**Dr. Jekyll or Mr. Hyde? Thinking aloud about a possible Trade in Services Agreement (TISA)**

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## Contextual considerations

It is a pleasure to appear before the European Union Parliament's Committee on International Trade and to renew my friendship with its Chairman (and WTI friend), Professor Vital Moreira, and the many familiar faces in the audience today.

I am especially grateful for the opportunity afforded me, as the only full-time academic in this panel, to advance a set of conflicting thoughts on the proposed Trade in Services Agreement (TISA). Indeed, as my remarks today will make clear, I am of two views on the proposed negotiations.

The services veteran in me all too readily applauds the sight - *enfin!* - 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 requires 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, the negotiating veteran and academic observer that I am harbors a number of doubts or at the very least interrogations – rooted largely in the information asymmetries that stem from my status as a TISA outsider - on the journey proposed, it's likely value-added and the collateral effects it could yet exert on the WTO's services talks. My hope is that today's dialogue may lay to rest many or most such misgivings, allowing the debate on the proposed TISA to proceed on merit and facts rather than speculative musings.

## Recalling the starting point

As the GATS approaches its twentieth birthday, 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.

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That the Uruguay Round is not yet completed in services even as the Doha Round languishes in the twelfth 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 political economy of which is all too often dauntingly intractable.

To be sure, the Uruguay Round's negotiating harvest in services was a mere (and meek) down payment, the product of a first slow dance between protagonists exhibiting the natural caution typically associated with a first date. Confronted with what was largely a blank page – a frightening site for any policy official – negotiators had little choice but to tread lightly in what was essentially uncharted terrain. Many in this room will appreciate that home runs are rarely hit on first at bats, and the GATS is no exception to this baseball analogy (my apologies for being North American!).

Still, in a world that has witnessed an IT (and highly service-centric) technological revolution of unprecedented magnitude since the curtain fell on the Uruguay Round, one can readily understand 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 ranks among the most apposite. The currency of services negotiations being domestic regulation, dismantling the trade- and investment-impeding measures that lie chiefly behind borders implies that services talks are wholly akin to negotiations on non-tariff barriers – a recipe for a headache in super slow-motion! To convince yourself of such a proposition, consider the relative ease with which WTO members completed the 1996 International Technology Agreement ITA), a critical mass, MFN-based, tariff dismantling deal, with the continued agony WTO members have subsequently confronted in trying to dismantle the broad range of non-tariff measures inhibiting trade in IT products.

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 DDA equation alongside agriculture and NAMA, 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, 108 such agreements have been notified to the WTO, a number of which, including those concluded by the EU, have achieved significant WTO+ and WTO-X advances in the services field. TISA looks set to become the latest, and most important, such agreement.

**Plurilateral or preferential?**

A first question to raise in regard to TISA concerns its constitutional DNA. A negotiating process currently associating 22 WTO Members (counting the EU-27 as one), TISA is unquestionably plurilateral in character. But it is plurilateral in the sense of the NAFTA or ASEAN's AFAS (the ASEAN Framework Agreement on Services), 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 multilateralization 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 "Really Good Friends of Services" (RGFS) group of countries without allowing for third country (and WTO Secretariat) observership,

are all in my view suggestive of a potentially difficult migratory journey.

Rather than opening the ISA doors wide and large and afford all WTO members an opportunity to sit in on the negotiations in a transparent manner, determine where their interests lie in the deal on offer, contribute to shaping the Agreement's substantive texture and ultimately decide whether to opt-in or opt-out of the negotiated outcome, the ISA 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 WTI anchoring.

Indeed, for those old enough to have an institutional memory in these 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 non-OECD country signed onto by the Round's end. It also recalls the failed quest for a "state of the art" Multilateral Agreement on Investment at the OECD, yet another "us against them/build it and they'll beg to join" construct whose fate is known to many in this audience but whose predictable 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 in the

area of IP enforcement, a process this Committee had some say in, shared a number of procedural similarities with TISA.

The longer the TISA negotiating process retains what appears to be a closed shop mindset, the lesser the agreement's perceived multilateral legitimacy and prospects for later WTO anchoring. Such procedural opaqueness paradoxically affords key reluctant players – think BRICS or several larger ASEAN Member States, none of whom are currently sitting at the TISA table – with an all too easy excuse to justify their non-participation to talks where genuine openness might help dampen conspiratorial instincts and prompt much needed pro-active engagement.

Things look distinctively different if the RGFS simply acknowledge what seems closer to the most probable outcome of the journey: that TISA is nothing more - but far from trivially – than a preferential agreement on services proceeding on the basis of GATS Article V. WTO Members enjoy full rights to selectively pursue a services PTA and any such deal need not raise any legitimacy concerns so long as it respects the legal strictures for WTO compatibility enounced in Article V of the GATS (Economic Integration).

**When is a critical mass critical?**

A further interrogation regarding the putative multilateralization of TISA concerns the share of world commercial services trade the agreement could potentially cover. The 22 countries currently party to the talks account for a combined 68.2 percent of world services trade. Fully 91 percent of this total is accounted for by OECD countries, with the 7 non-OECD countries associated to the talks providing the remaining 9 percent. Hong Kong (China) and Chinese Taipei account together for close to nine-tenths (87 percent) of the non-OECD share, with no other developing country RGFS accounting for more than 0.3 of world exports of commercial services.

