of payments (BOP) statistics provide some help, but the collection of traditional BOP statistics primarily relies on measuring cross-border transfers of money, and hence does not "see" the actual transaction of the service that is being paid for. Even if the service provider can be identified as the recipient of the payment, it is often not clear which service was provided (as the provider may provide different services), nor in which mode of supply. Modes 1, 2 and 4 will usually trigger international money transfers as provider and recipient are based in different jurisdictions, so bank or cash transfers across borders will happen and can thus be reflected in the BOP. However, central banks or statistics agencies have little means to tell which mode actually applied –did the lawyer travel to the client, the client to the lawyer, or just the legal memo through the internet before the client made the bank transfer to the lawyer?

[5] Sauvé, in: European Parliament, INTA Workshop Report (2013), p. 17. The CARIFORUM-EU EPA, for instance, did result in some mode 4 opening including in the notoriously closed categories of independent professionals and contractual service suppliers, while the recent EU-Singapore FTA leaves these entirely out and focuses almost solely on intra-corporate transferees, i.e. persons typically accompanying a mode 3 investment.

- Second, sectoral classifications traditionally used in BOPs are largely out of synch with categories usually used in trade negotiations, making it difficult for trade negotiators to use BOP data for many sectors, even if such data are available, as they will often be too aggregated. Much work has been done to advance convergence, but until today services trade statistics remain mostly unusable for any detailed trade negotiations.
- Third, mode 3 is almost entirely under the BOP radar screen as it triggers local, not international payments (from a local service consumer to a foreign-invested, but locally established provider). The needed Foreign Affiliates Statistics (FATS), both inbound and outbound, are difficult and tedious to establish, and most developing countries don't even try. As a result, mode 3 service provision goes largely unmeasured, except to the extent that it appears as part of FDI statistics.

All these (and some more) issues have long been recognized, and a group of international agencies including among others the IMF, EUROSTAT, the WTO and UNCTAD, has made significant efforts to compile recommendations and international best practices,[6] but actual practice lags far behind.

The issue of services trade statistics, notably, is not exclusive to developing countries. Traces of the magnitude of the challenge are found almost as much in developed country resources and discourse. To pick a random example, a recent report by the US Congressional Research Service on TPP members looks at US services trade with only eight of the eleven (non-US) TPP parties because the US Bureau of Economic Analysis (BEA) lacks individual data for trade with the others.[7]

This weakness of data has the understandable but odd consequence that more often than not the unavailability of data translates directly into a lack of awareness among those who otherwise tend to rely on data, such as administrative agencies, politicians and negotiators.

This effect is exacerbated in trade in services as many stakeholders (including businesses themselves) have only a shallow grip on the concepts and mechanics of trade in services. Finally, the sheer sectoral spread in services adds to the resulting confusion.

The result is a political and economic discourse that is perilously removed from reality. However, the fact that something is difficult to measure of course does not mean that it is not there. The above observations and any exchange with service providers and their clients will make it clear that trade in services is a major reality, and an even bigger potentiality, for any economy. It is therefore incumbent on policy makers and other stakeholders to make every effort to ensure that the absence or paucity of data does not lead to misinterpretations. This requires an enhanced qualitative, as opposed to just quantitative, discourse, and arguably an even closer engagement with stakeholders than elsewhere.

[6] Manual on Statistics on International Trade in Services (MSITS), 2010.
[7] Williams (2013), p. 17.

### 2.6 Liberalization vs. Deregulation in Services: The more you liberalize, the more you need to regulate

Services liberalization is often casually misunderstood as services deregulation.

The opposite is true: In many sectors, including most notably network-based services (such as telecoms, rail and energy) and sectors where information asymmetries translate into serious risks (*e.g.*, financial, medical, accountancy, engineering or legal services), effective market liberalization requires sophisticated regulation.

This has important implications for trade in services policy making, and negotiations conducted by, developing countries. While often liberalized markets will thus be desirable in principle, the way there leads through improved rules and institutions and thus requires not only political will but technical know-how and resources which, both, may be in short supply. They may, however, be available through those same (or ancillary) negotiations as trading partners may be willing to offer support, guidance, cooperation and money. This provides significant opportunities, but complicates the normally reciprocal setup of negotiations.

Many ACP countries, of course, are not only well aware of but also experienced in managing this nexus. However, the need to do so well may be particularly pronounced in the context of services where regulatory experience and sophistication is most scarce.

### 2.7 Trade Policy: The End of Silos

The above-described pervasiveness of services throughout the economy means that service-related policy, including trade in services policy, cannot be managed in isolation; nor can other economic policies, including trade policies, as these overlap with services. There is a distinct need for integrated perspectives, and integrated policy responses, including in trade negotiations.

Consider, for example, trade facilitation, which is closely interrelated with transport policies. The recent Trade Facilitation agreement reached in Bali addresses significant aspects in particular of customs regulation and administration. Its effect, however, will be much reduced if it is not integrated with policies on transport infrastructure and transport services, which in turn implies a considered trade in services response.

Or consider food security. While much of the related trade policy debate, including at MC9 in Bali, focuses on production, imports, exports and subsidies, a major and often possibly the single biggest factor after the weather are in fact services, which may or may not be traded internationally. The rate of post-harvest loss is intimately related to the quality, availability and pricing of packaging, transport, storage and distribution services, often the true Achilles heel of economies at risk. Again, trade in these services may provide solutions (if better or more services become available at higher quality levels and for lower prices),

but may also pose additional risks (e.g. if efficient but small and decentralized local providers are crowded out by bigger foreign competitors, at the cost of redundancies which may provide security in times of crisis). In any case, however, a considered services-related response is needed.

A similar conclusion follows from the increased fungibility, or exchangeability of goods and services. Increasingly, the same or similar economic value can be delivered in different forms, as goods or services or just IP. Consider, for example, the case of a small textiles producer who is strong on design but finds it difficult to compete on production costs as inputs are too expensive, and/or tariffs or NTBs in export markets are too onerous. Trade in goods policies and agreements may or may not help her.

But she may also stop producing goods and instead export the most significant part of the value in the form of design and advisory services for foreign producers. In this case the obstacles she faces are very different and fall under trade in services policies and disciplines. A goods exporting industry can thus transform itself into a services exporting industry, and vice versa, depending on the most efficient design of the value chain, which of course may again change over time.

Importantly, such changes from one form of value to another are not entirely new, but today often much easier done than before.Trade policy makers thus must keep in mind both options as they devise export and import policies for goods and services, and ideally synchronize their responses. Thinking in isolated silos – trade in goods here, trade in services there – is often inadequate to capture the country's economic reality and potential.

### *2.8 Envisaging the Future: Why Thinking Outside Old Boxes is Not Optional But Imperative*

A major feature of many services today is the speed with which they emerge and change markets. Facebook was founded just ten years ago, and could have been invented in Malawi or Tonga. It is today one of the most valuable companies in the world.

This means that for both import and export-related policy making, including the negotiation of trade agreements, governments must make a significant allowance for continued flexibility, and vigilance. The sheer flexibility of businesses and consumers, including business consumers, means that today's assumptions are tomorrow's history – sometimes literally so.

# 3 REVIEW OF THE STATE OF PLAY: NEGOTIATIONS, AGREEMENTS AND OTHER MAJOR DEVELOPMENTS

## *3.1 Negotiations& Agreements*

### 3.1.1 WTO/DDA Negotiations on Services: A History – and a Future?

When the DDA went officially into hibernation in 2011 with ministers' acknowledgement at MC8 that the round had reached an impasse, the services negotiations had already been effectively on hold for three and a half years. The July 2008 Signalling Conference, a novel, ambitious and controversial attempt to generate momentum and perspective, had indeed delivered a climactic moment, but the failure of the Mini-Ministerial to generate a breakthrough in AG and NAMA proved too powerful as a dampener of spirits. Services, despite various attempts over time to overcome this predicament, remained the round's "perfect hostage."[8] That said, in the shadow of the big issues standing still a small one continued to soldier on: The negotiations on Domestic Regulation.

After the 2011 Ministerial a unique situation evolved, with no precedent in GATT/WTO history. With the DDA services negotiations effectively dormant, services *demandeurs,* calling themselves the "Really Good Friends of Services" (RGF) opened an entirely new track, very explicitly outside the WTO, but with an agenda to rival the DDA services negotiations head-on: The negotiations on a new, comprehensive "International Services Agreement" (ISA), since rekindled "Trade in Services Agreement" (TISA). The catch for the DDA and the WTO: TISA protagonists professed a hybrid, dual and perhaps contradictory ambition to negotiate outside the WTO, but with the aim to bring the result back to the organization – if possible. This is discussed further below.

With this new rival track opened and rather active, what is thus the current state of play in the DDA negotiations? Or, more pointedly: *Is there a current state of play?*

The short answer is: yes, but with a caveat. A bit of history will help to explain.

#### *3.1.1.1 Recalled: The GATS' Build-in Agenda*

It is useful to recall that the GATS itself was a first of its kind, and was negotiated with great caution as negotiators operated virtually without the usual background of precedents, data and other experiences. Specific market access and national treatment commitments of original WTO Members were barely if at all negotiated and reflect a mere down payment rather than actual market opening. While the GATS does contain a number of useful disciplines, it was recognized from the start that more would eventually be needed. In other words: The GATS was meant, and is designed, to operate as a basis and framework with an

[8] Hamid Mamdouh, comment made at an UNCTAD experts' meeting on 25 November 2013.

explicit, built-in agenda to evolve, through multilateral negotiations both on market access and rule making.

GATS Article XIX thus foresees that Members enter into "successive rounds of negotiations," and mandatesthem to start the first of such rounds negotiations aimed at "achieving progressively higher levels of liberalization" no later than five years after the entry into force of the GATS, *i.e.*, by the year 2000. As to rule making, the GATS mandates Members to negotiate disciplines on services subsidies (GATS Article XV), emergency safeguard measures (ESM) (GATS Article X) and government procurement in services trade (GATS Article XIII).

#### *3.1.1.2 The DDA Negotiations on Services*

The DDA negotiations on services are divided into three main areas, namely Market Access, Domestic Regulation and GATS Rules, in addition to the LDC Modalities.

**Market Access: The Hostage**

With respect to market access, little has been achieved over the past years. After less than satisfying attempts to progress on the basis of individual offers and requests, Members on the basis of the 2005 Hong Kong Ministerial Declaration (Annex C) exchangedand discussed a number of plurilateral requests, with however hardly any tangible overall effect either.The Mini-Ministerial in July 2008 finally provided context and momentum forthe "Signalling Conference" where several Members "signalled" possible new and improved commitments on market access they would be ready undertake. While overall surprisingly ambitious, the results of the Signalling Conference remained, however, intangible as they were neither properly fixated nor, in many cases, sufficiently detailed to allow for "hard" conclusions. Little progress on market access was made since 2008.

It is important to recognize that the slow and eventually stalled progress in the services negotiations has one of its roots in the approach taken by a majority of Members, in particular developing countries including the ACP, to insist that engagement in services had to follow in time, and would in substance and ambition depend on, the modalities in AG and NAMA. This sequencing (in time) had been agreed at the Hong Kong Ministerial in 2005. There was a clear logic to that approach, designed to force developed countries to face and address their idiosyncrasies in AG and NAMA before being allowed to focus and develop pressure on what was then still perceived to be primarily their "pet" area, services.

