The Proposed Non-MFN Trade in Services Agreement: Bad for Unilateralism, the WTO and the Multilateral Trading System

Malcolm Bosworth

Abstract

The probability that the Trade in Services Agreement (TiSA) currently being negotiated among a sub-set of WTO Members will continue at least for the foreseeable future as a discriminatory (non-MFN) Preferential Trade Agreement (PTA) under the GATS raises many serious concerns that have been inadequately addressed. Like the proliferation of PTAs generally, TiSA will further the demise of the WTO as an effective global liberalization body defending the critical importance of unconditional MFN (Non-discrimination) trade. The WTO will continue to wither on the vine until Members again in practice (not just in words) recognize that efficient global trade and regionalism requires a strong commitment to MFN (non-discriminatory). Without this, the WTO will continue to wither on the vine; it may not fall off but will not bear any fruit. In this regard, TiSA will be bad for unilateralism, the WTO and the multilateral trading system.

Research for this paper was funded by the Swiss National Science Foundation under a grant to the National Centre of Competence in Research on Trade Regulation, based at the World Trade Institute of the University of Bern, Switzerland.

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The Proposed Non-MFN Plurilateral Trade in Services Agreement: Bad for Unilateralism, the WTO and the Multilateral Trading System

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Executive Summary

Unilateral reform to self-liberalize is the best way to generate country and global prosperity, as well as to resuscitate the WTO and the world trading system. The economic gains of liberalization accrue through the improved resource-use efficiency induced from a country opening its market to more efficient imports, and allowing it to specialize in what it does best – according to its comparative advantage. This requires that trade be efficient i.e. having the country’s imports sourced globally from their most efficient supplier and for its exports to be in activities that efficiently use its resources. Preferential Trade Agreements (PTAs), and associated discriminatory regionalism whereby PTA partners receive selective access at the expense of global non-PTA members, are most unlikely to generate efficient trade, neither between the PTA parties nor between them and non-parties, or globally.

Such regionalism is damaging the WTO system, and would seem irreversible. Discriminatory regionalism based on PTAs thus needs to be curtailed, not encouraged, as is the pre-occupation currently. Of course, enhanced regionalism founded on non-discrimination and efficiency, which will be inevitably induced by non-discriminatory unilateral and multilateral liberalization, is to be welcomed as essential segments of achieving efficient globally integrated markets. That will take care of itself if unilateralism and multilateralism is pursued globally. Paradoxically, unless there is a determination to proceed with this quickly, efforts to promote regionalism via discrimination will weaken not strengthen it in the longer run.

Trade negotiations are no substitute for unilateralism. Especially in the case of PTAs, they can make sensible economic trade reforms less likely by crowding out unilateral and multilateral efforts. Regionalism based on PTAs and multilateralism have poor track records in instigating actual liberalization – being more concerned with liberalizing ‘on paper’ commitments instead of ‘on the ground’ measures – and trying to resist not embrace self-liberalization as flawed mercantilism thinking and fears of trading partners ‘free riding’ on another country’s liberalization dictate negotiations and policy attitudes. But at least multilateralism is in sync with unilateralism by being non-discriminatory. While governments will undoubtedly pursue further PTAs – the egg has been scrambled – their continued proliferation, priority and distraction from what really matters, risks undermining global prosperity by letting unilateral efforts across the global community wither. A continuation of PTAs as the main ring event rather than the sideshow they should be sets an on-going dangerous course for unilateralism and the WTO’s revival.

Thus, confronted by the excessive PTA obsession it is vital that PTAs be subject to much greater transparency and public scrutiny. This should be done throughout the negotiations based on public release of full details of the negotiations and offers made as they occur. There is no economic reason for why PTAs should not be subject to such on-going transparency requirements (indeed in the TiSA context it is noteworthy that two members publicly released from the outset their initial offers). While doing so may reduce the mystique surrounding negotiations, and make it more difficult for governments and trade

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ministers to use such negotiations to politically grandstand and to hide-behind or gain kudos for such outcomes, doing so would help ensure that more economically sensible PTAs are negotiated; that their economic benefits are not oversold as is usually the case; and that largely ‘window-dressed’ PTAs are not concluded based on exaggerated claims to meet political aspirations while achieving little in reality. Publicly releasing such details after the negotiations have been ‘signed off’ is too late, and on-going consultations conducted in private by trade departments with interested stakeholders achieve little transparency in reality. Indeed, selective release of information on negotiations may be even counter-productive from a public policy perspective. At the very least, domestic processes for negotiating and evaluating PTAs need to be substantially overhauled with greater transparency in mind.

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 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 SA 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. The real 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. Such an outcome would be bad for all WTO Members and for global governance generally.
And as if this is not bad enough, more alarmingly unilateralism, the only basis of setting sound trade policies premised on sensible economic reform, is being badly damaged.

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.

The paper is structured as follows. Section 2 discusses the impossible marriage between multilateralism and preferentialism, highlighting the troubles the WTO faces and how the proliferation of PTAs and the erosion of the non-discrimination (MFN) principle have helped cause this outcome. Section 3 emphasizes the vital role unilateralism must play in promoting global liberalization and prosperity, and how PTAs and discrimination are directly at odds with such reforms. Section 4 introduces the TiSA, including its structure and how it is being negotiated as a non-MFN GATS Article V PTA. Section 5 discusses whether MFN negotiations on services were possible within the GATS. Section 6 considers the approaches available within the WTO to overcome the perceived ‘free-rider’ problem. Section 7 examines the implications of having a non-MFN Plurilateral TiSA within the WTO. Section 8 looks at the possible multilateralization of TiSA and Section 9 examines shifting TiSA as a PTA to within the WTO. Section 10 discusses the PTA minefield that already exists and how it is only going to get worse with TiSA and other on-going regional trade developments. Section 11 assesses the implications of TiSA for the WTO and the multilateral trading system. Section 12 concludes the paper.

2. Multilateralism and Preferentialism, an Impossible Marriage

While the WTO is in deep trouble for many reasons, the proliferation of PTAs is at the forefront. Governments have been either oblivious to, or dismissive of, the high collateral damage non-MFN (i.e. discriminatory) PTAs are inflicting on the WTO. They have increasingly promoted PTAs mainly for non-economic, including political and foreign policy, motives that are better handled outside trade agreements and the benefits of which are largely uncertain and non-quantifiable. Governments have thus been reluctant to transparently sell PTAs at home on these non-economic grounds, choosing instead to publicize their supposed quantifiable economic benefits. However, as well as over-selling these benefits, aided generally by purportedly independent studies but strongly driven by pre-specified assumptions and

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2 Some argue PTAs are actually the symptom of a poorly functioning WTO, with Members pursuing PTAs due to the WTO’s constraints and slowness. However, while politically attractive, this argument economically flawed. If true, the most efficient response would not be to negotiate inefficient PTAs but to improve the WTO’s effectiveness. PTAs only further weaken the WTO’s relevance, making it less likely that fundamental reforms to enhance its efficacy will occur. Thus a vicious cycle is created, in which more PTAs further undermine the WTO and where before too long they displace the WTO, and the side-show becomes the ring event.

