

## **Towards a plurilateral Trade in Services Agreement (TISA): Challenges and prospects**

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This paper addresses a number of policy challenges arising from ongoing attempts to negotiate a plurilateral Trade in Services Agreement (TISA), a recently launched plurilateral negotiating initiative coexisting uneasily alongside the World Trade Organisation's General Agreement on Trade in Services (GATS), particularly in the context of the ongoing Doha Development Agenda. While the TISA offers scope for imparting much needed forward movement to a policy area of central economy-wide and trade importance, such progress, even if realized within the narrower confines of a preferential trade agreement made possible under the GATS, poses a number of systemic risks to the multilateral order extending beyond services trade.

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JEL Classifications: F13, F15

### **1. Introduction**

On 15 February 2013, in a submission to the European Council,<sup>1</sup> the European Commission formally proposed to open negotiations on a new international agreement on trade in services. Initially called the “International Services Agreement” (ISA), the proposed plurilateral treaty currently involves a self-selected coalition of 23 World Trade Organisation (WTO) Members belonging to the so-called “Really Good Friends of Services” (RGFS) grouping.<sup>2</sup> It has since been re-named the “Trade in Services Agreement” (TISA). The RGFS aims for the agreement to comply with WTO rules so it can be “multilateralized” at a later stage.<sup>3</sup> The Commission's initiative comes on the

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<sup>1</sup> See [European Commission \(2013\)](#) for a fuller depiction of the key policy motivations behind the initiative and the Commission's stated aims and expectations heading into the negotiations.

<sup>2</sup> The RGFS grouping currently involved in the TISA talks includes the following WTO Members: Australia, Canada, Chile, Chinese Taipei, Colombia, Costa Rica, the European Union, Hong Kong, Iceland, Israel, Japan, Liechtenstein, Mexico, New Zealand, Norway, Pakistan, Panama, Paraguay, Peru, South Korea, Switzerland, Turkey and the United States. China and Uruguay have recently signaled their desire to join the negotiations.

<sup>3</sup> See [Hufbauer et al. \(2012\)](#) for an early depiction of the plurilateral agreement's main aims.

heels of a similar process launched a few weeks earlier by the Obama administration in the United States.<sup>4</sup>

This paper advances a set of conflicting thoughts on the proposed TISA. Bruised veterans of services trade negotiations, including the author of these lines, are logically prone to applauding the sight of forward movement in an area of trade governance whose potential for growth and development, as a source of vibrant export growth and as a means of durably facilitating the entry of firms, big and small, into global value chains, mercifully no longer require much convincing. It was not always thus! This is so even as the full potential of services trade remains fiendishly difficult to harness in a negotiating setting, and particularly so at the multilateral level.

Still, based on the limited publicly available information that has filtered on the TISA negotiations to date, one may harbor a number of genuine doubts on the journey proposed, it's likely value-added and the potentially damaging collateral effects it could yet exert on the WTO's ongoing services negotiations under the General Agreement on Trade in Services (GATS) and, more broadly, on the centrality of the WTO as a locus of trade governance. Simply put: if TISA holds considerable promise as a potentially innovative preferential services trade agreement pursued under the aegis of Article V (Economic Integration) of the GATS, prospects of its eventual incorporation into the WTO architecture seem significantly less compelling for reasons, both procedural and substantive, that this paper aims to explore.

## **2. Origins of the Initiative**

As the GATS approaches its 20th birthday, it bears recalling that it remains to this day the sole piece of the Uruguay Round jigsaw that has yet to be solved, with leftover negotiations pending in core areas of services rule-making such as subsidy or procurement disciplines, non-discriminatory regulatory conduct or emergency safeguard measures. When it entered into force in 1994 alongside all other elements brokered during the Uruguay Round, the GATS officially became the first body of multilateral disciplines governing trade in services in a comprehensive manner, featuring a number of General Agreement on Trade and Tariffs (GATT)-like provisions adapted to fit the more complex universe of services transactions involving a multiplicity of modes of supply (not only cross-border supply as under the GATT but also embracing factor-based trade which brought in its wake the significantly more controversial underlying political economy of capital and labour movement under a trade roof.<sup>5</sup>

Designed to promote an orderly and development-friendly process of progressive market opening in sectors typically characterized by heavy doses of domestic regulation, the GATS confronted negotiators with an agenda almost wholly centered on behind the border measures in a manner akin to GATT discussions on non-tariff

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<sup>4</sup> See World Trade Report (2013).