This logic, however, was predicated on success on the first leg. When talks in AG and NAMA lost momentum and eventually stalled, the logic fell apart and services became an arguably accidental victim as negotiations had never been allowed to reach a level of engagement commensurate with the task at hand: to bring the GATS and Members' commitments into the 21$^{st}$ century. The somewhat dangerous cleavage that had emerged between the rulebook and the reality it was meant to address was crudely exposed, with no intra-

systemic remedy readily at hand as negotiations were on hold. This is the background for the TISA initiative.

It is worth recalling that in terms of substance the ACP and other developing country groupings have based their ambitions GATS Article IV and related ministerial pronouncements, namely that market access should be provided in particular "*in sectors and modes of supply of export interest to developing countries, such as modes 1 and 4, in accordance with Article IV of the GATS*" and that "[c]*ommitments shall be commensurate with the levels of development, regulatory capacity and national policy objectives of individual developing countries*." Both hortatives continue to provide guidance and could and should remain key demands for developing countries, including ACP members, in services negotiations within and beyond the WTO contexts.

**Domestic Regulation: Slow, but Steady**

On domestic regulation (DR),the Working Party on Domestic Regulation (WPDR)has since 2009 negotiated on the basis of a Chair's text containing a draft set of disciplines on domestic regulation.[9] While there remain considerable disagreements among Members, some more fundamental than others, it appears plausible that the negotiations could, eventually,be concluded successfully.

While not a *demandeur*, the ACP will wish to remain actively engaged in the WPDR process to ensure that these disciplines reflect ACP interests. This concerns both substantive disciplines and special and differential treatment (S&D). On S&D an important ACP demand is the provision of DR-specific financial, not just technical assistance. This is pertinent as more sophisticated regulation and regulatory institutions, for example to achieve pro-competitive regulation in network industries, will require the investment of non-negligible financial resources. Perspectives on substantive DR disciplines have been in a state of continued evolution since the beginning of the DR talks, not least as RTA negotiations continue to touch on the issues. A key concern, however,remains to safeguard small and weak ACP administrations against overly burdensome disciplines while ensuring fair and adequate regulatory treatment for ACP service providers in their export (and home) markets.

**GATS Rules: No Wings in Sight**

In GATS Rules (subsidies, emergency safeguards and transparency in government procurement), Members have never managed to come even close to text-based negotiations, as almost two decades of deliberations remained largely on the level of basic principles, despite some strong pushes by the respective *demandeurs*. In 2011 the Chairman of the Working Party on GATS Rules (WPGR) had to report that the proponents of GATS

[9]Draft Disciplines on Domestic Regulation Pursuant to GATS Article VI.4, InformalNote by the Chairman, 20 March 2009, contained in WTO Document (S/WPDR/W/45)

rules "*could not convince Members of the need for new disciplines in any of the three areas*".[10]

This almost complete lack of momentum *ab initio* stands in some contrast to the relevance of the matters at hand, not least from an ACP perspective, and it is worth keeping them in sight, in the WTO and elsewhere. An ESM may provide significant comfort to ACP and other developing country Members which may wish to undertake additional commitments, and should thus be considered in this light. Subsidies to service providers are an obvious challenge. Since services subsidies are primarily provided by developed countries, including with effects on services exports, their disciplining under the GATS could be in the interest of ACP members.

**LDC Modalities: Progress!**

The only area with actual movement over the past years are the negotiations on the LDC Modalities. GATS Article IV:3 requires Members to increase the participation of LDCs in world trade through negotiating specific commitments related to (a) the strengthening of domestic services capacity and efficiency, (b) the improvement of access to distribution channels and information networks and (c) the liberalization of market access in sectors and modes of supply of export interest to LDCs. A set of LDC modalities was established in 2003 to assist Members in their negotiations, exhorting Members to provide effective market access in sectors and modes of supply of interest to LDCs and develop appropriate mechanisms to achieve full implementation of Article IV:3.

While the natural focus of the modalities was on shaping the overall DDA services negotiations which of course are on hold, progress on this front was nonetheless made in 2011 with the adoption of the LDC Services Waiver decision – a ministerial decision that waives the MFN obligation to the extent that Members grant more favourable treatment to LDC services and services suppliers.[11] As part of the LDC package adopted in Bali, ministers issued a subsequent decision on "operationalizing" the LDC Services Waiver.[12]

[10] See the last report on the matter by the Chairman of the Council for Trade in Services – Special Session, WTO Document TN/S/36, dating from April 2011). On EMS proponents continued to underline their position that a direct political connection exists with negotiations on Market Access, but no measurable progress has emerged so far. Work on subsidies has yet to move beyond analytical and fact-finding efforts. In February 2010 the WPGR chair initiated a renewed "Work Programme on Information Exchange on Subsidies" in an attempt to generate momentum. Members cautiously welcomed the effort but some including ACP members were not comfortable with the idea of participating actively in the process, which foresees that Members provide systematic information about their subsidy programmes relevant to services. On government procurement, Members' ambitions so far remain low, with the exception in particular of the EC as the main demandeur. In sum, it seems improbable that results in GATS Rules could be achieved any time soon, with the possible exception of EMS.

[11] Preferential Treatment for Services and Service Suppliers of Least-Developed Countries WTO Ministerial Decision, WTO Document WT/L/847 (17 December 2011).

[12] Operationalization of the Waiver Concerning Preferential Treatment to Services and Service Suppliers of Least-Developed Countries — Ministerial Decision, WTO document WT/MIN(13)/43 (11 December 2013).

The LDC Waiver, barely noted by many observers, is arguably a giant in disguise. As discussed further below, it represents a novel, perhaps unique opportunity for something the WTO has never seen: The discussion of and a push for, actual, real life services liberalization *vis-à-vis applied regimes*. As preferences for LDC services and service providers would deviate from applied MFN in market access, domestic regulation or other areas, any "operationalization" of the Waiver means Members *actually changing their services regimes* by creating more liberal carve-outs for LDCs. Unlike all other negotiations, be it in the WTO, in TISA, in Mega- or in other RTAs, which focus on legal commitments that will almost always remain below current applied openness ("water") and hence change little on the ground, any use of the LDC Waiver implies actual, practical – even if partial, preferential – liberalization. In fact, the preferential nature of the exercise may turn out to be the most thought-provoking element and reveal the Waiver as a trailblazing awareness raising exercise: If something can be done for LDC services and service providers, perhaps it can be done for others as well, after all?

We will come back to the Waiver at the end of this chapter, after considering TISA, the Mega-Regionals, EPAs and RECs.

### 3.1.2 TISA: A Really New Kid on the Block

TISA, the (future) Trade in Services Agreement, an initiative of 20+ WTO Members calling themselvesthe "Really Good Friends of Services" (RGF), has attracted significant attention since it was launched two years ago, following MC8. After the initial participants obtained formal negotiating mandates from their constitutional authorities in early 2013, the talks have now entered a phase of intensified, ambitious negotiations. In September 2013 China, as the first of the BRICS countries, requested to join the talks. While TISA participants have not yet accepted the request, the move is certain to be a "game changer" either way.

Seen from the perspective of other WTO Members – including the ACP – the TISA initiative raises a somewhat bewildering set of questions. What, exactly, is TISA? How does it, how will it relate to the GATS and the WTO? What does it mean for the DDA? Who are, who could, who should be the participants?

The fact that TISA talks happen in private and are not open to non-parties, with TISA parties, on the other side, sharing information on their terms in the CTS and public for a, may add to a certain sense of insecurity. However, given that trade negotiations do benefit and may sometimes require confidentiality, the restraint exercised by TISA parties should probably not be chastised without reservations.

#### *3.1.2.1 What is TISA?*

With the deadlock in the DDA negotiations including the services negotiations and the proliferation of PTAs, the RGF – a group of 23 WTO Members (now) comprising Australia, Canada, Chile, Colombia, Costa Rica, the European Union, Hong Kong, Iceland, Israel, Japan,

Korea, Lichtenstein, Mexico, New Zealand, Norway, Pakistan, Panama, Paraguay, Peru, Switzerland, Chinese Taipei, Turkey and the United States –in summer 2012 started talks on an International Services Agreement (ISA), later renamed the Trade in Services Agreement (TISA). More recently, China and Uruguay expressed their interests in joining the negotiations.

The current negotiations are centred around developing and refining a framework for the negotiations. Various proposals related to the main body of the agreement including "new and enhanced disciplines" were tabled over the past months. TISA members go at length to stress that the objective is to conclude a WTO compatible agreement that has a broad participation and that could be multilateralized once a critical mass is reached.

#### *3.1.2.1.1 Scope and Ambition*

TISA parties aim to conclude an ambitious agreement with a comprehensive scope. The plan is to generate a complete agreement, much like the GATS or a PTA, with a main legal text containing general disciplines and country-specific schedules of specific commitments and limitations.

TISA parties emphasize that they are negotiating in fact on three tracks:

- A main body (text), containing general disciplines, definitions etc. much like the GATS
- Sector-specific commitments/limitations on Market Access (MA) and National Treatment (NT)
- "New and enhanced disciplines" – meaning regulatory disciplines for specific sectors, modes of supply or thematic areas

A negotiating draft for the **main text** already exists. By design it resembles closely the GATS, reflecting the professed ambition of TISA participants to create as much compatibility with the GATS as possible from the start, to facilitate and hence keep option options for integration of or linkages between the two agreements. Technical elements such as scope and definitions, main building blocks such as the MFN clause and general and security exceptions, and other provisions such as those on recognition, balance of payments or monopolies have been taken *verbatim* from the GATS. The provisions on Market Access (MA) and National Treatment (NT) are equally taken from the GATS, with one significant modification: NT will be assumed across all sectors, unless reservations are scheduled – a negative list approach.

Negotiations on **MA and NT**have just begun, with some initial offers (not based on requests) having been submitted on schedule in late 2013 and others still outstanding. The professed level of ambition of TISA participants is very high– what that means in practice, however, remains to be seen. Importantly, however, as just indicated, there is a marked departure from the GATS which has attracted some attention: While for MA TISA is likely to follow the GATS model of a hybrid approach where commitments (and hence schedules) are based on a positive list of sectors liberalized subject to listed limitations, TISA participants have

agreed to approach NT very differently, namely a negative list. NT will thus apply across the board to all sectors and modes of supply unless an exception is specifically listed in a party's schedule.

Significantly, these known mechanisms are proposed (not yet agreed) to be coupled with rather powerful lock-in mechanisms:

- Standstill: Parties will bind existing openness, and limitations may only be listed and applied to the extent that they already apply. In other words: there will in principle be no "water" between commitments and applied regimes when the agreement is concluded. To what extent there will be deviations from this rule remains to be seen. One could imagine that some parties would want to reserve *some* upward flexibilities in sectors where regulatory regimes have only recently been reformed, and may come under further revision.
- "Ratchet": This would lock in any subsequent autonomous liberalization.
- New services: New services developed after the agreement comes into being could be automatically covered.

Further points are or were under discussion, such as some disciplines on government procurement, state-owned enterprises.