3 When referring to MFN, 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.
reliant on questionable economic modeling, governments have often adopted to seal the deal dubious trade policy changes affecting their economies e.g. strengthened intellectual property, investor state dispute settlement provisions (Box 1). They have also ignored (intentionally or unintentionally) the adverse systemic effects PTA proliferation, many with ‘GATS-minus’ (incompatible) commitments, are having on the WTO and the multilateral system. Simply because these effects cannot be quantified does not mean they are any less important. As the WTO/GATT with its priority on non-discrimination (MFN) has helped underpin world prosperity, any likely erosion of its effectiveness is disturbing.

Unfortunately too few economists have steadfastly rejected preferentialism to highlight the dangers of PTA proliferation, many with ‘GATS-minus’ (incompatible) commitments, are having on the WTO and the multilateral system.5 Simply because these effects cannot be quantified does not mean they are any less important. As the WTO/GATT with its priority on non-discrimination (MFN) has helped underpin world prosperity, any likely erosion of its effectiveness is disturbing.

**Box 1: The Dangers of Negotiating Intellectual Property in Trade Agreements**

Intellectual property (IP) protection was contentiously introduced into the WTO by negotiating the Trade-Related Aspects of Intellectual Property Rights (TRIPS) in the Uruguay Round. It is still pushed strongly by the US and the EU, the major exporters of intellectual property. TRIPS goes against standard WTO principles which try to boost global and domestic competition to improve economic efficiency by removing economic rents earned by producers and traders. However, TRIPS is anti-competitive; it strengthens monopolies and increases such rents of IP producers and exporters. This has expanded the ongoing rent transfers from consumers to producers of IP. TRIPS-plus measures are not really concerned with providing incentives for new IP. Since most countries, including many developed countries, are net importers of IP, this has transferred greater rents from importing nations to the few IP exporting countries. Given difficulties in the WTO the IP game has shifted to PTAs. Consequently, trade liberalization is presently being held hostage to the IP agenda of the US and the EC, and this is inimical to development (Dee, 2014).

The Australian Government accepted in principle the Productivity Commission’s (APC) recommendation to avoid having IP in PTAs unless rigorous economic analysis showed they would generate overall net benefits to the parties (APC, 2010).

These views are supported by others. For example, ‘...ever since PTAs began gathering momentum they were an unfortunate development that posed a threat to multilateral liberalization. ...It is now clear that, PTAs have become a major stumbling block to multilateral liberalization...The game is being played almost entirely as Bhagwati had predicted....he had hypothesized that the hegemonic power is likely to gain a greater payoff by bargaining sequentially with a group of non-hegemonic powers than simultaneously....More PTAs, such as the TTIP, ‘will without doubt damage the multilateral trading system....These developments will fragment rather than unify the world economy....Equally, the process will produce even worse outcomes in the area of rulemaking eventually undermining the WTO as an

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5 For example, Australia recently included ISDS provisions in the PTA with Korea, which will reportedly be extended to those being negotiated with China and Japan. This policy reversal was not publically reviewed and rejected the Productivity Commission’s advice (on which the previous Government’s decision was based) to avoid ISDS provisions in PTAs that grant foreign investors substantive or procedural rights beyond those enjoyed by domestic investors (APC, 2010).

6 PTAs have no more successfully tackled obstinate import restrictions than multilateral negotiations, both in goods (e.g. agricultural subsidies) and services. This is unsurprising insofar as common conflicting positions, for example between countries on the need for and scope of additional regulatory disciplines on services, are no easier to accommodate in PTAs than in the WTO.
institution (Panagriya, 2013). The MFN is no longer the rule but almost the exception, and that this matters profoundly for the WTO (Sutherland, 2004).

MFN is the WTO’s cornerstone for sound non-economic and economic reasons. ‘The great political virtue of multilateralism, far exceeding in importance its economic virtues, is that it makes it economically possible for most countries, even if small, poor and weak, to live in freedom and with chances of prosperity without having to come to special terms with some Great Power’ (Viner, 1947). This political virtue of MFN remains highly relevant. Trade bullies still exist. Global or hegemonic powers left largely uncontrolled often pursue their commercial interests at the expense of others. Trade bullying is not reserved to Global Powers negotiating with other nations, but can be practiced by any moderately-sized economy with asymmetrical powers in negotiating PTAs with smaller countries e.g. Australia and New Zealand negotiating with Pacific island states. Multilateral MFN negotiations, although imperfectly, help offset these intimidating tactics.

MFN liberalization is superior economically to non-MFN. Non-discrimination ensures imports from the world’s most efficient suppliers by the most efficient route, and hence facilitates economical global supply chains. By guaranteeing trade creation and no trade diversion, MFN liberalization unambiguously raises a country’s national welfare. Alternatively, discriminatory liberalization (PTAs) intentionally diverts trade which may outweigh any trade creation. The possibility of welfare-reducing liberalization clearly distinguishes preferential liberalization from multilateral liberalization (Krishna, 2012). Thus, setting trade policy using discriminatory PTAs (assuming they actually ‘liberalize’ significantly) may cause perverse economic outcomes for participants, and distracts attention from the unilateral MFN self-liberalization that really matters. This is increasingly the case given the types of non-tariff restrictions and other ‘behind-the-border’ regulations, especially in services that liberalization must tackle. These often maintain non-discriminatory market access measures that prevent both domestic and foreign suppliers from entering the market (e.g. state monopolies or oligopolies). These are not amenable to reform via traditional trade negotiations that focus on selectively applied national treatment or discriminatory border measures.

The mistaken view that PTAs in services will in practice induce MFN reforms since services barriers cannot generally operate to discriminate between trading partners, does not recognize that this is why PTAs actually do not substantially negotiate on non-discriminatory market access measures. Also, if services barriers cannot discriminate than why not negotiate them on an MFN basis in the first place. PTAs almost inevitably miss most measures where the biggest economic gains from reforms lie.

