

# Trade in Services Negotiations and Developing Countries

Whether, Where and How to Negotiate?



This study is published as part of the “Support to Enhance Development of Trade in Services Negotiations” initiative jointly undertaken by ILEAP, CUTS International Geneva and the University of Sussex’s CARIS. It aims to contribute to the increased and more effective participation of Least Developed, Low and Lower-Middle Income Countries and their Regional Economic Communities in multilateral, regional and bilateral services trade negotiations.

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

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ACWL	Advisory Centre on WTO Law
AGOA	African Growth and Opportunity Act
ASEAN	Association of Southeast Asian Nations
BIA	Built In Agenda
CFTA	Continental Free Trade Area
COMESA	Common Market for Eastern and Southern Africa
DDA	Doha Development Agenda
EAC	East African Community
ECOWAS	Economic Community of West African States
EPA	Economic Partnership Agreement
GATS	General Agreement on Trade in Services
GDP	Gross Domestic Product
GVC	Global Value Chain
ICT	Information and Communication Technologies
ILEAP	International Lawyers and Economists Against Poverty
LDC	Least Developed Country
MC	Ministerial Conference
MFN	Most Favoured Nation
NAMA	Non-Agricultural Market Access
ODI	Overseas Development Institute
RECs	Regional Economic Communities
RCEP	Regional Comprehensive Economic Partnership



RTA	Regional Trade Agreement
SADC	Southern African Development Community
SPS	Sanitary and Phytosanitary Standard
TBT	Technical Barrier to Trade
TFA	Trade Facilitation Agreement
TiSA	Trade in Services Agreement
TPP	Trans-Pacific Partnership
T-TIP	Trans-Atlantic Trade and Investment Partnership
UNCTAD	United Nations Conference on Trade and Development
USD	United States Dollar
WTO	World Trade Organization

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# Introduction

## Services and Trade in Services: Importance for Developing Countries

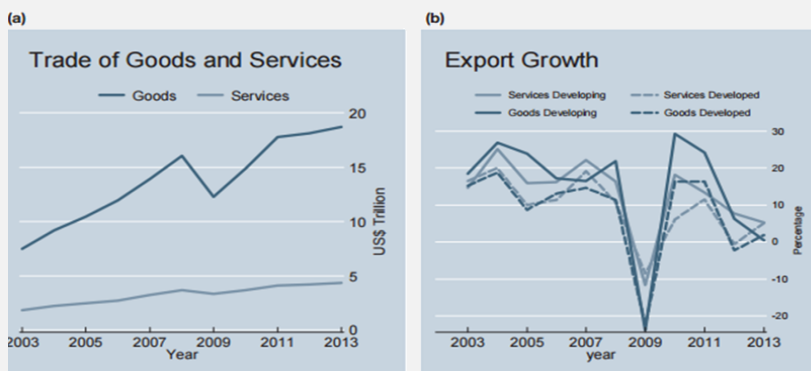
As the fastest growing sector, services play an increasingly prominent role in both developed and developing country economies, with its share in global employment in 2013 at 45 percent (Council on Economic Policies, 2015). Moreover, in 2014, services represented on average 70 and 50 percent of GDP of developed and developing countries, respectively (Statistics Times, 2015).

In 2013, world trade in services was valued at USD \$4.7 trillion, representing 20 percent of international trade (UNCTAD, 2015a). When seen in value-added terms, it has been suggested that services comprise 50% of global trade (Francois et al, 2013). Developed countries account for two-thirds of world trade in services, though the global share of trade in services of developing countries is growing steadily and was at 30 percent (UNCTAD, 2014). Kindly see Figures 1 and 2 below.

Moreover, according to UNCTAD (2014), trade in services is growing at a faster rate today than trade in goods grew in the 1980s. In 2014, the trade in services in developing countries grew at a rate of 4.8 percent (UNCTAD, 2015c).

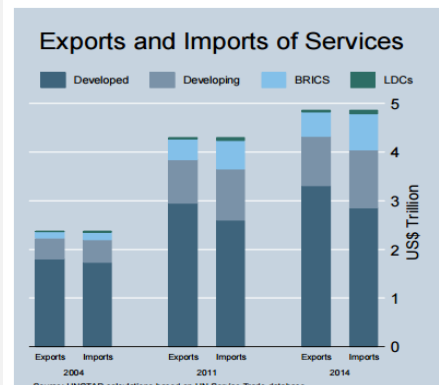
It is therefore unavoidable to repeat the cliché that services now comprise a larger and growing part of the economies of developing countries. But most low income countries (LICs) and least-developed countries (LDCs) in particular, are still marginal players in international trade in services despite services being a larger part of their respective economies (for example, in 2015, LDC share in global commercial services trade was 1.19% (WTO, 2016)).

**Figure 1**  
Values and growth rates of world trade in goods and services



Source: [unctad.org](http://unctad.org)

**Figure 2**  
Values of trade in services by region



Source: [unctad.org](http://unctad.org)

Even more important for developing and least-developed countries is the role that services and services trade can play in their growth and development. The services sector not only directly contributes to GDP and job creation, it also provides significant inputs for other sectors of the economy (i.e. agriculture and industry). It also has crucial effect on the overall investment climate in the country which is an essential determinant of growth and development. Finally, some service sectors, such as the health, education, water and sanitation etc., are also directly relevant to achieving social development objectives (Cali et al, 2008).

