

LEGAL FORMS OF NEGOTIATED TRADE IN SERVICES AGREEMENT (TiSA) OUTCOMES – PERSPECTIVES ON TRADE INTEGRATION AND AN INCREMENTALIST APPROACH TO QUASI-MULTILATERALIZATION^a

Amalie Giødesen Thystrup^b

Abstract

The summer 2016 saw some of the key emerging economies change their position on services negotiations at the WTO, which may prove instrumental in bringing services back to the WTO, via The Trade in services Agreement (TiSA). While TiSA parties have discussed critical mass based multilateralization for a while, another approach may prove to be more viable - "incrementalism" and "quasi-multilateralization". This hybrid legal form of negotiated outcomes would entail a long-term, multilayered approach integrating TiSA into the GATS/WTO framework at a time that may see TiSA's silver lining materialize. TiSA could help re-invigorate services negotiations at the WTO and conceptualize legal forms that embody coexistence and transmission between frameworks.

^a This research, forming part of a PhD thesis in law, was carried out while a Visiting Scholar with the WTO Secretariat, Services and Investment Division, and a Junior Visiting Fellow with The Graduate Institute Geneva, Centre for Trade and Economic Integration (CTEI), 30 May through 26 August 2016. The author is grateful to Abdel-Hamid Mamdouh and to Professor Joost Pauwelyn for hosting her. The author would like to thank professor Petros C. Mavroidis for framing the question on critical mass and for helpful discussions. The author would also like to extend her gratitude to Abdel-Hamid Mamdouh for being so generous with his time and his expertise. All errors and omissions belong to the author, and the views expressed in this paper are personal. Manuscript date: 29 September 2016.

^b agt@jur.ku.dk. PhD Fellow, University of Copenhagen, Faculty of Law, Centre for Enterprise Liability (CEVIA).

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Legal Forms of Negotiated Trade in Services Agreement (TiSA) Outcomes – Perspectives on Trade Integration and an Incrementalist Approach to Quasi-Multilateralization

Amalie Giødesen Thystrup¹

Abstract: The summer 2016 saw some of the key emerging economies change their position on services negotiations at the WTO, which may prove instrumental in bringing services back to the WTO, via The Trade in services Agreement (TiSA). While TiSA parties have discussed critical mass based multilateralization for a while, another approach may prove to be more viable - "incrementalism" and "quasi-multilateralization". This hybrid legal form of negotiated outcomes would entail a long-term, multilayered approach integrating TiSA into the GATS/WTO framework at a time that may see TiSA's silver lining materialize. TiSA could help re-invigorate services negotiations at the WTO and conceptualize legal forms that embody coexistence and transmission between frameworks.

The plurilateral Trade in Services Agreement (TiSA) negotiations have progressed steadily among its now 23 parties (when counting the EU as one) since commencing in 2013 on the heels of the stalled Doha Round.² With TiSA, for the first time, world trade is seeing WTO negotiations replaced by negotiations taking place outside the World Trade Organization (WTO), and these negotiations are succeeding in shaping a deeper framework for trade in services. This development is speeding up as parties, in July 2016, stated that they aim to conclude TiSA this year.³ In the twilight of the Doha Round's deadlocked Doha Development Agenda (DDA), this summer also saw two major emerging economies, Brazil and Argentina, change their approach to services and related new issues at the WTO.⁴

¹ PhD Fellow, University of Copenhagen, Faculty of Law, Centre for Enterprise Liability (CEVIA). This research, forming part of a PhD thesis in law, was carried out while a Visiting Scholar with the WTO Secretariat, Services and Investment Division, and a Junior Visiting Fellow with The Graduate Institute Geneva, Centre for Trade and Economic Integration (CTEI), 30 May through 26 August 2016. The author is grateful to Abdel-Hamid Mamdouh and to Professor Joost Pauwelyn for hosting her. The author would like to thank professor Petros C. Mavroidis for framing the question on critical mass and for helpful discussions. The author would also like to extend her gratitude to Abdel-Hamid Mamdouh for being so generous with his time and his expertise. All errors and omissions belong to the author, and the views expressed in this paper are personal.

² See <http://ec.europa.eu/trade/policy/in-focus/tisa/> accessed 29 September 2016, 4.30 pm. The most recent round of negotiations – the 20th round - took place in Geneva, 16-26 September 2016. The DG Trade website includes reports on the rounds.

³ Transparency session co-chaired by Australia, EU, and US at the WTO, 18 July 2016, Geneva. Notes from the session are on file with author who was a non-participating observer.

⁴ During the services cluster, the Working party for Domestic Regulation (WPDR) met on 16 June 2016, and here, Brazil and Argentina declared their support for discussing Domestic Regulation (DR). During the Special Session on 4 July

May this development prove to be fertile ground for bringing the services pillar from the DDA – the one that escaped and is now taking shape in TiSA – back to the WTO? The purpose of this paper is to explore the legal forms of negotiated outcomes and to contribute to the discussions on multilateralization of TiSA by conceptualizing an alternative hybrid approach to TiSA’s integration into the multilateral trading system, “incrementalism” and “quasi-multilateralization”.

With TiSA parties, namely the EU, insisting that this new framework become “multilateralized”, the world trading system may see the services pillar – in the shape of TiSA along with new and enhanced disciplines and rules on new issues – return to the WTO.⁵ With a gap between TiSA parties and non-TiSA parties, and with variations in positions on TiSA’s legal form within the TiSA parties, the world trading community and trade negotiators need to be creative and explore new approaches to trade integration. In doing so, trading parties need to think beyond what has been suggested in allowing for plurilateral agreements in the WTO.⁶ Which options could parties pursue to integrate TiSA into the GATS/WTO framework, and – as WTO members have returned from the summer break this September – how may this play out given recent policy shifts among WTO members?

Building on trade integration theory⁷ and on the framework for multilateralizing regionalism,⁸ the main purpose of this paper is to discuss legal forms of negotiated outcomes for TiSA based on

2016, both e-commerce and DR were welcomed, with 25 members supporting DR (20 members named DR a priority). Furthermore, Brazil and Argentina gave encouraging interventions during the General Council on 27 July 2016. Argentina even submitted its bid to host the 11th WTO Ministerial Conference, while Brazil declared its support for e-commerce and stated that the WTO would see “a changing Brazil”. The author was a non-participating observer during these meetings and has retained notes. Also, see the WTO website

https://www.wto.org/english/news_e/news16_e/gc_rpt_27jul16_e.htm accessed 15 September 2016, 4.30 pm.

⁵ See link to the Director-General for Trade (DG Trade) under the European Commission in footnote 2, supra. Also, see EU’s non-paper leaked on 15 September 2016. The non-paper, prepared by DG Trade, includes draft provisions on “multilateralisation”. See section IV.

⁶ Bernard M. Hoekman and Petros C. Mavroidis, WTO ‘à la carte’ or ‘menu du jour’? Assessing the Case for More Plurilateral Agreements *Eur J Int Law* (2015) 26 (2): 319-343 doi:10.1093/ejil/chv025, and Bernard M. Hoekman and Petros C. Mavroidis, Embracing Diversity: Plurilateral Agreements and the Trading System. *World Trade Review* (2015), 14, pp 101-116. doi:10.1017/S1474745614000378. Pauwelyn, Joost, *Plurilateral Trade Agreements: In or Out of the WTO? MFN or Preferential??* The Graduate Institute, Geneva, 2012. Also see for example speech by Director-General Pascal Lamy, delivered 1 October 2010) at the occasion of the 10th anniversary of the World Trade Institute in Bern, “...One approach would be to explore the scope for more plurilateral agreements — allowing smaller groups of Members to move forward, outside the single undertaking, on issues important to them...”. For the RTA perspective, see Pauwelyn, Joost. “Legal Avenues to “Multilateralizing Regionalism”: Beyond article XXIV1.” *Multilateralizing regionalism: Challenges for the global trading system*, Cambridge University Press (2007), p. 368.

⁷ Including Ethier, W. and H. Horn (1984), *A New Look at Economic Integration*, in Kierzkowsky, H., *Monopolistic Competition and International Trade*, OUP, pp. 207-29.

current developments. However, it is not the purpose of this paper to give a full account of trade integration theory or international relations, and it does not offer an analysis of legal-political or institutional implications of the legal forms suggested available to TiSA parties. Nor does it explore implications on governance stemming from non-parties affected by rules that they have not participated in shaping. While the paper draws on new and enhanced disciplines such as Domestic Regulation (DR) and e-commerce, space does not allow for an analysis of these disciplines. This paper is merely a piece coupling developments over the summer 2016 with insights into legal forms available for a still moving target that may – and most likely will – change dramatically over the course of the next few months as parties pursue an (almost) done deal by the end of the year. For this purpose, the paper assumes that TiSA will be compatible with GATS.⁹

Section 1: From the DDA to TiSA...

