非最惠國待遇之複邊服務貿易協定提案：世界貿易組織的另一次內爆行為

伯斯沃司
澳洲國家大學客座經濟學家

關鍵字：世界貿易組織、最惠國待遇、複邊服務貿易協定、服務貿易總協定

中文摘要

被視爲有效的全球貿易自由化團體的世界貿易組織(WTO)正遭遇大麻煩，而其問題的來源不是外在而是內在。會員國，尤其是國際貿易的主要大國或大區塊如美國與歐洲聯盟(EU)難辭其咎。當世貿組織需要強而有力的多邊領導與支持時，這些強權們卻口是心非，說的是一回事，而做的卻是一些對 WTO 運作有害的舉動。WTO 的從內部崩解將會持續，除非會員國中止他們不尊重與不履行該組織核心原則，尤其是最惠國待遇(MFN)，這是 WTO 的最主要的比較利益，WTO 也是唯一能維護此一根本價值的機構。堅持維護 WTO 的 MFN 原則不僅確保該組織的運作，並且存在的有意義。如果複邊談判(plurilateral negotiations)不幸被默認爲巴里後模式(post-Bali way) ，也應該是與 WTO 的這些原則一致，且必須是在 WTO 內以透明的「關鍵多數決」(critical mass)門檻來確保所有會員國的最惠國待遇。

The Proposed Non-MFN Plurilateral Trade in Services Agreement: Another Act of WTO Implosion

Malcolm Bosworth[1]

Key words: WTO, plurilateral negotiations, most-favoured-nation treatment,

Executive Summary

The WTO as an effective global trade liberalization body is in deep trouble, and the causes are from within not outside. Members, especially the key players in international trade like the US and EU, are squarely to blame. At a time when strong multilateral leadership and support for the WTO is needed, these hegemony economies are preaching one thing but adopting actions that are at the heart of the WTO's demise. The WTO's implosion will continue unless Members stop driving it into the ground by not respecting and implementing its core principles, especially of most-favoured-nation, the WTO's main comparative

[1] Visiting Research Fellow, World Trade Institute, Bern, Switzerland, and Visiting Economist at ANU Enterprise, the Australian National University, Canberra, Australia. The author is especially grateful for detailed comments from Rolf Adlung, Pierre Sauvé and Brett Williams. Amar Breckenridge, Greg Cutbush, Martin Roy and Ray Trewin also provided very useful comments. The views expressed are the author's and do not necessarily reflect those of the WTI or the ANU.

advantage; it is the only institution capable of defending this fundamental value.[2]

Preserving a strong MFN principle is essential to ensuring the WTO not only survives operationally, but remains worthwhile. If plurilateral negotiations are unfortunately by default to be the post-Bali way, they ought to be as consistent as possible with these WTO principles, and be negotiated within the WTO using transparent 'critical mass' thresholds to ensure MFN treatment for all Members. Plurilaterals 'aren't just plurilaterals' and have their own problems, especially if negotiated discriminatorily outside the WTO. The WTO has plenty of scope to negotiate 'MFN plurilaterals' in services, for instance, by using protocols and understandings in the General Agreement on Services (GATS) e.g. the 4th and 5th protocols that incorporated the results of the extended negotiations on basic telecommunications and financial services, respectively, into participants' GATS schedules.

The form the Trade in Services Agreement (TiSA) is taking and what is being negotiated will have significant

[2] It is important to distinguish between 'unconditional' and 'conditional' MFN. The WTO (GATT Article 1) is based on 'unconditional' MFN, namely that the best treatment extended to one trading partner is automatically extended to all WTO Members. However, 'conditional' MFN on which PTAs are based entails reciprocity, and extends MFN treatment to only the negotiating parties. In this paper, 'MFN' or 'non-MFN' refer to 'unconditional' MFN. Plurilateral agreements can also be 'conditional' MFN, applying only between parties, or 'unconditional MFN' whereby benefits are also extended to non-parties, such as to all WTO Members.

ramifications not only for services liberalization generally, but for the WTO's future relevance and possible survival as an effective institution to advance open global trade. The non-MFN pathway along which TiSA negotiations are proceeding raises many uncertainties that risk further harming the WTO as the defender of the multilateral non-discriminatory trading system, at a time when the institution and multilateralism are in deep trouble and much in need of revival. The tepid Bali outcomes after 12 years of tortuous negotiations highlight the extent of the distress. It is very doubtful whether TiSA's negotiation as being executed is in the interests of global trade or of the WTO. The TiSA approach to establish a discriminatory PTA to end the WTO's impasse is gobbledygook, and should be avoided.

Negotiating TiSA as a plurilateral non-MFN PTA in Geneva under GATS Article V outside the WTO and possibly competing with the GATS, to be somehow but without guarantee multilateralized, to advance multilateral services negotiations risks backfiring badly. It is an exemplar of why PTAs and associated regionalism are best avoided, both for their own weaknesses, but also because they are contributing to the demise of the multilateral trading system. PTAs do not address the domestic political economy pressures opposing liberalization, even possibly inflaming them; exacerbate the flawed mercantilist thinking and 'free rider' problem used to resist self-liberalization; and distract from what really matters, namely home-based reforms through unilateralism built on domestic transparency to expose the economic costs of protection and to ensure trade policies are publicly scrutinized so as to keep

governments accountable in looking after the national rather than vested interests.

Despite stated intentions to multilateralize TiSA based on some 'critical mass' coverage of participants, this remains uncertain. To help achieve this outcome the threshold should be set as low as possible. However, the odds-on favourite emerging is that once implemented as a PTA it will remain so into the foreseeable future. This would be another nail (probably a bolt) into the WTO's coffin. It TiSA is to be negotiated it is essential to ensure it only operates as a MFN plurilateral agreement within the WTO.

The compounded fear is that TiSA, especially when combined with the TPP, RCEP, and the TTIP, will become the tipping point beyond which Members justify ignoring WTO norms because no one else follows them (Baldwin and Carpenter, 2009). Such an outcome would be bad for all WTO Members and for global trade governance generally.

1. Introduction

Australia and the US, with solid support from the EU and others, are driving the plurilateral non-MFN TiSA negotiations in Geneva, in parallel with the Doha negotiations on the GATS. TiSA aims for strong commitments on market access and national treatment, as well as new trade rules, to address behind- the-border barriers to trade in services. Its proclaimed objective is to 'negotiate a high-quality and comprehensive agreement compatible with the WTO's GATS that will attract broad

participation among WTO Members, and thereby support and feed back into the multilateral trade negotiations'. This ambitious route is intended to revitalize global services trade negotiations given the Doha Round's failure and the meager progress in the GATS.

2. The Trade in Services Agreement

Given no real progress in most key areas of the Doha negotiations, WTO Members agreed in 2011 to commence negotiations in certain areas aimed at reaching 'provisional or definitive agreements based on consensus earlier than the full conclusion of the single undertaking.' Subsequently some WTO Members, led by the US and Australia with strong support from the EU and others, commenced negotiations of a stand-alone plurilateral TiSA. Negotiations started in 2013. The Fifth Round of negotiations was held in February 2014, when access negotiations began in earnest. The Sixth Round of negotiations was held in April-May 2014. TiSA has 23, mainly developed, participants (counting EU as one).[3] As of the end of the Seventh Round of negotiations, all but two participants (Paraguay and Pakistan) have made initial offers; Pakistan had informally circulated a draft offer before the Fifth Round. All offers are confidential, except for Switzerland and

[3] Australia, Canada, Chinese Taipei, Chile, Columbia, Costa Rica, EU (on behalf of the 28 member states), Hong Kong, Iceland, Israel, Japan, Liechtenstein, Mexico, New Zealand, Norway, Pakistan, Panama, Paraguay, Peru, South Korea, Switzerland, Turkey, Peru and the US. Uruguay has recently decided to join.

Norway.[4] The Seventh Round agreed that market access negotiations would become an increasing focus of the talks going forward. The Eighth Round is scheduled for late September 2014.

