Goettingen Journal of International Law 6 (2014) 1, 115-143

The Least-Developed Countries Services Waiver: Any Alternative Under the GATS?

Claudia Manrique Carpio* & Jaume Comas Mir**

Table of Contents

* Researcher at Barcelona University of Barcelona, Department of International Law and Economics, Faculty of Law.
** Lawyer with MESTRE ABOGADOS, S.L.P.

doi: 10.3249/1868-1581-6-1-carpio-mir

Abstract

Despite the fact that least-developed countries (LDCs) constitute approximately 12 percent of the world's population, they account for 0.5 percent of the world's trade in commercial services.[1] LDCs have important disadvantages that prevent them from acquiring an adequate share of benefits from liberalization of trade in services.

In this context, the suitability of the special and differential treatment provisions of the *General Agreement on Trade in Services* (GATS) for the LDCs' needs and of the flexibility of GATS architecture has been questioned. Article IV:3 of the GATS gives a mandate to negotiate mechanisms that could increase the participation of LDCs in the multilateral trade system. After more than ten years of negotiations, finally in December 2011, the Ministerial Conference of the World Trade Organization (WTO) approved a services waiver decision that allows developed and developing countries to depart from the most favored nation principle in order to grant preferential treatment for LDCs' services and service suppliers.

Therefore, this article first examines the legal scope of the LDCs services waiver, including the background of the waiver, the preferences covered, and the main conditions applying to these preferences. Then, the viability of the waiver's implementation as a useful tool to boost LDCs' participation in trade in services and engagement within the GATS is analyzed. The authors also examine whether the waiver has failed to fulfill its mains objectives, whether other alternatives exist.

In this contribution the authors argue that the waiver might not have a strong incidence, because of the following regulatory concerns: Firstly, neither a binding obligation is imposed on developed and developing countries to grant preferential treatment in market access, nor any right to perceive preferential treatment is assured to LDCs. As the services waiver is primarily focused on voluntary market access preferences, LDCs' services suppliers may not find enough legal

[1] See, with reference to 2011, United Nations Conference on Trade and Development (UNCTAD), *The Least Developed Countries Report 2013: Growth With Employment for Inclusive and Sustainable Development* (2013), 28; WTO, *Market Access for Products and Services of Export Interest to Least-Developed Countries: Note by the Secretariat*, WTO Doc WT/COMTD/LDC/W/56/Rev.1, 31 October 2012, 23 & 40, paras 58 & 86. In 2012, the share of LDCs in world exports of commercial services increased insignificantly to 0.6 percent. See WTO, *Market Access for Products and Services of Export Interest to Least-Developed Countries: Note by the Secretariat*, WTO Doc WT/COMTD/LDC/W/58, 10 September 2013, 22, para. 2.48.

certainty regarding a preferential treatment, as it might be withdrawn at any time. Secondly, the discipline which allows other discriminatory measures in favor of LDCs is even weaker as it needs approval by the Council on Trade in Services. It therefore should be reinforced and clarified. Thirdly, the difficulty of interpreting 'rules of origin' and the consequences of its ambiguous definition need to be overcome. Finally, it is also relevant to consider the differences between the preferential treatment process of concessions to LDCs and the general multilateral negotiation process for trade in services in the WTO that should be considered by members to grant preferences.

Nevertheless, alternatives to enhance LDCs' integration within the GATS could exist, although lack of political willingness may affect the outcome. Two options have been identified. Firstly, market access negotiations in modes of supply of export interest to LDCs should be linked with those attractive to non-LDCs. Secondly, good regulation and regulatory cooperation are essential to overcome non-market access barriers, while disciplines on domestic regulation and extension of mutual recognition agreements to LDCs should be reinforced, essentially building solid institutional mechanisms. Consequently, the 'aid for trade' shall be driven to implement LDCs' domestic regulatory reforms.

A. Background: Special and Differential Treatment Within the *General Agreement on Trade in Services*

The World Trade Organization (WTO) has introduced several provisions within its agreements that take into account the special situation of developing countries in general and least-developed countries (LDCs) in particular. The provisions are aimed to achieve one of the following goals: to increase trade opportunities of developing members; safeguard the interests of developing members; to allow them flexibility of commitments, action and use of policy tools; to use transitional time periods; to receive technical assistance; and finally there are provisions aimed only at LDCs which fall into the above categories.[2]

[2] WTO, *Special and Differential Treatment Provisions in WTO Agreements and Decisions*, WTO Doc TN/CTD/W/33, 8 June 2010, 59-63, paras 41-42 [WTO, Special and Differential Treatment Provisions in WTO Agreements and Decisions]; WTO, *Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions*, WTO Doc WT/COMTD/W/77/Rev.1, 21 September 2001, 41-55. See generally M. Matsushita, T. J. Schoenbaum & P. C. Mavroidis, *The World Trade Organization: Law, Practice, and Policy*, 2nd ed. (2006), 601-696.

Most of the WTO agreements provide a special and differential treatment (S&D) regime with some of the provisions mentioned above. For instance, under the *General Agreement on Trade and Tariffs* (GATT), the 1979 *Framework Agreement*, nowadays Part IV of the GATT, together with the 'Enabling Clause',[3] sets this regime.[4] They constitute the legal basis for the 'General System of Preferences' (GSP) scheme and in particular for deeper preferences for LDCs.

However, there is a growing literature that points out the deficiencies of S&D to effectively serve the commercial and development interests of developing countries and LDCs in particular. Some commentators request more flexibility in implementing WTO rules,[5] others demand a rebalance in the agreements to reflect developing countries' interests and recommend the use of S&D as a broader principle to assist in interpreting WTO provisions.[6] Recently Pauwelyn, for example, proposed to develop new criteria to distinguish between countries.[7] In this context, it is clear that the early statement that Hudec made in 1987 against preferential and non-reciprocal treatment for developing countries is currently a strong argument and cause of debate.[8]

In the framework of the *General Agreement on Trade in Services* (GATS)[9], the S&D has a particular scheme. It does not follow the structure of GATT and other WTO agreements, where all developing countries have the same degree of special consideration. Instead of establishing a more specific and specialized regime, it is mainly the flexible architecture of GATS that gives room for

3 GATT, *Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries: Decision of 28 November 1979*, Doc L/4903, 3 December 1979.

4 See, e.g., J. Whalley, 'Non-Discriminatory Discrimination: Special and Differential Treatment Under the GATT for Developing Countries', 100 *The Economic Journal* (1990) 403, 1318, 1320.

5 S. W. Chang, 'WTO for Trade and Development Post-Doha', 10 *Journal of International Economic Law* (2007) 3, 553, 569 (especially).

6 A. D. Mitchell, 'A Legal Principle of Special and Differential Treatment for WTO Disputes', 5 *World Trade Review* (2006) 3, 445, 469 (especially); B. Hoekman, C. Michalopoulos & L. A. Winter, 'Special and Differential Treatment of Developing Countries in the WTO: Moving Forward After Cancún', 27 *The World Economy* (2004) 4, 481, 503-504 (especially).

7 J. Pauwelyn, 'The End of Differential Treatment for Developing Countries? Lessons From the Trade and Climate Change Regimes', 22 *Review of European Community & International Environmental Law* (2013) 1, 29, 41 (especially).

8 R. E. Hudec, *Developing Countries in the GATT Legal System* (1987). See, e.g, C. Thomas & J. P. Trachtman (eds), *Developing Countries in the WTO Legal System* (2009); J. M. Finger, 'Developing Countries in the WTO System: Applying Robert Hudec's Analysis to the Doha Round', 31 *World Economy* (2008) 7, 887.

9 *General Agreement on Trade in Services*, 15 April 1994, 1869 UNTS 183 [GATS].

LDCs' interests.[10] GATS liberalization is done through a 'hybrid approach',[11] as countries use a positive list to schedule their commitments and they also inscribe limitations and conditions (trade-restrictive measures) which they consider appropriate.[12] For this reason, it is argued that the flexible provisions of the GATS already give room for each country to liberalize considering its own needs.[13]

GATS also includes references to development and preferential treatment in some of its provisions which are of particular relevance to developing countries' trade in services.[14] There is a lax S&D framework, aiming at the increasing participation of developing countries in trade in services according to Articles IV:1 and IV:2, and the priority in attending the needs of LCDs established in Article IV:3. The S&D provisions in GATS are however non-binding, as

[10] See, e.g., WTO, *Special and Differential Treatment Provisions in WTO Agreements and Decisions*, *supra* note 2, 59, para. 41.