The conclusion of the Uruguay Round saw the creation of the WTO and the conclusion of the General Agreement on Trade in Services (GATS).¹⁰ It also saw the conception of the so-called built-in agenda calling for the start of market access negotiations on agriculture and services in 2000.¹¹ In article XIX, The GATS, including its Annexes and Related Instruments, sets out the “built-in agenda” for progressive liberalization of services, and Article XIX:3 stipulates how the process of progressive liberalization shall be advanced in rounds of negotiations directed towards increasing the general level of specific commitments by members under GATS. The Doha Round, commencing in Qatar in November 2001, followed two unsuccessful rounds in Seattle and Cancun. The Doha Round was billed as a development round¹² and when adopting its agenda, called the Doha Development Agenda (DDA), it consumed the built-in agenda but re-conceptualized it to include market access in three pillars: agriculture, non-agricultural manufacturing (NAMA), and services.¹³ Thus, services negotiations were folded into the DDA.¹⁴ The DDA architecture is in line

⁸ Multilateralizing regionalism was conceptualized in Geneva in 2007, see the 2009 book following the 2007 conference, Baldwin, Richard, and Patrick Low, eds. *Multilateralizing regionalism: challenges for the Global Trading System*. Cambridge University Press, 2009.

⁹ Preliminary findings suggest this is the case (to be developed as part of PhD thesis). For a different perspective, see ADLUNG, R. (2015) ‘The Trade in Services Agreement (TiSA) and Its Compatibility with GATS: An Assessment Based on Current Evidence’, *World Trade Review*, 14(4), pp. 617–641. doi: 10.1017/S1474745615000294.

¹⁰ For an overview of the GATS creation, Marchetti, Juan A., and Petros C. Mavroidis. "The Genesis of the GATS (General Agreement on Trade in Services)." *European Journal of International Law* 22.3 (2011): 689-721..

¹¹ GATS article XIX.

¹² On the Doha Round’s fundamental objective to improve the trading prospects of developing countries, see the WTO website https://www.wto.org/english/tratop_e/dda_e/dda_e.htm accessed 10 September 2016, 1 pm.

¹³ The “Doha Ministerial Declaration” is available at the WTO website https://www.wto.org/english/tratop_e/dda_e/dda_e.htm#declaration accessed 10 September 2016, 1 pm.

with the single undertaking mentality that was successful during the Uruguay Round, as the structure of the agenda, including its three pillars, clearly identifies a goal of achieving negotiated outcomes on a “packaging basis”. Thus, the three pillars are inherently tied together, with an additional layer of development objectives.

In 2005, attempting to move services negotiations forward in the DDA, the Hong Kong Ministerial Declaration provided that plurilateral request-offer negotiations take place in addition to bilateral request-offer exchanges, and commitments would then be extended on an MFN basis.¹⁵ In 2006, WTO members engaged actively in a plurilateral request and offer process in the context of Doha but despite these efforts, the DDA was not yet been resolved. On 26 July 2008 WTO members proceeded to engage in a so-called “signaling conference” in what has been described as a “last-ditch effort” to negotiate services within the framework of the DDA, and here WTO members “signaled” to each other in which areas they found progress could be made.¹⁶ This exercise helped WTO members map interest in commencing negotiations on services, and the chairman concluded the exercise by noting some optimism.¹⁷ Yet, the signaling conference failed to produce any meaningful follow-up, leaving the WTO members who wanted to pursue progress in multilateral liberalization of trade in services frustrated.¹⁸ With negotiations not moving, some commentators and participants attributing the lack of progress to a lack of political will.¹⁹

¹⁴ Rachel F. Fefer, ‘US Trade in Services: Trends and Policy Issues’, Congressional Research Service, CRS Report dated 3 November 2015, p. 16.

¹⁵ The Hong Kong Ministerial Declaration, adopted on 18 December 2005, is available here https://www.wto.org/english/thewto_e/minist_e/min05_e/final_text_e.htm. Annex C is available here https://www.wto.org/english/thewto_e/minist_e/min05_e/final_annex_e.htm, see para 7: “In addition to bilateral negotiations, we agree that the request-offer negotiations should also be pursued on a plurilateral basis in accordance with the principles of the GATS and the Guidelines and Procedures for the Negotiations on Trade in Services. The results of such negotiations shall be extended on an MFN basis.” Both accessed on 13 September 2016, 3 pm. Also see Juan A. Marchetti and Martin Roy, ‘The TiSA Initiative: An Overview of Market Access Issues’, *Journal of World Trade* 48, no. 4 (2014): pp. 683-728, p. 703, footnote 19.

¹⁶ The Behavioural Dynamics of Positive and Negative Listing in Services Trade Liberalization: A Look at the Trade in Services Agreement (TiSA) Negotiations by Tomer Broude and Shai Moses in “Research Handbook on Trade in Services”, ed. Martin Roy Pierre Sauvé, Edgar Elgar Publishing (2016), p. 401.

¹⁷ See **JOB(08)/93**, 30 July 2008, **SERVICES SIGNALLING CONFERENCE**, Report by the Chairman of the TNC, see in particular para. 48, “concluding remarks”, p. 8.

¹⁸ The Behavioural Dynamics of Positive and Negative Listing in Services Trade Liberalization: A Look at the Trade in Services Agreement (TiSA) Negotiations by Tomer Broude and Shai Moses in “Research Handbook on Trade in Services”, ed. Martin Roy Pierre Sauvé, Edgar Elgar Publishing (2016), p. 401.

¹⁹ Including Abdel-Hamid Mamdouh in “WTO Blueskying Ideas for the new DG”, June 2013, and in “Services Plurilateral Negotiations – Substance vs. Architecture”, p. 4.

The so-called “sequencing issue” is an important part of the story of how services negotiations failed to move in DDA, but are now taking place in TiSA.²⁰ The WTO members advocating agriculture, so-called “champions” of agriculture, are also the members advocating for the DDA the strongest because agriculture encapsulates many interests of developing countries. The advocates of the issue – namely India, Brazil, and South Africa – have been very vocal when advocating their interests in the course of the DDA.²¹ When championing agriculture, these members have insisted that other WTO members resist “cherry-picking”, meaning members should not move ahead with issues more ripe but had to commit to the packaging approach and the single undertaking embodied in the Uruguay Round and the DDA. Beyond this systemic argument, the agriculture champions have also insisted that they would not negotiate services until agriculture had found a solution. This policy builds on the multilateral trading system’s institutional underpinnings. Applying a narrow lens, from the perspective of the services minded members (The Really Good Friends of Services, RGFS), the sequencing issue could almost seem like a hostage taking situation. Services are the only self-contained pillar in the DDA because its potential allows for trade-offs within the pillar between services sectors meaning that members can negotiate meaningful outcomes within this area without having to resort to cross-pillar compromises and trade-offs. Insisting on sequencing agriculture with services disallows other members from pursuing their interests in negotiating services. In effect, the agriculture champions have thus kidnapped the services pillar in promoting agriculture. Within a closed system, this reasoning makes sense because the interest in services could amount to leverage that would make services members engage in negotiations on agriculture. However, world trade is not a closed system. Thus, conceptually, the hostage escaped, when services members decided to pursue plurilateral trade negotiations on services in 2012, commencing in 2013, and to conclude soon, while the DDA has not yet been resolved despite efforts over the last 16 years. This development shows how the story of TiSA is in many ways the story of the DDA as it mirrors the issues that made the RGFS find it necessary to proceed with services negotiations on a plurilateral basis.

²⁰ The term “sequencing issue” is to a large extent seems to belong to WTO parlour, but in the section on “A Look from Inside”, Yonov Fredrick Agah addresses the sequencing of issues in DDA, “Africa and the promise of the Doha Round”, in *Trade, Poverty, Development. Getting Beyond the WTO's Doha Deadlock*, Edited by [Rorden Wilkinson](#), [James Scott](#), Routledge (2013).

²¹ See for example Ismail, Faizel. "An assessment of the WTO Doha round July–December 2008 collapse." *World Trade Review* 8.04 (2009): 579-605.

