

Trade in Services: A Holistic Solution to New-Found Issues in Trade Law?

FOREWORD	<i>Trade, Law & Development: A Year in Review</i>
EDITORIAL	Ipsiata Gupta & Radhika Parthasarathy, <i>Trade in Services: A Tool to Redress Unemployment?</i>
ARTICLES	Rudolf Adlung, <i>The GATS: A Sleeping Beauty?</i>
	Petros C. Mavroidis, <i>And You Put the Load Right on Me: Digital Taxes, Tax Discrimination and Trade in Services</i>
	Andreas Maurer, <i>Overview on Available Trade Statistics and Tools to Assess Trade in Services</i>
	Markus Krajewski, <i>The Impact of Services Trade Liberalisation on Human Rights Revisiting Old Questions in New Contexts</i>
	Hildegunn Kyvik Nordås, <i>Telecommunications: The Underlying Transport Means for Services Exports</i>
	Weiwei Zhang, <i>Blockchain: Replacing, Eliminating and Creating Trade in Services</i>
	Mira Burri, <i>Trade in Services Regulation in the Data-Driven Economy</i>
	Pralok Gupta & Sunayana Sasmal, <i>The Curious Case of Trade Facilitation in Services: Rejected Multilaterally but Adopted Bilaterally and Plurilaterally</i>
	Ben Shepherd, <i>Quantifying Trade Law: New Perspectives on the Services Trade Restrictiveness Index</i>
	Sunanda Tewari & Prakhar Bhardwaj, <i>Situating India's Mode 4 Commitments in Geopolitics and Political Economy: The Case of GATS 2000 Proposal, India-Singapore CECA and India-ASEAN TiS</i>
NOTES	Anirudh Shingal, <i>Aid for Trade in Services: Definition, Magnitude and Effects</i>

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THE CURIOUS CASE OF TRADE FACILITATION IN SERVICES: REJECTED MULTILATERALLY BUT ADOPTED BILATERALLY AND PLURILATERALLY

PRALOK GUPTA* & SUNAYANA SASMAL†

The services sector is gaining importance in international trade and commerce globally. Like goods trade, services trade also requires facilitation for enhancing global trade. Trade Facilitation in Services (TFS) Proposal was submitted by India in the World Trade Organization (WTO) for the consideration of the Members. However, unlike the Trade Facilitation Agreement in Goods (TFA) which was adopted by Members to be an integral part of the WTO agreement, no appetite was shown by Members to adopt the TFS proposal. An analysis of free trade agreements (FTAs) of selected WTO Members reveals that these Members included many of the TFS provisions in their new age FTAs, thereby reflecting a dichotomy in Members' approach for TFS in WTO and their FTAs.

TABLE OF CONTENTS

- I. INTRODUCTION
- II. NEED FOR TFS
 - A. LACK OF TRANSPARENCY IN SERVICES TRADE
 - B. DOMESTIC REGULATION AS A DISGUISED MEANS OF PROTECTION
- III. TFS PROPOSAL AT THE WTO: AN INITIATIVE BY INDIA
- IV. INDIA'S TFS PROPOSAL: AN IMPROVEMENT OVER GATS
- V. ADOPTION OF TFS PROVISIONS IN FTAs AND PLURILATERAL ARRANGEMENTS
 - A. FTAs
 - 1. TRADE IN SERVICES AGREEMENT A.K.A TISA (2016)
 - 2. EU-CANADA COMPREHENSIVE ECONOMIC TRADE AGREEMENT A.K.A. CETA (2017)

* Dr. Pralok Gupta is an Associate Professor at the Centre for WTO Studies, Indian Institute of Foreign Trade, New Delhi. He may be contacted at pralok[at]iift.edu.

† Ms. Sunayana Sasmal is a Research Fellow at the Centre for WTO Studies, Indian Institute of Foreign Trade, New Delhi. She may be contacted at sunayana[at]iift.edu.

3. COMPREHENSIVE AND PROGRESSIVE AGREEMENT FOR TRANS-PACIFIC PARTNERSHIP *A.K.A.* CPTPP (2018)
 4. US-MEXICO-CANADA AGREEMENT *A.K.A.* USMCA (2019)
- B. PLURILATERAL AGREEMENTS
1. JOINT INITIATIVE ON SERVICES DOMESTIC REGULATION
 2. JOINT INITIATIVE ON INVESTMENT FACILITATION
 3. JOINT INITIATIVE ON E-COMMERCE
- VI. CONCLUSION

I. INTRODUCTION

The only existing multilateral legal instrument regulating the international trade in services is the General Agreement on Trade in Services (GATS) that was entered into force on January 1, 1995. Since 1995, the world has evidently witnessed a sizeable difference in the way services trade has impacted the growth and development of several nations. In a manner similar to the TFA¹ which was adopted by the WTO Members in 2014 and entered into force on February 22, 2017, a need was felt for a counterpart agreement on TFS by India. In accordance with this, India submitted its proposal on TFS at the WTO in 2016.² The TFS is expected to result in the reduction of transaction costs associated with unnecessary regulatory and administrative burden by addressing the key issues such as transparency, streamlining of procedures and eliminating bottlenecks through its various provisions.³

TFS depends, to a significant extent, upon regulatory coherence among trading countries as protection comes generally in the form of regulatory measures, as opposed to tariff and non-tariff measures as in the case of goods. Moreover, it is the domestic regulations and regulatory frameworks that are the main policy instruments used to protect domestic service sectors, not to mention meeting other national objectives. The twin nature of these regulations – acting as an instrument of protection and meeting public policy objectives to aid the process of liberalisation⁴ – poses significant challenges for their global harmonisation, or in

¹ General Council, *Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization*, WTO Doc. WT/L/940 (Nov. 27, 2014).

² Working Party on Domestic Regulation, *Note by the Secretariat: Report of the Meeting Held on Oct. 6 2016*, WTO Doc. S/WPDR/M/68 (Nov. 11, 2016) [hereinafter *WPDR-Secretariat's Note*].

³ Working Party on Domestic Regulation, *Communication of India: Possible Elements of a Trade Facilitation in Services Agreement*, WTO Doc. S/WPDR/W/57 (Nov. 14, 2016) [hereinafter *WPDR-India's Communication*].

⁴ DOMESTIC REGULATION AND SERVICE TRADE LIBERALIZATION 3 (Aaditya Mattoo & Pierre Sauvé eds., 2003) [hereinafter *Mattoo and Sauve*]; *See also* Stefan Zleptnig, *The GATS*

other words, for services trade facilitation. The importance of transparency and clarity in domestic regulations in WTO law and jurisprudence is otherwise clearly established. An example of where this was spelt out clearly was in the *Shrimp-Turtle* case where the Appellate Body found that “lack of transparent, predictable certification process” and of any “formal opportunity for an applicant country to be heard, or to respond to any argument that has been made against it” are procedural shortcomings that amounted to a denial of basic fairness and due process.⁵ Thus, the attention to procedure not only makes the process of trade more streamlined and efficient but the element of fairness also levels the playing field between all participating countries.

The TFS appears to be posited on the general principle of transparency in governance and administration,⁶ when applied to services trade and the processes faced by the service providers. It provides certain rights to service providers, clarifies certain legitimate expectations that can be held when trying to enter a particular market, while imposing certain obligations on the Members’ authorities to act expeditiously and judiciously. While the TFS does not look to increase market access,⁷ through liberalisation, an intended outcome would be to do away with barriers created by opaque, inefficient and arbitrary administering of qualification, technical and licensing (QTL) requirements,⁸ and thereby ensure improved administration of regulatory measures.⁹ The underlying philosophy is the same as that of the TFA that was adopted in 2014 as a WTO covered agreement. Against this backdrop, this article tracks the adoption of services trade facilitation provisions in various agreements. Parts two and three discuss the need for trade facilitation in services and TFS initiative by India, respectively. Part four compares the provisions of the proposed TFS agreement by India with GATS. Further, Part five assesses the inclusions of the TFS elements in recent FTAs of selected Members and the ongoing plurilateral negotiations at the WTO so as to assess if the provisions of TFS have been adopted in the modern age trade rules bilaterally

and Internet-based Services: Market Access and Domestic Regulation, 20(1) CAMBRIDGE REV. INT’L AFF. 133, 146 (2007).

