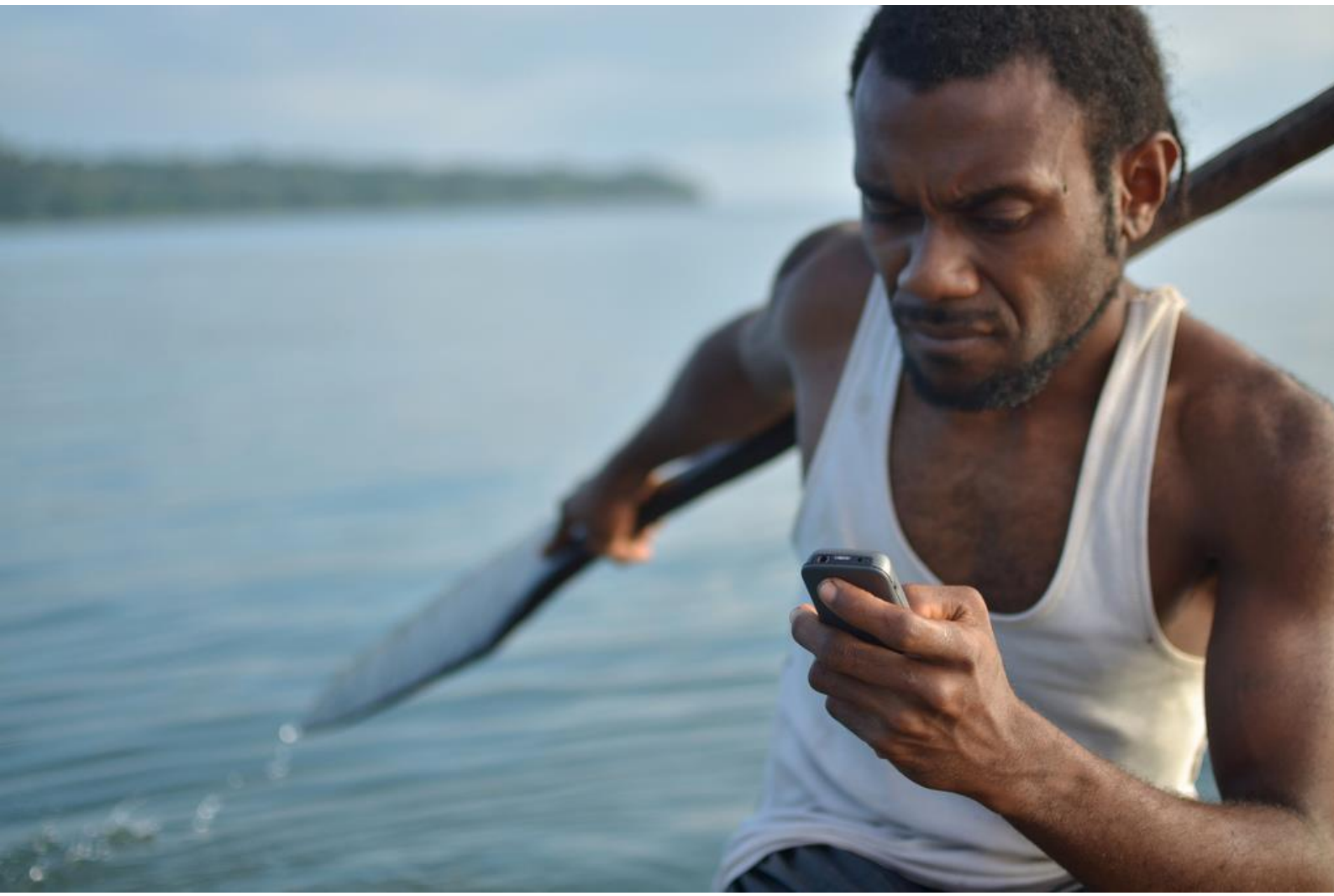
CASE STUDY

Now the Real Thing

Getting Creative to Make the LDC Services Waiver Work



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The initiative promotes understanding among policy makers, regulators and negotiators about their services sectors and the role that trade negotiations can play in pursuing their strategic interests therein.

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Abbreviations

BPO	Business Process Outsourcing
CSS	Contractual Services Suppliers
DDA	Doha Development Agenda
EEA	European Economic Area
EU	European Union
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ICT	Information and Communication Technology Services
ICTs	Intra-corporate Transferee
IP	Independent Professionals
LDCs	Least-developed countries
MFN	Most-favoured nation clause
NT	National Treatment
PTA	Preferential Trade Agreement
SMEs	Small and Medium-sized Enterprises
TFS	Agreement on Trade Facilitation in Services
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization

Foreword

Services and services trade can play a central role in promoting sustainable development, supporting inclusive economic growth, and reducing poverty in modern economies. However, LDCs, LICs, and LMICs continue to face challenges in catalysing or sustaining progress across this diverse range of economic activities. With respect to trade policy and related negotiations, services have become an increasingly visible feature of discussions - domestically, regionally, as well as at the bilateral and multilateral levels.

A number of challenges impacting services trade negotiations and policy-making have been identified however. Many lack access to reliable services trade data on which to base analysis and decision-making, and skills for processing and analysing existing services trade data to underpin conclusions. Ineffective interactions between stakeholders to support decision-making - within government, and between the government and the private sector, civil society, and other non-state actors - is also a major challenge.

Against this backdrop, ILEAP, CUTS International Geneva and the University of Sussex's CARIS have partnered to undertake a series of interventions that seek to contribute to the increased and more effective participation of LDCs, LICs, LMICs and RECs in multilateral, regional and bilateral services trade negotiations.

With funding support from the UK Trade Advocacy Fund, a set of studies, toolkits and trainings are developed to assist these countries in increasing their participation in services trade. Target beneficiaries range from negotiators, policymakers, regulators, statistical officers and various non-state actors.

This case study analyses the progress made in the operationalization of the WTO's 2011 LDC Services Waiver, which allows WTO Members to grant better regulatory, tax, administrative or other treatment to services and service providers from LDCs than to those from other countries.

Twenty-three WTO Members have meanwhile notified preference schemes, and the outcome is better than most expected. A first step has been made. But more should and could be achieved. Most measures announced remain shallow, and few Members have created real preferences, or responded to the call for targeted preferences that go beyond mere 'market access' and address real-life barriers to trade in services from LDCs. A closer look reveals that it is perfectly possible to design creative but realistic solutions for LDC services and suppliers to some of these challenges. WTO Members should consider these solutions as their targets, including for future upgrades to their notified scheme, if any. Many solutions are often in fact very close to home and other preferences often already exist for nationals. These preferences, small or big, often lend themselves to extension or creative adaptation for the benefit of LDC providers – assuming an open mind and the requisite political will.

Where we come from, and where the journey should go – an introduction

When put in motion in 2011 the LDC Services Waiver[1] attracted little attention. Despite the promise embodied in its title – *Preferential treatment for LDC services and service providers* – expectations were low. Few saw LDCs as services exporters, could imagine preferences in services to work, or wanted more unilateral preference schemes to start with. For many the Waiver was, in essence, a fig leaf, put together to swell yet another 'LDC package' for yet another WTO Ministerial that was threatening to fall short on substance. Little surprise, then, that two years later nothing had happened – no preferences, and still comparatively little clamour for them.

The 2013 WTO Ministerial changed that. Under pressure from the LDC Group the "Operationalization Decision"[2] was reached which instituted a process under the auspices of the WTO's Council for Trade in Services. After the LDCs delivered on the first step, or initial condition – a collective request – WTO Members then convened for a pledging conference-type 'High Level Meeting' in February 2015, following which, in turn, their written notifications of actual preference schemes became 'due.' For all developed and some advanced developing countries ignoring the Waiver had ceased to be an option, and something had to be delivered.

With 23 notifications to the WTO to-date, important progress has been achieved vis-à-vis the aim of "operationalising" the LDC Services Waiver. In reality however, the actual preferences provided (i.e. treatment at or behind the border that is more favourable than that accorded to non-LDCs) have been marginal at best. Put another way, with a few exceptions the waiver has yet to achieve any real market opening on the part of the preference grantors.

That said, the glass is arguably in the process of being filled. Probably the best way to look at it is that this process is precisely that – a process, one that is inherently iterative and should evolve over time. The journey has just begun.

Looking towards the next phase of putting the waiver into action, this paper aims to provide some food for thought on how greater creativity can be introduced into the efforts of securing better treatment for LDC service suppliers and their exports. The waiver is an important and still largely unexplored new tool for preferential treatment at or behind the border for LDCs, but as such, it is but one of a larger package of measures required internationally and at home within LDCs to boost their services supply capacity.

[1] Decision on the *Preferential Treatment to Services and Service Suppliers from Least-Developed Countries,* WT/L/847, December 2011.

[2] Decision on the *Operationalization of the Waiver Concerning Preferential Treatment to Services and Service Suppliers from Least-Developed Countries,* WT/L/918, December 2013.

Section 1

Background and Status

Brief history

The idea that LDC services merited special attention is enshrined in the GATS itself, in Article IV. The recognition of the importance of special treatment for LDCs in services dates back to 2003 when the WTO's Council for Trade in Services adopted a decision on *Modalities for the Special Treatment for Least-Developed Country Members in the Negotiations on Trade in Services*. The decision was preceded by a number of discussions on the possibility for WTO Members to open their services market more broadly to LDCs. In these deliberations (many) WTO Members acknowledged and recognized the specific economic situation of LDCs for the purpose of the negotiations and the need to accord them special treatment for trade in services. However, the underlying ideas remained, at that time, just that: a set of ideas in the form of principles and objectives, and although they were reiterated in the 2005 Hong Kong Ministerial Declaration, no implementation measures were taken for them to make any real-life impact on trade in services of LDCs – nor were there any tools developed for that purpose.

