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# THE TRADE IN SERVICES AGREEMENT PLURILATERAL PROGRESS OR GAME-CHANGING GAMBLE?

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**THE TRADE IN SERVICES AGREEMENT:  
PLURILATERAL PROGRESS OR GAME-CHANGING GAMBLE?**

**Patricia M. Goff**



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## ABOUT THE AUTHOR



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## ACRONYMS

ASEAN	Association of Southeast Asian Nations
EC	European Commission
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ITA	Information Technology Agreement
MFN	most-favoured nation
OECD	The Organisation for Economic Co-operation and Development
RTA	regional trade agreement
TFA	Trade Facilitation Agreement
TiSA	Trade in Services Agreement
TTIP	Transatlantic Trade and Investment Partnership
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization

## EXECUTIVE SUMMARY

Trade analysis in the current moment is understandably focused on mega-regional negotiations, but plurilateral talks also deserve our attention. This paper takes plurilateral negotiations leading to a Trade in Services Agreement (TiSA) as its focus. It argues that the barriers to trade in services are distinct and their removal consequential; thus inviting careful consideration and, ideally, public debate. Five key questions about TiSA are examined. The answers to these questions are not clear, making this a propitious moment to explore promising avenues for both maximizing the gains and minimizing the costs of services liberalization.

## INTRODUCTION

“Trade agreements are a subject that can cause the eyes to glaze over, but we should all be paying attention.”

— Joseph Stiglitz (Stiglitz 2014, paragraph 1)

Looking around the trade landscape, it is easy to conclude that most of the action these days is not at the global level; it is in the proliferation of regional trade agreements (RTAs) and, in particular, the negotiation of mega-regional agreements. Developments at the World Trade Organization (WTO) have been discouraging in recent years. The Doha Round negotiations have been ongoing for over a decade in fits and starts, with little to show for the effort. WTO members did manage to deliver the Trade Facilitation Agreement (TFA) at the end of 2013, which promises to reduce the cost of customs procedures at national borders. However, hopes were dashed again when members missed the July 31, 2014 deadline to start the official TFA ratification process. In October 2014, the director-general of the WTO, Roberto Azevêdo, expressed pessimism at resolving the impasse. At this writing, a breakthrough agreement between the United States and India suggests that Doha Round efforts might be back on track, but a final outcome is still undetermined.

At the same time, negotiations such as those for the Trans-Pacific Partnership, which includes Canada, the United States, Japan, Mexico and several other Asia-Pacific trading nations; the US-EU Transatlantic Trade and Investment Partnership (TTIP); and the Canada-EU Comprehensive Trade and Economic Partnership have all caught the public’s attention. Wise observers are also paying increased attention to the Regional Comprehensive Economic Partnership that includes the Association of Southeast Asian Nations (ASEAN) nations, China, India, Japan, Australia, New Zealand and South Korea. These negotiations are noteworthy for including some of the largest traders (and excluding others), for the volume of

trade that they would regulate and for the kinds of economic policy issues that they tackle. All of these prospective agreements seek to move beyond the traditional tariff reduction and market access goals of conventional trade agreements to rule-making and regulatory convergence.

If the frame of reference in observing the trade landscape is global versus regional, then it makes sense to focus on the mega-regional at this particular time. Nonetheless, it is important to note that we risk missing another category altogether — the plurilateral. There are developments in this realm that can have real consequences for domestic economies and societies, yet they can go unnoticed. This paper seeks to illuminate developments in the plurilateral realm, specifically negotiations toward the Trade in Services Agreement (TiSA). Just as it has become commonplace to ask whether regional agreements advance economic and political agendas, so is it useful to explore the promise and peril of plurilateral agreements.