TiSA is in principle to be open to new participants with the same objectives. China, initially strongly opposed to TiSA, indicated in September 2013 it would join.[5] India is also reportedly considering following China's lead, although there is no indication of it relaxing its opposition to TiSA in the WTO. Most participants reacted positively, but cautiously, to China's decision. The US remains particularly skeptical, however, if China has the requisite level of ambition to liberalize services.[6] China has 'strongly urged' in the WTO TiSA participants to 'demonstrate by concrete measures that the negotiations are open to all Members who share the objective of the negotiation' (Pruzin, 2013). Admitting China could complicate or slow the negotiations if contrary to recent assurances it ended up

[4] The Australian DFAT rejected a request for access to the TiSA text and Australia's initial offers on the grounds that since 'TiSA is an ongoing government-to-government negotiation the documents remain confidential unless otherwise agreed'. However, it subsequently conceded that even though participants could publish their own offers, Australia would not. Since DFAT had only received at end-January 2014 nine public submissions businesses may not be overly interested in the negotiations.

[5] China and Uruguay are still waiting to join the negotiations; no decision has yet been made. Discussions are reportedly on-going 'behind the scenes' with China by the US, which still appears to be the main government obstructing China's membership.

[6] China has stated it has a 'high level of ambition' and wishes to join TiSA 'positively, constructively and equally'.

adopting a cautious or defensive approach to services liberalization, as it has in the WTO and PTAs. China's admission could be blocked by any participant preventing the requisite consensus from being reached. This decision will test the resolve of participants to keep TiSA open to all nations considered to match ambition levels of existing parties; exactly how in practice this is to be determined is unclear.

The other BRICS (Brazil, Russia and South Africa), the ASEAN nations and many developing countries still reject the non-MFN plurilateral TiSA approach.[7] China, if admitted, may prompt others to join.

(i) Structure of TiSA

According to the December 2012 Framework Agreement, the TiSA plurilateral negotiations are to be based on the GATS, incorporating some of its core articles e.g. definitions, scope, market access, national treatment, and security exemptions. TiSA's objectives are to be (a) ambitious, compatible with the GATS, have broad participation, which could be multilateralized in future (b) comprehensive in scope, including substantial sectoral coverage with no service sector or mode of supply excluded and (c) commitments should reflect 'as close as possible' actual levels of liberalization such that participants may adopt a 'standstill' clause to ensure that commitments in principle reflect actual practice, and provide for improved market

[7] Doha services negotiations were handicapped by insignificant offers from the BRICS.

access. National treatment commitments are, in principle, to be applied horizontally to all service sectors and modes of supply (unlike the GATS), subject to negative-list exemptions. Market access commitments will be negotiated 'positively' as traditionally under the GATS (which does not prescribe any specific approach).

TiSA may include regulatory disciplines in areas such as telecommunications, financial services and postal/courier services, along with new and improved rules to the GATS, such as on domestic regulation (e.g. authorization and licensing procedures) and international maritime transport.[8] This does not mean it has been agreed to have new or better rules in all of these sectors; nor is the list exhaustive. Participants may also adopt a 'ratchet clause' so that any future elimination of discriminatory measures would be automatically locked in unless specifically exempted.

Participants are intent on keeping the TiSA text as close as possible to the GATS, while also incorporating the service-related 'advances' of the many PTAs negotiated by TiSA parties. While aiming to capture the liberalization already committed 'on paper' under their PTAs it is unclear how these two potentially contradictory objectives will evolve in practice. The EU and US recently declared that their Korean FTAs would be the basis for TiSA commitments (Pruzin, 2013). But this alone would result in minimal actual liberalization.

---

[8] Other possibilities are e-commerce, cross—border data transfers, postal and courier services, financial services, mode 4, government procurement, export subsidies and state-owned enterprises.

TiSA is being negotiated in Geneva outside the WTO as a PTA under GATS Article V. It has no formal assent from the broader WTO membership and is at arm's length to the Secretariat. Non-TiSA WTO Members have no access, not even as observers or interested parties, to the negotiations (Sauvé, 2013). At best Members are receiving broad updates and being given opportunities to comment on TiSA in the Services Council; not even this happens in the negotiation of other PTAs.

The secrecy surrounding TiSA negotiations makes it impossible to comment on its likely success or otherwise. This paucity of information runs counter to transparency. Like the text, no TiSA documents, except the initial offers by two participants, have been released publicly, nor filed with the WTO or otherwise made available to non-participating Members. There would seem no justified reason for not making public all documents, including offers and drafts of the main texts, during the negotiations to improve transparency, public scrutiny and accountability. Governments could then not so simply repeat ad nauseam, as is usually done with PTAs, initially announced ambitious expectations during the negotiations well after it has become obvious they are unachievable (if ever they were).

Only time will tell if TiSA will differ to other PTAs in being able to meet its ambitious objectives. Experience so far with PTAs suggests strong skepticism is warranted, even though participants include most of the main WTO Members and cover a large share of services trade. The PTA arena is littered with agreements which, despite best intentions, have fallen well short on objectives, achieved

little if any actual liberalization or improved outcomes, and probably in the end have only been signed to meet political/foreign policy ends and/or enable governments to save face by justifying the political capital and large budgetary funds invested in the negotiations.

(ii) Non-MFN PTA

WTO Members discussed prior to the negotiations whether TiSA should be MFN. Despite some strong misgivings expressed by several participants it was agreed to proceed as a non-MFN PTA. TiSA should thus meet the requirements of the GATS (Article V). These are mainly that it has 'substantial sectoral coverage in terms of number of sectors, volume of trade affected and modes of supply, with no a priori mode of supply excluded'; 'provides for the absence or elimination of substantially all national treatment discrimination within the parties in the sectors covered through (a) eliminating existing discriminatory measures and/or prohibiting new or more discriminatory measures, within a reasonable time-frame (Article V.1); and 'shall' not raise the overall level of barriers faced by non-participants (Article V.4).[9]

[9] This aims (like GATT Article XXIV) to minimize the injury PTAs cause to the welfare of outsiders. However, it is based on the erroneous view that their welfare is not reduced provided PTAs do not raise barriers to them. But for PTAs not to hurt outsiders, barriers to their imports must also be reduced sufficiently to ensure the same value of imports (Kemp and Wan, 1976; Panagariya and Krishna, 2002). Moreover, with quantitative restrictions, as in services, meeting this condition is even more problematical since margins of preference provided PTA parties may actually rise due to different market conditions, even though the measure is unchanged (and Article V.4 satisfied).

Flexibility is also to be shown to developing countries, based on their development status, both overall and in individual sectors and sub-sectors, especially in meeting the requirements on discrimination (Article V.3). PTAs are also to grant service suppliers from non-parties the same treatment provided they engage in 'substantive business operations' in one of the PTA countries (Article V.6).

While TiSA is claimed to be negotiated according to these requirements, Article V is well known to be very soft and ambiguous, surrounded by loose interpretation. For example, it requires TiSA to only have 'substantial' (and undefined) sectoral coverage and not of 'all' sectors; 'should not' instead of 'shall not' exclude no a priori mode of supply; only national treatment discriminatory measures to be liberalized; 'prohibition of new or more discriminatory (NT) measures' may be sufficient not 'elimination'[10]; and liberalization only within a 'reasonable time frame'. In evaluating whether these conditions are met TiSA's relationship to 'a wider process of economic integration or trade liberalization' among participants 'may' be considered (Article V.2). The meaning of this provision is

[10] Article V:1(b)(i) and (ii) which are separated by 'and/or'. It is possible that Article V.1 requires parties to provide for both the elimination of discriminatory measures and (not 'or') a stand-still obligation in a manner 'conducive to ensuring the absence of substantially all discrimination' in the sectors covered (Cottier and Molinuevo, 2008). But this opinion is untested in any dispute settlement case. Moreover, if governments did adopt the literal interpretation reflected in the text, this would apply until when and if challenged and legally over-turned.

unclear and may in practice undermine even more the liberalization requirements.

In practice Article V allows liberalizing commitments in PTAs to be greatly watered down during the negotiations, despite best intentions. Many PTAs which essentially only replicate parties' GATS commitments with minor improvements would seem unlikely to comply. Moreover, Article V, and hence TiSA, suffers economically by placing reform to national treatment measures ahead of market access limitations, which could even be welfare-reducing for the country concerned. Moreover, since the biggest gains accrue from removing market access limitations and not national treatment restrictions, there are serious risks in negotiating on national treatment before market access.

As well as there being plenty of scope for TiSA to fall well short of its ambitions and still 'meet' Article V, its conclusion is open-ended. TiSA is far from complete, and it is unclear how China's possible inclusion (and perhaps of other countries e.g. India) may affect the pace and complexity of the negotiations.

