The Depth of the Trade in Services Agreement

Harold Godsoe, American University Washington College of Law
THE DEPTH OF THE TRADE IN SERVICES AGREEMENT

Abstract

The setting against which plurilateral negotiations toward a new Trade in Services Agreement (TISA) are taking place is frustration. Service liberalization from GATS to bilateral PTAs to the Doha round have proven difficult and/or ineffective. The glaring and unexamined question is: why? This paper examines the current trade literature for what is known about TISA to date and subjects that information to a feasibility analysis for trade in service agreements. My goal is to understand what went wrong in previous attempts to liberalize services and/or trade and, consequently, what might be going wrong in TISA, and how it might be made right. In the end, I conclude that TISA’s potential will not be realized on its current course. The only currently feasible aspects of the agreement are recognition of a dormant economic and political potential of service liberalization. Left behind are the necessary multilateral consensus, any approach to the regulatory hurdles, credence among the parties, basic understanding of the effects of services liberalization or, indeed, the resources to approach these deficiencies.
# THE DEPTH OF THE TRADE IN SERVICES AGREEMENT

## TABLE OF CONTENTS

**Introduction/Overview** ........................................................................................................ 2  

**I. The Elements of TISA** ........................................................................................................ 3  
  
  A: Plurilateral Negotiations ........................................................................................................ 3  
  B: A Standalone Deal Outside of the WTO .............................................................................. 4  
  C: Market Access Expectations ............................................................................................... 4  
  D: ‘Positive’ List for Scheduling Market Access Concessions ................................................. 5  
  E: ‘Negative’ List for National Treatment Commitments (The New ‘Hybrid’ Approach) .......... 6  
  F: ‘Ratchet-in’ & ‘Standstill’ Lock-ins for National Treatment (But Not for Market Access) .... 6  
  G: Expectations for New Rules .............................................................................................. 7  

**II. A Feasibility Test for Trade Agreements** ........................................................................... 8  
  
  1: The Economic Factor ➔ No Risks in Liberalization for the Developed Countries .......... 9  
  2: The Consensus Factor ➔ No Multilateralization ............................................................... 13  
  3: The Constituencies Factor ➔ Liberalization will be Subject to Political Skill .................. 14  
  4: The Sovereignty Factor ➔ Shallow Regulatory Convergence .......................................... 16  
  5: The Credence Factor ➔ Subject to Improvement; Falling Short of Multilateralization .... 18  
  6: The Tractability Factor ➔ We’re Liberalizing in the Dark .................................................. 20  
  7: The Resources Factor ➔ Too Few Negotiators, Regulators, and Money ....................... 24  

**III. Concluding Recommendations** ...................................................................................... 25  
  
  More Research, Theory, and Data on Services Trade ........................................................ 26  
  A Multilateral Effort on Regulatory Convergence .............................................................. 26  
  Additional Recommendations ............................................................................................... 26
INTRODUCTION

The setting against which TISA

1 negotiations are taking place is frustration. Current concessions in service sectors date from the conclusion of General Agreement on Trade and Services (GATS) at the end of the Uruguay Round in 1995, and offers through the GATS system have fallen well short of expectations.2 Ten years of service negotiations in the World Trade Organization (WTO) have failed to produce conclusive results,3 and stand-alone services negotiations in 2000 failed to make progress.4 Of the 211 Preferential Trade Agreements (PTAs) in force in 2012, only 89 include coverage of services, most were concluded after 2000, and mostly by only three countries: the United States, Singapore, and Chile.5 One veteran of the Doha negotiations lamented that, discouraged by the complexity of service liberalization, Doha’s negotiators “spent maybe five–ten percent of their time on services and sixty–seventy percent of their time on goods and agriculture.” As stated by Deputy USTR Michael Punke in 2012, the “genesis of [TISA] … lies in our hard-nosed assessment that we simply will not be able to make real progress on services trade liberalization any time soon under existing WTO frameworks.”

Service negotiations are hard. The glaring and unexamined question is: why? This paper examines the current trade literature for what is known about TISA to date and subjects that information to a feasibility analysis for trade in service agreements. My goal is to understand what went wrong in previous attempts to liberalize services and/or trade and, consequently, what might being going wrong in TISA, and how it might be made right. In the end, I conclude that TISA’s potential will not being realized on its current course. The only currently feasible aspects of the agreement are recognition of a dormant economic and political potential. Left behind are the necessary multilateral consensus, any approach to the regulatory hurdles, credence among the parties, basic understanding of the effects of services liberalization or, indeed, the resources to approach these deficiencies. With this conclusion, I make two primary recommendations: first, to address a critical lack in both understanding and persuasive power, considerably more research,

---

3 Ibid.
4 Ibid at 134.
5 Ibid at 135.
7 “USTR Takes First Steps to Services Negotiations” (21 Jan 2013) 29(2) Washington Trade Report 1 at 1.
theory, and data on services trade; second, a multilateral effort on regulatory convergence, independent and prior to TISA, with recognition of the supremacy of national decision-making.

In part I, I describe the elements and issues of TISA as they stand at this point in the negotiations. In part II, I work through the 7-factor feasibility analysis of the agreement. In part III, I draw upon the preceding analysis to offer my recommendations.

I. THE ELEMENTS OF TISA

A: Plurilateral Negotiations

TISA was proposed in a policy brief from the Peterson Institute for International Economics in January 2012.\(^8\) Preliminary talks have been taking place since then among a plurilateral group of twenty-one WTO members then referred to as the “Real Good Friends” of Services coalition,\(^9\) which now includes twenty-one members: Canada, the United States and Mexico in North America; the European Union plus Iceland, Norway, and Switzerland in Europe; Australia, New Zealand, Hong Kong, Taiwan, Japan, and South Korea in Asia; Chile, Colombia, Costa Rica, Panama, Peru in Central and South America; and Israel, Pakistan, and Turkey in the Middle East.\(^10\) Participants agreed to a rough framework for the formal discussions in December 2012.\(^11\) Formal notification of negotiations was provided to the U.S. Congress in January 2013,\(^12\) where the initiative already enjoys strong support.\(^13\) Other Negotiating Parties must yet fulfil their own domestic procedures for beginning a new trade negotiation, after which full negotiations may begin as early as April or May of 2013.\(^14\) The details of TISA negotiations

\(^12\) Washington Trade Report, supra note 7 at 1.
\(^13\) Ibid at 5.
\(^14\) Inside US Trade 17 Jan 2013, supra note 11.
and scheduling are yet unsettled. If everything works as planned, the agreement is anticipated to be concluded by 2014.

B: A Standalone Deal Outside of the WTO

TISA is being negotiated as a standalone deal outside of the WTO by a subset of WTO members committed to services trade liberalization. Other WTO members could potentially join the negotiations, and the deal could later be brought into the WTO framework through a vote of members, similar to the manner in which the Government Procurement Agreement was brought under the WTO.

C: Market Access Expectations

TISA negotiations are expected to reflect new types of services that have emerged since GATS was negotiated, and generally seek to expand market access concessions among the Negotiating Parties. Sectors that have been expressly indicated as on the agenda include telecommunications, insurance, digital media, engineering, accounting, higher education, and audiovisual services.