The above naturally leads to the conclusion that services sector development should be a key element of development strategies of developing and least-developed countries and that the international disciplines and liberalisation commitments related to trade in services should support that. The crucial importance of trade in services negotiations at the bilateral, regional (including the so-called mega-regional<sup>1</sup>) and multilateral levels that lead to such disciplines and liberalisation commitments cannot be over-emphasised.

However, the LDCs and smaller developing countries are often not the participants and – even where they do participate – are unable to shape the negotiations and outcomes of such bilateral, regional, mega-regional, and plurilateral negotiations (a notable exception being Continental FTA or CFTA being negotiated in Africa). The situation, therefore, is rather challenging for these countries. They, too, have interests in trade in services and their presence at the negotiating table can facilitate the incorporation of their interests and concerns in the outcomes. The worst scenario for these countries will be to be left out of the opening of services markets through bilateral, regional and plurilateral agreements among developed and a

few developing countries, as well as see the disciplines governing services regulations develop without their participation and inputs.

This paper is an attempt to understand the current situation, its reasons and possible way forward from the perspective of smaller developing and least-developed countries through a consultative approach. A number of delegates dealing with trade in services negotiations in Geneva, and international experts on trade in services were approached for their considered and candid views on the following five questions.<sup>2</sup>

- In the current environment – at the WTO and globally - what prospects do you see for future services negotiations at the WTO?
- What aspects of the WTO services negotiating agenda would you consider a relative priority (e.g. for low-income developing countries, LDCs, etc)?
- To what extent, if at all, should low-income developing countries and LDCs engage in large-scale services negotiations outside the WTO? And if so, how would you prioritize (e.g. TiSA, TPP, CFTA, RCEP)?
- If you consider negotiating services issues multilaterally at the WTO as a priority, what ideas do you think could be considered to re-engage the interest of the main services negotiators?
- What are the options for the low-income developing countries and LDCs to positively initiate/engage in services negotiations, given the stalemate in the WTO on the one hand, and their developmental interests in the services sector on the other?

<sup>1</sup> There is no universally agreed definition of “mega-regionals”: this term is normally used to describe the trade agreements involving countries with a substantial share of global production, population and trade. The most mentioned in this respect are: the Trans-Pacific Partnership (TPP), the Trans-Atlantic Trade and Investment Partnership (T-TIP), the Regional Comprehensive Economic Partnership (RCEP), and the Continental Free Trade Agreement (CFTA).

<sup>2</sup> While thankfully acknowledging the time and views of many experts and delegates, the author is particularly grateful to Ms Mina Mashayekhi (Head, Trade Negotiations and Commercial Diplomacy Branch, Division on International Trade in

Goods, Services, and Commodities, UNCTAD), Dr. Joy Kategekwa (Head, Regional Office for Africa, UNCTAD), Ms Fatma Brahim (Director, WTO Issues, Ministry of Industry and Commerce, Tunisia), Liping Zhang (Senior Economic Affairs Officer, Trade Negotiations and Commercial Diplomacy Branch, Division of International Trade in Goods and Services, and Commodities, UNCTAD), and Deanna Easton (Counsellor, Australian Permanent Mission to the WTO) for sharing their views and insights.



The rest of the paper is divided in three parts. The next part gives a brief account of the state of play of trade in services negotiations at the WTO and in some mega-regionals involving developing countries as well as the Trade in Services Agreement (TiSA). Part three then presents the consolidated views and perspectives around the above five questions without any individual attributions. Part four concludes.

It is expected that this exercise can lead to further reflections and discussions among LDCs and smaller developing countries as well as with their other developing and developed country partners. This can have a positive impact on services negotiations, particularly as WTO Members prepare for the next Ministerial Conference (MC11) to be held in Buenos Aires in late 2017.

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# Context

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## Trade in Services Negotiations: Brief State of Play<sup>3</sup>

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Unlike trade in goods, international commitments and disciplines on trade in services are relatively new and less developed. In fact, trade in services emerged on the scene as part of the Uruguay Round of multilateral negotiations (1986-93) that led to the conclusion of the first multilateral agreement on trade in services – the General Agreement on Trade in Services (GATS) – as part of the international trade architecture under the World Trade Organisation (WTO).

### 1. Trade in Services Negotiations in the WTO

Recognising that the GATS and commitments undertaken by WTO members under it were only the beginning of a process, it was agreed to have a built-in agenda (BIA) to continue the negotiations to develop rules and regulations related to trade in services as well as towards further liberalisation commitments. The BIA comprised three pillars: negotiations under Article VI.4 of GATS for *domestic regulations* (to develop disciplines on qualification requirements and procedures, technical standards and licensing

requirements and procedures, to ensure that these do not constitute unnecessary barriers to trade in services), negotiations to develop *rules* for emergency safeguard measures (under Article X of GATS), government procurement in services (under Article XIII of GATS) and subsidies (under Article XV of GATS), and *market access* negotiations under Article XIX of GATS for further liberalisation of trade in services.