(iii) GATS-minus commitments

A further complication in building TiSA upon participants' existing PTAs is that many contain GATS-minus commitments i.e. PTA commitments that downgrade GATS commitments from full to partial or to unbound. PTAs with GATS-minus commitments are common, covering about two-thirds of PTAs (Adlung and Miroudot, 2012;

Adlung and Mamdouh, 2013).[11] They have been ignored e.g. in the WTO Committee on Regional Arrangements with Members turning a 'blind eye' and not challenging such PTAs.

Adopting these commitments in TiSA could have significant legal consequences in meeting GATS Article V. For example, if the EU bases TiSA on its recent Korean PTA this would replicate GATS-minus commitments on subsidies, also present in other EU PTAs (Adlung and Miroudot, 2012)(Box 1). PTAs of other TiSA participants also contain significant GATS-minus commitments.

The legal consequences of PTAs, including TiSA, containing GATS-minus commitments may be to render them WTO illegal. Since the GATS (Article XXI) requires PTA parties intending to withdraw or modify a specific scheduled commitment to re-negotiate with interested WTO Members, PTA commitments cannot legally fall below their GATS-scheduled counterparts (Cottier and Molinuevo, 2008). Thus, TiSA's legality if it had GATS-minus commitments could be challenged within the WTO as violating Article V. If successful, the TiSA parties may be required to remove the offending GATS-minus commitments or failing that extend MFN treatment of all TiSA's preferences to all other WTO Members. Otherwise, non-TiSA WTO Members may be entitled to claim retaliatory compensation against TiSA parties. But this would require TiSA to be challenged.

[11] The OECD dataset of 66 PTAs used by Adlung and Miroudot has over 3000 sector-specific GATS minus commitments (in addition to a variety of horizontal minus commitments).

Box 1: EU's GATS-Minus Commitments in TiSA if Based on EU-Korea FTA

Basing TiSA commitments on the EU-Korea FTA would mean that the EU would reproduce in TiSA its following GATS-minus commitments i.e. downgrade its GATS commitments to:

exempt subsidies from MFN and national treatment across all modes (EC 12 schedule has no subsidy-related national treatment limitations under modes 1 and 2);

reduce the scope of commitments on establishment in health and social services to 'privately funded services' (EC12 schedule has no commitments for the full sector);

make establishment in education services 'subject to concession' (EC 12 schedule has no such limitation);

apply a similar limitation to above and a possible economic needs test for hospital services (EC 12 schedule commits fully under mode 3 for Germany, Denmark, Greece, Ireland and UK); and

Weaken the provision on the admission of new financial services under the Understanding on Financial Services from 'shall permit financial services suppliers of any other Member established in its territory to offer any new financial services' to 'permit a Korean financial service established in the EU to provide any new financial service that it would allow its own financial service suppliers to supply, in like circumstances, under its domestic law, provided the new financial service does not require a new law or modification of an existing law. The EU may determine the institutional and juridical form through which the service may be provided and can require authorisation for the provision of the service. Where this is required, a decision shall be made within a reasonable time t may be refused only for prudential reasons.

Source: Adlung and Miroudot, 2012

More to the point, having GATS-minus commitments in TiSA will make it even more difficult to multilateralize it within the WTO. To do so would require replacement of these GATS-minus commitments with the corresponding GATS obligations.

(iv) Some preliminary signs

While likely to be improved during the negotiations, a number of the initial offers, especially from Mexico and Switzerland, were reportedly less ambitious than expected (Pruzin, 2014). The US's initial offer excluded Mode 4 and financial services commitments, but before the Sixth Round it submitted a revised offer that included financial services. The US signaled in the Fifth Round that it would submit a financial services offer before the Sixth Round.[12] The US is also likely to continue resisting liberalizing mode 4 or maritime transport (Sauvé, 2013). Canada's initial offer also excluded financial services.

The proposed annex on financial services will reportedly merge commitments under the financial services annex of the GATS with the 1997 Understanding on Commitments in Financial Services, and also contain commitments under bilateral and regional trade pacts e.g. NAFTA). This would seem to depart significantly from the GATS, under which the Understanding is an optional separate agreement that provides Members with an alternative approach to making specific commitments; many WTO Members have not

[12] The US's last bilateral PTA with Mode 4 commitments was with Singapore and Chile in 2003.

accepted the Understanding.

Some preliminary signs of what may emerge from TiSA can be drawn from the initial offers published by Switzerland and Norway. Already it seems that the TiSA negotiations may fall well short of ambitions; include many sectoral and other exceptions and exemptions; and be riddled with many unbound commitments across many modes of supply, especially mode 4. It also appears that not all participants may have to subscribe to some of the new disciplines e.g. unlike Switzerland, Norway's offer makes no reference to 'ratchet or standstill' commitments; the Swiss commitment itself is full of exclusions from these disciplines. There seems to be no attempt to remove or reduce binding overhang, or of giving any indication when bindings match the actual situation. While difficult to state with certainty, there seems to be no cases in either offer of TiSA generating actual liberalization.

Norway's offer is conditional on TiSA having no equivalent 'denial of benefit' provisions to GATS Article XXVII. Omitting this provision would seemingly prevent a TiSA participant from being able to deny benefits to a service supplied from a non-WTO member or from a WTO Member to which it does not apply the WTO Agreement. If this interpretation is correct, TiSA would seem to be providing non-WTO members access to TiSA benefits that are not extended to WTO non-TiSA Members.

Not surprisingly, the schedules, difficult enough to understand in the GATS, are becoming even more convoluted and tough to interpret. This adds additional

confusion and imprecision to the commitments, thus reducing transparency and making enforcement, and the value of bindings, even more questionable.

3. MFN Negotiations Within the GATS

MFN negotiations within the GATS would have been by far the best outcome by ensuring liberalized commitments were immediately extended to all WTO Members. This would have helped maintain the WTO's status and credibility. Such negotiations were possible in Doha with sufficient political will. A subset of Members could have negotiated and extended improved commitments to all (see discussion on the extended sectoral negotiations under the 4th and 5th GATS Protocols, basic telecommunications and financial services, respectively). This would also have promoted widespread openness and Members' transparent access to the negotiations fully consistent with the WTO rules and spirit. Commitments would have also been subject to the WTO dispute settlement mechanism, thereby improving enforceability.

Regrettably but predictably, however, fears (more political than real) of the so-called 'free rider' problem by influential WTO Members, especially the US and EU, prevented such negotiations. The 'free rider' obsession, an overhang from mercantilism, still pervades the WTO and other trade negotiations. It essentially views 'imports as bad' and 'exports as good', so that opening own markets to imports is a 'cost' or 'concession' to be used to negotiate market access abroad for exports, seen as the gain from trade

negotiations. This flawed thinking gives rise to the mistaken idea exporters from countries not opening their markets 'free ride' on countries that do, such that those self-liberalizing lose. But 'free-rider' thinking is economic nonsense since the main gains come from self-liberalization. Governments would do better pursuing these benefits than chasing tantalizing, but spurious, gains from opening foreign markets.

Rectifying, or at least, mellowing such thinking is essential to resuscitating the WTO as a genuine global body for promoting non-discriminatory trade and reducing protection. Even if good 'economic diplomacy' for the US and the EU to use their foreign policy and economic muscle to forge PTAs, it does not mean this approach is best for others. Indeed, separating trade policy from foreign policy is one of the five key principles of setting good trade policy (Box 2). The 'free rider' problem is also a political not an economic dilemma and contradicts the merits of unilateralism, another key principle of setting good trade policy. Adopting the 'free-rider' approach universally and consistently would see the end of unilateral trade reforms. But if all countries pursued unilateral reforms to improve their economic efficiency and performance optimal global liberalization would also result.