15 Amy Porges, The Impact of a Successful EU-US Trade Agreement and the Transpacific Partnership Agreement on World Trade (Panel Discussion, delivered at American University, Washington College of Law, on 22 April 2013) [unpublished].
16 Kronby and Barutciski, supra note 10.
17 Ibid.
19 Kronby and Barutciski, supra note 10.
20 Ibid.
22 Ibid.
24 Ibid.
25 Ibid.
26 Ibid.
D: ‘Positive’ List for Scheduling Market Access Concessions

Negotiating Parties have agreed to a ‘positive’ list for scheduling market access concessions.28 The ‘positive’ list obligates countries to open to foreign competition only those sectors that they specifically schedule.29 A ‘negative’ list would open all sectors to foreign competition, except for sectors ‘carved-out’ of the agreement.

The ‘positive’ list approach has no real consequences for the negotiation of market access concessions over a ‘negative’ list approach.30 A ‘negative’ list with a great number of carve-outs would be identical to a limited ‘positive’ list. These two approaches can be thought of as glass-half-full and glass-half-empty perspectives on scheduling concessions and may affect early negotiations in a corresponding way—in that it’s easier to begin with the optimistic attitude that accompanies ‘positive’ control. Concrete consequences from the choice of methods could arise for future, not-yet-existent services, which would be automatically covered by a ‘negative’ list but, because those sectors could not be specifically listed at the time of negotiation, would subject to inclusion in the agreement through periodical negotiations under the ‘positive’ approach.31 Coverage of not-yet-existent services was an explicit goal of the United States, however negotiators have indicated that not-yet-existent services might still be captured through flexible definition of service categories or a process for modernizing concessions after an initial deal is inked.33 Additionally, the ‘positive’ list approach more closely follows the GATS scheduling commitments,34 which: a) makes TISA easier to potentially integrate into the current GATS architecture35 b) makes it easier for the European Commission to argue that TISA is a continuation of the multilateral negotiations in the Doha Round and thereby avoid requesting a

33 Inside US Trade 5 Feb 2013, supra note 31; Inside US Trade 17 Jan 2013, supra note 11.
34 Inside US Trade 7 Feb 2013, supra note 28.
new negotiating mandate; and, c) signals Negotiating Parties’ interest in attracting China and other emerging markets to a more familiar agreement.36

E: ‘Negative’ List for National Treatment Commitments (The New ‘Hybrid’ Approach)

Under the GATS structure, WTO members also used a "positive" list to negotiate national treatment. In other words, in those areas that WTO members agreed to liberalize, they reserved the right to treat domestic providers more favorably than foreign ones except in those specific areas where they agreed to sign up to national treatment disciplines. In TISA, by contrast, members will be obligated to provide full national treatment in all liberalized sectors unless they specifically list the areas in which they reserve the right to treat domestic providers more favourably than foreign ones.37 Using a combination of positive and negative lists to schedule market access and National Treatment commitments has been labelled a “hybrid” approach.38 Expansion of the principle of non-discrimination was a stated goal of the Negotiating Parties.39

F: ‘Ratchet-in’ & ‘Standstill’ Lock-ins for National Treatment (But Not for Market Access)

TISA is expected to lock-in liberalization undertaken unilaterally by parties since the GATS came into force.40 The Negotiating Parties have agreed that TISA will prohibit signatories from going back on National Treatment commitments that exist under their current regime.41 This is referred to as the ‘standstill’ commitment. TISA will also extend unilateral National Treatment commitments they make to all other signatories, preventing them from backing off those concessions.42 This obligation is referred to as a ‘ratchet’.

Like the ‘positive’ list for scheduling market access concessions, Negotiating Parties adopted this approach in part to attract other WTO members to the agreement in the future. In GATS, the ‘ratchet’ and ‘standstill’ obligations also apply only to National Treatment commitments, and not to market access concessions.43 Additionally, Negotiating Parties viewed

---

40 Ibid.
41 Inside US Trade 7 Feb 2013, supra note 28.
42 Ibid.
43 Ibid.
application of the ‘ratchet’ and ‘standstill’ obligations as potentially inhibiting to future liberalization, if signatories’ incremental improvements to market access were inflexible and legally binding.\textsuperscript{44}

\textbf{G: Expectations for New Rules}

TISA negotiators have been given a weighty and complex task in assembling the disciplines required for a “gold standard, A-grade agreement.”\textsuperscript{45} However, they need not start from scratch. There is already an extensive network of bilateral and regional preferential trade agreements among the negotiating countries, stakeholder and public interest contributions to Negotiating Parties, half-concluded negotiations under the Doha round, and parallel plurilateral service negotiations under the Trans Pacific Partnership. Drawing on those precedents, the January 2012 Peterson Institute briefing paper recommended that particular disciplines of GATS be bolstered in TISA,\textsuperscript{46} creating a “GATS-plus” agreement.

Some disciplines will be procedural—the United States has indicated that it wants to ensure greater transparency and predictability for its service providers from trading partners.\textsuperscript{47} Among other issues the January 2012 Peterson Institute briefing paper recommended that TISA include new competition policy and mutual recognition of professional credentials.\textsuperscript{48} On cross-border data flows,\textsuperscript{49} the United States has indicated that it will propose equal treatment for electronically delivered goods and services, absolute freedom of cross-border data transfers, and freedom from regulations requiring companies to locate data servers in any particular location.\textsuperscript{50} Australia and New Zealand are opposed to freedom of cross-border data transfers on the grounds of ensuring adequate protection and control over their citizens’ electronic data.\textsuperscript{51}

Other disciplines will be specific to a particular sector. On financial services, for instance, the United States may push for GATS-plus market access, including the right to establish


\textsuperscript{46}Inside US Trade 3 May 2012, \textit{supra} note 8.

\textsuperscript{47}USTR Notification, \textit{supra} note 39; Melly, \textit{supra} note 25; “Inside US Trade 17 Jan 2013, \textit{supra} note 11.

\textsuperscript{48}Inside US Trade 3 May 2012, \textit{supra} note 8.


\textsuperscript{51}Schott, Kotschwar & Muir, \textit{supra} note 21 at 32.
commercial presence, 100 percent ownership, and the provision of cross-border services without the requirement to establish commercial presence. Participants have generally agreed to address disciplines such as licensing or residency requirements, and barriers on investment, including requirements as to residency, form of establishment, participation in joint ventures or the satisfaction of economic needs tests.

Both the European Union and the United States have indicated that it is unlikely that members involved in the plurilateral negotiations will have to make commitments on opening up to private competition government-provided services, such as public water utilities. However, the “trade distorting actions” of State Owned Enterprises (SOEs) are an issue likely to be raised in the negotiations and unfavourably received by other WTO members. Disciplines addressing government procurement of services will likely be supported by some, but certainly not all, parties to the negotiations.

Another specific matter marked as important by some of the parties is allowing individuals to go to other countries to supply services (called Mode 4 supply in GATS). Discussion of cross-border movement of workers would begin with improving temporary entry for business people, professionals and technical experts, including intra-company transfers, which can be important for businesses operating in foreign markets. The Peterson Institute for International Economics has proposed going further, with liberal rules for the movement of semi-skilled workers. The United States is generally opposed to liberalization of Mode 4, due to the impact on domestic immigration concerns. Turkey has taken an opposite tack and proposed an entire separate chapter on Mode 4 including binding regulations on how countries grant visas.