<sup>5</sup> See [WTO \(2013\)](#) for a comprehensive description of the legal architecture and substantive provisions of the GATS.

measures. The very architecture of the resulting agreement and the manner in which its core provisions — including in respect of the foundational principles of national and most-favored nation treatment — differ in both design and use from the GATT reflect the many subtle but important differences between goods and services trade. The novelty of the rule-making journey, the more complex political economy entailed by the sheer diversity of major sectors of economy-wide importance (e.g. telecommunications, transport, finance), the multiplicity of market failures to which legitimate public policy responses are required across many service markets, the initial (perceived) gulf in export capacity between developed and developing countries, all contributed to making the GATS a more complex agreement subject to greater doses of variable geometry than those practiced elsewhere in the WTO. The above combination of novelty, sharply contrasting ambitions and heightened regulatory intensity in turn produced a negotiated outcome erring noticeably in the direction of regulatory precaution.<sup>6</sup>

That the Uruguay Round is not yet completed in services even as the Doha Round languishes in the 13th year of its own tortured journey says a lot both about the inherent complexity of services rule-making and the difficulty of harnessing the forces of reciprocity in markets subject to a dense layer of domestic regulation, the politics of which are often dauntingly intractable given the multiplicity of stakeholder constituencies involved in governmental and non-governmental circles (both business and NGOs). The Uruguay Round's negotiating harvest in services was a mere down payment, richer on rules (even if incomplete) than on market opening commitments. Confronted with what was largely a blank page — a frightening site for any policy official — early GATS negotiators had little choice but to tread lightly in what was essentially uncharted negotiating or rule-making terrain.

Yet, in a world that has witnessed a highly service-centric technological revolution of unprecedented magnitude since the curtain fell on the Uruguay Round, one can readily appreciate the unease that flows, most palpably in corporate circles, from playing services with yesterday's rule-book. That is, with the weak, incomplete, rules and the limited, regulatory precaution-laden, pre-Internet, commitments of 1994.

In seeking the right epithet to characterize two and half decades' worth of efforts at prying open services markets, frustration probably ranks among the most apposite. The very currency of services negotiations consists of domestic regulatory measures. This is of essence a slow, ponderous, process. Proof of the above can be seen from the relative ease with which WTO members completed the 1996 International Technology Agreement or ITA), a critical mass, MFN-based, tariff dismantling sectoral deal, with the continued difficulties and definitional quagmires they have subsequently confronted in trying to dismantle the broad range of non-tariff measures inhibiting cross-border trade in Information Technology (IT) products.

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<sup>6</sup>For a fuller discussion of how innate differences between goods and services translated into a legal regime for services trade displaying significant differences from the legal order governing goods trade under the GATT, see [Sauvé \(2009\)](#).

Meanwhile, those areas of services trade where the border retains crucial salience — transport and labor movement for instance — are precisely the ones where market opening gains have been least impressive, including in the generally more liberalization-friendly confines of preferential trade agreements (PTAs). Frustration over the glacial pace of multilateral market opening and over the inability of services to gain adequate traction in the Doha Development Agenda (DDA) equation alongside agriculture and non-agricultural market access (NAMA) talks has prompted a large and growing number of WTO members to turn to PTAs as the chief vehicle to advance their services agendas and harvest the proceeds of far-reaching unilateral liberalization. To date, 118 such agreements have been notified to the WTO, a number of which have achieved significant WTO+ and WTO-X advances in the services field.<sup>7</sup> TISA looks set to become the latest, and likely most important, such agreement.

### 3. Plurilateral or Preferential?

A first question to raise in regard to TISA concerns its constitutional DNA. A negotiating process currently associating a coalition of 23 willing WTO Members (counting the EU-28 as one), TISA is unquestionably plurilateral in character. But it is plurilateral in the sense of the North American Free Trade Agreement (NAFTA) or of the Association of South-East Asian Nations' ASEAN Framework Agreement on Services (AFAS), not in that of the WTO-embedded Government Procurement Agreement (GPA). This, as it happens, is a non-trivial distinction.

The above distinction matters to the extent that TISA proponents have repeatedly affirmed the hope of seeing the Agreement's subsequent multilateralisation or, alternatively, its anchoring in the WTO in the manner of the GPA. Yet the fact that the negotiations currently proceed:

- (i) without the formal ascent of the broader WTO membership;
- (ii) in Geneva but wholly outside the WTO's perimeter;
- (iii) at arm's length of the WTO secretariat (despite the professed desire of TISA protagonists to see the WTO become the Agreement's ultimate custodian);
- (iv) among the RGFS grouping but without currently allowing for third country (and WTO Secretariat) observership,

are all suggestive of a potentially difficult migratory journey.