As to the rule making, TISA aims to address the so called **"new and enhanced disciplines"** which could include disciplines on ICT, financial services, international maritime transport services, e-commerce, professional services, postal & courier services, telecom services, domestic regulation more generally, mode 4 and possibly export subsidies and state-owned enterprises. The level of ambition regarding these "new and enhanced disciplines" remains to be seen. Many proposals are likely to be reminiscent of similar provisions in existing RTAs and disciplines proposed in the context of collective requests tabled in the WTO, but may also go beyond that. Irrespective of the level of ambition, the drive to address these issues through a plurilateral instrument is interesting and will no doubt have its implications on rule making at the WTO.

#### *3.1.2.1.2 Substance v. Architecture: Does it Matter?*

With all the hype around the TISA initiative, early discussions tended to highlight the above-mentioned architectural elements, from negative listing to standstill, ratchet or new services, as evidence of both ambition and departure from the GATS, the latter being casually dismissed as outdated.

A closer look warrants a different assessment. Form a technical perspective *all* elements under discussion within TISA could just as well be accommodated through existing, in many cases time-proven mechanisms under the GATS/WTO. The issue, in TISA as much as in the GATS/DDA, was and is hence primarily one of political will and energy, not of technique.

A key consequence of this is that TISA disciplines and commitments could, in principle, be integrated into the GATS/WTO framework, through existing technical means. This provides a significant opening for the future coexistence and/or convergence of both.

### *3.1.2.2 TISA, the GATS and the WTO*

#### *3.1.2.2.1 Is TISA a "Plurilateral"? What is a "Plurilateral"?*

Much confusion has been caused by the characterization of TISA as a "plurilateral" agreement, and its consequence for its position vis-à-vis the GATS and within/without the WTO.

As an agreement between some but not all WTO Members, TISA will by definition be plurilateral, as opposed to multilateral, in nature. It shares this characteristic with Regional Trade Agreements, the WTO Government Procurement Agreement, and a few other "agreements" concluded under the WTO, for instance the Information Technology Agreement (ITA) – which is where the confusion is rooted.

It is therefore important to understand the technical (and philosophical) differences between the "plurilaterals."

- **RTAs:** RTAs (FTAs, Customs Unions, Economic Integration Agreements) are preferential agreements outside the multilateral framework. Preferences granted therein are exempted from the otherwise applicable MFN obligations by way of explicit exemption clauses, namely (in particular) GATT Article XXIV and GATS Article V (provisons ACP members are acutely aware of, given their prominence in the EPA context).[13] These provisions are readily available and can be used by all WTO Members, provided their requirements (such as the infamous "substantially all trade" standard in GATT Article XXIV) are met.
- **WTO Plurilaterals (in the actual sense):** The GPA is one of four plurilateral agreements which are part of the original WTO architecture and institutional framework, but only bind and benefit participating Members.[14]Any new plurilateral agreement of this kind (exclusive, but within the WTO architecture) would require the agreement of WTO Members.
- **Critical Mass Agreements:** The ITA and others, such as the telecoms agreement which resulted inter alia in the telecoms "Reference Paper," are in fact multilateral agreements resulting from plurilateral negotiations (as, in fact, almost all WTO law)

[13] *See* L. Bartels/S. Silva/H. Hijazi/H. Schloemann/Th. Cottier, Re-Thinking Reciprocity: A New Framework for WTO Disciplines on North-South Regional Trade Agreements, NCCR Trade Regulation Working Paper No 2013/20, available at *http://www.nccr-trade.org/publication/re-thinking-reciprocity-a-new-framework-for-wto-disciplines-on-north-south-regional-trade-agreement/?tx_nccr_pi1[mode]=extended&cHash=35c4b987ad5d402c5135700f99d3e9e3*

[14] It is worth noting that the GPA does not require any deviation from disciplines in other WTO Agreements, and is hence not in disharmony with other provisions.

among a "critical mass" of WTO Members. Because the mass of commitments reached by those Members was judged (by them) to be sufficient to warrant their respective own commitments, they eventually agreed to integrate their commitments *on an MFN basis* into their WTO commitments (e.g. their GATS schedule of commitments). This means that although the negotiations were plurilateral and only the participants agreed to make commitments, all WTO Member benefit from them on an MFN ("multilateralized") basis.

#### *3.1.2.2.2 What Type of Plurilateral Will TISA Be?*

What, thus, will TISA be? The answer is still open, and may remain so until the conclusion of TISA negotiations.

TISA protagonists have always underlined their ambition to strive towards maximum harmony between TISA and the GATS/WTO. This, however, could mean either of the above three approaches. Importantly, there is no technical need to determine the eventual format up front.

At present the most likely (immediate) outcome would appear to be a PTA. This follows from a subtraction exercise, looking at the other options.

- A WTO plurilateral of the GPA kind would require the other Members' consent, which at present appears unlikely, given some Members' reaction to the TISA initiative. That said, however, given that the alternative may be a PTA entirely outside the WTO Members may reconsider their options. A WTO plurilateral may offer better opportunities for monitoring (e.g. through observership) and overall transparency and cohesion in the future.
- A "critical mass" agreement, in turn, would require TISA participants to agree to let all other WTO Members "free ride" on their commitments. Several TISA protagonists have made it – understandably – clear that at least the major emerging economies would have to be part of a deal before it can be multilateralized.

A few observations are in order. First, the three approaches are *in theirsubstance* not entirely mutually exclusive. One could imagine, for instance, at least some of the "new and enhanced" regulatory disciplines that may emerge within TISA to be of a kind that would allow TISA Members, or at least some of them, to voluntarily inscribe them as "additional commitments" (GATS Article XVIII) in their schedules, much like the "Reference Paper" agreed under a protocol on telecoms, a "critical mass" agreement. What a "critical mass" is – an assessment TISA parties will have to make, as they are the ones making the commitments – could differ from one element to the other.

Second, whether or not a "critical mass" is reached is a political decision, not a numerical calculation. While a rule of thumb for previous "critical mass" agreements seems to have

been a coverage of around 90% of relevant trade,[15] this number is as arbitrary as any other. This means that other Members can do several things to influence the outcome. First, they can join TISA. This increases the present coverage (without China and Uruguay), estimated to be around 68.2%. Second, they can try to join TISA. Even if it does not succeed (and depending on the reasons therefore), this may help in exerting, third, political and institutional pressure on TISA parties.

##### *3.1.2.2.3 Can TISA and GATS DDA Negotiations Coexist?*

There is no technical reason why TISA and GATS DDA negotiations could not run in parallel. Practically, however, it is hard to imagine how that would work, as TISA parties would hardly be interested in any multilateral negotiations with (significantly) more reluctant WTO Members as long as they are engaged in TISA talks.

That said, other Members may be able to change that, for example, by pro-actively offering engagement at the WTO of an ambition that exerts some attraction on TISA parties, or by any other motion that promotes re-starting the DDA engine on services.

### 3.1.3 TPP: Mega-Space with a Services Ambition

The Trans-Pacific Partnership (TPP) negotiations are among the biggest exercise of its kind. The now twelve negotiating parties (Japan joined in mid-2013), covering over 40% of world GDP, aim to establish *inter alia* a gigantic free trade zone for trade in goods and services.

TPP and TTIP and their overall relevance for the ACP are the subject of another reflection paper.[16] We can therefore here limit ourselves to a focus on services.

#### *3.1.3.1 Services in TPP – the Ambition*

The comprehensive ambition of TPP parties to generate a "21st century agreement" includes, prominently, the ambition to greatly facilitate trade in services across the region. In fact, from the perspective of the United States, "innovations regarding services are a key part of the Obama Administration's vision of TPP as a "21st century model" for trade agreements."[17]

Part of that ambition is to remain open to new entrants, a rather important perspective for China (and hence all TPP parties in their trade with China), which is flirting with entering the talks.

#### *3.1.3.2 Coverage and Mechanics – A Snapshop*

Among the features taking shape as negotiations progress, the following seem among those worth noting in the present context:

[15] See the discussion in Sauvé (2013).
[16] *See* Draper et al. in this collection.
[17] Fergusson et al. (2013), p. 22.

- **Cross-border services: Negative list.**Services provided cross-border will likely be covered by a negative list approach. While this need not necessarily lead to farther reaching commitments than under a positive list approach, it is likely to assist TPP protagonists in their ambition of broad and extensive coverage. Importantly, it will cover new services.
- **Financial services: Separate chapter, coverage partly limited, but disciplines far-reaching.**A separate chapter will address financial services. If the US approach in its recent FTA with Korea (KORUS) is replicated, this may mean that mode 3 services will be liberalized on the basis of a negative-list approach, while commitments on cross-border trade may be limited to certain sub-sectors (excluding, for example, life and health insurances). Importantly, the chapter may address key ancillary matters such as the transmissibility of data.
- **Telecoms: Separate chapter, disciplines.**A separate chapter on telecoms will address *inter alia* disciplines on pro-competitive regulation and access to networks.
- **Cross-Cutting Chapters: Investment, IP, Regulatory Coherence, E-Commerce etc.**Perhaps the most innovative and interesting aspect of TPP, seen from the outside, is the envisaged holistic (and ambitious) treatment of cross-cutting issues, many of which are of great relevance for services in general and services trade in particular. Among these are possible disciplines on, and mechanisms for, regulatory coherence. In services perhaps more than in any other area, the quality, coherence and harmonization of regulation and administration is arguably the single most important factor in facilitating, or hindering, international trade. Regulatory cooperation in particular has been identified in research as holding great potential.[18]

### 3.1.4 TTIP: The "New Gold Standard" in Services?

Much like the protagonists of TPP, the TTIP parties – the United States and the European Union – are aiming high when it comes to services.Observers have expressed the expectation that "TTIP couldserve as the gold standard of services liberalization."[19] Services account for around 70% of both economies' GDP.

#### *3.1.4.1 State of Play – Quick Overview*

TTIP negotiations began in July 2013, just weeks after the parties had obtained their respective mandates, and two further rounds of negotiations in November and December 2013 generated significant momentum and public attention. Negotiators are demonstrating harmony and projecting an atmosphere of fast progress.There are no results yet to be reported on, only ambitions.

[18] *See* Hoekman and Mattoo (2012).
[19] Patricia Paoletta, ICT in the TTIP – an Opportunity to Enhance Services Trade and Cybersecurity, The European Institute, Editor's Note (2013), available at http://www.europeaninstitute.org/EA-May-2013/ict-in-the-ttip-an-opportunity-to-enhance-services-trade-and-cybersecurity.html .

The process itself, however, is of interest. First, with regulatory convergence being one of the overarching purposes of the agreement, the parties have made a point of bringing sectoral regulators to the negotiating table from the start. Second, partly for the same reason, somewhat unusual pro-active stakeholder engagement has characterized the process. During the latest week of negotiations in late December 2013 negotiators from both sides met with stakeholders for a lengthy open exchange of views and information, as they had done during the first round in July. The European Commission further organized an open stakeholder meeting in Brussels on 14 January 2014. Both approaches may hold lessons for future services negotiations in other fora.

#### *3.1.4.2 Services in TTIP*

Like TPP, TTIP combines far-reaching overall ambitions on market access and national treatment with numerous initiatives for sector-specific as well as cross-cutting disciplines of relevance for 21st century trade and investments.

