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Services Negotiation and Plurilateral Agreement: TISA and sectoral approach¹

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Abstract

- 1 The World Trade Organization (WTO) General Agreement on Trade in Services (GATS) negotiation has not resulted in any major achievements since the Telecommunication and Financial Services Agreements concluded in 1997 due to a lack of momentum in the Doha Round, concerns about free-riding, and free trade agreement (FTA) competition. In the stalemate in the Round, TISA, together with FTAs, have been promoted as a strong tool for liberalization and rulemaking in services.
- 2 Trade in Services Agreement (TISA) is a plurilateral initiative among like-minded countries aiming at high level liberalization and rulemaking in services. Japan needs to be involved fully in it since this framework has the potential to form global rules directly, create new business opportunities for Japan, and serve as a leverage in individual FTAs to protect Japanese interests.
- 3 Although the legal structure of TISA is to be discussed, defining TISA as an FTA is problematic since it may lead to an arbitrary interpretation of Article 5 of GATS, furthermore, the scenario for globalizing it involving developing members is not clear, economic welfare problem exists, and it does not match the horizontal nature of services regulations. In light of global rulemaking, TISA should be developed based on the idea of participation of members forming critical mass and the extension of benefits of the agreement to non-participants on a most-favored nation (MFN) basis.
- 4 Sectoral agreement as exemplified in the Telecommunication and Financial Services Agreements is a useful tool to develop GATS that is capable of incorporating the characteristics of various sectors. Sectoral approach should be developed in TISA aiming at global rules. Japan is encouraged to table sectoral proposals actively in such areas as retail and distribution, manufacturing related services, culture related services, environment related services, and cross border data flows in TISA.

Keywords: Service, GATS, TISA, Plurilateral agreement, FTA, Sector

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With a focus on the importance of plurilateral agreements, this paper will discuss the importance and problems of the Trade in Services Agreement (TISA) currently under negotiation, as well as the importance of sectoral negotiations in services and orientations towards their realization.

Section I provides an overview of the current status of service negotiations in the WTO.

Section II discusses the importance and problems of the TISA and considers the direction that should be aimed towards, while Section III discusses the importance of sectoral negotiations, and proposes strategies to enable their realization.

I Current status of WTO GATS negotiations

1 Current status of GATS negotiations

In addition to disciplines in goods, the Uruguay Round that concluded in 1993 stipulated rules for services, in the form of the World Trade Organization (WTO) General Agreement on Trade in Services (GATS).

This agreement divides services into four means of delivery, Modes 1 to 4, and stipulates the disciplines on most-favored nation (MFN) status, national treatment (NT), and market access (MA), as well as appending Schedules of Commitments clarifying the specific commitments of each signatory nation.

The services represent 70% or more of the GDP of the developed nations, and the volume of trade in services is increasing annually. Trade in services now occupies an important position in international trade alongside trade in goods.

However, compared to the disciplines on goods, the services agreement resulting from

the Uruguay Round had a short history, and the scope and depth of the framework and commitments do not come close to those for goods.¹

Generally speaking, the agreement that emerged from the Uruguay Round presents a “snapshot” of the level of services liberalization disciplines of each country at the time of its conclusion, and contains few elements resulting from a quest for further liberalization. However, compared to GATT, with its disciplines limited to only trade in goods, GATS is a groundbreaking framework, even by merely expanding the WTO scope into services or domestic regulations, for example on investments.

Given the development of the GATS framework to date, it cannot be said that GATS has evolved steadily since its conception – with the exception of the Agreement on Financial Services and Agreement on Basic Telecommunications in 1997, two agreements which will be further analysed in Section III.

2. Development of GATS following the conclusion of the Agreements on Financial Services and Basic Telecommunications

From the conclusion of the Agreements on Financial Services and Basic Telecommunications in 1997 to the launch of the Doha Round in 2001, there was no major development in the services field (GATS). This situation continued following the launch of the Doha Round. Broadly speaking, this was due to three factors:

Firstly, the WTO negotiation rounds have promoted bargaining across sectors and

¹ For the relationship between disciplines on goods and services, see Reference Materials 1 (Comparison of Goods and Services Disciplines)

negotiation pillars, and they have also displayed an unfortunate lack of progress in each pillar. When negotiation rounds go into motion, WTO members tend to forgo the attempt to make deals in individual areas and instead maintain their sensitivities, as they may become valuable bargaining chips in settling large packages. The framework envisioned for the rounds was based on parallel negotiations in multiple fields, that would incentivise a deal between the WTO members, through which rule-making and liberalization could be advanced within an expanded equilibrium.