⁵ Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 181, WT/DS58/AB/R (adopted Nov. 06, 1998).

⁶ Carl-Sebastian Zoellner, *Transparency: An Analysis of an Evolving Fundamental Principle in International Economic Law*, 27(2) MICH. J. INT’L L. 579 (2006).

⁷ PTI, *India’s facilitation proposal expected to push services trade*, ECON. TIMES (Feb. 15, 2017), <https://economictimes.indiatimes.com/news/economy/foreign-trade/indias-facilitation-proposal-expected-to-push-services-trade/articleshow/57167984.cms?from=mdr>.

⁸ Arpita Mukherjee & Avantika Kapoor, *India and Trade Facilitation in Services (TFS) Agreement: Concerns and Way Forward* 3 (ICRIER Working Paper No. 347, 2017) [hereinafter Mukherjee & Kapoor].

⁹ World Bank Group, *Trade Facilitation in Services – Concepts and Empirical Importance* 3 (Pol’y Research Working Paper 9234, 2020).

and plurilaterally, even if not accepted multilaterally. Finally, Part six concludes with important lessons drawn from such comparisons.

II. NEED FOR TFS

Despite the importance of the services sector in global trade and investment flows, services trade remains subject to numerous border and behind-the-border barriers as well as procedural bottlenecks. There has been little effective multilateral liberalisation of the sector, notwithstanding the negotiations to improve market access under the auspices of the GATS. The TFA, concluded at the Bali Ministerial Conference in December 2013 and adopted by the WTO in 2014, deals with goods trade and provides for expediting the movement, release and clearance of goods including goods in transit but does not cater to services trade. Facilitating services exports and imports was not discussed at the WTO despite the important role played by services in international trade.

A. Lack of Transparency in Services Trade

An important issue affecting services trade is the lack of transparency pertaining to regulatory requirements imposed by various countries on service providers. The non-transparent nature of regulations makes such requirements onerous and more burdensome for the foreign service providers as compared to domestic service providers. Trade potential in services – such as professional services, health services including nursing and paramedical – is not yet fully realised owing to costly and burdensome qualification and licensing restrictions imposed by major importing countries. It could be noted that WTO Members are free to exercise their regulatory space subject to their commitments under the GATS. The issue of facilitation therefore comes to the fore when this space is abused to impose excessive and over-burdensome restrictions on foreign service suppliers, that are designed and administered arbitrarily. For example, the imposition of stringent immigration requirements by certain countries can be a severe impediment to the service suppliers of another,¹⁰ non-responsiveness of immigration authorities to queries, lack of publication of measures before adoption, lack of clearly laid out factors of economic needs tests etc., are real issues that hinder services trade.¹¹ As Mattoo enunciates, the economic costs of regulatory discrimination can far outweigh the actually realised gains of entering new markets.¹² The TFS seeks to obligate countries to fulfil such mandates.

¹⁰ Request for Consultations by India, *United States — Measures Concerning Non-Immigrant Visas*, WT/DS503/1 (Mar. 03, 2016).

¹¹ Aaditya Mattoo & Deepak Mishra, *Foreign Professionals in the United States: Regulatory Impediments to Trade*, 12(2) J. INT'L. ECON. L. 435-456 (2009).

¹² *Id.* at 442.

B. *Domestic Regulation as a Disguised Means of Protection*

Services trade is inherently different from goods trade, the latter being subject to tariff rates and even quantitative restrictions, but mainly, being in the nature of border measures.¹³ Therefore, goods trade regulation could be considered much more objective in nature. However, trade in services is subject to GATS commitments made by countries multilaterally, and to the commitments taken in FTAs. The measures therefore allowed by the commitments can be of nature prescribed in the GATS and other legal instruments.

Characteristically, these measures are different from market access measures, which must be enlisted as per the country's commitments, and are imposed inside the borders as quality control measures, thereby an important crystallisation of regulatory autonomy.¹⁴ While the former pertains to the 'maximum requirements' that relates to market access under Article XVI of the GATS, domestic regulations, regulating QTL requirements form the 'minimum requirement'.¹⁵ Consequently, the former relates to the quantitative aspect of service supply, and the latter regulates the qualitative aspect.¹⁶ Thus, creative drafting may not violate the agreement but can finally create discrepancies in the playing field to favour domestic service supplier, for example, by way of harsh QTL conditions, opacity and inconvenient rules that hinder market access. If not regulated, then there might be several unnecessary, excessive, and burdensome hurdles that may restrict foreign service suppliers from supplying their services effectively.

An example of an attempt to control this is reflected in the provision on Domestic Regulation in GATS Article VI.¹⁷ Not just confined to a provision, it also laid down a negotiating mandate for the Council for Trade in Services to develop sector wise disciplines on how to formulate appropriate and GATS compliant domestic regulations.¹⁸ These disciplines had to be carefully negotiated as they can easily form barriers to trade unless they are carefully drafted and implemented. Several countries enact legal and administrative requirements regarding

¹³ Mattoo and Sauve, *supra* note 4.

¹⁴ Joost Pauwelyn, *Rien ne va plus? Distinguishing Domestic Regulation from Market Access in GATT and GATS*, 4 WORLD TRADE REV. 131, 133 (2005) [hereinafter Pauwelyn].

¹⁵ *Id.* at 152.

¹⁶ Appellate Body Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 250, WT/DS285/AB/R (adopted Apr. 20, 2005).

¹⁷ Panagiotis Delimatsis, *Determining the Necessity of Domestic Regulations in Services — The Best is Yet to Come*, 19(2) EURO. J. INT'L. L., 365, 366 (2008) [hereinafter Delimatsis].

¹⁸ GATS Training Module: Chapter 3, *A Closer Look at Domestic Regulations*, WTO, (last visited Apr. 29, 2020), https://www.wto.org/english/tratop_e/serv_e/cbt_course_e/c3s2p1_e.html.

qualification and licensing that are too burdensome and tedious to comply with, thereby providing an edge to domestic service suppliers. Thus, the drafters of the GATS found it worthwhile to add those measures regarding,

. . . qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, inter alia:

- (a) based on objective and transparent criteria, such as competence and the ability to supply the service;*
- (b) not more burdensome than necessary to ensure the quality of the service;*
- (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.¹⁹*

The interplay of domestic regulation, market access and national treatment were deemed contentious after the much controversial reasoning of the Panel and an unperturbed Appellate Body in *US-Gambling*. Scholarly understanding has emerged that the mere effect of inhibiting foreign service suppliers on the basis of non-discriminatory quality control standards established by a country cannot be held as a violation of WTO law, and that proper differentiations between market access restrictions and Domestic Regulation (DR) exercised due to regulatory autonomy must be maintained.²⁰ While this paper does not seek to clarify the position of law in this regard nor debates on the correctness of the outcome of the *US-Gambling* dispute, this discussion highlights the importance of DR as a tool for a country to maintain and allow services of only a certain standard within its borders. It is necessary to realise that these can be onerous obligations that even if are non-discriminatory, can impede market access and other guarantees under GATS.

A study by Francois and Hoekman suggested that regulation in services is pervasive and is driven by both efficiency and equity concerns.²¹ Thus, even though the measures are driven by public policy objectives, they often become impediments to trade and investment flows in services due to their onerous nature and the way in which they are administered and implemented.²² For instance,

¹⁹ General Agreement on Trade in Services, art. VI:4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS].

²⁰ Pauwelyn, *supra* note 14, at 168.

²¹ Joseph Francois & Bernard Hoekman, *Services Trade and Policy*, 48(3) J. ECON. LITERATURE 642, 652 (2010).

²² Pralok Gupta, *A Proposal to Facilitate Trade in Services*, 13(2) SAWTEE TRADE INSIGHT 12 (2017).

recognition of qualification could involve contacting various agencies which may be cumbersome and costly for the foreign service providers. Similarly, a delay in granting license to foreign service providers to provide services may adversely affect their investment decisions.