The 8th Ministerial Conference in 2011 in Geneva was a significant step in the process, as it gave a concrete form to the objectives previously agreed by WTO Members. As part of a somewhat hectic eleventh-hour effort to generate a meaningful LDC package a waiver was adopted in order to enable developing and developed-country Members to provide preferential treatment to services and service suppliers originating in LDCs. Emulating in part the "Enabling Clause" applicable to goods it released WTO Members from their legal obligation to ensure non-discriminatory (MFN) treatment of all trading partners, and instead authorized Members to grant unilateral preferential treatment to LDC services and service providers. The initial duration of the waiver was 15 years, i.e. until the end of 2026.[3]

However, beyond the adoption of the waiver itself, i.e. the authorization to grant preferences, initially no progress was made in practice, as no Member actually went ahead to provide any special treatment to LDCs on the basis of the 2011 decision. To be fair, there were also relatively few voices from the LDC side demanding implementation. The same must be said about many of their friends – the services theme, it seemed, was still exotic for most, and many may have felt that other, classical LDC themes such as cotton and duty-free-quota-free treatment were more important targets to pursue. There was therefore a need to ensure that the waiver would not remain just a piece of paper – a fig leaf, some might say.[4]

Progress was made behind the scenes, however, with discussions among the LDCs emerging and a research programme put in motion for the LDC Group by ILEAP, WTI Advisors and ICTSD in 2013. Pressed on by the LDCs the 9th Ministerial Conference in December 2013 in Bali adopted a follow-up decision entitled *Operationalization of the Waiver Concerning Preferential Treatment to Services and Service Suppliers of Least*

[3] This was meanwhile extended to 2030 at the 2015 Ministerial in Nairobi, see below.

[4] An early call for action was made in Schloemann. H. (2012) *The LDC Services Waiver – Making it Work*, BRIDGES Africa, Vol. 1 No. 4 (based on work done for ILEAP for the benefit of the LDC Group immediately prior to the 2011 waiver decision).

Developed Countries. The decision, importantly, established a process to lead WTO Members to the design and actual implementation of preferences for LDCs. For this to happen, the decision foresaw the submission of a Collective Request by the LDC Group followed by a High-Level Meeting (the term 'Signalling Conference' was seen as politically charged) to be held in order to follow up with WTO Members on the matter.

Following in-depth research on the services markets and regimes of importing countries and in-country assessments of service providers' export-related concerns in 16 LDCs, an extensive catalogue of barriers and potential preferences was prepared, listing services exported by LDCs, their destinations, the modes of supply used, the barriers and challenges encountered, and possible preferences that could overcome them. The catalogue described cross-cutting issues relating to all or several sectors, as well as specific issues by sector, such as business services, educational services, construction services, distribution services, health services, etc. It formed an important background element for the LDC Group's preparation of its July 2014 Collective Request.[5]

The idea of a Collective Request emerged in an effort to ensure that the preferences granted by WTO Members would meet the actual needs of LDCs and match with their expectations. Supporters of the idea felt that this requirement was essential to guide Members in the preparation of the preferences that they would grant to LDCs in services. Others felt that it was an attempt by detractors to delay or even stop action from happening, expecting that LDCs would find it difficult to come up with a meaningful collective request. Be that as it may: Barely seven months after the ministerial, and against the background of the sizeable research effort already mentioned, the Collective Request was circulated in July 2014. The Collective Request detailed the specific needs of LDCs in terms of market access, national treatment and other regulatory issues in relation to services.

The submission of the request triggered the organization of the High-Level Meeting six months later. The purpose of the Meeting, eventually held in February 2015, was to invite Members to announce how they intended to respond to the Request.

Following this, several Members submitted notifications to the WTO listing the preferences they had decided to grant to LDCs. In December 2015 in Nairobi, the 10th Ministerial Conference was a new forum for discussions about the LDC Services Waiver. There, a decision was adopted to extend the Waiver until 31 December 2030. The decision also encouraged Members that had not notified preferences to do so and Members that had already notified to provide technical assistance and capacity building to allow LDCs to benefit from the preferences granted. It further encouraged Members specifically to address regulatory barriers as defined in GATS article VI:4, shining a spotlight on the 'elephant in the room': Most LDC issues are SME issues, and SME's primary problems in practice are often not found in the clarity of market access channels, but rather in the often muddy waters of regulation, administration or taxation.

[5] The Collective Request itself fell somewhat short of the possibilities established by the preparatory work, and some have observed that it could have benefited from further reflection and editing. However, again the glass is primarily partially full: Few would have expected the LDCs to present such a rich 'wish list', and it did play its role well, as the subsequent process has shown – it started a major reflection and engagement exercise beyond the expectation of most.

Current status, briefly

WTO Members' Notifications of Preferences

By the time of writing 23 Members have notified preferences under the Waiver to the WTO. It is interesting to note that the notifications were submitted not only by developed-country Members, but also by developing countries. Countries that have notified preferences are *Australia, Brazil, Canada, Chile, China, Chinese Taipei, European Union, Hong Kong, Iceland, India, Japan, Korea, Liechtenstein, Mexico, New Zealand, Norway, Singapore, South Africa, Switzerland, Thailand, Turkey, United States, Uruguay.*

Despite the decision of the 10th Ministerial Conference in December 2015 encouraging (additional) Members to grant preferences, only two followed suit. The last new notification was submitted in February 2016 by Thailand, following Uruguay's in January 2016. (In June 2016, Turkey notified a revised version of its notification.)

What's in them? The value of the 23 notifications[6]

While the formal engagement of 23 WTO Members – counting the EU as one – is in itself encouraging, the proof, of course, can only be in the pudding: What do they actually promise to do, and of what value is it for LDC services industries? The short answer is: The glass is getting filled. It may not be half full yet, but what those 23 Members have offered is an important step forward. So – what's in those notifications?

A large number of preferences were granted – over 2,000, arguably (the number depends on the method of counting), counting only those instances where WTO Members promised LDCs better treatment than they are obliged to grant all WTO Members under their existing commitments under the GATS. That in itself is impressive.

There is a large spread of variations between the various preference 'programmes' offered, however. Some notifying Members clearly took into account the LDC's Collective Request and granted preferences in an effort to meet the specific needs of LDCs. Other notifications are weaker, as they grant either very few preferences or many preferences that are of little interest to LDCs' services markets, i.e., in modes and/or in sectors with no or limited relevance to the services exported by LDCs. For example, by one count 46% of the preferences went beyond the Collective Request. But many of them were granted in mode 2 (where a foreign consumer travels to consume the service in the service provider's country) – normally the least interesting for our purpose, because there are little barriers to start with – or in services sectors that were not broadly used by LDCs.

The sectors where most preferences were granted are business services and transport and logistics services, all important for LDCs, with however some other sectors of LDC relevance, such as tourism, attracting much less attention.

In addition, many notifications – about 40% – reflect the DDA offers of the respective Members, that is, the treatment already formally offered to all WTO Members under the currently stalled round of negotiations. In most cases these will be a mere reflection of current practices (already in 2006-2008, when the offers were generated) that are, in fact, already more liberalized than in the 20-years old GATS schedules of Members. In

[6] The numbers in this section – as well as those in in sections below – are taken from a paper by Miguel Rodriguez Mendoza, Hannes Schloemann, Hadil Hijazi and Christophe Bellmann for UNCTAD, 2016. They were generated primarily through work conducted by Clémentine Pitard and Anna Markitanova.

other words: These 'preferences' will in all likelihood not reflect any real preference in the sense of better treatment of LDC services and service suppliers as compared to others, but rather the treatment that is granted to everyone anyway. That leaves LDCs with only a small value in hand: In case that Member decides to introduce new barriers to trade they may be spared some of their effects, as the promise to them goes further than the promise to others. Even that effect is limited, however, because the Waiver notifications do not translate into legally binding commitments.

More remarkable is the comparison with Preferential Trade Agreements (PTAs). Members seem to have at least in part lived up to the ambition to offer to LDCs what they offered to third parties in their PTAs. But again, much of that is likely to be reflective of actual applied MFN practice – in other words: Leaves the status quo unaffected and does not provide actual preferences.

Section 2

Towards More & More Meaningful Preferences for LDC Services & Their Suppliers

Why again services preferences? Is it not all about capacity?

Before going back to the 'How' it may be good to pause for a moment and ask: Why again are we doing this? Are we missing the point when focusing on preferences when the real issue is capacity – the capacity to supply and export services?

The quick answer is: Preferences in services can be a uniquely effective tool to use existing and stimulate future capacity. But this is not because of the need for a 'preference margin', an advantage over competitors without which LDC services would be uncompetitive. To the contrary, in fact. It is rather about allowing LDC service providers to play out their existing and developing strengths because preferences allow for the effective fine-tuning of regulatory and other mechanisms that would otherwise stand in the way – to actually let the rubber hit the road, if you like.

Of course, it is true that LDCs and LDC service suppliers face myriad capacity challenges, from weak infrastructure via weak regulatory and quality frameworks to business challenges such as financing, education, communication and overall export-readiness, and these challenges merit all the attention they can get. Any direct support to address them is welcome, and donors are well advised to direct their focus accordingly. But the story has another side, and it matters greatly. LDC services and service suppliers often are in fact quite competitive, innovative, creative, well-organized, quality-oriented, inspired, business-savvy, and all that. But – apart from the said constraints at home – they face a great number of obstacles on their way to their actual or potential foreign client. These include many governmental barriers in export markets, including regulation, taxes and charges, visa and work permits, and classical market access restrictions.