Thus, PTAs have at least two major weaknesses. First, they usually negotiate only ‘on paper’ commitments, and by not changing actual measures deliver little liberalization in practice. This is true for any trade negotiations, including the WTO. Again, this hardly surprises; liberalizing services trade also often requires profound institutional reforms not easily achieved in international negotiations. For example, some countries enshrine a postal monopoly in the constitution, or rest regulatory competences with sub-federal entities. There is also increasing evidence that PTAs (and the WTO) are ineffective in

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6 This seems to be acknowledged in the GATS by Article V (economic integration) only requiring PTAs to liberalize national treatment (i.e. discriminatory) limitations and not market access measures. However, this could also capture discriminatory market access limitations where the measure applied to both types of commitments.

7 PTAs, like the WTO, primarily negotiate bindings which cap the measures’ level of restrictiveness (often above actual levels). While ‘negative list’ PTAs may bind actual measures and hence more effectively limit backsliding, this is still not actual liberalization. The only significant exception is tariffs (irrelevant to services) where PTAs negotiate actual preferential tariff reductions on each other’s imports instead of bindings as in the WTO.
constraining actions in opaque policy areas operating ‘behind-the-border’ where treaty violations are hard to observe and prove, such as in government procurement.\(^8\)

While negotiating bindings can offer advantages, mainly helping to ‘lock in’ reforms multilaterally (or regionally in the case of PTAs), they run a distant second in importance to unilateralism. This actually reforms measures, the essence of trade policy. Moreover, since many bindings are at ceiling levels (substantially less restrictive levels than applied), they do not in practice prevent substantive backsliding or de-liberalization. Indeed, many governments, especially developing countries, seek to negotiate this outcome (including repeated use of WTO ‘special and differential’ or S&D provisions) in order to maintain so-called ‘policy space’ to introduce more protectionist policies.\(^9\) However, this argument erroneously sees protection as a way out of any future economic difficulties. Countries should be willing, or even to volunteer, at least to self-bind their measures to guard against reverting to protection.

Second, even if PTAs reduce actual barriers, by doing so discriminatorily they raise other potentially serious problems, both for the importing parties and for non-parties. For example, trade diversion may outweigh trade creation, such that national welfare of a party or parties may fall (Box 2). Trade diversion from PTAs is usually identified with preferential tariff reductions on goods. However, trade diversion can be more subtle and in fact creep substantially during a PTA’s existence; ‘the spectre of protection diversion and more subtle forms of trade diversion is forever present, and non-tariff forms of trade diversion can become a much greater source of discrimination’ (Prusa, 2011). Empirical studies are very mixed on whether PTAs generally create or divert trade, and have not really helped, due especially to the limitations of modeling and the inability to quantify many of the economic costs associated with PTAs. However, frequent claims that PTAs have been generally trade creating cannot be substantiated.

### Box 2: Dispelling Some Myths About the Benefits of PTAs

A recent review of the collective experience of countries on both the preferential and multilateral levels found that:

- Despite PTAs proliferating, the amount of liberalization actually achieved is quite limited. Trade flows between such partners are a relatively small share of world trade, thus casting doubts on the efficiency of PTAs in liberalizing trade;
- While evidence is mixed on whether PTA liberalization has actually improved welfare, a few studies show significant trade diversion. This should at least hasten caution against casually dismissing trade diversion as only a theoretical concern. Finding adverse terms-of-trade effects on non-parties also highlight that PTAs may negatively affect outsiders;
- While a rich empirical literature has found mixed results on whether tariff preferences help or hurt multilateral liberalization, the picture is different for the more elastic tools of trade policy, such as anti-dumping duties; their use against non-members has dramatically increased while that against PTA parties has fallen;
- Intra-PTA trade is relatively small, suggesting multilateral initiatives covering world trade remain most relevant; and
- Scepticism on how much deeper PTAs, on average, have gone beyond the possibilities offered by the WTO.

The review challenges the ‘ideas that PTAs present an efficient alternative to multilateral approaches in achieving genuine liberalization of trade and that PTAs have uniformly enabled the ‘deep integration’ claimed’.

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\(^8\) Empirically neither multilateral nor PTAs have substantially reduced governments’ propensity to ‘buy national’, thus showing the difficulty of regulating non-transparent areas via international treaties (Rickard and Kono, 2013).

\(^9\) Use of S&D treatment by developing countries in the WTO has harmed their economic interests. It is based on flawed mercantilism that has reinforced their attitudes to resist self-liberalization falsely believing they will nevertheless gain significantly from others liberalizing. But poor countries cannot progress economically without adopting domestic reforms needed to resuscitate their non-competitive economies. Domestic supply constraints, not overseas trade barriers, are their main impediments to growth and development. Also, now that some two-thirds of WTO Members are developing countries burgeoning use of S&D treatment has helped undermine MFN.
While usually more opaque, the negative welfare effects of trade diversion from PTAs can also affect services e.g. mode 3 via investment diversion from discriminatory investment measures. This is despite many PTAs, like the GATS, having liberal ‘denial of benefits’ clauses that extend preferences to any supplier from a non-party that conducts ‘substantial business operations’ within a party. For example, imagine a country with a state-owned telecommunications monopoly. This is a mode 3 non-discriminatory market access limitation and a (discriminatory) national treatment measure. Assume it enters a PTA with a major trading partner, say the US, and agrees to partially privatize the entity by divesting 40% to a major US supplier. However, to preferentially allow a US supplier to purchase the equity without removing the non-discriminatory monopoly is likely to make the country worse off. This is because without further domestic competition, telecommunication prices are unlikely to fall, thus providing few benefits to the economy, while the partial privatization overseas will now mean 40% of these rents, previously accruing to the government, will be transferred to the US supplier.\(^{10}\)

While liberalizing rules-of-origin (RoO), usually a major constraint on PTA tariff liberalization, is required to help ensure that such preferences are utilized, such improvements only reduce but do not necessarily remove the PTA’s negative trade diversion welfare effects, nor establish the most efficient supply chains (Box 3). Rather than promoting efficient supply chains and reducing production fragmentation as is often claimed, PTAs further fragment production and generate inefficient supply chains as less efficient regional supply chains expand at the expense of global supply chains. Thus this concern is really a call for greater multilateral not preferential liberalization (Krishna, 2012). Bilateral deals and country RoO should be scrapped as reciprocity and mercantilism makes even less sense today as exports depend on imports and more efficient global supply chains, which need unilateral opening (Sally, 2013a).