Despite DRs being used as means of disguised protection, not much success is achieved till date in the WTO in developing DR disciplines. The Working Party on Domestic Regulation (WPDR) has been struggling for years to develop DR disciplines, however, the only success has been in the drafting of Disciplines on Domestic Regulation in the Accountancy Sector in 1998.²³

In the absence of suitable DR disciplines that facilitate trade in services, the proposal by India to have a text on TFS is essentially not to increase market access but to ensure a more streamlined, enforceable legal instrument regarding the administration of any qualitative regulations. It takes forward the GATS provision on DR and goes beyond just that. The proposal is thus aimed at ensuring countries do not choose to have in place unnecessarily obstructive and burdensome regulations that resultantly reduce foreign service suppliers' presence in that country, by incorporating provisions such as transparency, streamlining of procedures and various other provisions.²⁴

Over the years, multiple bilateral and plurilateral trade agreements have chosen to have some provisions above and beyond the GATS pertaining to TFS, especially in recent years. It is undeniable that countries are recognising the need for swifter and easier regulatory processes to enhance global trade in services.

III. TFS PROPOSAL AT THE WTO: AN INITIATIVE BY INDIA

India was the first country to introduce the concept of TFS at the WTO in 2016. The proposal on the 'Concept Note for an Initiative on Trade Facilitation in Services'²⁵ was submitted at the WPDR meeting on October 06, 2016.²⁶ Subsequently, in 2016, India proposed 'Possible Elements of a Trade Facilitation in

²³ Council for Trade in Services, *Disciplines on Domestic Regulation in the Accountancy Sector*, WTO Doc. S/L/64 (Dec. 17, 1998) [hereinafter Domestic Regulation (Accountancy)].

²⁴ WPDR-India's *Communication*, *supra* note 3.

²⁵ Working Party on Domestic Regulation, *Communication from India: Concept Note for an Initiative on Trade Facilitation in Services*, WTO Doc. S/WPDR/W/55 (Sept. 27, 2016).

²⁶ WPDR-Secretariat's *Note*, *supra* note 2.

Services Agreement'.²⁷ On February 23, 2017, it submitted a draft legal text on 'Trade Facilitation Agreement in Services' at the WTO.²⁸

This draft legal text received mixed response from WTO Members. While some Members appreciated the proposal, which generated debate and discussions on services, several developed and developing country Members expressed concerns on the mandate, scope and content of the draft agreement. Besides these, a few other issues were raised like concerns about transparency going beyond the scope of Article III;²⁹ the appropriate forum to have TFS discussions; interplay of TFS with DR; extension of TFS provisions to market access; applicability of TFS provision to only scheduled commitments or all, unwillingness to engage in discussions on social security and so on.³⁰ Based on the feedback received, India presented a revised draft on July 27, 2017. The revised legal text has a Preamble and three Sections: Section I on Facilitating Trade in Services; Section II on Development Provisions and Section III on Institutional Arrangements and Final Provisions.³¹ The text states that the provision of the TFS agreement will apply to measures affecting trade in services in sectors where specific commitments have been undertaken. Thus, the focus of the agreement is on making existing market access meaningful rather than getting new market access. The revised draft was better accepted by the Members. It garnered appreciation from the Least-Developed-Country (LDC) group due to inclusion of special and differential treatment provisions, and Turkey welcomed it, terming it a 'balanced package'.³² However, some concerns remained, such as those of Ecuador and Kazakhstan about creation of additional burdens that countries with less interests in services trade may not be willing to undertake; and of China regarding provisions on facilitating cross-border flow of information, social security contributions and facilitating the movement of natural persons.³³

²⁷ WPDR-India's *Communication*, *supra* note 3.

²⁸ Council for Trade in Services & Working Party on Domestic Regulation, *Communication from India: Trade Facilitation Agreement for Services*, WTO Doc. S/WPDR/W/58 (Feb. 23, 2017) [hereinafter Draft TFS].

²⁹ Working Party on Domestic Regulation, *Note by the Secretariat: Report of the Meeting Held on 15, 16, 22 June and 5 July 2017*, WTO Doc. S/WPDR/M/71, 32 (Sept. 29, 2017).

³⁰ Council for Trade in Services - Special Session, *Communication of India: India's Responses to Issues Raised by WTO Members on the Indian Proposal on the Draft Agreement on Trade Facilitation in Services*, WTO Doc. RD/SERV/139 (May 4, 2017).

³¹ Council for Trade in Services Special Session, *Communication of India: Trade Facilitation in Services Revision*, WTO Doc. TN/S/W/63/Rev.1 (July 27, 2017) [hereinafter Draft TFS Revision].

³² Council for Trade in Services, *Note by the Secretariat: Report of the Meeting Held on 16 June 2017*, WTO Doc. S/C/M/132, 6-11, (Aug. 28, 2017).

³³ *Id.*

TFS provisions are drawn from a number of sources, including obligations of the GATS, negotiating texts on DR, Australia’s proposal on administration of measures (JOB/SERV/239), Turkey’s proposal on economic needs tests (JOB/SERV/224), bilateral, plurilateral, and regional trade agreements (RTAs), India’s earlier WTO submissions and the TFA for goods. Table 1 shows the applicability of TFA provisions for TFS.

The TFS proposal by India contains provisions that are applicable to all modes of services supply as well as mode-specific provisions. Several provisions are not obligatory but are there on a best endeavour basis. There are provisions for cooperation among competent authorities,³⁴ special and differential treatment for and technical assistance to LDCs in developing and strengthening their institutional capacities.³⁵ The proposal also mentions establishing a Committee on Trade Facilitation in Services, the role of which would be to ensure a smooth operation of the agreement.³⁶

Some important provisions contained in the TFS proposal by India include publication and availability of information, administration of measures, reasonable fees and charges, administration of economic needs tests, recognition, facilitating cross-border flow of information, consumption abroad and movement of natural persons, cooperation among competent authorities, special and differential treatment and establishing relevant authorities to monitor trade facilitation in services.

Table 1: Applicability of TFA Articles for TFS

TFA Article		Applicability for TFS		
Article No.	Description	Yes	May be	No
	Preamble	√		
Section-I				
1	Publication and availability of information	√		
2	Opportunity to comment, information before entry into force, and consultations		√	
3	Advance rulings	√		
4	Procedures for appeal or review	√		
5	Other measures to enhance impartiality, non-discrimination, and transparency		√	

³⁴ Draft TFS Revision, *supra* note 31, at art. 10.

³⁵ *Id.* at art. 11-12.

³⁶ *Id.* at art. 13.

6	Disciplines on fees and charges imposed on or in connection with importation and exportation and penalties	√		
7	Release and clearance of goods			√
8	Border agency cooperation	√		
9	Movement of goods intended for import under customs control			√
10	Formalities connected with importation, exportation, and transit		√	
11	Freedom of transit	√		
12	Customs cooperation			√
Section-II (Special and differential treatment provisions for developing country members and least-developed country members)				
13	General principles	√		
14	Categories of provisions	√		
15	Notification and implementation of category A		√	
16	Notification of definitive dates for implementation of category B and category C		√	
17	Early warning mechanism: extension of implementation dates for provisions in categories B and C		√	
18	Implementation of category B and category C		√	
19	Shifting between categories B and C		√	
20	Grace period for the application of the understanding on rules and procedures governing the settlement of disputes	√		
21	Provision of assistance and support for capacity building	√		
22	Information on assistance and support for capacity building to be submitted to the committee	√		
Section-III (Institutional arrangements and final provisions)				
23	Institutional arrangements	√		
24	Final provisions	√		

Source: Authors' construction based on TFA and India's draft on TFS.

IV. INDIA'S TFS PROPOSAL: AN IMPROVEMENT OVER GATS

The differences between India's TFS proposal and GATS are plenty. At first glance, the TFS is visibly an improvement over the similar provisions, and it seeks to take forward the ideals of GATS present in Art. VI of DR. DR, as per the text

of GATS and several trade law scholars,³⁷ is the regulation of necessary and legitimate policy objectives that are pursued by a country, behaving more in the sense of quality control of the services being provided in the country. As explained above, the TFS does not seek, and neither does the proponent of TFS (India) seek to achieve increased market access through this agreement. That is taken care of by negotiations between Members and resultant scheduling of commitments by Members.

