

INDIA'S PROPOSAL FOR TRADE FACILITATION OF SERVICES: A BREATH OF FRESH AIR FOR GLOBAL TRADE?^a

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1. Introduction

India recently forwarded a set of proposals towards the formulation of a Trade Facilitation of Services Agreement that was tabled before the Working Party on Domestic Regulation at the WTO, with the specific aims of addressing issues of transparency, streamlining procedures and elimination of bottlenecks in international services trade. Although the goals of the proposed Agreement seem simple and straightforward, the challenges in achieving such changes become clearer when these proposals are contrasted with the state of services trade negotiations at the multilateral and bilateral levels, where internal policy considerations as well as structural weaknesses in the General Agreement of Trade in Services (GATS) make substantial changes to the services trade framework a difficult process. This may also be contrasted with the exponential growth of the services industry in the past decades in developed, developing as well as least developed economies, creating in effect a significant gap between the services sector and the international legal and regulatory framework governing it.

Even though several impediments exist in the conduct of empirical research in the area of services, recent studies and newly developed methodologies in global services trade identified several areas where bottlenecks to the flow of services have been created. This is especially relevant considering the rising backlash against globalization around the world, where depressed trade and economic performance outlooks have created an urgent need for revisiting and improving the present structural framework governing economic relationships.

After setting out the background for the current state of play of services trade, this paper analyses the core proposals made by India towards facilitation. For this purpose, the paper is organized as follows: in section 2, services trade in the present international context has been situated. In section 3, the paper shifts towards the manner in which trade facilitation can be a solution to the problems facing the services sector. In section 4, India's core proposals in the draft TFS Agreement under the four modes of supply are briefly examined.

2. Services trade in the present international context

While the international trade in services has been recognized as important driver of economic growth and prosperity, there has been a continuing lack of impetus and agreement among States to give full effect to commitments made by them towards the liberalization of their respective services industries and services trade overall. Services constitute the largest proportions towards the GDP of most developed and developing countries, and the sector overall has been on growth trend for decades. It is also noted that while the international trade of goods and its multifaceted aspects has been a subject of continuing negotiations, scrutiny and debate, services trade has been unable to occupy a similar mantle at the multilateral level, despite the critical nature of the services sector to international trade and economy.

Resultantly, the existing structural framework governing international trade in services has lagged behind the booming services industry. This may have been compounded by the fact that research in the area of international services trade has been hamstrung by difficulties in analyzing cross-border flow of services. Literature in this field has consistently noted the inherent difficulties in data collection and research, highlighting the characteristic problems associated with international services trade³. Despite these drawbacks, empirical research in services trade has grown, bringing along with it several new tools that have enabled more efficient and targeted research in the area of cross-border trade in services⁴.

The most critical factor behind the stasis in the services trade negotiations is however, the WTO Members themselves. While the adoption of the General Agreement on Trade in Services (GATS) following the Uruguay Rounds in 1995⁵ was both the centerpiece and catalyst towards liberalization of global services trade, there has been fairly limited progress made in recent years towards giving full effect to the commitments made by Members therein⁶. Research has pointed towards a combination of factors that have

³ Ingo Borchert, Batshur Gootiiz, and Aaditya Mattoo, *Policy Barriers to International Trade in Services: Evidence from a New Database*, (2013) 28 *The World Bank Economic Review* 1

⁴ *Ibid.*

⁵ For an account of the history behind the creation of GATS, see Juan A. Marchetti & Petros C. Mavroidis, *The Genesis of the GATS*, (2011) 22 *European Journal of International Law* 3

⁶ Recent negotiations in services trade at the WTO has focused on four major areas: market access, domestic regulation, GATS rules, and the implementation of LDC modalities, with varying levels of progress made in the

hindered services trade negotiations and the movement towards services liberalization ever since GATS came into force, such as follows:

1. The flexible and accommodative nature of the GATS Agreement coupled with the absence of significant binding provisions for Member States, allowing for departures from commitments⁷;
2. Concerns among Member States of losing their freedom to regulate services in the domestic market, especially in the absence of adequate international legal and regulatory framework to manage entry and competition of service providers⁸;
3. Absence of adequate WTO case law with respect to the GATS, that has led to continuing uncertainty regarding the meaning and interpretations of several Articles and terms contained in the GATS text⁹;
4. Lack of impetus on States in proceeding towards standardization of services, increased regulatory cooperation, greater transparency and predictability in State-imposed regulations and other forms of regulatory bottlenecks¹⁰;

The abovementioned issues are largely illustrative, and do not account for several other factors responsible for the slow pace of services negotiations at the WTO, not the least of which are State-specific political considerations and related maneuvering. Global economic events, such as the financial crises in 2008 and the subsequent economic recession have also raised several critical questions regarding the adequacy of multilateral agreements such as GATS in preventing and resolving such situations when they arise in an increasingly inter-connected world¹¹. In fact, such situations may fuel wider calls to *restrict* cross-border trade of services, specifically due to the ease with which such crises may spread across the various economic channels opened by international agreements. It should be noted that this issue is not just specific to the

negotiation process. For a full account, see Report by the Chairman, Ambassador Fernando de Mateo, to the Trade Negotiations Committee, Council for Trade in Services – Special Session (21 April 2011) TN/S/36

⁷ Rudolf Adlung, *Services Negotiations in the Doha Round: Lost in Flexibility?* (2006) 9 *Journal of International Economic Law* 4

⁸ Bernard M. Hoekman and Aaditya Mattoo, *Liberalizing Trade in Services: Lessons from Regional and WTO Negotiations* (2013) EUI Working Paper RSCAS 2013/34

⁹ Eric H. Leroux, *Eleven Years of GATS Case Law: What have we learned?* (2007) 10 *Journal of International Economic Law* 4

¹⁰ World Trade Organization, *World Trade Report 2016* p. 138

¹¹ Panagiotis Delimatsis and Pierre Sauvé, *Financial Services Trade after the Crisis: Policy and Legal Conjectures* (2010) 13 *Journal of International Economic Law* 3

WTO or its laws, but has spread with regard to the large network of bilateral and plurilateral trade agreements, where negotiations and commitments on services may extend above and beyond the GATS provisions¹². Therefore, solutions with respect to the issues affecting cross-border services trade and services negotiations can potentially have an impact upon the formulation of trade agreements. In the path towards finding such relevant solutions in the services sector, the proposal made by India starting in 2016 towards a Trade Facilitation in Services Agreement (TFS Agreement) is the first such step in the form of an multilateral agreement aiming at achieving transparency, streamlining procedures and eliminating bottlenecks¹³. This paper will aim at evaluating the specific proposal made by India in this context, while keeping the identified in services trade in mind.

The next section will evaluate trade facilitation in the services sector, as proposed by India, as a possible solution to some of the issues affecting international services trade. Following this, the specific proposals made by India towards services facilitation will be examined.

3. Trade facilitation as a solution for services trade bottlenecks

While there has been a growth of a significant amount of literature in the area of trade facilitation with respect to goods trade¹⁴, the concept of trade facilitation focusing exclusively on services trade is fairly new. In a 2013 paper written by Prabir De, this concept was explored in-depth within a larger discussion assessing barriers to service trade in India¹⁵. The paper focused on a statistical analysis of the existing trade barriers and their impact with the formulation of a Services Trade Facilitation Index (STFI). De

¹² Supra Note 6

¹³ Para 1.1, Working Party on Domestic Regulation, *Communication from India: Possible Elements of a Trade Facilitation in Services Agreement* (14 November 2016) S/WPDR/W/57

¹⁴ For example, see Ben Czapnik, *The Unique Features of the Trade Facilitation Agreement: A Revolutionary New Approach to Multilateral Negotiations or the Exception Which Proves the Rule?* (2015) 18 *Journal of International Economic Law* 4. See also, Antonia Eliason, *The Trade Facilitation Agreement: A New Hope for the World Trade Organization* (2015) 14 *World Trade Review* 4. John Wilson and Michael Finger, *Implementing a Trade Facilitation Agreement in the WTO: What Makes Sense?* (2007) 12 *Pacific Economic Review* 3. Nora Neufeld, *The Long And Winding Road: How WTO Members Finally Reached a Trade Facilitation Agreement* (2014) WTO Staff Working Paper ERSD-2014-06. Also, Nora Neufeld, *Trade Facilitation Provisions in Regional Trade Agreements: Traits and Trends* (2014) WTO Staff Working Paper ERSD-2014-01