**Box 3: PTAs, Trade Diversion and Rules-of-Origin (RoO)**

Assume China has an MFN tariff of 25% fob on imported lobsters. They are imported directly from Australia, say the world’s most efficient producer. The fob price is $100, transport to China $10 and Chinese tariff revenue is $25. The landed-duty-paid price to Chinese consumers is $135. Chinese lobsters also sell at this price to compete with Australian imports. China now removes the 25% MFN tariff. The Chinese price falls to $110 to compete with Australian imports selling at $110. Thus there is no trade diversion but only trade creation as the full loss of China’s tariff revenue of $25 flows onto to Chinese consumers as a fall in price of $25. Thus, less efficient Chinese lobster production is displaced by more efficient Australian imports, therefore releasing Chinese resources for use by more efficient activities, and imports from Australia increase at the lower price also benefiting Chinese consumers. Thus, with MFN liberalization the Chinese economy and consumers are unambiguously better off. Chinese imports also continue to be imported from Australia, the most competitive producer, such that Australia also benefits from increased exports to China and the growth of an efficient industry that draws resources from other less efficient activities, including possibly other exports. New Zealand has an MFN tariff of zero on lobsters, such that it continues to import lobsters from Australia for $110 (including freight of $10 from Australia) that is cheaper than the New Zealand fob price of $120. These displace less efficient New Zealand lobsters and release resources for use in more efficient activities. It does not export lobsters because it is non-competitive. A landed-duty-paid price of $130 including freight from New Zealand to China of $10. So China imports lobsters from New Zealand under the PTA and not from Australia which can no longer compete in China due to the PTA preference extended to New Zealand. Chinese consumers thus gain $5 because they can now buy lobsters from New Zealand for $130 compared with paying $135 before the PTA for imports from Australia. However, China has foregone $25 in tariff revenue. China is thus worse off by $20 ($25 less $5) due to trade diversion from the PTA. However, some trade creation will occur as the price of lobsters (both New

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\(^{10}\) Also, since ‘first mover’ advantages into services markets can be significant, extending preferential access to suppliers may impose significant long lasting diversion and efficiency costs to the country concerned, and to the world, that cannot be easily rectified in future by removing the trade discrimination.
Thus, liberalizing the RoO has reduced the loss in China’s national welfare from trade diversion under the PTA, but has not eliminated it. This is because the PTA has replaced the most efficient supply chain (exporting Australian lobsters directly to China) with a less efficient one of Australia exporting to China via New Zealand. The PTA would also still be worse for Australia and New Zealand than if China had liberalized unilaterally on an MFN basis.

International studies of PTAs repeatedly measure significant under-utilization of tariff preferences in PTAs, reflecting mainly restrictive RoO, low margins of preference, and costly and inefficient procedures in the exporting country for exporters to obtain the needed Certificates of Origin to utilize the preferences. Many tariffs in PTAs also already have zero MFN rates, thus making preferences irrelevant.

‘Preferential liberalization may actually result in a greater degree of trade protection (for inefficient partners), and measured increases in intra-PTA trade do not automatically indicate an economic improvement’ (Krishna, 2012). Moreover, while open membership to PTAs would help integration and be expected to move closer to global free trade, this ‘does not imply that discrimination is eliminated or guarantee a faster path to global free trade than multilateralism’ (Krishna, 2012).\(^{11}\)

Other adverse systemic effects on the WTO of discriminatory liberalization are that it promotes domestic protectionist and rent-seeking behavior from firms lobbying governments to use PTA negotiations to reinforce or create privileged positions (Box 4). Import-competing firms, for example, strive to ensure their goods or services are left off the negotiating table or receive favourable treatment to maintain import protection, which can also strengthen their successful opposition to any unilateral reforms. Exporters push for discriminatory access abroad as a way to earn rents. Rent-seeking behavior engenders economic inefficiency. The non-transparency of PTA negotiations that preclude public scrutiny until too late facilitates, and even encourages, lobbying by vested interests. Also, exporters gaining preferential access can have a diminished incentive to support (or even to strongly oppose) a multilateral trade deal that would remove the benefits they enjoyed from the PTA diverting trade to them (Krishna, 2012, 1998).

**Box 4: PTAs facilitate Inefficient Rent-Seeking and Fail to Tackle the Political Economy Constraints to Trade liberalization**

Since the political opposition of the import-competing lobbies works heavily against trade liberalization, it is unclear why lobbies opposed to multilateral liberalization would more easily support preferential liberalization. Thus, it would be expected that they would mostly only support preferential arrangements that protected their rents, by either accessing partners’ markets or exempting liberalization on competing imports. Studies confirm this complementarity between MFN and PTA tariffs, indicating that third factors e.g. vested sectoral interests, drive trade policy at both the multilateral and bilateral level. This implies liberalization that is difficult at the multilateral level will not necessarily be easier bilaterally.

Evidence also suggests that ‘trade-diverting PTAs are more likely to win domestic support’. Governments face conflicting pressures from exporters (gain from reduced trade barriers abroad), and import-competing sectors (suffer from lower trade barriers at home). Trade diversion effectively shifts the burden of the gain to member-country exporters of member-country import-competing sectors onto non-member producers, who have little political clout inside member countries’.

\(^{11}\) No trade bloc or PTA has granted such liberal accession. There are also many ways to make a PTA exclusive, like requiring parties to negotiate on certain non-trade issues (e.g. labour and environmental standards and intellectual property) which, to the extent that they actually mean anything, prevent other countries from joining. This is the case in the Trans-Pacific Partnership Agreement (TPPA) whereby the US template makes it ‘implausible’ for major developing countries (e.g. China and India) to join (Panagriya, 2013).
3. Unilateralism Must Prevail for Prosperity

The most effective means to reform, especially in sensitive areas, is to build unilateral support at home. This provides a ‘reconciliation between the world of trade diplomacy and the domestic policy world that ultimately determines what diplomatic efforts can achieve. It is no longer reasonable to expect that external negotiations among countries based solely on reciprocity can do the trick, even among subsets of the so-called ‘like minded’ (Banks, 2013). Getting policies right unilaterally is difficult enough, let alone ultimately determines what diplomatic efforts can achieve. It is no longer reasonable to expect that

Unilateral liberalization should remain the ‘main game in town’ for any government. Trade policy is not trade negotiations. It is set by actual measures, not commitments, going well beyond those not to introduce new or more discriminatory national treatment measures as only required of PTAs by the GATS. Trade negotiations only look at the broad parameters of trade policy; the ‘nuts and bolts’ lie outside and are set at home in response to domestic political and economic pressures (Box 5).

Box 5: The Political Economy of Trade Reforms

The traditional political economy justification to support multilateral and PTA negotiations is that they help counter lobbying pressures from producers for import protection by mobilizing exporters’ support for liberalization at home in return for achieving greater market access abroad. It is also claimed that external pressure via international negotiations and bound commitments can generate self-liberalization, even though actual cases of this are rare.