The major provisions in the GATS that were enacted regarding administration of measures facilitating services were Article III (Transparency), Article VI (DR) and Article VII (Recognition). Thus, upon studying the corresponding sections of the two agreements, one can conclude that the TFS has attempted to provide more detailed processes and regulations that a country must have in place.

While there must be prompt publication of measures of general application relating to the supply of a service, the GATS provides for an exception during ‘emergency situations’, while the TFS does not. Moreover, as a publication requirement, the TFS proposes a mandatory list of what each Member *shall* publish, with compulsory publication in at least one official WTO language:

- the official titles, addresses and contact information of relevant competent authorities;
- requirements for authorisation, requirements for periodic renewal of such authorisation and general applicable terms and conditions of such authorisation;
- requirements and procedures relevant for the supply of a service;
- the normal timeframe for processing applications relating to authorisation, requirements and procedures;
- fees, charges and penalties imposed by competent authorities on or in connection with the supply of services;
- where applicable, details as regards public hearings or opportunity for comments in relation to any authorisation, requirements, and procedures as well as applicable fees and charges.³⁸

The GATS had not laid down any such mandate. Observing this list, the TFS has in a way attempted to define the implication of ‘relevant measure’. It therefore looks to ensure that any service provider shall have full and complete knowledge of how the administrative set up in the particular country works, what amount of initial investment would be required, what are the available judicial and quasi-judicial remedies if necessary, et cetera. In the absence of such detailed guidelines,

³⁷ Delimatsis, *supra* note 17.

³⁸ Draft TFS, *supra* note 28, at art. 2.1.

a country has the freedom to decide what ‘relevant’ could mean, and what measures it needs to publish so as to comply with Article III of GATS.

Moreover, the TFS allows a Member to comment on a proposed introduction or an amendment of a regulation before it comes into effect,³⁹ so as to maintain some stability and predictability regarding applicable laws and regulations in the country. The GATS however, only had a requirement to “respond promptly to all requests by any other Member for specific information on any of its measures”, without providing for an obligation to allow for service suppliers to opine on the new or amended regulation.⁴⁰

The TFS also adds to the GATS by laying down how such measures affecting services and service suppliers are to be administered, mainly with respect to authorisation and immigration formalities — for example, a member *shall* attempt to have a single window clearance mechanism for all service authorisations,⁴¹ there should be *reasonable* timeframes for submission of applications,⁴² and to the extent possible, there should be acceptance of electronic formats and copies of documents.⁴³ The TFS proposes a very comprehensive set of obligations with regards to the processing of applications, such as avoiding undue delays, providing the applicant the status of their application or informing them that the application is incomplete and allow for additional submission of requisite information, reasons for rejection et cetera.⁴⁴ The GATS only provides for timely intimation of decision and status of application⁴⁵ The TFS also provides for an efficacious judicial and administrative appeal mechanism.

A major inhibiting factor affecting supply of services from lesser-developed nations is the opaque nature and the high levels of fees and charges imposed by other countries. The GATS does not have any explicit provision to address these issues though it tries to implicitly tackle it by mentioning that “in sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner”.⁴⁶ On the contrary, the TFS has explicitly proposed that fees be “reasonable, transparent, commensurate with the costs

³⁹ *Id.* at art. 2.2.

⁴⁰ GATS, *supra* note 19, at art. III:4.

⁴¹ Draft TFS, *supra* note 28, at art. 3.1.

⁴² *Id.* at art. 3.2.

⁴³ *Id.* at art. 3.2.

⁴⁴ *Id.* at art. 3.4.

⁴⁵ GATS, *supra* note 19, at art. VI:3.

⁴⁶ *Id.* at art. VI:1.

incurred by the competent authorities, and do not in themselves restrict or impair the supply of the relevant service".⁴⁷

Above and beyond the GATS, the TFS also proposes provisions that correspond to the different modes of supply of service, other than those discussed above that corresponded majorly with Mode 3. These include Mode 1: Facilitating Cross-Border Flow of Information under Article 7 of the TFS; Mode 2: Cross Border Insurance Coverage and Emergency Authorisation, Facilitating Consumption Abroad under Article 8 of the TFS; and Mode 4: Provisions Facilitating Movement of Natural Persons under Article 9 of the TFS.

For providing services through movement of natural persons (Mode 4), the recognition of professional qualifications and licenses is an important issue. For the service importer, it is a matter of national policy to guarantee a certain quality of service to its consumers. However, for service providers, it may become unnecessary and unreasonable discrimination due to the lack of not having earned a local qualification. The GATS as well as TFS both have provisions on Mutual Recognition Agreements.⁴⁸ What the TFS does, a step forward, is that it allows for service suppliers to understand where their professional qualification is lacking, and thus allows them to make up for the same through course work, examinations, training, and work experience. Wherever examinations are to be held, the TFS puts an obligation on the Member to hold such examinations at regular intervals electronically and in the home country of the applicant, subject to costs.⁴⁹

Mode 4 is a very politically sensitive topic, and it is important for certain countries that have enormous supply of qualified and skilled service providers to be guaranteed a transparent entry system free of uncertainty and instability. However, many countries such as the USA continue to impose several restrictions on the movement of natural persons.⁵⁰ Several requirements of licensing, work permits, nationality and residency requirements often act as barriers.⁵¹ Thus, it is important to have a streamlined and transparent process in place which is not unnecessarily and overtly restrictive. Publication of important information regarding immigration formalities for temporary stay, making the administrative process more transparent, ensuring multiple entry to service suppliers with required

⁴⁷ Draft TFS, *supra* note 28, at art. 4.

⁴⁸ *Id.* at art. 6.2.

⁴⁹ *Id.* at art. 6.1.

⁵⁰ D. Ravi Kanth, *Strong Support for India's Initiative on Improving DR Disciplines*, THIRD WORLD NETWORK (Dec. 11, 2018), <https://www.twn.my/title2/wto.info/2018/ti181205.htm>.

⁵¹ Debjani Ganguly, *Barriers to Movement of Natural Persons: A Study of Federal, State and Sector-Specific Restrictions to Mode 4 in the United States of America* (ICRIER Working Paper No. 169, 2005).

qualifications, exemption from payment to social security contributions are the important provisions which have been considered by the TFS,⁵² whereas the GATS has Annex on Movement of Natural Persons Supplying Services Under the Agreement that only requires that measures regulating entry of foreign service suppliers “are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment”.

In spite of providing significant improvement over the GATS and India being receptive of suggestions of WTO Members to incorporate these into the revised TFS text, the TFS proposal by India did not garner the required support in the WTO for reasons mentioned earlier. Most of the Members were critical of the various provisions of the TFS proposal by India. This could be because a few Members had concerns on some of the provisions whereas some other Members on other provisions and the Members seem to have viewed the proposal in silos and not as a complete package for facilitating trade in services in all four modes. However, various provisions included in India’s TFS proposal found their way into recent FTAs and in plurilateral discussions on DR at the WTO. These provisions had definitely hit a nerve with fifty Members issuing the Joint Ministerial Statement on Services Domestic Regulation at Buenos Aires in 2017.⁵³ The adoption of TFS provisions in various FTAs and plurilateral discussions are discussed in the following part.

V. ADOPTION OF TFS PROVISIONS IN FTAs AND PLURILATERAL ARRANGEMENTS

A. FTAs

1. Trade in Services Agreement a.k.a TiSA (2016)

In 2012, “Really Good Friends of Services” comprising twenty-three WTO Members launched talks on an “International Services Agreement”.⁵⁴ The aim was to increase liberalisation mandate and go beyond the GATS disciplines. They sought to achieve enhanced liberalisation by agreeing that TiSA should go beyond the margins of preference already established by existing preferential trade agreements (PTAs) by locking in the current levels of unilateral liberalisation

⁵² Draft TFS, *supra* note 28, at art. 9.

⁵³ World Trade Organization, *Joint Ministerial Statement on Services Domestic Regulations*, WTO Doc. WT/MIN(17)/61 (Dec. 13, 2017) [hereinafter *Joint Ministerial Statement 2017*].

