

# EAC GENEVA FORUM

Supporting EAC country missions  
to the WTO

GENEVA UPDATE NOTE N°17



## Trade in Services Agreement (TiSA)

An Information Note on Current Scenario and Scope for  
Future<sup>1</sup>

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<sup>1</sup> This Information Note has been prepared by Tanvi Sinha under the supervision of Rashid S Kaukab of CUTS to facilitate the discussion at a meeting of Geneva EAC Forum and is not to be quoted. It is emphasised that the TiSA negotiations since the very beginning have been shrouded in mystery and very little information on the content of the negotiations is publicly available. This makes it very difficult to present verified information about TiSA provisions and analyse and assess its implications for developing countries including the EAC countries.

## Introduction

The services sector is the world's largest employer, and produces 70 percent of global gross domestic product (GDP). In the United States, for instance, services generate more than 75 percent of the national economic output and provide 80 percent of private sector jobs. Frustrated by the lack of progress in services negotiations under the Doha Round, 20 members (counting the EU as one) of the World Trade Organization (WTO) known as, 'The Really Good Friends of Services' (RGFS) started unofficial negotiations to draft a treaty that would serve as a tool to liberalize trade in services, including many areas of private and public services. Initiated in early 2012 by the United States and Australia, the TiSA has held several rounds of negotiations in Switzerland with now 50 participants (counting the EU as 28) that represent 70 percent of the world's trade in services.<sup>2</sup>

### ● Background

The initiative was initially termed as "International Services Agreement" (ISA), which has now been re-named the Trade in Services Agreement.<sup>3</sup> Current WTO parties negotiating TiSA are: Australia, Canada, Chile, Chinese Taipei (Taiwan), Colombia, Costa Rica, Hong Kong, Iceland, Israel, Japan, Liechtenstein, Mexico, New Zealand, Norway, Pakistan, Panama, Paraguay, Peru, South Korea, Switzerland, Turkey, the United States, and the European Union, which includes its 28 member states Austria, Belgium,

Bulgaria, Cyprus, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. This includes 9 developing countries, seven from Latin America and two from Asia. At present no Africa country is in the group, nor is there any BRICS country though China (and Uruguay) have expressed interest in joining the negotiations but so far are not included.<sup>4</sup>

Given the paucity of publicly available information on TiSA, most of the current public analysis and debates are based on the Annex on Financial Services of the agreement which was leaked out by Wikileaks. This Annex gives a sense of major motivations and aims of the negotiations. According to the leaked document, the draft text will not be declassified until 5 years after the TiSA comes into force or the negotiations are otherwise closed.<sup>5</sup>

The TiSA negotiations are fundamentally different from previous plurilateral negotiations in the WTO context because key participants, particularly the U.S., are unwilling to automatically extend the results to all other WTO members on an MFN basis. Instead, the whole point of the TiSA is to pressure major developing countries into joining the agreement on terms dictated by the RGFS group.<sup>6</sup>

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2 See: "The Trade In Services Agreement (TiSA)" retrieved from: <https://servicescoalition.org/negotiations/trade-in-services-agreement>

3 Sauvé Pierre (2013), "A Plurilateral Agenda for Services? Assessing the case for a Trade in Services Agreement (TiSA)", NCCR Trade Regulation; Working Paper No 2013/29, pp. 2-20

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4 See: Secret Trade in Services Agreement (TiSA) - Financial Services Annex" retrieved from: <https://wikileaks.org/TiSA-financial/>

5 See: "Trade in Services Agreement (TiSA), Australian Government, Department of Foreign Affairs and Trade, retrieved from: <http://www.dfat.gov.au/trade/negotiations/services/trade-in-services-agreement.html>

6 Sinclair Scott and Hadrian Mertins-Kirkwood (2014), "TiSA versus Public Services", Public Services International, pp. 5-19

- **Objectives**

The TiSA aims to address fundamental barriers to trade in services affecting the countries to push their trade in services like limited movement of data across borders, unfair competition from state-owned enterprises, lack of transparency and need for due process of law, and forced local ownership and discrimination in obtaining business licenses and permits.<sup>7</sup> Therefore such an agreement has the potential to create trading conditions that enable services industries in the participating to achieve their full potential.