Among these are

- Far-reaching disciplines on **telecoms** regulation, moving beyond the level of the WTO Reference Paper to matters such as number portability;
- A set of cross-cutting rules on **electronic commerce**, including issues such as electronic signatures, liability of intermediaries, unsolicited communications, consumer protection and conditions under which service provision by electronic means may be restricted.
- Regulatory coherence and cooperation in **financial services.**

The negotiators stress, however, that **data privacy** is **not** part of TTIP – addressing a major concern in particular of European civil society. The lines eventually drawn between the envisaged liberalization of **data flows** (for the benefit of service provision in areas such as financial services and IT) and data privacy will undoubtedly be of keen interest to stakeholders and observers, including third parties such as ACP service providers trading with the EU and/or the US.

However, while the parties are in unison when it comes to the overall level of ambition, there are a number of areas where significant work will have to be done to align desires and actions, for example in **mode 4**, where both have been reluctant to be overly progressive in undertaking commitments in both GATS and RTAs.

An interesting feature for EU and US service providers, which includes commercial presences of ACP providers in those two markets, may be the plan to include **investor-state dispute settlement** in TTIP (it already exists in several bilateral investment treaties between EU Member states and the United States).

### 3.1.5 EPAs: The Strange Saga Continues

#### *3.1.5.1 History and Background, or: All Eyes on Tariffs*

It is worth recalling that when ACP and EU agreed in Cotonou to eventually upgrade their relationship from a largely unilateral preference scheme to one based on (somewhat) reciprocal Economic Partnership Agreements (EPAs), their vision included agreements that would move beyond the realm of trade in goods and could include, among many other elements, trade in services.

The 2001 "Cotonou Waiver" granted by WTO Members in Doha set a 31 December 2007 deadline for unilateral preferences (in goods). When that deadline approached, only talks with one region, the Caribbean, had matured to the point where services could be included. As a result, the CARIFORUM-EU EPA is the only EPA which contains a chapter on services and specific commitments on Market Access and National Treatment from both sides. The other, somewhat scattered "interim" or "stepping stone" EPAs concluded by a handful of ACP countries with the EU, driven primarily by a desire to preserve crucial market access preferences in goods, deal almost exclusively with trade in goods; some contain a "rendezvous clause" on services, others don't. Meanwhile negotiations both on outstanding interim/stepping stone EPAs and more comprehensive EPAs continued, with services thus remaining on the table, but at the same time no universal agreement that they would be included in all final outcomes – a situation of limbo, varying in its details and extent from region to region, with many of the negotiations dragging on with insufficient orientation.

As with the initial push to 2008, the process has now been overshadowed again by the "ticking clock" of a deadline for preferential access into the EU: in March 2013, the European Parliament's Committee on International Trade (INTA) agreed on an October 2014 deadline to complete the negotiations (despite strong lobbying from the ACP for a 2016 deadline) by providing that the interim grant of preferential access on the basis of signed but not ratified interim/stepping stone EPAs under EU Regulation 1528/2007 will expire at that time. The EU decision sets the scene for an 18-month period of intense activity, during which ACP governments that have not yet concluded their interim EPA process will need to either ratify their interim EPAs, or conclude the negotiation of comprehensive regional EPAs if they wish to maintain existing preferential access for goods.

One of the many oddities and predicaments of the EPA process, or processes, thus continues to apply: It is driven and somewhat dominated by the threat of the loss of preferences in *goods*, even though the process is, or could and should be, about much more. This is not to say that EPAs should necessarily cover the liberalization of trade in services; rather, that the discourse and negotiations are selectively and somewhat artificially dominated by one issue at the expense of others.[20] Among the latter is trade in services, a

[20] This has its roots as much in the EU-ACP trade history dominated by commodities as, tragically, in the somewhat accidental and arguably misguided dominance of GATT Article XXIV ("substantially all trade") in the WTO-related perspective. In Bartels et. al (2013) the authors of this paper argue that this dominance of GATT Article XXIV leads to paradoxical outcomes, is erroneous, does not correspond to the logic of the WTO system,

matter of undoubtedly great importance for ACP countries. How to deal with it in the relationship with the EU is a question for debate.[21] Not to allocate time, resources and political capital to examine, discuss and address it properly is a mistake – or would be: As a brief overview of the EPA processes shows, services recently appear to feature more prominently than at earlier junctures, and more than the public debate may suggest.

### *3.1.5.2 Overview: Services in EPAs – State of Play*

#### *3.1.5.2.1 CARIFORUM – EU EPA*

As noted, CARIFORUM included a comprehensive agreement on services in its EPA. While regional integration in services remains a "work in progress," this did not operate as a significant obstacle to reaching agreement with the EU. Most Caribbean countries saw a significant potential for economic gain in trade in services with the EU. A significant – but by no means exclusive – focus was on "mode 4," which led to a number of significant achievements, including through "creative design" making the CARIFORUM EPA the object of significant political and scholarly interest beyond the EPA/ACP context. However, limitations such as Economic Needs Tests and graduate qualifications had to be accepted.

Interestingly, as discussed further below, the services MFN clause (although not applicable in respect of mode 4) provides a potentially major benefit for the CARIFORUM states and their service providers. Unlike in the area of trade in goods where the (near) 100% commitment by the EU makes future liberalization vis-à-vis third parties largely irrelevant, in the services context the EU is likely to conclude agreements with third parties – including TTIP and TISA –which, through the MFN clause, will benefit CARIFORUM providers. A further interesting feature is the general regional integration clause (Article 235) which in services leads to a significant regional market opening among CARIFORUM states – at least on paper, as implementation so far is reportedly limited.

#### *3.1.5.2.2 West Africa[22]*

While even recent indications[23] seemed to suggest that the final EPA between the region and the EU[24]would include (only) a rendezvous clause for services, a rather different and powerfulmessage emerged recently in the Final Communique of the Extraordinary Session of the ECOWAS Authority of Heads of State and Government, held in Dakar (Senegal) on 25 October 2013. Having generally reaffirmed their continued commitment to "the conclusion of an equitable and development-oriented EPA" as soon as possible, the Summit (i.e. the

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and should and could be avoided through appropriate political leadership and legal interpretation of the applicable WTO law.

[21] *See* Brenton et al. (2010) recommending a cautious approach.

[22] Benin, Burkina Faso, Cape Verde, Ivory Coast, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, Togo and Mauritania.

[23] European Commission, Overview of EPA Negotiations, Updated 10 November 2013.

[24] So far two West African countries, Cô te dIvoire and Ghana, initialled bilateral "stepping stone (or "interim") EPAs" with the EU at the end of 2007. The interim EPA with Cô te d'Ivoire was signed on 26 November 2008. The interim EPA with Ghana has not been signed. Neither agreement has been ratified.

heads of state and government) explicitly directed the West African negotiators to "to put services and free movement of persons on top of the priorities during the negotiations."

As the negotiations pick up in early 2014, it remains to be seen whether and how that impulse will be translated into action by EU and ECOWAS negotiators.

#### *3.1.5.2.3 Central Africa*[25]

Cameroon is the only country in the Central African region to have signed an interim ("framework") EPA (on 15 January 2009). The Agreement has not been ratified yet. Interestingly, however, it contains a rather explicit commitment to negotiate the "necessary provisions for the gradual, asymmetrical and reciprocal liberalization of establishment and trade in services.[26]

In negotiations on a finalregional EPA, the central African countries have moved away from an initial suggestion to deal with services only in the form of a rendezvous clause and are now pro-actively engaged in full market access negotiations. Remarkably, they have submitted a request which includes several pointed demands, including:

- Establishment of a new category of Mode 4 under the framework of establishment and trade in services to enable semi-skilled workers at the outset of their career to access temporary work in Europe, with the aim of acquiring the skills, knowledge and experience needed to strengthen Central African services sectors on their return;
- A modified definition of intra-corporate transferees;
- Additional flexibility regarding the criteria required for certain sub-categories (e.g. "graduate trainees") to reflect the realities Central African providers and the supply-side constraints in the region's educational system; and
- An obligation for the EU to take "corrective measures" in its internal subsidy regime to avoid the nullification of benefits enjoyed by Central African service providers under the EPA – the nucleus of a subsidies discipline in services.

The Central African countrieshavefurther requested a number of specific market access commitments, including in business services, construction, engineering, education, financial, tourism/travel, and health. For themselves they have maintained that any disciplines on services regulation must be based on regulatory audits prior to any engagement with the EU.

The EPA negotiations, however, have not advanced for a while. European and Central African negotiators last met in Bangui (Central African Republic) in September 2011. At that occasion, however, negotiating groups discussed*inter alia* services.

[25]Cameroon, the Central African Republic, Chad, Congo, the Democratic Republic of Congo, Equatorial Guinea, Gabon, Sao Tome and Principe.
[26]Article 54 of the "Framework" EPA.

#### 3.1.5.2.4 Pacific[27]

An interim agreement was signed by the EU, Papua New Guinea (PNG) Fiji in 2009. The EU and PNG have ratified this agreement but Fiji is not yet applying the agreement. This interim agreement does not contain disciplines on services, but in it the parties do "reaffirm" their commitment to negotiate a comprehensive EPA.

These recently intensified negotiations, however, hit a roadblock when in July 2013 the efforts to reach a deal between the EU and the 14-member Pacific ACP (PACP) bloc were suspended. The Pacific bloc had sought to wrap up negotiations by the end of 2013, but the Vanuatu Ministry of Trade confirmed that the two sides were unable to resolve "serious divergences" at the latest round of talks in July 2013. A separate EU source indicates that the EU is open to exploring the alternative possibility of widening the membership and deepening the content of the existing interim EPA (with unclear consequences for services).

In services the PACP had wanted a different approach to that of the GATS and other trade in services agreements which traditionally draw a key dividing line between the provision of services in "mode 4" (temporary movement of natural persons as or for foreign service providers based in another country) and labour mobility (movement of labour for purposes of joining the local labour market). The PACP had pushed for a simultaneous and comprehensive treatment of both. As of June 2013, it was understood that the EU had been reluctant to engage fully on labour mobility. While this is not entirely surprising, it is symptomatic for a key difficulty of bringing diverse ambitions on services to match: While the EU pursues a classical agenda with emphasis on modes 3, 1 and 2, and limited flexibility on mode 4, the PACP's push to even link mode 4 with labour mobility more broadly reflects a key economic reality of many developing countries (and other ACP regions), namely that their present comparative advantage lies to no small extent in the movement of persons more broadly.

Importantly, and again symptomatically, the political linkage between services and labour mobility in this case has an additional regional dimension beyond this EPA, namely with respect to PACER-Plus, the planned agreement between Australia, New Zealand and the Pacific islands. Because of the importance of labour mobility in that context the PACP are reluctant to set a precedent by reaching agreement on trade in services in the EPA-context without simultaneous satisfactory treatment of labour mobility. Although PACP services offers for the EPA were already developed in 2006/07, this importance of the nexus with labour mobility has led to the present situation where only a rendezvous clause is on the table in respect of services – but one, if the PACP have their way, that would emphasize the link to labour mobility.

#### 3.1.5.2.5 SADC[28]

[27]Cook Islands, East Timor, Fiji, Kiribati, the Marshall Islands, Micronesia, Nauru, Niue, Palau, Papua New Guinea, Samoa, the Solomon Islands, Tonga, Tuvalu, and Vanuatu.