The trade in services negotiations were duly initiated in early 2000 under Article XIX of GATS, subsequently to be merged in the Doha Development Agenda (DDA) negotiations that were launched in late 2001. Negotiations toward progressive liberalization in services trade; flexibility and appropriate accommodation of developing countries, with special priority reserved for LDCs; and consideration of the needs of small- and medium-sized service suppliers form the GATS' core objectives. All sectors and modes of supply are included in the negotiations.

Unfortunately, the DDA enterprise ran into difficulties and has yet to be concluded. This larger stalemate

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<sup>3</sup> This section contains inputs from David Primack, including Primack (2016).

also affected the negotiations on trade in services which have been at a standstill for many years.

The market access negotiations under Article XIX has not seen any tangible progress since the Services Signaling Conference in 2008 – the year when the DDA negotiations on trade in agriculture broke down with acrimony among some major developed and developing countries. An area of major interest to developing countries under the market access negotiations relates to Mode 4 (the temporary movement of natural persons). But this has been a highly disputed area with very little progress as developed countries tend to be more restrictive and view it in the context of their immigration policies, which have become increasingly politicized and sensitive since the 2008 global financial crisis.

Progress under the Domestic Regulations (DR) negotiations too has been slow and intermittent, but some advancement has been achieved in the last five years. Notably, these negotiations have taken place since 2009 based on a Chair's text<sup>4</sup> which sets out a number of draft disciplines (including general and institutional provisions, plus provisions on transparency, licensing requirements, licensing procedures, qualification requirements, qualification procedures, technical standards and development). In fact, some elements of this agenda (e.g. on transparency) appeared potentially ripe for a decision at the 10<sup>th</sup> Ministerial Conference of the WTO (MC10), held in Nairobi in late 2015. This did not happen mainly because several WTO Members were unable to support it without progress in other areas of interest to them in the DDA.

As with the market access pillar, progress in the rules negotiations has proved challenging and discussions have generally been unable to escape the conceptual stage - in large measure due to what some feel are the inherent linkages between these topics and market access in services. (Primack, 2016)

The only area of the GATS services negotiations that has seen some meaningful progress relates to the implementation of the LDC modalities as per GATS Article IV:3 (Primack, 2016).<sup>5</sup> On the basis of a Ministerial Decision<sup>6</sup> taken at the 8<sup>th</sup> WTO Ministerial Conference in December 2011, WTO Members agreed to a 'waiver' that allows any country to offer LDCs preferential treatment on trade in services without running afoul of the GATS' MFN requirement. In that the completed negotiations only provided the conditions for preferential treatment to be given, discussions since 2011 have focussed on putting the waiver into operation – i.e. securing treatment for LDCs that is better than the treatment received by any other trading partner. Towards this aim, additional Ministerial Decisions were adopted as part of the LDC packages agreed at MC9 of the WTO at Bali<sup>7</sup> (2013) and at MC10 in Nairobi.<sup>8</sup> To-date, 23 WTO Members have notified preference schemes for LDCs. Recent analysis however indicates that most measures announced remain shallow and that 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 (Schloemann, Hijazi & Pitard, 2016).

It should be noted that this year has witnessed some renewed interest in trade in services negotiations at the WTO. In June, the Working Party on Domestic Regulation noted support from services negotiators to re-engage in the development of new disciplines for domestic regulation in services, and reported on regulatory barriers faced by service suppliers in Modes 3 and 4. Both developed and developing countries stressed the importance that WTO disciplines guarantee Members' rights to regulate the supply of services in line with national policy objectives. At the meeting of the Services Council in early July, Members expressed willingness to resume negotiations on market access, domestic regulations and services aspects of e-commerce. These, it was suggested, could lay the groundwork for concrete proposals and

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<sup>4</sup> Second Revision, Draft Disciplines on Domestic Regulation Pursuant to GATS Article VI.4, Informal Note by the Chairman, Room Document, 20 March 2009

<sup>5</sup> With a view to enhancing their participation in services trade, GATS Article IV:3 calls on Members to give "special priority" to LDCs through negotiated specific commitments dealing with strengthening domestic services capacity, improving their

access to distribution channels and information networks, and in liberalising sectors and modes of LDC export interest.

<sup>6</sup> WT/L/847; LDC efforts to negotiate the services waiver were supported by ACWL, ILEAP and others.

<sup>7</sup> WT/MIN(13)/43

<sup>8</sup> WT/MIN(15)/48

outcomes at the 11<sup>th</sup> Ministerial Conference in 2017. More recently, Members met to discuss two separate proposals aimed at better facilitating services trade flows, including a proposal from India for an initiative on Trade Facilitation in Services and an Australian-led proposal to simplify authorization procedures for the licensing and qualification requirements of services suppliers.

## 2. Trade in Services

### Negotiations outside the WTO

The stalemate at the WTO did not deter – many would argue instead encouraged – many Members to pursue their trade in services negotiating agenda at other fora. This includes services negotiations and commitments that are an integral part of more comprehensive bilateral and regional trade agreements, particularly those involving developed countries as well as the so-called mega-regionals. On the other hand, the plurilateral TiSA negotiations exclusively focus on trade in services.

There are at least two interesting examples of more comprehensive RTAs involving developing countries that also include trade in services negotiations: the Continental Free Trade Area (CFTA) and the Regional Comprehensive Economic Partnership (RCEP).