Imposing legal obligations from outside is unlikely to solve the political economy pressures faced by governments in reducing trade protection. Most political and bureaucratic systems are inherently biased towards protection, which unless effectively tackled will not change. Externally imposed reforms may actually intensify domestic resentment of trade liberalization and of the WTO, with an unintended backlash on efforts to open trade. International evidence shows the successful and sustainable reforms to be home ‘grown’ and owned. Convincing yourself what are good economic reforms will is bound to be always more effective than having others telling you from abroad.

The most effective and sustainable means to counter political economy pressures favouring protection is for governments to enhance public transparency and scrutiny of its economic costs, and to build strong private and electoral support for trade and other micro-economic reforms. This empowers a broader coalescence of support for liberalization. In today’s global world, it is no longer appropriate to talk about exporters’ and import-competing interests as if they are separate; interests in trade policy cut across these boundaries and will vary between products, services and issues. Domestic transparency based on evidence allows all parties affected by protection, namely exporters, importers, efficient import-competing firms, taxpayers, and even workers, to understand the harm selective protection of inefficient industries does to them, and to better lobby governments for unilateral reform. This puts the reform focus on where it matters most, self-liberalization as a means to promote economic efficiency. Governments are adept politically at blaming overseas barriers as the main obstacles to exports to deflect attention from having to make hard reforms at home. But the main hurdles to efficient exporters are domestic trade restrictions and other micro-economic policies that hinder competitiveness and penalize exporters. All protection regimes contain an in-built anti-export bias; a tax on imports is really a tax on exports. Even if trade agreements helped such political economy outcomes in the past has not been happening for some time. The political economy of trade agreements, especially with PTAs proliferating, has become concentrated not on achieving trade reforms at home but on gaining preferential access overseas for exporters. The ‘fruitful lie’ behind trade negotiations that gains from trade come from exports and not imports that may have previously helped governments in the WTO to counter the inevitable domestic political economy pressures against liberalization no longer works: governments instead have become ‘convinced of their own mercantilist propaganda to embrace the misconception that their countries’ interests are served only if they can get other governments to make bigger concessions than their own’ (Crook, 2006).
Trade negotiations inherently contradict the logic of unilateral reforms. Trade negotiations work on the premise that self-liberalization is a ‘cost’ or ‘concession’ to be agreed only if other countries in return liberalize sufficiently to give exporters enough market access for the benefits to outweigh the ‘costs’. And because governments and trade departments measure the success of negotiations using the mercantilist yardstick of conceding as little to get as much as possible, talks inevitably become very protracted. But this is perverse economic thinking. The economic gains come overwhelmingly from actual self-liberalization and governments should see this as a benefit not a ‘cost’. This also applies to bindings; it is of more economic value to self-bind trade policies against backsliding at home than obtaining bindings abroad. The challenge should be to use trade negotiations as a means to self-bind/liberalize. But those servicing the negotiations, including trade ministers, are not well equipped or positioned to do this; they are mandated to extract liberalization abroad and not to reform domestic policies.12

PTAs especially can serve as a brake on self-liberalization. The reciprocity of negotiations works to keep the unilateral reform threat to local incumbents at bay. Trade departments focused on drawing entry concessions from foreigners are willing partners in perpetuating this outcome. They can be used by governments as a political ‘smoke screen’ to give the impression they are actively pursuing more open trade when in fact they are resisting self-liberalization. The brunt of the costly arrangements is borne by domestic consumers (including producers using protected-inflated priced inputs) denied access to cheaper and/or better goods or services. The political deal is one that always serves incumbent producers better than consumers. It is often claimed that reciprocal trade negotiations help governments implement difficult trade reforms. However, such cases are rare, especially when the critical distinction between commitments and actual measures is recognized. The reform ‘tough nuts’ are invariably omitted or largely side-stepped in trade negotiations, thereby greatly limiting, if not negating, any potential economic benefits.

While PTAs may have foreign policy and political merit, including handing governments opportunities to grandstand at home by asserting that negotiating PTAs is important for the economy (undoubtedly explaining their popularity), they are problematic economically. Perhaps it is just as well that PTAs are generally impotent; otherwise they may inflict even more damage on a country’s trade policy and the multilateral trading system. Governments should of course enter a PTA assessed to be in the country’s best interests after balancing economic and non-economic considerations. However, any economic costs and benefits must be properly evaluated. Governments selling PTAs on their economic merits should be kept accountable by having these claims publicly scrutinized. Too often they get away unchallenged, for example, with selling outcomes of trade agreements, especially PTAs, by creating the impression that new commitments and disciplines automatically boost prosperity. But without actual trade liberalization this is false. This is where unilateralism counts in liberalizing trade measures beyond commitments, and in implementing agreed disciplines effectively.

One of the many ways PTAs impact negatively on unilateralism is that they develop a discriminatory mindset towards liberalization among policy makers and governments that refutes the non-discrimination appeal of unilateral reform. Governments thus increasingly resort to retaining ‘negotiating coin’, either ‘on paper’ or ‘on the ground’, for future PTAs. This is a risky strategy that can end up holding a country’s unilateral reforms hostage to trade negotiations, only to its detriment e.g. Australian tariff policy is now to reduce tariffs only in PTAs, thus rejecting domestic calls to unilaterally remove all tariffs. The solution to reduced preferentialism, urgently needed to rescue the WTO, lies not internationally but domestically in developing a resurgence in unilateralism and of its economic merits.

12 For example the Australian Department of Foreign Affairs and Trade (DFAT), in calling for public submissions on TiSA is interested in hearing about specific market access interests in those markets and explicit barriers faced by exporters to further inform Australia’s market access requests (DFAT, 2014).
Despite the hype surrounding PTAs they inevitably fail to deliver on over-sold economic benefits by governments, and deliver far less than would unilateral MFN reforms (APC, 2010; Sally, 2008). Most economic benefits come not from gains in export access but from actual self-liberalization, and the largest of these come from tackling major restrictive and economically-distorting trade-related measures (Anderson and Neary, 2007; Martin and Anderson, 2008). Thus, the wrong economic benchmark is used to assess the value of PTAs. It is not the extent to which they open foreign markets but rather the extent to which they achieve self-liberalization that is important. A country’s national welfare is determined by its import openness and consequent economic efficiency.13 After all, greater market access overseas will be of little use if the exporting country has supply constraints and/or cannot export the goods or services efficiently. And this depends on its trade and other economic policies. If overall exports cannot expand, those to PTA markets would only be diverted from non-PTA, with no economic gain to the exporting country. Moreover, the exporting economy would be made worse off if its increased exports were in activities in which it was less efficient than non-parties (i.e. trade diversion), as it would be better off to import those items from non-parties and not to export to them. A country’s national welfare is harmed if it produces goods or services that cost more than they are worth internationally, even if these are exported. And these resource-use inefficiencies will result unless a country’s trade is efficient, which PTAs and associated regionalism work strongly against.14

The most efficient way that a country can raise its exports is to reduce its trade barriers to increase its imports. Trade restrictions end up taxing exports, and if these are removed efficient exports will prosper. This is because as imports increase so must exports and/or inward foreign direct investment; otherwise the country’s exchange rate will depreciate to retain external balance by reducing imports and raising exports, as well as discouraging inward FDI.