WTO Members can unilaterally improve their GATS commitments any time through individual certification procedures (Marchetti and Roy, 2013), independent to the Doha negotiations. This enables individual Members to request others not to object to their amended schedules that are deemed an improvement. Once approved, the

Box 2: Guiding Principles in Setting Good Trade Policy

Five guiding principles that governments should follow in setting trade policy are:

- *Unilateralsim* – 'pro-competitive economic reform should be pursued in its own right; it should not be conditional upon other countries reforming their economies. Adopting a bargaining-chip approach of refusing to liberalise unless other countries offer to reduce trade barriers as a *quid pro quo* only damages the country's long-term prosperity.' Any assessment of national interest should not include how much a country had to give up, or 'pay', by way of reform.
- *Non-discrimination* - no good reason exists for trade discrimination.
- *Separation* – trade and foreign policy should not become entangled.
- *Transparency* – Trade policy should be set transparently to ensure the economic costs and benefits of proposed measures are publicly scrutinized and governments are kept accountable. In PTAs, instead of modelling ideal, hypothetical PTAs, which can mislead decision makers and the public, it should be of the actual deal. Results should be independently peer reviewed.
- *Indivisibly of trade and economic reforms* - trade policy and microeconomic policy are as one; 'the best trade policy is domestic economic reform – a productivity- raising, competitiveness-enhancing microeconomic reform program supported by responsible fiscal policy'.

Source: ADAFT, 2011

amendments become part of the Members' GATS schedules and are applied MFN to all Members. As for unilateralism the perceived 'free rider' problem works strongly against this happening.

4. Overcoming the Perceived Free-Rider Problem Within the WTO

WTO approaches used to reduce the perceived free-rider problem have focused on developing a 'critical mass' in the negotiations to extend MFN treatment to all WTO Members. These negotiations are among sufficient Members to meet a specified threshold level of representation.

This approach was used on trade in goods for the Information Technology Agreement (ITA). The ITA began as a Ministerial Declaration among 29 (including the EC States) WTO Members in 1996. However, its stipulated start date of 1 April 1997 was conditional on sufficient Members joining to reach the 'critical mass' threshold set of 'approximately' 90% coverage of world trade in information products. This ensured that all important traders in these goods participated. The ITA foresaw no MFN exception and extended the tariff removal benefits to all Members from the outset. Additional obligations by Members accepting the ITA were simply incorporated into the WTO by including reference to it in their tariff schedules.

(i) Specific to services

The GATS contains several 'critical mass' approaches. Indeed, the Marrakesh Agreement specifically states that amendments to the GATS (except for Article II.1) and respective annexes 'shall take effect for the Members that have accepted them upon acceptance by two-thirds of the Members and thereafter for each Member upon acceptance of it' (Article X.5). While this is usually

interpreted as applying to proposed changes to the GATS, and to the accession of new Members, broadening this may importantly provide already the legal scope to apply a 'critical mass' threshold of two-thirds of Members for an agreement, such as TiSA, to be negotiated in the GATS and to be applied MFN to all.

Of course, this outcome would effectively take the services negotiations out of the Doha Round. However, the proposed TiSA will do this and in a more damaging way. Given Doha's failure, it is hard to imagine another Round being launched in the foreseeable future. Thus, further liberalization of commitments in services (and elsewhere) in the WTO may require operationalizing the various 'built in agendas' incorporated in many Uruguay Round agreements, but not really applied. For example, the GATS (Article XIX) requires Members to 'enter into successive rounds of negotiation' periodically aimed at 'achieving a progressively higher levels of liberalization' through the 'reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access.'[13] Enabling these sectoral negotiations to deliver effective liberalization of commitments, in isolation from other negotiations and with no need for the 'Single Undertaking' which is really relevant to only full Round negotiations, may provide an important way forward for the

[13] This refers to 'effective market access', which could cover both national treatment and market access (as for the GATS). However, to be consistent with the WTO PTAs only have to deal with national treatment, although this could also capture discriminatory market access limitations where the measure applied to both types of commitments.

WTO. But this will require much greater recognition by Members of the economic benefits from self-liberalization, and the inherent weaknesses of mercantilist trade negotiations to produce a so-called 'balanced outcome between the 'costs' and benefits of liberalization across a wide range of measures.[14] The essence of good trade policy is to reform trade policies sectorally without necessarily trading-off gains in one sector with so-called 'costs' in another.

The 'critical mass' approach was also used in the GATS to temporarily extend negotiations on telecommunications (1997), financial services (1995 and 1997) and even though limited mode 4 (1995) beyond the Uruguay Round (Harbinson and De Meester, 2012).[15] These applied MFN to all WTO Members via protocols that incorporated new commitments into their GATS schedules.[16] These protocols also had enhanced regulatory disciplines (e.g. Telecommunications reference paper) as 'additional' commitments, and were not limited to market access or national treatment. However, the protocols specified no

[14] The failure to move away from the traditional bargaining processes partly explains why the 'built in' agendas have not worked. Governments saw these as too narrowly based to achieve 'balanced outcomes' that reflected Members' both defensive and offensive interests. However, as Doha has shown having a broad coverage of issues and agendas does not guarantee success, and may even be counter-productive.

[15] Annexes to the GATS mandated the temporary extension of negotiations in these services.

[16] Protocols are additional agreements covering results of additional negotiations attached to the GATS. These commitments were subsequently incorporated into the GATS and so did not need a separate protocol.

'critical mass'. Instead, they provided that only those Members involved in the negotiations that had accepted them by the due date would decide on their entry into force. This helped ensure that the new commitments operated only on reaching a 'critical mass' of participants. Again MFN was implemented on acceptance of the protocols implementing the Agreements on Basic telecommunications and Financial Services. These protocols achieved a similar ratio to the ITA's 'approximate' 90% (over 95% on financial services).

A similar alternative to protocols would be to negotiate TiSA as an Understanding that WTO Members could adopt in their GATS schedules on an MFN basis (Marchetti and Roy, 2013). This occurred with the Understanding on Commitments in Financial Services negotiated in the Uruguay Round and included in the Final Act, but not formally part of the GATS.[17] Such Understanding(s) could be extended to any sector or group, and be either optional or have built in some form of 'critical mass' regarding implementation.

These cases (including the ITA) generally provide examples of how effective MFN plurilateral, especially 'issue-based' agreements can be negotiated within the WTO if sufficient political will exists (Nakatomi, 2013). It is

[17] The Understanding stated that 'resulting specific commitments shall apply on a MFN basis' and that Members still had the 'right to schedule specific commitments' under the GATS. Members' adopting the Understanding incorporated it into their GATS commitments using a horizontal note in their financial services commitments (Marchetti and Roy, 2013).

discouraging that the TiSA participants did not explore these options in greater detail before jumping for the PTA route. Not doing so may have reflected the existing obsession with non-MFN PTAs, and the 'revealed' preference of major WTO Members to pursue discrimination. After all, the GATS' flexibility is capable of accommodating many of the perceived political and other benefits of PTAs, and it is not the agreement type what really matters in achieving liberalized commitments but rather that governments have sufficient political resolve to do so.[18] Examining various services negotiations, including in Doha, WTO accessions and different types of regional trade agreements, found that structural issues have limited, if any, impact on the results (Adlung and Mamdouh, 2013).

5. Non-MFN Plurilateral TiSA within the WTO

Negotiating a plurilateral MFN agreement within the WTO is improbable. While plurilateral Annex 4 agreements can be added if the Ministerial Council decides 'exclusively by consensus' to adopt it at the request of 'Members to a trade agreement' (Art X.9, Marrakesh Agreement), these are non-MFN.[19] However, such a plurilateral agreement may

[18] 'Additional elements might consist, for instance, of locking - in existing levels of openness, automatic bindings of future liberalization moves, or further initiatives to promote deeper market integration, whether through stricter competition disciplines, common procurement rules, harmonized regulations or mutual recognition schemes' (Adlung and Mamdouh, 2013).

[19] WTO plurilateral agreements are binding only on participants and 'do not create either obligations or rights on Members that have not accepted them' (Article II(3), Marrakesh Agreement). The WTO provides the framework for their implementation, administration and operation (Article II(4), Marrakesh agreement).

have enabled an outcome like having the Agreements on Government Procurement and Civil Aviation (negotiated in the GATT as Tokyo Codes among a sub-set of Parties) incorporated as such into the WTO. Conceiving it in the WTO would have ensured any Member had at least the right to negotiate TiSA membership (even given participants could include provisions on accession negotiations). Moreover, this would have meant it was covered from the outset by WTO dispute settlement, although its relevance would be reduced since any dispute would only concern the rights and obligations of TiSA participants and not of other WTO Members. These would be unaffected unless the plurilateral agreement's legality was at stake e.g. if it had GATS-minus commitments.[20]

No plurilateral non-MFN Annex 4 agreement has been added to the WTO. Moreover, for such a plurilateral services agreement, even if introduced, to be MFN would necessitate a waiver being granted to alter the GATS' MFN obligation. This would need a consensus decision, or failing that, a three-quarters majority.[21] Waivers can only be issued in 'exceptional circumstances' and for a definite period, to be reviewed annually. It would be practically

[20] The WTO's dispute settlement body administers dispute settlement under Annex 4 plurilateral agreements on behalf of their participants (Understanding on Rules and Procedures Governing the Settlement of Disputes (Article 1)). However, for a new Annex 4 plurilateral agreement to be covered would require a WTO consensus to incorporate it into the Understanding's Appendix 1 List of Agreements subject to WTO Dispute Settlement.