[11] The authors who defend the 'hybrid approach' argue that the GATS schedules of commitment have both elements of positive and negative list approaches. See M. Molinuevo, 'Article XX GATS', in R. Wolfrum, P.-T. Stoll & C. Feinäugle (eds), *WTO – Trade in Services* (2008), 445, 455, para. 26; C. Fink & M. Molinuevo, 'East Asian Free Trade Agreements in Services: Key Architectural Elements', 11 *Journal of International Economic Law* (2008) 2, 263, 267-279 (especially) [Fink & Molinuevo, East Asian Free Trade Agreements in Services]; P. Delimatsis, 'Don't Gamble With GATS – The Interaction Between Articles VI, XVI, XVII and XVIII GATS in the Light of the US–Gambling Case', 40 *Journal of World Trade* (2006) 6, 1059, 1062 (note 17) [Delimatisis, The Interaction Between Articles VI, XVI, XVII and XVIII GATS]. More conservative authors consider the GATS liberalization process as a 'positive list' approach, focused on the roof of further liberalization. See M. E. Footer & C. George 'The General Agreement on Trade in Services', in P. F. J. Macrory & A. E. Appleton & M. G. Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis*, Vol. I (2005), 799, 821; WTO, *A Handbook on the GATS Agreement* (2005), 16. Positive list system or bottom-up means that no services sector is open unless listed in the specific commitments.

[12] It refers to Part III of the GATS where countries can open services sectors and indicate limitations on market access (Art. XVI), national treatment (Art. XVII) and additional commitments (Art. XVIII).

[13] R. Adlung & A. Mattoo, 'The GATS', in A. Mattoo, R. Stern & G. Zanini (eds), *A Handbook of International Trade in Services* (2008), 48. About GATS flexibility as a bottom-up agreement see Organisation for Economic Co-operation and Development (OECD), *Special and Differential Treatment Under the GATS*, OECD Doc D/TC/WP(2005)24/FINAL, 21 January 2006, 7-12, paras 9-36.

[14] The main provisions related to S&D under the GATS for developing countries are the Preamble, Art. III:4 about transparency requirements, Art. XIX:1 and 2 about progressive liberalization, and Art. XIX:3 on LDCs. Moreover, Art. V:3 on regional agreements, Art. XV:1 referring to subsidies, and the Annex on Telecommunications.

they are mainly best endeavor clauses which lack an operative mechanism.[15] This mechanism could resemble the 'Enabling Clause' of GATT, which allows exemptions from the most-favored nation (MFN) treatment to developing countries.

Specific S&D for LDCs under the GATS is provided mainly by Article IV:3 and Article XIX:3. The former allows other members to take certain measures in order to enhance the integration of LDCs in trade in services and the latter refers to special treatment related to progressive liberalization that LDCs are entitled to have. Both are stated by the WTO as mandatory provisions, but Article IV:3 is considered only an obligation of conduct and not an obligation of result.[16]

In this context, Article IV:3 requires the members to assume conducts with particular priority for LDCs. This special treatment to LDC shall be implemented according to the rules established by Articles IV:1 and IV:2 for developing countries in general.[17] The article also states, in reference to Article IV:1(c), that members shall negotiate specific commitments to liberalize "[...] market access in sectors and modes of supply of export interest to them" [LDCs]. This provision needed indeed to be operationalized. In 2002, the LDCs asked for the establishment of additional measures ensuring the increasing participation of the LDCs, and in this sense an additional paragraph of Article VI:3 was also proposed.[18]

15 P. Delimatsis, *International Trade in Services and Domestic Regulations: Necessity, Transparency, and Regulatory Diversity* (2007), 32 [Delimatsis, International Trade in Services and Domestic Regulations].

16 See, e.g., WTO, *Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions – A Review of Mandatory Special and Differential Treatment Provisions: Note by the Secretariat*, WTO Doc WT/COMTD/W/77/Rev.1/Add.2, 21 December 2001, 30. See also WTO, *Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions – Mandatory and Non-Mandatory Special and Differential Treatment Provisions: Note by the Secretariat*, WTO Doc WT/COMTD/W/77/Rev.1/Add.1, 21 December 2001, 4; WTO, *Special and Differential Treatment for Least-Developed Countries: Note by the Secretariat*, WT/COMTD/W/135, 5 October 2004, 15-16 (in which paragraph 6 (d) of the Annex on Telecommunications is added apart from the other two articles already mentioned).

17 In this sense, member shall negotiate specific commitments which strengthen domestic services capacity, efficiency, and competitiveness of LDCs; the commitment shall improve the LDCs access to distribution channels and information networks, and liberalize sectors/modes of supply of LDCs interests. And the obligation of transparence to establish contact points in developed countries for information on LDC related to services market.

18 See WTO, *Special and Differential Treatment Provisions: Joint Least-developed Countries Proposal on Special and Differential Treatment*, 1 July 2002, WTO Doc TN/CTD/W/4/

Article XIX:3 prescribes that negotiating guidelines and modalities must be established for the special treatment of LDCs; this is considered an obligation of result.[19] Following this mandate, the *Modalities for the Special Treatment for Least-Developed Country Members* (LDC Modalities) and the *Guidelines and Procedures for the Negotiation on Trade in Services* were devised in 2003[20] and have since then provided more guidance for the development of the waiver. The *LDC Modalities* are based on preferential coverage of services sectors and modes of supply of interest to LDCs, technical assistance, and non-reciprocity.[21] The non-reciprocity principle[22] releases LDCs from the pressure to make market access offers in services negotiations. Preferential coverage[23] is mainly focused on increasing openness of WTO members to LDCs suppliers, essentially in mode 4 market access. Modalities also urged members to develop mechanisms to implement Article IV:3 and facilitate "effective access of LDCs' services and service suppliers to foreign markets".[24]

In addition, the 2005 *Hong Kong Ministerial Declaration* called members to implement the *LDC Modalities* in a full and effective manner; and in particular required again to develop, *inter alia*, methods for according special priority for LDCs' market access.[25] The Declaration reaffirmed moreover the

Add.1, 9, paras 50-51: "In sectors of their export interest multilaterally agreed criteria for giving priority to the least developed country Members shall be established, and when developing further disciplines and general obligations under the agreement[.]"

19 WTO, *Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions – Mandatory and Non-Mandatory Special and Differential Treatment Provisions*, *supra* note 16, 4.

20 WTO, *Modalities for the Special Treatment for Least-Developed Country Members in the Negotiations on Trade in Services*, WTO Doc TN/S/13, 5 September 2003 [WTO, Modalities for the Special Treatment for Least-Developed Country Members in the Negotiations on Trade in Services]; WTO, *Doha Work Programme: Ministerial Declaration*, WTO Doc WT/MIN(05)/DEC, 22 December 2005, 5, para. 26 [WTO, Doha Work Programme: Ministerial Declaration].

21 A. Melchior, 'Services and Development: The Scope for Special and Differential Treatment in the GATS' (2010), available at http://nupi.no/content/download/13215/126242/version/5/file/NUPI+Report+Melchior+et+al.pdf (last visited 15 August 2014), 15.

22 WTO, *Modalities for the Special Treatment for Least-Developed Country Members in the Negotiations on Trade in Services*, *supra* note 20, 1 & 2, paras 4 & 11.

23 *Ibid*., 2, para. 6, 7 & 9.

24 *Ibid*., 2, para. 7.

25 WTO, *Doha Work Programme: Ministerial Declaration*, Annex C, *supra* note 20, C-2 & C-3, paras 3 & 9 (a). See also *ibid*., 8-9, para. 47.

non-reciprocity principle in negotiations with LDCs[26]; an aspect which may have influenced LDCs' negotiation approach for the services waiver.

Based on these antecedents, in 2008 the general support of the members for a MFN exemption for LDCs was evident, as it appeared to be the most satisfactory mechanism to give special priority to LDCs in trade in services.[27] In this sense, the waiver has been oriented to give S&D to the LDCs in order to increase their up to now minimal participation in the international market of services as exporters. During the debates after the *Hong Kong Ministerial Declaration* it was noticed that LDCs did not primarily focus on export interests as it had been stated in the *LDC Modalities,*[28] but they promoted a more general perspective in order to obtain non-reciprocity special provisions in sectors and modes of supply of interest to them. This proposal would have led to a wider scope than the one adopted in the waiver.[29] Zambia and other LDCs wanted a mechanism with binding provisions for developed countries to allow preferential market access to LDCs, thereby waiving the obligations of Article II:1. Moreover they proposed these S&D to be granted on a permanent basis and referred to a 'non-reciprocity' special priority to LDCs.

Finally, according to the options identified in a note by the Secretariat of 2008,[30] members agreed on that "a waiver, available to all Members, from the obligations of Article II:1 of the GATS in respect of preferential treatment benefiting all LDC Members offers the most satisfactory outcome of this negotiation".[31] The ensuing negotiations focused on the content of the waiver and

26 *Ibid*., 5, para. 26 states: "We recognize the particular economic situation of LDCs, including the difficulties they face, and acknowledge that they are not expected to undertake new commitments."

27 WTO, *Elements Required for the Completion of the Services Negotiations: Report by the Chairman*, WTO Doc TN/S/34, 28 July 2008, Annex, 3, para 9 [WTO, Elements Required for the Completion of the Services Negotiations].

28 WTO, *Modalities for the Special Treatment for Least-Developed Country Members in the Negotiations on Trade in Services*, *supra* note 20, 2, para. 6.