The US and Australia were the first parties to start entertaining the idea of a plurilateral agreement among the RGFS, following the Bali Ministerial Conference in 2012.²² EU then joined, insisting that TiSA be GATS compatible and open to others and with a view to multilateralizing the outcomes/the agreement.²³ As stipulated by both EU and the US, TiSA parties rely on the “Elements for Political Guidance” issued at the end of the Bali Ministerial Conference in December 2011 when pursuing negotiations outside the single undertaking.²⁴ The “Elements for Political Guidance” stipulate how, in order to achieve this end (the DDA) and to facilitate swifter progress, “...Ministers recognize that Members need to more fully explore different negotiating approaches while respecting the principles of transparency and inclusiveness.”²⁵

Shortly after, the first “brainstorming” session facilitating discussion on a plurilateral services agreement was held in Geneva on January 17, 2012.²⁶ TiSA negotiations were launched in April 2013,²⁷ and by October 2013, TiSA parties included Canada, Chile, Colombia, Costa Rica, Hong Kong China, Iceland, Israel, Japan, Korea, Liechtenstein, Mexico, New Zealand, Norway, Pakistan, Panama, Paraguay, Peru, Switzerland, The Separate Customs Territory of Taiwan, Penghu, Kinmen,

²² Press release dated 15 February 2013, Brussels, European Commission, http://europa.eu/rapid/press-release_MEMO-13-107_en.htm accessed 31 July 2016, 8 pm and DG Trade Memorandum available here http://trade.ec.europa.eu/doclib/docs/2013/june/tradoc_151374.pdf, p. 1, accessed on 10 September 2016, 10 am. See EU memo accessible http://trade.ec.europa.eu/doclib/docs/2013/june/tradoc_151374.pdf accessed 16 July 2 pm. For an early indicator of trajectory of TiSA taking the form of an EIA and then, upon accession of a critical mass, becoming multilateralized on the basis of MFN, see p. 3. See also discussion below.

²³ For evidence of this policy, see Press release dated 15 February 2013, Brussels, European Commission, http://europa.eu/rapid/press-release_MEMO-13-107_en.htm accessed 31 July 2016, 8 pm and DG Trade Memorandum available here http://trade.ec.europa.eu/doclib/docs/2013/june/tradoc_151374.pdf, p. 1, accessed on 10 September 2016, 10 am, and European Commission, DG Trade, ‘Trade for All. Towards a more responsible trade and investment policy’, European Union 2015. Also see the leaked EU non-paper, dated 5 July 2016, which includes draft provisions on openness, multilateralization, and accession, in section 3 and 4 in draft article IV, available at WIKILEAKS here <https://wikileaks.org/tisa/> accessed 21 September, 2 pm.

²⁴ For the US perspective, see Rachel F. Fefer, ‘US Trade in Services: Trends and Policy Issues’, Congressional Research Service, CRS Report dated 3 November 2015, p. 22. For the EU perspective, see DG Trade Memorandum available here http://trade.ec.europa.eu/doclib/docs/2013/june/tradoc_151374.pdf, p. 1, accessed on 10 September 2016, 10 am. Also see DG for External Policies, ‘Policy briefing The Plurilateral Agreement on Services: at the starting gate, European Parliament, February 2013.

²⁵ “Elements for Political Guidance”, para 4 under the section “Doha development Agenda”, The World Trade Organization, WT/MIN(11)/W/2, 1 December 2011.

²⁶ Modeled after GATS, TiSA has the following building blocks: Core text provisions with new and enhanced disciplines; schedules of commitments, and sector and rule-specific annexes. As per July 2017, TiSA has 18 draft annexes that fall within 3 (or 4) sub-groups: Sector specific annexes, such as transportation, financial services, and delivery services; rule-based annexes encapsulating new and enhanced disciplines, namely on DR, transparency, localization requirements, and e-commerce, which may become chapters; and mode-specific disciplines on the movement of natural persons (mode 4). Within this body of texts, TiSA also encapsulates regulatory aspects promoting or ensuring regulatory cooperation, regulatory coordination (e.g. for data flows) and mutual recognition.

²⁷ <https://ustr.gov/TiSA> accessed on 31 July 2016, 6 pm.

and Matsu (Chinese Taipei), and Turkey.²⁸ In September 2013, China applied to join the negotiations with the support of the EU.²⁹ However, China was never admitted to the group of negotiating parties. In 2015, Mauritius – a small island economy focusing on developing a services economy – was admitted as the first African country to join TiSA negotiations.³⁰ Singapore was the first party to withdraw from the negotiations, later on followed by Paraguay and Uruguay.³¹

In addition to the sequencing issue, Brazil, India, and more have refused to discuss negotiation rules and rulemaking (new or enhanced disciplines) until the DDA has been solved. Thus, these members were blocking the WTO from making progress in new areas such as e-commerce and in existing rules, such as DR. Though members once again failed to conclude the DDA, the Nairobi Ministerial Conference (MC10) in December 2015 did see a change in paradigm in this regard because it included measured progress on e-commerce, breaking the ice on negotiating issues before solving the DDA.³² This development coincided with TiSA negotiations including e-commerce.

On 15 through 17 June 2016, the WTO convened a number of meetings in the various bodies engaged in services. During the cluster, the Working Party for Domestic Regulation (WPDR) met on 16 June 2016, and here, Friends of DR, who advocate the issue, found new support in Brazil and Argentina. For the first time, Brazil and Argentina declared their support for discussing DR.³³ Up until now, these members have refused to discuss or negotiate new issues, such as e-commerce, until the DDA had been concluded, and within the DDA, they opposed negotiating the services pillar, until agriculture and non-agricultural manufacturing (NAMA) had been solved. Brazil and Argentina's change in attitude to DR suggests change in their position on services negotiations and sequencing. During the Informal Council for Trade in Services, Special Session, which met at the WTO on 4 July 2016, members gave interventions supporting negotiations on e-commerce and DR

²⁸ JOB/SERV/164/rev.1

²⁹ See press release, Brussels 31 March 2014 http://europa.eu/rapid/press-release_IP-14-352_en.htm accessed on 31 July 2016, 7.30 pm. Also, see the following para from the DG Trade website using present tense: "TiSA is open to all WTO members who want to open up trade in services. China has asked to join the talks. The EU supports its application because it wants as many countries as possible to join the agreement." Available here <http://ec.europa.eu/trade/policy/in-focus/tisa/> accessed 31 July 2016 at 7 pm.

³⁰ <http://www.ictsd.org/bridges-news/bridges-africa/news/mauritius-first-african-country-to-join-tisa-negotiations> accessed on 31 July 2016, 3 pm.

³¹ See updated list of participants, for example the DG Trade website <http://ec.europa.eu/trade/policy/in-focus/tisa/> accessed on 31 July 2016, at 7 pm.

³² https://www.wto.org/english/thewto_e/minist_e/mc10_e/nairobipackage_e.htm accessed on 17 July 11.30 am. Thus, services related outcome of the Nairobi Package (10th Ministerial Conference) was the LDC Services Waiver (WT/MIN(15)/48 — WT/L/982) and the Work Programme on Electronic Commerce (WT/MIN(15)/42 — WT/L/977).

³³ The author was a non-participating observer during this meeting, on 16 June 2016, and has retained notes from all interventions made, including the ones from Brazil and Argentina.

with DR receiving support from 25 members with 20 of said members declaring it a priority. During the General Council on 27 July 2016, Brazil announced that the world trading system would see “a changing Brazil” as Brazil was now ready and prepared to discuss issues such as e-commerce, while still pushing for agriculture. Argentina announced its bid for hosting MC11, followed by Uruguay.³⁴ Keeping the positive spirit surrounding e-commerce and DR in mind, here lies the real change. TiSA includes both DR and e-commerce, as well as rulemaking in other areas, invoking a potential for reinforcing an already intimate link between the two negotiating agenda.

The big change over time stretches from the Uruguay Round, which saw the conclusion of the GATS and the built-in agenda, to the Doha Round stalemate and its DDA deadlock, to the TiSA negotiations thriving outside the WTO. This development makes TiSA the only trade negotiations to replace multilateral trade negotiations within WTO. In contrast, the Government Procurement Agreement (GPA) is a plurilateral trade agreement listed in Annex 4 along with Civil Aircraft but it was grandfathered by the GATT system, which preceded the WTO. The Information Technology Agreement (ITA) and the Environmental Goods Agreement (EGA) cover new areas that have not been part of multilateral negotiations, and nor do they form part of the DDA. FTAs, even so-called mega-regional agreements like TPP, are only designed for its parties. They do not replace multilateral negotiations within WTO but fall within the category of FTAs and form part of the proliferation of FTAs. In the “era of mega-regional agreements”, on the heels of a proliferation of RTAs, TiSA is unique because it encapsulates the replacement of multilateral trade negotiations with a new kind of regionalism on a major scale, in a sector-specific way. The proliferation of PTAs/RTAs is often perceived as a threat to the multilateral trading system.³⁵ What is interesting about TiSA is its potential for returning to the WTO, unlike any other PTA.