#### 2.1. The Continental Free Trade Area (CFTA)

The CFTA is currently under negotiation between the 54 Members States of the African Union and aims at establishing a continent-wide free trade zone by 2017. The decision to form a CFTA was adopted at the African Union Summit held in Addis Ababa, Ethiopia in early 2012. The CFTA aims to expand intra-African trade of goods and services; improve international competitiveness; facilitate inter-state coordination; and accelerate regional and continental integration processes. One of the declared objectives aims to enhance intra-African trade by 50 percent over the next five years. Currently, merchandise trade occurring between countries in Africa constitutes 16 percent of their total (merchandise) trade, which is the lowest

compared to other regions, such as Europe (70 percent), Asia (50 percent), and Latin America (21 percent). Unfortunately, data on intra-African services trade flows is not available (see Shingal, 2016).

The scope of the envisaged CFTA encompasses trade in goods and trade in services in a first phase, followed by investment, intellectual property rights, and competition policy. As part of the African Union's Boosting Intra-Africa Trade Action Plan, service sectors such as transport, professional services, financial services, as well as ICT have been targeted for trade liberalization and further regulatory cooperation.

The first two negotiating rounds of the CFTA began in late February and mid-May 2016, with the third meeting of the CFTA Negotiating Forum having just taken place in early October. With respect to services, negotiators met to discuss the draft modalities for the CFTA negotiations on trade in services, which aim to assist Member States in preparing for and facilitating the CFTA services negotiations. The draft modalities cover the principles of negotiation, negotiating parties, scope, modalities of negotiation, basis of negotiation, as well as elements on capacity building and technical assistance. A fourth Negotiating Forum is expected in November to finalize these modalities.

#### 2.2. The Regional Comprehensive Economic Partnership (RCEP)

The Regional Comprehensive Economic Partnership (RCEP) is a potential free trade area under negotiations between ASEAN Member countries and six of ASEAN's prominent trading partners (Figure 3). The Partnership involves three developed, ten developing, and three least-developed countries. The RCEP aims to reduce barriers to trade in the region to facilitate mutual growth. The Agreement would include trade in goods, trade in services, investment, economic and technical cooperation, intellectual property, competition, and dispute settlement. With successful negotiations, the RCEP would form the largest free trade area in the world accounting for 40 percent of global trade with a combined GDP amounting to USD \$21.3 trillion and a collective population of over three billion. The RCEP may function as an alternative to the Trans-Pacific Partnership trade agreement.

**FIGURE 3: RCEP PARTNER COUNTRIES**

Source: [china-briefing.com](http://china-briefing.com)

Trade in services constitutes one of the main foci of the RCEP. At present, all service sectors and modes of supply are subject to negotiations. Discussions have already taken place regarding the scope of provisions, approaches to scheduling market access commitments, and areas of market access and a consolidated draft text for the services chapter has been under negotiation since 2015. In parallel, negotiations are on-going for sectoral annexes (or possible chapters) that cover financial services, telecommunications, audio-visual services, and movement of natural persons. Proposals have been put forward for a separate chapter on professional services, whereas others view the topic as being sufficiently addressable within the movement of natural persons' chapter/annex. Similarly, India has put forward proposals for an RCEP Business Travel Card and an RCEP Service Supplier Card, which remain under discussion. Initial services market access offers were also exchanged in 2015 and remain a key feature of the negotiations. Like at the WTO however, it would appear that at present the lack of conclusion of the goods agenda is impacting progress on the services

agenda. That notwithstanding, the declared intention is to conclude the negotiations for the RCEP Agreement this year.

## 2.3. The Trade in Services Agreement (TiSA)

In 2013, a number of WTO Members also launched plurilateral negotiations for the Trade in Services Agreement (TiSA). With the advances made in technology, changing business practices, and greater global integration, services trade has transformed significantly since the period in which the GATS was brought into force in 1995. The TiSA thus aims to update rules and regulations to better reflect present trade in services, generate new market access opportunities, and address major barriers to services trade for both developed and developing countries. As alluded to above, TiSA's emergence is in part the result of decelerating progress in the DDA and the insistence by some WTO Members that movement under GATS would depend upon progress in the negotiations on agriculture.

The TiSA is currently under negotiations outside the WTO among 50 countries whose economies represent over two-thirds of world services trade. Participating countries include developed, middle-income, and developing countries.<sup>9</sup> All negotiations for the TiSA are conducted in secrecy.