An interim EPA was signed by the EU and by Botswana, Lesotho, Mozambique and Swaziland in 2009. Namibia, which has initialled the agreement, appears to be not ready to sign. The agreement has not been ratified. In a somewhat creative provision[29], the parties agreed to negotiate the liberalization of services (as well as *inter alia* an investment chapter), starting (for the four SADC parties) with one sector and later expanding it to more, coupled with a standstill clause and a commitment from the EU to provide capacity building related to the strengthening of regulatory frameworks for services – recognizing implicitly the crucial link between services commitments and the capacity to regulate effectively.

Negotiations now focus on reaching a comprehensive agreement with the whole SADC EPA Group, including South Africa. The comprehensive EPA will include a rendezvous clause on services. As of June 2013 it was intended that this rendezvous clause would include a commitment by parties to exchange requests and offers not later than December 2013 and conclude negotiations by December 2015. As some of the SADC countries have meanwhile made it clear that they do not intend to negotiate services liberalization, the negotiations continue between the EU and a sub-group of interested countries.

#### *3.1.5.2.6 ESA[30]*

In 2009 Mauritius, Seychelles, Zimbabwe and Madagascar signed an interim EPA, which has been applied since 14th May 2012. The interim agreement does not contain disciplines on trade in services, but a rendezvous clause. While negotiations do not seem to advance fast (the last meeting was held in 2011) it seems likely that there will eventually be ancomprehensive EPA which will include a comprehensive chapter on Trade in Services.

The parties seem to have secured agreement on several key principles, particularly the need for so-called "variable geometry" to ensure coherence between regional COMESA commitments and market access afforded to the EU. ESA and the EU have also narrowed differences on sections related to tourism and travel, postal services, maritime services, computer services, and a separate chapter on capital movement.

Again, labour mobility and mode 4 have taken centre stage. The ESA parties aim to secure a binding commitment from the EU to recognise professional qualifications on the basis of an objective set of criteria, and guarantees that measures relating to qualification requirements and procedures do not constitute disguised restrictions to trade. ESA has adopted the term "enhanced mode 4" to cover the various skilled, semi-skilled and unskilled categories of labour market access that the region is seeking. The EU however maintains that new categories of supply should be avoided, and that ESA should focus instead on modifying commitments under new categories.

[28]Angola, Botswana, Lesotho, Mozambique, Namibia, Swaziland and South Africa.
[29]Article 67 ("Second stage of negotiations").
[30]Djibouti, Eritrea, Ethiopia, Somalia and Sudan, Malawi, Zambia and Zimbabwe, Comoros, Mauritius, Madagascar and the Seychelles.

#### 3.1.5.2.7 EAC[31]

Burundi, Rwanda, Tanzania, Kenya and Uganda initialled a framework EPA on 28 November 2007[32] and are now negotiating a comprehensive regional EPA. The framework agreement contains, in Article 37, a rendezvous clause whereby the parties commit to continue negotiations on, *inter alia,* trade in services. However, it appears that this may remain the case for the comprehensive EPA. The negotiations now await ministerial guidance from a ministerial meeting in late January 2014.

### 3.1.5.3 Services in EPAs: A Word on "Mode 4", Precedents and Creative Solutions

A main concern in ongoing EPA negotiations on services remains trade in mode 4 and the related issue of labour mobility. The GATS and other trade in services agreements traditionally draw a key dividing line between the provision of services in mode 4 (temporary movement of natural persons as or for foreign service providers based in another country) and labour mobility (movement of labour for purposes of joining the local labour market). This distinction, however, while somewhat logical from a traditional trade and trade regulation perspective, is economically questionable and in any case does not reflect the needs of many developing countries, including many ACP countries. Several ACP EPA groupings, perhaps most vigorously the PACP, have therefore pushed for a simultaneous and comprehensive treatment of both.

The EU has been very reluctant to engage, fearing not only concrete immigration issues but also a precedence effect. Curiously, the same applies vice-versa, with the PACP in particular worrying about precedence effects on their PACER Plus negotiations with Australia and New Zealand. This focus on precedent illustrates an important point about FTAs: While bilateral/regional in scope, they are not irrelevant for outside parties.

For mode 4, a possible way forward lies in smart design choices as demonstrated by the CARIFORUM EPA.Efforts spent on creative design, from the definition of services and service providers (e.g. avoiding formal qualification requirements for certain groups) to the design of hybrid special side agreements (like in the case of the "Cultural Protocol" under the CARIFORUM EPA) to procedural mechanisms designed to enhance effective access for ACP providers (as in the mutual recognition clause in Article 85 of the CARIFORUM EPA) can yield significant (potential) benefits. Other ACP regions have taken note, and are well-advised to pursue a forward looking, creative agenda in this regard.

This applies also to access quotas and other classical labour mobility issues.Creative design is possible and worth pursuing in the context of services negotiations on mode 4. Even where fully fledged labour mobility cannot be achieved there is no reason why quotas and other mechanisms cannot be used to refine services commitments, and thereby offer the

[31]Kenya, Uganda, Tanzania, Burundi and Rwanda.
[32] The framework agreement has not been signed or ratified.

possibility for expanding on commitments (e.g. by including further sub-categories of providers subject to quotas and/or expanding lengths of stay).

### 3.1.6 ACP RECs: Integration all around

It would go beyond the scope of this paper to review in any detail the situation in Regional Economic Communities among ACP states. However, it is worth noting that all are engaged in processes of progressive integration which include, sometimes prominently, the liberalization of trade in services.

The instruments vary. Some, like UEMOA/WAMEU, ECOWAS, ECCAS or CARICOM have embarked on processes of – at least in form – EU-style integration with mechanisms such as "freedoms" (of movement of persons; of establishment; of movement of capital). Others, such as the EAC, SADC and COMESA (and their envisaged Tripartite Agreement) are using GATS-style negotiations and agreements to achieve gradual, sector-specific openings for trade in services.

While in applied practice many agreed "freedoms," market access commitments and non-discrimination promises are yet to be applied reliably and consistently, and while much planned or hoped-for liberalization is still to be negotiated, designed, legislated or regulated, it is fair to state that there is a clear trend among ACP RECs: Regional services integration is a recognized and broadly accepted goal. In some regions, such as the EAC, it has already generated significant dynamics for the benefits of local economies, with more likely to come.

### 3.1.7 The LDC Services Waiver: The Secret Champion of Services Lib

Perhaps the most remarkable recent development for trade in services generally and ACP members in particular has so far attracted much less attention than TISA, the Mega-Regionals and others: The LDC Services Waiver at the WTO. It is remarkable because it has the potential to do what trade in services agreements rarely do: provoke actual liberalizing changes to the applied services regimes of a number of WTO Members, and in the process inspire detailed self-reflection on what hinders services trade in particular for small and medium-sized service providers, and what can be done to change that.

The currently ongoing process of "operationalizing" the waiver, which has inspired and is in turn supported and encouraged by the recent ministerial decision in Bali on the subject, is of great interest to the ACP – not only its LDC members, but also other ACP countries which will be able to draw significant inspiration from the findings for the benefit of future initiatives to seek meaningful services commitments from their trading partners, including not only developed but also developing and even least-developed countries.This is because unlike trade agreements, which tend to lead to commitments that lock in at most existing levels of openness, any instance of LDC Waiver "operationalization" by definition implies that a preference is designed in deviation from current applied MFN practices. This means

that WTO Members will have to take a much closer look at what they are currently doing, and consider specific improvements that could assist LDC service providers in exporting to their markets – a potentially very instructive "soul-searching" exercise.

#### *3.1.7.1 The Waiver: Background and Mechanics Recalled*[33]

The LDC services waiver emerged as one of the few deliverables of the 8th WTO Ministerial in December 2011. Members are now authorised to grant preferences to services and service providers of LDCs – not only WTO Members, but all LDCs.

The waiver effectively operates as a new LDC-only "Enabling Clause" for trade in services, with benefits limited to LDCs. Prior to the waiver decision, and in marked contrast to the situation in goods, no unilateral services preferences at all were possible, apart from very narrow exceptions to the otherwise all-encompassing MFN principle in GATS article II. Importantly, the waiver allows not only for classical market access preferences, but also covers regulatory and other preferences, subject to an application and approval procedure in the WTO's Council for Trade in Services (CTS). While this two-tiered approach did not fully meet LDC demands (they had – rightly – asked for all preferential measures to be automatically covered), the bottom line is that all preferences are in principle covered by the waiver, and thus can and should be explored without distinction.

**Market Access Preferences**

Members may thus now without further authorization grant LDC services/suppliers exclusive market access in otherwise closed sectors and modes of supply, or provide them with incrementally relaxed market access vis-à-vis other Members. They can, for example

- allow LDC midwifes to provide services (mode 4) under an LDC-only quota, while not admitting midwifes from other countries;
- waive for LDCs the otherwise applicable ENT for restaurant or hotel licenses (mode 3);
- allow LDC contractors to use a higher number of foreign building professionals than contractors from other countries (mode 4 –CSS);
- allow LDC tour operators the right to maintain a local presence (mode 3) in the form of representative offices while providers from other countries must establish full branches or subsidiaries;
- create a special visa quota for IT professionals from LDCs in addition to existing access quotas for foreign professionals (mode 4).

**Regulatory and Other Preferences**

[33] This section draws heavily – partly *verbatim* – on Schloemann (2012).

Other measures discriminating in favour of LDC services/suppliers which can be approved by the CTS include preferences granted through selective (LDC only) national treatment, preferential treatment on the level of domestic regulation, or even subsidies. For example:

- recognition of qualifications based on practical experience for LDC professionals (vs. requiring formal qualifications);
- facilitated licensing procedures for LDC providers (e.g. submitting papers in home language with a summary in the local language instead of full translations);
- concessional application fees for LDC applicants for trucking licenses;
- an "LDC Helpdesk" to assist in meeting qualification requirements, technical standards or managing licensing procedures;
- facilitated vehicle registration for LDC providers of cross-border road transport services;
- Facilitated/delayed payment of withholding tax for LDC performers & IT professionals (mode 4);
- Automatic coverage of state-sponsored health insurance in developed country X for its tourists when travelling to LDC destinations (mode 2);
- Education grants for studies in LDC universities (mode 2).

Even the indicative list above shows that such preferences could make a significant difference to LDC providers. As in goods, where TBT and SPS measures reign supreme, it is often precisely these regulatory issues which pose the greatest obstacles to LDC services exports.

**Rules of Origin**

To avoid free-riding, e.g. by non-LDC providers creating shell companies in LDCs to benefit from waiver preferences, WTO Members agreed on certain rules of origin.The adopted formula represents a sensible compromise: where LDC investors act through an LDC-incorporated company no further questions are asked. Where non-LDC investors act through an LDC-incorporated company, however, they have to be ready to prove that their LDC company is more than a shell by demonstrating "substantive business operations". Importantly, however, these operations would not have to happen in the same LDC where the company is incorporated. It would be sufficient if they maintain such operations in any LDC – a solution reflecting LDC demands.

These rules should provide sufficient flexibility not least for ACP service providers from LDCs and non-LDCs to establish commercial presences in LDCs that would benefit from LDC preferences. The waiver could thus operate, not least, as a supporting tool for regional services integration.