[21] Although the Marrakesh Agreement does allow decisions to be voted on if consensus fails, consensus decision making is so embedded into the WTO that this has never happened.

impossible for TiSA parties to obtain the required consensus to amend the GATS' MFN obligation; any single Member could block such a decision.

The difficulty (or, rather, impossibility) of negotiating Plurilateral non-MFN agreements in the WTO is not a bad outcome. Indeed the intended objective of introducing the 'Single Undertaking' in the Uruguay Round was to remove the option Parties had to sign on to various disciplines applied as voluntary Codes. The 'Single Undertaking' required all WTO Members to accept all multilateral disciplines; they could no longer 'pick and choose'. This was a major innovation that also helped promote the WTO as a genuine multilateral institution with all Members put on a similar footing. Within the context of a full Round of multilateral negotiations (e.g. Doha) the 'Single Undertaking' also provided a negotiating device whereby 'nothing is agreed until everything has been agreed upon'. However, the WTO is in such a dismal state that even with this tool Rounds are unlikely to be effective.[22]

But if the potential payoff in terms of the economic gains from trade is properly recognized it is not the 'Single Undertaking' or the MFN principle that are the problem, but rather Members' attitudes towards the WTO and trade liberalization generally (Bosworth, Cutbush and Corbett, 2013). Members have not grasped the scope for all to materially benefit if multilateral liberalization can build on the major gains from unilateral reforms. Instead, they seem

[22] 'Winding back the clock' to the pre-1995 situation of having no 'Single Undertaking' to effectively allow different tiers of WTO membership is unlikely to be any more successful this time.

to be treating the negotiating of any PTA as a success. If Members genuinely want an effective WTO and multilateral trading system they must start treasuring its fundamentals, especially MFN, and stop weakening the WTO rules to allow them to engage in trade distorting and discriminatory policies. This will only accelerate the WTO's obsolescence and undermine global prosperity.

Clearly the 'Single Undertaking' was never intended to oblige all WTO Members to make the same level of specific commitments. It does mean, however, that all Members must subscribe to, or tacitly condone, all related agreements (excluding the Annex 4 plurilateral agreements), ministerial decisions and declarations adopted in the Uruguay Round and going forward, but with different specific commitments on market access, MFN and national treatment. But also adopting further commitments in agreements with critical thresholds to be met for implementation is broadly consistent with the 'Single Undertaking' provided they apply MFN treatment to all WTO Members.

The problem is not the Single Undertaking per se but rather than too many non-trade or other issues have been incorporated into the WTO. A prime example is TP under the TRIPS Agreement. This should never have been incorporated into the WTO and has also become major elements of PTAs, pushed strongly by the IP exporting giants of the US and the EU. As a result, it has introduced into trade agreements areas not concerned with global free trade but rather have enabled these net exporters to gain rents from consumers, including countries that are net IP

importers, by establishing greater anti- competitive and monopoly rights over intellectual property. This does not just adversely affect developing countries but most developed countries (e.g. Australia and New Zealand) which are also net IP importers.[23] And as other non-trade issues are added to trade agreements this trend will continue.

There has been a strong backlash against the 'Single Undertaking'. Support has dropped with many Members calling for its demise. Indeed, the TiSA PTA proposal could be seen as an attempt to bypass it and MFN in a way that could split WTO membership. TiSA could end up competing in a derogatory way with the GATS. This would be a huge setback for the WTO's credibility, already under attack from existing PTAs, including in services many of which do not meet the standards of GATS Article V, and creating a legal system unrelated to and irreconcilable with the WTO. Why will TiSA be any different?

6. Multilateralizing TiSA

[23] Moreover, the inclusion of TRIPS in trade agreements, which have increasingly been used as conduits to provide international aid to developing countries, has resulted in large amounts of assistance being spent on trying to implement sophisticated IP in such countries that has little chance of success, and diverts resources from far more pressing areas for their development. The same applies to efforts to implement sophisticated competition laws into developing countries. They would do well to remember that the best competition policy is open trade, investment and government de-regulation, neither of which depends on having sophisticated competition law.

TiSA is being implemented as a PTA to avoid the perceived 'free-rider' problem. Its MFN extension to all WTO Members will be delayed until a 'critical mass' of Members join it.

But urgently incorporating TiSA within the WTO would seem essential to avoid the obstacles likely to be created by having a PTA covering many (and the major) WTO Members co-existing with the GATS. TiSA's debilitating impact on the GATS would continue while ever they existed in parallel. It would be outside WTO dispute settlement and need its own mechanism, which as for other PTAs may generate inconsistent and confusing legal outcomes. The uneasy relationship and difficulties PTAs pose to multilateral dispute settlement need clarification (Marceau and Wyatt, 2010; de Mestral, 2013). For example, the dispute settlement provisions of many East Asian PTAs ultimately permit parties to block panels from being formed by not having any mechanism to resolve a procedural deadlock from a party failing, as required, to nominate a panelist from the eligible list: experience with NAFTA shows defending parties use this loophole to prevent the establishment of arbitral panels (Fink and Molinuevo, 2008).

PTAs essentially establish two sets of legal obligations for WTO Members. While the WTO can handle duplicative PTAs, the enforcement of obligations that go beyond WTO Members' commitments is ambiguous. Moreover, it is likely to arise in a PTA where GATS-plus commitments in a particular sector by a Member would be covered only by the PTA dispute settlement procedures, while an identical issue arising from another WTO Member's GATS commitments would be handled multilaterally. It would also be unclear

how to resolve any inconsistency between a Members' WTO and PTA commitments, including in which jurisdiction to hear the dispute.[24] Without these issues being clarified, TiSA is likely to accentuate this confusion and potentially open dispute settlement to inconsistent outcomes.

To be multilateralized TiSA must be incorporated under the WTO's umbrella, meaning the commitments and rules negotiated be extended to all Members. TiSA thus should incorporate a credible pathway to achieve this. This apparently the case, but no details are available. Moreover, as is likely, the less TiSA complies in practice with GATS (e.g. has GATS-minus commitments) or takes on different commitments and structures, the less likelihood it will be legitimately multilateralized.

(i) 'Critical mass' approach

TiSA is intended to follow a 'critical mass' approach to 'multilateralization'. It will begin as a plurilateral PTA according to 'conditional' MFN, to be extended 'unconditionally' to all WTO Members only when a 'critical mass' of WTO Members join TiSA.

But TiSA is being negotiated as a PTA unlike the ITA and the 'critical mass' precedents used in the GATS. Also, these previous arrangements started only when reaching the 'critical mass'; TiSA will start operating beforehand on a non-MFN basis. If the WTO internal MFN approaches

[24] WTO agreements have no supremacy over PTAs; they remain valid and binding on parties even if WTO inconsistent (Cottier and Molinuevo, 2008).

were used the adverse implications for the WTO of TiSA would have been largely avoided. However, the decision to develop TiSA as a PTA, and its timing, was crucial as it probably sucked any remaining oxygen from the broader GATS negotiation, with possible longer term implications.

The adoption of the 'critical mass' threshold for TiSA's MFN extension to all Members should have a set deadline. This would help create a momentum to join and to prevent TiSA from operating indefinitely as a stand-alone PTA if the set threshold is not met. TiSA from the outset should specify the 'critical mass' threshold for its ultimate multilateralization. The three critical mass agreements concluded in the WTO had very high, seemingly excessive, global trade coverage ratios of at least 90%.

However, serious inadequacies in international services trade statistics make determining country trade shares difficult. The obvious threshold to use would be the share of world commercial services trade as these are the most reliable and comprehensive services trade statistics available. However, these statistics seriously understate services trade as they mainly cover only mode 1 (cross-border supply). Excluding especially mode 3 (commercial presence), the most common means of exchanging services internationally is likely to affect the overall level of global services trade and also country shares.