Formal negotiations toward a TiSA started in March 2013. The most recent round of talks occurred in Geneva in December of 2014. Another round of talks is scheduled for February 2015. Currently, there are 23 parties to the Trade in Services negotiations, commonly referred to as the “Really Good Friends of Services,” which are Australia, Canada, Chile, Chinese Taipei, Colombia, Costa Rica, the European Union, Hong Kong, Iceland, Israel, Japan, Liechtenstein, New Zealand, Norway, Mexico, Pakistan, Panama, Paraguay, Peru, South Korea, Switzerland, Turkey and the United States. It is, of course, notable that Brazil, India, Russia and other emerging market countries are not involved at this time. China has expressed interest in joining the talks; however, the United States seems hesitant to welcome China to the negotiating table. The United States is seeking assurances that China will commit to a high level of services liberalization and reports suggest that the Americans have imposed conditions for China’s participation, which the Chinese government has, unsurprisingly, rejected (Inside US Trade, cited in Sinclair and Mertins-Kirkwood 2014). In March 2014, the European Union expressed strong support for China to join TiSA negotiations. Uruguay has also asked to join the talks. No other countries have made formal requests to join.

## PLURILATERAL AGREEMENTS

The TiSA is best characterized, at this time, as a plurilateral agreement. The proliferation of trade agreements invites discussion of definitions. When subsets of WTO members pursue agreements among themselves, the terms “RTA” and “plurilateral agreement” are particularly relevant. The WTO defines RTA “as reciprocal trade agreements between two or more partners. They include free trade agreements and customs unions” (WTO 2014). The General Agreement on Tariffs and Trade (GATT) allows for the formation

of customs unions and free trade areas, providing, “duties and other restrictive regulations of commerce... are eliminated with respect to substantially all the trade between the constituent territories or at least with respect to substantially all the trade in products originating in such territories” (GATT 1994, paragraph 8(a)(i)) The WTO defines plurilateral agreements as those by which not all members are bound.

These categories seem quite similar. Plurilateral agreements resemble RTAs in the sense that both have a limited number of signatories. But, whereas an RTA aspires to be comprehensive across the full range of sectors, a plurilateral agreement typically focuses on a specific sectoral domain. Good examples include the Agreement on Trade in Civil Aircraft and the Agreement on Government Procurement, which are two plurilateral agreements operating under the auspices of the WTO. Plurilateral agreements offer the possibility of moving forward on an issue that does not concern all trading nations or that cannot gain the support of all of them. B. M. Hoekman and M. M. Kostecky (2009, 529) explain that plurilateral agreements “are a vehicle for like-minded countries to cooperate in areas not (yet) addressed by the WTO. They allow countries not willing to consider disciplines in a policy area to drop out.”

Negotiating plurilateral arrangements is not uncommon in the history of the trading regime, dating back to the GATT era, which predates the WTO. As M. Nakatomi (2013, 3) explains, “the Kennedy Round (1964–67) and the Tokyo Round (1973–79) produced a number of codes — the Agreement on Subsidies and Countervailing Measures, the Anti-dumping Agreement, the Agreement on Technical Barriers to Trade, the Agreement on Import Licensing Procedures, the Customs Valuation Agreement, the Agreement on Trade in Civil Aircraft, the Agreement on Government Procurement, the International Dairy Agreement, and the International Bovine Meat Agreement.” These codes functioned with a subset of signatory countries, as few as 10 in some cases.

Many of the codes negotiated in prior rounds became multilateral commitments during the Uruguay Round. Some plurilateral agreements, such as the International Dairy Agreement and the International Bovine Meat Agreement, were terminated when their relevance waned. Some unsuccessful plurilateral efforts have been made outside the WTO (for example, the Anti-Counterfeiting Trade Agreement). Other plurilaterals, such as the Information Technology Agreement (ITA), are considered to be successful. Despite this variation, we can point to only a handful of plurilateral agreements as compared to the approximately 375 RTAs currently in force.