Pushing to re-invigorate unilateralism as the best way to advance trade reforms need not be the forlorn hope many see it is. By far most actual trade reforms globally have been sourced unilaterally, including in developing countries, and this will inevitably continue. It is not that unilateralism is not happening but rather that it has slowed to a crawl in most countries, in some cases backsliding, as efforts are focused elsewhere. This has even occurred in countries like Australia which extensively liberalized unilaterally in the 1980s and 1990s independent of the WTO and other trade negotiations. “Australia fortunately took a different path to trade liberalization (than to trade negotiations) that was essentially unilateral…. Its more recent pursuit of PTAs has not really changed the essential story… Relatively little liberalization has occurred through these compared to the domestically initiated reforms’ (Banks, 2013). When over the past decade Australia’s PTA activity has been highest non-coincidentally unilateral efforts have diminished. This picture would also seem true internationally. Most time and resources are being devoted to the least efficient and most perverse form of liberalization, PTAs, to the detriment of unilateralism.15

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13 This is because allowing the most efficient imports displaces less efficient domestic production, and hence in addition to reducing prices for all domestic consumers, including processors using inputs, will unambiguously re-allocate resources from less to more efficient uses. This benefits the economy, including all exporters and import-competing activities of goods and services, and not just possibly a few privileged exporters that may ambiguously be able to benefit from improved market access abroad.

14 Efficient trade does not mean that a country should import every good or service that it is not competitive in internationally or export every good or service that it is competitive in. Instead, it should import those goods and services where it is relatively least competitive and export goods and services where it is relatively most competitive. And for this to happen requires domestic resources to flow into their most productive uses.

15 This is evident in the extent to which international aid to promote capacity building in setting trade-related policy now focuses on trade negotiations, especially PTAs, as the basis of setting trade policy, undoubtedly at the expense of providing fundamental skills and knowledge on how to design, implement and sequence sound
Trade policy has lost its way, and trade agreements, especially PTAs, are part of this mess. Those economies that have globally integrated most successfully have embraced unilateral trade reforms and not waited for trade negotiations; this is the ‘Nike approach’ of just doing it so as to liberalize now and to negotiate later (Sally, 2008). The priority for all governments should therefore be bottom-up unilateral liberalization; the biggest danger is complacency and reform fatigue which threatens to halt globalization’s advance (Sally, 2008). The bulk of Asian trade and FDI liberalization has occurred unilaterally and in a non-discriminatory fashion, with governments opening autonomously and copying each other rather than liberalizing through cumbersome, bureaucratic international negotiations (Sally, 2013b).

So dismissing unilateralism as being politically too hard ignores both history and reality. Unilateralism must be the crux of any reforms. Trade policy despite its international dimension is first and foremost domestic policy. Since protectionism is domestically induced sustainable and meaningful reform must come from home. The real choice is not between alternative paths to self-liberalization but rather between significant and well sequenced trade and other micro/economic reforms that only unilateralism can deliver or insignificant reform without it. Those economies embracing unilateral reform best will benefit most.

However, the WTO will struggle while ever Members, despite their rhetoric in support of multilateralism, signpost their domestic actions that non-MFN PTAs are a good policy substitute for MFN liberalization (either unilaterally or via the WTO). The proliferation of PTAs ad nauseam, initially led by the US and the EU but now enthusiastically embraced by most if not all Members, is only making things worse. All governments, especially of the major Members, must share the blame for the WTO’s parlous state. Having wisely created the WTO based on MFN, governments owe it to their economies to make it work as an essential global public good. ‘Ironically, the leadership in Washington, long the champion of multilateralism, has shifted its focus overwhelmingly to preferential trade initiatives’ and where ‘trade negotiations have probably vanished and preferential agreements are the only game in town, the steady corrosion of the WTO’s leadership will continue’ (Bhagwati, 2013).

Because domestic transparency and public scrutiny of such trade policies is a pre-requisite to setting good trade policy, it is vital that PTAs be subject to far more effective transparency and public scrutiny than currently. The traditional mode of conducting trade negotiations in secret until after they have been concluded no longer makes economic sense (if ever it did). There is no economic reason for nor releasing details of the negotiations, including of offers and draft texts, throughout the negotiations as they occur (indeed as indicated later in the TiSA context two members publicly released their initial offers immediately). While doing so may reduce the mystique surrounding negotiations, and make it more difficult for governments and trade ministers to use such negotiations to politically grandstand and to hide-behind or gain kudos for such outcomes, it would help ensure that more economically sensible PTAs are negotiated; that their economic benefits are not oversold as is usually the case; and that largely ‘window-dressed’ PTAs are not concluded based on exaggerated claims to meet political aspirations while unilateral micro-economic reforms. Much of the Aid for Trade and assistance under the Integrated Framework suffers from these deficiencies. The priority seems to be more on transmitting skills to become effective mercantilists and to negotiate commitments ‘on paper’ rather than actually reform trade measures, and to obstruct rather than to promote self-liberalization. Indeed, much donor aid, multilateral and bilateral, seems more directed at enticing developing countries to the negotiating table to negotiate PTAs that are more likely to be in the interests of the developed than the developing partners; the PTAs could even impact negatively on the poorer partners. Bringing aid to the table only tilts the negotiating powers further against developing countries. Any capacity building deemed to be part of a trade agreement development process should be funded and delivered so as to minimize potential (or perceived) conflicts of interest; such programs should not obligate negotiating a trade agreement (APC, 2010). It is doubtful if the widespread practice of developed economies directly providing trade negotiating capacity building to developing countries they are also negotiating a PTA with would meet this test.
achieving little in reality. Publicly releasing such details after the negotiations have been ‘signed off’ is too late, and on-going consultations conducted in private by trade departments with interested stakeholders achieve little transparency in reality. Indeed, selective release of information on negotiations may be even counter-productive from a public policy perspective. At the very least, domestic processes for negotiating and evaluating PTAs need to be substantially overhauled with greater transparency in mind (Box 6).