Unfortunately, however, this issues linkage did not eventuate smoothly in the Doha Round.

Reflecting this fact, from 1997, the year of conclusion of the Agreements on Financial Services and Basic Telecommunications, an extended period has gone by without any major changes in the WTO. The mentality has been for members to conceal the aces up their sleeves, and not to play any cards that would see them suffering even a minor loss.

Secondly, there is an (excessive) fear of free riding on the outcomes of liberalization. What has emerged from the Agreements on Financial Services and Basic Telecommunications has been the concept of extending the benefits to non-members based on the most-favoured nation (MFN) principle as a precondition. The logic is that domestic regulation within each WTO member is often applied non-discriminatory, and therefore MFN corresponds to the economic and legal realities on the ground where any nation can receive the benefits. There was therefore no emphasis on a sense of caution with regard to the fact that non-signatory nations would receive the benefits of agreements between signatory members, in particular the developed countries.

However, there has ultimately been a significant change in this situation since the

conclusion of the Agreements on Financial Services and Basic Telecommunications.

With an increasing concern towards the free rider problem in developed countries including the U.S., a strong sense of caution has also developed in the services field given the rapid growth of developing countries, especially the BRICS. After China's accession to the WTO in 2001 in particular, the contrast between China's rapid economic growth and the regulations of the Chinese services market led to a strong dissatisfaction and a sense of caution amongst the developed countries – asking themselves the question Why should they open their markets to companies in competitive developing nations such as China, Brazil and India without commensurate access to markets in those countries? This led to an increasingly mercantilist notion to seek the necessary leverage to open the services market in BRICS countries.

It is often pointed out that the severity of the free rider problem differs in market access vis-à-vis rules. It is often argued that extension of benefits to non-members based on MFN had a significant impact on firm-level competition in the area of market access (through e.g. tariffs), but only a minor and indirect effect in the area of rules.²

In general, the same argument can also be made with regard to services negotiations, but a more analytical argument is necessary to take into consideration the specific details of liberalization and disciplines.³ Despite the fact that services negotiations differ from tariff negotiations given the former focusing on rules in addition to market access, we must not forget that in the negotiations concerning financial and basic telecommunications services, the agreements were based on critical mass and extension

² See Van Grassek and Sauvé (2006), pp. 857-8.

³ See Elsig (2010). With regard to MFN, Elsig claims that we should not adopt a dichotomous perspective, but for each field focus on the benefits of cooperation and the incentives for free riding, which differ for the opening of markets and the formulation of rules. Elsig indicates the importance of creating incentives for participation by non-participating nations.

of benefits on the MFN principle as foundations.

Recently, in the U.S. in particular, in the area of liberalization of services, emphasis has been placed on the elements of market access in a similar way to tariffs, and the danger of free riders has tended to be over-stressed.

Thirdly, and closely related to the prior points, is the deployment of free trade agreements (FTAs).

Amid the stagnation of the WTO and the Doha Round, the members have turned to the use of FTAs as a means of services liberalization and rulemaking. However, no FTA to date had dealt exclusively with the services sector alone. Usually, FTAs negotiate services bilaterally concurrently with tariffs on goods (in accordance with preferential agreements permitted under Article XXIV of GATT for goods, and Article V of GATS for services).

Because services negotiations in FTAs are characterized by a) the fact that there is a limited number of participants in the negotiations (compared to the Doha Round where the 160 members participate), and b) discriminatory treatment is allowed through FTAs given it is not contrary to GATS Article V, the relative importance of non-tariff measures have been emphasised in FTAs as they represent an easier means services liberalization and creating rules, against the background of the stagnation of WTO negotiations.

The concept of FTAs, i.e. discrimination between participants and non-participants of the FTA,, differs fundamentally from the basic concept of GATS. While MFN treatment is also a principle in GATS, exceptions are recognized, and if GATS Article V (corresponding to GATT Article 24; there has been insufficient discussion of this discipline since GATS was formulated. See II: 3.) is invoked in an FTA, discrimination

that is not registered as an exception to MFN treatment in GATS is legitimized, with participating nations attempting to make the “stingiest” possible response to non-participating nations.

3 The Signaling Conference

As efforts to conclude the Doha Round continued, 2008 was the year that the Doha Round came closest to conclusion. In the services negotiations, the Signaling Conference was held in 2008 in order to expose the aces hidden up in the sleeves of the WTO members, in a spirit of honesty. During this process, the WTO members expressed some of their true intentions, and the Signalling Conference had some specific outcomes. However, with the failure to conclude the Doha Round in summer 2008, any progress also came to a halt in the services negotiations.