29 WTO, *Communication From the Republic of Zambia on Behalf of the LDC Group: A Mechanism to Operationalize Article IV:3 of the GATS*, WTO Doc TN/S/W/59, 28 March 2006, 1, para. 1 [WTO, Communication From the Republic of Zambia on Behalf of the LDC Group: A Mechanism to Operationalize Article IV:3 of the GATS].

30 WTO, *Options to Implement the LDC Modalities: Note by the Sectetariat*, WTO Doc JOB(08)/8), 21 February 2008.

31 WTO, *Elements Required for the Completion of the Services Negotiations*, Annex, *supra* note 27, 3, para. 9.

were based on the 2010 proposal of the LDC Group.[32] This proposal essentially requested a waiver from the GATS MFN treatment clause, providing effective market access in sectors and modes of supply of export interest to LDCs through negotiated specific commitments.

B. No Obligation to Provide Preferential Treatment: May It Diminish the Effectiveness of the Waiver?

The mechanism that was adopted at the 8th WTO Ministerial Conference of December 2011 to implement the *LDCs Modalities* and therefore enhance the participation of LDCs within the multilateral trade in services is a waiver[33] that acts similar to a traditional enabling clause,[34] providing the possibility to depart from the MFN principle.[35] It states that "[...] Members may provide preferential treatment to services and service suppliers of least-developed countries […]".[36] This is a voluntary and non-binding provision, by its nature of exception. In this sense, the concession of preferential treatment in services to LDCs is not enforceable. As a reference, the tariff preferences in the GSP do not constitute a binding commitment either.[37]

As some scholars have pointed out, one of the main problems of S&D provisions is their inefficiency[38] which is due to the fact that they are not binding

32 WTO, *Communication From Zambia on Behalf of LDCs: Draft Text for a Waiver Decision*, WTO Doc JOB/SERV/18, 30 June 2010 (copy on file with author) [WTO, Communication From Zambia on Behalf of LDCs: Draft Text for a Waiver Decision].

33 WTO, *Preferential Treatment to Services and Services Suppliers of Least-Developed Countries: Decision of 17 December 2011*, WTO Doc WT/L/847, 19 December 2001 [WTO, Preferential Treatment to Services and Services Suppliers of Least-Developed Countries: Decision of 17 December 2011].

34 It is, for instance, mentioned by H. Schloemann, 'The LDC Service Waiver: Making it Work', 1 *Bridges Africa* (2012) 4, available at http://ictsd.org/bridges-news/bridges-africa/news/the-ldc-services-waiver-making-it-work (last visited 15 August 2014).

35 As the waiver covers the entire scope of MFN obligation in GATS, the preferences covered include any services and services suppliers, whether or not any commitment is inscribed.

36 WTO, *Preferential Treatment to Services and Services Suppliers of Least-Developed Countries: Decision of 17 December 2011*, *supra* note 33, 2 (operative part 1).

37 See GATT, *Generalized System of Preferences: Decision of 25 June 1971*, Doc L/3545, 28 June 1971, 1 (Preamble, para. 5) and the WTO Appellate Body Report, *EC – Tariff Preferences*, WT/DS246/AB/R, 7 April 2004, 36-37 & 44-45, paras 92 & 111. They stated that WTO members are 'encouraged' to grant tariff preferences under the Enabling Clause; not that they are obliged to do so.

38 F. Mangeni, 'Strengthening Special and Differential Treatment in the WTO Agreements: Some Reflections on the Stakes for African Countries', *ICTSD Resource Paper* (2003)

or enforceable as initially demanded by the LDCs.[39] On the one hand, lack of mandatory provisions in the waiver has been outlined as a main concern since LDCs will have to rely on other WTO members' willingness to provide S&D through this instrument.[40] For this reason, not only in this particular case but also in S&D provisions in general, LDCs usually support a reading of S&D provisions as legally enforceable clauses,[41] in the sense that it could be possible to submit a dispute under the WTO adjudicatory system.

On the other hand, even if S&D provisions and market access preferences for trade in services in particular were considered legally enforceable clauses and could consequently establish the main argument to start a WTO dispute, it appears that it would not be enough to implement the Panel or Appellate Body report. This is particularly true as LDCs do not have an important retaliation power,[42] which may be the reason why some LDCs have proposed to strengthen

4, 13; L. Bartel & C. Häberli, 'Binding Tariff Preferences for Developing Countries Under Article II GATT', 13 *Journal of International Economic Law* (2010) 4, 969, 974-976 (for example); M. Irish, 'Special and Differential Treatment, Trade and Sustainable Development', 4 *Law and Development Review* (2011) 2, 72, 72 (for example). It is also said that most S&D are a type of soft law. See, e.g., G. Olivares, 'The Case for Giving Effectiveness to GATT/WTO Rules on Developing Countries and LDCs', 35 *Journal of World Trade* (2001) 3, 545, 548-550.

39 See also the proposal of the LDCs group of 2006 regarding the binding character of S&D provisions: "1. [...] non-reciprocal special priority shall be accorded only to least developed countries in sectors and modes of supply of interest to them. 2. Developed country Members shall, and developing country Members declaring themselves in a position to do so should, accord non-reciprocal special priority to least developed countries." WTO, *Communication From the Republic of Zambia on Behalf of the LDC Group: A Mechanism to Operationalize Article IV:3 of the GATS*, *supra* note 29, 3.

40 See, for instance, M. R. Islam & A. Bhattacharya, 'WTO's Services Waiver for LDCs: Between Hope and Doubt', *The Daily Star* (9 January 2012), available at http://thedailystar.net/newDesign/news-details.php?nid=217560 (last visited 15 August 2014).

41 Enforceability of S&D provisions within WTO law is a controversial issue as the drafting language is imprecise. See, for instance, E. Kessie, 'Enforceability of the Legal Provisions Relating to Special and Differential Treatment Under the WTO Agreements', 3 *Journal of World Intellectual Property* (2000) 6, 955.

42 Dispute Settlement Body rulings in WTO law allow retaliation in cases where the condemned country does not modify the sanctioned behavior. Nonetheless, retaliation is not a major power in the hands of LDCs as they are generally small economies. This view is implicit, for instance, in H. Nottage, 'Developing Countries in the WTO Dispute Settlement System', *GEG Working Paper* (2009) 47, B. 1.

the developing countries' enforcement power in the Dispute Settlement Body (DSB).[43]

In the second paragraph of the services waiver members are required to specify, among other issues, "[...] the period of time during which the Member is intending to maintain those preferences [...]".[44] Even though there is, at least, a requirement to approximately establish the duration of any preferential treatment provided, which is in line with the best-endeavor nature of the waiver, it is also true that it is merely mandatory to set the 'intended' duration. WTO members are free to withdraw any preferential measure at any time, which introduces an element of unpredictability that could affect the decision of LDCs' potential businesses and investors.[45] As in the case of tariff preferences, it appears that preferences in trade in services will be authorized on dubious grounds and without due process. In terms of Bartel and Häberli, it "reduces [...] [the] potential value" of the preferences.[46]

In the end, what may reduce the effectiveness of the mechanism are both the fact that the waiver acts as an 'Enabling Clause' and that even provisions

43 The LDC Group together with the African Group proposed an obligation for the DSB to recommend monetary or other compensation, taking into account any injury suffered, with retroactive effect from the date of adoption of the measure found to be inconsistent with the covered agreement. See WTO, *Text for LDC Proposal on Dispute Settlement Understanding Negotiations: Communication From Haiti*, WTO Doc TN/DS/W/37, 17 January 2003, 2-3, para. VII [WTO, Text for LDC Proposal on Dispute Settlement Understanding Negotiations: Communication From Haiti]; WTO, *Text for the African Group Proposals on Dispute Settlement Understanding Negotiations: Communication From Kenya*, WTO Doc TN/DS/W/42, 24 January 2003, 3, para. VIII. The LDCs also asked for the possibility to allow a 'collective' suspension. See WTO, *Text for LDC Proposal on Dispute Settlement Understanding Negotiations: Communication From Haiti, supra* this note, 3, para. VIII. In a more recent communication, the African Group asks, related with the effective implementation of recommendations and rulings: "the DSB, upon request, shall grant authorization to the developing or least-developed country Member and any other Members to suspend concessions or other obligations within 30 days." WTO, *Text for the African Group Proposals on Dispute Settlement: Understanding Negotiations: Communication from Côte d'Ivoire*, WTO Doc TN/DS/W/92, 5 March 2008, 2, para. III (c). See also G. Shaffer, 'How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies', *ICTSD Resource Paper* (2003) 5, 38 *et seq.*

44 WTO, *Preferential Treatment to Services and Services Suppliers of Least-Developed Countries: Decision of 17 December 2011*, *supra* note 33, 2 (operative part, para. 2).

45 UNCTAD, *Ways and Means of Enhancing the Utilization of Trade Preferences by Developing Countries, in particular LDCs, as well as Further Ways of Expanding Preferences: Report by the UNCTAD Secretariat*, Doc TD/B/COM.1/20, 21 July 1998, 16, para. 68.