II. A FEASIBILITY TEST FOR TRADE AGREEMENTS

There are seven interrelated factors making cooperation on broad and deep plurilateral services trade liberalization increasingly difficult—seven questions which weigh TISA’s capability reaching its ambitious liberalization and multilateralization goals. First, does TISA and/or services liberalization have the potential to increase trade and make money? Second, what

---

52 Ibid at 21.
53 Kronby and Barutciski, supra note 10.
54 Ibid.
55 Inside US Trade 28 Mar 2013, supra note 27.
56 Washington Trade Report, supra note 7 at 5; Inside US Trade 20 Dec 2012, supra note 50.
57 Inside US Trade 3 May 2012, supra note 8; Kronby and Barutciski, supra note 10.
58 Ibid.
59 Ibid.
60 Inside US Trade 3 May 2012, supra note 8.
61 Ibid.
is the collective will among WTO members to implement services liberalization and eventually multilateralize TISA under WTO? Third, what are the domestic political obstacles to participation in TISA? Fourth, what is the potential for critical regulatory convergence among the major international economic players? Fifth, what impact could the recent history of cooperative efforts have on the liberalization and multilateralization of TISA? Sixth, what do we actually know about the functioning of trade in services under liberalization, and is it enough to actually predict results? Seventh, do each country’s negotiators (or at least the major players) must have access to sufficient resources of staff and finances to effectively complete the negotiations?

1: The Economic Factor → No Risks in Liberalization for the Developed Countries

The first factor is whether a new trade plurilateral agreement has the potential to benefit the parties economically. The economic size of the parties involved in the agreement is substantial. TISA involves twenty-one Negotiating Parties, representing 47 economies, and nearly two-thirds of global services.63 Generally, domestic service production is the dominant economic activity in the world.64 In low-income economies, service sectors accounted for 45% of GDP, which climbs to 57% in middle income economies, and almost 71% in high-income economies.65

The first question is whether liberalizing trade in services will actually stimulate those large numbers. If goods and services are essentially economically equivalent, there is clear and simple economic argument for the liberalization of services: liberalization of trade in goods has correlated very strongly with growth66 and (unlike goods) services are relatively un-liberalized.67 There is, however, considerable debate as to whether trade in services is the same kind of trade as trade in goods, and therefore whether the strong correlation of growth with liberalization ought to apply, in theory, to services as well. This potential lack of theoretical understanding dovetails into issues considered under the sixth factor of feasibility. It is possible that the effects of services liberalization are well-understood and economically valuable, or neither well-understood nor economically valuable, or only one but not the other. Unfortunately, while the

63 Melly, supra note 23.
64 Plank, supra note 64 at ix.
67 Jensen, supra note 6.
debate is ongoing and evidence is scarce, it is difficult to separate the two—so we must examine both assumptions.

**Opportunities and Risks (If Service Liberalization is Like Goods)**

Speaking to the lack of liberalization of services, J Bradford Jensen, an economist at the Peterson Institute for International Economic, calculates that tradable business services are five times less likely to be exported than manufactured products.\(^6\) He argues that if the exports-to-sales ratio in tradable business services were increased to the same level as manufacturing, there would be a 40% increase in total U.S. exports.\(^6\) As Jensen modestly assures, “[e]ven if those aren’t the right numbers, the right numbers are big.”\(^7\) Additionally, more service exports mean more jobs. USTR estimates that every $1 billion in U.S. services exports supports an estimated 4,000 U.S. jobs.\(^7\) That’s about 3 million additional jobs. Workers in tradable services earn about 20% more than workers in similar industries, even accounting for their higher education. Service jobs are qualitatively better.\(^7\) These estimates ought to be considered on a country-by-country basis, but the basic assumptions following from growth in services exports will often be the same for other developed countries.

Developed countries have the most to gain from liberalization of trade in services. Comparative advantage is the classical way to think about the opportunities in trade—a country has trading advantage where its factors of production are abundant. For services, the most salient factor is skill/education and, in general, the United States and other developed countries have a great comparative advantage in the amount and quality of high-skilled, or highly educated, service providers.\(^7\) The United States is also currently the world’s largest services trader.\(^7\) Additionally, Jensen speculates that there are an obvious future opportunities for developed countries to reap dividends from a coming $40 trillion global infrastructure boom, mostly in the emerging economies, involving architecture, financing, engineering services, water treatment, and project management services.\(^7\)

For the developed world, there is urgency to Jensen’s benefits. The developing world’s comparative advantage through skilled labour and education is rapidly eroding. In the cohort of individuals between the ages of 25-29 in 2010, the level of education around the world has more

\(^7\) Ibid.
or less flattened, compared to the same aged cohort thirty-five years ago (who are now earning their peak lifetime incomes), in which the United States clearly had a massive educational comparative advantage.\textsuperscript{76} Also, the coming infrastructure boom is likely to be (at least partially) government projects, and many large, fast-growing, emerging economies are not participants in the WTO’s Government Procurement Agreement (GPA), so interactions between GATS as it is and the GPA would make liberalization within those emerging economies difficult.\textsuperscript{77}

If services are traded in the same way as goods—again, still an untested hypothesis—then the risks of services liberalization are also best considered through the lens of comparative advantage.\textsuperscript{78} There may\textsuperscript{79} or may not\textsuperscript{80} be justification in widespread concerns about job losses from adjustments in developed economies as a result of liberalized trade; however, even if the fears are justified, developed countries risk limited outsourcing losses from liberalization in services trade. Tradable services are skill intensive, and the United States is (still) relatively skill abundant.\textsuperscript{81} Jensen has further found that only about 25\% of tradable service jobs are low-wage jobs below the U.S. threshold of comparative advantage—thereby subject to outsourcing. Additionally, no region in the United States has a high concentration of those low-wage tradable service jobs. The jobs that would be dislocated by liberalized service trade are largely in dynamic urban areas, suggesting that whatever impact occurred from the minimal economic displacement would be evenly absorbed into the background of the entire U.S. economy.\textsuperscript{82} Again, country-by-country analysis may reveal differences, but similar assumptions should apply to all large, developed economies.

In contrast to the developed countries, the primary opportunity for developing economies is time. The world is experiencing a hospitable environment for economic catch-up.\textsuperscript{83} So long as countries have some combination of fundamental background conditions, ideas and blueprints will spread, and firms from developing countries will be able to take advantage of the

\textsuperscript{76} Ibid.
\textsuperscript{77} Ibid.
\textsuperscript{78} Ibid.
\textsuperscript{79} Ibid.
\textsuperscript{80} Fifty percent of U.S. manufacturing jobs are still below the U.S. threshold of comparative advantage, suggesting further adjustment in the U.S. economy: Ibid.
\textsuperscript{81} Import growth, in general, is a sign of economic recovery, not a sign of increasing displacement of jobs; the effects of manufactured imports have been positive on equality and welfare, and manufactured imports have had no effect on jobs and wages, rather the declining trend in US manufacturing employment has been driven by the combination of a shift in domestic demand away from spending on goods and faster productivity growth in manufacturing: Lawrence Edwards and Robert Lawrence, “Rising Tide: Is Growth in Emerging Economies Good for the United States?” (Book Release Presentation, delivered at Peterson Institute for International Economics, Washington DC, on 18 Oct 2011) online: <http://www.piie.com/events/event_detail.cfm?EventID=269>
\textsuperscript{82} Jensen, supra note 6.
educational and technological infrastructures of the developed world.\(^8^4\) Similarly, time can only add to what little is known now about the underlying factors that determine whether a developing country produces significant service exports. The best we can say is that education and human capital is critical for certain service sectors,\(^8^5\) and developing economies are only going to close the education gap.\(^8^6\)

Jensen asserts that developing economies need access to cheap services to build out their infrastructures.\(^8^7\) As well, service exports typically require much more infrastructure for the client than the exporter and, in these cases, developing countries can compete on a very high level with minimal investment at home.\(^8^8\) However, negotiating service trade agreements is resource-intensive and so developing countries that face challenges negotiating the agreement may be more motivated to join in when the work is done, and their own service sectors are stronger.

