REGIONAL COMPREHENSIVE ECONOMIC PARTNERSHIP (RCEP) SERVICES CHAPTER: RISKS FOR DEVELOPING COUNTRIES' AND LDCS' POLICY SPACE AND REGULATORY SOVEREIGNTY

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The leaked services chapter in the Regional Comprehensive Economic Partnership (RCEP) from August 2015 reflects a standard approach. Services are treated as commercial products that are exchanged for money through markets. That very narrow view takes precedence over the social, employment, development and environmental aspects of services that governments would normally give priority, or at least treat as equally important, when making and implementing domestic policies and regulation for services.

The rules target laws and policies that foreign firms say make it harder for them to sell their services in another country and to compete with locals, even when they are massive trans-national companies. Viewed from the social perspective, the rules in RCEP's services chapter severely restrict the regulatory sovereignty and policy space of governments, which can have serious social, environmental, cultural, gender, political and economic consequences.

Policy space is critical for developing countries, especially for least developed countries (LDCs), and requires flexible rules and the ability to respond to unanticipated problems without facing the threat of a legal dispute or economic sanctions. It is too easy to make mistakes in such a complicated chapter as services. What appears to be low risk at the time it is agreed can become a major liability, especially when domestic and global economic circumstances change and new technologies alter the impact of rules and commitments. The international context can also change. For example, all RCEP negotiating parties have committed to achieving the 2030 Agenda for Sustainable Development, which will require a rebalancing of developmental over commercial outcomes; yet the RCEP chapter is silent on those goals.

Instead, the leaked services chapter shows the non-ASEAN countries, especially Australia, New Zealand, South Korea and Japan, have been very aggressive in their demands and insisted on new ways to bind the hands of governments in the future. ASEAN appears to have agreed to the framework, but is arguing about how far it should go and which aspects are voluntary. India has proposed some novel arrangements and protections, while pursuing its own ambitions for labour mobility, but seems to have few allies. China did not appear to play a very prominent role.

This paper examines some of the ways in which the leaked draft chapter would restrict governments' policy space and regulatory sovereignty. It is important to stress that the leaked text is from a year ago and accompanied by only a few explanatory documents. Much is unclear, including how far the negotiations have progressed in the past year. That makes it difficult for specialists to provide independent analysis that could assist developing countries and inform citizens in all RCEP countries who stand to be affected. Given pressure from ministers to close the RCEP by the end of the year it is of particular concern that developing country governments and the LDCs are being pushed into accepting an outcome that could cause severe damage to their economies and societies in the future.

The general framework

The RCEP has some standard rules drawn directly from the World Trade Organization's General Agreement on Trade in Services (GATS) that operate across the national, regional and local government levels. Country-specific schedules of commitments apply to some of the rules. These schedules limit the right of governments to adopt new restrictions in the services sectors they have promised to keep open, and they face legal challenges and trade penalties if they breach their obligations.

The 'market access' rule requires governments to open and keep open their services markets so that foreign firms can expand their operations with few restrictions. This means removing restraints on the growth of the services market and access to it by providers of services, even when the limits apply to everyone and are not just targeted at foreign firms. As a result, market access commitments in RCEP put handcuffs on governments' ability to shape the provision of services to meet local needs. The rules would, for example, prohibit a transport monopoly or a requirement to show an unmet need before opening a new big supermarket or port, restricting the number and size of hotels in a region, or imposing a ban on certain kinds of advertising.

Likewise, governments cannot give preferences to local services and service suppliers and foreign suppliers of services must be treated at least as well as their national counterparts ('national treatment'). An obvious breach would be to deny foreign firms the same subsidies, grants or loans that the government gives to local firms. However, recent agreements, including RCEP, have an exception that allows subsidies to be limited to locals.

The national treatment rule would still prevent, for example, the exclusion of foreign investors from broadcasting or telecoms, banning foreign ownership or leasing of land, a rule that only local communities can run eco-tourism operations, remediation levies on foreign-owned mining or forestry operators, restrictions of offshore banks, requiring foreign firms to hire local personnel, only allowing domestic firms to run schools or hospitals, or saying only nationals can be registered as lawyers or midwives.