¹⁵ Prabir De, *Assessing Barriers to Services Trade in India: An Empirical Investigation* (2013) 28 *Journal of Economic Integration* 1

made some notable observations with respect to trade barriers and services trade facilitation, which has had a visible impact on India's proposals in the proposed TFS Agreement, as will be seen later. Some of the relevant findings were:

1. There is a significant difference in quality of services traded across countries, and is more prominent between developed and developing countries. These variations stem from differences in the quality and cost of infrastructure services as well as differences in policies, procedures, and institutions.
2. The quality of a country's air transportation infrastructure, information technology quality, regulatory quality and overall competitiveness are statistically most significant in determining the quality of its service trade.
3. India's poor quality of infrastructure is one of the most significant factors hampering its services trade performance. A 1 percent improvement in its trade facilitation measures would lead to a 2 percent rise in service exports in India.
4. Services trade facilitation is a key factor impacting upon India's service exports. Relaxation of barriers on services exports, such as stringent visa regulations for services professionals in the IT sector, aviation tax on air services, foreign ownership caps, restrictions on types of commercial presence, discriminatory registration requirements and licensing procedures, nationality and residency requirements, economic needs tests, and discriminatory treatment advantaging domestic companies over foreign ones are some of the major areas that would need to be addressed in order to have a more efficient services sector.

Thus, while the concept of trade facilitation in services dwells both on aspects of trade policy and regulation, its solutions are largely within the realm of removing regulatory bottlenecks, reducing transactional costs and improving the institutions of cooperation among States overall. These factors were kept in consideration by India, as seen from its first communication to the Working Party on Domestic Regulation (WPDR) introducing the initiative on Trade Facilitation in Services in September 2016¹⁶. The said 'Concept Note' makes reference to the recently concluded Trade Facilitation Agreement (TFA) in relation to goods that was adopted by Member States of the WTO in 2014, and seeks to

¹⁶ Working Party on Domestic Regulation, *Communication from India: Concept Note for an Initiative on Trade Facilitation in Services* (27 September 2016) S/WPDR/W/55

resolve the 'regulatory' issues in services trade through a similar TFS Agreement. The core proposals made by India are specific to the four modes of services supply as provided under GATS¹⁷.

On the basis of its 'Concept Note', which was discussed at a meeting of the WPDR¹⁸, India issued an 'Elements Paper' that provided additional details with respect to India's proposals¹⁹. In this paper, India presented the substantive elements of its proposed TFS Agreement, while also stating its sources of inspiration for its proposed Agreement as the 'TFA, ongoing discussions on Domestic Regulation, provisions of the GATS, several bilateral and regional FTAs as well as experience and feedback from service suppliers'²⁰. India also clarified that its proposed TFS Agreement would largely focus on measures affecting trade in services in sectors where Members had taken specific commitments, while provisions such as that of transparency would apply to all measures affecting trade in services²¹. These elements were incorporated in the draft legal text that was subsequently released by India, and will therefore be discussed in the next section. It is important to note that in a follow up meeting of the WPDR, several Members presented diverging opinions on the Elements Paper as circulated by India²². While not dwelling on the detailed positions of the Members, some of the notable observations and criticisms against the Elements Paper in brief were as follows:

1. Developed country Members were in general reluctant to discuss measures relating to cross-border portability of health insurance, immigration as well as social security measures;
2. Several Members suggested that several proposals made by India were not within the mandate of the WPDR (as well as Article VI: 4 of GATS) and a relevant forum would be required for their consideration;

¹⁷ Article I:2, General Agreement on Trade in Services

¹⁸ Working Party on Domestic Regulation, *Report of the Meeting held on 6 October 2016: Note by the Secretariat* (11 November 2016) S/WPDR/M/68

¹⁹ Supra Note 11

²⁰ *ibid* Para 1.4

²¹ *ibid* Para 2.1

²² Working Party on Domestic Regulation, *Report of the Meeting held on 25 November 2016: Note by the Secretariat* (22 December 2016) S/WPDR/M/69

3. Some Members stated the difficulties in implementing measures that would intersect with jurisdictions of other Members and due to internal political considerations;
4. It was agreed by most Members that text based discussions would be more viable for the present discussions.