There would be some economic advantages in setting the threshold as low as possible. The lower the threshold, the sooner the TiSA PTA could be incorporated into the WTO

and discrimination with other WTO Members removed. However, many Members would object to setting a lower threshold due to the perceived 'free-rider' problem. The 'critical mass' threshold itself should be included in TiSA, and not left unspecified for TiSA participants to decide after the negotiations. TiSA will need to include a clause that triggers extension of benefits on an MFN basis if this is its intention. If not, there will be no legal basis behind the stated intention of multilateralizing TiSA when a critical mass is achieved. Perhaps it would also be useful to include a date, say 10 years from the when TiSA came into force, when it would be multilateralized even if the critical mass was not reached. To think that major WTO Members not participating in the TiSA negotiations prior to its implementation would subsequently join TiSA, which was negotiated without them and would probably require protracted negotiations with all TiSA participants, may be politically naive.

The number of participants needed to meet any set global trade share threshold will depend on how it is measured. This raises two issues. First, should it be based on exports of commercial services or total trade, including imports. Second, should intra-EU services trade be included. Depending on the definition, trade shares and the number of participants needed to meet any given threshold will vary (Table 1).

Table 1: Coverage of TiSA Participants Using Trade in Commercial Services, 2012

Country/Entity	Excluding EU Intra-Trade		Including EU-Intra trade	
	Exports	Exports & Imports	Exports	Exports & Imports
EU	24.8	22.5	42.1	40.0
Australia	1.6	1.8	1.2	1.4
Canada	2.3	2.8	1.8	2.2
Chile	0.4	0.4	0.3	0.3
China	5.7	7.2	4.4	5.5
Colombia	0.2	0.2	0.1	0.2
Costa Rica	0.2	0.1	0.1	0.1
Hong Kong, China	3.7	2.7	2.8	2.1
Iceland	0.1	0.1	0.1	0.1
Israel	0.9	0.8	0.7	0.6
Japan	4.3	4.8	3.3	3.7
Korea (South)	3.3	3.3	2.5	2.6
Mexico	0.5	0.6	0.4	0.5
New Zealand	0.3	0.3	0.2	0.3
Norway	1.3	1.4	1.0	1.1
Pakistan	0.1	0.2	0.8	0.1
Peru	0.2	0.2	0.1	0.1
Switzerland	2.7	2.1	2.1	1.6
Taipei, Chinese	1.5	1.4	1.1	1.1
Turkey	1.3	0.9	1.0	0.7
United States	18.6	15.7	14.4	12.1
Uruguay	0.1	0.1	0.1	0.1
Total	73.6	69.5	79.7	76.4
India	4.2	4.1	3.2	3.2
ASEAN	7.6	8.1	5.8	6.2
Singapore	3.3	3.5	2.6	2.7
Total	85.4	81.6	88.8	85.8

Source: WTO Statistical Database, Time Series on International Trade.

Note: figures may not add due to rounding.

A strong case could be made to use total trade shares (i.e. exports and imports) since imports are as important as exports. On this basis, adding China and Uruguay to the list of TiSA participants increases their share from 62.2% to 69.5% (2012 data). The corresponding ratios based on exports are higher at 67.8% and 73.6%. It could also be argued that intra-EU services trade should be included in the calculations since even though it is within the EU, a single member of the WTO, this is also international trade. On this basis and for total trade, including China and Uruguay in TiSA increases the total share of participants from 70.8% to 76.4%. The corresponding shares for exports alone are 75.2% and 79.7%. Hence, the basis for calculating the 'critical mass' threshold must be specified and taken into account when setting it. On any basis, the total shares of current TiSA participants, including China and Uruguay, remain well below 90%. Indeed, even if India joined and all ASEAN States, this would still be the case. Hence achieving a 90% threshold, especially if defined to exclude intra-EU trade and to be based on total trade, could be very challenging and a major impediment to the multilateralization of TiSA.

(ii) Accession requirements for TiSA

TiSA will need to have a specific accession clause. Participants have agreed on this as well as a pathway outlining the mechanisms and conditions to its multilateraization (EC, 2013). However, unless it specifies precisely what a party must do to accede there is the risk that participants will make a political decision to exclude a candidate. This could become very problematical

especially if TiSA required, as expected, existing participants to make these decisions by consensus. This risk confronts any PTA, whereby the point can come where existing parties lose any incentive to keep admitting new entrants, so that expanding trading blocs will not achieve global free trade unless external tariffs are also lowered along with abolishing internal tariffs (Bond and Syropulos, 1996; Krishna, 1998; Andriamananjara, 1999).

7. Shifting TiSA to Within the WTO

TiSA as a PTA could, in principle, be incorporated into the WTO as a non-MFN Plurilateral agreement at the request of TiSA participants, subject to a consensus agreement among WTO Members (Marrakesh Agreement Art 10.9). However, reaching consensus to grant a waiver amending the scope of the GATS' MFN provisions is so improbable it can virtually be ruled out. However, if TiSA could somehow be incorporated into the WTO as an Annex 4 Plurilateral Agreement it would ensure that other Members at least had the right to negotiate membership with existing TiSA parties.[25] While ever a stand-alone PTA, any WTO Member wishing to join TiSA would require first a consensus agreement among participants. Thus, any TiSA participant could block it.

[25] This does not guarantee membership since entrants must negotiate with existing parties acceptable accession terms. These negotiations can be very protracted. China, for example, has been negotiating to join the Government Procurement Agreement since 2001. But at least WTO Members have the 'right' to negotiations, even if long and arduous.

In any event, having a TiSA as a non-MFN Annex 4 Plurilateral agreement co-existing within the WTO alongside the GATS would be very problematic.

Multilateralising a stand-alone TiSA will require simultaneously incorporating it into the WTO and extending it unconditionally to all WTO Members. However, it remains uncertain how this could be achieved. One way would be to adopt some sort of protocol approach that would amend the GATS commitments of TiSA participants through a consensus from WTO Members. Alternatively TiSA participants could unilaterally amend their GATS commitments to include additional TiSA commitments.

But precisely how any new scheduling and other architectural features in TiSA would be incorporated into the GATS is unclear, and while conceivably possible given the GATS' flexibility, is likely to be challenging.[26] As indicated, while meeting the 'critical mass' as the trigger for this and multilateralization of commitments is envisaged, it would add certainty and transparency to negotiate in the WTO simultaneously the protocol specifying these details.

The messiness of having the GATS and the TiSA co-existing would depend on the degree of architectural dissonance between them (Sauvé, 2013). While negotiators are apparently seeking to keep TiSA and

[26] The templates exist in the 4th and 5th Protocols, and perhaps most issues not falling under market access and national treatment could be addressed via additional commitments (GATS Article XVIII).

GATS compatible, several significant differences have already been noted e.g. TiSA will depart from the scheduling practices of the GATS by proposing to liberalize national treatment measures horizontally through a negative list and adopting a GATS positive list approach for market access.

The greater the eventual dissonance between the agreements the more difficult it is also likely to be to multilaterize TiSA. Extending the ratchet mechanism and any standstill provisions on services in TiSA that go well beyond participant's GATS commitments, unless subject to sweeping exclusions covering for example sub-federal entities, to WTO Members will also be tricky (if not impossible). Initial offers by Switzerland and Norway confirm that exclusions will abound.

Indeed, if over time the differences between the agreements become wide, especially in fundamental structure and architecture, multilateralizing TSA may become virtually impossible. Non-TiSA WTO Members would have to be prepared to accept TiSA's new structure, which could require major changes to the GATS. This would present major political challenges in getting consensus and legal hurdles; they would almost certainly strongly oppose such moves. The longer TiSA operates as a PTA the greater this likelihood as the two agreements perhaps become competing, or at least alternative, possibilities for WTO Members to negotiate on services. This would damage the GATS and the multilaterally system.

The multilateralization of TiSA in the foreseeable future, despite stated intentions, is not guaranteed. Indeed, for now the 'odds-on' favourite emerging would seem to be for it to remain a PTA into the foreseeable future.