Section 2: Mapping exercise - Legal forms of negotiated outcomes for TiSA

On 18 July 2016, during the transparency session for WTO members that are non-parties to TiSA the EU delegation reiterated how multilateralization is a key objective that TiSA parties share

³⁴ Notes from the mentioned meetings are on file with the author who was present as a non-participating observer. See news item the Special Session on 4 July 2016 on the WTO website https://www.wto.org/english/news_e/news16_e/serv_04jul16_e.htm accessed 15 September 2016, 4.30 pm. As for the General Council 27 July 2016, see the WTO website https://www.wto.org/english/news_e/news16_e/gc_rpt_27jul16_e.htm accessed 15 September 2016, 4.30 pm.

³⁵ See for example the publication from OECD responding to the perception of a threat, available here <http://www.oecd.org/tad/benefitlib/regionalismandthemultilateraltradingsystem.htm> accessed 15 September 2016, 5.30 pm, and Baldwin, Richard, and Patrick Low, eds. *Multilateralizing regionalism: challenges for the Global Trading System*. Cambridge University Press, 2009.

but there are many ways to achieve it and to extend preferences to others. The EU delegation also stated that it was not correct that this exercise was about imposing TiSA on others.³⁶ AU has circulated a paper on multilateralization between TiSA parties.³⁷ On 5 July 2016, the EU communicated a non-paper on multilateralization and accession for other parties to consider, and said non-paper leaked on 15 September 2016.³⁸ The forward work plan indicates that parties are considering alternative paths to multilateralization and that parties are to develop proposals further.³⁹

1. Decision-making and negotiations

The main rule for decision-making within the WTO is the consensus rule in Article IX:1 of the WTO Agreement, and negotiations mostly take place among all 164 members. Trade negotiations is one of the main functions of the WTO under Art III:2 of the WTO Agreement but this provision does not prescribe a certain procedure for conducting these negotiations, and nor does it specify the legal forms that such outcomes could or should take. However, the WTO Agreement does provide for a number of specific procedural rules to be followed in specific circumstances, such as Article IX: 2 on interpretation, article IX: 2 and 3 on waivers, and article X on amendments. For this purpose, article X on amendments is the most interesting as it provides guidance on specific procedures for different categories. Yet, Article X does not entirely address the legal forms of negotiated outcomes in all their forms, cf. article III: 2. The GATS/WTO framework enables or allows for a number of options.

2. Legal forms of negotiated outcomes

The leaked non-paper from the EU includes the following draft provision in section 4, “Multilateralisation”, article VI:8: “Objective of multilateralisation. The Parties recognize the importance of the multilateralisation of the Agreement as soon as possible. To this end, they shall consider means for incorporating the rights and obligations under this Agreement into the WTO.” Article IV:9 on “Process leading to multilateralization” reads: “Upon positive determination to be taken by consensus, the TiSA Committee shall submit the instrument of multilateralization to the Parties for acceptance in accordance with their internal procedures.”

³⁶ The author was a non-participating observer during the Transparency Session, organized by the TiSA parties for WTO members at the WTO on 18 July 2016, notes from interventions are on file with the author.

³⁷ Stocktaking documents July 2016, on file with the author.

³⁸ See footnotes 5 and **Error! Bookmark not defined.**

³⁹ TiSA Stocktaking documents July 2016, on file with author.

The following sections will offer a map of available options, referring jointly to “means” and “instruments” as legal forms of negotiated outcomes.

2.1. Economic Integration Agreements (EIA), GATS article V

One option is the Economic Integration Agreement under GATS article V. Under this provision, the GATS does not prevent any of the members from being a party to or enter into negotiations on an agreement (FTA/PTA) to liberalize trade in services between or among its parties, provided that the so-called Economic Integration Agreement (EIA) meets certain requirements. In article V, GATS requires that such an agreement (a) has substantial sectoral coverage, which, under its footnote 1, is understood in terms of number of sectors, volume of trade affected and modes of supply, and to meet this provision, the EIA in question should not a priori exclude any mode of supply, and (b) provides for the absence or elimination of substantially all discrimination in the sense of article XVII (NT), between or among the parties in the sectors covered by (a).⁴⁰ An EIA does not extend MFN to others, thus precluding non-parties from freeriding. However, GATS article V has been identified as “largely inoperative”.⁴¹ Recent research even show that it is difficult to determine compatibility between EIAs and GATS article V.⁴² The question becomes more opaque recalling how there is no jurisprudence on the issue and quite possibly no support from the GATT jurisprudence as the provisions are worded differently.⁴³

2.2. Plurilateral agreements within the WTO, no MFN

Allowing for plurilateral agreements, the WTO Agreement article II:3 stipulates how these agreements and associated legal instruments included in Annex IV are also part of the GATS for those members that have accepted them, and are binding on those members. This is what the Plurilateral Trade Agreement approach under the WTO Agreement looks like.⁴⁴

Annex IV Plurilateral Trade Agreements

- Annex 4(a) Agreement on Trade in Civil Aircraft

⁴⁰ For a walk-through of the GATS article V elements, see p. 719 in Juan A. Marchetti and Martin Roy, ‘The TiSA Initiative: An Overview of Market Access Issues’, *Journal of World Trade* 48, no. 4 (2014): pp. 683-728, p. 721. Also see For GATS article V, see Juan Marchetti and Martin Roy (ed.), *Opening Markets for Trade in Services: Countries and Sectors in Bilateral and WTO Negotiations*, (Cambridge University Press, 2009) p. 126 ff.

⁴¹ In Pauwelyn, Joost. “Legal Avenues to “Multilateralizing Regionalism”: Beyond article XXIV1.” *Multilateralizing regionalism: Challenges for the global trading system* 368 (2007)

⁴² PhD thesis submitted in September 2016 by Johanna Jacobsson, European University Institute (EUI).

⁴³ See GATT article XXIV.

⁴⁴ https://www.wto.org/english/docs_e/legal_e/legal_e.htm#services 14 August 2016 5.30.

- Annex 4(b) Agreement on Government Procurement
GPA 1994
Revised GPA
- Annex 4(c) International Dairy Agreement (this Agreement was terminated end 1997. See document [IDA/8](#))
- Annex 4(d) International Bovine Meat Agreement (this Agreement was terminated end 1997. See document [IMA/8](#))

It follows from the WTO Agreement article II:3 that these plurilateral agreements do not create either obligations or rights for members that have not accepted them, i.e. plurilateral agreements within the WTO do not extend MFN to others, disallowing freeriding.

Recalling how the main rule for decision-making is consensus, article X, and how article X:9 on plurilateral agreements stipulates that the Ministerial Conference may decide to add more plurilateral agreements to annex 4 exclusively by consensus, the plurilateral agreement only applies to the signatories but they still need consensus to have it added to annex 4.⁴⁵ Thus, for an agreement to take this form, WTO members have to agree to waive the MFN and in effect this means that any member can block TiSA if TiSA was to take this form. Such a scenario would invoke the services deadlock that spurred TiSA in the first place.

2.3. Certification approach, on an MFN basis

The certification approach extends MFN to all members. Marchetti describes this approach as unilateral liberalization, or “going it alone”. In this analysis, the certification approach poses a prisoner’s dilemma with parties not knowing if other parties will follow suit, or when they may follow suit.⁴⁶ Here, members would unilaterally take on new commitments by updating their national schedules, and they are at any time free to do so under GATS, see article XX.

Most recently, members pursued the ITA⁴⁷ based on this approach, as opposed to the protocol approach. With the certification approach, members pursuing the ITA deal gave legal effect to the negotiated outcomes by individually certifying them in their tariff schedules successfully lowering

⁴⁵ See p. 720 in Juan A. Marchetti and Martin Roy, ‘The TiSA Initiative: An Overview of Market Access Issues’, *Journal of World Trade* 48, no. 4 (2014): pp. 683-728; See Bernard M. Hoekman, and Petros C. Mavroidis. ‘WTO “à La Carte” or “Menu du Jour”? Assessing the Case for More Plurilateral Agreements’. *EJIL* 26, no. 2 (2015): 319–43; Bernard M. Hoekman, and Petros C. Mavroidis (2015). *Embracing Diversity: Plurilateral Agreements and the Trading System*. *World Trade Review*, 14, pp 101-116.