Rather than opening the TISA doors wide and large and afford all WTO members an opportunity to sit in and observe the negotiations in a transparent manner, determine where their interests lie in the deal on offer, allow those expressing a readiness to join (i.e. to move beyond mere observership towards active participation) the negotiations

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<sup>7</sup>The terms WTO+ and WTO-X were first coined by Horn *et al.* (2008) and refer to rules or market access commitments that go further than or involve a qualitative deepening over existing WTO rules or commitments (WTO+) or represent novel advances not yet found in the WTO (WTO-X).

to contribute to shaping the Agreement's substantive texture and ultimately decide whether to opt-in or opt-out of the negotiated outcome, the TISA has to date operated as a closed club. That being the case, the recent history of trade multilateralism is strongly suggestive that this could be a major handicap from the perspective of any future WTO anchoring.

Indeed, for those with an institutional memory in such matters, such a process recalls the stillborn "Fu-Lung" Group, the name of the Chinese restaurant in Geneva where secretive discussions on financial services among G-10 central bankers and finance ministries (comprising the G-7 nations as well as Australia, the Netherlands and Switzerland) took place in the Uruguay Round's early days and which eventually led to the drafting of the *Understanding on Commitments in Financial Services* to which not a single developing or transition economy signed onto by the Round's end.

The club mindset of TISA also recalls the failed quest for a "state of the art" Multilateral Agreement on Investment pursued in the mid-1990's at the OECD, yet another "us against them/build it and they'll beg to join" construct whose failure contributed in no small measure to the WTO's subsequent inability to complete its own legislative arsenal by embedding a comprehensive set of investment rules under the so-called "Singapore Issues" agenda. More recently still, the failure of ACTA<sup>8</sup> in the area of intellectual property enforcement shared a number of procedural similarities with TISA.

The longer the TISA negotiating process retains its current closed shop mindset, the lesser will be the Agreement's perceived multilateral legitimacy and the dimmer its prospects for later WTO anchoring. Such procedural opaqueness paradoxically affords key reluctant players — chief among which leading emerging nations such as Brazil, India, Russia or South Africa or several important Association of South East Asian Nations (ASEAN) Member States, none of whom are currently sitting at the TISA table — with a ready-made excuse to justify their non-participation in talks where genuine openness might help dampen conspiratorial instincts and prompt much needed pro-active engagement on their part.<sup>9</sup>

Things look somewhat different if one looks at TISA as a WTO-sanctioned construct. At the end of the day, the most probable outcome will be to see TISA emerge as a preferential agreement on services proceeding on the basis of GATS Article V. Under WTO rules, WTO Members enjoy full rights to engage in PTA negotiations in services with the partner of their choice. Any such agreement need not raise any particular legal

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<sup>8</sup> ACTA is the acronym for Anti-Counterfeiting Trade Agreement, which aimed unsuccessfully to establish an international legal framework for targeting counterfeit goods, generic medicines and copyright infringement on the Internet. It would have created a new governing body outside existing intellectual property forums, such as the WIPO, the WTO or the UN. The Agreement's fate was sealed when the European Parliament voted overwhelmingly against its provisions in July 2012.

<sup>9</sup> China has interestingly broken ranks with other leading emerging countries by explicitly seeking admission to the TISA talks in a letter circulated to all RGFS in October 2013. To the consternation of some, given the increase in negotiating legitimacy and critical mass China's participation would entail (to say nothing of the pressure such a decision would likely exert on other large emerging nations, chief among which India and Brazil), not all RGFS were immediately welcoming of China's signal to join the TISA talks in the context of the country's determined shift towards a more consumption-based growth model.

concerns so long as it respects the structures for WTO compatibility enounced in GATS Article V,<sup>10</sup> though the questions of TISA's systemic impact on the WTO, on the options confronting non-members and their potential marginalization and on the incentives for future multilateral negotiations on service all retain salience.

#### 4. When is a Critical Mass Reached?

A second major interrogation regarding the professed desire of the RGFS to see TISA multilateralized concerns the share of world commercial services trade the agreement could potentially cover. As Table 1 reveals, the 23 countries currently party to the

Table 1. Share of TISA participants in world services trade.

TISA participant	Share of world services trade (%)
Australia	2.4
Canada	3.5
Chile	0.6
Chinese Taipei	2.1
Colombia	0.2
Costa Rica	0.2
European Union	36.4
Hong Kong, China	5.6
Iceland	0.1
Israel	1.2
Japan	6.6
Korea	4.3
Liechtenstein	0.02
Mexico	0.7
New Zealand	0.5
Norway	1.9
Pakistan	0.2
Panama	0.3
Paraguay	0.04
Peru	0.2
Switzerland	4.4
Turkey	1.8
United States of America	26.9
Share of world total	68.2
<i>Of which: Share of OECD country TISA participants</i>	<i>91.0</i>
<i>Share of non-OECD country TISA participants</i>	<i>9.0</i>

Source: WTO (2013a).