46 Bartel & Häberli, *supra* note 38, 969.

as important as those related to the duration of any preferential treatment are non-binding.

Other issues related with the non-binding character of the mechanism and its effectiveness are the connection with the negotiations on trade in services and the LDCs' participation in the process. Negotiations to liberalize services within the GATS are done mainly through a request-offer approach[47] and LDCs have been given more flexibility to commit or not according to their development situation. In particular, the *Modalities for Special Treatment* for LDCs establish: "Members [...] shall exercise restraint in seeking commitments from LDCs" and "not seek the removal of conditions which LDCs may attach when making access to their markets",[48] which in a sense may push them out of negotiations.[49]

It appears that LDCs are going from 'request offer' to a 'request only' approach of negotiation, as they are released from taking part in the normal process of negotiations due to their special circumstances, and with the waiver the LDCs should first submit a request to developed countries according to their particular sectors and subsectors of interest. However, at the same time the new mechanism does not impose any obligation on other WTO members to offer preferential treatment. In this sense, the effectiveness of the waiver is depending not only on the political willingness of developed countries, but on the active negotiation role of LDCs as well.

However, the effectiveness of the entire mechanism may be even lower if it is taken into account, as in previous documents such as the *LDCs Modalities* and the *Hong Kong Ministerial Declaration*, that LDCs have been released of any pressure to negotiate.

In other words, non-reciprocity could work more successfully if it is accompanied by a binding obligation of developed and developing countries to provide preferences to LDCs.[50] In the current form, LDCs only have the

47 WTO, *Guidelines and Procedures for the Negotiations on Trade in Services*, WTO Doc S/L/93, 29 March 2001, 2, paras 11-12 [WTO, Guidelines and Procedures for the Negotiations on Trade in Services].

48 WTO, *Modalities for the Special Treatment for Least-Developed Country Members*, *supra* note 20, 1, para. 4. WTO, *Doha Work Programme: Ministerial Declaration*, *supra* note 20, 5, para. 26 provided that in recognition of the particular circumstances of LDCs, "they are not expected to undertake new commitments".

49 WTO, *Guidelines and Procedures for the Negotiations on Trade in Services*, *supra* note 47, 2, paras 11-12.

50 This view is implicit in P. Macrory & S. Stephenson, 'Making Trade in Services Supportive of Development in Commonwealth Small and Low-income Countries', *Commonwealth Economic Paper Series* (2011) 93, 5.

possibility of S&D being granted if they enter into particular negotiations out of the general process having strong, technical, and specific arguments in their request. In this particular negotiation for preferential treatment, it is important for LDCs to identify their individual preferences needs.[51]

C. Beyond Market Access Preferences?

The LDC services waiver is based on two types of measures that developed and developing countries can adopt to provide preferential treatment to LDCs departing from the MFN principle. First, members can provide voluntary preferential treatment related to the application of market access measures, with the sole requirement of notification to the Council for Trade in Services (CTS) as a fast procedure. Second, members can also provide preferential treatment in any other measure if it is approved by the CTS.[52] For this reason, it can be argued that the services waiver is primarily focused on market access preferences.

Market access provisions in the reading of Article XVI of the GATS call for members not to adopt certain limitations when specific commitments were undertaken, in order to allow progressive openness in services sectors.[53]

The measures regarding which WTO members may automatically provide preferential treatment to LDCs are restricted to those listed in Article XVI:2, which essentially deal with quantitative restrictions to services suppliers.[54] These include quotas and other limitations related with the type of legal entity or economic needs tests. For example, the member could grant

51 Recently as response to a request by LDC Group, the Secretariat of WTO has developed some elements to be considered in identifying possible preferences to LDCs. WTO, *LDC Services Waiver: Background Note by the Secretariat*, WTO Doc JOB/SERV/135, 22 February 2013, 4-7, paras 2.1-2.19.

52 WTO, *Preferential Treatment to Services and Services Suppliers of Least-Developed Countries: Decision of 17 December 2011*, *supra* note 33, 2 (operative part 1).

53 Note here that the typology of trade barriers in services is not clear and generally there are some overlaps between Art. XVI and Art. XVII. See Delimatsis, *International Trade in Services and Domestic Regulations*, *supra* note 15, 76-83.

54 Except for Art. XVI:2(e) GATS which states a qualitative limitation (forms of establishment), the others are quantitative. See generally P. Delimatsis & M. Molinuevo, 'Article XVI GATS', in Wolfrum, Stoll & Feinäugle (eds), *supra* note 11, 367. The limitations on Art. XVI:2 are limitations on the number of services suppliers, limitations on the total value of services transactions, limitations on the total number of services operations, limitations on the total number of natural persons that might be employed in a particular service sector, limitations that restrict or require specific types of legal entities, and limitations on the participation of foreign capital.

additional immigration quotas for midwifes from LDCs, extend the number of construction staff for contractors from LDCs, or release geographic economic needs tests for hotel licenses.[55] As in most cases these market access preferences are clearly identified, the waiver only includes this type of measures under its fast procedure.

In contrast to what is now stated in the waiver, another option would have been to establish a general provision to provide preferential treatment to all measures included in the GATS, in modes and sectors of interest to LDCs,[56] instead of subediting potential preferences to other measures than those of Article XVI to a CTS consultation. In the current wording of the waiver, the possibility of preferences concerning national treatment, domestic regulatory preferences as the ones defined in Article VI:4, and other preferences like tax exemptions in fact not only depend on developed countries' willingness, but are also limited by the CTS' authorization.

For instance, Schloemann provides some examples of regulatory preferences such as recognition of qualifications based on practical experience for LDC professionals or facilitated licensing procedures for LDC providers among others.[57] Others options can be to administrate regulations with shorter periods to resolve applications for licenses in construction services for LDCs, or lower application fees for LDCs.

The WTO has stated that preferential market access will help to enhance the participation of LDCs in multilateral trade in services,[58] and the type of preferences covered by the waiver need to go beyond market access; a limitation of the coverage to market access only is contrary to the spirit of the *LDC Modalities*.[59] Indeed, when LDCs submitted the 2006 proposal for the waiver, they aimed at a wide scope and therefore did not mention any differentiation of

55 For similar and other examples see, e.g., Melchior, *supra* note 21, 17.

56 See the similar proposal of 2006 stating that non-reciprocal special priority shall be accorded only to least developed countries in sectors and modes of supply of interest to them. As long as it responds to promote exports of LDCs and responds to development needs and concerns of LDCs, provided on a permanent basis. WTO, *Communication From the Republic of Zambia on Behalf of the LDC Group: A Mechanism to Operationalize Article IV:3 of the GATS*, *supra* note 29, 1 (para. 1).

57 Schloemann, *supra* note 34.

58 See WTO, *Market Access for Products and Services of Export Interest to Least-Developed Countries: Note by the WTO Secretariat*, WTO Doc WT/COMTD/LDC/W/51, 10 October 2011, 33, para. 58.

59 South Centre, *LDC Package: State of Play and Proposed Language for WTO's MC8*, Doc SC/TDP/AN/MC8/1, November 2011, 8 (para. 3) [South Centre, LDC Package: State of Play and Proposed Language for WTO's MC8]; WTO (Council for Trade in Services,

treatment between market access limitations falling within Article XVI and any other type of measures.[60] This view seems to be supported by other institutions, which believe that other liberalization measures regarding qualitative restrictions shall be taken to extend the scope of the waiver beyond market access. This would help to ensure that domestic regulations do not act as barriers to LDCs services exports.[61]

During the negotiations, some members in favor of a narrower scope agreed on the application of the waiver to measures described in Article XVI and also showed some degree of flexibility indicating "a willingness to be flexible by considering an extension of coverage to Article XVII measures as well".[62] One important problem for LCDs was to explain and name the types and specific examples of preferential treatment beyond the quantitative limitations on market access of Article XVI they were interested in. This made it difficult to determine the implications of such potential preferential treatment related to national treatment or other rules and domestic regulations.[63] On the other hand, all the while developed countries held that increasing the scope of the waiver beyond market access preferences would sink the entire process.[64] The United States of America (U.S.) were concerned about creating an instrument that would apply too broadly and might result in unintended consequences.[65]

Other non-LDC members commented that preferential treatment related to other measures not related to limitations of Article XVI could be particularly

Special Session), *Report of the Meeting Held on 15 April 2011: Note by the Secretariat*, WTO Doc TN/S/M/42, 21 June 2011, 13, para. 69.

60 WTO, *Communication From Zambia on Behalf of LDCs: Draft Text for a Waiver Decision*, *supra* note 32, para. 1.

61 South Centre, *Analysis of Draft Waiver Decision on Services and Services Suppliers of LDCs*, Doc SC/TDP/AN/SV/14, December 2011, 9, para. 42 [South Centre, Analysis of Draft Waiver Decision on Services and Services Suppliers of LDCs].