Reducing these challenges will make a significant impact for LDCs – even if done on an MFN basis, i.e. for services and suppliers from all countries. The option to do so on a *preferential* basis however, as now authorized by the Waiver, has a distinct advantage: It allows Members to make adjustments to their services market regulation which they would simply not (yet) be ready to make on an MFN basis – even on an experimental basis. This – and the few instances where an actual 'margin' creates a mildly subsidizing effect (e.g. preferential taxes and charges) – will in turn stimulate the growth of supply capacity in LDCs. Any attention given to generating such preferences is thus well-invested. So is attention given to direct improvements in supply-side capacity, including regulatory infrastructure in exporting LDCs. But Waiver preferences should

be a central element of the policy toolbox of any Member who is serious about LDC services.

Securing Meaningful Preferences: An Iterative Process

Clearly, however, one will likely work only half as well without the other. Effective use of the preference option presupposes an iterative process.

To be meaningful, preferences should address real-life challenges faced by LDC services and services suppliers and ideally confer actual *preferential* treatment (at and behind the border), i.e., treat LDC services and suppliers better than others; at the same time, LDCs need to have capacity to take advantage of the better treatment. But capacity is fluid, dynamic and evolving – limitations in capacity should therefore not be used (or abused) as reasons to limit the scope and depth of preferences to be offered.

Doing so would mean to sacrifice the stimulus effect of *opportunity*. Most SMEs, not only in LDCs, do not have the muscle to run against a wall until it breaks down – they simply have to take the world as they find it, and make do with the opportunities on offer at any given time. They will develop capacity if there's an opportunity to expand; they won't if not.

Holding back LDC preferences because of a current or perceived lack of capacity would also mean to sacrifice the effect of *attention.* 'Those in the dark one does not see', quipped Bertold Brecht, and this aptly describes LDC providers' (and indeed other SMEs') experience in much of services liberalization until today. Recognizing their potential by opening doors, even if just a tiny bit further, fosters a discourse that may well provide the spark that lights the fire.

Again: What do we have on the table now? A slightly closer look at 'preferences' granted

As seen above, 23 Members' notifications of their preferences have so far been submitted to the WTO in relation to the LDC Services Waiver. The preference granting countries are both developed and developing country Members.

To avoid confusion it is important to pause briefly
to establish a fundamental bit of terminology here: When we – and WTO Members in sessions at the WTO – speak about 'preferences' here we refer to promises made by WTO Members for the benefit of LDC services and service providers which go beyond what they are already obliged to do for all WTO Members under their existing GATS schedules of commitments. Crucially, thus, under that definition a 'preference' offered does not imply necessarily that even a single one of them in fact means actual preferential treatment.

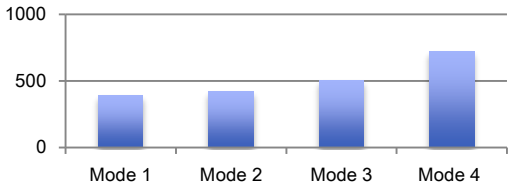
That's because most Member's commitments represent only baselines, and actual (MFN) treatment of foreign services and service providers is often much more liberal. What is thus promised to LDCs in the packages submitted under the Waiver may in many cases represent the status quo as applied to all – in other words: nice words, not more.

With that important caveat in mind let's take a quick look at a few features of interest:

Modes of supply: Preferences were granted in all four "modes of supply": cross-border trade (mode 1), consumption abroad (mode 2), commercial presence (mode 3) and presence of natural persons (mode 4). Somewhat remarkably many countries took up the LDCs long-standing concern about mode 4 and offered better market access for services that

required the presence of natural persons. In fact, mode 4 arguably accounts for the biggest

Figure 1: Preferences Granted, by Mode



number of preferences granted (depending on how they are counted). Importantly some Members did specifically improve their offers for contractual service suppliers (CSS) and independent professionals (IPs), two types of service providers of great importance to LDCs, but often not well covered by GATS and FTA commitments – in contrast to Intra-Corporate Transferees (ICTs), linked to investments in branches and subsidiaries, which usually enjoy better coverage and treatment.

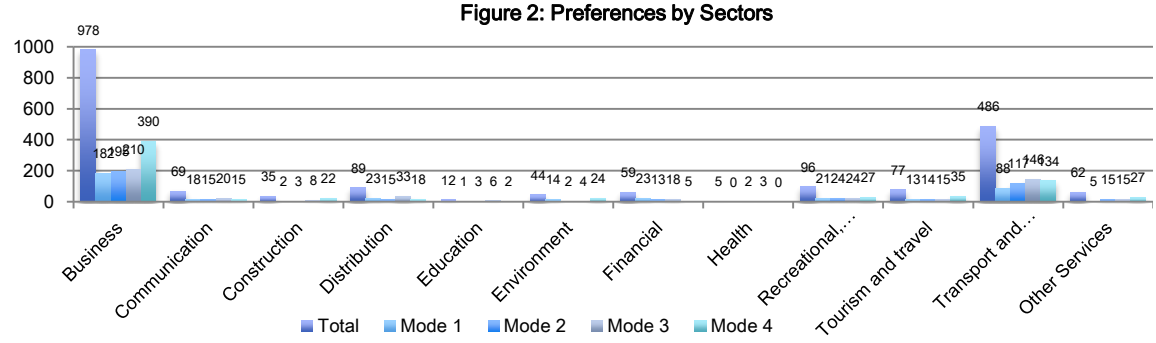
However, many preferences were also granted in mode 2. This mode of supply is of less interest to LDCs (except for tourism, health and education), for the simple reason that most countries do not maintain many barriers to their citizens consuming services abroad. While

Some services sectors are subject to preferences in many notifications. This is the case of business services and transport and logistics services. Nevertheless, other sectors suffer from a lack of consideration that is regrettable. This is the case of tourism and recreational, cultural and sporting services, among others, where more commitments from WTO Members would have been highly appreciated.

A matter of degree - Full or partial liberalization? Some preferences offer a full liberalization of the relevant sectors, i.e. they eliminate every limitation to services imports from LDCs to the granting WTO Member. The majority of preferences however only provide a partial liberalization of the concerned sectors – meaning that they eliminate some limitations but not all. This is due to the fact that many of them are granted in mode 4, which is difficult to fully liberalize generally. as it is generally dealt with at a horizontal level – i.e. mode 4 is identical for almost all sectors.

Mostly "Market Access", little else. Notifications mostly focused on market access as defined by GATS article XVI, with 85% of the preferences

Figure 2: Preferences by Sectors



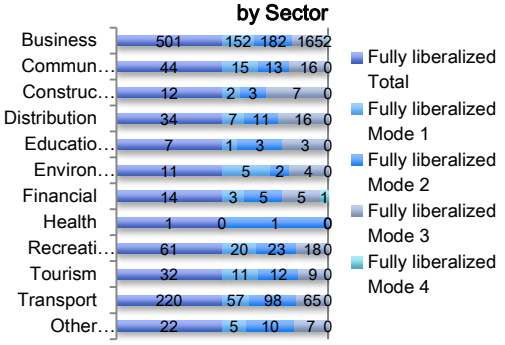
many of those preferences may have been a legitimate side-effect of Members tackling sectors as a whole (in all modes at once), some Members also seem to have taken the opportunity to artificially inflate the number of preferences offered and blur the real value of the notifications. A mode 2 promise usually costs very little, if anything at all.

Preferences by sectors: Preferences increase the degree of liberalization of a number of sectors in one or several modes of supply, which facilitate the access to services import markets to LDCs.

granted in market access, a few ones in national treatment and almost none regarding regulatory preferential treatment to LDC service suppliers (such as visas, work permit, recognition of professional status and diplomas).

More than offers made to all in the DDA round of trade negotiations, and in some cases even better than Preferential Trade Agreements. Perhaps the most interesting comparisons are those with the general liberalization offered by the same Members in earlier WTO negotiations (the still unfinished DDA negotiations), and with

Figure 3: Degree of Liberalization - Full, by Sector

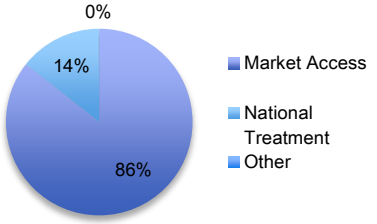


the commitments made to individual trading partners in Preferential Trade Agreements (PTAs), such as FTAs. Here the count is reasonably impressive: Many Waiver preferences – about 40% – reflect the DDA offers of the respective Members, but almost half of them go beyond them, i.e. are more favourable to LDCs than the treatment mentioned in the DDA offer. When compared to recent PTAs of every granting country many preferences were found – as expected – to be at the level of the best PTA of the corresponding Member (68%), but some were more favourable than the best PTA (25%), and some less (7%). In both cases, however, as discussed earlier, preferences are in all but a few cases likely to reflect applied MFN treatment rather than actual preferences.

Quality and quantity – form v. substance. Assessing and comparing the various notifications is made challenging by the variety of formats chosen. Some Members chose to re-issue their entire GATS schedule, with modifications for LDC beneficiaries woven into them and hence not always easy to spot, while others only notified strictly those promises that are new and specific to LDCs. Out of these some, again, submitted complete sets of schedules for those sectors where additional promises for LDCs were made, with the effect that elements that remained unchanged are repeated, while others only listed those elements that imply preferences. It bears repeating, however, that virtually no Member clarified which notified preferences deviate from actually applied MFN treatment – in other words: which 'preferences' are real, applied preferences. Short of a comprehensive, line by line comparison on a national basis comprising an assessment of the actually applied regime – a worthwhile task for law school clinics! – this remains something of a mystery, for the time being.

A second caveat is that quantity does not equal quality. Some notifications offer many preferences, albeit including many less relevant ones, while others offer short but 'loaded' lists of preferences that target specific needs of LDCs' services exporters. Of course, the opposite also features: Long lists that are rich in content, and short notifications of largely meaningless promises.