**Opportunities and Risks (If Service Liberalization is Different)**

Taking economists at their word, some progress has been made in analysing the economic effects of services trades in the special form of trade-in-tasks, or outsourcing. Trade-in-tasks has been shown to be theoretically analogous to migration of foreign factors of production to the outsourcing nation while retaining foreign costs.\(^8^9\) Gene Grossman and Esteban Rossi-Hansberg, who introduced the idea of trade-in-tasks, have shown that this conception of trade is economically beneficial in a formal analogy with technological improvement.\(^9^0\) At the same time, Robert Baldwin and Frédéric Robert-Nicoud have introduced an analytic framework which takes into account known special cases and integrates trade-in-tasks theory with mainstream trade theory,\(^9^1\) adding certainty to the problem of unexpected outcomes\(^9^2\) and

---

\(^8^4\) Ibid.
\(^8^6\) Jensen, supra note 6.
\(^8^7\) Ibid.
\(^8^8\) Goswami, Matoo & Sáez, supra note 85 at 5.
\(^9^1\) Ibid.
\(^9^2\) Ibid at 3-5.
inapplicability of standard trade theorems. As it continues to develop, the theory of trade-in-
tasks may offer further assurances that the familiar beneficial effects of trade liberalization under GATT will continue.

2: The Consensus Factor ➔ No Multilateralization

The second factor is the sum of any evidence for bringing the trade agreement to the multilateral system. In this area, the TISA Negotiating Parties have made a gamble by not including the large, emerging economies—believing that there will be enough pressure from a concluded agreement to force a multilateral adoption. The desire of the TISA Negotiating Parties to “redefine global trade” and then multilateralize the agreement at the WTO—most likely through the use of GATT Article V—has been quite explicit. However, despite deep divisions on the question of new entrants to TISA, the Negotiating Parties are unlikely to extend the benefits of a deal until a ‘critical mass’ of WTO members join, to avoid the ‘free riders’ problem—new countries receiving benefits from TISA without making any concessions during the negotiations. That ‘critical mass’ of new entrants is unlikely to be achieved.

Among the TISA Negotiating Parties calls for the removal of barriers to entry for new entrants are contradicted by equally strong calls for deep commitments that WTO members are unlikely to make. The United States, for instance, is both anticipating and discouraging China’s accession to TISA with regulatory proposals for rules disciplining state-owned enterprises.

---

93 Ibid at 5.
94 Gary Horlick, The Impact of a Successful EU-US Trade Agreement and the Transpacific Partnership Agreement on World Trade (Panel Discussion, delivered at American University, Washington College of Law, on 22 April 2013) [unpublished].
95 USTR Notification, supra note 39; Melly, supra note 25.
96 An agreement under GATS Article V is required to cover “substantially all trade” defined by sectors, volumes of trade and modes of supply. It also requires the elimination of substantially all discrimination among parties. Inside US Trade 3 May 2012, supra note 8; Inside US Trade 22 Mar 2012, supra note 9.
99 Least Developed Countries may be extended the benefits of the services even if they don’t participate in the plurilateral discussion: Inside US Trade 9 Oct 2012, supra note 28; Inside US Trade 20 Sep 2012 - Mexican, supra note 45; Inside US Trade 22 Mar 2012, supra note 9; Schott, Kotschwar & Muir, supra note 21 at 51.
100 Harbison & Lim, supra note 2 at 145.
101 Inside US Trade 5 Feb 2013, supra note 31; Washington Trade Report, supra note 7 at 5.
Outside the intentions and capacities of the TISA Negotiating Parties, there is little indication that the large, emerging economies, in particular, have either the capacity or the will to join a multilateral TISA under any mechanism. Politically, the large, emerging economies are not interested, and they have the power to block TISA at the WTO. Once a plurilateral agreement is concluded, its value may be perceived as having something which is denied to others—possibly motivating countries outside the deal to enter, but equally motivating signatories to refuse entry to countries outside the deal, and so hindering the political task of multilateralization, at least in the short term. If TISA is to be a building block rather than a stumbling block to multilateralization, then it must be undertaken with a greater regard for brokering an eventual multilateral global consensus, with more than symbolic concessions to the large, emerging economies.

3: The Constituencies Factor → Liberalization will be Subject to Political Skill

The third factor is whether governments have the support of domestic constituencies to take on new international commitments. One of the lessons of the collapse of 19th century globalization was that national governments will be unable to maintain open economies if they don’t have the support of their constituents, whether they be narrow elites or broad masses. On the one hand, politicians have the advantage in managing constituencies. Each government’s trade agreement supporters may be somewhat crafted in the first place with active political organization and the reach of any transparency in developing trade negotiations and, if constituent support turns against a deal, political reorganization may be capable of pushing it through. For instance, the governments which negotiated NAFTA in Canada and the United States were both defeated in elections in which anti-NAFTA public sentiment was a significant factor and yet the agreement was ultimately signed by the anti-NAFTA successor governments. On the other hand, in virtually all countries, political incentives are heavily weighted on domestic problems at the expense of international ones, and political capital is not infinite. In the aftermath of the Great Recession, the TISA Negotiating Parties and other WTO members will likely face greater than their normal domestic political restraints. Examples of the tenuous

---


103 Washington Trade Report, supra note 7 at 4.


105 Frieden et al, supra note 83 at 59.

106 Ibid at 7.

107 Ibid at 33.

108 Ibid at 3.
balance in the United States, European Union, and Japan, the largest players among the TISA Negotiating Parties, are illustrative.

One major American constituency is firmly in favour of trade liberalization: internationally oriented financial institutions and corporations.\textsuperscript{109} In Congress, TISA has strong early support\textsuperscript{110} and trade agreements have generally fared well: 12 of 15 PTAs set before Congress have passed with hundreds of votes to spare.\textsuperscript{111} Even the ostensibly nationalist and ‘neo-isolationist’\textsuperscript{112} Tea Party is not a protectionist group in Congress; 65 of 85 of their members have approved all the negotiation of three of the new PTAs.\textsuperscript{113} On the other side, public opinion toward international trade was more hostile in 2007 in the United States than in any of the other 47 countries regularly surveyed by Pew Charitable Trust.\textsuperscript{114} While that opinion may be changing with the demographics of the country,\textsuperscript{115} the majority of Americans, and especially those with lower incomes, believe that liberalized trade reduces jobs, wages, and the economy as a whole.\textsuperscript{116} Only Americans with college degrees and incomes above $100,000 hold positive views on trade liberalization.\textsuperscript{117}

European public opinion towards trade liberalization in general is more even than in the United States,\textsuperscript{118} and not as politically charged. However, Europeans overwhelmingly believe that globalisation makes society more unequal, and that it is only good for large companies. As an example of political restructuring to win the favour of constituencies, economic growth in Europe is presented to public opinion as a defensive measure to protect citizens when they cannot work, rather than as an economic reward in itself.\textsuperscript{119} As explained in \textit{The Economist}, “Europe ... is not the most dynamic and competitive economy in the world, because lots and lots of Europeans do not want to live in the most dynamic and competitive economy in the world.”\textsuperscript{120} Yet, however trade liberalization must be crafted by European politicians, the European Union is confronting some major internal economic issues, and these problems are likely to draw upon much of its politicians’ energies for the foreseeable future.\textsuperscript{121}