⁵⁴ Elina Viilup, *The Trade in Services Agreement (TiSA): An end to negotiations in sight?*, EUR. PARL. POLY DEPT., (Oct. 12, 2015), [https://www.europarl.europa.eu/RegData/etudes/IDAN/2015/570448/EXPO_IDA\(2015\)570448_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2015/570448/EXPO_IDA(2015)570448_EN.pdf).

(standstill) and any further unilateral liberalisation or removal of discriminatory measures after the implementation of the agreement will be applied at this newly liberalised level and will become a bound commitment at this more open level (ratchet mechanism).⁵⁵ Additionally, an MFN-forward clause would mean any future concession given to a trading partner under a bilateral treaty will automatically get extended to other members of TiSA.

The TiSA leaked texts provide a glimpse of some provisions being negotiated. The provision on DR resonates some of the draft TFS elements, such as judicial, arbitral, or administrative tribunals and procedures that are objective and impartial; recognition of education, requirements and licensing; transparent application timeframes etc., as discussed in the table below. However, the TiSA is an ongoing negotiation that is shrouded in mystery and automatically raises questions about transparency, and parties such as the USA have a high number of demands that may not be deemed favourable by other parties. Most of these demands aim at curtailing regulatory powers, and it is commonly believed that as a plurilateral agreement, TiSA runs the wild risk of being multilateralised into the WTO legal system through the back door.⁵⁶ Thus, without the final text, it is not possible to draw coherent conclusions about its similarities and deficits in comparison to the draft TFS.

Thus, the prospects look bleak when compared to the TFS' proposed text, though it has been argued that the TiSA may offer more liberalisation,⁵⁷ which is also an important objective for many countries. Thus, at a multilateral level, when the development levels and imperatives of all countries must be considered during negotiations, the TFS appears to be a more relevant choice than the TiSA, because the TFS would benefit all WTO Members and not just the selected members of TiSA.

2. EU-Canada Comprehensive Economic Trade Agreement *a.k.a.* CETA (2017)

⁵⁵ Katarzyna Kaszubska, *Deconstructing India's Position on the Trade in Services Agreement*, ORF ISSUE BRIEF NO. 146 3 (2016), https://www.orfonline.org/wp-content/uploads/2016/06/ORF-IssueBrief_146_Kaszubska.pdf.

⁵⁶ *Legislative Train Schedule – A Balanced and Progressive Trade Policy to Harness Globalisation*, EURO. PARL. LEGIS. TRAIN. [https://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-trade-in-services-agreement-\(tisa\)](https://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-trade-in-services-agreement-(tisa)).

⁵⁷ Sherry Stephenson, *Services Trade Facilitation and the TiSA: Overlap? Helpful? Future Challenges?* Workshop on Trade Facilitation in Services, New Delhi, India (2017) in Mukherjee & Kapoor, *supra* note 8; Pierre Sauvé, *Towards a plurilateral Trade in Services Agreement (TiSA): Challenges and prospects*, 5(1) J. INT'L. COMM. ECON. POL'Y 10 (2014).

The CETA is perhaps the most comprehensive of all the agreements being compared in this article. It came into force provisionally in September 2017, making it a relatively new agreement that is yet to test the waters in full force.⁵⁸ The CETA has in place multiple provisions that resonate with those of the TFS. These provisions can be found in different chapters through the text, including Chapter 9 (Cross-Border Trade in Services), Chapter 10 (Temporary Entry and Stay of Natural Persons for Business Purposes), Chapter 11 (Mutual Recognition of Professional Qualifications), Chapter 12 (Domestic Regulation), Chapter 21 (Regulatory Cooperation) and Chapter 27 (Transparency). It should also be noted that the CETA includes a Chapter 6 on Customs and Trade Facilitation, but evidently the scope is restricted to trade in goods only. Thus, it seems that the importance and urgency of facilitating smoother trade in services skipped the attention of CETA signing countries.

There are general provisions housed in Chapter 27 that covers any matter that the Agreement covers. Article 27.1 and 27.2 make it mandatory for the Parties to the Agreement to publish laws, regulations, procedures, and administrative rulings promptly, allow for interested parties to comment and to be given information whenever inquired. Contact points are mandatorily to be established for purposes of Chapter 10 and 11, while there is a Chapter 21 on Regulatory Cooperation that covers matter arising under number of trade law issues including cross-border services trade. Article 21.5 of the CETA makes the contact points responsible for consulting and coordinating with its respective regulatory departments and agencies. Chapter 11 of CETA lays down necessary provisions regarding mutual recognition agreements, which is also a proposed inclusion in the TFS.

In a first, the CETA lays down an obligation that the QTL requirements must not be based on criteria that are arbitrary.⁵⁹ It also empowers the Parties to grant a particular Minister the power to rule on the authorisation of a service, in case the ideals of public interest demand so, which is also not present in other agreements. However, this right is not present in case of professional services. Timely decisions, reasonable timeframes, independence and impartiality of decision-making authorities, acceptance of authenticated copies, reasonable fees and charges form important provisions in this Chapter.⁶⁰ These are also some of the cornerstones of the corresponding TFS provisions. Impartial and objective decision making by judicial, arbitral, or administrative tribunals is a provision present in both the TFS and the CETA.

⁵⁸ Comprehensive Economic and Trade Agreement, Can.-EU, Oct. 30, 2016, O.J. (L 11) 23 [hereinafter CETA].

⁵⁹ *Id.* at art. 12.3.

⁶⁰ *Id.*

The TFS remains novel in terms of its unique provisions of Modes 2 and 4, in the form of Articles 8 & 9 of the TFS, respectively. The explicit provision for multiple temporary entry permits for businesspeople and fast-tracked procedure are also included in the proposed text with a view to smoothen the tension surrounding Mode 4, by pacifying the service exporting nations. However, Chapter 10 of the CETA lays down detailed legal provisions containing maximum duration of stay permitted, professional qualifications, Visa formalities etc., for different categories of natural persons — key personnel, contractual services suppliers, independent professionals, and short-term business visitors.⁶¹

3. Comprehensive and Progressive Agreement for Trans-Pacific Partnership *a.k.a.* CPTPP (2018)

The world's most awaited mega-regional trade agreement Trans-Pacific Partnership (TPP) that ran into a number of 'presidential' issues finally saw the light of day in 2018 sans the USA, with a new name — Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).⁶² Ultimately, the chapters negotiated earlier for the erstwhile TPP were imbibed into the CPTPP. It is interesting to note that the CPTPP also has a separate chapter of trade facilitation in goods trade,⁶³ with similar provisions as mentioned in the TFS, but with coverage of only goods and customs related issues.

A side-by-side comparison of the TFS and CPTPP shows that most of the proposed provisions of TFS are covered by the mega-regional agreement. The provisions are spread across several chapters, with two being dedicated to Mode 1 and Mode 4 of services trade. Other TFS provisions are covered in the broader, general categories of regulatory coherence, transparency, and administrative provisions.

One major prong, transparency, finds itself couched in Chapter 26 of the CPTPP, wherein Members are mandated to promptly publish or make available "its laws, regulations, procedures and administrative rulings of general application with respect to any matter covered by this Agreement". There are additional requirements of giving no less than sixty days to comment,⁶⁴ reasons for the specific publication and where would be the appropriate place for publication. However, Article 10.11 of the CPTPP the article on Transparency must be read with Article 26.2. It imposes an obligation on the Party to explain with reasons

⁶¹ CETA, *supra* note 58, at art. 10.2 & 10.8.

⁶² Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Dec. 30, 2018 [hereinafter CPTPP].

⁶³ *Id.* at ch. 5.