Figure 4: Types of Preferences



How does this compare to what was asked for?

Quantity again: Who and how many?

The quantity of notifications looks perhaps a bit disappointing when compared with the total number of WTO Members (164 at present). That said, with one of the 23 notifications coming from the EU encompassing its 28 Member States, almost one third of WTO Members have now made at least some effort to respond to the new challenge of focusing on LDC services exports (or imports from LDCs). Taking the 2013 "Operationalization Decision" as the benchmark, which had called for "developed and developing Members, in a position to do so" to present their intentions at the High-level Meeting, this is arguably not a bad response, for a start. The 2015 "Implementation Decision" however, addressing the same group "developed and developing Members, in a position to do so", expresses the ambition – or hope – that more Members come on board.

An obvious 'Elephant in the Room' not emphasized by any of the WTO Decisions are the LDCs themselves. This has perhaps to do with the misguided perception that preferences are donations, and preference grantors are hence 'donors.' That's of course entirely wrong. Trade preferences, while often politically 'sold' as concessions, are most often designed to benefit local user industries and consumers, or at least not to hurt them. This is particularly true for services, where preferences usually do not mean any loss in revenue – unlike goods services usually do not attract customs duties or similar market entry taxes. Second, services trade is often local and regional, and proximity still matters in many sectors – think of transportation, logistics, health, education, and many other services that may often be exchanged between regional neighbours. This suggests that LDCs may often have a two-way interest in granting other LDCs services preferences. In fact, given that the GATS – unlike the GATT with its Enabling Clause – does not otherwise authorize sectoral preferential agreements among developing countries (so trade preferences in services can usually only be granted on the basis of comprehensive agreements such as FTAs), the Waiver provides a new and significant opportunity for LDCs themselves to engage in meaningful services liberalization without necessarily inviting over-powerful providers from developed or big developing countries to join in.

And what about content – how much if it corresponds to the Collective Request?

Comparing preferences granted with the LDC's 2014 Collective Request is a challenging exercise, not least because of the slightly convoluted design of that document, with various overlapping lists and a mix of specific and general demands. That said, by one count 23% of the preferences respond exactly to the Collective Request – they grant not more, not less, than what was requested in a particular sector and mode of supply. 31% provide a preferential treatment in a sector and mode that were asked for in the Collective Request, but the preference is weaker than requested. 46% of the preferences grant even better treatment than what was requested by the LDC Group. But does that mean a better result? Probably not, even to the contrary. Around 18% of those 46% are granted in mode 2, which was – wisely – not emphasized by the LDCs in their Collective Request, in an effort to focus Members' attention on the modes that matter more. And among the remaining 28% many preferences were actually granted in sectors that were of very little interest to LDCs. While 46% of the preferences granted go beyond the Collective Request, many or most of them do not mean much. In fact, one may argue that some of them even blur the picture and operate as 'fig leafs', and hence detract from a more desirable focus on meaningful preferences.

What's more, this analysis obviously misses the most important point because it looks only at the preferences granted, rather than those not granted at all – sectors, modes of supply and, most importantly, regulatory and administrative matters not addressed. Assessing that deficit is a very difficult thing, however, as it would require comparing what a country could reasonably do to what it has put on offer in its notification. This leaves the possibility of a qualitative, bottom-up assessment of what could in principle be done if Members were to engage more creatively – for some thoughts on that see further below.

A look at priority sectors

That said, to shed more light on this a few observations can be made on the sectoral coverage. Again, the Collective Request's organization with its mix of specific and general requests makes it challenging to apply straight-line comparisons. In addition to two long alphabetical lists of 60+ subsectors, a few sectors are expressly highlighted in groups of specific demands – these are tourism, transport and logistics, education and training, information and communication technology (ICT) and business process outsourcing (BPO) services, and creative industry services (including sports professionals). Two more can be highlighted as figuring strongly in the general lists: business/professional services and construction services.

As discussed above the distribution of notified preferences among services sectors is rather uneven. By far the largest number is found in **Business Services**. While some of that effect is clearly due to the sector's size and diversity, this is also one of the sectors where some of the most interesting sub-sectors for LDCs are, sub-sectors in which LDC providers may enjoy a comparative advantage. These include Professional Services (including e.g. accounting, engineering and nursing, professions where many LDCs have highly trained professionals often with internationally recognized qualifications to offer); Computer and Related Services (which covers most IT and some IT-enabled services, including may BPO services); and the myriad 'Other' business services, from consulting to packaging to building cleaning services. Not surprisingly, as indicated, the LDC's Collective Request contains many references to this sector. The response here is indeed encouraging – even if much remains to be done on the visa/work permit and regulatory fronts – more on this below.

The second largest sector covered by the notifications is **Transport Services**, one of the sectors emphasized in the Collective Request. This is welcome – in particular cross-border transport operations are not only highly relevant in their role as providers of crucial infrastructure for trade in goods, but also as a significant value-adding activity – and highly tradable service with limited prerequisites in terms of qualifications, infrastructure and capital – in its own right. That said, few Members took the bait and addressed thorny but crucially important matters such as truck licenses, drivers' licenses, environmental regulation or withholding taxes which were highlighted in the Collective Request. In this as in other sectors the almost exclusive emphasis on classical market access arguably provided an easy way out of the real challenge – and left a 'to do list' on the table.

Still somewhat encouraging are the preferences offered in **Recreational, Cultural and Sporting Services**, which include services such as music and dance performances. However, given the wide discrepancy between potential and actual exports more would have been welcome. And again the more specific requests were largely ignored, such as those on facilitations on visas/work permits or social security charges. Many LDC performers and their groups – bands, orchestras, dance companies – will continue to simply not get in as a result of visa and work permit requirements and procedures, leaving a large potential of bona fide exports virtually stranded. Some apparent highlights, such as Turkey's offer to facilitate access for football players, seem to reflect existing, non-LDC-specific practices rather than actual, new preferences.

Arguably disappointing is also the small number of preferences offered in **Tourism Services,** which includes restaurants and catering (including for non-tourists in other countries – mode 3, 4). While it is true that the main mode of supply – Mode 2 – encounters relatively few hard obstacles to start with, there are significant export potentials related to mode 4 (e.g. tour guides, but also business visitors such as agency operators visiting clients or attending tourism fairs) and mode 3 (restaurants, hotels, travel agencies) that will not find their desired additional space among the set of preferences offered. A few notable exceptions – such as India's offer to allow a certain number of LDC tour guides in – seem to confirm rather than disconfirm that finding.

Also less than satisfying is the offer in **Construction Services**. Here LDC operators often do have a comparative advantage, emphasized somewhat indirectly in the Collective Request by listing several specific sub-sub-sectors (such as "construction work for warehouses and industrial buildings" and "construction work for multi-dwelling houses"), to which the preferences on offer only respond partly. Most crucial here would be liberal and effective access for Contractual Services Suppliers (CSS), including their not-so-highly-trained employees – something most Members have found difficult to offer.

Almost entirely absent from notified preference programmes are both **Health and Education**

Services. While these do not figure very prominently in the Collective Request, they do represent export potential, including but not limited to Mode 2, that currently often meets barriers – including in Mode 2, where publicly financed or controlled financing schemes for students and patients alike play a major role.

"Best PTA", again

It bears repeating that the Collective Request, in line with the 2013 "Operationalization Decision", generally exhorts Members to grant LDC preferences by extending treatment granted to other trading partners under FTAs and other Preferential Trade Agreements – the "best PTA" approach. As discussed above many Members do seem to have taken a close look at their PTAs (and their DDA offers), and taken inspiration for their LDC Waiver notifications.

That said, this applies again almost entirely to classical market access issues – leaving almost entirely aside the large potential for extending regulatory, tax and other benefits to LDC providers. More on this further below.

The bottom line – It's a nice start!

The sectoral coverage, as seen, does show a reasonable match with the Collective Request – with some caveats.

The same can be said for modes of supply – Members did engage on mode 4, against the predictions of many at the beginning of the Waiver process, and generally modal coverage is broad. However, the attempt made in the Collective Request to focus Members minds further arguably failed. The Collective Request specifically listed sectors in which LDCs requested a liberalization of the sectors in modes 1, 3 and 4. However, many preferences in these sectors were still granted in mode 2 – fair enough if done in a cluster with other modes, but in some cases apparently also a reflection of an attempt to boost appearances.

The picture is less encouraging when one zooms in on the details. The LDCs the more specific demands, many of which related to regulatory aspects, remain largely unaddressed. Most preferences remain on the level of market access. However, part A of the Collective Request refers to National Treatment and parts B and C deal with regulatory issues such as work and residence permits, visas, recognition of qualifications of professionals and accreditations of LDC institutions. Yet, almost no preferences were granted to respond to these demands – again, with a few notable exceptions, albeit probably reflecting existing practices rather than new and LDC-specific preferences.

In conclusion, the picture of what we have now is mixed. Only a part of the LDCs' requests were fully or partially met – there is a significant margin for improvement, even if (only) the Collective Request is taken as the benchmark.

How does this compare to what could reasonably be envisaged?

While being a significant step forward both the preference bundles offered and the Collective Request, in fact, arguably only begin to tap into the fountain of possibilities. Many good ideas for realistic and practicable preferences are still left on the table, many of which are contemplated in the matrix of ideas for potential preferences generated by LDC services suppliers and the researchers and analysts who developed the catalogue of barriers and preferences for the LDCs that underpinned the Collective Request.

The biggest gaps would seem to be in the areas of physical market access for natural persons (visas, work permits and residence permits), recognition of qualifications of persons and institutions (accreditation), general domestic regulation, taxation/subsidies, transparency and (remedies for) general business challenges. There a number of possibilities exist that have barely been even generally explored, let alone implemented. The following section considers some of these and puts them into the context of the waiver process and its further potentials.