In addition, the concessions signaled by the participants of the Signalling Conference represent a snapshot of the state of play at the time. Whereas today, as if they had been preserved in a refrigerator and later thawed, and the outcome of the conference should be regarded as no longer relevant.

4 TISA, FTAs, and the stagnation of the Doha Round

The Doha Round has become bogged down. Negotiations commenced in 2001 and have now passed their thirteenth year, with no prospect of a conclusion coming into sight.⁴ In order to break the deadlock, discussions were held at the WTO Ministerial Conference at the end of 2011 concerning the possibility of seeking separate resolutions for each agenda on the table, each within separate time frames. The efforts were shifted towards

⁴ For a prescription for the early conclusion of the Doha Round and the reform of the WTO, see Nakatomi (2011).

expanding the product coverage of the Information Technology Agreement (ITA), an agreement on trade facilitation, as well as reaching an understanding on security measures in agriculture and delivering a package for the least developed countries (LDCs) – which led to an agreement at the Bali Ministerial Conference held at the end of 2013.

This approach has opened up a path towards the possibility of sectoral or issues-based plurilateral agreements amongst interested WTO members only, as opposed to the multilateral approach based on an agreement between all WTO members. The Trade in Services Agreement (TISA) discussed in Section II, is understood as representing this trend.⁵ At the same time, with the stagnation of the WTO and the Doha Round, competition between various FTAs has also accelerated recently.

The TISA and mega-FTAs (such as TTIP, TPP and EU-Japan FTA) are existing and functioning in parallel, forming twin avenues for liberalization and rulemaking on services.⁶ In the U.S. and the EU (particularly the U.S.), there is strong interest in achieving the outcomes that have not been produced by WTO services negotiations through one or other of these means.⁷

However, many countries, including Japan, have a strong interest in FTAs, and in particular mega-FTAs, while not showing sufficient interest in TISA⁸. The importance and the problems of TISA will be discussed in the following section.

⁵ See Nakatomi (2013c)

⁶ In addition, the increase in the specific gravity of FTA in liberalization and the formulation of rules in the services field is also related to the emergence of the FTA concept in the TISA.

⁷ See Reference Materials 2: (Apparent Level of Interest in Services Negotiations, by Country).

⁸ See Reference Materials 2: (Apparent Level of Interest in Services Negotiations, by Country).

II The importance of TISA

1 What is TISA?

Recognizing that progress was not being made using traditional negotiating methods, the 2011 WTO Ministerial Conference acknowledged the possibility of advancing negotiations in different areas at different speeds in order to overcome the stagnation of the Doha Round.⁹

With this agreement, activities recommenced in a variety of fields. Within services, the idea of a Trade in Services Agreement (TISA) was introduced, with the U.S. as its driving force.

The TISA is an initiative for services liberalization and rulemaking being discussed by 23 members,¹⁰ amongst a coalition called “Really Good Friends of Services” (RGF) centered around the U.S. It is an attempt to break through the deadlock of services negotiations, aiming at high-level liberalization and rules.

Following the 2011 Ministerial Conference, preliminary discussions concerning TISA between participating members commenced in 2012. On June 28, 2013, the RGF issued a joint declaration to the effect that discussions concerning TISA had advanced, and that the participating members had now moved to the stage of full-fledged negotiations.

It is necessary to bear in mind the fact that TISA is not an initiative involving all the

⁹ The agreements concerning trade facilitation, LDC, and food security realized at the 2013 Bali WTO Ministerial Conference can be understood as an extension of this accord at the 2011 Ministerial Conference.

¹⁰ Countries and regions participating in TISA negotiations (23 countries and regions (49 countries and regions if the individual countries of the EU are included)): Japan, the U.S., the EU, Canada, Australia, South Korea, Hong Kong, Taiwan, Pakistan, New Zealand, Israel, Turkey, Mexico, Chile, Colombia, Peru, Costa Rica, Panama, Paraguay, Norway, Switzerland, Iceland, and Lichtenstein.

WTO members, but strictly speaking, a plurilateral initiative outside the WTO framework. The details of the agreement change day by day, but it is certain to have a significant effect on trade in services if an agreement is ever reached.

At the same time, the TISA is viewed critically by other WTO members, especially by developing countries, precisely because it is not an initiative involving all the members. The future outcome of the TISA cannot be foreseen. In terms of content, numerous vicissitudes and legal complexities can be predicted. In fact, it is probably optimistic to consider that it will substitute the GATS negotiations, as the present exaggerated rhetorics would like to claim. In addition, given the current situation in TISA negotiations, its conclusion is also certain to be a long-term prospect.