⁶⁴ *Id.* at art. 26.2.

why there is a lapse in providing opportunity to comment, if any. However, unlike the TFS, there is no exhaustive mandatory list of necessary information that must be published by a Party. Chapter 27 titled “Administrative and Institutional Provisions” has provision on contact and enquiry points, “to facilitate communications between the Parties on any matter covered by this Agreement”.⁶⁵

However, CPTPP has not captured the importance of a government trying to establish a single window clearance as much as possible, nor is there an establishment of fixed timeframes for submission of applications. Regarding the processing of applications, there are similar provisions in the TFS, but it does not include any provision that sets forth the best endeavour to accept electronic submission of applications. The CPTPP ensures that authorisation fees are reasonable, transparent and do not restrict the supply of service, just as the TFS.⁶⁶

A noteworthy and unique aspect of the CPTPP is that it has a separate set of provisions in Annex 10-A, on “Professional Services” that serves the purpose of setting a legal background to recognising professional qualifications, licensing or registration of certain kinds of professionals including, engineers, architectural and legal service providers. For creating uniformity in the way service providers’ qualifications are recognised across borders, the CPTPP has a few lessons to offer to the TFS experience that will go a long way in ensuring full utilisation of Mode 4 services trade.

The CPTPP also has a separate Chapter 12 titled “Temporary Entry of Business Persons” that ensures that immigration formalities and procedures are streamlined and clear, with a strong emphasis on transparency thereby allowing for easier movement of people. The measures in this regard must not be “applied in a manner as to nullify or impair the benefits accruing to any Party”.⁶⁷ However, a requirement of complying with any immigration formalities is not a nullification or impairment of a benefit, and the person granted entry must still comply with other licensing requirements under Chapter 10. The underlying tenet of this Chapter is resonated in the TFS, which obligates Members to publish information on the types of business and work related visas or permits issued in respect of the categories of natural persons specified in its schedule of specific commitments,⁶⁸ and it must allow for information to be provided when asked.⁶⁹ Under this chapter, the provision on Dispute Settlement must be read together with the general, all-encompassing provision mentioned in Chapter 26 of CPTPP, whereby judicial,

⁶⁵ *Id.* at art. 27.5.

⁶⁶ *Id.* at art. 10.8.5.

⁶⁷ *Id.* at art. 12.2.3.

⁶⁸ Draft TFS, *supra* note 28.

⁶⁹ CPTPP, *supra* note 62, at art. 12.6.

quasi-judicial or administrative tribunals must be established. An aggrieved party looking for temporary entry must first exhaust all administrative remedies before approaching the CPTPP's dispute settlement system. With regards to the other Modes, it must therefore be assumed that Article 26.3 on due process in administrative proceedings, which is like the corresponding TFS provision, must prevail.

The CPTPP had often been hailed as a forerunner for all other trade agreements to come, given its comprehensive provisions and the negotiators' ambitious foresight. This may be the largest mega-regional agreement in existence at the moment, but it provides a solid blueprint for multilateral negotiations. Thus, it is easy to surmise that though the TFS came to be proposed after the negotiations of the CPTPP Services chapter had closed, the emotions surrounding facilitative aspects of services trade were running high throughout.

4. US-Mexico-Canada Agreement *a.k.a.* USMCA (2019)

The USMCA, or the refurbished North American Free Trade Agreement, is unique as it signifies an attempt to liberalise trade linking both developing and developed economies. While the USMCA contains provisions echoing India's TFS proposal, it has failed to treat the matter of trade facilitation in goods and services on an equal footing. The USMCA dedicates an entire chapter to trade facilitation and customs administration.⁷⁰ However, the scope of it is noticeably confined only to goods trade, as in the case of EU-Canada CETA. Instead, the provisions of TFS are included in the general chapter on cross-border trade in services.⁷¹ This denotes that there is a relatively much lesser urge felt to promote and regulate trade facilitation in services than in goods.

Article 15.8 of the USMCA relates to development and administration of measures, which fits in squarely within one of the proposed TFS provisions. It refers to the requirement of objectivity and transparency in implementing licensing and qualification requirements, independence in decision making, and general ease for the applicant. For those service suppliers who would require authorisation, reasonable timeframes for processing of the application, procedures for appeal and review have been provided for. These would mainly relate to ease of operability through Mode 3 and Mode 4 measures. This provision also states that the authorisation fees must be reasonable, transparent, and not restrictive, keeping in line with India's proposal. Article 15.9 of the USMCA also provides for recognition of education or experience obtained, requirements met, or licenses or

⁷⁰ United States-Mexico-Canada Agreement, ch. 7, Sept. 30, 2018 (H.R./5430) (2019) [hereinafter USMCA].

⁷¹ *Id.* at ch. 15.

certifications granted to make services trade in Mode 4 seamless and easier. Appendix 1 to the Chapter also provides extensive guidelines on mutual recognition agreements, their scope, coverage, manner of negotiations etc. Chapter 16 (Temporary Entry of Business Persons) entirely is devoted to immigration requirements of foreign business persons. A provision from India's TFS proposal regarding publication of information relevant to immigration is couched in Article 16.5.

The USMCA does include a specific chapter on administrative and institutional provisions that provides for setting up Agreement Coordinator,⁷² which will make it easier for the government bodies to coordinate and cooperate with each other, which is also mentioned in India's TFS proposal. Chapter 29 (Publication and Administration) obligates a Government to publish a proposed law/measure and afford adequate time and opportunity to stakeholders to respond. It also mandates the laws to be published on free, publicly, and easily available websites. Chapter 28 also deals with the transparent development of regulations, meaning regulatory measures must be published along with report of impact assessment, before being formally introduced, therefore allowing interested parties to give their opinions.⁷³ Therefore, the USMCA appears to have imbibed the substance of India's TFS proposal, in the specific trade in services chapter as well as in other administrative provisions thereafter. Chapter 28 reiterates that the governments must act with greater transparency, objective analysis, accountability, and predictability.⁷⁴ However, India's proposal as to a single window clearance facility is not provided in so many words, though there is a provision which says that for licensing and qualification requirements, a party should, "to the extent practicable, avoid requiring an applicant to approach more than one competent authority for each application for authorisation".⁷⁵ There is also nothing on fast track application process, or on administration of economic needs test. Hence, the USMCA to a large extent captures the essence of the proposed TFS scope, and therefore is yet another example of its out-of-WTO adoption.

Thus, with a close comparison of the provisions of TFS and four other trade agreements, there is a clear case of why the TFS would serve a beneficial purpose for countries at all levels of development, since like the TFA, the TFS would also be implemented in stages, therefore giving enough preparatory time for less capable nations. Table 2 attempts to give a clearer picture of where the TFS shines a bright light.

⁷² *Id.* at art. 30.5.

⁷³ *Id.* at art. 28.9.

⁷⁴ *Id.* at art. 28.2.

⁷⁵ *Id.* at art. 15.8(2)(d).

Table 2: Comparison of TFS Provisions with Selected FTAs

TFS	TiSA⁷⁶	CPTPP	CETA	USMCA
Art. 2: Publication and Availability of Information	With small differences.	With small differences. Also present in Chapter 26 on “Transparency and Anti-Corruption”.	Present in Chapter 27 on “Transparency”.	Present in Chapter 29 on “Publication and Administration”.
Art. 2.2: Opportunity to Comment and Information before Entry into Force	Being negotiated, in Annex on Domestic Regulation.	With small difference. Also present in Chapter 26 on “Transparency and Anti-Corruption”.	Also present in Chapter 27 on “Transparency”. Present for Financial Services, and in chapter on Trade Facilitation in goods.	Present in Chapter 29 on “Publication and Administration”.
Art. 2.3: Enquiry Points	Present, in Chapter on “Transparency”.	Present, in Chapter 27 on “Administrative and Institutional Provisions”.	In Chapter 21 titled “Regulatory Cooperation”.	Present, in Chapter 30 on “Administrative and Institutional Provisions”.
Art. 3.1: Single Window	No provision.	No provision.	No provision.	No provision.

⁷⁶ For the purpose of this analysis, the following leaked texts have been used: June 2016 Draft of TiSA Core Text; June 2016 Draft of Chapter on “Transparency”; October 2015 Draft of Annex on Domestic Regulation; and June 2016 Draft of Annex on Movement of Natural Persons.