<table>
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<th>Box 6: Increasing Transparency in Negotiating PTAs</th>
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<td>The APC found that the Australia’s approach to conducting feasibility studies for its PTAs has generated overly optimistic expectations of their likely economic effects, and has failed to provide a satisfactory basis for evaluating their merits. In particular, such ex ante studies were based on the assumption that a ‘nirvana’ PTA would be negotiated that removed all significant barriers to trade and investment between the parties that in the end had little resemblance with what had been negotiated. Disturbingly, because the actual PTA was not empirically evaluated ex post, the overly optimistic benefits estimated in the ex ante studies, which also usually confuse trade impacts with national welfare effects, often continue to be deceptively used to sell the benefits of the PTA.</td>
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<td>The APC recommended that Australia should improve the scrutiny of the potential impacts of prospective PTAs, and opportunities to reduce barriers to trade and investment more generally by:</td>
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<td>• preparing a trade policy strategy identifying trade and investment impediments and available liberalization opportunities, including a list of priority trading partners. Cabinet should review the strategy annually, and it should released publicly;</td>
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<tr>
<td>• entering negotiations with any prospective partner only after conducting a transparent analysis of the potential effects of the options for advancing trade policy objectives with that country. An independent body should oversee all empirical analysis and modelling;</td>
</tr>
<tr>
<td>• commissioning and publishing an independent and transparent assessment of the final text of the agreement when the negotiations are concluded but before the PTA is signed.</td>
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4. 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 (Box 7). 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).16 As of the end of the Sixth 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 (Pruzin, 2014). All offers are confidential, except for Switzerland and Norway.17 The Seventh Round is scheduled for late June 2014.

16 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.

17 The Australian DFAT declined a request for access to the TiSA text and Australia’s initial offers on the grounds that ‘TiSA is an ongoing government to government negotiation and the documents therefore remain confidential unless otherwise agreed’. However, it subsequently conceded that participants had discretion on whether to
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.\textsuperscript{18} 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.\textsuperscript{19} 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 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

\textsuperscript{18} China and Uruguay are still waiting to join the negotiations. They were updated in the Fourth Round by a ‘transparency session’.

\textsuperscript{19} China has stated it has a ‘high level of ambition’ and wishes to join TiSA ‘positively, constructively and equally’.

publish their own offers, but that Australia would not do so. Since DFAT had only received at end-January 2014 nine public submissions it seems that businesses may not be overly interested in the negotiations.
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.20

The other BRICS (Brazil, Russia and South Africa), the ASEAN nations and many developing countries
still reject the non-MFN plurilateral TiSA approach.21 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 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.22 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 serve as the basis for TiSA commitments (Pruzin, 2013). But this alone would result in
minimal actual liberalization.

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

20 No decision on China’s (and Uruguay’s) participation was made at the Sixth Round of negotiations (discussions
are reportedly on-going ‘behind the scenes’ between the US and China). The US still appears to be the main
government obstructing China’s membership.
21 Doha services negotiations were handicapped by insignificant offers from the BRICS.
22 Other possibilities are e-commerce, computer related services, cross—border data transfers, postal and courier
services, financial services, mode 4, government procurement, export subsidies and state-owned enterprises.
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).23

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

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23 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 Hrishna, 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).

24 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 Molinuesso, 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.
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).25 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 8). PTAs of other TiSA participants also contain significant GATS-minus commitments.

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<th>Box 8: EU’s GATS-Minus Commitments in TiSA if Based on EU-Korea FTA</th>
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<td>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:</td>
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<td>• 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);</td>
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<tr>
<td>• 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);</td>
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<tr>
<td>• make establishment in education services ‘subject to concession’ (EC 12 schedule has no such limitation);</td>
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<tr>
<td>• 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</td>
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<tr>
<td>• 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 period and it may be refused only for prudential reasons.</td>
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*Source: Adlung and Miroudot, 2012*

25 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).
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 of course this would necessitate TiSA to be challenged.

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 (Pruzin, 2014). 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 (Pruzin, 2014). 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 accepted the Understanding.

Some preliminary signs of what may emerge from TiSA can be drawn from the initial offers published by Switzerland and Norway (Table 1). 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 where TiSA will generate 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.

26 The US’s last bilateral PTA with Mode 4 commitments was with Singapore and Chile in 2003.
<table>
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<tr>
<th>Country/Feature</th>
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<td><strong>Switzerland</strong></td>
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<tr>
<td>Approach</td>
<td>Hybrid approach – sectoral market access commitments scheduled positively and national treatment commitments horizontally on a negative basis</td>
</tr>
<tr>
<td>Ratchet &amp; standstill</td>
<td>Obligations apply in the national treatment column of Part II of the schedule (according to Article II-2 on ‘Scheduling of National Treatment Commitments’ of the TiSA core text). The horizontal ‘ratchet and standstill’ commitments exclude many, some very broad, activities e.g. financial services are fully excluded. These provisions also exclude measures (a) introduced non-permanently e.g. moratoria, subject to legislative review, with a set time limit, related to an exogenous event (b) subject to a higher level review e.g. its legality or constitutionality (c) when terminated the possible re-introduction is declared under certain conditions (d) process of renewal had started before terminated, for the time necessary for the legislative bodies involved to decide (e) to conditions and qualifications on mode 4 under Section B of the horizontal commitments.</td>
</tr>
<tr>
<td>MFN exemptions</td>
<td>To be added when the corresponding provisions of Part I and II of the text are stabilized</td>
</tr>
<tr>
<td>Sectoral coverage</td>
<td>Business services, communications, including postal, construction and related engineering services, distribution, education, environmental services, financial services, health related and social services, tourism and travel related services, recreational, cultural and sporting services, and transport</td>
</tr>
<tr>
<td>Air, maritime transport &amp; maritime auxiliary</td>
<td>Blanket exemptions to national treatment apply, except as so far it is committed in the GATS, measures (a) on subsidies, and all tax instruments e.g. incentives and credits, acquisition of real estate, as well as to domicile or residency requirements under mode 3 (b) measures at the cantonal and municipal levels (c) concerning categories of people movement other than the categories referred to in the market access columns of the sectoral commitments. The national treatment obligation is also excluded from a large number of specified sectors and sub/sectors. The sectoral commitments also contain many additional national treatment limitations covering various sectors and modes of supply, especially 1, 3 and 4</td>
</tr>
<tr>
<td>National treatment</td>
<td>For mode 4 that make market access ‘unbound except for certain specified measures’ and national treatment subject to a number of ‘limitations and conditions’, on a wide range of people categories. Section B also specifies a national treatment limitation for mode 3. These commitments apply to all sectors scheduled, unless indicated otherwise, and are in addition to the sectoral commitments</td>
</tr>
<tr>
<td>Other horizontal commitments</td>
<td>Market access unbound on all modes for all services involving ionizing radioactive substances; modes 1 and 2 unbound for subsidies in all sectors; and mode 4 unbound in all sectors except for the temporary presence without needing to comply with the economic needs test for specified personnel categories</td>
</tr>
<tr>
<td><strong>Norway</strong></td>
<td></td>
</tr>
<tr>
<td>Approach</td>
<td>Hybrid approach - sectoral market access commitments scheduled positively and national treatment commitments horizontally on a negative basis. Offer based on TiSA having MFN exclusion provisions equivalent to GATS Art II and V, and no ‘denial of benefits’ provisions similar to GATS Art XXVII</td>
</tr>
<tr>
<td>Ratchet &amp; standstill</td>
<td>Not included</td>
</tr>
<tr>
<td>MFN exemptions</td>
<td>Indefinite MFN exemptions cover road transport (passengers and freight) for all countries; widespread audio-visual services, covering depending on the specific activities all countries, Nordic countries, or European countries, domestic maritime transport (passengers and freight) for all Nordic countries and the UK; CRS, sales and marketing of air transport services for all countries; and for all sectors measures to enhance Nordic cooperation e.g. guarantees and loans to investment projects and exports from the Nordic Investment Bank, financial support by the Nordic Industrial Fund to research and development</td>
</tr>
<tr>
<td>Sectoral coverage</td>
<td>Business services, education, environmental services, financial services, tourism and travel related services, recreational, cultural and sporting services, and transport</td>
</tr>
<tr>
<td>Air, maritime transport &amp; maritime auxiliary</td>
<td>Wide range of services, as well as subsidies and commercial presence, excluded from national treatment, as well as in all sectors for general manager in a private or public limited liability company and at least half of the board of directors must be residents (unless individually exempted by the Ministry of Trade (i.e. negative list). Additional limitations to national treatment are scheduled for specific sectors, including certain business services, insurance and financial services, and maritime transport</td>
</tr>
<tr>
<td>National treatment</td>
<td></td>
</tr>
<tr>
<td>Other horizontal commitments</td>
<td>Market access unbound on all modes for all services involving ionizing radioactive substances; modes 1 and 2 unbound for subsidies in all sectors; and mode 4 unbound in all sectors except for the temporary presence without needing to comply with the economic needs test for specified personnel categories</td>
</tr>
</tbody>
</table>