Any time a subset of WTO members makes an agreement on their own, there is concern about weakening the multilateral system. The multilateral system presumes consensus and, since the end of the Uruguay Round, functions

according to the single undertaking. These principles set the tone for comprehensive and inclusive action. Nonetheless, various WTO agreements include provisions allowing smaller groups of members to move ahead on a regional or a plurilateral basis under specific conditions. Indeed, the General Agreement on Trade in Services (GATS) specifically anticipates such an effort in services. Article V (1) says that the GATS “agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement, provided that such an agreement... has substantial sectoral coverage.” (GATS 1995 paragraph 1). Therefore, while some might argue that neither regional nor plurilateral agreements fulfill the spirit of multilateralism, they are “GATT-legal.”

Plurilateral agreements, by definition, have limited or partial participation; however, this can be deceiving. Participation by a subset of countries can still allow for the liberalization of the lion’s share of trade in the sector under discussion. “In the case of the ITA, it was agreed that signatories must represent at least approximately 90 percent of world trade in products covered by the agreement as a prerequisite to its entry into force” (Nakatomi 2013, 13). The ITA came into force in 1997 with the participation of 44 countries, accounting for a “critical mass” of trade in information technology products, more than 90 percent (*ibid.*, 4). Today, 70 signatories represent roughly 97 percent of the information technology trade. It is noteworthy, then, that the absence of a number of WTO members need not indicate that sectoral liberalization will be partial or uneven. If the major contributors to the sector are party to the agreement, liberalization can be comprehensive.

Plurilateral agreements need not be static. They need not be restricted solely to the signatories that participate in the early negotiations. Benefits can be extended to non-participating partners in a variety of ways. For example, Nakatomi observes, “as is the case under the ITA, the Basic Telecommunications Services Agreement, and the Financial Services Agreement, liberalization commitments made under plurilateral agreements are, in many cases, applied to non-party members on an MFN [most-favoured nation] basis” (*ibid.*, 9). Some concerns about potential damage to the multilateral system can be allayed with a combination of ensuring inclusion of a critical mass of sectoral trade and MFN extension (*ibid.*, 11). The parties to the TiSA negotiations currently represent about 70 percent of international trade in services, which would not typically meet the critical mass threshold. It is not yet clear whether or how the agreement might be extended to non-signatories.

## WHAT COUNTS AS A SERVICE?

The range of activities that can usefully be categorized as services is quite broad. W. H. Cooper and R. M. Nelson (2014, 16) maintain, “the term ‘services’ includes a broad range of economic activities many with few characteristics in common except that they are not goods.” S. Herzenberg, J. A. Alic and H. Wial (2000, 22) point out “conventionally defined as a residual category, the service sector includes all parts of the economy other than farming, resource extraction (mining, forestry, fishing), construction and manufacturing.” The authors go on to note the importance of rethinking services as a residual category as their importance to the modern economy increases. “Government statistics in the United States (and elsewhere) lump service industries together with little obvious or satisfying logic. For example, real estate is conventionally grouped with insurance and banking, utilities with transportation” (ibid., 23). Included on this long and diverse list are: retail and wholesale sales; financial services; telecommunications; passenger fares and other travel and transportation services including tourism; royalties and licensing fees for the use of intellectual property rights; express delivery; e-commerce; education services; banking, insurance and other financial services; accounting; and construction, architectural and engineering, legal services and other professional services (Cooper and Nelson 2014, 1).

The features that distinguish services from goods make thinking about their liberalization complex. G. C. Hufbauer, J. B. Jensen and S. Stephenson (2012, 4) report, “in the early days of statistical publications, services were labelled ‘invisibles.’” Services are intangible (for the most part). They cannot typically be stored or loaded on a truck. The consumer and the producer often have to be present simultaneously as the service is frequently produced and consumed in the same moment (Hoekman and Kostecki 2009, 319). And even if there is a tangible product, a film reel or an architectural plan “most of the value of the product stems from the know-how and skills going into the original production, not the physical artifact” (Herzenberg, Alic and Wial 2000, 22). The Organisation for Economic Co-operation and Development (OECD) definition captures the diversity and complexity of the sector. “Services are not separate entities over which ownership rights can be established. They cannot be traded separately from their production. Services are heterogeneous outputs produced to order and typically consist of changes in the condition of the consuming units realised by the activities of the producers at the demand of the customers. By the time their production is completed they must have been provided to the consumers” (OECD 2005).