Art. 3.2: Application Timeframes	Being negotiated, in Annex on Domestic Regulation.	No provision.	Present, in Chapter 12 on “Domestic Regulation”.	Present, in Chapter 15 on “Cross-border trade in services”.
Art. 3.3: Electronic Applications and Acceptance of Copies	Being negotiated, in Annex on Domestic Regulation.	No provision.	Present, in Chapter 12 on “Domestic Regulation”.	Present, in Chapter 15 on “Cross-border trade in services”.
Art. 3.4: Processing of Applications	Being negotiated, in Annex on Domestic Regulation. Very similar to draft TFS.	Very similar.	Very similar.	Very similar.
Art. 3.6: Information and Verification Requests	Present, in Annex on Domestic Regulation.	Present in some form.	Present in some form.	Present in some form.
Art. 3.7: Fast-Track Procedure	No provision.	No provision.	No provision.	No provision.
Art. 4: Fees and Charges	No provision.	Present, with small difference.	Present, with small difference.	Present, with small difference.
Art. 5: Administration of Economic Needs Tests	No provision.	No provision.	No provision.	No provision.
Art. 6.1: Provisions Pertaining to Recognition	Present, with small difference, in core text of TiSA.	Present in a similar form.	Present, in a similar form	Present in a similar form.
Art. 6.2: Recognition Agreements	Present in core text of TiSA.	Present.	Present in Chapter 11, titled “Mutual	Present, in Chapter 15 on “Cross-border

			Recognition of Professional Qualifications”.	trade in services”.
Art. 7: Facilitating Cross-Border Flow of Information	No provision.	Present, in Chapter 14 on “Electronic Commerce”.	Present in Chapter 16 on “Electronic Commerce”.	Present, in Chapter 19 on “Digital Trade”.
Art. 8 (Facilitating Consumption Abroad) Art. 8.1: Cross Border Insurance Coverage	No provision.	No provision.	No provision.	No provision.
Art. 9 (Movement of Natural Persons) Art. 9.1: Grant of temporary entry	Present in Annex on Movement of Natural Persons.	Present in Chapter 12 on “Temporary Entry of Business Persons”.	Present in Chapter 10 on “Temporary Entry and Stay of Natural Persons for Business Purposes”.	Present in Chapter 16 on “Temporary Entry of Business Persons”.
Art. 9.2: Multiple Entry	Being negotiated, in Annex on Movement of Natural Persons.	No provision.	No provision.	No provision.
Art. 9.3: Social Security Exceptions	No provision.	No provision.	No provision.	No provision.
Art. 10: Cooperation Among Competent Authorities	Agreement Specific.	Chapter Specific.	Chapter Specific.	Chapter Specific.

B. *Plurilateral Agreements*

1. Joint Initiative on Services Domestic Regulation

The relation between DR and TFS cannot be more emphasised, as the first concept note submitted by India on TFS was at a meeting of the WPDR.⁷⁷

As mentioned earlier in Part 2.2, the GATS mandated the Council for Trade in Services to develop sector-specific guidelines. However, disciplines relating to only the Accountancy sector, which were formulated in 1998,⁷⁸ have been developed so far. Thus, over the last two decades, this issue has remained largely dormant. However, in 2017 at Buenos Aires, plurilateral talks (Joint Initiative) on DR were initiated⁷⁹ and resultantly, negotiations on a draft text ensued that may form the basis for future sectoral domestic regulations.

In late 2019, a Reference Paper on services DR was released by the Joint Initiative members.⁸⁰ At the first glance, it appears that most of the concerns raised in the TFS proposal have been incorporated in this Reference Paper. Since the scope of DRs is only to ascertain that within-the-territory qualification and licensing requirements are executed in manner that does not restrict market access unduly, the Reference Paper captures those elements of TFS which directly relate to development and administration of measures, and publication of information. The Reference Paper echoes the TFS elements of timely processing of applications, reasonable and transparent fees, mutual recognition of QTL, transparency, and publication of information relevant to supply of service, establishment of enquiry and contact points.

However, what should have ideally been incorporated as well, is regarding administration of economic needs test, which is crucial in terms of India's concerns regarding Mode 4 trade in services. There is also no mention of facilitating trade through Mode 2 and immigration related matters, but the scope of domestic regulation might not necessarily extend to it. Since these disciplines are being negotiated at the WTO, the Paper contains provisions on special and differential treatment and technical assistance, which FTAs typically are wanting of.

⁷⁷ Concept note in S/WPDR/W/55 was submitted at the meeting of WPDR (S/WPDR/M/68).

⁷⁸ Domestic Regulation (Accountancy), *supra* note 23.

⁷⁹ *Joint Ministerial Statement 2017*, *supra* note 53.

⁸⁰ Joint Initiative on Services Domestic Regulation, *Note by the Chairperson – Draft - Revision*, WTO Doc. INF/SDR/W/1/Rev.1, (Dec. 12, 2019).

Thus, since the Reference Paper is only in its draft stage, India in the future negotiations can try to include more of the elements of its TFS proposal that could squarely fit under DR's scope. The Joint Initiative on Domestic Regulation negotiation, in its current state, does appear to converge with the ideals that the TFS proposes. Moreover, as pointed out by India in its submission on GATS Article VI:4 disciplines for Mode 4,⁸¹ the plurilateral negotiations undertaken in the Joint Statement Initiative must be multilateralised through proper channels and as the GATS had legally mandated, through the WPDR. Having only a few countries decide the disciplines that could potentially affect all Members would lead to problematic and unbalanced outcomes.

2. Joint Initiative on Investment Facilitation

Similar to the disciplines reflected in the Reference Paper on DR, investment facilitation has been a work-in-progress, and WTO Structured Discussions on Investment Facilitation for Development have been taking place since the Eleventh WTO Ministerial Conference in Buenos Aires. Starting with discussions around a draft text⁸² on Investment Facilitation, a streamlined text has been developed as recently as January 2020.⁸³ Although the text does not cater to TFS explicitly, the facilitative elements of the text applies to services too as Mode 3 of trade in services is linked with commercial presence and foreign investment.

Investment was a part of the *Singapore Issues*, and of the Doha Development Agenda 2001. However, investment as a trade issue was dropped in Cancun in 2003, and it was decided in Nairobi in 2015 that any future multilateral discussion on a Doha Round issue would proceed with consensus.⁸⁴ Thereafter, there were workshops and meetings where some countries circulated their opinions on the need for multilateral instrument on investment facilitation.⁸⁵ At the beginning,

⁸¹ Working Party on Domestic Regulation, *Communication from India: GATS Article VI:4 - Disciplines for Supply of a Service Through the Presence of a Natural Person of a Member in the Territory of Another Member*, WTO Doc. RD/SERV/151* (Dec. 5, 2018).

⁸² World Trade Organization, *WTO Structured Discussion on Investment Facilitation for Development*, WTO Doc. INF/IFD/RD/39 (July 24, 2019).

⁸³ World Trade Organization, *WTO Structured Discussions on Investment Facilitation for Development: Streamlined Text*, WTO Doc. INF/IFD/RD/45 (Jan. 17, 2020).

⁸⁴ Balino et. al., *Investment Facilitation: History and the latest developments in the structured discussions*, IISD (Jan. 2020), <https://www.iisd.org/sites/default/files/publications/investment-facilitation.pdf>.

⁸⁵ General Council, *Communication from Russian Federation: Investment Policy Discussion Group*, WTO Doc. JOB/GC/120 (Mar. 30, 2017); General Council, *Communication from China: Possible Elements of Investment Facilitation*, WTO Doc. JOB/GC/123 (Apr. 21, 2017); General Council, *Communication from Argentina and Brazil: Possible Elements of a WTO Instrument on Investment Facilitation*, WTO Doc. JOB/GC/124 (Apr. 24, 2017).

there were concerns that investment is substantively not under the scope of WTO rules, and therefore any multilateral negotiations there could overstep into a realm that is strictly separate. Moreover, any multilateral discussions relating to investment could also potentially affect policy space of governments. However, fears were assuaged when it was decided that investment facilitation will not deal with substantive aspects of investment law, but instead, will ensure that issues such as transparency, efficiency, ease and predictability can be better guaranteed. The Joint Ministerial Statement of 2019 clarified that the negotiations on investment facilitation would not address market access, investment protection, and Investor-State Dispute Settlement.⁸⁶ Instead, focusing on the procedural and facilitation aspects, the structured discussions that followed the 2015 Nairobi Ministerial borrowed heavily from the TFA experience⁸⁷ and services chapters of trade agreements.

