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Deconstructing India's Position on the Trade in Services Agreement

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ABSTRACT Since the advent of the World Trade Organization (WTO) over two decades ago, international trade in services has undergone significant transformation, rendering the current regime obsolete. In light of the long-drawn Doha round of WTO negotiations, several countries then floated the idea of a plurilateral agreement to reduce barriers to trade in services: the Trade in Services Agreement (TiSA). The treaty, once finalised by the group of 50 countries, is intended to be anchored to the WTO system and be open for accession to other members. Following China's request to join the negotiating table, it is expected that other emerging countries will also aim to access the agreement. India, whose services sector has a significant contribution to the country's GDP, has yet to show interest in joining TiSA. This paper analyses India's position towards the agreement, taking into account the trade complementarities it enjoys with the major TiSA players.

INTRODUCTION

The General Agreement on Trade in Services (GATS) mandates the members of the World Trade Organization (WTO) to work towards the progressive liberalisation of trade in services through successive rounds of negotiations. This objective has been inscribed under the Doha Development Agenda (DDA) in 2001 as part of the principle of 'single undertaking'—which implies that all items of the DDA were to be concluded at the same time. The 'single undertaking' approach led to services becoming hostage to other more contentious issues, such as agriculture or non-agricultural market access (NAMA), that were being discussed simultaneously. In light of the stalemate at the DDA, no agreement on services has been achieved so far. Several countries thus realised the need to move from the outdated GATS provisions and advocated for the negotiations to continue in a smaller format outside the WTO.

CALL FOR A NEW DEAL IN TRADE IN SERVICES

The need to reform and update GATS has been clear from the early days of the WTO, with some experts calling it "an unfinished business" of the Uruguay Round. The Agreement established a sound framework for progressive services liberalisation, by defining different modes of service delivery, rules on market access, standards of treatment, among others. However, due to the protectionist approach employed by developing countries at the time of negotiations, it has not achieved a significant market opening and several core aspects of trade in services have been left undecided, including subsidies, procurement and domestic regulation. Moreover, studies by the Organisation for Economic Cooperation and Development (OECD) have pointed to a substantial mismatch between the level of commitments undertaken by the WTO members under GATS and the actual level of services liberalisation (so-called 'water'), which is viewed as the major weakness of the system. In other words, since services regulations applied domestically by the WTO members are more liberal than what they have committed under GATS, the Agreement does not even reflect the status quo of the international services liberalisation.

Yet global trade has experienced significant growth and transformation since the conclusion of the Uruguay Round. Services account for approximately 30 percent of all international trade, and their growth has outpaced that of both agriculture and manufacturing. Further, the digital revolution has had a tremendous impact on the way of trading, improving productivity, in particular for small and medium enterprises (e.g. through online trading). The United Nations Conference on Trade and Development (UNCTAD) has calculated that half of global services trade is facilitated by the digital economy. At the same time, the growth of Internet-enabled business operations have created new challenges, such as the need for the protection of private information during the online transfer of data. Information and Communication Technologies (ICTs) have contributed to the increase of innovations in services, which in the last 15 years grew faster in services than in the manufacturing sector. In these times of globalised economy, services (transport, ICT, financial, among others) are essential for the efficient functioning of the global value chains of goods but also constitute those of their own. Finally, the rise of servicification has made the production of goods more efficient.

None of these developments was envisioned upon the inception of GATS. And in light of the lack of progress in the DDA negotiations, certain WTO countries decided to look for alternative means to address these issues. The 2011 WTO Ministerial Conference gave the green light to continue negotiations in services to reach "provisional or definitive agreements based on consensus earlier than the full conclusion of the single undertaking."

TiSA'S BRAND OF LIBERALISATION

Consequently, the 'Really Good Friends of Services' (RGFS) group, an ad hoc coalition of countries willing to advance services negotiations, has been formed. The US and Australia—who initiated the idea—were advocating for a stand-alone agreement, pursuant to Article V GATS (economic integration agreement). However, following the exploratory talks in 2012, the RGFS group agreed with the EU proposal that the outcome of the negotiations should become an integral part of the WTO system, and be made open to all its members.