Section 3

Now Get (More) Creative: Some Illustrative Thoughts on What More is Needed, and Could in Fact Be Done

What are we trying to fix? Thinking from the real-life challenges

The main key to the solution of a problem is a good understanding of the problem itself. The issues facing LDC services and service providers are no exception. It is important to listen closely to what service providers in LDCs tell us – and that is very telling indeed.

While they do encounter classical market access problems, such as quotas, restrictions on mode 3 investments in certain sectors, and economic needs tests, many issues they face – of the type of relevance here, namely challenges that under the control of importing country governments – are of the seemingly smaller, sometimes complicated, sometimes rather simple type. These include myriad aspects of administrative procedures, qualification requirements, fees and charges, and the like.

Challenges vary from sector to sector, and of course from importing country to importing country, as legal systems and regulatory practices vary. Many issues however reappear across sectors and countries. Apart from the ones just mentioned a cross-cutting, recurring set of challenges relate to physical market access for natural persons, namely visas and work permits, ranging from procedures, visa/permit fees to visa categories and quotas – the basis for effective access in mode 4. Potential preferences aiming to address this first group of barriers would, correspondingly, tend to focus on reducing or eliminating legislative, regulatory or administrative strictures, just like preferential trade agreements or general reform schemes may do, ranging from liberalized access to certain sectors to preferential procedures to the reduction of fees, taxes and charges.

In addition, however, many challenges encountered by LDC services and service providers relate to hybrid business/government-related issues, such as transparency and market information, unequal playing fields affected by business and or governmental action, such as financing mechanisms, subsidies or market dominance, or simply challenging business realities in foreign markets. Potential preferences aiming to address the second group of barriers may often require positive or pro-active action, such as information mechanisms (e.g. an LDC helpdesk), direct or indirect support (e.g. subsidies) or administrative action (e.g. competition oversight to avoid abuse of dominance in LDC markets).

It is useful to recall that while some issues – and hence corresponding preferences – require 'negative' action in the sense of the removal or reduction of restrictions in law, regulatory mechanisms or administrative practices, others require positive action (i.e. introduction of new measures).
Sometimes barriers exist on an MFN and NT basis, i.e. all services and providers are

treated the same. Sometimes however barriers are operative only for the services and providers of some origins, i.e. those services and providers that do not already receive better treatment, e.g., where nationals or preferential trading partners benefit from better market access or other preferential conditions. In these cases the extension of preferential treatment offered to "like" services and suppliers of different origin may already be the solution needed.

Some barriers completely preclude the supply of a service by any foreigner. However, the vast majority of challenges to LDC providers do not prohibit completely LDC services from being supplied but rather relate to the difficulty of supplying these services. Challenges / barriers may affect the supply of services at different points during the (potential) life of the service supply – from barriers that prevent or make it difficult even to initiate the supply of a service to those that make it difficult to maintain a going concern.

What we need: Attention, Generosity, Creativity – all at very Little Cost!

Before looking at a few issues in some more detail in the form of 'case studies' it seems useful to share the overall conclusion up front. There are in essence three qualities that make engagement on the implementation of the Waiver useful and successful: attention, generosity and creativity.

- WTO Members should pay **detailed attention** to the real-life issues encountered by LDC service providers. General, abstract perspectives of the kind cultivated by services negotiators used to dealing with schedules won't do the trick. Real-life issues may include some of the somewhat rough-cut measures reflected in GATS Article XVI:2 – numerical limits, economic needs tests, maximum foreign shareholdings, etc. – but in most cases are a lot more subtle. Travel times to interview locations; suitable visa categories for service providers, sectors-specific where appropriate; security and fee requirements; etc. It is crucial that the message – that there are potential services exports that could be realized if looked at closely, rather than subjected to mechanisms that are not adapted to them and their market level, that work for big banks and telecoms operators but not small IT, accountancy or construction companies – reaches those in capitals who have the power to make targeted choices needed. In the first 'round' of Waiver implementation so far some of this attention has indeed been applied in capitals and Geneva, by some Members, while others have remained on the fence, settling for decoration rather than substance – at least for the time being. Generally, however, the Waiver process so far has raised the level of attention given to LDC services exports and the challenges they encounter considerably, much above what most would have expected when it started. But any sharp observer would need to agree: More is desirable and possible, and many issues are yet to be 'mainstreamed' sufficiently in the debate to trigger optimal responses.

- A key precondition for success is further a **generous** attitude – not of the sugar daddy kind, but of the parental or fraternal kind, namely the generosity that responds to potentials for development, including those that are not yet explored, often for the benefit of the entire family. WTO Members and their representatives need to avoid defensive reflexes, some of which are deeply engrained in services negotiators trained to give as little as possible (useful for binding treaty commitments, unsuitable for the smart design of adjusted mechanisms meant to *further* certain imports, namely those from LDCs). The same applies to others, such as interior ministry and consular officials dealing with visa issues, or professional associations with a long-standing bias against change and flexibility. Importantly, the generosity needed is not the costly type, but rather an attitude. Many solutions that can be found are entirely cost free, or very cheap. Again, some Members in their

response so far have already gone down this route, in different ways. Some have generally opened their box of FTA commitments, while others have made at least some careful inroads into more complex applied restrictions. But again, more is obviously possible and needed – if responding to actual needs (and hence: potentials) is the aim. An impediment so far has arguably been the format chosen. Notifying preferences in the format of GATS schedules has made it convenient to focus on matters that can be easily expressed in that format, and often already have been – e.g. in DDA offers, FTAs or other contexts.

- The third, closely related requirement is to be **creative.** This is where the process so far has been lagging most behind its potential. One aspect is to be specific: Specific problems would often need specific responses to be solved. That may require leaving one's (institutional, sometimes political) comfort zone, but often demands much less flexibility and political capital than one might think. A carefully designed, suitably limited exemption from certain fees or taxes; a nicely communicated extension of existing preferences for FTA partners in the recognition of qualifications also to LDC service providers; or the creation of an LDC helpdesk can go a long way, without costing much. The first round of notifications has seen relatively little of that – here much more seems possible. Again, the schedule format may have played a non-negligible role in not encouraging (or even discouraging) innovation.

Two considerations should be kept in mind. First, an easy way to make progress on this path is to re-visit – regularly – the possibility of extending both FTA preferences and national preferences to LDC services and service providers – not just on market access, but even more so in terms of regulatory, administrative and tax treatment. Oftentimes a closer look reveals that relevant flexibilities for these – or subgroups, such as historically disadvantaged minorities – exist, some of which could also work for LDC services and providers. Their existing operation (for others) means that the mechanics are already known and have been tested, and applying the same or similar preferences to LDCs would not require a de novo evaluation, nor raise design challenges. An example: The UK allows trained nurses from EEA countries who may not fulfil all requirements to be admitted as full nurses to register nonetheless as 'second level' nurses, allowing them to supply at least a subset of nursing services. This possibility does not exist for non-EEA foreign nurses. Extending this possibility to LDC nurses (many of which have been trained by very good institutions) would allow them to start their engagement at that level, and thereby sustain themselves as they work their way up the ladder. This would reduce a major impediment for LDC nurses with little or no capital in the background, namely to muster the otherwise often prohibitive costs (money and time) of passing all hurdles before earning any income.

Second, small things matter. Many obstacles that keep LDC providers from exporting are initiation, or start-up costs. The risk of losing a visa fee without any return in case of a refusal puts a significant chill especially on first-time service providers, for example cultural professionals, even if they have manifest bona fide opportunities to be realized, such as invitations to perform at reputable music festivals in Europe. Making such a fee repayable in case of refusal – even without any change in visa regulations or practice – would go some way to address legitimate providers' real-life challenges, and foster legitimate services businesses. The possibility of deferring payment of certain charges or taxes until the first fee income has been realized may again make a big difference for an LDC provider low in capital. Again, where that possibility already exists, for example for FTA partners, applying it to LDCs may be just a matter of engaging the right people, with the right attitude.

Cases Illustrated: From the (1) Need via the (2) Collective Request and the (3) Notifications to (4) Further Possible Steps

It seems useful to look at these challenges through the prism of a few 'case studies', that is, to look at specific areas where issues with importing country measures exist, and follow them through four steps: From the (1) issue/need via its treatment in the (2) Collective Request and Members' response so far, as reflected in the (3) Notifications to (4) ideas for further possibly steps that would bring us closer to the goal of responding to the actual need.

Physical Market Access for People: Visa, Work Permits, Residence Requirements

The issue

Gaining physical market access (visa) and obtaining the necessary authorization to perform economic activities (work permit or similar) is the single most important impediment to LDC services exports in a broad range of sectors, from IT to cultural services. Visas and work permits are the minimum prerequisites for the supply of services in mode 4 – as well as, to some extent, in modes 1, 2 and 3, as initial contacts, occasional meetings and sometimes the intermittent direct service supply in mode 4 are in practice important elements of many successful client relationships that are primarily based on cross-border supply, consumption abroad or commercial presence. Physical contacts are the 'glue' of many business relationships.

LDC service providers and their staff face often very high barriers to entry – often significantly higher than those facing their direct competitors from other countries –, caught in the wider context of immigration policies that are ill-adapted to bone fide services trade. Multiple issues persist, including the absence (or non-application) of suitable visa categories, including for (LDC) business visitors; the duration of visa/work permit procedures; documentation requirements, including the need to provide original copies; the requirement to visit consulates, sometimes in third countries, sometimes more than once; high fees, often amounting to a substantial share of per capita GDP in LDCs, and their non-refundability in case of refusal; financial security requirements; visa refusal stamps; the absence of written reasons for refusal; and limited or no rights to appeal. These and other factors often work in concert, in a 'chicken and egg' relationship, reinforced by additional presence requirements, such as a residency requirement for membership in an accountancy association, which in turn may be a prerequisite for the authorization to conduct audits, including in other modes of supply than mode 4.