62 WTO (Council for Trade in Services, Special Session), *Report of the Meeting Held on 25 November 2010: Note by the Secretariat*, WTO Doc TN/S/M/39, 13 January 2011, 1, para. 5 [WTO (Council for Trade in Services, Special Session), Report of the Meeting Held on 25 November 2010].

63 WTO (Council for Trade in Services, Special Session), *Report of the Meeting Held on 18th March 2011: Note by the Secretariat*, WTO Doc TN/S/M/41, 7 April 2011, 1-2, para. 4 [WTO (Council for Trade in Services, Special Session), Report of the Meeting Held on 18th March 2011].

64 WTO (Council for Trade in Services, Special Session), *Report on the Meeting Held on 2 July 2010*, WTO Doc TN/S/M/37, 24 September 2010, 2-3, para. 13 [WTO (Council for Trade in Services, Special Session), Report on the Meeting Held on 2 July 2010].

65 WTO (Council for Trade in Services, Special Session), *Report of the Meeting Held on 25 November 2010*, *supra* note 62, 5, para. 22.

important in trade in services of LDCs. Giving a broader approach to the waiver could provide the opportunity to the members to determine the measures on which preferential treatment would be granted with more flexibility. In any case, the parameters of preferential treatment would be decided on discretionally by each granting member.[66]

It is, however, important to consider that, despite regulations being used to be the main barriers in trade for services, preferences in domestic regulation could sometimes be impossible or illogical to implement. This would be due to the many regulations based on a particular domestic public policy interest, and due to preferential treatment affecting the content of a regulatory requirement that may generate undesirable effects.[67] For instance, requirements of education or training for licenses and qualifications play an important role in the protection of the consumers and in public policy in general. As well, many countries will not allow lower capital requirements to LDC's banks as it would firstly be hazardous for the quality of the financial system in the country that granted such preferential treatment, and secondly be contrary to their preference to use financial prudential regulations.[68]

The waiver may be useful to address formal regulatory barriers or administrative limitations. For example, it may be possible to set a fast-track for LDCs providing them less burdensome procedures than like services and service-suppliers of non-LDCs. Such mechanism could be done through a guarantee of origin that would certify that the preference operates only when the service is supplied by a LDC exporter. In this sense, the *Agreement on Technical Barriers to Trade* and the *Agreement on the Application of Sanitary*

66 In this sense, Mexico mentioned that "Members should have the courage to go beyond Article XVI, since it was up to each granting Member to decide or not to grant the preference". *Ibid.*, 4-5, para. 21. The Chinese representative said that "Members offering preferential treatment to LDCs had full autonomy in determining the specific parameters of the preferential treatments and defining their scope. The delegation did not think, therefore, that Members should limit the scope of the waiver." See WTO (Council for Trade in Services, Special Session), *Report of the Meeting Held on 18th March 2011*, *supra* note 63, 2, para. 7.

67 Melchior, *supra* note 21, 17 & 31.

68 The GATS allows prudential regulation related to financial services which grants enough regulatory autonomy for members to decide whether they liberalize or not. The authorization to use prudential regulation under the GATS is based on the *Annex on Financial Services*. See *Annex on Financial Services* of the GATS, para. 2 (a) (*supra* note 9, 209, 209). See also M. Yokai-Arai, 'GATS' Prudential Carve Out in Financial Services and Its Relation With Prudential Regulation', 57 *International and Comparative Law Quarterly* (2008) 3, 613, 623-625.

and Phytosanitary Measures already include general disciplines to provide that no measure becomes an unnecessary barrier to trade.[69] In services, the factual negotiations on domestic regulation involve the possibility to implement a necessity test to ensure that measures relating to qualification requirements and procedures, technical standards, and licensing requirements do not constitute unnecessary barriers to trade in services.[70]

Although a fast-track for LDCs might be legally feasible, it seems that a broader approach of S&D within the waiver would be unlikely to happen as it might require political willingness and a clear identification of the export priorities for the LDCs in the granting country. It also appears to be difficult to demonstrate how and under which form regulatory preferences could lead to a broader market access for LDCs, reducing or eliminating disguised restrictions. This could be seen as an intrusion into the regulatory autonomy of the granting country.

Furthermore, a systemic problem related to the unclear distinctions and connection between the disciplines of the GATS would remain[71] which could influence the decisions of developed countries to grant S&D under the waiver

69 M. Krajewski, *National Regulation and Trade Liberalization in Services: The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* (2003), 131 [Krajewski, National Regulation and Trade Liberalization in Services]. See *Agreement on Technical Barriers to Trade*, 15 April 1994, Art. 2 (2) & Art. 2 (3), 1868 UNTS 120, 121 and *Agreement on the Application of Sanitary and Phytosanitary Measures*, 15 April 1994, Art. 5 (6), 1867 UNTS 493, 496.

70 Art. VI:4 GATS establishes the mandate to negotiate future disciplines on domestic regulations; in paragraph (b) it states that the disciplines would be "not more burdensome than necessary to ensure the quality of the service". GATS, Art. VI:4(b), *supra* note 9, 190. As Delimatsis points out, the necessity test is central to this mandate. See P. Delimatsis, 'Determining the Necessity of Domestic Regulations in Services: The Best is Yet to Come', 19 *European Journal of International Law* (2008) 2, 365, 365 [Delimatsis, Determining the Necessity of Domestic Regulations in Services]. The implementation of a necessity test in domestic regulation is an important controversial issue in the Working Party on Domestic Regulation negotiations. See generally WTO (Working Party on Domestic Regulation), *Report of the Meeting Held on 1 April 2009: Note by the Secretariat*, WTO Doc S/WPDR/M/40, 12 May 2009.

71 Note that there is a doctrine debate about the distinction between the Art. XVI on market access and Art. VI related to domestic regulation. See for this J. Pauwelyn, 'Rien ne Va Plus? Distinguishing Domestic Regulation From Market Access in GATT and GATS', 4 *World Trade Review* (2005) 2, 131; P. Delimatsis, 'The Interaction Between Articles VI, XVI, XVII and XVIII GATS', *supra* note 11, 1059-1080; M. Krajewski, 'Article VI GATS', in Wolfrum, Stoll & Feinäugle (eds), *supra* note 11, 165, 195-196, paras 73-74 [Krajwski, Article VI GATS]. In the *United States – Gambling* dispute the panel found that Arts VI:4 & VI:5 v. Art. XVI are mutually exclusive, however, this conclusion was

It seems that market access preferences, related to Article XVII will have a low impact in LDCs' trade in services, therefore addressing other regulatory barriers might help to enhance the effectiveness of this mechanism. Despite the importance of these non-market access preferences, according to the waiver, if a member wants to provide preferential treatment in measures other than the related to Article XVI, it will need to obtain the previous authorization of the CTS to be implemented.[72] This decision appears to be related to the position of several developed countries that want to analyze in detail and case by case this type of preferences. In this case, the implementation will also depend on how demanding and specific LDCs demand of preferences could be.

Thus, an agreement for a 'Fast Track', providing LDCs preferences related to regulatory concerns, such as less burdensome administrative procedures and requirements, might be difficult to achieve. The negotiations on new disciplines on domestic regulation of Article VI, which are still at an impasse and ongoing due to the divergent opinions of the members regarding their content, can be considered a similar development.[73]

Furthermore, the services waiver is focused on market access for LDCs services suppliers; however, it is also known that in general LDCs have supply side and regulatory constraints on their own, which makes it difficult for them to benefit from market access preferences.[74] Other options to address internal concerns of LDCs shall be examined below.

questioned. Panel Report, *United States – Gambling*, WT/DS285/R, 10 November 2004, 206, para. 6.305.

72 The waiver sets two types of procedures for the different measures that can be adopted: preferences that fall in the scope of Art. XVI GATS and a longer procedure for any other type of preference that do not fall within the scope of Art. XVI. As qualitative measures fall within the latter category, they need the approval of the CTS. See WTO, *Preferential Treatment to Services and Services Suppliers of Least-Developed Countries: Decision of 17 December 2011*, *supra* note 33, 2 (operative part 1).

73 See C. Manrique, 'El potencial del acuerdo general sobre el comercio de servicios (AGCS) en la agenda del desarrollo humano', in J. Escribano Úbeda-Portugués (coord.), *Comercio, Economía, Desarrollo y Derecho Internacional: Nuevos retos en la agenda global del siglo XXI* (2013), 76, 91 with further references.

74 Melchior, *supra* note 21, 31 (para. 41). As an example, Cambodia has not yet approved basic laws regarding services trade. See WTO, *Trade Policy Review: Cambodia: Report by the Secretariat*, WTO Doc WT/TPR/S/253, 27 September 2011, 19-20 (Table II.1).

D. Rules of Origin: Could They Help to Enhance the Mechanism's Efficiency?

Rules of origin are the criteria needed to determine the national source of a product or service.[75] The extent to which products with non-parties' inputs which are imported intermediately entitle for trade preferences is set by rules of origin.[76] (i.e. it is necessary to determine the level of transformations of the imported good). This seeks to prevent the transshipment of goods exports to a Preferential Trade Agreement (PTA) party only to obtain the preferential tariff treatment.