Other rules make it hard to regulate in ways that governments think are best for their communities, but which services firms consider too burdensome. This applies to professional qualifications (teachers, lawyers, accountants, nurses etc), technical standards (land zoning, water quality, construction standards, advertising rules, mining discharges, location of hypermarkets, etc), and licensing requirements (for fishery vessels, transport operators, schools, telecommunications, television, etc).

The leaked chapter also shows a shift from the focus of dominant countries on foreign investment to control of the global supply chain, especially by guaranteed rights to supply services through the Internet from outside the country and banning any requirement for those firms to have a legal presence inside the country. Rules that guarantee money flows into and out of the country to pay for those services are equally important.

The chapter applies to all levels of government - central, regional and local - as well as bodies that exercise powers delegated to them by those authorities. The TiSA-4 and China are

opposing the standard GATS flexibility that governments must show they have taken reasonable steps available to them to ensure compliance, and instead appear to require that central governments are held responsible for compliance by all levels of government.

The Negotiating Context

Trade in services agreements have always been controversial. The negotiation of the GATS 1995 faced strong resistance from developing countries during the Uruguay round. The powerful states did not get what they wanted on behalf of their dominant services transnationals. Continued resistance from developing countries and a backlash from civil society around the world have kept the GATS 2000 negotiations at stalemate.

To get around this, developed countries with large or sophisticated services firms have successfully pressured developing countries to agree to stricter rules and more expansive commitments in bilateral and regional free trade agreements (FTAs). Calling themselves the 'Really Good Friends of Services' they are also now moving to bypass the WTO through negotiations for a plurilateral Trade in Services Agreement (TiSA), with the explicit goal of exporting their deal back into the WTO. The same countries have rejected the demands of developing countries in areas of importance to them, especially the movement of people who deliver services (mode 4) – which is itself controversial for its commodification of human labour.

Australia, New Zealand, Japan and Korea are all part of the 'Really Good Friends' group negotiating TiSA and are referred to in this paper as the TiSA-4. The leaked documents show they have proposed an architecture and level of commitments in RCEP that strengthens their position in globalised markets and integrated supply and value chains. Although there is no public list of all the chapters and annexes, proposals on telecommunications and financial services appear to follow developed country templates in the GATS Reference Paper on Basic Telecommunications and the Understanding on Financial Services, which very few developing countries have adopted. If adopted these would strengthen the dominance of the TiSA-4 and non-RCEP countries that will also benefit from them, while adding to the burden on developing countries and LDCs.

The TiSA-4 are especially interested in the commercial opportunities created by new technologies so they can deliver services from offshore and minimise their investment inside the country receiving the services. They are seeking more commitments on cross-border modes of supply and new technological ways of delivering services will apply automatically to an increased number of services. A proposed e-commerce chapter would stop a government requiring an offshore service supplier to have a local presence or use local content. Increased provision from outside the country can potentially facilitate cheaper access to services for developing countries. But it also consolidates the power of dominant players in services supply chains and value chains. Countries and communities who rely on these services become dependent on offshore suppliers over whom they have very little influence and who can avoid local responsibilities in areas of taxation, training and employment, supporting small businesses, technology transfer, cultural relevance and legal liability.

The TiSA-4 want to take RCEP far beyond the GATS and ASEAN's existing FTAs. The rules and schedules in the services chapter are subject to negotiation. Every party potentially has a power of veto. However, documents show that ASEAN countries have agreed to new rules and are offering 'value-added' commitments that will tie their hands in unprecedented ways, while the TiSA-4 are refusing to make concessions that might potentially create commercial and employment opportunities. They also suggest the ASEAN bloc was urging India to drop its opposition to new rules and methods of scheduling. In the larger context, the developing countries and LDCs will also be pressured to make concessions on services as a trade-off for outcomes of commercial importance to them in other chapters, such as market access for goods. When problems emerge, RCEP makes these services commitments virtually impossible to change or withdraw.

Risks of Policy Space and Regulatory Failure

Central, regional and local governments are principally responsible for meeting the needs of their local communities, local businesses, workers and families and are held politically accountable for doing so. The foreign services firms that will dominate through the RCEP chapter are motivated by expansion of their market share and maximising the profitability and value of their business, not the needs of local communities or the responsibilities of governments to their people. This is a time of chronic instability of the global economy, rapid technological change and commitments by all RCEP countries to the Sustainable Development Goals. Governments need the maximum freedom to adopt policies and regulations they think are necessary for the national interest, and have the freedom to amend, withdraw or expand them as they consider appropriate to their needs at the time.