Collective Request

The *Collective Request* duly emphasizes the importance of the visa/work permit issue.[7] The Collective Request contains a specific part entitled "*Across all sectors, especially those found in the Annex, waive visa, work permit, residence permit measures*" (part B), where the LDCs included several specific requests, such as

- Waiving of visa, work permit and residency fees for Contractual Services Suppliers (CSS), Independent Professionals (IPs) and Intra-Corporate Transferees (ICTs)
- Expedited procedures
- Simplified documentation requirements
- Sufficient duration for work permits to cover services contracts
- Waiving of financial security requirements for stays up to 90 days
- No visa refusal stamps

[7] This alone was a significant development at the time. Previously many LDC delegates had joined others in engaging in the mistaken belief that a footnote to the GATS Annex on the Movement of Natural Persons excluded visas *per se* from GATS coverage.

- Providing reasons for visa/permit denial and guidance on how to correct deficiencies.

An additional horizontal request, in another section, exhorts WTO Members to

"*Through administrative, regulatory or other means, create a special temporary entry visa subcategory to allocate quotas within existing or newly created quota systems, for LDC contractual service suppliers or independent professionals".*

The fact that a whole part of the Collective Request is dedicated to visas and work and residence permits demonstrates the importance of these regulatory issues for LDCs and the necessity to enable LDC services providers to meet relevant requirements in the matter.

The response of WTO Members so far

However, just a few WTO Members responded to that request, and even those did so very selectively.

Turkey, for example, provides for access to a facilitated electronic Visa process (e-Visa) for tourism and business purposes to almost all WTO Member LDCs. The measure focuses on a crucial difficulty for LDC service providers, namely the many challenges associated with actually managing 'physical' visa processes through consulates and embassies, often in remote locations, with lengthy travel times for people and documents. However, it is not clear whether this is done on a preferential basis (with LDCs being per se treated better than others, even with exceptions, for which the Waiver would provide cover), or just happens to be the result of a security-based application of a general visa programme.

India however offers a straightforward preference by waiving the visa fees for natural persons of LDC applying for Indian Business and Employment visas – the visas used by service providers traveling to India in mode 4.

Now get more attentive, generous and creative

The above examples of Members' responses point in the right direction, but they fall well short of an overall satisfying response to what is perhaps the single most important issue for LDC service providers. There is clear room for improvement in terms of quantity, but also quality - focus on the issues (attention), departure from intuitive restraint (generosity), and creative design that targets needs while addressing key needs of other stakeholders, chief of them security and immigration management. It is clear that this will require the active engagement of these stakeholders, such as home offices and other immigration authorities. Trade policy makers would need to overcome their reluctance to engage with these forces, who more often than not put up string resistance to any "interference" in their matters. But it can and must be done if trade is taken seriously. Governments will hardly be able to avoid facing that challenge generally as the world further integrates, including through regional instruments, and as such the LDC Waiver may even operate as a useful catalyst and possibly trial balloon for a more generally needed development in trade policy making.

Already the Collective Request, as seen above, highlights a number of specific aspects that should be considered and addressed. The careful and sparing deployment of "visa refused" stamps in cases where possibly bona fide LDC service providers' requests are rejected for reasons other than fraud or the like could indeed be looked at, provided immigration professionals are engaged. The same applies to providing reasons for denial. This could be done with our without recourse to appeal. The important thing for business people is to be able to understand their business and plan ahead. Understanding the reasons for refusal alone can make or break certain business models, such as IT maintenance across borders. This underscores the general need for immigration stakeholders to understand – and possibly to be assisted in better understanding – the precise business implications of what they do, and how they do it. Often the needed adjustments, when looked at closely, may raise only very limited or no concerns.

The importance of visa fees has been highlighted by the Collective Request – but should be underscored again. Beyond the reduction or waiving of fees in the first place – the first best option - important flexibilities could be imagined that would have a significant impact for LDC service providers. For example, as requested in the Collective request, visa fees should be refunded to bona fide LDC service providers in case of refusal. This would significantly reduce their risk, and the deterrent effect it has on exploring export-oriented business models. This could, then, at close to no cost be coupled with another small

but effective flexibility, namely the deferral of the payment of the visa fee until a positive response. This would reduce cash flow challenges, which may seem petty from an outsiders perspective, but can operate as threshold issues for LDC service providers (consider young artists or small IT providers) who may find it significantly easier to obtain funding for up-front costs such as these if the likely recovery through the envisaged business activity is visibly likely (because the visa has been granted).

The general request to expedite visa/permit procedures for LDC providers is also worthy of a more substantial response. Many countries already operate expedited visa procedures against fees, and these could be made available to LDC service providers, or even just subsets of them (e.g. certain types of professionals), at no or reduced costs. Access for LDC service providers to 'trusted individuals' programmes could be facilitated, including – again – through fee reductions, but also through dedicated interview possibilities, dedicated helpdesk functions and generally a pro-active engagement with the explicit aim to make suitable LDC service providers benefit from available possibilities.

A related issue are financial security requirements, which LDC nationals are often challenged to meet, not only because thresholds are often very high for them in relation to their income, but also because the general tools foreseen in standard visa procedures drawn up in capitals far away may not be as easily accessible (e.g., some entirely legitimate service exporters may not have bank accounts, may not receive some of their income through bank transfers but through alternative channels such as cash or M-Pesa, etc.). Again, while fully respecting and safeguarding the rationale underlying such requirements an added dose of creativity may allow Members to better address LDCs needs.

The Collective Requests suggests to waive financial security requirements generally for stays below 90 days. While some Members may find it difficult to go that far (although in practice the security requirements operate primarily as a deterrent, rather than an actual means to secure visitors' viability – which would allow flexibility for LDC service providers without preconditions), gradual solutions can be devised by tailoring financial security requirements to the specific situation of LDC service providers. For example, existing service contracts presented by LDC service providers, generally or in certain sectors, could be allowed as guarantee or collateral.

Generally, or for certain providers the exporting country government could be allowed to provide statements of support, replacing financial guarantees. While this may at first sight seem challenging, a closer look at the issue reveals that there should be room for creativity. Take, for example, music and dance performers from The Gambia. Many of them – including many of the country's best, most promising artists – are male, young, and/or have never travelled before – in other words: per se raise red flags for the average consular officer. They also find it difficult to show a sufficient bank history to satisfy standard requirements. The net result is that The Gambia finds it hard to export one of its finest services product, namely music and dance. A solution could lie in allowing suitable exporting country institutions – in this case the governmental "National Centre for Arts and Culture" – to vouch for trusted performers, ideally without any cash outlay. A smart programme that allows for collaboration of consulates with institutions like that centre, monitors success and foresees safeguards could be devised with very little effort – provided the political will is there. It seems unlikely that the failure rates will be higher than under normal procedures (e.g. the requirement to demonstrate sufficient funds in bank accounts over the past 9 months), but even if they were, safeguards such as maximum numbers or temporary suspensions could be applied. The very limited additional effort (if any) involved in operating such mechanisms would be greatly outweighed by the very significant economic and overall developmental effect of facilitated bona fide services exports.

An important impact could also result from the careful crafting of visa categories, without even necessarily engendering any overall change in flexibility. The Collective Request asks members to "create a special temporary entry visa subcategory to allocate quotas within existing or newly created quota systems, for LDC contractual service suppliers or independent professionals." Doing so would indeed be welcome. But even short of

allocating quotas the very existence of a suitable visa category for LDC service providers (or subsets of them) would likely already have a positive effect, by facilitating de facto or de jure better treatment than under general categories as requirements and practices can be more easily targeted to respond to LDC realities, which often differ sharply from 'standard' realities in more developed economies. Again, this measure – creation of a visa subcategory for LDC service providers - is neither difficult nor inherently controversial. Some *attention* to the real issues coupled with small doses of (near-costless) *generosity* and creativity will do the trick. A simple matter of political will.

Many other measures, many achievable at very limited cost, could flow from the consequent extension to LDC service providers of existing preferences under FTAs and other regimes (as well as facilitation measures developed under comparable national procedures). Existing preferential visa quotas could be extended, work authorization schemes made accessible on a preferential basis, and administrative mechanisms opened. This should be kept in mind not least as progressively more targeted solutions are sought and found in bilateral and regional contexts. Even where an automatic extension of preferential treatment to LDCs is not possibly or suitable, the flexibilities explored could likely often be used as inspiration to devise similar ones for LDC service providers.

In conclusion, much work is left to do in future notifications. The importance of granting visa is all the more important that it is actually the starting point to allow any export of services in mode 4, as well as – very often – in modes 3, 1 and even 2. Providing market access to service providers that cannot physically enter in the host country has little impact on the actual improvement of LDCs' share in the world services market.

Fees, Charges, Taxes etc.: Small Investment, Big Effect

The Issue

Costs matter. They tend to matter more to SMEs than to bigger companies, in particular when unrelated to turnover or profits – such as most licensing, permit, authorization fees. Businesses with weak capital bases are much more vulnerable to cash flow challenges than those with more substance to rely on. In short: LDC service providers, usually SMEs, often with very little capital, care deeply about fees, charges and taxes, their timing and their accompanying circumstances such as payment terms, refundability etc.

Seemingly small costs can operate as formidable barriers to effective market access. Sometimes they stop providers from reaching the crucial first rung of the ladder, as shown earlier for the case of visa fees.