\textsuperscript{109} Ibid at 35.
\textsuperscript{110} Washington Trade Report, \textit{supra} note 7 at 5.
\textsuperscript{111} Horlick, \textit{supra} note 94.
\textsuperscript{113} Horlick, \textit{supra} note 94.
\textsuperscript{114} Frieden et al, \textit{supra} note 83 at 35.
\textsuperscript{115} Horlick, \textit{supra} note 94.
\textsuperscript{116} Frieden et al, \textit{supra} note 83 at 35.
\textsuperscript{117} Ibid at 35.
\textsuperscript{118} Ibid at 38.
\textsuperscript{120} Ibid.
\textsuperscript{121} Frieden et al, \textit{supra} note 83 at 37.
Japanese public opinion has traditionally been more accepting of governmental authority, with a sharp drop in the past two decades following a prolonged economic slump. However, in a very short time, Japan’s Prime Minister Shinzo Abe has generated a great deal of political capital with which to negotiate TISA. The initial results of “Abenomics” seem to be generating a rising stock market and improving business sentiment and Abe’s Cabinet’s approval rating now stands above 70%. On the other hand, the Japanese organization of agricultural interests (Zenchu) is a strong and vocal protectionist group, representing a predominant public concern with national interests. Although agriculture is not directly on the table in TISA, Zenchu has weighed in on other issues of national interest, such as health care, in the past. Additionally, while trade issues are relatively unknown in other countries, discussions of national interests in potential trade agreements are frequently front page news in Japanese newspapers.

4: The Sovereignty Factor - Shallow Regulatory Convergence

The biggest prize and the hardest puzzle for TISA will be greater ‘regulatory convergence’. Border measures (the traditional competence of trade negotiators) have little

---

122 Pankaj Mishra, “Last refuge of weak leaders” (May 14, 2013) The Japan Times online: The Japan Times Opinion <http://www.japantimes.co.jp/opinion/2013/05/14/commentary/last-refuge-of-weak-leaders/>

123 “Support for Abe Cabinet slides to 70.9%: poll”, (May 20, 2013) The Japan Times online: The Japan Times National Politics <http://www.japantimes.co.jp/news/2013/05/20/national/support-for-abe-cabinet-slides-to-70-9-poll/>


125 “Joint Statement from National Farmers’ Union (USA) and Ja Zenchu (Japan) Regarding the Lima Round of Trans-Pacific Partnership Negotiations” (14 May 2013) online: <http://insideustrade.com/index.php?option=com_iwpfile&amp;file=may2013/wo2013_1588.pdf>.


127 Attempts to quantify the effects of these regulatory measures on trade are underway, but incomplete: Jensen, supra note 6. According to the WTO, preferential trade agreements that commit to “deep” integration on regulatory measures increase trade between member countries by almost 8 percent: The WTO and Preferential Trade Agreements: From co-existence to coherence, World Trade Report 2011 (Geneva: WTO).

128 Domestic regulations with heavy impact on services trade include requirements for and restrictions on commercial presence, economic needs tests, quotas on number of producers, requirements for local joint ventures, licensing/accreditation, regulation, differential tax treatment, and government procurement practices: Jensen, supra note 6; Harbinson & Lim, supra note 2 at 134; Sykes, AO, “The (Limited) Role of Regulatory Harmonization in International Good and Services Markets”, Journal of International Economic Law 2(1) (1999) 49-70; Thomas J Bollyky, “Regulatory coherence in the TPP talks” in CJ Lim, Deborah K Elms, & Patrick Low, eds, The Trans-Pacific Partnership: A Quest for a Twenty-first Century Trade Agreement (NY, Cambridge University Press: 2012) 171 at 173. A further complication in that task would be a shift from the objective of totally unobstructed trade to identifying that level playing field that balances protection of consumers’ health and local values, and protection of producers’ trade goals: Pascal Lamy, “Lamy: Helping developing countries remains priority but ‘nature of trade is
bearing on trade in services. Negotiators will attempt to get all sides to move towards common rules, or at least regulations that are close enough that each party can accept the others’. The issue at the heart of the agreement will be balancing the diverse ‘thicket’ of domestic regulations with the needs of international trade. Negotiations will be difficult. Domestic regulations are difficult to police, hard to measure, more local and possibly more reflective of entrenched national values than the border measures placed on tangible goods. Even in instances where countries’ goals are aligned, an ‘unorthodox’ regulation that buys off the beneficiaries of the status quo may be preferable to an ‘orthodox’ regulatory alignment which proves impossible to implement.

Regulatory coherence within TISA will have to be shallow. The major TISA Negotiating Parties are all developed economies, and the developed economies have already unilaterally liberalized their regulatory measures to some degree. Western Europe and the United States already have low regulatory barriers to trade in services, relative to the rest of the world. However low the regulatory barriers are, they show no signs of falling any lower. Even between the Unites States and European Union, dialogues between regulators toward common rules have yielded little progress. WTO rules have been effective in limiting discriminatory regulatory measures, but have done little to eliminate the non-discriminatory regulations that hinder international trade. Regional trade agreements follow the same approach as the WTO: the government right to regulate is intact. Developed countries have been slow in many sectors to adopt international standards. WTO transparency obligations on services regulations have also

130 As an analogy, it is enough to see the example of the frustrated attempts to achieve a convergence in rules of origins.
132 Jensen, supra note 6; Bollyky, supra note 128 at 173.
133 Raustiala, supra note 131 at 126.
134 Frieden et al, supra note 83 at 78.
135 Jensen, supra note 6.
138 Stephenson, supra note 129.
been largely ignored, with developed countries being the worst offenders. Conversely, other trade agreements have not improved collaboration among regulatory agencies, or seen eagerness from civil society or regulators in the United States to allow their responsibilities (for which they are politically accountable) to be subject to potentially increased restrictions.

Among developing countries, there is also little pressure to attempt greater regulatory convergence. They all impose high barriers to trade in services. There is no global forum or mechanism for fostering a discussion of the impacts of services sector policies, the appropriate design of regulations, the preconditions for realizing welfare gains from liberalization. Regulatory convergence is likely to remain an exception rather than a rule.