There are five kinds of failures that governments negotiating RCEP rules and commitments need to anticipate.

***Policy failure*:** a policy, such as privatisation, liberalisation, or deregulation of services, turns out to be inappropriate, unworkable, damaging to important interests and needs to be changed. The policy may have been designed by consultants who are unfamiliar with the local context, required as a condition of debt financing without full consideration of the implications, copied from another country that has different circumstances, driven by ideological preferences of officials or politicians, or followed a popular fashion without adequate critical review and/or a proper cost benefit analysis.

***Regulatory failure*:** the regulatory techniques and institutions adopted to deliver a policy are inappropriate, unworkable, damaging to important interests and needs to be changed. The causes can be similar to policy failure, but are also likely to arise when the factors considered in a regulatory impact assessment or cost-benefit analyses are biased towards quantitative factors and give preference to light-handed regulation and market mechanisms (implicit in the RCEP domestic regulation disciplines).

***Market failure*:** the market is not sufficiently big or parts of it are unattractive to service suppliers because of remoteness, poverty of consumers, uneconomic niche markets or difficult consumer requirements. Dominant players may fail or foreign firms may decide to

exit the country, leaving a void in provision because there is no longer any local capacity and no foreign interest wants to take up on similar terms.

***Social failure*:** firms who dominate the market are not interested in providing important social services, or servicing locations or communities whose need is greatest. The firm may refuse to provide the specific service altogether, charge far more than what consumers can afford, or demand excessive subsidies from local or central governments who have become captive to them because they no longer have the capacity to provide the service themselves.

Political failure – policies or regulatory approaches become politically unsustainable, often as a consequence of other forms of failure.

All these forms of failure are heightened for developing countries and LDCs, whose regulatory regimes are still evolving, whose markets are limited in size and sophistication, and whose government agencies often lack strong institutional capacity and have competing priorities. Yet the leaked services chapter shows that RCEP will systematically foreclose their ability to address those failures.

Development asymmetry

The RCEP negotiating parties are diverse. They include three least-developed countries, others with embryonic market economies, large developing countries and advanced capitalist countries who belong to the OECD. These development asymmetries demand a high level of differentiated treatment that is not evident in the leaked RCEP services text. Instead, the documents consistently show the TiSA-4 is resisting special and differential treatment, and that Australia and New Zealand want to limit any such obligations to the three LDCs (Lao, Cambodia and Myanmar/Burma).

A WTO-compatible RCEP

Developed countries promised in Article 4 of the GATS to take steps to increase the participation of developing countries in the services economy. That assumes developed countries will make significant commitments in areas of commercial value to developing countries.

Regarding future negotiations Article 19.2 of the GATS says:

> The process of liberalization shall take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors. There shall be appropriate flexibility for individual developing country Members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching to such access conditions aimed at achieving the objectives referred to in Article IV.

Paragraph 26 of the Hong Kong Ministerial Declaration 2005 reiterates that negotiations 'shall have regard to the size of economies of individual Members, both overall and in individual

sectors' and paragraph 27 that 'particular attention will be given to sectors and modes of supply of export interest to developing countries'.

The vulnerability of LDCs requires even greater flexibility. GATS Article 4.3 says: 'Particular account shall be taken of the serious difficulty of the least-developed countries in accepting negotiated specific commitments in view of their special economic situation and their development, trade and financial need'. That is reiterated in GATS Article 19 relating to further negotiations under the GATS. The WTO Hong Kong Ministerial Conference Declaration from 2005 recognised in paragraph 26 that LDCs should not have to make any new commitments beyond those already made in the GATS.

The cumulative effect of GATS Articles 4 and 19 and the Doha negotiating mandates is that developing countries are entitled under the GATS to special and differential treatment when making commitments and attaching limitations to them, and they should receive commitments that genuinely bring economic benefits. This applies to all developing countries and is not limited to LDCs, but does include additional obligations to them.

Mandatory flexibility for FTAs like RCEP

This long-standing recognition of special and differential treatment informs the GATS provisions on free trade and investment agreements, including RCEP. The Most-Favoured-Nation rule in the GATS requires a WTO member to give all other Members the best treatment it gives to any country, including through an agreement like RCEP.