It is interesting to note that the GATS, the multilateral agreement that governs services trade, does not offer

an explicit definition of services. Instead, it captures the distinctiveness of services by specifying the categories that correspond to four modes of services supply or delivery. “Exports of services can take different paths. To illustrate, a U.S.-based software company can export its products via the Internet (‘cross-border trade,’ known as mode 1), provide training to its staff based in Spanish-speaking countries in Panama (‘consumption abroad,’ mode 2), sell service contracts through a Japanese affiliate (‘commercial presence,’ mode 3), and employ a Dutch national with an H-1B visa at its headquarters (‘movement of natural persons,’ mode 4)” (US Chamber of Commerce 2014, paragraph 6). This categorization drives home the unique attributes of services as compared to goods.

The distinctiveness of services makes measuring trade in services, and estimating a numerical value of the barriers to trade, challenging (Cooper and Nelson 2014; Schott, Lee and Muir 2012, 15). Indeed, a key controversy lies in identifying what counts as a barrier to services trade. There are few familiar tariffs or border measures. Instead, barriers to services trade are usually behind-the-border or regulatory in nature. It is safe to say that, in many instances, governments have implemented policies or regulations for reasons unrelated to services trade. Only after the fact do these measures come to be seen as barriers to trade in services or as discriminatory trade practices. For example, some industries limit or prohibit foreign ownership. This may be a perfectly defensible choice for political and practical reasons. But foreign actors wishing to participate in the industry see it as a discriminatory practice and perhaps as a limitation on national treatment. Similarly, governments may require professionals to hold certain credentials or work permits. These measures may spring from an immigration, a labour or even a consumer protection calculus. However, potential foreign entrants into these sectors see them as barriers to services trade. Navigating this overlap between trade and other policy areas can be especially challenging where public services are concerned (Sinclair and Mertins-Kirkwood 2014). Indeed, to date, governments have been hesitant to make commitments in sectors such as health and education for just this reason (Hufbauer, Jensen and Stephenson 2012, 8).

Liberalization of services does not entail the loss of revenue that accompanies removal of tariffs (ibid.). Nonetheless, governments and societies can incur costs of a different kind. Many so-called barriers to services liberalization take the form of government regulations. The challenge is to preserve the right of sovereign governments to regulate their own economy while encouraging them to do so in a “non-discriminatory” way. Some regulations are, however, by their very nature, discriminatory. The discrimination may be an inadvertent by-product of policy making for other purposes (ibid., 5), but when refracted through a trade lens, it appears to impede competition or market access. It falls to individual societies to weigh the potential

economic cost of not liberalizing a particular services sector against the political, social and cultural gain. For example, some might suggest that further liberalization of the financial services sector would bring economic gain. It is incumbent upon policy makers to ensure that the freedom to make necessary prudential regulation is not sacrificed in the bargain. Similarly, privatization of postal services can create opportunities for foreign operators. Conversely, such a fundamental shift to the delivery of public services is unpalatable to many for legitimate socio-political reasons. Yet another example some commentators have recently been exploring is the prospects for liberalization of health services (Lester 2013). This is an alarming development for societies that regard health care as a public service. These examples point to the importance of encouraging vigorous public debate over the limits of services liberalization and their prospective impact on other highly valued policy objectives. Ideally, this debate should be fostered now, before further progress is made in TiSA negotiations.