The issue arises across sectors and in multiple forms. Fees for licenses, permits and other forms of authorizations to provide a services, one-off or recurring; fees for the recognition of qualifications, for the administration qualification exams, for the authentication of certificates or the participation in qualification courses; taxes related or unrelated to turnover, profits, inputs; and social security contributions are among the many fees, charges and taxes that LDC service providers face when accessing foreign markets.

Often the related assessment and collection mechanisms matter as much as the charges themselves. For example, the collection of a tax in the form of a withholding tax that may be partly refunded later after assessment creates a cash flow disadvantage that could be alleviated by collecting the tax ex post; and the assessment of foreign service providers' social security contributions on the basis of an alignment with the rates and mechanisms for local employees rather than in line with the assessment of local independent service providers (as practiced by France, for example) puts a significant additional burden on LDC service providers.

Preferences in the form of reduced or eliminated charges, fees or taxes, and/or improved ancillary mechanisms such as those for assessment or collection, would often help LDC service providers in no small measure and may, as indicated, be instrumental for reaching the first rung of the (export) ladder. This could and should include access to tax incentives where these are available to others (e.g. local SMEs).

Collective Request

The Collective Request reflects the issue in multiple ways, but remains somewhat short

on detailed ideas, arguably missing an opportunity to stimulate the imagination of well-intended Members.

The Collective Request, for example, broadly asks Members to "[w]aive social security, income tax and similar deductions to remuneration of all LDC service suppliers across all sectors and modes of supply."[8] The same demand is further specified (repeated) specifically for LDC performers and cultural professionals, who indeed often encounter arguably unnecessary and sometimes discriminatory social security contribution requirements. The Collective request also, as already mentioned, asks Members broadly to "[w]aive residence permit, licenses, and work permit fees and any other processing fees" for contractual service suppliers (CSS), independent professionals (IPs) and intra-corporate transferees (ICT)."9

Another request goes to the waiver of "all fees associated with LDC services suppliers applications for patents, trademarks, geographical indications registration and other trade and professional fees."

Apart from the broad reference in the last phrase there is, thus, no specific mentioning of licensing fees for mode 3 providers (such as banks, hotels, restaurants, remittance service operators, trucking companies etc.), taxes on inputs (e.g. customs duties on IT hardware for IT service providers), qualification/recognition-related fees, and many other fees, charges or taxes. Assessment and collection mechanisms are also only mentioned in broad terms.

The response of WTO Members so far

In their notifications Members have so far paid relatively little attention to the issue of fees, charges, taxes and social security contributions. Precious few exceptions seem to underline the rule. India's waiver of visa fees for natural persons of LDC applying for Indian Business and Employment visas was already mentioned.

Now get more attentive, generous and creative

What else could, what should be done, what can realistically be expected from WTO Members, assuming the political will is there? A lot, in fact; sometimes at some, but usually very limited costs. For example:

- It seems often feasible to exempt LDC service providers – partly or wholly, generally or under specified conditions, all or only some sectors – from (some) withholding taxes, as requested in the Collective Request. Many countries apply these to some groups of foreign service providers, such as visiting cultural performers, audiovisual service providers, lawyers and others. In many cases a relatively straightforward mechanism could be to extend benefits accorded to other foreigners under double taxation agreements unilaterally to LDC providers. The sums involved are relatively small, and it seems quite feasible to contemplate exemptions. The withholding taxes are primarily imposed to 'catch the big fish' – pop stars, opera singers, etc. Most LDC performers will not fall into the primary target group. But for the eventuality that some do, it would seem feasibly to limit exemptions to suitably calculated *de minimis* cases (e.g. taxes for performance fees up to X000 EUR).

- A similar situation exists with regard to social security contributions, equally mentioned in the Collective Request. Some countries, in an advance defense against abuse and often to placate local providers who otherwise complain about (real or perceived) disadvantages, impose social security contributions on visiting service providers, often directly deducted from fees. While not per se wrong in any sense, in some cases this leads to questionable results. In France, for example, foreign independent professionals are normally charged social security contributions – directly deducted from fees – as if they were French employees, albeit without necessarily gaining any entitlements in return. This is waived for EEA nationals who are treated as independents, i.e., responsible for their own social security, and as a result are exempt from automatic deductions. A possibly LDC

[8] S/C/W/356, page 3, Section A, numbered paragraph 9.

[9] S/C/W/356, page 7, Section B, numbered paragraphs 1 and 2.

preference seems obvious, namely the extension of the EEA practice to LDC providers. More generally social security contributions could be waived, especially in cases where they do not actually lead to any entitlements.

- But even in the absence of actual exemptions there is often room for real-life facilitation that could make a difference. Many LDC service providers lack the effective capacity to manage the tax- and social-security-related processes effectively. As a result refunds due are not claimed, and other facilitation options not used. Facilitated procedures, pro-active support and free advice (e.g. by LDC helpdesks) could help equalize what in fact amounts to an existing disadvantage – in many cases the 'preference' would thus merely establish a level playing field.

- In many cases exemptions from licensing or qualification-related fees seem rather feasible, one case at a time, or even across the board for LDC applicants, if the political will is there and attention is paid to the issues, taking into account real-life proportionality. It would often make a significant difference. In the UK, for example, for 'overseas' nurses seeking registration in the application fee at the first stage of the application process is GBP 140. This amount is equivalent to around 17% of the per capita GNI of Lesotho. The mandatory study course and supervised training attracts further fees (over GBP 1000), in addition to living expenses during that time. But even where a reduction or elimination of these fees is difficult mechanisms for deferred payment – for example: after the first three months of practice – could allow bona fide LDC providers to grab and hold onto the proverbial first rung of the ladder.

- Exemptions from other fees and contributions should be equally contemplated. An example could be to exempt LDC courier service providers from contributions to universal services funds.
- Extending tax privileges available for (some) domestic providers, for example local startups, to mode 3 service providers from LDCs would also often provide a relatively easy route to meaningful LDC preferences.

It seems fair to conclude that WTO Members have left significant room for upgrading their preference offers. The near-complete absence of preferences related to fees, charges, taxes and social security seems to reflect a lack of attention more than anything else, often probably complemented by the understandable unwillingness to touch budgets. But given that many of the conceivable measures are quite limited in their fiscal impact and often find parallels in existing schemes (e.g. fee exemptions for disadvantaged groups), a little more effort may often lead to the harvesting of some in fact low-hanging fruit.

Mode 4 Categories: Tailoring Responses, Sidestepping Old Instincts

The Issue

Mode 4 commitments made by most WTO Members in their GATS schedules rely on categories of natural persons, in most cases pre-defined for all sectors in the horizontal sections of the schedules. Many Members focused primarily on intra-corporate transferees such as managers and specialists, and did not even include independent professionals (IP) and contractual service suppliers (CSS) in their schedules; those that did often apply significant restrictions, such as the requirement of academic qualifications. These limitations often reflect applied regimes where requirements are applied across the board without necessarily much attention being paid to the reality of smaller services businesses, especially those in developing countries.

As a result, these two categories of IP and CSS, of significant relevance to LDC service providers who often will not have the size and muscle to establish and operate a local base in the host country (i.e., provide services in mode 3), do not benefit from market access. Effective market access for CSS and IP – in other words: Mode 4 providers not linked to a mode 3 investment – has been traditionally

most elusive for LDCs (and other developing countries), as their service suppliers often encounter myriad restrictions that render business models based on CSS or IP service provision virtually moot. This affects sectors as diverse as cultural services (music performers, dance groups, etc.), transport (truck drivers etc.), construction (i.e. teams of specialized building professionals) or ICT services (e.g. computer specialists being sent to clients abroad), apart from traditional professional services – all of significant immediate interest to LDCs.

Collective Request

The Collective Request strongly emphasizes the need for better market access for CSS and IP – the four of the first five listed demands relate to these categories. The fourth even singles out a subgroup, namely installers and servicers of machinery – reflecting a demand more often advanced by developed countries, whose businesses usually produce and export advanced machinery.

However, somewhat curiously the LDCs themselves couple their requests with some classically applied limitations, such as minimum educational requirements (for IP), the need for an installation or servicing contract to be a condition of purchase of the equipment, or time limits. One may assume that this was done to placate and perhaps stimulate Members to engage in creative design rather than reject the demand.

The response of WTO Members so far

As discussed earlier the response from WTO Members has been surprisingly positive. While some of the notifying Members display the expected reflex to shy away from cross-cutting improvements in Mode 4, around half of them took the bait and offered - in some cases significant – new or improved horizontal commitments on CSS and IP. Examples include Chile, the EU, Norway and Iceland, with Chile arguably leading the way with a rather open category, avoiding overly restrictive requirements regarding specialization etc.

To what extent these preferences on paper translate into preferences in real life is another matter. But steps have been made and they deserve to be recognized.

Now get more attentive, generous and creative

That said, much more can be done if attention is paid to sectoral details, and creativity is applied to devise solutions that work. For example, academic or similar qualification requirements for CSS make little or no sense in sectors where quality professionals, especially in LDCs, often lack such credentials, for example in cultural services or construction. Sector-specific preferences can be designed to take this into account, i.e. offer access without qualifications.

The same applies more generally, even where political challenges seem to persist. The Cultural Protocol in the EU-CARIFORUM EPA, which creates soft market access *inter alia* for music bands and dance combos, arguably shows that it is possible to approach sectoral preferences for CSS in a creative way, taking due account of immigration-related needs and sensitivities.

Similar models could be explored much more actively under the LDC Waiver in the future. To do so it may be useful to make a step away from the schedule format, which seems to implicitly favour GATS-type responses in format and content, and address sectoral needs in a more direct and specific way. For example, a visa quota for LDC construction professionals travelling under CSS contracts for their LDC employers, applied reasonably easily, can help address host/importing country concerns while at the same time providing interesting new opportunities for competitive LDC providers.

