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The uncertain evolution of multilateral trade in services

From GATS to TiSA: can the leopard change its spots?

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The global development of digital technologies and the rise of liberalisation policies in the public services sector is increasingly blurring the boundaries between public/private and local/foreign services. This dynamic complicates the interpretation and application of international trading rules. As the WTO member states have not agreed on an exhaustive list of sectors to be covered under the General Agreement on Trade in Services (GATS), economic integration in the emerging services sectors lags behind the global needs of corporate supply chains. Unsurprisingly, Australia and other service-oriented economies are moving away from the sluggish WTO system to seek further avenues of trade liberalisation at the mega-regional level, in particular through the proposed Trade in Services Agreement (TiSA). However, adding yet another regulatory layer to the intricate framework of global trade in services may have the unintended consequence that encumber the liberalisation process.

The Achilles' heel of WTO-GATS: domestic regulation

Unlike trade in goods, tariffs and other customs restrictions do not normally impede trade in services at the border. In this context, Article VI of the GATS impacts domestic regulation in ways that differ strikingly with the provisions on market access and national treatment. Overall, Article VI GATS provides for signatories to identify service sectors that will receive MFN and/or national treatment. It established the Working Party on Domestic Regulation, so that 'any necessary disciplines' can be integrated into the GATS by making corresponding commitments under either Article XVII (National Treatment) or XVIII (Additional Commitments). This means that such integrated disciplines are only applicable to those Members who have scheduled specific commitments in the sector concerned.

Normally, discriminatory measures relating to licensing, qualifications and technical standards would need to be scheduled as national treatment limitations in the sectors where GATS commitments have been made. However, integrated disciplines

commonly focus on non-discriminatory regulations that are not subject to scheduling under Articles XVI (Market Access) and XVII (National Treatment) GATS. This interplay of domestic regulation with market access and national treatment provisions exemplifies the complex and circuitous architecture of GATS. Also considering that the legal effect of GATS in the Member States is not particularly strong, this explains why the GATS potential for liberalising services trade has not been fully unleashed.

Hence, the actual liberalising power of GATS is basically contingent on specific commitments that either grant market access or national treatment, or both, for a certain service. For instance, should a Member seek to liberalise the commercial presence of providers in a certain service sector, it will likely undertake a specific commitment not to limit access by inscribing 'none' in the respective schedule under the title 'market access'.

However, note that in practice domestic regulation provisions under Article VI GATS offer scant protection against indirect discriminations (i.e. 'non-discriminatory measures'). Take for example domestic regulations such as procedural and licensing requirements that on paper apply to all providers of a certain service, but in substance restrict market access by overseas service providers. This type of measure would only be barred if relevant disciplines are scheduled in specific sectors, which to date is the case only for the accountancy sector.

Changing the tack of trade in services: from preferential arrangements to concerted unilateralism

International trade agreements typically involve the reciprocal exchange of trade concessions and are not necessarily multilateral. The emerging feature of international trade is indeed the growing number of regional trade agreements (RTAs) and preferential trade arrangements (PTAs). The WTO encourages its members to notify when new agreements are formed.

RTAs are reciprocal trade agreements between two or more partners typically situated in a distinct geographical area. RTAs include free trade agreements and customs unions, and have become increasingly prevalent since the early 1990s. To date, over 600 RTAs have been notified to the WTO and more than 100 RTAs covering services are in force.

On the other hand, PTAs provide unilateral (i.e. non-reciprocal) trade preferences, best illustrated by the Generalized System of Preferences under which developed countries grant preferential tariffs to imports from developing countries. Less often,

PTAs may also include other non-reciprocal preferential schemes that are granted a waiver by the General Council of the WTO, such as the Trade Preferences for Pakistan from the European Union in 2012. To date, there are only about 30 PTAs in force, mostly dealing with schemes of generalized system of preferences and duty-free treatment.

In regards to services, the socio-economic benefits of reciprocal trade agreements on either a multilateral or regional basis over the past few decades have not proved compelling.[1] Hence, since the early 2000s, the political economy of services trade liberalisation of the US and other major players has gradually veered towards PTAs on either a bilateral or multilateral basis. The difference is that while RTAs tend to liberalise services trade liberalisation by removing discriminatory treatment against all parties involved, PTAs only do so on a preferential basis, in other words only for the particular partner country. Modern RTAs often also provide for preferential regulatory frameworks for mutual services trade.[2]

However, not all regional arrangements are preferential, such as in the case of the Asia Pacific Economic Cooperation (APEC) forum. APEC uses its nonbinding approach to members to encourage unilateral economic reforms, including the common liberalisation of trade practices. This approach is called ‘concerted unilateralism’, which is a half-way house between reciprocal and preferential trade liberalisation policies. Initiatives such as the APEC Business Travel Card and APEC Engineer are good examples of voluntary cooperation in the area of professional standards and recognition of qualifications and experience that contribute to the liberalisation of movement of professionals within the region.

A hybrid approach to trade multilateralisation: the TiSA initiative

In 2013, the European Commission took the initiative to propose the opening of negotiations for a new international agreement on trade in services. Initially, this proposed multilateral treaty was named the International Services Agreement (ISA) and involved a co-opted grouping of 23 WTO members, including most of the top global trading economies. Subsequently, the ISA evolved into the Trade in Services Agreement (TiSA) reflecting an objective of harmonisation with WTO rules, which means that it could become a multilateral instrument at a later stage.

Controversially, only limited information on the procedures and substance of the TiSA negotiations have entered the public realm to date. Hence, it can only be speculated that, while TiSA presents significant promise as a far-reaching preferential services trade agreement in application of Article V GATS (on Economic Integration), the prospects for its later incorporation into the WTO framework seem

very uncertain. In fact, despite the declared goal of compatibility with the GATS, the early TiSA negotiations point to clear departures from GATS practice, in particular where it seeks to deal with national treatment measures through a negative list approach, while sticking to a positive list approach for market access schedules as it occurs in the WTO. A positive list allows parties to an agreement to specifically choose the sectors in which to schedule commitments. Conversely, a negative list approach means that parties to an agreement commit to certain measures in all sectors, except those specifically reserved.

It has been argued that the hybrid listing rationale of TiSA "lie in the fact that governments often find it easier to progressively liberalize discriminatory regulation […] than to dismantle quantitative restrictions limiting competition in services markets".[3] Compared to the current GATS provisions that only apply if and when a specific commitment on national treatment and market access is scheduled, the segmented approach of TiSA to market opening is likely to lead to complex legal interpretation issues of compatibility with existing GATS schedules. This is evident if we consider that GATS disciplines such as payments and transfers would automatically apply to all measures affecting trade in services that escape the TiSA negative list of measures violating national treatment. However, these same GATS disciplines would only be applicable in sectors and modes of supply where positively listed market access commitments were scheduled. This situation would thus create a variable geometry to multilateral liberalisation of services trade that may take the rule-making environment of international trade into uncharted territories. A split system of services trade liberalisation would indeed further unsettle the WTO system at a time when it is struggling to keep relevant to emerging service sectors, particularly those with network properties, such as resources distribution, waste disposal and telecommunications.

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[1] Dee, P.S., *Services Trade Reform: Making Sense of it*, in Studies of International Economics, Vol.28, World Scientific (Singapore, 2013) at p.250.
[2] See further on the *Scope of RTAs* in the WTO website at < https://www.wto.org/english/tratop_e/region_e/scope_rta_e.htm>
[3] Sauve', P. and Shingal, A., *The Preferential Liberalization of Trade in Services*, Edward Elgar Publishing (Cheltenham Glos, UK, 2014) at 420.