<sup>10</sup>See WTO (2013) for a description of the Article V disciplines which signatories of preferential agreements in services must comply with under WTO law.

talks accounted for a combined 68.2% of world services trade in 2012.<sup>11</sup> Fully 91% of this total relates to the services trade of TISA participating countries from the OECD area, with the eight non-OECD countries associated to the talks providing the remaining 9% of covered trade. Hong Kong (China) and Chinese Taipei account together for close to nine-tenths (87%) of the non-OECD country share, with no other developing country RGFS accounting for more than 0.3 of world exports of commercial services.<sup>12</sup>

It remains an open question whether the above numbers amount to a credible critical mass, an issue that once more does not arise in the context of an Article V services PTA. By comparison, the three critical mass agreements concluded in the WTO to date — the 1996 Information Technology Agreement (ITA), the Agreement on Basic Telecommunications and the Financial Services Agreement, both of which were completed in 1997 — were all reached with coverage ratios exceeding 90% of total trade in the respective sectors or issue areas at play. The perception, largely corroborated by Table 1 data, that TISA, as currently configured, is chiefly an agreement for and by advanced industrialized nations, once again raises doubts over the smoothness of its possible subsequent multilateralization.

## 5. Avoiding Architectural Dissonance

The universe of agreements on trade in services is today almost equally divided between agreements that follow the negotiating modalities of the GATS, which are predicated on a hybrid approach<sup>13</sup> to scheduling commitments across 4 distinct modes of service supply and those, slightly more numerous today and which, following the 1994 North American Free Trade Agreement (NAFTA), adopted what is called a negative list approach to market opening. In the latter agreements, commitments relate to the preservation, in so-called “reservation lists”, of *existing* non-conforming (i.e. treaty inconsistent) measures or the identification (in a separate reservation list) of sectors where scope for the introduction of *future non-conforming measures* can be maintained (the negative list equivalent of an “unbound” sectoral commitment in GATS-like agreements).

Significant experimentation in approaches to market opening has been pursued in recent years in the proliferating set of services PTAs, with combined approaches

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<sup>11</sup> All figures are from the World Trade Organisation’s WTO (2013a).

<sup>12</sup> As noted earlier, China and Uruguay have recently signaled a desire to join the TISA negotiations. Should a favorable decision among the RGFS be reached regarding their request, their participation would increase the aggregate share of world services trade covered by prospective TISA members from the current 68.2% percent to roughly 72.3%, with China accounting for the bulk of the increase given its 4.38% share of world exports of commercial services. The looming addition of China and Uruguay to TISA would consequently increase the share of non-OECD participation from 9.0% to 13.35% of world services trade.

<sup>13</sup> The hybrid approach to scheduling commitments under the GATS involves the positive choice of sectors, sub-sectors and modes of supply which WTO members voluntarily choose to place in their schedules combined with the negative listing of limitations maintained in scheduled sectors, sub-sectors or modes of supply.

increasingly common — for instance a negative list approach for investment in services and a positive list approach for cross-border trade or other such variations.<sup>14</sup>

Despite the professed desire of TISA participants to craft an agreement that is compatible with the GATS so as to facilitate its eventual multilateralization, the TISA appears to be clearly departing from GATS practice by proposing to liberalize national treatment-inconsistent measures via a negative list approach while maintaining a positive list approach for market access commitments. The likely rationale behind such segmentation could well lie in the fact that governments often find it easier to progressively liberalize discriminatory domestic regulations, which typically nonetheless allow for some (constrained) market contestability, than to dismantle quantitative restrictions limiting competition in services markets. The political economy of dismantling quota rents is indeed often more challenging given the strength of the political influence of those who hold such rents.

The adoption of such a novel approach to market opening would once more be perfectly feasible and uncontroversial in the context of an Article V agreement given the prevalence of PTA precedence. Its adoption in an agreement slated for subsequent multilateralization would, however, likely give rise to complex problems of legal co-existence and interpretation with regard to existing GATS commitments. This is so to the extent that, as currently holds, a large number of GATS provisions only apply if and when a specific commitment (on national treatment and market access) is scheduled.

Under TISA's proposed segmented approach to scheduling, a number of GATS disciplines — for instance on payments and transfers under Article XI — would automatically apply to all measures affecting trade and investment in services that are left off the negative list of national treatment-inconsistent measures but would only be applicable in sectors and modes of supply where positively listed market access commitments were scheduled. Such dual treatment would appear largely devoid of a sensible policy rationale, all the more so when one considers that the frequency of quantitative restrictions to services trade is typically greater than that of discriminatory measures.