In order to be WTO-compatible, the TiSA must comply with Article V of the GATS regarding economic integration, such that it has substantial sectoral coverage, should not provide for the *a priori* exclusion of any mode of supply, and provides for the absence or elimination of substantially all discrimination. In that respect, it is understood that specific market access commitments will be taken based a positive list (per GATS) but that national treatment will operate on the basis of a negative list (like in GATT, i.e. all sectors and modes will be covered unless otherwise carved out through exemptions). Furthermore, TiSA is expected to include a 'standstill' clause, which would ensure that whatever treatment is applied nationally at the agreed

<sup>9</sup> Australia, Canada, Chile, Chinese Taipei, Colombia, Costa Rica, the 28-Member EU, Hong Kong China, Iceland, Israel, Japan, Korea, Liechtenstein, Mauritius, Mexico, New Zealand,

Norway, Pakistan, Panama, Peru, Switzerland, Turkey and the United States.

point in time (e.g. TiSA's entry into force) becomes the guaranteed minimum level of treatment under TiSA. This would serve to eliminate what's referred to as the 'water' between a participant's commitments and the regime that is actually in place. A 'ratchet' clause would also automatically bind any new autonomous liberalisation. Sectors to be covered by regulatory annexes potentially include financial services; ICT services (including telecommunications and e-commerce); professional services; maritime transport services; air transport services; competitive delivery services; energy services; temporary entry of business persons; government procurement; and new rules on domestic regulation.<sup>10</sup>

The round of negotiations that took place in late-2015 focused on domestic regulation, Mode 4, financial services, and issues of transparency. The following round held in February 2016 returned to discussions on Mode 4, and also discussed data localization issues, telecommunications, and e-commerce. Advances in negotiations were made in May and July 2016 in all previously-mentioned areas, in addition to opening discussions on new provisions, professional services, movement of natural persons, and transport. July's round also held discussions regarding institutional provisions and dispute settlement, based on submissions from the EU. A recent September 2016 negotiating session focussed in particular on the Annexes covering financial services, telecommunications and rules on data and e-commerce, as well as the EU's institutional proposals. With a view to completing the negotiations by the end of 2016, an intensification of the process was agreed. This would include an October informal meeting and two formal negotiating sessions in November.<sup>11</sup>

Notably, with respect to rules governing domestic regulation, non-attributable reports indicate the lack of consensus on the inclusion of a necessity test (i.e. that regulations can be subject to consideration of whether they are 'more burdensome than necessary'). Consensus would also appear to be absent on the questions of TiSA's coverage of government procurement in services.

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<sup>10</sup> <http://www.dfat.gov.au/trade/negotiations/services/trade-in-services-agreement.html>

<sup>11</sup> The latter would include Ministers if a final agreement was in sight.

# Trade in Services Negotiations

## Exploring Options and Ways Forward

Within the above background and context, this part presents the consolidated views and perspectives of a number of international experts on trade in services as well as delegates of developed, developing and least-developed countries dealing with the trade in services negotiations on a non-attributable basis and in response to a set of five questions.

### 1. Prospects for Trade in Services Negotiations at the WTO

#### QUESTION:

In the current environment – at the WTO and globally – what prospects do you see for future services negotiations at the WTO?

There is broad consensus that services negotiations in the WTO have been stalemated. To break this stalemate, it is important to better understand its reasons which are many.

The reason most cited is the relative lack of importance given to services negotiations in the WTO. Despite this being a part of the WTO Built-In Agenda (BIA), services negotiations were treated less than at par with other DDA negotiations, particularly agriculture which was

always at the centre of DDA negotiations. The implicit assumption and expectation has been that services negotiations will move only if there is movement in agriculture negotiations. One can argue in hindsight that services negotiations should have been treated at par with agriculture.<sup>12</sup>

The situation can be considered even grimmer now if one looks at the stalemate regarding the Doha mandate emerging from MC10 in Nairobi. If the services negotiations remain tangled in the larger stalemate and politics, no progress can be expected.

Another reason is the focus, particularly of some major developed countries, on services negotiations under bilateral, regional, mega-regional, and now TiSA. These negotiations take the energy and negotiating resources of major players, not to mention the public and business attention. The outcome is a situation where WTO services negotiations are further neglected and bilateral/regional/mega-regional/TiSA negotiations gain further momentum.

Finally, there is the politics around WTO services negotiations themselves. The agendas of developed and developing countries seem to diverge, e.g. developed countries resist the agenda of developing countries (e.g. movement of natural persons, special and differential treatment). Moreover, a large number of countries do not see any value addition in the larger services negotiations. This can be the case of LDCs who may think that their limited interests are being served by movement on the LDC Services Waiver, even if the progress on that is slow and not as much as they would have liked. Advancing services negotiations in

<sup>12</sup> It is important to note that many developing countries only accepted trade in services being brought into the multilateral trading system during the Uruguay Round on the understanding that it would be in return for some real reforms in agriculture. Unfortunately, the UR Agreement on Agriculture did not fulfil this

expectation. Hence, many of these countries insisting on that expected agricultural reform before going any further on services.

the WTO without the active interest of any substantial group of countries therefore becomes very difficult.

While recognising the above, some delegates and experts feel optimistic. They argue that the main hurdle for progress in services negotiations has been the Single Undertaking of DDA, and the issue of sequencing, i.e. agriculture as the priority in DDA. But the current situation regarding the DDA mandate may provide an opportunity to treat services negotiations as important in themselves.<sup>13</sup> Similarly, some Members are now realising that services negotiations are of interest to not only the developed countries but can also provide opportunities to developing countries (including in areas unrelated to mode 4). Moreover, unlike some other areas of negotiations, low-hanging fruit in the services negotiations have not been harvested yet, which can be an opportunity for progress in the negotiations.