⁴⁶ See p. 719 in Juan A. Marchetti and Martin Roy, ‘The TiSA Initiative: An Overview of Market Access Issues’, *Journal of World Trade* 48, no. 4 (2014): pp. 683-728

⁴⁷ See https://www.wto.org/english/tratop_e/inftec_e/inftec_e.htm accessed on 17 July 2016 at noon.

tariffs on IT products. However, this entails some degree of uncertainty regarding procedure in the absence of a protocol in a prisoner's dilemma like situation.

2.4. Protocol approach – MFN-basis, with critical mass

Marchetti and Roy refer to this approach as the protocol approach in the context of market access.⁴⁸ In the context of TiSA, the EU, and others, refer to it as multilateralization upon a critical mass.⁴⁹ Mavroidis and Hoekman explain how these instruments are colloquially referred to as “plurilateral agreements”, not to be confused with actual plurilateral agreements under article II:3.⁵⁰ Bottom line, the sub-set of members have to secure a critical mass, and non-parties will enjoy MFN.

Discussions on TiSA's potential for integration into the multilateral trading system highlight the concept of critical mass as the benchmark required for multilateralizing TiSA.⁵¹ Members have successfully pursued approaches to legal forms of negotiated outcomes beyond those specified in the WTO agreements article IX or X by way of the protocol approach. Prominent examples include the annexes on Basic Telecommunications and on Financial Services. Here, the outcomes were annexed to protocols stipulating procedural elements, including legal effect, date of entry, timeframe for acceptance of the protocol, and other institutional provisions. The adoption of protocols does not require consensus among all members affording like-minded members an opportunity to commence and conclude negotiations while relieving them from obtaining consensus. Instead, they simply schedule commitments to the protocol.

While the approach has often been used in market access negotiations, like the request-offer exchanges in 2006 following the Hong Kong Ministerial,⁵² it has also been used in rulemaking, however to a lesser extent. An example is the development of a template on Regulatory Principles for Basic Telecommunication.⁵³ This is what the protocol approach looks like:⁵⁴

⁴⁸ See p. 717 ff. in Juan A. Marchetti and Martin Roy, 'The TiSA Initiative: An Overview of Market Access Issues', *Journal of World Trade* 48, no. 4 (2014): pp. 683-728

⁴⁹ See footnotes (DG Trade and Memo)

⁵⁰ Bernard M. Hoekman, and Petros C. Mavroidis. 'WTO "à La Carte" or "Menu du Jour"? Assessing the Case for More Plurilateral Agreements'. *EJIL* 26, no. 2 (2015): 319-43

⁵¹ For example, DG Trade European Commission, <http://ec.europa.eu/trade/policy/in-focus/tisa/> accessed 9 September 2016, 4.30 pm, USAID/UNCTAD training workshop <http://unctad.org/meetings/en/Presentation/ditc-ted-Nairobi-24082015-USAID-stephenson-2.pdf> and Abdel-Hamid Mamdouh in "WTO Blueskying Ideas for the new DG", June 2013, p. 2.

⁵² See above, Hong Kong Ministerial Declaration and its annex C.

⁵³ Hamid Mamdouh, 'Legal Forms of Negotiated Outcomes. Could variable approaches benefit the negotiating process?' Note dated 8 May 2014, p. 3. Also see examples in "Critical Mass as an Alternative Framework for Multilateral Trade Negotiations", Peter Gallagher and Andrew Stoler in *Global Governance*, Vol. 15, No. 3, The Future

POST-1994 GATS PROTOCOLS

THESE ARE ADDITIONAL AGREEMENTS NEGOTIATED AFTER THE URUGUAY ROUND AND ATTACHED TO THE GENERAL AGREEMENT ON TRADE IN SERVICES. THERE IS NO “FIRST PROTOCOL”.

- **Second protocol:** financial services
- **Third protocol:** movement of natural persons
- **Fourth protocol:** basic telecommunications
- **Fifth protocol:** financial services

The Environmental Goods Agreement (EGA) is the most recent example of negotiations within the WTO aiming for a plurilateral agreement extending MFN benefit to all members upon accession of a critical mass.⁵⁵ Since July 2014 the EU, counting as one, and 16 other WTO members have been negotiating the EGA to remove barriers to trade in environmental or "green" goods that are crucial for environmental protection and climate change mitigation.⁵⁶

When pursuing the protocol approach, this subset of members have to form a critical mass, 80-90%.⁵⁷ The negotiated outcomes are applied on an MFN basis. In practice, this means that a sub-set of members can pursue negotiations and upon accession of a critical mass the outcomes benefit all members on an MFN basis, i.e. the negotiated outcomes become “multilateralized” as TiSA parties frame it. In the context of market access, Marchetti and Roy identify this approach as “a truly multilateral one, in the sense that even though the negotiations would be held by a handful of WTO Members, the commitments would be “multilateralized through the MFN principle”.⁵⁸ From the point of view of such a “club”, the access for others to freeride on the MFN benefit, without taking part in the negotiations or making commitments themselves, makes this option less attractive to its parties.

2.4.1. Metrics for critical mass

of the Multilateral Trade System: What Role for the World Trade Organization? (July–Sept. 2009), pp. 375-392, asking if critical mass can work for agriculture.

⁵⁴ https://www.wto.org/english/docs_e/legal_e/legal_e.htm#services 14 August 2016 5.30 pm.

⁵⁵ See the WTO website https://www.wto.org/english/tratop_e/envir_e/envir_neg_serv_e.htm accessed 13 September 2016 6 pm.

⁵⁶ DG Trade, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1116> accessed on 13 September 2016 6 pm. Here, DG Trade also stipulates how the EU would like for EGA to extend to services too.

⁵⁷ 80-90% seems to be the accepted benchmark. See Hufbauer, G. C., & Schott, J. J. (2012). Will The World Trade Organization Enjoy a bright future? *Policy Brief In International Economics*, 12-11 citing 90%, p. 8, and in the context of TiSA (then ISA), p. 9, and see “Critical Mass as an Alternative Framework for Multilateral Trade Negotiations”, Peter Gallagher and Andrew Stoler in *Global Governance*, Vol. 15, No. 3, The Future of the Multilateral Trade System: What Role for the World Trade Organization? (July–Sept. 2009), pp. 375-392, Vickers, Brendan. *The Relationship between Plurilateral Approaches and the Trade Round*. E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, 2014, www.e15initiative.org/, p. 4, footnote 8.

⁵⁸ Juan A. Marchetti and Martin Roy, ‘The TiSA Initiative: An Overview of Market Access Issues’, *Journal of World Trade* 48, no. 4 (2014): pp. 683-728, p. 718

In sum, within the WTO, parties pursue negotiations plurilaterally on a critical mass-basis that will extend MFN to all members, but determining the existence of a critical mass depends on the metric used to measure it. These are metrics envisioned for TiSA and services:

2.4.1.1. By membership

With each member counting as 1, we have a critical mass when 80-90% of WTO members accede to TiSA.

TiSA has 23 parties when counting the EU as one. However, all EU member states are members of the WTO, and so is the EU itself, so in fact, 50 WTO members are parties to TiSA. 80% of 164 members equals 131 members, which means the RGFS should make approximately 2,5 times as many friends. In theory, making new friends could be “cheap” as accession could take the form of agreeing to TiSA without taking any commitments. However, in practice, this would not happen for many reasons. For example, during negotiations, parties would insist on commitments in each other’s schedules in a trade-off based on defensive and offensive interests.

2.4.1.2. By mode or sector:

GATS modalities operationalize the GATS scope, and thus GATS applies to measures affecting trade in services, as stipulated in article 1:1. Under article 1:2, trade in services is defined as supply of services through 4 modes of supply, cross-border trade in services (mode 1), consumption abroad (mode 2) commercial presence (mode 3), and presence of natural persons (mode 4), GATS article I. TiSA replicates the GATS modalities.⁵⁹ As for sectors, the GATS framework, and trade in services at large, is conceptualized by classification of sectors and sub-sectors. Classification serves as the backbone of scheduling commitments, and the same will be true in TiSA.⁶⁰

A. Coverage of market access commitments horizontally (across all sectors)

If 80-90% of members take some/any market access commitments, we have a critical mass.