5: The Credence Factor → Subject to Improvement; Falling Short of Multilateralization

The fifth factor in the analysis is whether the TISA Negotiating Parties (and other potential members) have a track record of trust, established through prior successes and rewarded cooperation. Importantly, the WTO has been the most successful of humanity’s efforts at a global system on a major issue. Globally, however, there is a disappointing, chequered record of success for international cooperation over on recent international issues. The Center for Economic Policy Research (CEPR) released a gloomy report in 2012 on collective international efforts over the past decade, concluding: “optimistic anticipation has ... given way to empty phrase-mongering.” Resentment toward perceived ‘bullying’ is another obstacle to collective action. Economist Richard Baldwin makes the argument that ‘twenty-first century PTAs’ are much less about the reciprocal negotiation of market access than about stronger economies—the United States, the European Union and Japan—negotiating in the context of significant power asymmetries and imposing domestic reforms on weaker countries. In other words, strong

141 Bollyky, supra note 128 at 173.
143 “U.S. Proposal for TPP Regulatory Coherence Chapter Mostly Non-Binding” 29(43) Inside US Trade (2010) 6-7; Frieden et al, supra note 83 at 49.
144 Ibid.
145 Ibid at 48; Inside US Trade 5 Feb 2013, supra note 31. India boasts the highest barriers on services trade, though it remains outside the TISA negotiations: Jensen, supra note 6.
146 Goswami, Matoo & Sáez, supra note 85 at 4.
147 Frieden et al, supra note 83 at 78.
148 Richard Cunningham, “Trade After Doha: The Growing Divide Between the Emerging Nations and the Developed World” (Canada-US Law Institute Distinguished Lecture, delivered at Faculty of Law, Western University 16 October 2011) [unpublished].
149 Frieden et al, supra note 83 at 3.
150 Frieden et al, supra note 83.
economies are perceived to be filling the factories of their weaker counterparts in exchange for control over weak countries’ domestic regulations.\(^{151}\)

Among the TISA Negotiating Parties, the level of credibility is higher—one of the factors which may have lead to the initial ‘Good Friends of Services’ grouping. However, many of the TISA Negotiating Parties have been working on Doha together for over a decade. The failure to strengthen the multilateral system by concluding the Doha Round is an honest embarrassment and major lack of credibility for negotiating countries, especially those at the forefront in the G20.\(^{152}\) Those members of the G20 who have joined TISA negotiations are: the United States, the European Union (including France, Germany, Italy, and the UK), Canada, Australia, Japan, Mexico, South Korea, and Turkey. Are these countries responsible for the Doha?\(^{153}\) The members of the G20 which have not joined the TISA negotiations are: Argentina, Brazil, China, India, Indonesia, Russia, Saudi Arabia, and South Africa. If the responsibility for the withering death of Doha is laid at the feet of these eight countries (BRICS+3?), perhaps that sacrifice will allow the remaining members of the G20 to negotiate TISA with genuine trust in their partners and optimism about their prospects of cooperation.

More broadly, however, is there credence in the concept of a plurilateral or multilateral services agreement at all? The WTO’s GATS, the first multilateral agreement to address trade in services, achieved little actual liberalization.\(^ {154}\) In fact, the implementation of GATS does not seem to have had significant effects on global trade at all. It is difficult to separate trade in services from trade in goods. However, while trade grew at roughly 11% per year in the decade before the Uruguay Round (1985-1995),\(^ {155}\) in the decade since the Uruguay Round, the rate has been closer to 5%.\(^ {156}\) It is possible that there may have been an exogenous process that promoted trade in services before GATS, and which ceased afterward. The telecommunication and financial revolutions in the early 1990s are potential contenders.\(^ {157}\) Nevertheless, it is hard to imagine any such combination of processes which would coincidently negate any and all gains from GATS at precisely the same time as the agreement was coming into effect. The more likely conclusion is that all the growth in services trade since GATS must be attributed to technological

\(^{151}\) Capling & Ravenhill, supra note 104 at 290. Interestingly, the situation was reversed during the interwar period: “many Americans felt that existing international organisations did not accurately reflect the role of the US in the world, and were indeed to some extent intended to constrain US influence in favour of the European powers.” Frieden et al, supra note 83 at 6.

\(^{152}\) Ibid at 63.

\(^{153}\) Washington Trade Report, supra note 7 at 2.


\(^{155}\) Marchetti, supra note 65 at 97 (table 4.3).

\(^{156}\) Raustiala, supra note 131 at 127.

\(^{157}\) Ibid.
advances\textsuperscript{158} in transportation and (especially) communication technology\textsuperscript{159} and unilateral liberalizations.\textsuperscript{160}

GATS did lock-in the level of services liberalization that countries had already achieved unilateral reforms, ostensibly adding certainty to services trade.\textsuperscript{161} However, many countries committed themselves to levels of openness that were actually less liberal than their applied measures, leaving room for later adjustments within the agreement.\textsuperscript{162} Additionally, despite using a limited and cautious approach, the GATS obligations of WTO members have, in at least one case, turned out to be the reverse of what was intended.\textsuperscript{163} As a result, GATS schedules have grown increasingly irrelevant.\textsuperscript{164}

If the approach to TISA clearly innovated on GATS, the Negotiating Parties would enjoy a benefit from faith in the potential of that new innovation. However, the compromises so far announced have revealed a negotiating plan remarkably similar to GATS, with general obligations and a ‘positive list’ of specific commitments that give members the option to schedule trade liberalization in service a la carte, and to exclude controversial service sectors,\textsuperscript{165} albeit with the addition of a ‘negative list’ of National Treatment obligations.\textsuperscript{166} Only the hoped-for addition of ‘GATS-plus’ regulatory disciplines hold any promise of something new.\textsuperscript{167} Even in this area, other ‘modern’ preferential trade agreements have not yet played a role in promoting service exports.\textsuperscript{168}

6: The Tractability Factor \(\Rightarrow\) We’re Liberalizing in the Dark

The sixth factor is whether the trade negotiation is approached with sufficient understanding to practically solve the problems. ‘Intractability’ refers to a high level of complexity, which makes it difficult to change, manipulate, or resolve an issue. Are services too

\textsuperscript{158} Washington Trade Report, \textit{supra} note 7 at 3; Goswami, Matoo & Sáez, \textit{supra} note 85 at 1.
\textsuperscript{160} Washington Trade Report, \textit{supra} note 7 at 4.
\textsuperscript{161} \textit{Ibid} at 3.
\textsuperscript{162} \textit{Ibid}.
\textsuperscript{163} In the arbitrated result of \textit{US–Gambling} the United States was surprised to learn that it had liberalized offshore gambling from Antigua. See Plank, \textit{supra} note 64 at ix; Jane Kelsey, \textit{Serving Whose Interests? The Political Economy of Trade in Services Agreements} (NY, New York: Routledge-Cavendish, 2008) at 174-81.
\textsuperscript{164} Washington Trade Report, \textit{supra} note 7 at 3.
\textsuperscript{165} Plank, \textit{supra} note 64 at ix.
\textsuperscript{167} Inside US Trade 20 Sep 2012 - Mexican, \textit{supra} note 45.
\textsuperscript{168} Goswami, Matoo & Sáez, \textit{supra} note 85 at 19.
complex to negotiate? Is the challenge of services trade liberalization under existing WTO frameworks\textsuperscript{169} a consequence of a high level of complexity?