### *3.1.7.2 State of Play: "Operationalization" in Process*

Since its inception, the waiver has seen some discussion, but no implementation. No WTO Member has to date granted any preferences to LDC services or service providers. The reasons lack of initiative, political will and pressure, but also lack of clarity and understanding what LDCs need and what could sensibly be done.

The LDC group, however, has meanwhile embarked on a major process aimed at triggering the operationalization of the waiver. Its first concrete fruit is the recent ministerial follow-up decision issued in Bali,[34] which foresees that six months after the LDCs present a collective request "identifying the sectors and modes of supply of particular export interest to them the CTS will convene a "High-Level Meeting"[35] at which "developed and developing Members,in a position to do so, shall indicate sectors and modes of supply where they intend to providepreferential treatment to LDC services and service suppliers." The decision also puts the operationalization firmly on the agenda of the CTS, which is tasked with regularly reviewing progress.

The primary onus is thus now on the LDCs to identify their demands. To this end a major research effort[36] is under way which comprises, *inter alia,* a series of 16 LDC country studies aimed at identifying (1) current and potential services exports, (2) administrative, regulatory and legislative challenges they encounter in export markets, and (3) potential preferences that could address those challenges by eliminating or – in most cases – reducing hindrances. Because technical and political feasibility is an obvious concern, research is also done in five countries which are target markets for LDC exports. These and other efforts will form the basis of the said collective request, and will assist LDCs and potential preference granting countries in designing and implementing suitable preferences.

### *3.1.7.3 Watch This Space – Why and How the Waiver is Arguablythe Biggest Game in Town (Not Only for LDCs)*

- **Actual liberalization instead of treading water**. As discussed earlier, the waiver exercise is very different from a trade negotiation, as its "operationalization" necessarily implies actual market opening. (Truly good friends of services should love it for that reason alone!)
- **Regulatory obstacles in focus.**The "operationalization" process is revealing the obvious: Most challenges LDCs services exporters (and, with them, most other SME services exporters) encounter in their export markets are of a regulatory rather than market access nature. Exploring possibilities how these can be reduced, sector by sector, mode by mode, will be of interest not only to LDCs, but all others as well.

[34] Operationalization of the Waiver Concerning Preferential Treatment to Services and Service Suppliers of Least-Developed Countries — Ministerial Decision, WTO document WT/MIN(13)/43 (11 December 2013).
[35] The term "Signalling Conference," originally put forward by the LDC Group, was abandoned, with no loss of substance.
[36] This effort is supported by TAF through the work of ICTSD, ILEAP and WTI Advisors.

- **Not a North-South Issue:**Importantly, the LDC Waiver is not a north-south issue. While developed countries can and should seek sensible ways of facilitating services imports from LDC, most LDC services exports go to neighbouring countries, which tend to be developing or even fellow least-developed countries.
- **Regional integration.**The waiver thus offers significant opportunities, not least for sensible *ad hoc* small scale openings that may flank regional integration and/or apply across regional groupings, most notably in Africa.
- **LDC Services Exports:** An important effect of this exercise will be awareness raising in both LDCs and their trading partners (again, both rich and poor) on what services LDCs do or can export, and in which modes of supply. Early results of the research process under way show that LDCs export services in virtually every sector, and virtually every mode of supply – including, importantly, in mode 3. This is likely to inspire also non-LDC developing countries, in many of which governments and even businesses are barely aware of the services exports that are currently happening, let alone potentials.

## *3.2 Pertinent Developments in Major WTO Members: TwoArbitrary Snapshots*

It would go beyond the scope of this paper to attempt to paint a representative picture of developments on trade in services in all major WTO Members. However, a brief look at two examples reflects an important trend: services have become a headline concern and policy focus for key countries, both developed and developing.

### 3.2.1 EU: Services Directive 2006

The 2006 EU Services Directive[37] came almost 50 years after the Treaty of Rome codified the freedom of movement for persons, services and capital. Ever since, EU enterprises and EU citizens have had the right to establish businesses in Member States other than their own (freedom of establishment), and to provide services from their home Member State to consumers located in other Member States (freedom to provide services). That means that EU law prohibits national EU governments from creating obstacles that would either: (a) prevent EU enterprises from setting up a business in their respective territories or (B) inhibit EU citizens/enterprises from supplying services across border into to persons in another EU territory.

The idea behind granting these rights was that the freedom to establish and to provide services was integral to an integrated common EU market—where nationality of businesses or service providers should not be an issue, where everyone benefits from the free flow of services.

[37]Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [Official Journal L 376 of 27 December 2006].(EU Services Directive).

However, beyonddirect obstacles that certain Member States maintain in certain sectors, obstacles that clearly violated EU law—e.g. bans on the establishment of companies that have foreign ownership or the supply of certain services into their territories—the parameters of the legal rights (to establish/supply services) were not always clear. What constituted an illegal obstacle (prohibited by EU law) was not always easily ascertainable – a space of insecurity that allowed a multitude of problematic measures to continue until challenged. This had obvious damaging consequences, hindering in many cases the free flow of services, including a lack of clarity and thus predictability for service providers and business that might like to expand or set up in other EU territories.

The 2006 EU Services Directive addresses these obstacles and clarifies the parameters of EU businesses/persons rights to establish and provide services in and to other EU territories. The Directive does not apply to every sector, however. This was a compromise in one respect, while also a recognition that more (unjustifiable) obstacles continued to exist in particular sectors which needed to be addressed more specifically. The Directive doesachieve many things, however, all together representative of the challenge of liberalizing trade in services even in a highly integrated economic space like the EU. For example, the Directive generally reduces the authority that national governments had to refuse the setting up of EU businesses in their territories and it drew a clear line that nationality requirements attached to the establishment of companies are illegal obstacles, contrary to EU law. It also ensures conditions for the freer flow of services by making it explicitly illegal to require the submission of original/certified documents. The Directive is also innovative in that it requires EU Member State governments to take steps that would positively aid companies/persons from other EU Member States to establish their companies in the former's territory or to supply services to the former's nationals: it required governments to create e-portals (Points of Single Contact) allowing enterprises/individuals to complete formalities online and to obtain useful information on market conditions in that Member State.

The EU Services Directive has been hailed as an important step forward. It clarified what obstacles are permissible and clearly banned certain laws/requirements as illegal obstacles to the free flow of services. Again, however, the very need for the Directive 50 years into the integration project is also testimony to the challenges involved.

### 3.2.2 China: Services, Services, Services (and the Shanghai Free Zone)

A number of recent developments have been interpreted as indications of a more liberal services trade policy on the part of China. These include China's interest in joining TISA and the opening of movement of capital and financial markets in the new free trade zone in Shanghai.

However, this new focus on services does find its reflection already in high-level political pronouncements over the past few years. For example, Hu Jintao[38] in his Report at the 17th Party Congress (2007) announced to "energetically develop services trade," and the development of trade in services is now officially perceived as central to the development of the Chinese economy.[39]

The development of China's services sector is an important element of China's 12th Five-Year Plan (2011-2015) as China seeks to shift away from low-end manufacturing. The current Five-Year Plan sets a target of increasing service sector contribution to GDP by no less than four percentage points (i.e. to 47% of GDP). During the preceding Five-Year Plan period, its services sector output exceeded targets (reaching 43.4 per cent of GDP by 2009). In June 2013, in a key note address, Chinese Premier Li Keqiang told a joint Leaders' Summit of the Global Services Forum and the China International Fair for Trade in Services that services sectors around the world represent the most important opportunities developing countries' growth and economic "upgrading"."Services", he stressed, "are a contributor to the recovery of the world economy and are the engine for industrial restructuring."

In August 2013, the Standing Committee of the National People's Congress in the fourth conference authorized the establishment of the pilot **Shanghai Free Trade Zone (SFTZ)**. A rather interesting aspect of this project is China's willingness to experiment with respect to opening services sectors and the regulation of services sectors, i.e. to liberalize services in this zone beyond China's international commitments and applied regime.

The scope of services covered in the SFTZ appears to show that China is indeed serious about this pilot. Rather than reserving its experimentation to a limited number of services, China has decided to explore different frameworks with respect to a broad array of services. The sectors for which the SFTZ permits extended liberalization include: financial, maritime transportation, telecommunications, tourism, professional, engineering, entertainment services and education services (significant in that the latter might often otherwise be reserved for public service providers in China). The enhanced liberalization comes in the form not only of expanded market access (i.e. with respect to the scope of permissible services) but also in the form of preferential rules for the supply of services (e.g. preferential rules relating to establishment, legal form, joint-venture possibilities, foreign ownership, capital requirements, the accordance of national treatment, etc.) The Chinese government is rather sanguine about the possibility of extending liberalization successfully tested in the SFTZ to the rest of the country.

[38] At the time General Secretary of the CPC Central Committee.
[39] See MOFCOM's portal that is dedicated to trade in services: http://tradeinservices.mofcom.gov.cn/en/inc/aboutus.jsp.

# 4 DISTILLED: MAJOR TRENDS FROM AN ACP PERSPECTIVE

What are, thus, the major trends, seen from an ACP perspective?

## *4.1 Enormous unilateral liberalisation and regulatory advancement globally sinceGATS – but also some tightening of rules*

The first, and perhaps most important observation is that most liberalization and regulatory development is in fact unilateral and autonomous. Over the past 20 years, since the inception of the GATS, countries around the globe, including many ACP countries, have reformed and upgraded their regulation of many services sectors and liberalized imports, often outside of trade agreements. These steps have benefited their own services trade as well as that of others.At the same time, in some areas such as financial services regulation rules and mechanisms have been tightened, making some trade more difficult.Both trends appear likely to continue.

In terms of market access, trade in services agreements, from the GATS via bilaterals to the upcoming Mega-RTAs, have usually followed, rather than preceded significant developments. In other word: Services agreements, including ambitious ones, tend to reduce "water" between commitments and applied regimes, rather than cause market opening.

Two things follow. First, there are a great number of low-hanging fruits, in the sense of possible commitments that can be exchanged for greater security for exports, the occasional actual market opening and/or regulatory reform and/or cooperation – and/or commitments and disciplines in other, non-services areas, in the case of comprehensive agreements. This means that ACP countries, like others, have capital to invest and should not be too shy to engage.

Second, ACP countries should at this stage worry less about increased competition in services export markets within the Mega-RTAs in which they do not participate, but rather – if at all – about not being at the table when new rules, or "enhanced disciplines" in TISA parlance, are negotiated that are likely to set global standards.

## *4.2 The DDA is dead – or is it not?TISA as a cry for attention*

Services negotiations under the DDA have suffered severe neglect, forced upon the Members by themselves through locked-in positions on the sequencing of negotiations within the "single undertaking." What may have been rational when originally agreed arguably turned against the Membership with a vengeance, as services, comprising multiple 21st century issues par excellence, could not be addressed when talks on AG and NAMA ran

on ground. The at least glacial progress on domestic regulation is the small token exception that confirms the big rule.

The Members liberated themselves from this problem through the 2011 Ministerial Declaration, acknowledging defeat and effectively lifting the freeze imposed by the single undertaking idea, at least procedurally.

The result in services was the TISA initiative, very explicitly *outside* the WTO and the DDA. Why so explicitly outside, when Ministers at MC8 would seem to have presumed that the now authorized exploration of "different negotiating approaches while respecting the principles of transparency and inclusiveness" would still happen within the WTO/DDA context?