## TRADE IN SERVICES

Statistics on services trade are not as comprehensive or plentiful as those available for goods trade (Cooper and Nelson 2014; Schott, Lee and Muir 2012). Nonetheless, there is mounting evidence to suggest that the economic importance of the services sector has grown in recent decades, in no small part due to technological advancements. Hufbauer, Jensen and Stephenson (2012, 1) call the service sector “an ‘enabler’ of economic activity, permitting production processes in agriculture, manufacturing, and even final service industries to move forward smoothly.” The services sector contributes directly to GDP, but also indirectly as an input to other sectors, including manufacturing, agriculture and natural resources. According to the Coalition of Services Industries (2014, paragraph 4) “the services sector is the world’s largest employer, and produces 70 percent of global GDP.” Hufbauer, Jensen and Stephenson (2012, 1, 4) note, “service sectors have long been the largest destination of foreign direct investment flows....Worldwide, the service sector accounts for over 68 percent of global GDP, agriculture less than 10 percent.”

The growing contribution of the services sector is not only observed in developed economies. As Hufbauer, Jensen and Stephenson (2012, 4) state, “in advanced economies, such as the United States, the United Kingdom, and the European Union, services employment is two-thirds or more of the total. But even in some economies with lower income per capita, such as Russia and Brazil, the service sector accounts for more than 60 percent of employment, and in Mexico it is almost 60 percent.” Similarly, the United Nations Conference on Trade and Development (UNCTAD) reports that the services sector constitutes

approximately 51 percent of GDP in developing countries (UNCTAD 2014, 10).

The United States is the largest exporter and largest importer of services if the EU member states are taken separately. Otherwise the United States is second after the European Union, if the European Union is taken as a unit (Cooper and Nelson 2014, 7). In 2012, services accounted for 29 percent of total US exports (*ibid.*, 1). Industry Canada (2013, paragraph 2) reports that the service sector in Canada is growing. “Sales have increased by 13.5 percent over the period 2007–2011, reaching \$122.3 billion in 2011. Employment grew by 13.7 percent during the same period....GDP for the sector grew by 2.7 percent.” According to Statistics Canada (2006, paragraphs 1 and 3), “the GDP of service industries in 2004 totalled \$714 billion — almost double the amount in 1984....In 2004, three out of every four working Canadians — 12 million people — worked in services.”

Despite the rising economic importance of the services sector, many analysts note that services liberalization has not progressed as far as one might have predicted. As early as 1974, the US government was seeking liberalization of services or, at least, seeking to add services liberalization to the trade agenda (Cooper and Nelson 2014, 13). However, Hoekman and Kostecki note that services liberalization has not progressed as far as goods liberalization and this is not surprising (see also Hufbauer, Jensen and Stephenson 2012). The stakes in services liberalization are different and, for many, higher. This is partly due to the fact that trade in services is simply not as intuitive for many as trade in goods. Hufbauer, Jensen and Stephenson (2012, 4) remind us, “just two decades ago, the common view (even among economists) was that nearly all services were ‘nontradable’ products.”

The United States sought to add services to the GATT agenda in 1982 (Hoekman and Kostecki 2009, 318). This initiative was met with “vigorous resistance” (*ibid.*); however, it did precipitate the establishment of a work program around services, as well as national-level self-study with regard to domestic services sectors. This laid the groundwork for negotiation of the GATS during the Uruguay Round of GATT negotiations (*ibid.*). GATS was the first major agreement on services trade and the only multilateral one, coming into force in 1995. Compared to efforts to liberalize goods trade, GATS is a tentative step, reflecting the reticence of many WTO members to liberalize services. During the Uruguay Round, most countries agreed that moving forward cautiously would be appropriate.

As a result, GATS establishes general principles pertaining to trade in services. Specific liberalization commitments apply only to the sectors designated by members in their respective “schedules” (*ibid.*, 335). The GATS agreement

explicitly recognizes that it was a first step in the process of services liberalization. It mandates continued efforts. This “built-in” agenda was incorporated into the Doha Development Round. “Article XIX of the [GATS] mandates WTO members to ‘enter into successive rounds of negotiations...with a view to achieving a progressively higher level of liberalization on specific commitments’” (Schott, Lee and Muir 2012, 13). The slow pace of the Doha Round has meant that little progress was made on services liberalization in that context. Also, Cooper and Nelson (2014, 15) note that the offers being made by WTO members as part of Doha Round negotiations in services were generally unsatisfactory.