There is exemption from the MFN obligation where such an agreement complies with GATS Article 5. Unlike the GATT, this includes special and mandatory flexibilities for developing countries when entering agreements with developed countries. Article 5.3(a) requires flexibility to reflect the different levels of development of developing countries in RCEP, overall and in individual sectors and sub-sectors. Three kinds of development flexibilities must be provided if RCEP is to be exempted from the MFN rule:

(i) RCEP must have 'substantial sectoral coverage' in market access. That is not simply calculated by counting how many of the 12 broad sectors and 160-odd sub-sectors on the W/120 classification list a country has included in its schedule of commitments. Footnote 1 to Article 5 says this calculation must be understood in terms of the volume of trade affected and the modes of supplying the services (by foreign investment, from across the border, a real person visiting to deliver the service, or consuming the service while offshore). If this weighting is taken seriously, achieving 'substantial coverage' would require the major trading parties to RCEP to make the most concessions, because the contribution to services 'trade' by the developing countries and LDCs is far less. This interpretation is reinforced by Article 5.3 which says there must be flexibility for developing countries in light of levels of development, for commitments in sectors and sub-sectors.

(ii) Substantially all discrimination should be removed for these substantial commitments on market access. Again, Article 5.3 of GATS says there must be flexibility for developing countries in meeting this requirement, in light of levels of development. The requirement for flexibility is even stronger for national treatment than for market access.

(iii) RCEP must include all modes of supply, and cannot exclude those of particular interest to developing countries, which often focus on mode 4. That requirement cannot be met if mode 4 is limited to elite labour as has become the common practice in FTAs.

Developed countries get 'RCEP for free'

Assessing development flexibilities under Article 5 becomes even more complicated when the levels of commitment by the TiSA-4 and other RCEP countries are compared, using as the measure that amount of new liberalisation each of them is committed to make. Using that calculation, the asymmetry actually works in favour of the developed countries.

The TiSA-4 have already made many commitments in their existing FTAs, including through negative lists. They will not need to take any significant new obligations to meet the numerical requirement of substantial sectoral coverage currently being used, but will largely repeat their schedules in the ASEAN+1 FTAs. The 'value-added' commitments to standstill, ratchet, MFN-forward and future liberalisation, discussed below, will also be much less significant for them, because they already have highly liberalised economies. Most of the new rules on services already reflect their current policies and regulatory settings. In other words, the TiSA-4 effectively get the services part of RCEP for free.

By contrast, developing countries and LDCs are being pressured to take significant new commitments which will require changes to their domestic policies and regulation. The 'value-added' elements will also have a disproportionate impact on them. It does not matter if they are dressed up as indicative, unenforceable and in the case of LDCs, voluntary.

Good faith requires development flexibilities

It might be argued that the developing countries in RCEP have waived this protection by agreeing to more extensive commitments in other FTAs. However, the ASEAN Framework Agreement on Services is between developing countries; the Article 5 flexibility is mandatory for agreements between developed and developing countries in recognition of the asymmetries of development and negotiating power. The position is more problematic for the ASEAN+1 agreements, and for those developing countries in RCEP that are potential parties to the Trans-Pacific Partnership Agreement (TPPA), where a negative list approach involves very extensive commitments.

However, Article 5 imposes a mandatory obligation as a pre-requisite for North-South agreements to gain exemption from the MFN obligation for good reason: to address the reality of asymmetrical power between the global North and South and avoid the situation where pressure is brought to bear by more powerful and often over-bearing parties in such negotiations. A WTO-compatible RCEP should not allow the more developed parties to cherry pick the GATS obligations that suit their interests and ignore explicit protections for developing countries. Further, they should not ask LDCs to undertake any services commitments in RCEP beyond the obligations that already exist between those countries, let alone pressure them to take complex 'value-added' commitments 'voluntarily'.

'Value added' for whom?

The recently released documents show the RCEP meeting in July 2015 in Kuala Lumpur agreed to use a positive list with so-called 'value added' elements, although India was still reluctant to agree. This appears to have been a condition on which the TiSA-4 was willing to accept the GATS-consistent positive list approach, which states which services subsectors will be covered by which rules and subject to what limitations.