The reason seems to have been, and continue to be, the perceived risk of contamination with the inertia with which the WTO finds itself identified – or found itself identified prior to the Bali success. The TISA initiative is thus perhaps best interpreted as a cry for attention, if not for help. The multilateral services negotiations are not dead, but rather in the process of being reanimated, through a possibly temporary externalization of the blood circulation. Whether the operation succeeds, however, depends on whether the doctors manage to transfer the circulation back into the body. For this to work, however, it should not stay outside for too long.

### *4.3 TISA, TTIP, TPP: Competing for Leadership on 21st Century Issues in Trade in Services, Possibly with Harmonizing Effect*

TISA, TTIP and TPP are carried forward by a major wave of ambition. For purposes of services trade this means *inter alia* the ambition to develop intelligent, up-to-date disciplines for pressing 21st century issues. These include disciplines, standards and cooperation mechanisms for digital trade and post-crisis financial services trade, supervision and integration.

While the United States as the hub for all three is likely to advance similar agendas in this regard, the different compositions of the parties to the three agreements will likely lead to some variations in terms of rules, concepts and mechanisms. However, not least in view of the sheer magnitude of the individual and combined membership of the three exercises, an excessive "spaghetti bowl" effect of barely compatible disciplines and mechanisms appears unlikely. In fact, rather than further fragmenting the trading world the three agreements will instead likely lead to some degree of harmonization.

Combined with the said ambition to tackle 21st century services issues head-on, this is particularly interesting in services, where rulemaking is most behind schedule. The simultaneous emergence of the three agreements could thus turn out to be a rather unique opportunity to combine the benefits and opportunities of smaller group negotiations with

the effect of *de facto* global leadership, for the eventual benefit of all (and the WTO). Should China indeed join TISA, and perhaps also TPP, this effect is likely to become inevitable.

That vision, of course, may provide as much discomfort as comfort to the ACP and others outside the movements. Should the said leadership effect come to bear, they would again be ruletakers rather than rulemakers. That said, in view of the broad membership one may speculate that the rules are likely to be well-vetted and of high quality. The ACP, like others, would have the comfort of looking at the rules in action, probably benefit from them as TISA/TPP/TTIP participants will likely apply them on a *de facto* MFN basis, and consider whether to support their eventual reflection in the WTO.

### *4.4 Market Access – Major Locking-In Exercises with Third Party Benefits*

While of course the actual commitments are yet to be negotiated, when it comes to Market Access and National Treatment it appears clear that TISA as well as TPP and TTIP will operate first and foremost as tools to lock in existing openness.

This provides third parties, such as ACP members, with *de facto* more secure Market Access and protection against discrimination, as in most cases TISA parties are not likely to introduce discriminatory measures, given not least the already wide membership. Some exceptions, however, are likely to occur over time.

### *4.5 "Enhanced Disciplines,"the Importance of Regulation and the Need for Regulatory Convergenceand Cooperation*

To date TISA participants have purportedly put forward no less than 15 proposals for "enhanced disciplines," meaning in particular regulatory disciplines on a sectoral and modal basis, akin to the WTO's Telecoms Reference Paper and the disciplines on domestic regulation in accountancy. TPP is equally going to put an emphasis on such disciplines, albeit differently organized within the agreement. TTIP, an agreement between two TISA participants and protagonists, will likely provide for add-ons on enhanced bilateral administrative, regulatory and supervisory cooperation.

This focus on disciplines is reflective of the major importance of domestic regulation and the need for regulatory convergence – themes of great relevance to other countries as well, including the ACP.

The latter, regulatory convergence and cooperation, may be the most important, but also the most exclusive. Important in the sense that recent research has shown that possibly the most effective tool for the liberalization of services trade is to harmonize (not necessarily

remove or reduce) regulation and cooperate on the level of administrative, regulatory and supervisory authorities and their stakeholders.[40]

### *4.6 The LDC Services Waiver "Operationalization" Exercise: Expect Surprises*

As discussed, the process of "operationalization" now enshrined in the Bali Ministerial Declaration has the potential to generate a multitude of insights as well as political momentum, both not limited to LDCs or their immediate interests.

The very focus on LDC services *exports* and obstacles they face in export markets is in many ways new and holds the promise of inspiration. "LDCs issues" in services in the WTO have so far usually been casually reduced to demands for flexibilities and exemptions from commitments and disciplines, despite GATS Article IV:3. When exports are discussed, supply-side constraints and regulatory challenges at home dominate the discourse. While these of course matter greatly, the focus on *what LDCs can and do export* and *what trade liberalization can do for those LDCs services exports* (beyond the obvious in mode 4, which is of key relevance), is likely to broaden the focus considerably. Again, the benefits of this process, while directed at LDCs, will likely spill over to other developing country services exporters.

### *4.7 The Ominous EPA MFN Clause – Back with a Vengeance, this Time Pro-ACP!*

The MFN clause, or rather: clauses, in EPAs have attracted much attention and scorn from ACP countries and observers as EPAs were, and are, being negotiated. The matter has gained some fame as one of the "contentious issues" in those negotiations, with the ACP sides wary of being locked into a mechanism that would make later trade agreements with major trading partners such as Brazil less feasible and attractive. With the EU anyway offering duty free, quota free access, the clause appeared to be an effectively one-sided deal – in goods.

The situation is markedly different, however, for services. The only EPA with a developed services chapter, the CARIFORUM-EU EPA, contains said clause for services provided in modes 1, 2 and 3 (but not 4). As the EU embarks on ambitious negotiations with third parties under TISA and TTIP, CARIFORUM members can look forward to the automatic extension of any market access in those three modes which the EU may grant to its TISA and TTIP partners.

[40] Hoekman and Mattoo (2012).

# 5 WHAT FOLLOWS FOR THE ACP: POSSIBLE POLICY GUIDANCE

## *5.1 General*

**(1) TISA, TTIP and TPP: monitor, reflect and engage.**Trade in services is of crucial relevance for many ACP countries. The ACP is well-advised to monitor as closely as possible developments in TISA, TPP and TTIP negotiations with a view to obtaining early insights into what may transpire. Even while formally outside the negotiations, it is possible and advisable for ACP members to engage with participants in these negotiations, to exchange views and possibly influence the outcome. Monitoring could usefully be organized on the ACP and/or REC levels.

**(2) Understand what's happening in your (services)economy**, and elsewhere. Currently weak statistical and other data should be improved as a matter of longer-term priority. In the meantime it is important to engage closely with services stakeholders to understand their businesses and their issues.

**(3) Establish consultative structures**, make them work, and encourage your private sector to self-organize, for example in the form of services coalitions. Close and intensive dialogue is indispensable for a successful trade in services policy.

**(4) Awareness, awareness, awareness!** A critical mass of broad-based understanding of trade in services among stakeholders and within the wider economy is the key to a meaningful public dialogue.

## *5.2 Specific*

**(5) DDA: Rethink approach, consider push (via WTO or TISA or both).** The situation on the ground has changed since the 2005 Hong Kong Ministerial. Global and local value chains are in a major process of transformation, with many production and other processes undergoing significant "servicification." Technology has created greater, often entirely new possibilities of providing and consuming services across borders. ACP RECs have advanced service trade liberalization, with encouraging effects. As a result of these and many other factors discussed in this paper, it may be time for ACP members to consider pro-actively re-engaging in services negotiations in the WTO as the one forum that gives all of them a voice. A renewed, or rather: new impetus from erstwhile non-*demandeurs,* coupled with fresh ideas how needed flexibilities can be designed without compromising the thrust of disciplines, could potentially generate significant effect and possibly foster the re-integration of the breakaway TISA process for the benefit of all.

**(6) TISA: Fundamental opposition is futile, but pro-active critical engagement should be an option.** TISA parties have successfully isolated their process from the need

to seek consensus with non-*demandeurs.* There is however room, and the need, for constructive engagement (which may even be critical in nature).

- **Join TISA...?** ACP members that have reached a critical level of services awareness and regulation and in principle share the ambitions of the TISA protagonists may wish to consider joining the TISA initiative. Two ACP countries havereportedly explored the option, but others may be in apposition to do so as well.
- **…With a view to bringing it back to the WTO?** ACP and other developing countries should consider the possibility of joining TISA as a way of bringing it back to the WTO, possibly as a "critical mass" agreement. The more countries engage, the stronger the case for reintegrating TISA into the GATS.
- **Work to ensure WTO compatibility of TISA.** ACP members should work to ensure TISA's compatibility with the WTO. This can be done on multiple levels, namely through engaging TISA protagonists on substance in the CTS and its committees, as well as on other political levels, e.g. regional, bilateral fora.

**(7) TPP and TTIP (and to some extent TISA).** As PTAs these agreements are outside the direct sphere of influence of outside parties such as ACP countries. However, there are number of benefits to be derived, and interfaces to be explored, from engagement with the respective parties and/or from close observation.

- **Understand the new "gold standard".** Both TPP and even more TTIP aim very high when it comes to disciplines on regulation. Whether or not the advance praise as the "new gold standard" in services liberalization will be adequate once the ink is dry, both agreements will likely set new standards. These should be studied closely by services regulators, negotiators and stakeholders in other countries.
- **Reap insights on sub-federal level services regulation**. The EU-US negotiations under TTIP in particular are likely to go deeper than others before them. One effect, admittedly sought by the EU, is to get a better understanding of services regulation on the sub-federal, or state level, in the United States. This information is notoriously difficult to come by, and, if made available, will benefit operators and negotiators elsewhere, including in ACP countries.
- **Learn about regulatory cooperation, and seek it where appropriate.**The EU and the US in TTIP in particular are exploring intensive forms of cooperation and communication. First, this may be instructive as "best practice" example for regulators elsewhere. Second, based on their practice under TTIP US and EU regulators may be in a better position to engage equally with third parties, such as ACP regulators. The same may apply in relation to TPP parties.

- **Benefit from regulatory harmonization and possibly recognition/equivalence.** TTIP in particular aims at fostering harmonization and/or recognition/equivalence of the parties' standards and procedures. (The same is true, probably to a lesser extent, in TPP.) This may in some cases lead to changes for ACP exporters of services to (and importers of services from) the EU or the United States, but overall will benefit them as compliance becomes easier. Recognition of services standards, qualifications, qualification procedures, licensing requirements (or elements thereof) or licensing procedures can potentially be extended to suitable ACP parties. Where that is a possibility and there is relevant actual or potential trade, ACP countries/regulators may wish to engage pro-actively.
- **CARIFORUM (and possibly others): Reap benefits of EPA MFN clause in the EU (TTIP and TISA).**Since the clause extends market access and national treatment under modes 1-3 which the EU grants to third parties to the Caribbean, it is worth following-up closely on the EU's implementation in sectors of interest.

**(8) TISA, TPP, TTIP and other PTAs: Seek extension of preferences to LDCs.** All such preferences can be unilaterally extended to LDCs under the LDC Services Waiver.

**(9) EPAs: Engage (with caution and creativity), and get that MFN clause!**EPAs offer concrete possibilities and opportunities, but like any PTA also carry the risk of market distortion (e.g. first-mover advantages for second best providers), which warrants some caution. Important potential benefits include not only market access e.g. in mode 4 for otherwise elusive provider categories and sectors, but also in particular regulatory convergence and cooperation (coupled with TA). The much-dismissed MFN clause may in services generate non-negligible benefits in the future, and should therefore be carefully considered, separate from its twin in goods.