Questions also arise as to the means under TISA to procure future regulatory immunity in respect of discriminatory measures, as the negative list approach to national treatment would solely lock in measures at their *existing* level of non-conformity and oblige signatories to accept that all future measures in the same sector or, more controversially still, in new (i.e. future) sectors be automatically bound at free. Such an outcome would of essence require that TISA replicate provisions, common to all negative list PTAs, allowing scope for Parties to preserve the right to introduce new non-conforming measures in sectors with acute policy sensitivities. For the European Union, this would be the only means of accepting that TISA covers trade in sectors such as audio-visual, education or health services as the EU could then reserve such

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<sup>14</sup>For a fuller discussion of differing negotiating architectures in PTAs, see [Mattoo and Sauvé \(2011\)](#).



entire sectors from the Agreement's scope of coverage. The main policy lesson to be derived from the above discussion is a relatively simple one: the greater the architectural dissonance between TISA and the GATS, the harder the eventual normative migration to the WTO could prove to be.

Rather than pursue an approach to liberalization sure to sow greater interpretative confusion and give rise to heightened legal complexity (a likely major private sector turn-off), TISA proponents should rather consider forward-looking ways of remedying a number of the foundational weaknesses of the GATS in regard to scheduling commitments<sup>15</sup> by adopting practices that have been successfully pursued in a number of more recent PTAs.<sup>16</sup>

If TISA participants were genuinely concerned by TISA's subsequent multilateralization, the RGFS could seek to replicate the voluntary, bottom-up, approach to scheduling commitments of the GATS but condition such an approach on two important qualitative improvements:

- (i) the adoption of a new provision mandating that any commitment voluntarily scheduled lock in the regulatory *status quo* (i.e. that TISA signatories no longer bind less than the access flowing from *prevailing* regulatory regimes) and
- (ii) the incorporation into TISA of country-specific, annexes featuring *non-binding* negative lists of non-conforming measures, documenting, solely for transparency promoting purposes, all treaty inconsistent measures maintained by Parties.

Such a dual approach would largely approximate the good governance and transparency promoting properties of negative listing and ensure that TISA commitments relate to specific, existing measures and no longer merely to a GATS-like standard of treatment that may be divorced from prevailing regulatory realities. The production of non-binding negative lists would allow members to conduct useful domestic audits of the optimality of their services regimes while also generating information that could usefully allow for a rank-ordering of measures based on their commercial and negotiating importance. Such an approach would thus generate information of considerable use to policy officials conducting periodic rounds of negotiations, allowing them to devise formula-based approaches to market opening in areas or sectors where the nature and incidence of policy restrictions appears convergent. The transparency gains flowing from such an approach would also yield commercially useful information for private sector users, who would be supplied a full mapping of regulatory restrictions likely to be encountered in foreign markets.

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<sup>15</sup> Arguably the greatest weakness of the GATS (and of PTAs predicated on the GATS approach) in respect of its market opening provisions is the fact that the Agreement allows Parties to schedule commitments below the regulatory *status quo*, i.e. to maintain a gap between existing (applied) regulations and what appears in their GATS schedules. This in effect replicates the gap found under GATT between bound and applied tariffs in WTO Members' tariff schedules.

<sup>16</sup> See, for instance, [Sauvé and Ward \(2009\)](#) for a fuller discussion of the novel scheduling approach adopted in the EU-CARIFORUM Economic Partnership Agreement.

A potentially more controversial element to ponder in TISA's market opening arsenal could be the adoption of a so-called "ratchet clause", found today in a large number of PTAs (particularly in the Western Hemisphere) and through which unilateral liberalization measures enacted *between* negotiating rounds would automatically be bound at the new level of (lessened) non-conformity under TISA.

## 6. Just How WTO+? The Fate of Sensitive Sectors and Modes of Supply

Every country has sensitive sectors to contend with at the negotiating table. For the United States, the maritime sector has historically proven impervious to services trade talks, followed more recently by mode 4 trade (arguably in violation of Article V, which states that services PTAs should not exclude any mode of supply on an *a priori* basis).<sup>17</sup> For the EU and Canada, audio-visual services remain no-go zones in services trade talks, as are publicly-funded health and education services in a large number of countries taking part in the TISA negotiations. Trade in air transport services offers another example of a sector largely immune from the forces of trade negotiating-induced liberalization. This is so despite the globally competitive nature of the industry, the continued need for airline consolidation and the lower cost of capital that a progressive lifting of onerous existing ownership restrictions would entail, as well as its central importance as a means of ferrying both goods and people (business people and tourists) to market.

The question naturally arises of those sectors in which TISA could generate the value-adding WTO+ and WTO-X commitments extolled by its main proponents. A related question is the likelihood that TISA's political economy, particularly in the absence of large developing countries such as Brazil, India, Indonesia, South Africa or any number of leading ASEAN Member States, will be conducive to putting on the table what has largely stayed off it so far at the WTO and in many PTAs.