So far, TiSA negotiations have included various areas of services such as domestic regulation, financial services, e-commerce, maritime transport services, air transport services, temporary movement of business persons, professional services, competitive delivery services, energy services, ICT services and telecommunication services. In the context of financial services, for instance, proponents aim to further deregulate global financial services markets. In this regard, the leaked draft calls for more competition in, and deregulation of, the banking sector which points to uninhibited cross-border data flows of highly sensitive consumer information which might have private implications.<sup>8</sup>

As part of the TiSA mandate, each participant must match or exceed the highest level of services commitments that it has made in any services trade and investment agreement that it has signed. This "best FTA" approach is meant to ensure that the starting point of TiSA negotiations (each government's initial offer) reflect the furthest extent of concessions in any

previous agreement. But such commitments are only the floor. In this regard, US advocates for "highest common denominator" approach, suggesting that commitments for all TiSA parties should be brought up to the highest degree of commitment of any other party.<sup>9</sup>

- **Basic Structure**

It has been widely argued that to establish legitimacy of the agreement, efforts have been made to tailor its principles and composition in a way that is complies with the WTO conditions and hence can acquire a "multilateral" framework. The Agreement is hence being crafted to be compatible with GATS so that a critical mass of participants will be able to pressure remaining WTO members to sign on in the future.<sup>10</sup>

Hence it is reported that some core GATS articles (including on definitions, scope, market access and national treatment, general and security exemptions) are being incorporated into TiSA. However, it should be emphasized that foreign services providers and their products will receive "National Treatment" except for those services specified in an exemption list (a serious deviation from the GATS structure). In this respect, it was agreed that commitments on national treatment would in principle be applied on a horizontal basis to all services sectors and modes of supply. Exemptions to this horizontal application would have to be listed in the countries' national schedule of commitments. Participants in the negotiations might also agree that commitments would in principle reflect actual practice (the "standstill clause") and that future elimination of discriminatory measures would be automatically

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7 See: "The Trade In Services Agreement (TiSA)" retrieved from: <https://servicescoalition.org/negotiations/trade-in-services-agreement>  
8 Sinclair Scott and Hadrian Mertins-Kirkwood (2014), "TiSA versus Public Services", Public Services International, pp. 5-19

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9 Ibid.

10 See: Secret Trade in Services Agreement (TiSA) - Financial Services Annex" retrieved from: <https://wikileaks.org/TiSA-financial/>

locked in (the so-called "ratchet clause") unless an exemption were listed.<sup>11</sup> There are also discussions around enforceability and Dispute Settlement Mechanism to be adopted.

- **Overview of Negotiating Sessions**

A total of seven negotiating sessions have been held so far with the eighth session planned from 21 – 15 September 2014 in Geneva that will be chaired by the EU. Table 1 provides a summary of the relevant information for the sessions including the issues addressed.

## **Criticism of TiSA**

The leaked financial services draft annex shows the US and EU, who pushed financial services liberalisation in the WTO, as the most active in the financial services negotiations in TiSA.<sup>12</sup> Further concerns can also be raised regarding the US promoting for the "Highest Common Denominator" principle, which can potentially increase the costs for other member countries to match up to the standards set by the leading countries which may erode their comparative edge. Therefore there have been arguments propounding the overarching advantages that the leading countries would have over or even at the cost of the development of the rest of the members. Also, the absence of many leading developing countries such as the BRICS and Africa countries and LDCs in the negotiations process brings out the lack of inclusivity. The questions on legitimacy have also been raised owing to the negotiations being outside of the WTO framework.

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11 Sauvé Pierre (2013), "A Plurilateral Agenda for Services? Assessing the case for a Trade in Services Agreement (TiSA)", nccr Trade Regulation; Working Paper No 2013/29, pp. 2-20

12 See: "Trade in Services Agreement (TiSA), Australian Government, Department of Foreign Affairs and Trade, retrieved from: <http://www.dfat.gov.au/trade/negotiations/services/trade-in-services-agreement.html>

Some analysts have gone to the extent of arguing that the proposed agreement is the direct result of systematic pressure by transnational corporations in banking, energy, insurance, telecommunications, transportation, water, and other services sectors, working through lobby groups like the US Coalition of Service Industries (USCSI) and the European Services Forum (ESF). As a result of which, due to deregulation of the key industries and increased liberalisation and competition, employment and labour rights could also be seriously undermined. In addition, foreign investors may be granted protections through the TiSA against what they deem to be trade-restrictive regulations (even if these regulations were designed to protect the environment, health, safety, financial stability and the public interest). It has also been advocated that in terms of national commitments, the agreement poses potential threat to public services due to excessive deregulation.<sup>13</sup>

## **Major Issues & Questions for EAC Countries**

TiSA adopts a "negative list" approach to national treatment. Under the TiSA, national treatment obligations would automatically apply to all measures and sectors unless these are explicitly excluded.