For the largest services exporters, services liberalization has not advanced satisfactorily at the WTO. Some have pursued their interests in RTAs; however, this represents a patchwork effort. Recent RTAs include services provisions that seek to go beyond what was achieved with the establishment of the GATS. Schott, Lee and Muir (2012) surveyed selected free trade agreements, concluded recently by Asian governments, to show that services coverage in those agreements is uneven. They note that the US-Korea free trade agreement has gone the farthest in the sense that it uses a negative list approach and provides unconditional MFN and national treatment (*ibid.*, 4). The authors go on to note that the United States and Korea made commitments that go beyond those made in GATS across a series of service sectors (*ibid.*, 11).

As early as 2005, WTO members, unsatisfied with the uneven and slow multilateral liberalization of services, floated the idea of a plurilateral effort. It was not until the prospects for a successful Doha Round dimmed that serious negotiations toward a plurilateral TiSA took hold. The United States and Australia renewed calls for a plurilateral agreement on services in 2012.

## KEY QUESTIONS ABOUT TiSA

### WILL TiSA FUNCTION ACCORDING TO A NEGATIVE OR POSITIVE LIST?

Signatories to trade agreements typically make their commitments on the basis of a positive or negative list.

Under the negative list approach all service sectors and measures are included in the agreement, and generally all of the disciplines apply to these sectors and measures without limitations, unless otherwise specified. The positive list allows each country to select which service sectors and subsectors will be included, and what type of market access and treatment each will receive. The positive list approach is more limiting with regard to the coverage in each national schedule. In contrast, the negative

list approach obliges countries to review the entire range of regulatory measures and restrictions in the service sector, and identify those that should be placed in a list of “non-conforming” measures (i.e., those measures or sectors that cannot meet the core disciplines of market access, national treatment, and unconditional MFN). (Schott, Lee and Muir 2012, 20)

Multilateral goods negotiations and most RTAs use a negative list. However, due to the sensitive nature of services liberalization, GATS signatories made commitments on a positive list basis. Each GATS signatory has a schedule of commitments that indicates specifically which sectors the government is willing to open. “Thus, unless a member country has specifically committed to open its market to service suppliers in a particular service that is provided via one or more of the four modes of delivery, the national treatment and market access obligations do not apply” (Cooper and Nelson 2014, 14).

TiSA will likely not preserve the GATS positive list approach in its entirety. The United States and the European Union, the main motive forces behind the initiative, want TiSA to include the full range of services and to move beyond the efforts made in the multilateral context. “The EU — like the other participants — wants the negotiations to go beyond simply further opening up markets for services. The aim is also to develop new rules on trade in services, such as those applying to government procurement of services, licensing procedures or access to communication networks” (European Commission [EC] 2014a, paragraph 7). Reports suggest that parties to the TiSA negotiations are currently working with a hybrid approach — “national treatment obligations would be negotiated under a negative list and market access obligations would be negotiated under a positive list” (Cooper and Nelson 2014, 21). Governments will certainly retain less flexibility in areas governed by a negative list.

### WILL PROTECTIONS BUILT INTO THE GATS CARRY OVER TO TiSA?

In addition to using a positive list, GATS contains specific exclusions. For example, GATS, Article I:3 excludes services “provided in the exercise of governmental authority.” The article goes on to say, “a service supplied in the exercise of governmental authority means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers” (WTO 1995, 286 [3:C]). This exclusion was considered to be especially important to protect a government’s ability to supply public services. Whether TiSA will preserve this exclusion is not yet clear. Indeed, it is debatable whether doing so would insulate public services to the degree that many would prefer.