The first obvious hurdle is the structural resistance of service industries. In other words, separating tradable services from non-tradable ones—and it is possible. Jensen, working through the Peterson Institute, has identified tradable service industries and occupations by locating national service industries with unusually high geographical clustering within the United States but broad consumption, thereby determining which services are already traded between American states. Software, for example, is consumed everywhere in the United States, but its development is clustered in Silicon Valley, and so software development is a tradable service. From his calculations, Jensen concludes that approximately 60\% of services in the United States are currently tradable.\textsuperscript{170}

However, Jensen readily admits that there is not enough information about current trade flows in the services sectors he has identified. He states that “[t]here are more than 10,000 manufacturing categories reported on monthly from the U.S. census. Since 2006, there have been 30 service categories that are reported on quarterly by the U.S census. There is a lot more detail than before, but it’s not enough.”\textsuperscript{171} So we know which service sectors are tradable in the United States, but we don’t know anything about how they are currently traded. Equally, the reasons for the success or failure of other countries in exporting services are hampered by the lack of available data.\textsuperscript{172}

The supply of services is also not well understood. The division of supply under GATS into Mode 1 (cross-border), Mode 2 (consumption abroad), Mode 3 (commercial presence), and Mode 4 (natural presence), is impractical for real economic analysis. The different modes of supply can compliment or substitute for one another differently for specific services.\textsuperscript{173} Instead, Jensen asserts that “[s]ervices are not delivered as Mode 1 or 2 or 4—they are delivered as Mode 1 and 2 and 4, and parsing that mix is difficult. Mode 3 is important, but separate—it works in a very different way.”\textsuperscript{174}

The biggest potential problem for TISA’s negotiators is a potential conflation of the unknown functioning of trade in services is with the relatively well-known functioning of trade in goods. ‘Services’ are treated frequently treated as a kind of ‘good’ by trade theorists. Some economists, including Bhagwati, argue that we don’t need a new structural framework for the services sector—that the basic concepts of international trade theory are as applicable to services

\textsuperscript{169} Washington Trade Report, supra note 7 at 1.
\textsuperscript{170} Jensen, supra note 6.
\textsuperscript{171} Ibid.
\textsuperscript{172} Goswami, Matoo & Sáez, supra note 85 at 5.
\textsuperscript{173} Ibid at 2.
\textsuperscript{174} Jensen, supra note 6. See also Goswami, Matoo & Sáez, supra note 85 at 2.
Trade as they are to goods. Others, for reasons of complexity of services and service sectors, believe that a clearer conceptual understanding of services trade is required before any theories can be drawn about the consequences of service trade liberalization—on both economies and public policy objectives. Looking at the loose definitions and underperformance of GATS, and the increasing interconnectedness of international trade, it is easy to appreciate that caution.

Despite being the first and only WTO trade agreement on service trade, GATS contains no explicit definition of a ‘service’. Instead, services have been defined in trade theory as either ‘not-goods’ (“a diverse group of economic activities distinct from manufacturing, mining, and agriculture”) or simply by a list of industries or sectors. Yet the economic functioning of services has the potential to be radically different than that of counterpart goods or even of counterpart industrial sectors. Contrasted with goods, services are intangible; they add value to the client directly (possibly, but not necessarily, by the transfer of rights to a good); they are simultaneously created and consumed in a transaction (meaning they are also non-perishable, non-transferable, and non-storable); they are co-produced by the provider and client; they are unable to be inspected before delivery and therefore priced with more emphasis on client expectations and less on real utility, quality, cost of production, or taxes; they able to be delivered in dynamic ways; and—most importantly for trade agreements—they are able to generate (potentially unforeseeable) linkages by facilitating the production of other commodities in an economy.

International trade increasingly involves ‘intermediate’ goods and ‘tasks’ along continuums of global supply chains. Anecdotal evidence is easy to come by: A Barbie doll is manufactured in a criss-crossing web of tasks performed in seven countries; Apple’s iPhones are notoriously designed in California, sourced throughout Asia (adding 35% of its value in Japan), and assembled in Shenzhen, China (adding only 4% of the final value); and, according to the WTO, the value of typical ‘American’ car includes 30% from Korea, 17.5% from Japan.

---


177 Marchetti, supra note 65 at 84.

178 For example, “The term [“services”] encompasses a broad range of industries that provide basic economic infrastructure (communications, transport, distribution, energy[...], construction, water supply, sanitation and sewage[...], waste collection and disposal), financial infrastructure (banking, insurance, financial markets), support to business (advertising, marketing, computer services, professional services), or social infrastructure (education, health, and social services)”: Ibid at 84.

179 Fernandes, supra note 176 at 113-119.


182 Trade patterns and global value chains in East Asia: From trade in goods to trade in tasks, WTO & IDE-JETRO (Geneva, WTO Secretariat: 2011) at 107.
7.5% from Germany, 4% from Taiwan and Singapore, 2.5% from the UK, 1.5% from Ireland and Barbados, and the remaining 37% of the production value from the United States.\textsuperscript{183} In these fragmented webs of production, the line between goods and services is becoming less and less theoretically relevant to multinational corporations. Is the final layer of paint applied to a car a service or the manufacture of a product? Does it matter whether the paint is applied at the dealer, or the factory—or by another corporation entirely? Some economists have been working to create a model of these new processes,\textsuperscript{184} yet the core of international trade theory continues to be dominated by thinking about production and exchange of completed goods.\textsuperscript{185}

Yet another added complexity to TISA is the negotiations themselves. Tariff preferences can be changed incrementally, but preferences for services are much more radical commitments—on/off switches that either allow a trading partner to either serve your market or not.\textsuperscript{186} Consequently, there is much more potential trade displacement with a change in service preferences, and a hugely increased advantage for ‘first runners’—those given market access before any others—and, therefore, a much greater value given to agreements which include some WTO members, but shut out others.\textsuperscript{187} In addition, trade negotiators are typically experienced in dealing with border measures, which have little bearing on services—service negotiations are about domestic regulations, which require a completely different sort of competences—and even with the engagement of regulators, there is also no central information about how regulatory measures affect trade in services.\textsuperscript{188} Finally, negotiators have few benchmarks or measures of progress in service negotiations.\textsuperscript{189} During Jensen’s launch of his book at the Peterson Institute’s policy brief, a veteran of the Doha Round negotiations posed a illustrative scenario in which he compared negotiating tariffs and service schedules:

You establish a benchmark for reducing tariffs, and it’s either zero or it’s a given percentage, and subsequently you look at products and you average it out, and you get to a certain tariff reduction. [But] anybody who’s seen a services schedule knows that it takes about five months—six months—just to understand what’s in the schedule. It’s extremely difficult to actually find an objective way of benchmarking and quantifying liberalization by third countries who have barriers. … So I think there’s a real problem in terms of the complexity of services schedules and finding a coherent way

\begin{footnotesize}
\begin{enumerate}
\item[183] \textit{WTO Annual Report} (1998) at 36.
\item[184] See factor 1 in this analysis.
\item[186] Porges, \textit{supra} note 15.
\item[187] \textit{Ibid}.
\item[188] Harbinson & Lim, \textit{supra} note 2 at 134.
\item[189] \textit{Ibid} at 134.
\end{enumerate}
\end{footnotesize}
in which you can agree around the table on benchmarks to liberalize services. I don’t know if you have a magic bullet for that problem, or—\footnote{H.H. from the E.U. Embassy posing a question during the question and answer session of Jensen, \textit{supra} note 6 at 24:39–26:26.}

Jensen replied: “There is a thicket of policy impediments. Measuring service imports and exports is very difficult. It’s not clear that we’re providing the level of resources that need to be provided to measure it well. \textit{We’re largely in the dark}.”\footnote{Question and answer session of \textit{ibid} at 26:26 [Emphasis Added].} Reaching practical economic or political goals through TISA using the current set of analytic tools seems impractical.