Table 1: Initial TiSA Offers by Switzerland and Norway
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.

5. 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 follow that this approach is best for other countries. Indeed, the separation of trade policy from foreign policy is one of the five key principles of setting good trade policy (Box 9). 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.

<table>
<thead>
<tr>
<th>Box 9: Guiding Principles in Setting Good Trade Policy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Five guiding principles that governments should follow in setting trade policy are:</td>
</tr>
<tr>
<td>• <strong>Unilateralism</strong> – ‘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 at home unless other countries offer trade barrier reductions as a <em>quid pro quo</em> only damages the home 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 domestic reform.</td>
</tr>
<tr>
<td>• <strong>Non-discrimination</strong> - no good reason exists for trade discrimination.</td>
</tr>
<tr>
<td>• <strong>Separation</strong> – trade and foreign policy should not become entangled.</td>
</tr>
<tr>
<td>• <strong>Transparency</strong> – 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 free trade agreements, which can mislead decision makers and the public, it should be of the actual, final deal. And for public integrity of the modelling results, they should be independently peer reviewed.</td>
</tr>
</tbody>
</table>
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 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.

6. 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.’

Enabling these sectoral

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27 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
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 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.\(^28\) 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).\(^29\) These applied MFN to all WTO Members via protocols that incorporated new commitments into their GATS schedules.\(^30\) 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 ‘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 (1997), financial services (1995 and 1997) and even though limited mode 4 (1995).

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.\(^31\) 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 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

could also capture discriminatory market access limitations where the measure applied to both types of commitments.

\(^28\) 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.

\(^29\) Annexes to the GATS mandated the temporary extension of negotiations in these services.

\(^30\) 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.

\(^31\) 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).
governments have sufficient political resolve to do so. 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).

7. 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. However, such a plurilateral agreement may 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.

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. Waivers can only be issued in ‘exceptional circumstances’ and for a definite period, to be reviewed annually. It would be practically 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

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32 ‘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).

33 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).

34 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.

35 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.
‘nothing is agreed until everything has been agreed upon’. However, the WTO is now at such a dismal position that even with this tool Rounds are unlikely to be effective.36

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 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 (Box 1). 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.37 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?

36 ‘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.

37 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.
8. Multilateralizing TiSA

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 panellist 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. 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 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’

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38 WTO agreements have no supremacy over PTAs; they remain valid and binding on parties even if WTO inconsistent (Cottier and Molinuevo, 2008).
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 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 2).

<table>
<thead>
<tr>
<th>Country/Entity</th>
<th>Excluding EU Intra-Trade</th>
<th>Including EU-Intra trade</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Exports</td>
<td>Exports and Imports</td>
</tr>
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<td>EU</td>
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<td>China</td>
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<td><strong>Total</strong></td>
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<td><strong>69.5</strong></td>
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</tbody>
</table>
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 multilateralization (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 Syropoulos, 1996; Krishna, 1998; Andriamananjara, 1999).

9. Shifting TiSA PTA 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. 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.

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.

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39 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.
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.\(^{40}\) 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 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 multilateralize 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 TiSA 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.

10. 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 to 118. Countries with most PTAs on services are Mexico, Chile, US and Singapore; all except the latter are in TiSA (Marchetti and Roy, 2013).\(^{41}\) 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.\(^{42}\) Chile has PTAs on services with 17 TiSA participants. Colombia, EU,

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\(^{40}\) 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).

\(^{41}\) Singapore withdrew from TiSA in 2013.

\(^{42}\) 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, even though largely ignored by CRTA.
Mexico, Peru and the US each have at least nine PTAs with TiSA participants.\textsuperscript{43} 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 Agreement (RCEP). The EU and the US have also launched the TTIP.\textsuperscript{44}

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, 2009 and forthcoming). 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 10). 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.

\begin{boxedtext}
\textbf{Box 10: 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.

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.\textsuperscript{45} 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 themselves have yielded minimal actual reform. This outcome would thus fall well short of TiSA’s proclaimed ambitions to improve market 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, 2009 and forthcoming). 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.
\end{boxedtext}

\textsuperscript{43} 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.
\textsuperscript{44} Other bilateral service negotiations involving TiSA participants being finalized include the Canada EU Agreement. The Pacific Alliance between several TiSA participants is also expanding membership to other TiSA parties.
\textsuperscript{45} Given that GATS is some 15 years old PTAs would be expected to contain at least some improved commitments.
11. 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.

12. 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.

11. References


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