Choosing 2 of 3 new handcuffs

It is uncertain from the available documents exactly how this will work. It appears that each country's schedule of commitments will contain 2 of 3 'value added' elements, which were originally proposed by Australia, New Zealand and South Korea, but this would be voluntary for LDCs. The three elements are:

> (i) a ratchet that automatically binds any future liberalisation in sectors or sub-sectors identified as 'FL' ('future liberalisation'). Australia, New Zealand and Korea want governments to go further and impose a standstill at current levels of restriction for all sectors and subsectors marked 'FL';

and either

> (ii) sharing any better treatment in future FTAs with all the RCEP parties (MFN-forward)

or

> (iii) listing current measures that are not compliant with the rules (described as a 'transparency list').

In the leaked text from August 2015 the Article entitled Schedules of Specific Commitments only refers to (i) and (ii). Other documents indicate acceptance of (iii), but with ASEAN insisting that it is non-binding and has no legal force within the agreement. India was resisting the 'value-added' elements, possibly as a bargaining chip to secure commitments on mobility of professionals and contractual service suppliers.

The different elements are explained below.

Standstill

A ***standstill*** freezes the current rules that are applied in a particular subsector. A government will often ensure it keeps some room to move by scheduling a commitment that is less restrictive than it currently applies. A standstill takes way that flexibility. Where a government has made a standstill commitment in RCEP on market access or national treatment, a future government cannot adopt more restrictive policies or regulations. This vastly increases the risks arising from policy, regulatory, social or political failure, and can leave the government unable to respond to new circumstances, including the unforeseen impacts of technologies. It also allows the political party in power to fetter the future options of its opponents by locking in its laws and policies.

Ratchet

A ***ratchet*** takes the standstill a step further. Any more liberalised measure that a government adopts is automatically locked in. It is irrelevant if the government has been poorly advised, reckless, ideologically driven, corrupt, or captive of corporate elites. A future government that is more prudent, or seeks to rebalance interests and close the opportunities for profiteering or corruption, cannot undo what the previous government has done.

MFN-forward

What is described as ***MFN-forward*** requires an RCEP party to share any greater services liberalisation it provides in a future agreement with all the others in RCEP. This is set out in the Most-Favoured-National Treatment provision of the leaked text, as proposed by Australia, NZ and Japan. That text suggests there would be a separate schedule that identifies the sectors and sub-sectors this rule applies to, subject to any limitations. Other documents suggest that either the word MFN or TL would be indicated against each sub-sector in a country's main schedule.

This MFN obligation would make future negotiations with non-RCEP countries more complicated, because governments need to factor in the potential consequences of extending the commitments to RCEP parties as well. The effect may actually be counter-productive, as RCEP countries may become more reluctant to enter into future FTAs.

The rule would not apply to any existing free trade agreement or 'multilateral international agreement' signed before RCEP comes into force (although Australia and China want the MFN obligation to apply to all the ASEAN+1 agreements as well). Significantly, the waiver for existing agreements does not extend to bilateral investment treaties. That means a services firm from RCEP country A that has invested in RCEP country B (under 'mode 3') could claim any better treatment country B gives to investors from country C under a BIT between countries B and C.

Transparency List

'***Transparency'*** has become one of the most over-used terms in recent free trade and investment agreements. It means multiple things, all of which are designed to increase the leverage of foreign states and foreign investors over a government's decisions, and none of which aims to increase citizens' access to negotiations or the implementation of the rules in their own country. In RCEP 'transparency' has another new meaning: governments are to list their services laws, policies, regulations and practices that are inconsistent with RCEP's market access and national treatment rules.

The available documents do not make it clear how far this obligation would go. Originally the TiSA-4 seemed to want each government to list all its existing measures that do not conform to the market access and national treatment rules, including in sectors and sub-sectors they have not made commitments. The idea is to use that list to convert the positive list schedules in RCEP to 'negative lists' in the future. Australia is using a negative list for RCEP from the

start. (The problems with negative lists are set out below). It appears to have been agreed that each country will indicate TL (or MFN) against sub-sectors listed in its schedule. However, the TiSA-4 still want it made clear that this is intended to form the basis for shifting to a negative list in the future.