Public services in many places, including Canada, are provided according to a mixed system with public and private components (see Goff 2007; Sinclair and Mertins-Kirkwood 2014). If a particular public service has a commercial element, would it still fall under a GATS-like exclusion? The answer is unclear. The safest avenue is for a government to resist making any commitments in any sector over which it wants to retain control.

### **WILL TiSA RESTRICT SIGNATORY GOVERNMENTS' REGULATORY FLEXIBILITY?**

For many, the answer to this question hinges on whether there will be a ratchet clause in TiSA. "This clause requires that all liberalization that takes place in a service sector subsequent to the entry into force of the agreement must be retained permanently and applied to all parties" (Hufbauer, Jensen and Stephenson 2012, 7). A ratchet clause would make it difficult, if not impossible, for a government to reintroduce a practice recognized by other signatories as a trade barrier in a sector that it has not shielded from liberalization. Reports suggest that a ratchet in TiSA would apply to national treatment, but not to market access commitments. Where a government has not made commitments, the ratchet would not apply.

Opponents of the ratchet clause worry that negotiators cannot anticipate every eventuality that governments might face. Governments, such as the European Union, can seek to exclude sectors such as water because they have experienced "remunicipalization," wherein a privatized sector has been returned to public hands (Sinclair and Mertins-Kirkwood 2014). But, short of excluding all sectors, governments may find that they have their hands tied.

### **WHAT WILL TiSA'S RELATIONSHIP TO THE WTO BE?**

TiSA's relationship to the WTO could take various forms. At the moment, TiSA is being negotiated outside of the WTO because multilateral negotiations are stalled. Those who want to advance services liberalization are unwilling to wait until the impasse at the WTO is resolved. This scenario leaves open the possibility that TiSA might eventually be brought under the auspices of the WTO. Indeed, various participants in TiSA negotiations have indicated that their starting point is the GATS agreement. Starting from a GATS-friendly foundation should ostensibly make it easier to bring TiSA back into the WTO (EC 2014b). The European Union, for example, has expressed the hope that more WTO members will join the TiSA negotiations so that it might eventually be a broader WTO agreement (ibid.). This suggests that the goal of the negotiating parties is to skirt the frustration of the stalled Doha Round, but not the frameworks and disciplines of the multilateral system itself (Schott, Lee and Muir 2012, 19).

Nonetheless, M. Kolsky Lewis (2013) argues that integrating TiSA into the WTO may not be so simple. "It remains to be determined how the TiSA would be integrated within the WTO, if at all. One option would be to treat it as a plurilateral agreement that would fall under Annex 4, akin to the Agreement on Government Procurement" (Kolsky Lewis 2013, 2). However, Kolsky Lewis predicts that some countries currently outside TiSA negotiations, such as Brazil, Russia, India, China and South Africa (the BRICS), might not deliver the consensus required of all WTO members to make this happen. She goes on to say, "another possibility would be for TiSA to be integrated as a special services protocol, akin to the Financial Services and Telecommunications Annexes to the [GATS]" (ibid., 2). This approach, too, seems unlikely, as it would require the TiSA parties to provide their concessions on an MFN basis to all non-TiSA signatory WTO members. At the moment, reports suggest that participating TiSA parties are not considering unconditional MFN. Some analysts are counselling conditional MFN for TiSA. "Conditional MFN treatment may be the wiser choice in this agreement considering the fact that several important countries have not yet agreed to participate in the ISA and would be 'free riders' on the prospective liberalization if the accord is implemented on an MFN basis" (Schott, Lee and Muir 2012, 20; see also Cooper and Nelson 2014, 21; Hufbauer, Jensen and Stephenson 2012, 2).