There are generally few signs suggesting a major shift in US attitudes towards maritime transport or mode 4 liberalization, nor would much hope appear warranted in the sudden ability of the EU or Canada to drop their long-standing reluctance to revisiting the case for market opening in audio-visual or other services with notable public good characteristics. The above questions are equally germane in regard to the probable liberalization harvest of the proposed Transatlantic Trade and Investment Partnership (TTIP). Still, the TISA offers a platform for participants to try as best they can to push the liberalization envelope in new directions, where the scope for binding commitments may have newly opened up as a result of recent autonomous liberalization, changes in market structures or novel advances in pro-competitive regulation. Sectors that come most prominently to mind in this regard include a wide range of environmental services, energy-related services as well as postal and courier services.

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<sup>17</sup>No PTA concluded by the United States since its bilateral agreement with Australia in 2004 has featured negotiated commitments on the temporary entry of service providers.

One area where TISA could usefully break new ground would be in testing out novel formula-based approaches to market opening, devising deeper *à la carte* liberalization packages using model schedules, collective requests to remove selected modal or sector-specific impediments such as foreign equity limitations or economic needs tests linked to licensing, as well as multi-sectoral clustering — for instance a TISA cluster on trade facilitation services combining transportation, distribution, customs brokerage and associated border management consulting services, warehousing, express delivery and logistics services. Another cluster where forward movement should be conceivable would relate to a package of IT-related business services (including selected professions with accompanying Mode 4 commitments), particularly in regard to Mode 1 trade, which could be packaged as the services complement to the WTO’s Information Technology Agreement currently being renegotiated under the GATT.

Should TISA delve more deeply into new sectors, notably those with network properties, such as waste disposal services, water and energy distribution or rail transportation, participating countries should explore the scope for developing new sets of pro-competitive regulatory disciplines first pioneered in the Uruguay Round’s negotiations in the area of basic telecommunications. Finally, there would seem every reason for TISA to take stock of the post-Uruguay Round revolution in digital trade and codify the latest set of trade-facilitating, pro-competitive, and net neutral disciplines aimed at preserving transactional freedoms in cyberspace. This is a terrain that has already been mined extensively in chapters on digital trade in the PTAs of many TISA participants. Such precedents should, once again, facilitate TISA codification. However, in tackling the digital trade agenda, one should not underestimate the scope of a possible transatlantic divide on issues linked to data privacy and IP protection, both of which are salient in discussions of new disciplines on cross-border data flows, an issue that has taken on more sensitive policy proportions of late in the wake of the concerns arising from revelations of far-reaching spying practices by the United States.

## **7. TISA as a Rule-Making Laboratory?**

The unfinished rule-making agenda of the GATS is by no means a multilateral monopoly. Such an agenda covers the important areas of disciplines on non-discriminatory domestic regulation (so-called necessity tests under GATS Article VI:4), subsidies (under Article XV), emergency safeguards (Article XII) and government procurement (Article XIII). With the exception of procurement liberalization, for which extensive PTA-induced liberalization can be reported, none of the other elements of the GATS’ unfinished rule-making agenda has been tackled meaningfully at the level of PTAs.

Still, to the extent that a very large number of TISA participants have concluded PTAs in services with each other (see Table 2), significant (though by no means full) procurement liberalization in services has already been achieved. TISA offers scope for

Table 2. Existing and planned PTAs in services among TISA partners.