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13 Sinclair Scott and Hadrian Mertins-Kirkwood (2014), "TiSA versus Public Services", Public Services International, pp. 5-19

## Table 1: Summary of negotiating sessions

Date	Session	Chair	Issues Addressed
27 April – 3 May 2013	First Round	USA	<ul style="list-style-type: none"> <li>• Parties produced a first draft of core negotiating text</li> <li>• Discussions on temporary entry of business persons.</li> <li>• Initial discussions were also held on financial services.</li> </ul>
24–28 June 2013	Second Round	EU	<ul style="list-style-type: none"> <li>• Discussions around the inclusion of provisions from the WTO General Agreement on Trade in Services in the core text of the TISA</li> <li>• Initial discussions were held on Annex on Professional Services.</li> <li>• New proposals were tabled on financial services and domestic regulation.</li> <li>• Preliminary discussions on e-commerce and maritime transport services</li> </ul>
16–20 September 2013	Third Round	Australia	<ul style="list-style-type: none"> <li>• Significant progress was made on the core text of the agreement,</li> <li>• Commencement of market access negotiations.</li> <li>• Discussions also progressed on new and enhanced disciplines.</li> </ul>
4–8 November 2013	Fourth Round	USA	<ul style="list-style-type: none"> <li>• Focused on advancing new and enhanced disciplines (trade rules) on ICT services, financial services, professional services, temporary entry of business persons, maritime transport services and domestic regulation.</li> <li>• New proposals were tabled on air transport services, competitive delivery services, energy services and subsidies.</li> <li>• The provisions on scheduling commitments now largely finalised.</li> </ul>
17-24 February 2014	Fifth Round	EU	<ul style="list-style-type: none"> <li>• Discussions on new and advanced disciplines (trade rules) for ICT services, financial services, domestic regulation and transparency, maritime transport, professional services and temporary entry of business persons.</li> <li>• Agreement to move from proposals to negotiating texts for all of these disciplines.</li> </ul>
28 April - 2 May 2014	Sixth Round	Australia	<ul style="list-style-type: none"> <li>• Progress in advancing discussions in all areas of the negotiations, including on new and enhanced disciplines (trade rules) for financial services, domestic regulation and transparency, e-commerce and telecommunications, and maritime transport.</li> <li>• Negotiating text for air transport.</li> <li>• The Global Services Coalition organised a substantial industry presence in the margins of the negotiations.</li> </ul>
23-37 June 2014	Seventh Round		<ul style="list-style-type: none"> <li>• Focused on advancing the new and enhanced disciplines (trade rules) for e-commerce and telecommunications, financial services, professional services, domestic regulation and transparency, air and maritime transport and temporary entry of business persons.</li> <li>• Further discussions on the competitive delivery services and road transport proposals.</li> </ul>

Here TISA appears to be departing from GATS by proposing to liberalize national treatment inconsistent measures via a negative list approach while maintaining a positive list approach for market access commitments. (The likely rationale behind such segmentation could be that governments often find it easier to progressively liberalize discriminatory domestic regulations, which typically nonetheless allow for some (constrained) market contestability, than to dismantle quantitative restrictions limiting competition in services markets. The political economy of dismantling quota rents is indeed often more challenging given the political influence of those who hold such rents.<sup>14</sup>

But this is fundamentally different from GATS and can be an issue of concern to EAC countries due to its possible implications for the structure of GATS and the WTO services negotiations.

It should also be noted, however, that under the TISA, like the GATS, national treatment would apply to subsidies, meaning that any financial support for public services would have to be explicitly exempted, or be made equally available to private, for-profit services suppliers.<sup>15</sup>

It also seems that special and differential treatment for developing countries is not an integral part of TISA. This may be a major obstacle for any developing country, e.g. Kenya in the EAC, that may want to consider joining the agreement at some stage. Moreover, absence of S&D treatment provisions that are at par with those in the GATS may make it very difficult to multilateralise TISA later through its incorporation into the WTO.

Finally, an important question is also whether TISA outcomes would be extended automatically and unconditionally to LDCs on a non-reciprocal basis.<sup>16</sup> This should be a matter of interest to LDCs in the EAC. Moreover, the implications of TISA for the LDC Services Waiver in the WTO will also partly depend on this question.

## Conclusion

While it is very difficult to draw robust conclusions due to the very limited availability of information, it can be argued that, in theory, TISA can lead to the liberalisation of trade in many service sectors of interest to developing countries like the EAC. This will be more likely to happen if the objectives and structure of TISA are in line with those of the GATS. Similarly, TISA should explicitly emphasize on S&D treatment including non-reciprocal preferences for LDCs to facilitate the potential participation of developing countries and LDCs as well as its possible later multilateralisation. Finally, more public information on the content and process of TISA negotiations should be made available so that its implications for non-participants such as the EAC can be assessed.

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<sup>14</sup> Ibid.

<sup>15</sup> Sauvé Pierre (2013), "A Plurilateral Agenda for Services? Assessing the case for a Trade in Services Agreement (TISA)", nccr Trade Regulation; Working Paper No 2013/29, pp. 2-20

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<sup>16</sup> Ibid.



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