There is also a broad consensus that some outcomes under the services negotiations can be harvested at MC11, scheduled to be held in late 2017. However, views diverge on the extent of such outcomes and it is recognised that this will be subject to targeted and sustained efforts between now and then. Advocates of services outcomes at MC11 also urge developing countries to take the lead in reviving services negotiations.

The most cited area of services negotiations for possible harvest at MC11 relate to domestic regulations (DR). It is felt that this outcome was possible to achieve at MC10 in Nairobi except for the larger negotiating dynamic at that time. Hence, it will be important not to let the issue of linkages with other DDA issues become a binding constraint again. Moreover, the ambition has to be “realistic”. Similarly, to gain adequate traction, the outcome should not be prescriptive but should rather consist of principles and guidelines. In other words, the view was expressed that an outcome on transparency in DR at MC11 should not be about convergence and harmonisation, but rather coming through a new “approach” that makes use of “soft law”.

The prospects for a DR outcome will increase if some market access outcomes in services are also included. Similarly, appropriate capacity building assistance for developing and least-developed countries can make a DR outcome more attractive for them. For such an outcome to materialize, it will be essential to prioritise this work as quickly as possible.

There is much less optimism for market access outcomes at MC11 though these could be possible in an optimistic scenario which would envisage organising another Services Signalling Conference by early 2017. Here Members could be urged to conditionally offer, at a minimum, what they are offering in their best RTAs.

It is striking to note that there are no expectations of an outcome on the GATS Rules negotiating agenda under services, even though this agenda predates DDA.

## 2. Relative Priorities within the WTO Trade in Services Agenda

### QUESTION

What aspects of the WTO services negotiating agenda would you consider a relative priority (e.g. for low-income developing countries, LDCs, etc)?

A general view is that the priority of a particular issue should be based on its content and substance and not on the historical context. Judged by this standard, all services negotiations should be a priority for developing countries. They have comparative advantage in several service sectors and their services exports face many barriers in export markets in developed countries which can be targeted in the negotiations. They also need to develop good domestic regulations for their services sectors to contribute to their developmental

<sup>13</sup> Paragraph 30 of the Nairobi Ministerial Declaration records the differing views of WTO Members on the Doha mandate, thus

raising a question mark on the continuation of the negotiations under the same mandate/approach.

objectives while improving the capacities and competitiveness of their service providers.

There is almost a consensus for treating negotiations on DR as a priority. There are many reasons for that. It was pointed out that all the issues included in the LDC Collective Request could not be addressed in the LDC Services Waiver. But some of these can be addressed under DR negotiations. Moreover, and generally speaking, developing countries too have interests in the DR negotiations and should not consider these to be of interest to developed countries only. Finally, a group of countries is working to advance the DR negotiations and there may be momentum building for this in the run up to MC11. Progress is possible as the interests of many countries may converge on transparency in DR.

However, and to make progress, developed countries should clearly indicate as to what kind of DR disciplines they would like to see as the outcome. Progress can also be facilitated by viewing DR as “trade facilitation measures” in services and hence cooperative approaches should be explored.<sup>14</sup>

It is also important to take full account of the severe capacity limitations of smaller developing and least-developed countries in this area. The Trade Facilitation Agreement (TFA) model can be used to build capacity and help in the implementation of the DR disciplines. But the DR disciplines and capacity building assistance should not be based on or aim to replicate the developed country regulations. Moreover, developing countries have ground realities (e.g., stakeholder dynamics, existing interest groups and lobbies, weak enforcement mechanisms) that make it very difficult to implement even the good regulations. Hence, the capacity building assistance model (akin to the TFA) is unlikely to be the magic bullet to solve all capacity-related constraints.

There is also the suggestion to accord market access negotiations in trade in services relative priority. Proponents of this view consider that services liberalisation through the WTO may not be a bad idea for developing countries as it stops the reversal of

policies which can attract investment into their services sectors as well as facilitate the competitive development of their services sectors. The case is also offered that opening at the multilateral level ensures the most competitive supplier can access the market (as compared to a relatively less competitive foreign supplier accessing the market via an RTA).

The most mentioned specific sectors and modes of supply for according relative priority included the following:

## ICT services

This will fit nicely with the agenda to integrate developing and least-developed countries into global value chains (GVC). This can also include the e-commerce aspect of services.

## Mode 4

Developing countries can request that all barriers to Mode 4 should be entered into the commitment schedules so that these can be addressed later.

## Mode 2

This can be potentially very interesting and useful for developing countries and least-developed countries. For example, several developing countries offer good, and cheaper health facilities which can be used more by consumers of developed countries if the issue of health insurance portability is addressed. The negotiations therefore can aim to address such issues to facilitate greater production and export of some services by developing and least-developed countries through this mode.

## LDC Services Waiver

While welcoming the incremental progress, it should be recognised that much work remains to be done in this area, particularly to provide real preferential market access to LDCs through the sympathetic consideration of their Collective Request. It will also

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<sup>14</sup> The proposals by both India and Australia can provide useful starting points for this purpose.



be very important to recognise and appropriately deal with supply constraints of LDCs.

### 3. Engagement in Trade in Services Negotiations outside the WTO

#### QUESTION

To what extent, if at all, should low-income developing countries and LDCs engage in large-scale services negotiations outside the WTO?