**(10) RECs:Advance and translate.**With the aforementioned general caveat that preferential treatment in services in particular can lead to first-mover advantages and other market distortions, regional integration of the often small ACP services markets holds significant promise. ACP countries are well-advised to translate the experience and momentum in their RECs into (1) regulatory and supply-side progress at home and (2) international clout, e.g. in the WTO (e.g. WPDR negotiations).

**(11) LDC Services Waiverfor Non-LDC ACPs:Follow and emulate the process.** Beyond theopportunities and benefits discussed above, the process of "operationalizing" the LDC waiver offers the opportunity well beyond just S&D to identify what developing country service providers, in particular SMEs, need, how it can be achieved, and who could give it. Non-LDC ACP countries may wish to follow the process closely and learn from it, as appropriate.

**(12) LDC Waiver: Use as an inter-ACP/DC tool.** It is worth stressing again that the LDC Waiver offers possibilities as a tool for selective market opening and regulatory reform *by both developing and least-developed Members of the group.* While only LDCs can be beneficiaries and all LDCs have to be treated equally, proximity will *de facto* often be a factor. This means that in particular within Africa the Waiver could flank or transcend regional agreements and thereby help foster regional integration.

# 6 DISCIPLINES AND FLEXIBILITIES IN SERVICES AGREEMENTS: A FEW REFLECTIONS "TO GO"

ACP countries are, and will increasingly be, engaged in services negotiations. Different for a – bilateral, regional, plurilateral or multilateral – require different responses, and generic advice risks being treacherous. With that risk in mind, a few selected observations, not least in light of the above, nonetheless seem in order.

## *6.1 Disciplines*

ACP countries are well advised to pay detailed attention to specific disciplines being explored in services agreements, including the Mega-RTAs discussed above, TISA, FTAs and, not least, EPAs and REC services initiatives among ACP members and elsewhere.

Several sectors appear to be in need of, and benefit, from **sectoral disciplines**. These include, for example:

- Telecoms, energy, rail and other network industries, which benefit from pro-competitive regulation the parameters of which can usefully be agreed in trade in services agreements.
- Financial services and arguably others benefit from agreed standards, including prudential standards (even while states routinely retain the right to take additional prudential measures), and regulatory and supervisory cooperation.
- IT and IT-enabled services, and more generally e-commerce, benefit from harmonization and coordination of requirements on a great range of matters from data security to electronic signatures, and from the responsibility of intermediaries to data flows.
- Services sectors prone to anti-competitive practices, for example tourism, distribution and transportation, benefit from cooperation of competition authorities and harmonized rules.

The complex matters surrounding **mode 4** and **labour mobility** can be vexing, but are open to initiative and smart design. The CARIFORUM EU EPA provides several examples of how well-chosen carve-outs and targeted mechanisms can offer at least incremental ways forward. For example:

- The inclusion of cooks and fashion models in mode 4 categories usually only open to university graduatesspeaks for a targeted negotiating approach.
- The same applies to the Cultural Protocol which, while falling deliberately short of full mode 4 commitments (as these were not attainable), creates soft obligations which can be used as a basis for action.
- Graduate trainees can now come from the subsidiary and go to the mother company, rather than just the other way round – a clear pro-development move.
- The mechanism to foster recognition of professional qualifications (Article 85) maps a path out of the notorious difficulty of reaching mutual recognition agreements, with recognition being probably the most important market access impediment for professional service providers.

## *6.2 Specifically and Generally: Regulatory Cooperation*

As research has shown, regulatory cooperation is likely to be the single most important factor in fostering effective trade in services. This applies in principle in all sectors where regulation matters, i.e. most services sectors.

As suggested above, in this context the TISA, TPP and TTIP negotiations promise to offer insights beyond experiences in recent FTAs around the globe, as the parties are looking for the "new gold standard" not least in this area. ACP negotiators, regulators and stakeholders are encouraged to watch closely.

## *6.3 Special and Differential Treatment*

Special and differential treatment (S&D) are, briefly put, provisions in trade agreements that (a) grant developing countries flexibilities in the implementation of their obligations under these trade agreements and (b) place additional obligations on other parties to the trade agreement (developed countries or developing countries in a position to do so) in support of developing countries' interests. Even as services liberalization grows in attractiveness and promise, such classical S&D tools do as well, if and when intelligently applied.

### 6.3.1 Classical S&D – A Snapshot

Classical examples of S&D include the following:

A. **S&D in the form of flexibilities for developing countries**including for example:

- Exemptions from obligations that would otherwise apply to developing countries: including for example allowing developing countries to place conditions on the use of public telecommunication infrastructure by foreign providers (GATS Annex on Telecommunications: Article 5(g));
- Transition periods in the implementation of obligations: including for example in relation to the establishment of inquiry points (GATS Article III:4)
- Flexibilities related to the level of liberalization required by developing countries: including for example in the context of their regional integration (GATS Article V:3(a)) or liberalization in the context of multilateral negotiations (GATS Article XIX:1)

**B. S&D in the form of enhanced obligations on the side of developed countries**including for example:

- Technical assistance and technical cooperation including general obligations to provide technical assistance to developing countries (GATS Article XXV) and specific obligations to provide technical assistance and cooperation such as facilitating the participation of developing countries in international organizations such as for example the International Telecommunication Union (GATS Annex on Telecommunications: Article 6(a)
- Enhanced transparency requirements on the side of developed countries including, for example, the obligation on developed countries to facilitate access to information about their services market and regime that is useful for developing countries' service suppliers through the establishment of contact point (GATS Article IV:2)
- Positive S&D provisions: these are provisions that acknowledge the special needs of developing countries and call for positive measures on the side of the other parties to the agreement to accommodate the special needs of developing countries. examples include requiring developed countries to liberalize services in sectors and modes of supply of interest to developing countries. The Ministerial decision on the LDC Services Waiver is another example.

### 6.3.2 "Equal & Equitable"Instead of "Special & Differential"

Many of the classical S&D provisions have been subjected to criticism, often for good reasons. Exemptions from obligations do not necessarily accelerate reform and without the pressure at home to comply with the requirements of importing countries developing countries' goods and services will continue to face challenges in export markets. Transition periods alone might not be sufficient to undertake the necessary steps to establish the regulatory, institutional and human infrastructure necessary to maintain development. Positive S&D provisions were often framed in hortatory language and technical assistance was often donor-driven and selective at best.

The DDA negotiations on S&D provisions unfortunately did too little to advance the debate intellectually, possibly because the thinking about the nature and function of S&D remained within the box. The very term "special and differential treatment" may be a terrible misnomer. It suggests that the challenge is to provide charitable accommodation for the weak in the form of friendly exceptions, while the real task may be to integrate differently situated players into the system for the political and economic benefit for all.

If so, many negotiations, discussions and debates on S&D at the WTO and elsewhere may miss the point. Instead of, or in addition to, thinking in categories of social policy, interpreters of old and negotiators of new WTO law (including modalities and the revision of existing S&D rules) may wish to focus on the efficiency gains, both economic and political, that can be derived from applying the systemic logic of effective integration instead of the often blind focus on unadjusted principles. Mantras are exchanged while significant potentials in developing countries LDCs may remain untapped, only because the system does not find effective ways to "treat unequal things unequally", a natural tenet of the principle of equality routinely taught to students of constitutional law. This lack of flexibility stands in stark contrast to the frantic search for and application of ad hoc measures in reaction to the global challenges, often in tension with if not violation of trade principles, if understood dogmatically.

What is needed is the courage to unapologetically fine-tune the system so that it generates maximum results for all, including both economic and non-economic gains. Creative but feasible solutions have been proposed, from the use of development indices to the design of flexible procedural solutions.The architecture of the Section II of the recently adopted Agreement on Trade Facilitation, linking the implementation of concrete provisions with access to assistance merits serious consideration, and the CARIFORUM EPA is a treasure trove of good ideas. Possible preferences to developing countries and LDCs such as those currently contemplated in discussions in the context of the LDC Services Waiver are instructive to this debate. These preferences could take the form of eliminating or relaxing market access limitations on developing countries' services imports and could also be in the form of regulatory flexibilities including, for example, facilitated licensing procedures and recognition of qualifications based on practice.

Developing countries including the ACP have a major role to play in leading and broadening the debate on S&D including in the context of trade in services.

### 6.3.3 S&D in TISA – A Contradiction in Terms?

While just under half of TISA participants are developing countries, the issue of S&D has reportedly not come up yet. There appears to be an unspoken assumption, maintained at least by some, that S&D would be in contradiction to the very ambition of the agreement.

That, however, appears to be misguided. There is no *a priori* reason why elements of S&D, crafted precisely with the above considerations in mind, namely to *support sustainable*

*services liberalization,* should not be a useful tool to facilitate the integration of ambitious and progressive, but yet underdeveloped, countries into TISA.

This applies in particular to measures geared specifically at generating or enhancing regulatory structures and capacities, through financial or technical assistance, and/or through enhanced regulatory cooperation. Targeted infrastructural and supply-side measures may equally fit into a progressive approach. But even classical flexibilities, both in the form of transitional periods (to allow time for planned regulatory upgrading) and on a permanent basis (in cases where the specific circumstances of a country, for example its smallness, so warrant), can have their place.

### *6.4 …And a Word on Aid for Trade in Services*

Aid for Trade (AfT) in services has attracted some attention in very recent years, in much-belated recognition of the growing contribution of the services industry to national and global economies generally and to the rise in trade in services more specifically. AfT in services has so far focused primarily on (a) improving the capacity of developing countries to negotiate services agreements, (b) helping to manage market opening including undertaking the necessary regulatory reforms, and (c) support in enhancing the export capacity of developing countries services, including access to finance, and assistance toaddress the supply side constrains of developing countries' services.

Despite the increased attention of AfT to services, current levels of AfT are way below what is needed. Considering the contribution of services to the GDP of developing countries, it is fair to say that AfT in services should at least reach 50% of all efforts. In addition, a host of areas that require serious attention and support is underserviced by AfT, including developing export strategies for services sectors (apart from tourism and ICT), assisting developing countries to formulate their services policies (separately or as part of their trade policies), improving services regulation generally (not only in the context of market opening), establishing regulatory institutionsand training regulators, enhancing the self-organization of service suppliers through the establishment and maintenance of sectoral associations and/or coalitions of services, establishing and maintaining private-public consultative structures and assisting developing country governments and service providers in addressing barriers to services trade in export markets.

## 7 CONCLUDING REMARKS

TISA, TPP and TTIP are probably best understood as symptoms of a much larger, pervasive, global and local trend: The recognition that services are everywhere, and almost everything is a service.

TISA is probably best understood as a "cry for help" of the system underpinning international trade in services, until today anchored in the GATS. The TISA process, if properly managed by both protagonists and outsiders, can be made fruitful for the development of that system. Ideally, however, this would happen by re-integrating it as soon as possible into the WTO system proper.

ACP countries have no choice other than to position themselves in the said trend, ideally by pro-actively shaping their understanding and policy responses. It is hoped that this paper succeeds in making a humble contribution to that effort.

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