8. The PTA Minefield

Assessing TiSA's implications for global trade and the WTO would be complex enough if it was one of only a few PTAs. But since 2000, PTAs notified to the WTO under GATS Article V has risen from 6 to118. Countries with most PTAs on services are Mexico, Chile, US and Singapore; all except the latter are in TiSA (Marchetti and Roy, 2013).[27] Thus a significant and expanding minefield of overlapping PTAs, most of which at least by containing GATS-minus commitments would seem GATS-inconsistent, already exists among TiSA participants.[28] Chile has PTAs on services with 17 TiSA participants. Colombia, EU, Mexico, Peru and the US each have at least nine PTAs with TiSA participants.[29] The minefield will become even worse with many participants also involved in the Plurilateral Trans-Pacific Partnership Agreement (TPPA) and the Regional Comprehensive Economic Partnership

[27] Singapore withdrew from TiSA in 2013.

[28] Given the legal uncertainties of Article V and that even the WTO transparency review of PTAs by the Committee on Regional Trade Agreements (CRTA) does not assess their compliance, this remains speculative. However, PTAs with GATS-minus commitments would be almost certainly non-compliant.

[29] For Israel and Turkey TiSA will be their first services PTA. It will be Pakistan's and Paraguay's first services PTA with other TiSA participants.

Agreement (RCEP). The EU and the US have also launched the TTIP.[30]

Unilateralism, supported to the extent possible by the WTO, must prevail over preferentialism if it and global prosperity are to be strengthened (Bosworth and Trewin, 2014). The WTO can help unilateralism by highlighting the economic benefits to all economies of pursuing non-discriminatory trade measures and perhaps by discouraging future trade de-liberalization by 'locking in' via multilateral commitments unilateral reforms. However, the sequencing is almost inevitably always unilateral reforms first; cases of multilateral negotiations, especially outside of accessions, causing actual liberalization are rare (Box 3). Indeed, the best way to fix multilateralism and the WTO is for Members to embrace unilateral reforms as this invariably sets what governments are prepared to commit to multilaterally.

Since TiSA participants have PTAs with more liberal commitments 'on paper' than offered in Doha, it should at least be able to replicate these commitments.[31]This would only require them to make their 'best PTA' offers in TiSA. However, this alone would contribute little to real liberalization since these 'on paper' PTA commitments still contain substantial binding overhang and have yielded minimal actual reform. This outcome would thus fall well short of TiSA's proclaimed ambitions to improve market

[30] Other bilateral service negotiations involving TiSA parties being finalized include the Canada EU Agreement. The Pacific Alliance between several TiSA participants is also expanding membership to other TiSA parties.

[31] Given that GATS is some 15 years old PTAs would be expected to contain at least some improved commitments.

Box 3: PTAs and Actual Liberalization

Assessing any actual liberalization generated by PTAs is inherently difficult since they do not indicate actual measures for comparison, or even if the commitment is above or below the status quo. This undermines transparency. However, the general consensus is that such PTAs are more the exception than the rule, mainly because unilateralism is essential to services liberalization (Francoise and Hoekman, 2010; Hoekman, 2008; Marchetti and Roy, 2008). There is limited evidence that certain PTAs, especially with negative lists (i.e. NAFTA-styled PTAs mainly with the US) have negotiated services bindings at the status quo and/or have caused non-conforming actual measures to be liberalized e.g. Canada and Mexico in NAFTA and Chile and Costa Rica (Roy, Marchetti and Lim, 2006).

But this work assumed that country schedules containing phase-out commitments of such measures was 'proof' of PTA- caused liberalization. However, such scheduling may simply reflect a unilateral decision at home to phase-out certain restrictions, and while scheduling these decisions offers advantages, it does not mean they were caused by the PTA. Moreover, as most of these phase-out commitments were in telecommunications and financial services, where rapid communication advances had undermined traditional regulatory regimes and enhanced their tradability, such reforms may well have reflected unilateral decisions to tackle these effects.

access and national treatment commitments, including removing binding overhang. Any possible gains would be diminished if TiSA ended up only reducing the binding overhang in the WTO to that existing in PTAs. Substantial

skepticism seems warranted on whether TiSA can become a genuine liberalizing force. Experience in negotiating PTAs in services suggest they have been 'much ado about nothing', especially in achieving actual openness, especially in sensitive sectors where the gains from liberalization would be greatest (Bosworth and Trewin, 2014). Also, as indicated even if some actual liberalization occurred, its discriminatory nature could introduce substantial trade distortions that may accentuate protection and perversely affect not only TiSA parties but non-TiSA WTO Members as well.

9. Implications for the WTO and the Multilateral Trading System

Precisely how TiSA as a non-MFN PTA will impact on the WTO and the multilateral trading system is very unclear. Exactly how TiSA relates to the WTO will also be crucial. Also, only time will tell if TiSA can deliver on its ambitious objectives? But while ever the two agreements co-exist, TiSA participants would have no incentives to negotiate in future in the WTO, such that the GATS would effectively be jettisoned from the multilateral system.

Skepticism is warranted at this stage. Services PTAs negotiated by TiSA Members, including among themselves, have nowhere near matched TISA's ambitions. Little, if any, actual liberalization is likely to be induced by the negotiations, especially in areas where the major economic gains from liberalization would result. Moreover, to the extent that any such changes were discriminatory the economic benefits would be seriously jeopardized.

A major drawback of TiSA being a PTA is that it distracts from what really matters. The main obstacle to liberalizing services trade is not the absence of effective trade agreements or commitments but a poor understanding at home of the significant economic benefits to countries from MFN self-liberalization, irrespective of what other nations do. Without a strong commitment to unilateral liberalization, built on transparency, liberalizing services will remain slow and uncertain. PTAs, and even the WTO, have generated little actual liberalization. More alarmingly, PTAs can erode unilateral efforts as governments put their trade policy 'eggs' in the foreign policy trade basket and focus on retaining 'negotiating coin' to liberalize only by swapping 'concessions' with other trading partners.

Thus, TiSA exposes the WTO to systemic risks, at a time when it is being severely challenged. It also challenges the completion of the Doha Round, to which Governments again committed to at the Bali Ministerial in December 2013. They instructed the WTO to 'prepare within the next 12 months a clearly defined work program on the remaining Doha issues…to build on decisions taken at the Ministerial Conference…as well as other issues under the Doha mandate that are central to concluding the Round (WTO, 2013). Services must obviously be part of this. However, precisely how this Work Program will be developed with on-going TiSA negotiations remains unclear. Indeed, they could make services even a bigger obstacle to completing the Round, as the focus of negotiations shifts to outside the WTO. Maintaining interest in the Doha negotiations while running the two negotiations in parallel could be awkward.

For example, will non-TiSA Members be willing to negotiate seriously with TiSA participants, especially if the latter are unwilling, as would seem likely, to offer the same commitments in the GATS as they have preferentially. GATS negotiations may thus become pre-occupied with whether Members will join TiSA and how this will impact on the GATS, especially if TiSA is implemented within the next 12 months. Once implemented, the Work Program would probably need to focus on TiSA's multilateralization and how the two agreements can effectively work in tandem until this happens. It would seem to be virtually impossible to shape the Work Program until TiSA's conclusion and details are released. The prospects of completing the GATS before TiSA would also seem low.

Since concluding the Doha Round will require trade-offs across different areas, with services featuring prominently in this, anything that confuses and reduces the likelihood of getting full agreement within the GATS is almost certainly going to further jeopardize the chances of concluding the Round. Thus, TiSA may have adverse impacts on Doha that extends well beyond services.

10. Conclusions

Unilateral liberalization, which is always on an MFN or non-discriminatory basis, has to remain the central part of setting a country's trade policy. MFN trade negotiations in the WTO can help support such reforms but cannot really substitute for unilateralism. PTAs are economically very hazardous, and not only risk undermining unilateral efforts to self-liberalize but also pose great dangers to the WTO

and the multilateral trading system. Discriminatory preferences involve leakages of political support that could otherwise be harnessed to support MFN liberalization, or preferably unilateral reforms.

Having TiSA negotiated as a PTA augers poorly for the WTO and the multilateral trading system. It will be another 'nail in the coffin' (perhaps a bolt) of the WTO and its cornerstone of MFN treatment. While TiSA is to have it seems a 'critical mass' threshold to shift commitments into the WTO and to extend MFN to all Members, the pathway, timing and means of ensuring this remain uncertain. Moreover, while this would be essential, the precedent established of negotiating large broadly/based discriminatory agreements in Geneva as PTAs to by-pass the WTO as a means of unblocking multilateral negotiations raises critical concerns for the WTO's future as their proliferation continues to make it less relevant. It is the wrong instrument to tackle the problem. Departures from reciprocity and non-discrimination are now eroding the feasibility of further multilateral trade liberalization (Williams, 2013).