With these considerations, the paper will now proceed towards the analysis of the core proposals made by India in its draft legal text that was submitted to the WPDR and compare the same with the prior findings on services trade. It is noted that due to the limited scope of the paper, the analysis will be primarily based on the four modes of service supply under the GATS and the corresponding proposals made by India.

4. Analysis of India's proposals in the draft TFS Agreement

On 23 February 2017, India circulated a communication²³ to the Members of the Council for Trade in Services, the Council for Trade in Services - Special Session and the Working Party on Domestic Regulation, wherein it submitted a draft legal text for the proposed Trade Facilitation Agreement for Services ('draft TFS'). The said draft expands and builds upon its previous concepts notes that were circulated and discussed at the meetings of the Working Party on Domestic Regulation and provides a broad framework for discussion among Members. The Preamble of the draft TFS outlines the considerations necessitating the adoption of such an agreement, which have been summarized as follows:

1. Need for facilitation in the movement of information, data, technology and natural and juridical persons to enable services trade.
2. Providing greater impetus to regulatory cooperation and mechanisms facilitating meaningful implementation of trade in services.
3. Bringing greater transparency, objectivity, clarity and easing the overall regulatory burden of Members
4. Clarification and improvement of the relevant aspects of various GATS Articles in order to address issues relevant for facilitating trade in services

²³Council for Trade in Services, the Council for Trade in Services - Special Session and the Working Party on Domestic Regulation, *Communication from India: Trade Facilitation Agreement for Services* (23 February 2017) S/WPDR/W/58, TN/S/W/63, S/C/W/372

- 5. Facilitating greater participation of developing and least developed Member States in trade in services, and for this purpose, providing assistance in capacity building as well as strengthening domestic services capacity, efficiency and competitiveness.

At the outset, it is apparent that India has sought to address a wide variety of issues in services trade, many of which are also currently subject to negotiations under other fora within the WTO, such as cross cutting issues on data flows²⁴. It is also noted from the Article I: 1 and Article I: 2 that India agreed to apply the TFS measures only on services in sectors where specific commitments have been made by Members, other than the provisions providing for publication of information and Emergency Authorization, wherein Members shall expedite the processing of immigration formalities in respect of service consumers who seek medical access on an emergency/urgent basis²⁵. These considerations are addressed through proposals for facilitation made under specific Articles contained in the draft TFS. These proposals correspond to the four Modes of supply of services that are provided under Article I: 2 of GATS. The following table illustrates the proposals contained in the draft TFS Agreement and the modes of services supply to which they correspond.

<u>Mode of service supply under GATS</u> <u>Article I: 2</u>	<u>Corresponding provisions in the</u> <u>draft TFS Agreement</u>
Mode 1: From the territory of one Member into the territory of any other Member	Article 7: Provisions facilitating cross-border flow of information
Mode 2: In the territory of one Member to the service consumer of any other Member	Article 8: Provisions facilitating consumption of medical and insurance services abroad

²⁴ Data management and data flows may cross-cut with current ongoing negotiations on e-commerce. See Council for Trade in Services, *Work Programme on Electronic Commerce*

²⁵ Article 8.2, Draft TFS Agreement

Mode 3: By a service supplier of one Member, through commercial presence in the territory of any other Member

Articles 2 to 6: Provisions enabling transparency and predictability in the administration of measures by Members and subsequent reduction of costs

Mode 4: By a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member

Article 9: Provisions facilitating movement of natural persons with respect to temporary entry, simplification of visa procedures, social security contributions etc.