The negotiations are presently being conducted among 23 WTO partners, primarily developed countries, together accounting for over 70 percent of global trade in services. Apart from the EU representing its 28 Member States, the RGFS group includes: Australia, Canada, Chile, Chinese Taipei, Colombia, Costa Rica, Hong Kong, Iceland, Israel, Japan, Korea, Liechtenstein, Mauritius, Mexico, New Zealand, Norway, Pakistan, Panama, Peru, Switzerland, Turkey, and the US. Notably, none of the emerging economies is participating in the talks, neither from Africa nor ASEAN. The membership in the group is open to any interested country which shows equivalent level of ambition in services liberalisation. However, China's request to join the negotiations, made in 2013, has been vetoed by the US. One of the most contentious issues over China's involvement in the talks, concerns its possible divergent interest on the chapter dealing with state-owned enterprises. Once the agreement is reached on this subject among TiSA negotiators, it is projected that the US will unblock Chinese accession. The BRICS countries (Brazil, Russia, India, China, South Africa) have been initially critical of pursuing trade liberalisation in a plurilateral format outside the purview of WTO. The opposition stemmed from their fundamental resistance to any initiative negating the 'single undertaking' rule. However, it is projected that China's accession to TiSA will encourage other emerging economies to reassess their own positions.

TiSA is intended to rectify the crucial weaknesses of GATS in order to achieve further liberalisation. Under GATS, only the most-favoured-nation (MFN) principle affects horizontally all trade in service, whereas market access and national treatment principles apply to sectors where specific commitments to liberalise have been made (this is also called the 'positive list approach'). It has been estimated that initial GATS offers contained approximately five percent of actual liberalisation. In order to achieve greater market access, TiSA partners agreed on a 'hybrid approach' (a combination of positive and negative lists) for their commitments, i.e., market access will follow the GATS pattern, where foreign service providers gain access only to sectors included in the list for the liberalisation; whereas, national treatment will be subject to a negative list, implying that sectors not listed will be automatically liberalised. To ensure that no new restrictions are imposed in the future, the agreement will contain a 'standstill provision' as well as a 'ratchet clause' which prescribes that a country cannot reintroduce a previously removed trade barrier in an area where it had made commitments under national treatment.

The negotiators are also aiming at an ambitious sectoral scope of the agreement. The thematic coverage is intended to lay down rules for trade in sectors as varied as telecommunication, e-commerce, financial services, maritime, air and road transport, delivery, distribution, professional services, energy and government procurements. The important chapters will also develop rules for domestic regulations, transparency and a sensitive issue of temporary movement of natural persons. The partners made *a priori* exclusion of public sector services, e.g. health care, education, as well as water distribution and audiovisuals, from the scope of the agreement.

Although it is currently being negotiated as an economic integration agreement, pursuant to Article V GATS, the ultimate objective is to multilateralise its rules at the later stage. To this end, the partners envision to keep TiSA closely aligned with GATS structure to enable the future merger between the two agreements. TiSA will thus replicate basic GATS provisions, while its new elements dealing with additional commitments and sectoral chapters can in the future be integrated as additional understanding or annexes to GATS. The open membership will allow new countries to join the agreement and, consequently, reach a so-called 'critical mass' required for its incorporation into the WTO system. While there has not been any fixed definition of what comprises a 'critical mass', all previous WTO critical mass plurilateral agreements (e.g. Information Technology Agreement, Financial Services Agreement and Telecommunications Agreement) covered more than 90 percent of global trade in their respective sectors. Consequently, for its multilateralisation, TiSA will require broader support among the WTO members.

At the same time, there are compelling reservations hindering the future anchoring of TiSA in the WTO system. Firstly, the secretive nature of TiSA talks has already created a considerable degree of mistrust among the third countries and civil society. Instead of negotiating the agreement in a closed club, the parties could increase its transparency by allowing observers from interested third countries and the WTO Secretariat to participate in the process. Recalling failed Anti-Counterfeiting Trade Agreement or Multilateral Agreement on Investments, various experts point out that history has not been kind to the agreements negotiated behind closed doors and based on the “we build it and they'll beg to join” approach. Further, on the substance of the agreement, TiSA departs quite significantly from the GATS model. It is not clear how its 'hybrid' architecture is supposed to coherently co-exist with the GATS practice of liberalising national treatment and market access only when specific commitments are undertaken.