It remains an open question whether the above numbers amount to a credible critical mass, an issue that once more would 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 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 areas at play.

The perception, largely corroborated by the facts, 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.

**Beware of 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 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), turned the GATS upside down in pursuing a negative list approach to market opening. In the latter agreements, commitments relate to the preservation, in so-called "reservation lists", of non-conforming (i.e. treaty inconsistent) measures or the identification of sectors where scope for the introduction of future non-conforming measures can be maintained (the negative list equivalent of an "unbound" whole of sector 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 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.

TISA appears to be 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 often more challenging).

Once again, the adoption of such a novel approach would be perfectly feasible and uncontroversial in the context of an Article V agreement. 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 - 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 then only to those arising in sectors and modes of supply where positively listed market access commitments were scheduled. 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 but oblige all future measures in the same sector to be bound at free. 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 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 GATS' foundational weaknesses in regard to scheduling commitments by adopting practices that

have been successfully pursued in a number of more recent PTAs, including by the EU in its Economic Partnership Agreement with CARIFORUM Member States.

For instance, with a view to facilitating its subsequent multilateralization, TISA could replicate the voluntary, bottom-up, approach to scheduling commitments of the GATS but condition such an approach on two qualitative improvements:

(i) the adoption of a new rule mandating that any commitment voluntarily scheduled lock in the regulatory *status quo* (i.e. that TISA signatories may no longer bind less than the access flowing from *prevailing* regulatory regimes); and

(ii) the incorporation of *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 promoting properties of negative listing and ensure that TISA commitments relate to specific measures and no longer merely to a GATS-like standard of treatment that may be divorced from prevailing regulatory realities.

A further, if 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.

**The fate of sensitive sectors and modes of supply**

Everybody has ghosts in its closet. 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). For the EU and Canada, audio-visual services remain no-go zones in services trade, as are publicly-funded health and education services in a large number of countries taking part in TISA talks.

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 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 protagonists will feel confident in their collective ability to generate value-adding WTO+ and WTO-X commitments, for instance, in the latter case, in energy or environmental services. A related question is the

likelihood that TISA's political economy, particularly in the absence of large developing countries such as China, Brazil, India, Indonesia, South Africa or any number of larger 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 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 services. The above questions are equally germane in regard to the probable liberalization harvest of the proposed Transatlantic Trade and Investment Partnership (TTIP).

One area where TISA could usefully break new ground would be in testing out 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 brokerages and associated border management consulting services, warehousing, express delivery and logistics services).

Should TISA delve more deeply into new sectors, notably those with network properties, such as waste disposal services, 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 overtime talks on 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 PTAs, which should 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.

**The ISA as a rule-making laboratory?**

The unfinished rule-making agenda of the GATS is by no means a multilateral monopoly. By and large, such an agenda has yet to be tackled meaningfully at the level of PTAs, with the notable, and commercially important, exception of government procurement in services.

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

PTAs to date have shown a limited capacity to make headway beyond procurement on the unfinished agenda of the GATS. This reflects a clear (and recurring) revealed preference for regulatory inaction on issues such as subsidy disciplines or emergency safeguard measures, where many TISA participants remain deeply skeptical, including on feasibility grounds.

Some progress could however be expected 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 do for services what they have long done for goods trade under TBT and SPS disciplines remains 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 markets. Doubts can legitimately be expressed as to whether TISA could meaningfully break this rule-making logjam, a rare instance where the quest for regulatory immunity trumps industry interests. Meanwhile, it begs recalling that that some of TISA's loudest protagonists seem to attach more rhetorical than genuine importance to transparency 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 4 new measures affecting their GATS commitments, as opposed to 60 each for Switzerland and China and 120 for Albania!

**Tentative conclusions**

One may express genuine concerns about a process while still hoping it can garner deserved traction. This is very much the predicament this observer faces in looking at TISA. I am a true believer in the merits of TISA if it is presented for what it is more clearly from the outset: as a GATS Article V PTA in services. Meanwhile, based on what I have read and heard, including at today's workshop, I harbor a number of reservations, procedural and substantive, that the Agreement being devised could easily or anytime soon be incorporated into the WTO architecture and co-exist next to the GATS. That there is no precedent for such coexistence in the GATT-WTO should already be a cause for concern.

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. 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 the WTO and the DDA, one may legitimately ponder the systemic implications of the proposed TISA and question the incentives its completion would entail for DDA's services talks should agreement be reached among the RGFS grouping.

The analysis put forward in this analysis is admittedly rooted in impressions garnered from looking at TISA from the outside. I do not pretend to know precisely all that is going on in the talks and stand to be corrected by those here who do. Still, my overall conviction is that a number of relatively simple corrective gestures 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. This note has advanced a few practical ideas to this end.

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).

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 note but germane in the context of the ongoing conversation on an LDC waiver for services, is whether TISA outcomes should be extended automatically and unconditionally to LDCs on a non-reciprocal basis.

I thank you for your attention and look forward to your questions and those of the panel.