And if so, how would you prioritize (e.g. TiSA, TPP, CFTA, RCEP)?

When it comes to trade in services negotiations, it can be argued that almost all the movement and developments are taking place outside the WTO. Developing and least-developed countries should seriously consider the implications if there is no movement in the WTO and think of ways to make use of the trade in services negotiations taking place outside the WTO.

RTAs among developing countries can be particularly of great interest and relevance to developing countries. These can be a good testing ground to experiment with liberalisation to see whether and how much their service providers can compete and improve their competitiveness. These can also be a testing ground for services regulations, particularly to address the common problems and challenges faced by developing countries and build the relevant knowledge and expertise. This experience and testing with services liberalisation and regulations can be then a launching pad to take forward their services trade agenda in other settings, including RTAs with developed countries and even the WTO. Both CFTA and RCEP should be seriously considered for this testing and experience purpose.

It is also important that RTAs among developing countries have the right structure, design and sequencing. These should be based on the positive

list approach as the negative list approach assumes a level of knowledge and capacity that may not be available in developing countries, thus leading to inadvertent liberalisation. Overall objective is not trade, but the well-being of people. Liberalisation as well as services regulation disciplines in the RTAs should be coherent with their national development goals. Hence, liberalisation commitments should be linked with their regulatory capacities. Finally, in RTAs among developing countries, larger developing countries should offer better terms to smaller developing countries, and not behave like developed countries do towards developing countries in the WTO.

African countries in particular may have some exciting options for experimentation. The Regional Economic Communities (RECs) in sub-Saharan Africa are moving ahead, for example, the Common Market Protocol and schedules of liberalisation in the East African Community (EAC), regulations on trade in services in the Common Market for Eastern and Southern Africa (COMESA), the Protocol on Trade in Services (including some regulatory aspects) in the Southern African Development Community (SADC), and regulatory disciplines in several sectors in the Economic Community of West African States (ECOWAS). African countries may also consider bringing some of these advancements to the relevant services negotiations under the WTO.

CFTA has particular significance in the African context. It is scheduled to be concluded by the end of 2017. African countries should prioritise it, noting that the US may want to replace the arrangements under the African Growth and Opportunity Act (AGOA) with EPA-type bilaterals. CFTA can be the key for African countries to experiment with services liberalisation and regulations. However, many of them face supply capacity and competitiveness challenges. A possible solution may be that larger and more advanced African countries make commitments to benefit the smaller countries which can then build their supply capacities.

For reasons similar in basic nature to those cited in favour of CFTA for African countries, the developing and least-developed countries in the Asia-Pacific region could consider joining the RCEP.

As opposed to CFTA and RCEP, TiSA is basically a consolidation of many existing plurilaterals and bilaterals. But since most LICs and LDCs are not part

of these existing plurilaterals and bilaterals, participation in TiSA would entail significant new commitments by them. While the participating developing countries are expected to have some differentiated commitments in specific sectors and/or in terms of market access offered, there are no special and differential treatment provisions for developing and least-developed countries in TiSA. As such, provisions such as the standstill and ratchet clauses would apply. It should also be noted that with the TiSA negotiations at such an advanced stage, any country wishing to join would have to do so after the completion of the negotiations via the accession provisions. At present it remains unclear whether TiSA will have special provisions for LDC accession.

There is consensus that the main challenge for developing and least-developed countries is the limited services supply capacities and competitiveness of their firms, which is relevant irrespective of the negotiation forum. Hence, their first priority should be to build this capacity domestically, using negotiations as a tool as and where needed.

## 4. Re-engaging the Interest of Major Players in the WTO Trade in Services Negotiations

### QUESTION

If you consider negotiating services issues multilaterally at the WTO as a priority, what ideas do you think could be considered to re-engage the interest of the main services negotiators?

Several ideas were outlined to revive the trade in services negotiations in the WTO and to re-engage the interest of the main WTO Members. These related to the level of developing and least-developed country participation in these negotiations, the substantive

aspects of these negotiations, and the conduct of the negotiations.

From the substantive point of view, and in the short to medium term, progress on DR and e-commerce aspects of services may revive the services negotiations. To increase the scope, DR outcomes may be paired with some market access issues as well. On e-commerce, progress can be part of a broader package that can include a moratorium on customs duties on electronic transmissions (developed countries are already doing that through their RTAs), liberalisation in some services sectors, tariff reduction on some goods, some disciplines on e-commerce, and capacity building assistance to developing and least-developed countries. In this regard, it was also opined that to have the interest of the main players in advancing services negotiations, the progress in these negotiations can be linked with the discussion on new issues of interest to developed countries, e.g., e-commerce.

Developing countries including LDCs should pay serious consideration to and actively participate in the WTO services negotiations. In particular, the main importers and exporters of services among the developing countries need to engage in the WTO services negotiations, by giving it at least equal if not more priority than the NAMA (Non-Agricultural Market Access) negotiations. Their participation may bring the big players too at the negotiating table. In this context, and to make progress in WTO services negotiations, bigger developing countries may consider making better offers. This will garner the interest of major developed countries in the negotiations and could help to break the logjam. Bigger developing countries can consider this as their contribution to the revival of the WTO process which may also have a positive impact in other negotiating areas of interest to developing and least-developed countries.