The streamlined text of January 2020 is extremely clear, and similar to the provisions proposed by India in TFS. Any provisions in the TFS affecting trade through Mode 3 have been addressed in the text, such as administration of measures, transparency, publication and adequate opportunity to comment, establishing single window facilities and contact points, strengthening capacity and providing special and differential treatment. In fact, China has also proposed the addition of provisions relating to temporary entry of businesspersons, necessary for the conduct of investment activities in the country.

Investment facilitation has however been a contentious issue. Investment is largely viewed to have a political aspect, and therefore is thought best avoided at the WTO as a trade issue in itself. However, its close relation with Mode 3 of services trade proves that the facilitative provisions are of a generic nature, and not threatening towards governments' political and FDI ambitions. The provisions are similar to those in most FTAs, and the DR disciplines under negotiation. Therefore, negotiating multilaterally on TFS and investment facilitation simultaneously will be beneficial in the long run.

3. Joint Initiative on E-Commerce

⁸⁶ World Trade Organization, *Joint Ministerial Statement on Investment Facilitation for Development*, WTO Doc. WT/L/1072 (Nov. 5, 2019).

⁸⁷ WTO Structured Discussions on Investment Facilitation for Development, *Elements Aimed at Streamlining and Speeding Up Administrative Procedures and Requirements*, WTO Doc. INF/IFD/R/2, (May 10, 2019); WTO Structured Discussions on Investment Facilitation for Development, *Elements Aimed at Enhancing International Cooperation, Information Sharing, and the Exchange of Best Practices, and Development Dimension*, WTO Doc. INF/IFD/R/3 (June 11, 2019); WTO Structured Discussions on Investment Facilitation for Development, *Other Cross-Cutting Issues*, WTO Doc. INF/IFD/R/4 (July 15, 2019).

Since January 2019, WTO negotiations on e-commerce have been taking place amongst 70 plus Members, and as a part of the Joint Statement Initiatives, several proposals have been tabled regarding the scope of the e-commerce negotiations. In many of the individual country proposals, trade facilitation and related aspects have been considered as important provisions.

For example, in the proposal submitted by New Zealand,⁸⁸ trade facilitation in a digital economy occupies an important role. An important factor associated with any form of global e-commerce is the financial and payments aspect, and its regulation. In this light, New Zealand proposed having a domestic electronic transactions framework, which provides for a basic framework for electronic contracting that coheres with international best practice in the form of the relevant well established UNCITRAL or UN documents. A commonality in the regulatory approaches would ensure lesser impediments and hurdles to e-commerce. Since e-commerce is only one facet of digital trade, which in the coming days will replace traditional business and transaction models, enabling paperless trading and electronic verification etc., will make it easier for smaller businesses to participate in the digital economy. New Zealand also noted that e-signatures emerged as one of the biggest difficulties in the 2017 OECD/WTO Aid-for-Trade Monitoring and Evaluation Exercise.⁸⁹ Thus, the use of electronic authentication mechanisms is crucial.

The EU's submission in the Joint Statement Initiatives also echoes the same points as New Zealand, whereby they too emphasised the importance of legal certainty of electronic contracts; electronic authentication and trust services, which include services such as electronic signatures, electronic seals, electronic time stamps, electronic delivery service and website authentication.⁹⁰ The EU noted that "trust services are thus crucial in facilitating both domestic and cross-border e-commerce as they help to ensure the authenticity, integrity and privacy of online transactions."⁹¹ They also suggested including a rule on prior authorisation on lines of technological neutrality, that says that no prior authorisation will be required for the supply of a service electronically.

⁸⁸ World Trade Organization, *Communication from New Zealand: Joint Statement on Electronic Commerce*, WTO Doc. INF/ECOM/2 (Mar. 25, 2019).

⁸⁹ World Trade Organization, *Digital Connectivity and E-Commerce- Joint OECD-WTO Aid-for-Trade Monitoring and Evaluation Exercise for the Global Review*, WTO Doc. WT/COMTD/AFT/W/72 (June, 2017).

⁹⁰ World Trade Organization, *Communication from the European Union: Joint Statement on Electronic Commerce - Establishing an Enabling Environment for Electronic Commerce*, WTO Doc. JOB/GC/188 (May 16, 2018).

⁹¹ *Id.*

USA's proposal included one of the points in India's TFS proposal, which focused on the importance of free flows of information.⁹² While India's concept paper on TFS also includes dataflow related provision but the context in the proposal is for business to business data. On the other hand, the USA proposal intended towards having free flow of all kind of data, thus is more encompassing. India is of the view that in an evolving digital economy, domestic regulatory frameworks pertaining to e-commerce and use of data must not be constrained by negotiating multilateral rules on e-commerce. Apart from proposals similar to TFS, USA emphasises that internet services such as communication through voice, text, and video that take place across borders must be regulated carefully, instead on stifling innovation businesses. While the US submission has a part titled trade facilitation, it restricts the coverage to trade in goods through electronic means, thereby focusing of the TFA's elements of *de minimis* exemption for customs duties. It does not directly mention trade facilitation in services.

Through talks over the past several months, post seven negotiating rounds, some clarity has been attained on the proposed inclusions in the E-Commerce Agreement at the WTO as of February 25, 2020.⁹³ Several of TFS elements have been incorporated, including electronic transactions, and transparency, electronic availability of trade related information, DR, cooperation and a cooperation mechanism. However, these are, currently, only proposed inclusions and therefore no consensus exists on what should be a part of the final outcome. It is nonetheless important to note that several countries are considering the proposed TFS elements important to be considered as legal rules in plurilateral trade negotiations.

VI. CONCLUSION

The discussion in Section 5 reveals that India's TFS proposal for adoption at a multilateral level has gained incidental recognition and is recurrent through a number of FTAs and on-going plurilateral negotiations at the WTO. The significance of these agreements and negotiations having covered most of the TFS provisions reveals an important point that facilitative aspects regulating services trade is gaining traction and countries find it crucial to be codified into hard obligations. The costs, resources and time in terms of economic productivity that is getting wasted due to lack of transparency and efficiency in the way in which services are administered are too high and can be avoided by ensuring streamlined processes in place.

⁹² World Trade Organization, *Communication from the United States: Joint Statement on Electronic Commerce Initiative*, WTO Doc. JOB/GC/178 (Apr. 12, 2018).

⁹³ World Trade Organization, *Joint Statement on Electronic Commerce: Seventh Negotiating Round, Facilitator's Report*, WTO Doc. INF/ECOM/R/7 (Feb. 25, 2020).

This article predominantly discusses the FTAs signed between or led by developed WTO Members. Several provisions in the proposed TFS text have been discussed and/or adopted in whole or in part by several developed countries in their FTAs and plurilateral negotiations but most of these countries were strong critics of India's TFS proposal. Thus, there is a dichotomy in these Members' approaches towards acceptance of TFS provisions at the multilateral level and at the bilateral/plurilateral level. The same may also be said about India as, despite a strong proponent of trade facilitation in services, India has not yet joined any of the plurilateral negotiations at the WTO. However, the non-joining of the Joint Initiatives by India could be due to two reasons — first, larger scope of these Joint Initiatives to go beyond facilitative elements only; and second, non-inclusion of some key provisions of India's TFS proposal.

Instead of a fragmented adoption through FTAs, RTAs and plurilateral arrangements, it would be more beneficial for all countries across all levels of economic development to agree to a multilateral text on trade facilitation in services for regulatory coherence. The TFS provisions in India's proposal where there are divergent views among Members could be negotiated for acceptance as 'soft law' while the more commonly accepted provisions of transparency and streamlined administrative procedures can be considered as binding obligations. Increased servicification of manufacturing, growing importance of services and rapid move towards e-commerce in a digital economy renders the regulation of services more crucial in future and thus prone to disguised protection. The TFS proposal hence deserves more attention than what it has gotten at the multilateral level.