Mode 1 – Towards facilitation of cross-border flows of information

India's proposals under Article 7 in this regard call for each Member to allow cross-border transfer of information, including personal information for the purpose of supply of services. The provisions allow for enactment and maintenance of specific laws by Members for the protection of personal information. However, Members will not be allowed to restrict flow of information from one territory to the other merely because the other Member has different data protection laws. It is also proposed that Members shall afford others the opportunity or mechanisms to negotiate their accession to recognition arrangements pertaining to data privacy and security.

The issues arising from such a provision are very clear from the varying standards and levels of data protection laws across different jurisdictions that countries with well developed data protection laws will find it quite difficult to accede to countries where the standards of protection are lower or non-existent. An example of this is the standoff between India and EU in the process of FTA negotiations due to data protection and privacy concerns that have been raised by the EU²⁶. India does not as of yet have a specific data protection law, and this is a situation that a lot of developing and least

²⁶ Geetanjali Nataraj, India-EU FTA: problems and future prospects (2015) World Commerce Review http://www.worldcommercereview.com/publications/article_pdf/934 (accessed 20 May 2017)

developed countries will be in. In the light of this, the modalities of cross-border data flow, especially personal information, may be a subject of contention between Members.

Mode 2 – Consumption of Medical and Insurance Services Abroad

The proposal under Article 8 of the draft TFS has been restricted to two areas, namely provision of insurance and medical services. The proposal provides for Members ‘to encourage’ insurance service providers in their territory to enable insurance coverage in respect of health related services availed in another Member. Further, the provision for ‘Emergency Authorization’ provides that states ‘shall endeavour’ to expedite the processing of immigration formalities in respect of service consumers who are seeking medical services on an urgent basis.

The language used in the construction of these provisions makes it amply clear that these are not intended to be mandatory and it is up to the Members to decide on providing such services. This is a fairly open ended provision that will do little to improve cross-border provision of insurance services, considering the reluctance of developed States to expand their health and insurance services beyond their borders, other than under exceptional circumstances²⁷. The comments made by Canada and EU in this respect may have also had an impact on the construction of the provision. Therefore, a stronger provision may be advisable to truly bring in to effect the purpose of allowing movement of health and insurance facilities.

Mode 3 – Towards greater transparency, clarity and certainty

The proposals under Mode 3 cover wide-ranging issues that have affected the efficient transmission of services, especially with respect to operations by foreign firms in a Member’s territory. The proposals under this mode of supply range across several Articles, which are summarized as follows:

²⁷ Supra Note 5. See also, Gary Hufbauer & Sherry Stephenson, *Services Trade: Past Liberalization and Future Challenges* (2007) 10 *Journal of International Economic Law* 3

- 1. Article 2: Publication and Availability of Information** – The provision essentially calls for Members to make available all measures of general application relating to supply of services in a ‘non-discriminatory’ and ‘easily accessible’ manner. The information is to include contact information of relevant officers/authority, schedule of fees, charges and penalties, timeframe for processing of application and details regarding public hearings or opportunity for comments in relation to any authorization, requirements and procedures.

Further, the Article calls for provision of a system for service suppliers and other interested parties to comment on proposed introduction or amendment of any measures relating to services supply. Such amendments are also to be published digitally at the earliest. Additionally, enquiry points will also be established for responding to enquiries posed by service suppliers with regard to any measure effecting supply of services.
- 2. Article 3: Administration of Measures** - Under this provision, the Members are required to provide a ‘single window’ service for service suppliers with respect to applications for authorization and for requirements and procedures. Further, Members are to provide precise and reasonable application timeframes, acceptance of electronic applications and copies of authenticated documents instead of originals. It has also provided a system similar to the TFA for the purpose of processing, approval or rejection of applications. Detailed provisions are also provided for Appeals and Review, Information and Verification Requests and a Fast Track process.
- 3. Article 4: Fees and Charges** – The provision states that reasonable, transparent fees and charges may be applied, which is commensurate with the costs incurred by competent authorities and which do not restrict the supply of services.
- 4. Article 5: Administration of Economic Needs Test** – The provision calls for publication of information with respect to the criteria on which Economic Needs Tests are to be based, as well as the details regarding requirements and procedures for the administration of such a test. No undue costs are to be imposed on service suppliers for the purpose of such tests.
- 5. Article 6: Provisions Pertaining to Recognition** – The provision makes it necessary for Members to ensure that whenever licensing or qualification requirements are placed for supply of services, there are adequate procedures present for assessing the applicant’s fulfillment of such requirements, including procedures for assessment and