TISA negotiating partner	Existing agreements with TISA partners	Agreements under negotiation with TISA Partners
Australia (AU)	3 (CHL; NZ; US)	4 (JP; KO; MX; PE)
Canada (CA)	5 (CHL; CO; MX; PE; US)	6 (EU; IC; JP; KO; NO; CH)
Chile (CHL)	16 (AU; CA; CO; CR; EU; HK; IC; JP; KO; MX; NZ; NO; PAN; PE; CH; US)	0
Chinese Taipei (CHT)	1 (PAN)	0
Colombia (CO)	9 (CA; CHL; EU; IC; MX; NO; PE; CH; US)	0
Costa Rica (CR)	6 (CH; EU; MEX; PAN; PE; USA)	0
European Union (EU)	9 (CHL; CO; CR; ICL; KOR; MEX; NOR; PAN; PE)	4 (CA; ISL; JP; US)
Hong Kong China (HK)	5 (CHL; IC; NZ; NO; CH)	0
Iceland (IC)	8 (CHL; CO; EU; HK; KO; MX; NO; CH)	1 (CA)
Israel (ISL)	0	1 (EU)
Japan (JP)	4 (CHL; MX; PE; CH)	7 (AU; CA; CO; EU; KO; NZ; US)
Liechtenstein	8 (CHL; CO; EU; HK; KO; MX; NO; CH)	1 (CA)
Korea (KO)	8 (CHL; CO; EU; IC; NO; PE; CH; US)	5 (AU; CA; JP; MX; NZ)
Mexico (MX)	10 (CHL; CO; CR; EU; IC; JP; NO; PE; CH; US)	3 (AU; KO; NZ)
New Zealand (NZ)	3 (AU; CHL; HK)	5 (JP; KO; MX; PE; US)
Norway (NO)	8 (CHL; CO; EU; HK; IC; KO; MX; CH)	1 (CA)
Pakistan (PK)	0	0
Panama (PAN)	6 (CHL; CHT; CR; EU; PE; US)	0
Paraguay (PAR)	0	0
Peru (PE)	10 (CA; CHL; CO; CR; EU; JP; KO; MX; PAN; US)	2 (AU; NZ)
Switzerland (CH)	8 (CHL; CO; HKC; IC; JP; KO; MX; NO)	1 (CA)
Turkey (TU)	0	0
United States (US)	9 (AU; CA; CHL; CO; CR; KO; MX; PAN; PE)	3 (EU; JP; NZ)

Source: Author's calculations based on Marchetti and Roy (2014 forthcoming).

deepening this process, notably at the sub-federal level, but here again one needs to ponder the incentive for the US, Canada, Japan, Australia or any large individual EU member with a federal political structure to open up this politically sensitive sector in return for reciprocal access to markets that are distinctly smaller in size and where market opening talks have already proceeded in most instances. Indeed, the issue of services procurement already is or will soon be at the core of ongoing bilateral negotiations between key TISA partners, notably the EU, Canada, the US, Australia

and Japan (including under the TPP and the TTIP). The limited proclivity for PTA partners to meaningfully address Uruguay Round leftovers reflects a clear (and recurring) revealed preference for regulatory inaction. Some progress could however be expected in TISA on the issue of non-discriminatory domestic regulation, but more along the lines of DDA discussions on greater transparency than in the direction of the development of a full-blown necessity test for services.

The reluctance of large players such as the US, Canada and the EU to accept the logic of necessity in services as they long have in goods trade under the Agreement on Technical Barriers to Trade (the TBT Agreement) and the Agreement on Sanitary and Phyto-Sanitary Measures (SPS Agreement) disciplines remains deeply paradoxical, all the more so as the US and the EU, as the world's leading exporters of services, remain the most likely victims of needlessly burdensome or disproportionate regulatory conduct in foreign services markets. Doubts can legitimately be expressed as to whether TISA could meaningfully break the above rule-making logjam, a rare instance where the quest for regulatory immunity trumps industry interests. Meanwhile, it begs to recall that some of TISA's strongest protagonists seem to attach importance to regulatory transparency that is perhaps more rhetorical than real if one is to go by the number of services measures notified under Article III.3 of the GATS. Since 2000, the US, the EU, Canada and Australia have collectively notified four new measures affecting their GATS commitments, as opposed to 60 each for Switzerland and China and 120 for Albania!

## **8. Conclusions**

It is possible to express genuine concerns about a negotiating process while still hoping it can garner useful forward momentum. This is very much the predicament one faces in looking at TISA. The substantive merits of a proposed TISA would be easy to applaud if the negotiations were presented for what they most likely are from the outset: as the potentially largest GATS Article V PTA in services concluded to date. Meanwhile, and based on the limited information that has filtered so far on the nascent plurilateral talks, a number of genuine reservations may be advanced, both procedural and substantive in nature, that the Agreement being devised could easily or anytime soon be incorporated into the WTO architecture and co-exist alongside the GATS (and least of all replace it). That there is no precedent for such coexistence in the GATT-WTO history should already be a cause for concern to TISA protagonists.

The world economy as a whole and every WTO member for that matter, regardless of income level, stand to gain from greater, more transparent and progressively more liberal trade and investment conditions in services markets. Services are central to all that an economy produces, exports, and invests in, such that an inefficient service sector represents a perverse tax on economy-wide efficiency. The growing acceptance of this central economic reality has fuelled unprecedented autonomous liberalization in services markets around the globe in recent decades (Ghani and Kharas, 2010; Schott

and Muir, 2012). Trade agreements, and especially the GATS, have not yet proven adept at locking in such autonomous policy virtue. In the case of the GATS, broader negotiating dynamics in the Doha Round may well have exerted the largest inhibiting influence.