TiSA is no more than participants choosing discrimination over non-discrimination. If the main traders fail to provide good leadership and instead both within and outside the WTO display bad habits for the rest to follow this can only lead to the WTO's inexorable demise. While it must be flexible to stay relevant, this must not mean changing rules and processes to accommodate such harmful and discriminatory practices. This may prolong the WTO's

survival but at a huge cost to global efficiency and prosperity.

The worry is that 'the steady erosion of the WTO's centrality will sooner or later bring the world to a tipping point – beyond which expectations become unmoored and Members feel justified in ignoring WTO norms since everybody else does' (Baldwin and Carpenter, 2009). The real fear is thus that TiSA, especially when combined with the TPP, RCEP, and the TTIP, will become the tipping point. Such an outcome would be bad for all WTO Members and for global governance generally.

Members having formed the WTO based on the MFN principle owe it to the institution and their constituents to make it work. The WTO has elements of a global public good which must be cherished. The best (and perhaps only) recipe that exists to resuscitate the WTO and promote global openness is to revive among all governments the virtue of MFN and of the benefits from unilateralism (self-liberalization); this is a domestic economic issue that will not happen while ever governments pursue PTAs and non- MFN outcomes. Returning trade policy as an integral part of any government's micro-economic reform agenda instead of them being obsessed with PTAs would be a good start. The best trade policy is domestic economic reform to raise productivity and competitiveness.

If plurilateral agreements are to be pursued, they should be as consistent as possible with the WTO's core principles, including MFN. This leaves in practice only one possibility, the ITA/services protocols and GATS' Understanding

approaches, whose operation is linked to achieving a specified 'critical mass', negotiated transparently within the WTO and applied on an MFN basis. As a Plurilateral PTA, TiSA's approach is unappealing, and should be avoided as a means of advancing services negotiations in Geneva. Despite participants saying that TiSA will be multilateralized as soon as possible, this is not guaranteed; the 'odds-on' favourite emerging is that it will remain a PTA for at least the foreseeable future. Thus if TiSA is to be negotiated it is essential that it operates only as a MFN plurilateral agreement within the WTO.

References

Andriamananjara, S. (1999), 'On the Size and Number of Regional Integration Arrangements: A Political Economy Model', Research Working Paper No. WPS 2117 (1999/05/31), May, Washington D.C.: World Bank.

Adlung, R., and S. Miroudot (2012), 'Poison in the Wine?: tracing GATS-minus commitments in regional trade agreements', Staff Working Paper ERSD-2012-04, January, Geneva: World Trade Organization.

Adlung, R. and H. and Mamdouh (2013), 'How to Design Trade Agreements in Services: Top Down or Bottom UP?', Staff Working Paper ERSD-2013-08, June, Geneva: World Trade Organization.

Australian Department of Foreign Affairs and Trade (ADFAT)(2011), 'Gillard Government Trade Policy Statement: trading our way to more jobs and prosperity', April, Canberra: Australian Government.

Baldwin, R. and T. Carpenter (2009), 'Why not in the WTO? The erosion of WTO centricity in trade liberalization,' The Graduate Institute, September, Geneva.

Bond, E.W. and C. Syropulos (1996), 'The Size of Trading Blocs, Market Power and World Welfare Effects,' Journal of International Economics, Vol. 40, Issues 3-4, May, pp.411-437.

Bosworth, M., G. Cutbush and J. Corbett (2013), 'Can the World Trade Organization be Saved? Only if Australia and Other members Stop Trashing It', Chapter 14 in the e-book "The Road to Bali: ERIA Perspectives on the WTO Ministerial and Asian Integration', ERIA Research Project Report 2012, No. 31, Y. Fukanaga, J. Riady and P. Sauve (eds), November, Jakarta.

Bosworth, M. and R. Trewin (2014), 'Australian PTAs in Services: "Much Ado About Nothing"; Chapter 9 in Sauvé, P. and A. Shingal, eds., The Preferential Liberalization of Trade in Services: Comparative Regionalism, London: Edward Elgar Publishers,

Bosworth, M. and R. Trewin (2009), 'Domestic Dynamics of Preferential Services Liberalization – Experience of Australia and Thailand" Chapter 18 in 'Opening Markets for Trade in Services: Countries and Sectors in Bilateral and WTO Negotiations', J. Marchetti and M. Roy (eds), Cambridge University Press, February, pp.663-666.

Cottier, T. and M. Molinuevo (2008), 'Article V GATS - Economic Integration', in Rüdiger Wolfrum, Peter- Tobias Stoll and Clemens Feinäugle (eds), 'WTO - Trade in Services, Leiden and Boston: Martinus Nijfhoff, pp. 125-151.

De Mestral, A.C.M. (2013), 'Dispute Settlement Under the WTO and RTAs: An Uneasy Relationship', Journal of International Economic Law 16, ppp.777-825, 9 December.

EC (2013), 'Negotiations for a Plurilateral Agreement on Trade in Services', Memo, Brussels, 15 February.

Fink, C. and M. Molinuevo (2008), 'East Asian Free Trade Agreements in Services: Key Architectural Elements,' Journal of International Economic Law 11(2), pp. 263-311, 26 February.

Francoise, J. and B. Hoekman (2010), 'Services Trade and Policy', Journal of Economic Literature, 48(3), September, pp.642092.

Harbinson, S. and B. de Meester (2012), 'A 21st Century work program for the multilateral trading system, National Foreign Trade Council, Washington, D.C.

Hoekman, B. (2008), 'The General Agreement on Trade in Services: Doomed to Fail? Does it Matter?', Washington D.C., October.

Kemp, M. and H. Wan Jr (1976), 'An Elementary Proposition Concerning the Formation of Customs Unions',

Journal of International Economics, Vol. No. 6, Issue No. 1, pp. 95-98.

Krishna, P. (1998), 'Regionalism and Multilateralism: A Political Economy Approach,' Quarterly Journal of Economics.

Marceau, G. and J. Wyatt (2010), 'Dispute Settlement Regimes Intermingled: Regional Trade Agreements and the WTO', Journal of International Dispute Settlement, Vol. 1 No. 1, pp.67-97.

Marchetti, J. and M. Roy (2013), 'The TiSA Initiative: an Overview of market Access Issues, WTO Staff Working Paper ERSD-2013-11, November, Geneva: World Trade Organization.

Marchetti, J. and M. Roy (2008), 'Services Liberalization in the WTO and PTAs,' in J. Marchetti and M. Roy (eds.), 'Opening Markets for Trade in Services: Countries and Sectors in Bilateral and WTO Negotiations, Cambridge University Press pp.61-112.

Nakatomi, M. 2013. Plurilateral Agreements: A Viable Alternative to the World Trade Organization? ADBI Working Paper 439, Tokyo: Asian Development Bank Institute.

Panagariya, A. and P. Krishna (2002), 'On Necessarily Welfare-Enhancing Free Trade Areas', Journal of International Economics, Vol. No. 57, Issue No. 2, pp. 353-67.

Pruzin, D. (2013), 'TiSA Round Sees Progress on Proposals, Commitments to Make Market Offers', WTO Reporter, 11 November, Geneva.

Roy, M., J. Marchetti and H. Lim (2006), Services Liberalization in the New Generation of Preferential Trade Agreements (PTAs): How Much Further than the GATS?', Staff Working Paper ERSD-2006-07, September, Geneva: World Trade Organization.

Sauvé, P. (2013), A Plurilateral Agenda in Services: assessing the case for a Trade in Services Agreement (TiSA), NCCR Working Paper No. 2013/29, Swiss National Centre of Competence in Research, May, Bern.

Williams, B. (2013), 'Australia Must Exhort the G20 to Lead on Multilateral Trade Liberalisation by Example Not Words" in M. Callaghan, P. Gallagher, J. Ravenhill, M. Thirlwell and B. Williams, 'Trade and the G20,' Lowy Institute for International Policy, *G20 Monitor*, Issue No. 3, June 2013, Sydney, pp33-40.

World Trade Organization (2013), 'Ministerial Conference, Ninth Session, Bali, 3-6 December 2013', Document No. WTO/MIN(13)/DEC, 11 December, Geneva.