### **IN WHICH SECTORS IS MY GOVERNMENT MAKING SERVICES LIBERALIZATION COMMITMENTS?**

The TiSA, similar to the WTO or any other trade framework, is neither intrinsically bad nor good. It is merely a forum or a process for national governments to negotiate outcomes. As such, the critical decisions are made in national capitals, and key questions about controversial elements of any services agreement must be posed there. To date, few governments have been transparent about their specific commitments. While some initial offers are available, the only significant agreement content that has circulated — the financial services annex — came about as a result of action by Wikileaks. Even this content must be read carefully because there are arguably linkages between the offers being made by the United States and the European Union in TiSA and the efforts that they will make to liberalize transatlantic trade in TTIP. Certainly, negotiations with such high stakes demand that governments not show their hand too early. At the same time, citizens need reassurances that there is a line beyond which governments will not go in order to protect certain policy domains from liberalization.

## CONCLUSION

Services liberalization is inevitable, but how this liberalization unfolds invites discussion and debate. This paper has sought to show that the stakes are high in the negotiation of the TiSA. We ignore it at our peril. Needless to say, there is still much that is not known about the negotiations given their lack of transparency. Regardless, some concluding observations can be made, in particular about the trading system generally and the potential domestic consequences of TiSA.

As a plurilateral undertaking, TiSA is allowing those governments that wish to move further and faster on services liberalization to do so. This is a positive development for them and for the businesses that wish to take advantage of liberalization opportunities sooner as opposed to later. It is worth noting that the parties to TiSA are essentially writing the latest rules governing services. Their objective is to move beyond the tentative steps taken in the GATS. They are doing so without consulting those excluded countries that may, one day, become subject to these same rules. Reverting to exclusive clubs to make rules that will govern key sectors of the economy in the coming years may have an economic payoff for some. At the same time, the fragmentation that can result is not optimal. In addition, an outcome that excludes trading partners, or seeks to impose rules on trading partners that did not participate in the process, lacks the legitimacy of a more inclusive effort.

Negotiating services liberalization inevitably means exploring domestic regulation in a range of policy areas since many so-called barriers to services trade are regulatory. It is entirely possible that regulations intended to achieve a non-trade objective can be designed in such a way as to be compatible with trade-related goals. Regulations aimed at achieving an environmental or consumer-safety outcome, for example, can be consistent with services liberalization efforts so long as they are non-discriminatory. The challenge comes when regulations designed to achieve a non-trade outcome come into conflict with services liberalization efforts. How will these conflicts be resolved? This is a question for each society to answer. Ideally, the guidelines for these conflicts will emerge not in backroom negotiations, but from spirited public debate.

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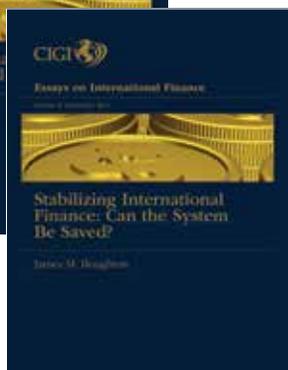
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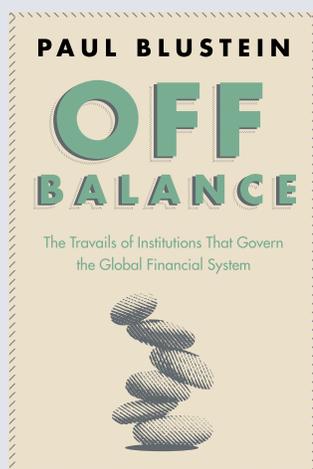
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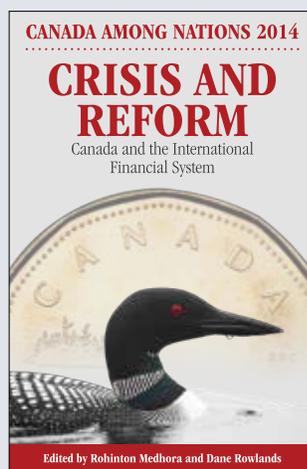
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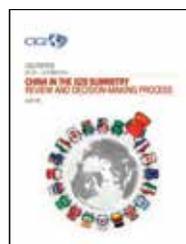
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