The restrictiveness of agreed rules of origin in services will determine the extent to which non-members can benefit from trade or investment preferences. These rules are generally used in a PTA. Here, the general rule is to adopt the most liberal rule of origin – the substantial business operations test, whereby any third country investor carrying out substantial business activities in the territory of a party to a PTA must be treated like an investor from any PTA party.[77]

Nevertheless, rules of origin in services are different from those in goods. As goods are tangible, it is possible to determine the percentage that has been produced in a given country, which is not the case in services, where the outcome is normally intangible and it is therefore not easy to determine the level of service transformation or the percentage that has been produced in each country.[78] Moreover, most services require the movement of either the consumer

75 On rules of origin in trade in services see B. Hoekmann, 'Rules of Origin for Goods and Services: Conceptual Issues and Economic Considerations', 27 *Journal of World Trade* (1993) 4, 81; A. Beviglia Zampetti & P. Sauvé, 'Rules of Origin for Services: Economic and Legal Considerations', in O. Cadot *et al.* (eds), *The Origin of Goods: Rules of Origin in Regional Trade Agreements* (2006), 114. Rules of origins are defined as " [...] those laws, regulations and administrative determinations of general application applied by any Member to determine the country of origin of goods [...]". *Agreement on Rules of Origin*, 15 April 1994, Art. 1:1, 1868 UNTS 397, 397.

76 Fink & Molinuevo, 'East Asian Free Trade Agreements in Services', *supra* note 11, 291.

77 According to Art. V:5 of the GATS, but ambiguously Art. V:3(b) GATS affords Parties to South-South PTAs the right to adopt a more restrictive rule of origin and deny the benefits of integration to third country investors that are not owned or controlled by juridical persons of a PTA Party.

78 The issue of domestic added value in services or intermediate inputs in services has not been developed. Currently UNCTAD is involved in a project related to the Global Value Chain (GVC), analyzing the value added in global trade to map the distribution of valued added and participation of a country in GVCs and in several sectors. They calculate that the share of services value-added exports in global value-added exports has increased at a faster rate than in manufactured products. See, e.g., R. Banga, 'Regional Value Chains

or the supplier.[79] Therefore, rules of origin in services PTAs are usually focused on identifying the origin of services suppliers.[80]

The rules of origin of trade in services in PTAs usually take into account three different contexts: the origin of services, the origin of service suppliers in the form of juridical persons, and the origin of service suppliers in the form of natural persons.[81]

The services waiver is opted for identifying and defining the norm of origin of a 'service supplier of a least-developed country' in the form of natural and juridical person in more detail, and describes the specific requirements in the case of supply of a service through commercial presence. Depending on the agreed criteria to determine the origin of services suppliers, potential suppliers benefiting from the services waiver may vary. Consequently, the importance of rules of origin lies in whether they are more liberal or more restrictive.[82]

Rules of origin in the LDCs services waiver identifying the service suppliers which can benefit from preferential treatment appear to be 'liberal rules' as it will be explained. On the one hand, developed countries are concerned to tackle free-riding.[83] Indeed, highly liberal rules might let non-LDC suppliers benefit from the application of the waiver. On the other hand, it is also noticed that, to some extent, liberal rules could help LDCs to enhance the benefits from any market access preference granted in pursuance of this waiver because, as it was mentioned before, one of LDCs' problems is their own supply side capacity[84] which could improve with the investment from a non-LDC country. In fact,

– Background Paper: Measuring Value in Global Value Chains' (May 2013), available at http://unctad.org/en/PublicationsLibrary/ecidc2013misc1_bp8.pdf (last visited 31 August 2014).

79 C. Fink & D. Nikomborirak, 'Rules of Origin in Services: A Case Study of Five ASEAN Countries', in M. Panizzon, N. Pohl & P. Sauvé (eds), *GATS and the Regulation of International Trade in Services* (2008), 111, 114-115 [Fink & Nikomborirak, Rules of Origin in Services].

80 South Centre, *Analysis of Draft Waiver Decision on Services and Services Suppliers of LDCs*, *supra* note 61, 6, para. 30. According to Fink and Nikomborirak rules of origin in services have opted to identify the service supplier instead of the services itself because most services require proximity and therefore usually cannot be supplied cross-border. See Fink & Nikomborirak, 'Rules of Origin in Services', *supra* note 79, 115.

81 Fink & Molinuevo, 'East Asian Free Trade Agreements in Services', *supra* note 11, 291.

82 South Centre, *LDC Package: State of Play and Proposed Language for WTO's MC8*, *supra* note 59, 8 (para. 7).

83 Schloemann, *supra* note 34.

84 South Centre, *LDC Package: State of Play and Proposed Language for WTO's MC8*, *supra* note 59, 8 (para. 7).

this effect is clearer in the case of liberal rules of origin applied to juridical persons as they could help to attract more foreign direct investment (FDI), but it is not so clear in the case of individuals, whose relocation to a country that is covered under the waiver may not play an important role in attracting FDI.[85]

Related to the definition of the norm of origin of 'services of a least developed country', the waiver does not contain any specification; it therefore appears necessary to consider the GATS definitions under Article XXVIII for its interpretation.[86]

Regarding the rules of origin for services suppliers the waiver distinguishes the case of natural and juridical persons to define under which circumstances LDCs can benefit from the discriminatory preferential treatment.[87] In the following, the authors will focus on the ambiguities of these rules.

Some of the criteria usually employed to determine the origin of service suppliers in the case of a natural person are nationality, residence (permanent or temporary), and the center of economic interests.[88] The waiver states that a natural person is considered a supplier eligible for a preference, if he or she is "a natural person of a least-developed country".[89] While the waiver does not specify any details about the definition applicable to 'a person of a least- developed country', the GATS does not have any specific disciples related to rules of origin of natural persons in PTAs. However, the GATS provides some guidance within its definitions. Indeed, Article XXVIII:(k) establishes two cumulative pre-conditions to define the meaning of a natural person from another member country: first, the requirement of residence in that other member country and, second, to have the nationality of that other member. Moreover, the latter could be substituted by the right of permanent residence if this member has no nationals[90] or if it "accords substantially the same treatment to its permanent

85 Fink & Nikomborirak, 'Rules of Origin in Services', *supra* note 79, 118.

86 The rule of origin related to 'services of a LDC', in the PTAs is normally based on the definition of 'services of another party'. This definition is established by Art. XXVIII:(f) GATS. It refers to the services which are supplied 'from a territory of another Member" (related to mode 1 and 2) and 'by a service supplier of that other Member' (related to mode 3 and 4). See GATS, Art. XXVIII:(f)(i) & (ii), *supra* note 9, 203.

87 WTO, *Preferential Treatment to Services and Services Suppliers of Least-Developed Countries: Decision of 17 December 2011*, *supra* note 33, 2-3 (operative part 5).

88 See Beviglia Zampetti & Sauvé, *supra* note 75, 114-145; Fink & Nikomborirak, 'Rules of Origin in Services', *supra* note 79, 122.

89 See WTO, *Preferential Treatment to Services and Services Suppliers of Least-Developed Countries: Decision of 17 December 2011*, *supra* note 33, 2 (operative part 5 (a)).

90 GATS, Art. XVIII:(k)(i), *supra* note 9, 203. This is the case of a member which is not a State under international law, e.g. the European Union (EU).

residents as it does to its nationals".[91] Consequently, it seems that under the services waiver both nationals and permanent residents in LDCs, depending on national law,[92] could benefit from the measures adopted in pursuance of the services waiver.

Finally, the waiver could include more liberal rules of origin for natural persons using the 'center of economic interests' criterion. On the one hand, this may widen the scope of the waiver to individual foreign suppliers that have no nationality or residence from a LDC. On the other hand, this would add legal uncertainty to the scope of the waiver, as this clause is difficult to interpret. Some elements that could be useful for this interpretation are the minimum numbers of years of residency, the payment of local income taxes, or the owning or renting of a dwelling.[93]

The liberality/restrictiveness dichotomy of rules of origin is more important when referred to juridical persons, in the sense that supply side problems for LDCs are more related to this type of suppliers. The services waiver states that those juridical persons which are "constituted or otherwise organized under the law of a least-developed country", but which are owned or controlled[94] by a natural or juridical person of a non-LDC, must be "engaged in substantive business operations in the territory of any least-developed country" to be considered a services supplier of a LCD and to benefit from the waiver.[95]

91 GATS, Art. XVIII:(k)(ii), *supra* note 9, 204. See also C. Feinäugle, 'Article XXVIII GATS', in Wolfrum, Stoll & Feinäugle (eds), *supra* note 11, 540, 558-560, paras 35-41 [Feinäugle, Article XXVIII GATS].

92 Nevertheless, it is important to note that even though nationality and permanent residency attribution falls in the domain of Private Law, there may arise ambiguous situations like double nationality, that in case of conflict may be limited by rules of International Public Law such as the 'genuine link'. See W. Zdouc, *Legal Problems Arising Under the General Agreement on Trade in Services: Comparative Analysis of GATS and GATT* (2002), 139-140.