Negative lists are high-risk even for governments with long-term experience of liberalisation, privatisation, de-regulation and market-based regulation, and which have well-resourced bureaucracies and experienced negotiators. There are obvious risks of limited foresight, error and omission, and changed circumstances. Sub-sectors may look very different in the future and require different kinds of measures. Services may also play a quite different economic and social role in the economy, raise new environmental and cultural factors, and affect the workforce or disadvantaged communities in new ways. Just like the standstill and ratchet, a negative list approach is also anti-democratic: it forecloses the right of democratically elected governments to change their policy settings in the future. Those risks are heightened for developing countries, which is why they have largely resisted the negative list approach to date.

This raises the question of who receives the 'added value'. Again, there are serious asymmetries. Preparing a 'transparency' (negative) list, even for sectors committed in a schedule, is a massive amount of work for a well-resourced and highly skilled government bureaucracy. The TiSA-4 originally wanted all RCEP countries to submit their first 'TL' entries within two months, with the final lists completed by the end of the negotiations. They and the TPPA countries from ASEAN have all prepared such lists recently. But most of the other developing countries, including ASEAN's LDCs, have not prepared a negative list before. Even a much longer time frame imposes a totally unfair and disproportionate burden on them at the same time as preparing initial, revised and final offers using a positive list under a tight deadline. There were suggestions that amendments might be allowed within three years to add measures that existed at the time RCEP entered into force but had not been listed. It is not clear whether this survived.

The parties have agreed that the 'TL' indicators will be non-binding, will not be subject to the dispute settlement mechanism, and only for federal measures. Despite these assurances, there is a real risk that a 'transparency list' prepared in haste under the pressure of RCEP negotiations will be treated as an informal pre-commitment by developing countries and LDCs to liberalise in the future, or used to limit their right to regulate to what is in their list.

'Benchmark' levels of commitments

It is unclear from the leaked documents what level of commitments on market access and national treatment ASEAN members have agreed to as a minimum. Given that commitments are meant to exceed the ASEAN+1 FTAs, and must be 'commercially meaningful', they are likely to go beyond the EU's proposed 'benchmarks' that developing countries rejected during the failed GATS 2000 round.

Again, it is not clear what has been agreed on the 'value added' elements. Leaked documents show that Australia wanted the ratchet to apply to an indicative minimum of 40-50 subsectors from the W/120 classification list (nearly one third) and the option for forward-looking MFN

to apply to a minimum of 70-80 subsectors (nearly half). The TiSA-4 want to ensure the transparency list is 'meaningful' by having 'substantial' coverage, containing accurate and comprehensive information, and a review mechanism. The leaked text shows Australia, NZ and Korea are not requiring LDCs to identify sectors or subsectors for future liberalisation, but want them to do so 'voluntarily'. ASEAN has insisted there should be negotiations on the quantum of commitments, but countries should choose the subsectors, taking into consideration levels of development and additional flexibility for LDCs. At one stage ASEAN suggested 5% as a maximum benchmark for 'value added' commitments from the total subsectors being offered. Without complete documents it is impossible to say what has been decided, or even if these matters are settled.

Every country's original schedule will be subject to negotiation. While the TiSA-4 wanted the value-added elements also to be subject to the to-and-fro of requests and offers, ASEAN was resisting that. Again, it is not known what has been decided. Clearly, the TiSA-4 will try to reduce the protections and flexibilities that ASEAN and India propose. Developing countries and LDCs will be on the defensive as they try to maintain prudent protections for the future. There is a serious risk that countries will try to meet the threshold by making commitments in sectors that are technical and not well understood but where there is a lot of subsectors, notably finance, or which they mistakenly believe are not important, such as computer services, so they can protect their especially sensitive services.

Locking in new technologies

Technological neutrality means that a commitment applies irrespective of the technology used to deliver it. If accepted in RCEP, technological neutrality would vastly magnify the problems of foresight - it is simply impossible to predict what issues or risks a new technology might create that would require regulation in the future. When a government schedules a commitment it would be gambling on how technologies may change the nature of services and what regulatory space it needs to try to preserve.