Even without intended incorporation into the WTO system, taking into account the role of its negotiators in the trade in services, the agreement is likely to influence rules of doing business globally. The regulatory regime agreed upon by the major international trade players will significantly increase competition and create trade diversion effect on the non-participating countries. Consequently, the question arises whether India's decision to ignore TiSA negotiations is the best approach to exploit its inherent advantages for the services sector.

NOTHING ABOUT INDIA?

In the years following the post-reform period, India's approach to trade in services underwent a crucial paradigm shift. From its role as the spokesperson of developing countries opposing liberalisation of services in the Uruguay Round, it has become one of the major players in today's trade in services. After all, the sector has turned into the main engine of India's development, placing it among the fastest growing economies in the world. Services contribute more than 60 percent to GDP and account for around 35 percent of total exports. As shown in Table 1, throughout the 1990s India had a negative trade balance in services, which then improved

Table 1. India trade in services with the world (in US$ billions)

Year	*Exports*	*Imports*	*Trade Balance*	*Year*	*Exports*	*Imports*	*Trade Balance*
1991	4.9	5.9	-1.0	2003	23.9	24.9	-1.0
1992	4.9	6.7	-1.8	2004	38.3	35.6	2.7
1993	5.1	6.5	-1.4	2005	52.5	47.3	5.2
1994	6.0	8.2	-2.2	2006	69.7	58.7	11.0
1995	6.7	10.3	-3.6	2007	86.9	70.8	16.1
1996	7.2	11.2	-4.0	2008	107.1	88.3	18.8
1997	9.1	12.4	-3.3	2009	92.5	80.2	12.3
1998	11.7	14.5	-2.8	2010	117.1	114.9	2.2
1999	14.5	17.3	-2.8	2011	138.9	124.7	14.2
2000	16.7	19.2	-2.5	2012	146.1	128.8	17.3
2001	17.3	20.1	-2.8	2013	148.6	126.6	22.0
2002	19.5	21.0	-1.5	2014	156.8	127.5	29.3

Source: *UNCTADstat, available at: http://unctadstat.unctad.org/wds/TableViewer/tableView.aspx, http://unctadstat.unctad.org/CountryProfile/GeneralProfile/en-GB/356/index.html (accessed on 19 May 2016)*

Table 2. India trade in services with the US and the EU

Trade with the US (in US$ billions)				Trade with the EU (in € billions)		
Year	Export	Import	Trade Balance	Export	Import	Trade Balance
2010	14.7	10.3	4.4	11.7	10.8	0.9
2011	17.4	11.8	5.6	13.7	11.1	2.6
2012	18.8	12.3	6.5	13.0	11.8	1.2
2013	19.4	13.5	5.8	12.7	11.7	1.0
2014	20.8	15.2	5.6	12.1	12.3	-0.3

Source: *Bureau of Economic Analysis, US Department of Commerce, available at: http://www.bea.gov/iTable/iTable.cfm?ReqID=62&step=1#reqid=62&step=8&isuri=1&6221=0,1&6220=1,2,3,4,5&6210=4&6200=161&6224=0&6211=161&6223=38&6222=1, Eurostat, available at: http://appsso.eurostat.ec.europa.eu/nui/show.do (accessed 19 May 2016)*

significantly since 2004. In 2014, India was ranked the 6th largest exporter of commercial services (3.2 percent of global trade) and the 9th largest importer (2.8 percent of global trade). The IT/ITeS industry is the biggest contributor to the country's services exports, with 90 percent of its exports directed to the US and the EU markets. The trends of India's bilateral trade in service with the US and the EU are summarised in Table 2. India has a progressive agenda to pursue on the international arena. Its key interests are in advancing further liberalisation of cross-border service delivery (Mode 1) and movement of natural persons (Mode 4). With its large English-speaking population in the working age, it has been seeking significant commitments in Mode 4 from its main trading partners. It turned out to be one of the contentious issues holding back trade talks with the EU and Australia as well as BIT negotiations with the US. Recently, India has filed a complaint in the WTO against the US decision to impose high fees on temporary working visas, usually used by Indian IT professionals to provide services in the US.

Both Mode 1 and 4 are on the table of TiSA talks. On the topic of cross-border service delivery, TiSA will set—and this is important from India's perspective—standards on online data security which has been a major irritant in its trade with the EU. Despite the US resistance to make concessions on Mode 4, in order to constitute an economic integration agreement, exempted from the WTO MFN obligation under Article V GATS, TiSA has to encompass all four modes of supply of services. It will also deal with relevant aspects of visa processing facilitation (including visa fees, processing time, and transparency) or removal of an economic needs test for certain categories of service providers. The EU industry expressed a desire to enhance global mobility of professionals to travel temporarily for work, i.e., by broadening the definition of 'business' visitors to include functions related to after-sale services.