93 The different types of suppliers that are included in a preferential treatment depending on whether rules of origin are more liberal or restrictive and the types of rules of origin applicable to individuals are identified in Fink & Nikomborirak, 'Rules of Origin in Services', *supra* note 79, 118 *et seq*.

94 Arts XXVIII:(n)(i) & (ii) GATS (*supra* note 9, 204) define 'owned by persons of a Member' "[...] if more than 50 percent of the equity interest in it is beneficially owned by persons of that Member" and 'controlled by persons of a Member' " [...] if such persons have the power to name a majority of its directors or otherwise to legally direct its actions". See also Feinäugle, 'Article XXVIII GATS', *supra* note 91, 563-564, paras 49-51.

95 WTO, *Preferential Treatment to Services and Services Suppliers of Least-Developed Countries: Decision of 17 December 2011*, *supra* note 33, 2-3 (oparative part 5 (b)) states that: "[...] a juridical person which is either: (i) constituted or otherwise organized under the law of a

This criterion is relatively liberal, as it gives the possibility to services suppliers owned or controlled by a natural or juridical person of a non-LDC to be granted with the preferential treatment of the waiver, with the condition to carry out substantive business operations in the LDC.[96]

This contrasts with Article V:6 of the GATS which just refers to the requirement to be a "juridical person constituted under the laws of a party".[97] This could be interpreted more restrictively as it does not include 'otherwise organized' that can be for example a branch or representative office.

Schloemann pointed out that the criterion of substantive business operations is a good balance between liberal rules and avoiding free-riding.[98] It has also been mentioned that, in fact, rules of origin that focus on a location requirement like substantive business operations instead of the criteria of ownership are more liberal.[99] The waiver does not require that the juridical person has also to be the owned or controlled by a LDC person, it only requires to be 'engaged in substantive business operations in the territory of any least-developed country'. Moreover, the real extent of preferential treatment will also depend on the meaning of 'substantive business operation'; in this respect, the waiver does not provide further guidance so we turn to the definition of 'juridical person of another Member' provided by Article XXVIII:(m) GATS.[100] However, the GATS does not provide any further detail regarding the meaning of 'substantive business operation' and therefore this concept will have to be

least-developed country and, if it is owned or controlled by natural persons of a non-least-developed country Member or juridical persons constituted or otherwise organized under the law of a non-least-developed country Member, is engaged in substantive business operations in the territory of any least-developed country; or (ii) in the case of the supply of a service through commercial presence, owned or controlled by: 1. natural persons of least-developed countries; or 2. juridical persons of least-developed countries identified under subparagraph (i)."

96 Fink & Molinuevo, 'East Asian Free Trade Agreements in Services', *supra* note 11, 293.

97 GATS, Art. V:6, *supra* note 9, 189.

98 Schloemann, *supra* note 34.

99 Melchior, *supra* note 21, 26-27.

100 According to Art. XXVIII:(m) GATS (*supra* note 9, 204) the term 'juridical person of another Member' is defined as "a juridical person which is either: (i) constituted or otherwise organized under the law of that other Member, and is engaged in substantive business operations in the territory of that Member or any other Member; or (ii) in the case of the supply of a service through commercial presence, owned or controlled by: 1. natural persons of that Member; or 2. juridical persons of that other Member identified under subparagraph (i)".

clarified.[101] Nonetheless, it has also been affirmed that the concept of 'business operations' covers the production, distribution, marketing, and delivery of a service as provided for in Art. XXVIII,[102] and that other GATS provisions like Article V:6 have a different understanding of 'substantive business operations', referring to "a service supplier engaged in regular commercial activity"[103] as one that engages in substantive business operations in the territory of the parties to such agreement. Nevertheless, Feinäugle then points out that the word 'regular' must be examined on a case-by-case basis.[104] Existing rules of origin for other regional or preferential trade agreements can give different definitions. For example, the *Mainland and Macau Closer Economic Partnership Arrangement*, although focused on rules of origin for goods, sets as a criterion for 'substantive business operations' that a service supplier shall be engaged for 3 years or more.[105] Other criteria are used in the case of the *Mainland and Hong Kong Closer Economic Partnership Arrangement*, where, for instance, the company must employ 50 percent of its total employees in Hong Kong.[106]

Consequently, even if including the criteria of 'substantive business operations' implicitly tends towards more liberal than restrictive rules of origin, it might be necessary to establish more guidance on the scope of this legal formula, firstly to see whether they are truly quite liberal, and secondly to provide legal certainty to non-LDC members issuing any preferential treatment in pursuance of the services waiver.

101 See WTO (Council for Trade in Services, Special Session), *Report on the Meeting Held on 2 July 2010*, *supra* note 64, para. 14, in which the EU argues that Art. XVIII GATS does not offer appropriate mechanisms to clarify in that case the previous LDC proposal. The lack of clear criteria to identify the 'scope of substantive business operations' is implicit in H. Wang, 'WTO Origin Rules for Services and the Defects: Substantial Input Test as One Way Out?', 44 *Journal of World Trade* (2010) 5, 1083.

102 WTO, *Compendium of Issues Related to Regional Trade Agreements: Background Note by the Secretariat*, WTO Doc TN/RL/W/8/Rev.1, 1 August 2002, 27, para. 112.

103 T. Cottier & M. Molinuevo, 'Article V GATS', in Wolfrum, Stoll & Feinäugle (eds), *supra* note 11, 125, 148, para. 63.

104 Feinäugle, 'Article XXVIII GATS', *supra* note 91, 561-562, para. 45.

105 *Mainland and Macao Closer Economic Partnership Arrangement*, 17 October 2003, Annex 5, para. 3.1.2. (2). Exercpts of this arrangement are reprinted in UNCTAD, *International Investments Instruments: A Compendium*, Vol. XIII (2005), 67. Annex 5, para. 3.1.2. (2) can be found on page 80 [UNCTAD, International Investments Instruments].

106 *Mainland and Hong Kong Closer Economic Partnership Arrangement*, 29 June 2003, Annex 5, para. 3.1.2. (5). Exercpts of this arrangement are reprinted in UNCTAD, *International Investments Instruments*, *supra* note 105, 31. Annex 5, para. 3.1.2. (2) can be found on page 46.

E. Any Alternatives to the Service Waiver?

As it has been seen through the previous analysis, the waiver seems to require improvements and an important political willingness to meaningfully enhance LDCs' participation in the multilateral trade system in services. In this sense, the 2013 WTO Ministerial Conference in Bali has emphasized the need of a LDC collective request indicating those service sectors of export interest for LDCs, in order to operationalize the waiver.[107] This may indicate that despite its approval in 2011 the implementation of the waiver is at an early stage. This might also be one of the reasons why in Bali the WTO members have insisted on the importance of technical assistance, capacity building, and on the optimal use of aid for trade to reinforce the benefit from the operationalization of the waiver.[108]

For this reason, it seems important to comment some alternatives that may help to increase the share of LDCs in multilateral trade in services.

Section B. of this article discussed the difficulties to obtain meaningful preferences granted by WTO members to LDC members under the waiver, as there is no obligation imposed on them, and the demands of preferences from LDCs will not be easy to formulate. One possibility could be to return to the general request-offer approach, focused on the LDCs and development priorities. Indeed some commentators have already mentioned the use of modal exchange of market access to overcome the exclusion of developing countries in general and of LDCs in particular.[109] This type of negotiations might link, for instance, mode 3 (commercial presence) openness, which is of interest to most developed countries, to mode 4 openness (temporary movement of natural persons, especially of low and medium skilled workers), which is essential for LDCs.[110] Nevertheless, this issue presents some concerns such as the low bargaining power of LDCs as they usually are small countries, or the fact that

107 WTO, *Operationalization of the Waiver Concerning Preferential Treatment to Services and Service Suppliers of Least-developed Countries: Draft Ministerial Decision*, WTO Doc WT/MIN(13)/W/15, 5 December 2013, 1 (operative part 1.1).

108 *Ibid.*, 2 (operative part 1.4).

109 See B. Hoekman, A. Mattoo & A. Sapir, 'The Political Economy of Services Trade Liberalization: A Case for International Regulatory Cooperation?', 23 *Oxford Review of Economic Policy* (2007) 3, 367, 381 [Hoekman, Mattoo & Sapir, The Political Economy of Services Trade Liberalization].

110 As stated for instance in WTO, *Modalities for the Special Treatment for Least-Developed Country Members in the Negotiations on Trade in Services*, *supra* note 20, 2, para. 9.

mode 4 is actually non-tradable for most developed countries,[111] essentially due to migrational and political concerns. It has also been proposed to link mode 4 market access negotiations with non-agricultural market access negotiations,[112] but it may be the case that this linkage may not be applicable, as some developed countries like the U.S. would not accept it.[113]

As it has been seen in section C. of this article, most trade barriers are not market access restrictions (in the sense of quantitative barriers given in Article XVI GATS), but are qualitative barriers such as domestic regulations, which present most impediments to trade. For example, it has been mentioned that burdensome procedures for LDCs could be overcome through the services waiver. Nonetheless, considering that GATS negotiations about disciplines on domestic regulation at a multilateral level are being difficult, it seems plausible that the same difficulties might arise to LDCs trying to apply the service waiver on market access preferences. Another possibility could take into account additional commitments (Article XVIII) as a way to reduce qualitative barriers without providing preferential treatment.