Some parties to TiSA and RCEP negotiations are claiming that technological neutrality is now settled trade law. But it is not written in the GATS or any other legal text. The principal source is in WTO jurisprudence, where there is no definitive finding. The idea that commitments apply whatever the *means* of delivering a service was argued in the dispute against the US on Internet gambling. The panel observed that the principle 'seems to be largely shared among WTO members'.[1] China argued, when defending a dispute brought by the US on audio-visual products, that the principle had never been accepted by WTO members. The panel found in that dispute found it was not necessary to decide the question, but did not reject the possibility.[2] Scholars suggest, rightly, the legal interpretation is still debatable.[3]

Even if there was a definitive interpretation, the dispute process does not have the power to interpret GATS rules; only WTO Members can. If RCEP was to change this, the rule would have

[1] Panel Report, *US – Gambling,* WT/DS285/R, 10 November 2004, para 6.285
[2] Panel Report, *China – Publications and Audiovisual Products,* WT/DS363/R, 12 August 2009, para 7.1257
[3] Jia-Xiang Hu, 'When Trade Encounters Technology: The role of the technological neutrality principle in the development of WTO rules' in Bryan Mercurio and Kuei-Jung Ni, *Science and Technology in International Economic Law: Balancing Competing.* Routledge, 2013, 75- 89, at 86

to be written into the text or made explicit in a consensually adopted understanding for scheduling commitments.

Another leak revealed the draft terms of reference for an E-Commerce chapter. The proposal includes provisions on the electronic supply of services, domestic regulatory frameworks for electronic commerce, non-discriminatory treatment of digital products, prohibition of requirements for local presence of computing facilities, and cross-border transfer of information. While the terms of reference promise 'appropriate' forms of flexibility for developing countries, and benefits to small and medium enterprises, the proposals are likely to follow similar chapters in the TPPA and TiSA which serve the interests of the major developed countries.

Adding technological neutrality to standstill, ratchet and either MFN or the 'transparency list', plus the e-commerce chapter creates a level of exposure for developing countries that is totally incompatible with an exception to MFN under Article 5.

Increased Exposure to Investment Disputes

The GATS and most other ASEAN agreements cover foreign direct investment by services firms (such as a hotel or a telecommunications company) in the chapter on services, known as 'mode 3' of delivering services. This is important for RCEP because commitments are being scheduled by positive list in the services chapter and by negative list in the investment chapter. India insisted on this approach and appears to have succeeded in gaining support from all countries except Japan.

Those investments will also be covered by the investor protection rules and investor-state dispute settlement (ISDS) mechanism in the investment chapter. New Zealand wants to ensure that an RCEP investor cannot use ISDS to enforce rules in the services chapter that relate to ways of supplying services other than mode 3. The investment chapter is also likely say that an investor cannot bring a dispute just because an obligation in another RCEP chapter has been breached, although such an allegation could still form *part* of its broader complaint.

As noted earlier, the MFN provision also appears to apply to an existing and future bilateral investment treaty. It remains to be seen how BITS are dealt with through the MFN provision in the RCEP investment chapter.

Making light handed regulation the norm

The RCEP services chapter has other important restrictions on the right to regulate. Some are common to the GATS.

Chilling effect on administrative decisions

General rules that in some way 'affect' services transactions must be *administered* in a 'reasonable, objective and impartial' way. Almost any decision can be challenged by another country on behalf of an unhappy business as 'unreasonable'. 'Objective' means no discretionary decisions or judgements with the general criteria and the weighting given to

them made public, clear and explicit, and explained afterwards. A decision that gives priority to local cultural, social or development factors, rather than commercial interests, could be challenged as not being 'impartial'.

The risk of a challenge can have a chilling effect on decision makers and make them overly cautious. In GATS Article 6.1 the same provision only applies in 'sectors where commitments are undertaken'. Australia and Japan want the rule to apply to all services, which would have a much wider impact and could paralyse a country's administrative agencies.

As in the GATS, governments must also provide for prompt review of administrative decisions, as soon as practicable. This can impose a useful discipline on decision makers. Equally, it can add to the chilling effect where agencies want to avoid public embarrassment and costly legal challenges, similar to the concerns about ISDS.

Targeting 3 kinds of regulation

The most detailed 'disciplines' on how central, regional and local governments can regulate their services apply to 3 areas of regulation that affect people's everyday lives:

- ***Technical standards***. Technical standards set the terms on which services are provided to communities, workers and consumers. They apply to virtually every kind of service: broadcasting, water quality, sanitation and effluent discharges, building codes, eco-tourism, town planning and zoning, advertising, educational qualifications, health and safety codes, shop opening hours, and much more.