\section*{7: The Resources Factor \rightarrow Too Few Negotiators, Regulators, and Money}

The final factor in the analysis is the extent and quality of the resources devoted to addressing problems and doing the work of negotiating TISA. The United States is the world’s largest economy and the single largest player in the WTO system, TISA, and two other ambitious regional trade negotiations happening simultaneously. And yet, USTR—which is responsible for negotiating U.S. trade agreements, participating in global trade policy organizations, resolving U.S. trade disputes, and \textit{most importantly} gathering input on trade issues and helping to formulate the President's trade policy positions—currently has only 179 full time employees, down from 198 employees in 2011.\footnote{“New USTR Will Face Many Challenges, Including Staff Dissatisfaction” (11 Feb 2013) \textit{Inside US Trade}, online: Inside US Trade News Analysis <http://insidetrade.com/201302112424255/WTO-Daily-News/Daily-News/new-ustr-will-face-many-challenges-including-staff-dissatisfaction/menu-id-948.html>.} USTR was ranked last in work quality among 29 small U.S. federal agencies in late 2012.\footnote{\textit{Ibid}.} In that comprehensive survey, USTR staff showed dissatisfaction with their jobs, their organization, and the effectiveness of their senior leaders.\footnote{\textit{Ibid}.} General budget pressures have been exacerbated by the fact that some of USTR's general funds have been redirected to another agency, the Interagency Trade Enforcement Center (ITEC).\footnote{\textit{Ibid}.}

If negotiating service trade agreements is resource-intensive for the United States, it is considerably more so for its trading partners.\footnote{\textit{Ibid}.} The people working in trade matters in other TISA Negotiating Partners are presumably fewer in number and have less expertise and educational background than in the United States. This paper’s analysis will conclude that TISA’s potential is not being realized with the level of resources currently allocated. To reach that potential, a significantly higher commitment is required.

\footnote{Goswami, Matoo & Sáez, \textit{supra} note 85 at 4.}
III. CONCLUDING RECOMMENDATIONS

The trade negotiators working for the participating governments are good. They will be able to find an ‘equilibrium of agreement’ and strike a deal on TISA, whether it is a shallow deal or a deep one.\(^{197}\) Liberalization along the lines of TISA is a risk free proposition for developed countries, subject to the political skill of governments, incremental improvements in the credence of trading partners, and sufficient resources to complete the task. However, the conclusion of TISA will very likely produce a shallow agreement with little understanding of the effects of the liberalization gained. In sum, like GATS before it, the deal will be a large investment, drain on the credibility of the world system, and will have little foreseeable value. Multilateralization of such a deal will be easier if it is obviously shallow; however, WTO members outside the TISA Negotiating Parties are deeply skeptical of both the proposed agreement and its proponents’ records. Multilateralization under the current circumstances is exponentially more unlikely if the deal is to have any content at all.

It is likely that trade negotiators among the major economic power are well aware of these conclusions. Keynes infamously wrote that “it is better for reputation to fail conventionally than to succeed unconventionally,”\(^{198}\) and protecting the reputation of the parties may ultimately be the overriding goal of the negotiations. It is also possible that negotiators are approaching TISA with a gambler’s dice and an alchemist’s kit,\(^{199}\) knowing that no harm can come from trying, and wasting the resources on the hope that, despite all indications to the contrary, lightning may strike.

If these presumptions are false, or can be made to be false, the two major (and a few more minor) recommendations to follow address the deficiencies identified in my analysis of TISA might assist negotiators’ efforts toward TISA’s two original explicit goals: the liberalization of services and the multilateralization of the concluded agreement. The recommendations are selectively adapted from Thomas J Bollyky’s chapter on regulatory coherence in *The Trans-Pacific Partnership: A Quest for a Twenty-first Century Trade Agreement,*\(^{200}\) Jensen’s full recommendations in *Global Trade in Services: Fear, Facts, and Offshoring,* from the Peterson Institute for Economic Cooperation,\(^{201}\) and Sherry Stephenson’s presentation, “Regulatory Disciplines in Trade Agreements”, given at the Australian Services Roundtable in 2007.\(^{202}\)

\(^{197}\) Horlick, *supra* note 94.


\(^{199}\) TISA is an expensive “laboratory” for testing new approaches to services liberalization: Harbinson & Lim, *supra* note 2 at 134.

\(^{200}\) Bollyky, *supra* note 128 at 178-81.

\(^{201}\) Jensen, *supra* note 6.

\(^{202}\) Stephenson, *supra* note 129.
More Research, Theory, and Data on Services Trade

The first step will be to abandon all hope and embrace data. We need more research, and more intellectual and economic theory on trade in services. Dorothy Dwoskin, senior trade policy director for Microsoft, made the case eloquently at an event with the USTR. She argued that "we've gotten so wrapped up in process, in procedure, we've lost sight of the economic arguments of why services are so important ... you need to spend a lot more time helping create the intellectual and economic argument on services trade liberalization."203 This must go beyond economic and intellectual cheerleading to the level of a concerted effort by the United States and its trade partners to support academic theoretical and field research in services trade, and in trade as a whole. As a necessary corollary, all trading partners must devise methods to collect substantially more and better data on the service sector,204 in addition to aiding developing countries to collect the same. To succeed in liberalizing services trade we can no longer fly blind.

A Multilateral Effort on Regulatory Convergence

Drawing from Bollyky and Stephenson, a deep agreement in services must address the serious challenges with regulatory coherence. A sincere attempt to build regulatory coherence would be reflected in an independent multilateral effort to promote regulatory convergence and cooperation. The resulting mandate of such an effort would be: preparing common technical regulations and standards; formulating Mutual Recognition Agreements with conformity assessments; assessing and recommending adoption of international standards; and promoting the sharing of surveillance data and inspection reports through the development of confidentiality arrangements.205 Maintaining sovereignty and local accountability of national regulatory authorities will be essential for meaningful participation across multilateral field, and so the participating governments must be confident that the final decision to adopt the recommendations of regulatory coherence would remain with them.206

Additional Recommendations

Seeing where services might be headed, Jensen proposed defensive and offensive actions. Of the former, he suggested that the United States in cooperation with its developed trade partners, make access to a good primary, secondary, and postsecondary education a high national priority, and urged more attention to education at all ages to maintain American workers’ high

204 Jensen, supra note 6.
205 Bollyky, supra note 128 at 180; Stephenson, supra note 129.
206 Bollyky, supra note 128 at 180.
level of skills. Jensen also added that the US should defensively strengthen its social safety net for workers dislocated by trade and technological advancement.\footnote{Jensen, supra note 6.} On the offensive, he called for an ‘aggressive push’ to open large, emerging markets; liberalize at the WTO; enlarge the GPA; and improve IP protections. The defensive proposals make good policy sense now—even if trade in services reveals strange new dynamics to trade, developed countries will only be stronger with high quality education and protection for workers. The offensive proposals are contradictory, and should be shelved until given effective foundations.

Even in its current form, the potential of TISA depends on the political skill of governments, the bridge-building skills of parties’ trade negotiators. Those factors should be merely be reinforced. To address the future goal of multilateralization, WTO members outside the TISA Negotiating Parties must be convinced (and not pushed)\footnote{Neither pushed, nor ‘strongly encouraged’ or any other euphemism that might be misconstrued as ‘bullying’, when the United States and other developed countries are no longer in a position to effectively bully in any case, and substantial persuasiveness is slower but, with an eye on success, more efficient, for all parties.} into appreciation of the merits of service liberalization, and the sincere interest of the TISA Negotiating Parties in reciprocal negotiations. These factors should follow from the above suggestions. Of course, sufficient resources must be found to complete these tasks. Finally, it is the most difficult task in political life to perceive the low rumble of a distant crisis and then take responsibility for a new order of things. True leadership is a necessary factor in all of the above.