It is necessary to deepen the debate about Article VI GATS related to procedural obligations in general and implementation of Article VI:4 which sets a mandate to establish disciplines on domestic regulation aimed at ensuring that measures related to qualification requirements and procedures, technical standards, and licensing requirements do not constitute unnecessary barriers to trade in services.[114]

In this sense, Munin pointed out that

> "[s]ome commentators believe that one of the future potential developments from which developing countries could profit is the development of strengthened multilateral disciplines on domestic regulation, for two reason: first, it can play a significant role in promoting and consolidating domestic regulatory reform in these countries. Second, such disciplines can help exporters in developing

111 See Hoekman, Mattoo & Sapir, 'The Political Economy of Services Trade Liberalization', *supra* note 109, 381; B. Hoekman, 'The GATS and Developing Countries: Why Such Limited Traction?', in Thomas & Trachtman (eds), *supra* note 8, 437, 444.

112 R. Adlung, 'Service Liberalisation From a WTO/GATS Perspective: In Search for Volunteers', *WTO Staff Working Paper* (2009) ERSD-2009-05, 10.

113 F. Ismail, 'Is the Doha Round Dead? What Is the Way Forward?", *BWPI Working Paper* (2012) 167, 15-16.

114 For a detailed analysis of the provision see, e.g, Krajewski, 'Article VI GATS', *supra* note 71, 168-196, paras 1-74.

countries address potential regulatory barriers to their exports in foreign markets".[115]

Nevertheless, it has also been mentioned that a main downside could be the restriction of the regulatory autonomy of the members, as the new necessity test could limit their domestic policy and development goals[116] and "imply a greater burden of costs in order to comply with these disciplines".[117]

Indeed, to overcome the difficulties that LDCs could face with the application of general disciplines, it has been proposed to adopt horizontal disciplines on a necessity test and to allow at the same time a transitional period for LDCs according to their development needs.[118] However, this view might paradoxically bring us back to more flexibility within the GATS as it is already the case within the waiver. Moreover, it is important to take into account that in the last draft of the disciplines the necessity test was withdrawn.[119]

Furthermore, another commentator suggests that the horizontal approach of the necessity tests is not effective and therefore approaches should be from a sectorial perspective.[120] Nevertheless, Article VI:5, which sets the provisional criteria, might be reinforced. It has been criticized that this regime only applies, first, to international standards that are already applied by the member in question, second, to sectors that are already listed, third, to cases of measures that nullify or impair what presents conceptual downsides, and finally, the scope of 'reasonable expectation' must be understood from the perspective of the schedules.[121]

115 N. Munin, *Legal Guide to GATS* (2010), 334 (footnote omitted). About the importance of a strong disciplines on domestic regulation see P. Delimatsis, 'Concluding the WTO Services Negotiations on Domestic Regulation – Hopes and Fears', 9 *World Trade Review* (2010) 4, 643.

116 This effect is explained as a consequence of the necessity test in Krajewski, *National Regulation and Trade Liberalization in Services*, *supra* note 69, 141-145.

117 Munin, *supra* note 115, 334.

118 It is argued in Delimatsis, 'Determining the Necessity of Domestic Regulations in Services', *supra* note 70, 365-408.

119 See WTO, *Draft Disciplines on Domestic Regulation Pursuant to GATS Article VI.4*: *Informal Note by the Chairman*, 20 March 2009 (room document) (copy on file with author).

120 A. Mattoo, 'Shaping Future GATS Rules for Trade in Services', *World Bank Policy Research Working Paper* (2001) 2596, 12-13.

121 See Krajewski, 'Article VI GATS', *supra* note 71, 192-194, paras 65-69; Krajewski, *National Regulation and Trade Liberalization in Services*, *supra* note 69, 152.

Standardization (Article VII GATS[122]) may also be a tool to enhance the participation of LDCs in multilateral trade in services. Nevertheless, mutual recognition agreements (MRAs), although being allowed, are negotiated bilaterally which actually has excluded LDCs from them.[123] In fact, India has proposed to standardize a GATS-visa,[124] but it has never been approved involving LDCs' interests in medium and low skilled suppliers' qualifications to be recognized. Therefore, it seems that any meaningful standardization might come from the creation of an autonomous mechanism that certifies the fulfillment of requirements which would be a high improvement.[125]

However, in line with what has been stated, LDCs may need to address their own regulatory issues if they want to benefit from trade in services liberalization and standardization processes.[126] Despite the creation of the *Enhanced Integrated Framework* by the *Hong Kong Ministerial Declaration*, in which a comprehensive Aid for Trade (AfT) framework was established, up to now it has been essentially directed towards supply-side and infrastructure-related trade constraints.[127] Although it is possible to add policy reforms among

122 No definition of recognition has either been done in Art. VII GATS or agreed on among academics. Nevertheless Krajewski states that in broad terms it is defined as "the acceptance of regulatory conditions for goods and services required in one country (exporting origin/home country) as equivalent to the conditions necessary in another country (importing country/host country)". See M. Krajewski, 'Article VII GATS', in Wolfrum, Stoll & Feinäugle (eds), *supra* note 11, 197, 198, para. 1.

123 M. Panizzon, 'International Law of Economic Migration: A Ménage à Trois? GATS Mode 4, EPAs and Bilateral Migration Agreements', 44 *Journal of World Trade* (2010) 6, 1207, 1222.

124 WTO, *Communication From India: Proposed Liberalisation of Movement of Professionals Under General Agreement on Trade in Services (GATS)*, WTO Doc S/CSS/W/12, 24 November 2000, 5-6, para. 18.

125 It has been, for instance, proposed by B. Hoekman, 'The GATS and Developing Countries', *supra* note 111, 451-452. It could also be the case that WTO members use GATS flexibility through additional requirements (Art. XVIII) to list qualitative pre-conditions in mode 4 access of interest to LDCs, in which the burden of ensuring temporariness of natural persons in the host country would be shared with LDCs as it is pointed out in B. Hoekman & A. Mattoo, 'Services Trade Liberalization and Regulatory Reform: Re-invigorating International Cooperation', *World Bank Policy Research Working Papers* (2011) 5517, 16 [Hoekman & Mattoo, Services Trade Liberalization and Regulatory Reform].

126 See, for instance, Hoekman & Mattoo, 'Services Trade Liberalization and Regulatory Reform', *supra* note 125, 11; S. Sáez, 'Trato especial y diferenciado y comercio de servicios', *Serie comercio internacional* (2008) 90, 30.

127 Precisely, the priorities for AfT are "[the] lack of access to financing for export or business development [...][,] [the] lack of access to reliable and inexpensive infrastructure [...][,]

its priorities, most AfT has been directed towards other issues.[128] Consequently, it is basic for LDCs to improve their national legislation and regulations in order to benefit from any standardization or reduction of quantitative and qualitative barriers for trade in services.

F. Concluding Remarks

GATS architectural flexibility gives room for the approved LDCs service waiver, whose impact may be reduced if the mechanism is not strengthened as follows: First, the waiver should impose obligations on non-LDC members instead of being an 'Enabling Clause'. Second, the fast procedure to grant preferences should be extended to other measures such as qualitative limitations, apart from quantitative ones, like the measures related with national treatment or the good governance of domestic regulation, as the former are the most important barriers to trade in services.

Third, liberal rules of origin may enhance the effectiveness of provisions granted by the waiver, but the legal formula 'substantive business operations' needs further clarification to provide legal certainty and avoid free-riding.

Due to the difficulties to modify the waiver provisions, other options have been explored to enhance LDCs participation by strengthening the GATS framework. First, market access negotiation linkages may not be effective due to the low bargaining power of LDCs and developed countries' reluctance to commit in mode 4. However, the modal exchange mechanism could have a positive effect for LDCs if political willingness is reinforced. Second, strong new disciplines on domestic regulations should be adopted, which take into account the priorities of LDCs. Meanwhile, Article VI:5 might be clarified and reinforced. Third, international regulatory cooperation could tackle technical standards, formal regulation barriers, transparency, and other regulation concerns through MRA or institutionalization mechanisms. Finally, concentrating AfT on addressing LDCs' policy reforms may help them to reach international standards.

[the] lack of access to a range of formal and informal networks and institutional facilities necessary for trade [...][,] [and to address] limited availability of trained staff and vocational training." WTO, *Workshop on Aid for Trade: Background Note by the Secretariat*, WTO Doc WT/COMTD/AFT/W/34, 12 July 2012, 9, paras 30-32.

128 This view can be seen in Hoekman & Mattoo, 'Services Trade Liberalization and Regulatory Reform', *supra* note 125, 17.