To take another example raised by the Collective Request, namely the (CSS/IP) category of installers and servicers of machinery and equipment. While the link to a transaction regarding the relevant machinery – as reflected in the Collective Request, apparently taking its inspiration from developed country proposals – captures the classical case (a seller of an piece of equipment also offers and sells the ancillary services), it may not be necessary to exclude alternative contractual arrangements or even cases where the seller of the goods has nothing to do with the servicing, but both seller and buyer work on the basis of the assumption that such services will be available from third party suppliers – for example, LDC service providers. In fact, this 'disentaglement' will be of particular interest

for SME producers (or buyers) of the relevant machinery who need to limit their exposure to contractual risk, while opening opportunities to third party servicers/installers. Those from LDCs could be treated preferentially in this context.

Both examples show, again, that attention to detail, and application to the specific needs and concerns involving a scenario where LDC providers of services are involved, can generate feasible results in terms of meaningful preferential treatment.

A Few Other Issues "To Go"

10.4.1. Recognition of Qualifications: Look Again

The recognition of their qualifications is often a major challenge for LDC service providers. The LDC's Collective Request, in a dedicated section, addresses the matter, albeit in a somewhat unspecific way, urging Members to 'enable conclusion' of recognition agreements, to 'enable recognition of diplomas from LDC accredited educational institutions' and to 'enable conclusion of memoranda of understanding…for all professional services areas where LDCs have demonstrated special priority.' These demands reflect a key challenge: Often governments are only indirectly, through professional bodies and other semi-independent agencies, in charge of recognizing qualifications. The parties to the EU-CARIFORUM EPA, which foresees the facilitation of mutual recognition agreements and even identifies four priority sectors where the parties commit to encouraging their respective professional bodies to engage, can testify to this difficulty. It is thus perhaps not surprising that Members have all but ignored this request, and offered no preferences relating to recognition.

However, a closer look shows that even here often a dose of creativity and attention to sectoral details may go a long way. It may often indeed be possible to recognize qualifications on a facilitated, pragmatic basis – sometimes similar schemes already exist and can be extended. An example: The UK allows trained nurses from EEA countries who may not fulfil all requirements to be admitted as full nurses to register nonetheless as 'second level' nurses, allowing them to supply at least a subset of nursing services. This possibility does not exist for non-EEA foreign nurses. Extending this possibility to LDC nurses (many of which have been trained by very good institutions) would allow them to start their engagement at that level, and thereby sustain themselves as they work their way up the ladder. This would reduce a major impediment for LDC nurses with little or no capital in the background, namely to muster the otherwise often prohibitive costs (money and time) of passing all hurdles before earning any income.

Another example of a small but potentially significant measure relates to membership in professional bodies. In some jurisdictions membership is a de jure or de facto precondition for the exercise of a profession, yet membership is not necessarily granted easily to foreigners, and sometimes made subject to reciprocity. At least in some cases Member governments will be able to ensure access for LDC service providers, waiving (or asking professional bodies to waive) reciprocity. This last aspect was also highlighted by the Collective Request.

10.4.2. Access to Financial Services: Essentials

LDC service suppliers often encounter difficulties in accessing even basic financial services in export markets. Such services include business bank accounts, merchant accounts and other facilities that often are *de facto* or *de jure* preconditions for effectively conducting business with that market. LDC service providers, especially when non-resident, often do not succeed in opening bank accounts and accessing other financial services, often as an indirect result of general anti-money laundering, anti-terrorism or other prudential regulation (e.g. "Know Your Customer" rules).

The Collective Request, however, makes no reference to preferences that could facilitate access to financial services – it might have been seen as too difficult –, and no Member addressed the issue. Yet notwithstanding the need to combat crime, terrorism and other problems a number of practical steps could be taken to facilitate LDC suppliers' access to financial services in their export markets. For instance, WTO Members could establish a

'right to a bank account' for LDC service providers (as some countries have done for their citizens), a right to basic financial services / bank account that are not subject to residency and only to minimal formal requirements.

Prudential regulations can be adapted to this need, applying *de minimis/de maximis* thresholds and other safeguards as appropriate. Grantors could also create facilitated procedures or targeted/dedicated assistance to LDC providers in navigating applicable requirements with regard to financial services.

10.4.3. And a 'Guest Appearance': Public Procurement

Governmental contracts often represent a significant part of the market. LDC service providers often have no or limited access to procurement projects by (1) foreign governments for their local consumption or (2) donors, international agencies etc. Better effective access would translate into significant benefits, especially in certain sectors such as IT and construction.

Procurement has not attracted any attention in the context of the LDC Waiver – for the simple technical reason that the Waiver is not required to justify the extension of preferences for procurement contracts because the GATS MFN obligation does not cover them. But that does not mean that WTO Members should not use this avenue to facilitate effective market access for LDC services – quite the contrary.

Members could and should grant improved access to procurement projects, e.g. by generally allowing them to tender, possibly on a national treatment basis; by relaxing local content requirements; by counting LDC inputs as local inputs; and/or other creative means.

Concluding Thoughts

Progress in Discourse, Discourse is Progress

The first encouraging steps have been made, and the foot is in the door. LDC services and service providers are on the radar, and most observers now recognize that the potentials they represent – for exports, diversification and general economic development – may be much more significant than previously thought. Many now seem to have warmed to the idea that preferences can potentially make a contribution, even if supply-side constraints are important. Most would agree that at least in that sense the waiver is indeed already a smashing success: as a catalyst of a much-advanced discourse on services and LDCs.

LDC issues are SME issues – LDC solutions are SME solutions

Most issues faced by LDC service providers when accessing and operating in their export markets are in fact similar to those encountered by SMEs from any background. Looking for LDC-specific solutions, or solutions geared towards addressing LDC problems, thus means also looking for solutions that may work more broadly for the benefit of SMEs.

Rehearsing creativity: The LDC Waiver as the secret champion of services liberalization

While the Waiver is technically a mechanism to provide preferences for LDCs, and should be used as such generously, it in fact fulfils a much broader, almost equally important systemic function for the WTO system which has been unable to advance services negotiations since the 1990ies. Precisely because the Waiver offers the possibility to take measures, or remove, reduce or otherwise modify measures selectively for the group that exerts the weakest export pressure, it offers a unique possibility to experiment almost risk-free with ways to address obstacles and challenges to services trade that are often universally problematic, long-standing, engrained, and poorly understood, at least on the trade policy level. As such the Waiver in fact acts as the secret champion of services liberalization in the multilateral discourse on services, alongside the TISA negotiations, and the discussions about notifications have arguably already energized the discourse in some of the discussions in Geneva.

It's all about facilitation: Why preferences are not like preferences

While preferences in the form of preferential market access of the quantitative sort can

indeed be useful and should be explored where possible, the main focus must be on *facilitation*. What LDC service providers really need, and benefit from, is a targeted removal or reduction of the myriad small and sometimes bigger obstacles and challenges on the way. For them preference *margins* are rarely if ever important. They don't need nor seek relative advantages over third country competitors, but rather need attention and creativity – and sometimes a bit of generosity – to be applied to the task of reducing or removing obstacles and challenges that impede their ability to effectively access and contest markets they can otherwise service perfectly well. Many of these obstacles may seem negligible to the untrained eye, but are significant in relation to their specific circumstances, such as size, capital base, regulatory and educational environment at home. Many may also seem adequate, fair or unavoidable when seen from a distance (e.g. immigration-related measures, standardized qualification requirements). But a closer look will often reveal that obstacles often affect LDC providers particularly, and disproportionately, not primarily relative to others but relative to their circumstances. Often small, smart changes are possible, and can generate significant impacts. And a closer look also reveals that measures that are generally fair and good may often still allow for little, smartly designed adjustments that would help avoid otherwise disproportionate effects on LDC services trade.

In tune with the trend: The Waiver and the recent proposals from India and Australia *et al*

Seen as what it is, an opportunity to generate smart trade facilitation for scores of great businesses that should, for the benefit of all, participate in world trade, the Waiver appears to be spot on and in tune with a broader trend, not least at the WTO. India's recent proposal to latch on to the progress made on Trade Facilitation for goods and negotiate a new Agreement on Trade Facilitation in Services (TFS) is part of that trend, and so is the parallel proposal from Australia and a few others (including the EU) that focuses on generating disciplines on the *administration* of domestic regulation measures. Both proposals contain elements that are the same as some of the demands articulated by the LDCs in the context of the Waiver – because they reflect broader or even universal issues that can and should be addressed. Many recent FTA negotiations confirm the trend: Services regulation is often unnecessarily burdensome and un-disciplined, and services trade is crying out to be *facilitated* - again, of course: without sacrificing any of the legitimate policy interests one may have.

The proof is in the pudding: Think reality

If the point of the exercise – that of the Waiver, that of ancillary policies – is to actually improve LDC services trade, it is important to focus on the moment and context when actual transactions and interactions happen. The key question is simple: When a legitimate, bona fide LDC service supplier meets a consular officer or a licensing authority, has everything been done, and is everything done, to facilitate her effective access (without compromising any of the importing country's legitimate needs)? The ambition should be to ensure that the answer is "yes" across all sectors and modes of supply, absent exceptional circumstances. If approached from this perspective the Waiver still offers significant room for WTO Members to improve their response – attentively, generously and creatively.

Support to Enhance Development of Trade in Services Negotiations

With support from the UK Trade Advocacy Fund, ILEAP, CUTS International Geneva and the University of Sussex's CARIS are undertaking a series of interventions that seek to contribute to the increased and more effective participation of LDCs, LICs, LMICs and RECs in multilateral, regional and bilateral services trade negotiations.

Through the studies, toolkits and training to be delivered, the envisaged results aim to assist these stakeholders in increasing their participation in services trade.

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