This metric builds on TiSA modalities and scheduling and could crystalize in the following ways

- Overall average

⁵⁹ See draft for TiSA core text, footnote **Error! Bookmark not defined.**

⁶⁰ See the TiSA draft core text and revised offers available online. TiSA schedules build on classification of sub-sectors. For more on classification, see WTO working paper ERSD-2015-11, dated 7 December 2015, Ruosi Zhang, COVERED OR NOT COVERED: THAT IS THE QUESTION - Services Classification and Its Implications for Specific Commitments under the GATS, available here https://www.wto.org/english/res_e/reser_e/ersd201511_e.pdf accessed on 21 September 2016, 8 pm.

- Full (listing full commitments without limitations with the entry “none” for modes 1-4, or maybe limited to modes 1-3) – this means critical mass requires a certain modal coverage.
- Partial – critical mass requires that 80-90% of members take any commitments, even if just in one mode.

B. Coverage of modes in commitments

If 80-90% of members agree on a mode, we have a critical mass for that particular mode.

Likewise, this metric would distinguish between

- Mode 1
- Mode 2
- Mode 3
- Mode 4

C. Coverage of sectors in commitments, sector-specific

If 80-90% of members take market access commitments in one CPC class/W 120 sector/sub-sector, we have a critical mass for that CPC class/W120 sector/sub-sector.

However, classification of services sectors and sub-sectors vary from one system to another with some system drawing different distinctions and/or identifying more detailed sub-categories. The metric would have to factor in such ambiguity, also where the systems conflict.⁶¹ Thus, the metric would have to be sensitive to the following different classification systems:

- By CPC class
- By W/120 classification (WTO doc MTN.GNS/W/120)
- By sub-sector

However, even when factoring in these issues, the metric would leave “new services” unaccounted.

2.4.1.3. By size of trade

A. By value of trade in services

⁶¹ For example, for a sector like maritime transport services this gives rise to additional issues as conflicts exist between classification in CPC, W/120, and the Maritime Model Schedule, and because no one agrees on a definition for an important sub-sector like cabotage. See WTO Document S/C/W/315, background note by the Secretariat on maritime transport services.

If 80-90% of world trade in services is covered by TiSA, we have a critical mass.

Here, it is interesting how several TiSA parties cite the support of a critical mass required under this model as TiSA covers 72% of services trade, cf. above. In fact, the USTR maintains that TiSA parties represent 75% of the world's USD 44 trillion services trade market.⁶² EU cites a slightly lower percentage – “Together, the participating countries account for 70% of world trade in services.”⁶³ With a moving target like TiSA, services negotiations attracting more interest, and given the level of uncertainty about the (legal) backbone of critical mass, covering 70 % of world trade is a strong (enough) indication for the existence of critical mass and makes for a valid argument, in fact, under almost any metric.

B. By value of trade in services + trade in value-added

If 80-90% of world trade in services, including trade in value added, is covered by TiSA, we have a critical mass.

2.4.1.4. When scaling relevant markets

Scaling the metric to the relevant market for trade in services allows additional metrics to materialize.

A. Scaling the relevant market when assessing the existence of a critical mass

When scaling the metric to the relevant market, the premise may be specific to the issue at hand, for example by taking only services economies into consideration, or – even if the member in question is considered a services economy - by removing countries with no (bilateral) services trade relations with any TiSA party from the metric.

Assuming TiSA itself is the relevant market, TiSA already has (almost) reached a critical mass for market access under the metric on overall sectoral coverage as the TiSA average, based on TiSA parties revised offers, is 72%.⁶⁴

B. Scale relevant markets and be sector-specific – and think about “who” rather than “what percentage”

⁶² <https://ustr.gov/TiSA> accessed on 31 July 5.30 pm.

⁶³ <http://ec.europa.eu/trade/policy/in-focus/tisa/> accessed on 31 July 2016, 7 pm. Australia cites “TiSA % of world services trade: 71% (2014)”, see <http://dfat.gov.au/trade/agreements/trade-in-services-agreement/pages/trade-in-services-agreement.aspx> accessed 29 September 2016, 7 pm.

⁶⁴ Document from a request citing these statistics on file with author. Numbers could be confirmed by going through all revised offers which could be done or almost done as most, if not all, delegations publish their offers online.

You have a critical mass when you have a meaningful outcome between the main players in the sector concerned.

The purpose of the metric's latter prong is to reduce the risk of non-parties freeriding. When insisting on having the main players on board, they are barred from freeriding and only other members can freeride on the agreement, which presupposes that they are not important and thus their freeriding does not pose a risk to the parties. The rationale behind this metric comes from another place than the metric above (A). In scenario A, critical mass should be among relevant trading partners because irrelevant trading partners should not be allowed to prevent a critical mass from taking shape. Focusing on the formation, this rationale does not take curbing freeriding into consideration. In contrast, in the modified version, the relaxation in language embodied in "meaningful" and "main players" curbs the concern for freeriding. However, it leaves little if any backbone to the rule because of the vague language in several of its components – what is meaningful? Who are the main players? How do you scale the sector in cases of conflicting classification? This metric very much resembles the one given by Marchetti and Roy in the context of the above mentioned plurilateral request/offer process of negotiating market access in 2006 following the Hong Kong Ministerial. It reads: "Those whose participation in the final negotiating package is considered essential"⁶⁵ which gives rise to the same kind of ambiguity – considered by whom? What does essential entail? The same lack of certainty applies to the metric suggested by Patrick Low, stating "A critical mass may be said to exist when a sufficient number of parties that do not represent the entire membership agree upon a common course of cooperative action to be taken under the auspices of the WTO."⁶⁶ Such lack of certainty reduces critical mass to a comforter and not an actual test, if it ever was one. The comforter may prove useful when building a policy and engaging with civil society, and likewise the freeriding is a useful argument for leverage. While the risk of freeriding can be managed, at the end of the day, committing to a plurilateral agreement entailing MFN-based outcomes is a political decision that may not be favorable given that other options allow members more control over the process and the final shape of both commitments and rules.

2.4.1.5. "Critical mass" is like a lamppost

⁶⁵ Juan A. Marchetti and Martin Roy, 'The TiSA Initiative: An Overview of Market Access Issues', *Journal of World Trade* 48, no. 4 (2014): pp. 683-728, p. 703, footnote 20.

⁶⁶ Patrick Low, 'WTO Decision-Making for the Future', WTO working paper, manuscript date May 2011, p. 8.

In summary, critical mass is dim concept, though it may be convenient to lean on. The sheer amount of available metrics and their ambiguity show how achieving a critical mass entirely depends on how you slice it or which metric you subscribe to, but reality is that you can easily argue the existence of critical mass under one or several of the metrics. Thus, critical mass is in fact a concept with little substance and it provides little legal certainty because if political will demands it, parties can easily find a fit among the many metrics available which indicates that critical mass is not a legal test per se but a “political” comforter or tool during negotiations. In any case, from a legal-political point of view, critical mass discussions may prove to be irrelevant because “incrementalism” and “quasi-multilateralization” allow TiSA parties more control while affording them a “take it or leave it” bargaining position that will reflect TiSA as the standard-setting regime for trade in services. In contrast, critical mass would open up for all sorts of calculations, packaging, and negotiations. TiSA parties would want to avoid this to remove themselves from the packaging and hostage taking characterizing services in the DDA, which sparked TiSA in the first place.

Section 3: ... And back again, how?

TiSA parties are free to pursue the so-called certification approach to unilaterally liberalize services trade by inscribing their TiSA commitments into their GATS schedules of commitments. This approach would extend these commitments to all WTO members on an MFN basis. The reasons for unilaterally liberalizing trade in services by improving one’s own GATS commitments are meek to none unless it forms part of a quid pro quo that employs this approach as a tool rather than as a goal in its own right. Despite members’ applied regimes sometimes being more liberal than reflected in their GATS commitments – so called “water” -, members usually do not unilaterally improved their commitments, unless the improvement forms part of a larger scheme. An example of such a larger scheme is the plurilateral Information Technology Agreement (ITA). In goods, with the ITA, the multilateral trading system saw members conducting plurilateral negotiations on lowering tariffs and committing to them by locking them into GATT using the certification process as a tool. TiSA parties could follow in these footsteps and export their TiSA negotiated outcomes into their GATS schedules by means of certification. This approach could apply to accessions to TiSA as well. However, in both scenarios, the prisoner’s dilemma poses a greater risk when the negotiations take place outside the WTO, like they do in TiSA, than when negotiations take place within the institutional framework of the WTO, like ITA, because grievances over non-compliance cannot be raised within the WTO framework. TiSA parties are

currently negotiating a dispute settlement mechanism,⁶⁷ and it is yet to be seen how the TiSA dispute settlement mechanism will work but one way of managing the risk stemming from the prisoners' dilemma would be allowing for TiSA cross-retaliation under any WTO or bilateral agreement that the TiSA parties in question are parties to.