Progress in *negotiated* market opening in services markets has been significantly greater in PTAs to date, if far from complete and still uneven across sectors. The advent of TISA represents a genuine opportunity to further advance the cause of preferential liberalization in services markets among a coalition of countries representing close to seven tenths of the global market (and closer to three quarter of world services trade should China succeed in joining the negotiations). While such a coverage ratio or critical mass remains significantly less that which was achieved in recent plurilateral agreements brokered at the WTO, it is far from trivial in potential market access terms. Moreover, the TISA talks have rekindled marked interest on the part of private operators and industry associations in championing negotiated market opening, recalling at times the early feverish days of the Uruguay Round. Failure to respond to such renewed private sector engagement would represent an unfortunate missed opportunity. Yet, in pursuing TISA, greater attention needs to be paid to the negotiating atmospherics and concrete steps taken to promote far greater inclusiveness, including on the part of the WTO secretariat in an observer capacity, than has been the case so far.

At a critical juncture for both the WTO and the Doha Development Agenda, one may legitimately ponder the systemic implications of the proposed TISA and question the incentives its completion would entail for the DDA's services talks should agreement be reached among the RGFS grouping. Indeed, and somewhat paradoxically, the more successful TISA is, the greater the systemic threat it arguably poses for the GATS and the WTO more broadly, as success in TISA runs the genuine risk of dramatically lessening the incentive to negotiate on an Most Favoured Nation (MFN) basis at the WTO, undermining the careful balance of benefits currently underpinning the multi-lateral trading system.

Moreover, and regardless of their collective weight in aggregate services trade, with only a small fraction (23–25 out of 162) of WTO Members involved in the TISA talks, questions arise of the political legitimacy and marginalization risks the negotiations pose for non-members. The recent decision of China to join the TISA talks raises a further set of important questions, notably with regard to the position that other large developing countries or fast growing emerging economies might take as a result, chief among which India, a major global services force in its own right, and Brazil, which has long maintained a more cautious policy stance in services. Both India and Brazil appear fearful that a successful TISA would considerably lessen the leverage they have been able to exert in the DDA in areas of greater importance (typically agriculture and food security) by strategically withholding engagement in the services negotiations. The prospect of seeing China garner preferential access to the services markets of major OECD countries might well produce a domino effect and generate a sudden, sharp, rise

in TISA's critical mass. Such an outcome would in effect create two parallel global regimes for services trade, a first in contemporary trade diplomacy and a precedent almost certain to undermine the political and juridical credibility of the WTO system.

This paper has suggested a number of relatively simple corrective gestures that could be taken to ensure that the negotiating process is more genuinely inclusive and transparent and does not needlessly pit developing countries against the predominantly OECD-centric RGFS grouping in a manner that could prove inimical to the confidence, goodwill and cooperation that will need to be supplied in vastly greater quantities for the DDA to be completed and for the WTO's credibility as a liberalizing legislature to be restored. TISA participants could furthermore adopt approaches to liberalization and rule-making with a view to facilitating, rather than hindering, the process of eventual anchoring in the WTO.

Looking ahead, plurilateralism and variable geometry approaches to rule-making and market opening are likely to prove important ways of keeping the WTO relevant, of sustaining the multilateral bicycle's forward journey while also acknowledging the increasing diversity of collective preferences — and concomitant interests and abilities — among a membership made up today overwhelmingly of developing countries whose primary export interests may not always lie in services (even as their infrastructural import needs should prompt greater engagement in services talks). Whenever possible, WTO Members should explore and pursue, under one common roof, the scope that exists for flexible approaches to rule-making and market opening commanding adequate critical mass. Pursuing plurilateral outcomes in an open setting that allows for economies of scale and learning is not the same thing as negotiating behind closed doors. History has not been kind to the latter initiatives.

An important final question, not addressed in this paper but germane in the context of ongoing discussions of a waiver for services exports from least developed countries (LDCs), is whether TISA commitments should be extended automatically and unconditionally to the world's poorest countries on a non-reciprocal basis (WTO, 2013b). Already, in the run-up to the WTO's December 2013 Ministerial meeting and in the wake of the 2011 Ministerial Decision establishing the LDC services, the operational modalities of which remain to be determined, the proposal has been made for non-LDC WTO Members, and particularly those developed countries that have typically assumed the deepest (both WTO+ and WTO-X) market opening commitments in their PTAs, to extend "best PTA" treatment in services unconditionally and non-reciprocally to all LDCs. The stated aim of making TISA the most liberalizing preferential construct to date in services would likely make the agreement the source of such best treatment on the part of signatories. While the ability of least developed countries to make use of such preferences remains subject to doubt given the acuteness of the supply constraints encountered in LDCs, the multilateralization of TISA benefits towards this grouping of 49 WTO Members — representing close to a fifth of the organization's membership — would offer potentially interesting economies of scale in both market access and implementation terms.

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