A coalition of the willing (e.g. member countries of TPP and TiSA) can also come together to push the services negotiations in the WTO. These countries together can provide a substantial force that will attract other Members.

Finally, and since the Single Undertaking is not working, trade-offs within the services negotiations should be identified and exploited to make progress,

instead of thinking of trade-offs between services and other areas of negotiations.

## 5. Options for Developing and Least-Developed Countries in and Outside the WTO Trade in Services Negotiations

### QUESTION

What are the options for the low-income developing countries and LDCs to positively initiate/engage in services negotiations, given the stalemate in the WTO on the one hand, and their developmental interests in the services sector on the other?

Several insightful comments and suggestions were made regarding the status and needs of services sectors in developing and least-developed countries and to improve their participation in trade in services negotiations with a view to enhancing the contribution of their services sectors towards their growth and development.

### Supply capacity and competitiveness building

The main constraint for developing and least-developed countries is the lack of supply capacity and competitiveness of their services sectors. Hence, their main objective and sustained efforts should be to improve their supply side capacities including through the use of existing bilateral, regional and international

assistance opportunities. Their emphasis should be on increasing services production, productivity and trade.

### Data collection, analysis of offers and requests, and national consultations

The lack of complete and accurate services production and trade data is still a major challenge for developing and least-developed countries. Hence, they should improve services data collection at the national level.<sup>15</sup> These countries should also carry out a thorough analysis of current requests and offers in the WTO services negotiations at the national level. This should be done through appropriate inter-ministerial coordination as well as broader stakeholder consultations, including with the private sector, civil society and think tanks. Through these consultations, developing countries should also develop their national services strategies. These preparations will go a long way in helping developing and least-developed countries prepare for and better participate in trade in services negotiations in any forum.

### Facilitating progress in the WTO services negotiations

The WTO stalemate on services negotiations seem to be breaking as the positions of some major developing countries seem to be changing because they too want to be part of the progress. This can be further strengthened by making some progress on movement of natural persons which is of interest to developing countries. Moreover, there can be development assistance provisions to implement disciplines, e.g. transparency and other DR disciplines.

While pushing for Mode 4, developing countries also need to think about and articulate their market access interests beyond Mode 4.

WTO should also consider allowing for provisional/time-bound market access commitments as this can encourage developing countries to offer more, knowing that these can be withdrawn under

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<sup>15</sup> Holmes et al (2016) suggest a sequenced process for improving services trade data collection based on the 'good' practices of other developing countries.

certain circumstances and hence they should not have to be extremely cautious.

In the run up to the next WTO Ministerial Conference (MC11), another Services Signalling Conference may be organised. This Conference should discuss the offers previously made, point out the gaps in these offers and what is being made available under RTAs and TiSA (particularly by developed countries), and identify practical ways to reduce this gap.

## Participation in RTAs

Recognising that parallel regional and bilateral tracks for services negotiations will continue, developing countries should actively participate in RTAs with other developing countries.

## Towards development-friendly regulatory frameworks for services

Regulatory frameworks for services are extremely important for national development goals. The objective of negotiations in this area should not be regulatory convergence as regulations are linked with levels of development, capacities, institutional frameworks, national goals and objectives, and overall economic landscape of a country. Developing countries are not in a position to harmonise their regulations with those of developed countries. Hence, the approach should be differentiated according to specific national circumstances. WTO Agreements on Sanitary and Phyto-sanitary Standards (SPS) and Technical Barriers to Trade (TBT) are quite instructive in this regard as they provide for different standards to achieve the same objectives. Similar approaches should be envisaged for services regulations.

## Autonomous liberalisation

Developing countries should consider autonomous liberalisation of services. The argument would be that if something is good, it should be done, even autonomously. However, while doing that, business and public interests should be balanced. Moreover, adequate and effective flanking policies should be in place while implementing autonomous services liberalisation.

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# Conclusion

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## Advancing Trade in Services Negotiations for Growth & Development

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In conclusion, three broad observations are offered.

One, developing and least-developed countries should accord more and conscious importance to services sectors as key contributors to their growth and development. Services are at the centre of the modern-day knowledge-based economy and play a significant role in increasing the productivity and competitiveness of other parts of the economy, i.e. agriculture and industry. They should view trade in services negotiations – whether at the WTO or outside – as means to achieve this larger objective. This will also guide their preparations for and participation in the trade in services negotiations.

Two, liberalisation of trade in services and development of robust services regulations are two sides of the same coin. Developing and least-developed countries should view them together and coherently. Such a holistic approach implies careful and calibrated pairing and sequencing, taking into account the status, needs, strengths, and challenges of the services sectors, both as importers and exporters. The same holistic approach should be adopted for participation in trade in services negotiations which should also include required capacity building provisions.

Three, and to advance the trade in services negotiations particularly in the WTO, a “zone of common interests” for all Members should be identified. Given the importance of services for all countries and based on a holistic approach as mentioned above, this should be possible though not easy. But, this is a challenge that all countries – developed, developing and least-developed – should accept. Some elements of a possible “zone of common interests” are there, including in the area of domestic regulations and certain services sectors and modes of supply. The urgent need is to start working on these from now so that tangible progress can be made by MC11.

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## 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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