TiSA parties could request members extend waivers of the MFN allowing TiSA parties to have TiSA to themselves in a GPA-like scenario, i.e. a plurilateral agreement within the WTO. However, this scenario is most unlikely because it requires consensus. Now that Argentina and Brazil has changed their stance on negotiating services, they could be inclined to extend such a waiver in return for accession to TiSA, preferential treatment, TiSA waivers, or other bargaining chips. However, by the same token, they would give up the leverage they have on bringing TiSA back to the WTO, and that may have more appeal because of the institutional framework's support and the protection accorded under the DDA. Even if these emerging economies did extend waivers, other emerging developing economies could remain inclined to veto for a myriad of reasons, primarily that they would not give up on the DDA. While the GPA was narrow and the circumstances of negotiations were different then, services is a wide subject drawn from the DDA upsetting a number members, so on a systemic level, keeping this in mind, TiSA parties are unlike to succeed in securing MFN waivers because non-parties would not be inclined to give up MFN. Yet, to TiSA parties, the FTA approach is an attractive default option, so TiSA parties can have their framework one way or another, without MFN, which could translate into leverage in the context of securing waivers.

During the transparency session on 18 July 2016, the US supported TiSA's multilateralization but in previous communications, the US has promoted the GATS article V option, the FTA approach. This preference is embedded in a CRS report prepared for Members and Committees of the US Congress, outlining how TiSA should "... possibly be brought be brought within the WTO framework in the future;..." while elaborating on how

"Another issue was the application of the TiSA commitments to nonparticipants. The participants agreed to conduct the negotiations on a non-MFN basis, that is, the benefits of the commitments made by the participants in the TiSA would apply to only those countries that

⁶⁷ See the leaked EU non-paper with draft provisions for a dispute settlement mechanisms.

have signed on to the agreement, thereby avoiding “free-riders”. This exception to the general WTO MFN principle is consistent with Article V of GATS...”⁶⁸

The EU has insisted on multilateralization from the outset⁶⁹ but the EU has also indicated how TiSA could have the status of an EIA under GATS article V to prevent freeriding while awaiting critical mass.⁷⁰ However, it is easy to establish a critical mass, as the test is more akin to a “comforter”, and some delegations have already established the existence of said critical mass. Thus, the EU and the US – as two major players in the negotiations – seem to converge on future multilateralization of TiSA but they also seem to agree that the path is not that straight forward, after all, and that it entails GATS article V when invoking the argument about freeriding. The leaked non-paper and its draft provisions does not rule out the GATS article V approach. In fact, proposing provisions on a future multilateralization, *in contrario*, offers a strong indication that TiSA will in fact conclude and start out as an EIA under GATS article V like its contemporaries The Transatlantic Trade and Investment Partnership (TTIP) and The Trans-Pacific Partnership (TPP) and like notable predecessors such as NAFTA. TiSA parties would then factor in how little is known about the application of the provision when notifying TiSA as an RTA to the RTA Committee. While the GATS article V elements are opaque, in a political scenario, and given lack of compliance with the notification regime for RTAs, members objecting then is unlikely.

Parties are of course at any time free to unilaterally multilateralize the commitments they make under TiSA by adding them to their GATS schedules but it is unattractive for the above-mentioned reasons. Thus, TiSA would crystalize as a GATS article V agreement. This is after all the natural starting point because it affords TiSA parties more control over accessions and integration to ensure that TiSA becomes a paradigm or a standard in the future, and there seems to be some traction for this, cf. above. In this scenario, TiSA and GATS would co-exist in the spirit of mutual accommodation,⁷¹ or TiSA could invoke variable geometry,⁷² or, thirdly, co-exist on parallel tracks.

⁶⁸ CRS report prepared for Members and Committees of the US Congress, Rachel F. Fefer, ‘US Trade in Services: Trends and Policy Issues’, Congressional Research Service, CRS Report dated 3 November 2015. On p. 23

⁶⁹ See inter alia, DG Trade http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152686.pdf accessed 31 July 2016, 7 pm, and “Trade for All”, October 2015, p. 27.

⁷⁰ See EU memo accessible http://trade.ec.europa.eu/doclib/docs/2013/june/tradoc_151374.pdf accessed 16 July 2016, 2 pm - indicator of trajectory of TiSA taking the form of an FTA (EIA) under GATS article V and then, upon accession of a critical mass, becoming multilateralized on the basis of MFN, see p. 3.

⁷¹ See Pauwelyn, Joost. “Legal Avenues to “Multilateralizing Regionalism”: Beyond article XXIV.1.” *Multilateralizing regionalism: Challenges for the global trading system* 368 (2007) on “mutual accommodation” and the hierarchy between WTO regimes and RTAs.

On the backdrop of TiSA parties promoting the concept of “multilateralizing” TiSA, parties could pursue this in the spirit of the EGA, and extending MFN to all members building on a critical mass would embody “full” multilateralization.⁷³ In theory, it is unlikely that TiSA parties can attract another 81 members so among the plethora of available metrics, this one metric, however, is hardly doable, even in a changing landscape. It may not be attractive to TiSA parties either because when needing others, TiSA parties would have to make concessions themselves. In any case, in practice, with this many options or metrics for critical mass, TiSA parties have many other options for establishing a critical mass, depending on how you slice it. The exercise above clearly shows the many variations, making critical mass akin to a “comforter”. The most clear example of the lack of legal backbone in the critical mass test is the metric building on “meaningful outcome” because when allowing for vague language and when allowing for scaling the relevant markets, you can argue your case one way or another, and counter-arguments are blunted by the lack of legal certainty (and lack of enforcement).

However, it seems unlikely, at least for now, that TiSA parties will pursue the protocol approach MFN-based outcomes, even when establishing a critical mass in one way or another, as some delegations would be opposed to this idea because it allows for others to freeride on their agreement.⁷⁴ If TiSA does not liberalize that much trade in services, there will not be much discrimination any way, and thus little to freeride on. If it is true that TiSA does not provide for much liberalization of trade in services, the freeriding argument is moot in theory. When the argument exists in reality and dominates discussions on both sides of the Atlantic, it could be for the leverage it affords its proponents when facing non-parties, given that TiSA negotiations are trade-offs like all other trade negotiations, and/or as an argument against acting on the critical mass that the same parties argue TiSA has already attracted.⁷⁵

TiSA parties not acting on the critical mass suggests that critical mass in practice may not be that interesting. Maybe with the exception of the plurilateral agreement requiring a waiver, TiSA parties can pursue any of the proposed legal forms of negotiated outcomes, and TiSA parties may

⁷² As conceptualized by Hoekman and Mavroidis for (Annex 4) plurilateral agreements in Bernard M. Hoekman and Petros C. Mavroidis, *WTO ‘à la carte’ or ‘menu du jour’? Assessing the Case for More Plurilateral Agreements* *Eur J Int Law* (2015) 26 (2): 319-343 doi:10.1093/ejil/chv025, and Bernard M. Hoekman and Petros C. Mavroidis, *Embracing Diversity: Plurilateral Agreements and the Trading System*. *World Trade Review* (2015), 14, pp 101-116.

⁷³ See Marchetti, above.

⁷⁴ This concern – or argument – is namely raised by the US, see CRS report prepared for Members and Committees of the US Congress, Rachel F. Fefer, ‘US Trade in Services: Trends and Policy Issues’, Congressional Research Service, CRS Report dated 3 November 2015, p. 23

⁷⁵ See footnotes 62 and 63

even pursue multilateralization of TiSA citing almost any metric. The way forward for integrating TiSA into the WTO framework is shaped by the economic and political interests of the parties and pressure from non-parties, but in reconciling the legal forms of negotiated outcomes with the political impetus underpinning TiSA, it is important to keep combinations, and long-term perspectives in mind.