verification of qualifications. Further, in case of any deficiency on the part of the service supplier, such deficiency will be pointed out and the available recourses shall be provided. Additionally, in case of requirement of examinations, Members shall ensure fairness and frequency in their conduct and other conveniences for the benefit of the examinee.

Mode 4: Facilitating Movement of Natural Persons

India's proposals with regard to Mode 4 are with respect to three factors: (i) Grant of temporary entry (ii) Multiple Entry (iii) Social Security Contributions. Other than the publication of information with respect to the various visa types, Members are to place adequate mechanisms for separate categories of visa that correspond to each category of natural person in respect of which commitments are taken by Members. A scheme for a GATS visa applicable for categories of natural persons contained in the commitments is also to be provided. Members shall also endeavor towards granting multiple entry visas to such natural persons who are service suppliers of other Members. With respect to social security contributions, the draft seeks to remove service suppliers from the ambit of provision of social security contributions in other Members. Where an exemption is not possible, or the natural person is unable to avail benefits from social security contribution, then the Member collecting the same must refund the contribution when the natural person returns to their home country.

Co-operation among Authorities

Beyond the mode-based measures, the draft text also provides for different methods under which authorities and regulatory bodies of Members can cooperate among themselves in order to create a uniform and predictable system. Such provisions may be found under Article 10 (Cooperation among competent authorities) and Article 12 (Technical Assistance to developing country Members and Least Developed Countries). With the stated goal of liberalizing services trade and with the aim of reducing bottlenecks, these provisions have correctly identified the areas in which important reforms can be instituted to ease the flow of services trade. Areas of cooperation among authorities, such as exchange of information on requirements and procedures, work with other intergovernmental bodies and NGOs to learn about best practices, exchanging

statistics on trade in services as well as providing technical guidance or assistance for the purpose of building to small and medium sized enterprises.

5. Conclusions

The draft TFS Agreement and the measures contained therein are targeted solutions to several issues that have accompanied services trade for a long time. While the process is still ongoing and it will be an uphill battle for India and other like-minded Members to proceed successfully negotiate a facilitation agreement for services, the issues highlighted by the draft should in the meantime act as important indicators of the areas in which services are in need of reform. Even if a multilateral agreement does not come into fruition, it will be of utmost importance for Members to work towards adopting these reforms in order to promote greater efficiency in the services sector.

Although the draft TFS Agreement provides a broad framework for implementation of measures, it is noted that there is a lot of 'vacant space' that will need to be filled in order to develop an agreement that has stronger and binding provisions that will ensure that States actually implement the measures contained in the Agreement. The framework that has been introduced by India can be efficiently modified based on various considerations of Members. However, the final result must also not be overly flexible and accommodating so as to render it innocuous and act simply as a set of non-binding guidelines.

The needs of small and medium enterprises should also be a major consideration while implementing a TFS Agreement, and therefore, the measures should reflect the multiple ways in which doing business for such small and medium enterprises can be improved at the international level. With accompanying measures in electronic commerce and other related activities, the needs of new enterprises should ideally be reflected in trade facilitation measures.

At present, however, some of the more ambitious proposals contained in the TFS, such as visa regularization under Mode 4 and facilitation of foreign services suppliers within the host Member's territory will be a difficult task to fulfill. It may be advisable,

therefore, to proceed in a step-by-step manner, with greater impetus on reforms that may be agreeable to most States. In this context, reforms under Mode 3, wherein in greater governmental cooperation and regulatory uniformity would be ideal places to begin, considering that such measures will equally benefit services exports as well as imports.