- ***Professional qualifications and requirements***. Countries like Australia, NZ, India and Singapore have strong professional services who work in the English language. They want other RCEP countries to recognise their qualifications and remove restrictions on their right to practice in country or across the border. Governments and professional bodies are traditionally cautious about that. Increased dependence on cross-border provision can also raise difficulties for governments and people using the services in checking the authenticity of qualifications and the quality and ethics of practitioners, applying consumer protection laws and enforcing penalties.

- ***Licensing requirements (and possibly procedures)***. Many services require licensing: professions, broadcasting, transport operators (bus, ferry, taxi, rail, ports, airports), importers, retailers of certain products, mining and forestry companies, hotels and restaurants, casinos, foreign exchange dealers, security firms, recruitment agencies, and many more.

Pro-business criteria for regulation

GATS Article 6.4 set out a multi-layered test that regulations would have to satisfy:

(i) regulations must not pose 'unnecessary barriers' to trade in services. A government's choice is open to challenge as not being supported by evidence where the evidence is contested or the government chooses a precautionary approach, or if there are less restrictive options the government could have adopted to achieve its policy goal;

(ii) the choice must be based on 'objective and transparent' criteria, such as competence and ability to supply the service or quantified standards. 'Subjective' criteria might include considering the local culture and needs of the local community, or weighing up a range of competing factors involving environmental, social, and regional development;

(iii) the regulation must be the 'least burdensome necessary' to achieve 'quality'. This is another way of saying it must be as light-handed as possible. The term 'necessary' allows challenges on the basis that there was a less burdensome alternative available. The purpose of the regulation is limited to achieving 'quality', which is not defined and can be interpreted very narrowly to exclude social, cultural, environmental and development considerations.

(iv) licensing and qualification procedures must not themselves restrict the supply of the service; for example, only some potential applicants can complete the procedures. There is also an overlap with the rules on market access and national treatment, for example if the licensing rules are explicitly or de facto discriminatory or only a limited number of licenses are available.

Negotiations to restrict the way governments can regulate in the 3 areas began soon after the GATS came into force, but they were so controversial that nothing has been agreed 20 years later. In the meantime, governments agreed to apply these restrictions to qualification requirements, technical standards and licensing procedures in the subsectors listed in the country's GATS schedule, but only if the government implemented that regulation in a way that nullified the national treatment or market access commitment *and* the regulation could not have been foreseen at the time the commitment was made.

Most recent FTAs have used the same approach. But Australia and NZ want to use RCEP to bind governments to a light-handed and market-based approach to regulating these 3 areas, something they have not been able to achieve in the GATS or even the TPPA. They say the restrictions on domestic regulation should apply to all services, whether or not they have are committed in a country's schedule for market access or national treatment. Their approach is not only GATS+, it is ASEAN+1 FTA+, TPPA+, TISA+ and is unprecedented. If adopted, it would have severe consequences for the policy space and regulatory sovereignty of all RCEP parties, especially developing countries. Even applying these 'disciplines' to services listed in a schedule is a problem for developing countries and LDCs. Few governments consider these restrictions when they draft their schedules, and there is no place in the schedule to limit the application of these rules.

There are many other aspects of the services chapter that are important, but more information is needed to provide comprehensive and up to date analysis to assist negotiators, national level policy makers, legislators and citizens to understand the potential implications of RCEP.

Links to recently published RCEP documents on services

RCEP services chapter negotiating text
http://www.bilaterals.org/?rcep-services-chapter-negotiating

RCEP services chapter: Australian proposal re scheduling value added elements (31 July 2015)

http://www.bilaterals.org/?rcep-services-chapter-australian-30915

RCEP services chapter: proposal for a ratchet (Australia, Korea, NZ, 4 August 2015)
http://www.bilaterals.org/?rcep-services-chapter-proposal-for

RCEP services chapter: positions on value-add elements (ASEAN v other RCEP country positions, 4 August 2015)
http://www.bilaterals.org/?rcep-services-chapter-positions-on

RCEP services chapter: Australian & Japanese transparency proposal (5 August 2015)
http://www.bilaterals.org/?rcep-services-chapter-australian

RCEP draft ecommerce chapter terms of reference
http://www.bilaterals.org/?rcep-draft-ecommerce-chapter-terms