1. Conceptualizing an “Incrementalist” Approach to “Quasi-Multilateralization”

Adopting a long-term and multi-layered perspective, TiSA parties could combine different approaches. This is where “incrementalism” and “quasi-multilateralization” come into the picture. The argument that TiSA’s multilateralization could have a long-term perspective has support in the EU non-paper, dated 5 July 2016. Here, the draft provision, article VI:9 (1) reads. “The TiSA Committee shall consider the multilateralisation of the Agreement upon proposal by a Party and at least every [3] years following the entry into force of this Agreement.” This stipulation, coupled with the header reading, “Process leading to multilateralization”, clearly outlines a long-term approach. Furthermore, on the backdrop of these early signs of developments among emerging developing economies such as Brazil and Argentina, TiSA parties could move forward on a piece by piece basis. Combining these two concepts amounts to a kind of “incrementalism”. TiSA parties could then take the most important chapters from TiSA and present them to the multilateral trading system as “their best FTA” or even present them to the relevant bodies at the WTO as JOBS, referring back to the objective of multilateralization in TiSA’s section 4.

The leaked non-paper’s proposal for a section 4 on “multilateralization” distinguishes between “means” in article IV:8 and “instruments” in article IV:9(2). This drafting can be perceived as unclear wording, lack of agreement on the choice of legal form for TiSA outcomes, or a constructive ambiguity that allows for hybrid approaches encompassing different instruments as means to an end. In line with the latter, TiSA could become part of the multilateral trading system in several ways, depending on the appetite among members, and the ripeness of the issue, using different instruments, as outlined above, and drawing on the mere existence of the TiSA outcome on a given issue. This process, or means to an end, can be conceptualized as “quasi-multilateralization” suggesting that it may draw on several instruments, in a hybrid scenario, that may not necessarily entail the straight-forward critical mass multilateralization discussed above.

To illustrate an “incrementalist” approach to “quasi-multilateralization”, it may be helpful to reiterate those recent changes in the WTO/GATS, with e-commerce and DR as cases on point.

Developments suggest that they may ripen within a very near future, and underscoring the potential import/inspiration from and interest in TiSA's DR and e-commerce disciplines, non-TiSA parties even mentioned DR and e-commerce during the TiSA transparency session on 18 July 2016.⁷⁶ In pursuit of common ground between TiSA parties and those members interested in discussing or negotiating services, TiSA parties could introduce the TiSA chapters on e-commerce and DR as JOBS or their TiSA commitments as their "best offer" to the GATS/WTO. Hereby TiSA parties could aim to infuse the debate at the GATS/WTO in a parceled and progressive way using TiSA chapters.

With the alliances changing along the trajectory of recent signs in e-commerce and DR, several scenarios could materialize, amounting to a "quasi-multilateralization" of TiSA's e-commerce and DR, piece by piece seeking TiSA-informed outcomes on DR and e-commerce building on an interest or appetite for these issues in the WTO/GATS.

Here, "quasi-multilateralization" implies TiSA parties taking more time, employing several legal forms in a hybrid, while denoting the straightforward and "full" multilateralization embodied in the protocol approach. The EU non-paper's draft provision article IV:16(1) refers to TiSA parties recognizing their "intention for this Agreement to coexist with their existing international agreements...". In fact, when envisioning coexistence between the WTO/GATS framework and TiSA, keeping existing concepts such as mutual accommodation, variable geometry, and parallel tracks, "quasi-multilateralization" could also happen through a kind of transmission from TiSA to the WTO/GATS framework. Coexistence, or even transmission, also implies that TiSA could de facto be a new standard for commitments and new or enhanced disciplines along with other regulatory aspects. Informally, TiSA could impact the modus operandi of negotiations, inform negotiations on the substance, or enable transmission from TiSA into the WTO/GATS framework. If members approach TiSA parties showing an interest in being part of this new standard, such members and TiSA-parties could negotiate bilaterally or plurilaterally on additional commitments in a trade-off where TiSA parties would commit their TiSA commitments under GATS in return for commitments that meet TiSA standards. The commitments are formally made binding by unilaterally taking on additional GATS commitments to encapsulate a TiSA standard trade-off.

Spearheaded by services negotiations taking place in TiSA, "incrementalism" and "quasi-multilateralization" embody a relaxation of the single undertaking and a shift away from the

⁷⁶ Notes from the session on file with author who was a non-participating observer.

packaging approach while allowing for operationalizing TiSA's integration by extending the analysis with two more dimension, time and co-existence.

Section 4: Concluding remarks and perspectives

This paper extends discussions on multilateralizing regionalism to a new reality materializing with TiSA by conceptualizing an incrementalist approach to quasi-multilateralization. While TiSA implodes "regionalism" by its sheer volume, for services TiSA has the potential for re-invigorating services negotiations within the GATS/WTO framework as shifts are happening at the WTO. The "kicker" is the current evidence suggesting positions in services negotiations in the WTO are beginning to change. Case on point are developments over the summer 2016 with traction for e-commerce and DR, and more specifically with Argentina and Brazil changing their approach. Time will show if the changing positions run deep welcoming services negotiations on a wide set of issues on more levels or if the changing positions have more of an issue-specific outlook. The development suggests that the "clubs" may begin to make new friends on specific issues, slowly.

Discussions on TiSA's potential for integration into the multilateral trading system highlight the concept of critical mass as the benchmark required for multilateralizing TiSA⁷⁷ but this paper argues that critical mass is a concept with little substance, and given recent developments and the political context of the negotiations, in fact critical mass is not (that) interesting for enabling TiSA's multilateralization. Beyond critical mass, TiSA parties have more options for legal forms of negotiated outcomes available to them when devising a more creative approach to integrating TiSA into the multilateral trading system. In fact, pursuing other options will allow TiSA parties to reconcile the political impetus for integrating the framework into GATS/WTO with a political-economic impetus to retain a strong regime and afford leverage in the process. One such option is coupling a piece by piece approach to introducing TiSA chapters to the relevant committees at the WTO and thus to WTO services negotiations, with a hybrid legal (political) form of the negotiated TiSA outcomes. The paper argues that this approach – "incrementalism" and "quasi-multilateralization" - could be palatable to TiSA parties because while meeting the public (and world trade) interest in integrating TiSA in the multilateral trading system, it affords TiSA parties benefits such as control over substance and leverage during negotiations. This is, of course, a

⁷⁷ For example, DG Trade European Commission, <http://ec.europa.eu/trade/policy/in-focus/tisa/> accessed 9 September 2016, 4.30 pm, USAID/UNCTAD training workshop <http://unctad.org/meetings/en/Presentation/ditc-ted-Nairobi-24082015-USAID-stephenson-2.pdf> and Abdel-Hamid Mamdouh in "WTO Blueskying Ideas for the new DG", June 2013, p. 2.

hypothetical scenario, but this paper argues that it could happen given the changing positions of major emerging services economies. Thus, this paper is optimistic that the near future may see a re-energization of services negotiations in the WTO.

Piece by piece, employing several legal forms of negotiated outcomes, most likely rooted in the FTA Article V approach, and expanded to plurilateral agreements in the broadest sense, beyond the GPA-like Annex IV plurilateral agreement, TiSA could return to the WTO framework. Thus, TiSA negotiations replacing WTO negotiations could in fact be perceived as a kind of “outsourcing” of the negotiations. Of course, this approach has a number of legal-political implications for the economic growth, the world trading system, and all parties affected, which are beyond the scope of this paper.

However, the point is that more options for bringing TiSA back exist, and given the changing dynamics among WTO members in their readiness to negotiate services, we are witnessing the first replacement of WTO negotiations, but we could also in a future scenario witness the first negotiations to return to the WTO. This makes a strong case for the need for more research on the lessons learned from regional negotiations, and more lessons may be drawn from the TiSA integration experience. By conceptualizing hybrid approaches to legal forms of negotiated outcomes, TiSA may devise a way forward for the institutional set-up for negotiations in the multilateral trading system, away from fixed one-lane approaches, and away from a fixation on critical mass, to hybrid approaches that encompass parcels rather than packaging, and quasi-multilateralization, rather than multilateralization.

Spearheaded by TiSA, the WTO framework may have to adjust to variable geometry and a relaxation of the single undertaking approach but the development could also see TiSA re-energize services negotiations at the WTO. Among several options, TiSA’s integration into the WTO/GATS framework take place piece by piece as quasi-multilateralism. It is too soon to assess implications, such as the expansion of variable geometry or further relaxation of the single undertaking. Time will show how this plays out as the world trading community awaits a number of important milestones, such as the fate of TiSA and the mega-regional agreements, and MC11, in Argentina or Uruguay.