Although TiSA partners are unlikely to make significant commitments in Mode 4 due to its political sensitivity, they may be willing to engage with India in quid pro quo negotiations with the view to optimise trade complementarities between the respective markets. With their saturated domestic economies, both the US and the EU are primarily interested in Mode 3 liberalisation in order to secure access to profitable opportunities abroad for their domestic investors. Responding to Public Survey on TiSA conducted by the EU, the industry was highly supportive of enlarging the agreement to emerging economies, in particular China and India.

Consequently, these diverging trade interests could be viewed as an opportunity for bargaining concessions in respective areas of interest. The European Parliament encouraged the EU TiSA negotiators to refrain from taking further commitments in Mode 4 unless an equally ambitious offer is presented by the partner. Through such reciprocal commitments both sides would ultimately obtain significant advantages for their economies. By intensifying liberalisation of Mode 3, which India has been already pursuing by virtue of domestic reforms (e.g. following the appointment of the current government, it has liberalised FDI limits in railways, insurance, defence and other sensitive sectors, also at the central level it has envisioned an increase to 100-percent overseas capital in retail of food products produced and manufactured in India), it could benefit from technology transfer and inflow of capital-intensive services. As an example, foreign investments in retail could significantly improve the supply chain infrastructure, whereas opening up legal and accountancy sectors would lead to better integration and moving up the value chains. Undertaking such commitments in TiSA forum, which gathers India's major foreign investors, rather than in respective bilateral FTAs, would limit a trade diversion effect on future capital inflows. Whereas, by easing entry barriers to the movement of people (economic needs test, quota restrictions, nationality or residence requirements), the industrialised economies, given their ageing populations, could benefit from India's high-skilled and competitively priced workers.

Undoubtedly, there are several contentious elements of the potential agreement which can be rightly considered controversial from the perspective of what the developing countries consider as their best interests. Some of the proposed clauses, such as standstill or ratchet, as well as its 'hybrid' approach, require a certain level of maturity of the domestic market. Considering that TiSA's main objective is to achieve ambitious market opening and remove regulatory cross-border barriers, it will indisputably entail increased foreign competition on the domestic market. However, postponing integration with the international trading system on the basis of lacking domestic reforms may as well be counterproductive for the development of the sector. On the contrary, international agreements effectively encourage necessary internal reforms which could otherwise be blocked by vocal domestic interest groups.

Finally, TiSA also aims at trade facilitation by eliminating administrative barriers, such as licenses and permissions required from foreign providers. The importance of reducing red-tape in the sector is well-recognised by India's policymakers, who have lately floated the idea of a trade facilitation agreement for services, equivalent to the WTO Trade Facilitation Agreement for goods. Although the initiative may be supported by several countries which have not yet engaged in TiSA negotiations, India's key export destinations, the EU and the US, may be less willing to dilute their energy in such parallel negotiations. Once talks on the proposed facilitation agreement are initiated, significant time and effort will be required to mobilise the multilateral system (keeping in mind that Trade Facilitation Agreement for goods took over nine years to conclude).

CONCLUSION

Taking into account India's export structure and great potential of services sector, its reluctance to engage in TiSA designing process remains questionable. In light of the current stalemate at the WTO, India has no other option but to overcome its aversion to plurilateral arrangements. It should join TiSA with a pragmatic approach to pursue its key interests in the sector. Rather than placing itself in the position of a rule-taker, it should make sure to sit at the rule-making table and design future framework of the international trade in services.

The negotiated agreement offers an important platform to engage in trade-off discussions with India's major trade partners. Given its attractiveness to foreign investors, India has a significant leverage to exercise in services negotiations. However, rushing into far-reaching commitments without first ensuring a level playing field for domestic suppliers may bring adverse effects on the livelihood of millions of people employed in a specific sector. Consequently, a comprehensive strategy for services encompassing both key domestic reforms as well as progressive international opening up of the economy is a key to advancing modernisation of the sector, allowing India to move up the global value chain and enhance its share in international trade.ORF

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