A European Commission memo¹¹ has provided an outline of the structure of the TISA. The main points of the memo are discussed below:¹²

(Purpose)

Seeking to realize an ambitious agreement that is consistent with GATS, the aim is to increase the number of participating nations and multilateralize.

The agreement will possess a comprehensive scope, and specific service sectors and modes will not be excluded at the outset. Like the DDA negotiations, all sectors can potentially be covered by the negotiations.

Each participating nation will decide on the sectors in which and the extent to which services can be provided by foreign service businesses operating in its national territory.

¹¹ See European Commission (2013).

¹² For detailed information regarding the purpose of the TISA, see Hufbauer, et al. (2012) and the testimony of Samuel A. Di Piazza, Jr. and Peter Allgeier (both of the Coalition of Services Industries (CSI)) to the Interagency Trade Policy Staff Committee (Di Piazza, Jr. and Allgeier (2013)).

The agreement will cover regulatory disciplines including autonomy of regulatory authorities for telecommunications, finance, postal services, etc., fair approval procedures, and non-discriminatory access to telecommunications networks.

Based on proposals from the RGF, it will be possible to incorporate the creation of new rules for services related to domestic regulations, international shipping, telecommunications, e-commerce, and computers, cross-border data transfer, postal and courier services, financial services, temporary movement of natural persons, government procurement, export subsidies, and state-owned enterprises (SOE)¹³.

(Structure)

The agreement will conform to GATS, and will incorporate the basic clauses of GATS.

Future integration of the agreement with GATS will be allowed for.

It has been agreed that national treatment will in principle be applied across the board.

Unless other provisions are made, participating nations might agree to a standstill clause and a ratchet clause (future abandonment of discriminatory measures).

(Multilateralization)

Initially, the agreement will only be binding on participating nations. At the same time, the EU has ensured that the structure of the agreement allows a path towards its future multilateralization.

Two conditions must be fulfilled for the agreement to be incorporated in the WTO system. These are:

¹³ As examples of the new rules that should be realized through the TISA, Di Piazza, Jr. and Allgeier (2013) list cross-border data transfer, SOE, regulatory barriers, licensing, freedom of the legal form for business operation, transparency, and standardization.

- 1) That the obligations specified by the agreement are of the same type as those specified by GATS; and
- 2) That the number of nations participating in the agreement reaches critical mass in order for it to be multilateralized to all WTO member nations.

In order to prevent free riding, automatic multilateralization based on the MFN principle will be temporarily suspended unless a critical mass of WTO members joins the agreement¹⁴.

An accession clause will be added for interested WTO members, opening a path towards multilateralization of the agreement.

Negotiations concerning TISA continued amongst the RGF throughout 2013, and by the end of 2013, the U.S., the EU, and Japan had submitted their offers and proposals. There are not yet any agreements on services schedules, but the RGF will continue to pursue negotiations towards its realization in 2014.

2 The TISA and Japan

Given the importance of the services sector, it will be necessary for Japan to abandon the passive stance that it has adopted up to the present, and make full-fledged efforts towards the conclusion of TISA.

It will also be essential for Japan's business community to correct its own passive response in the services sector, assuming existing rules and market conditions as unchangeable preconditions rather than and to seek changes and reforms in business

¹⁴ European Commission (2013) is unclear as to what form this suspension of multilateralization through MFN will take, and which conditions should be fulfilled for multilateralization through MFN.

environments overseas.

The importance of TISA could be considered from different perspectives. First, with the stagnation of the Doha Round and the lack of prospects for an outcome from the GATS negotiations, the TISA is the only framework that possesses the potential to advance direct global liberalization and rulemaking.

It is a great pity that 13 years after the commencement of the Doha Round, liberalization and rulemaking have effectively come to a halt. However, the TISA, as a plurilateral framework being advanced by the RGF, which accounts for approximately two-thirds of world cross-border services trade (see European Commission, 2013), has the potential with future development and the realization of a legal framework to create the foundation for new multilateral rules.

It is highly likely that the RGF comes close to the critical mass on creating a foundation for global rules. Naturally, the inclusion of developing countries (in particular China and other major economies) is an essential condition for the TISA to become a meaningful global framework in the future, and thus, the further expansion of the membership of the agreement will be essential.¹⁵ TISA is not being negotiated within the WTO framework with the involvement of all the WTO members, but if the participation of developing members can be secured in future, it is possible to expect it

¹⁵ Critical mass was not discussed as a numerical benchmark in the cases of the Agreements on Financial Services and Basic Telecommunications either. On this point these agreements differ from the ITA, for which the condition for critical mass was the participation of nations representing approximately 90% of trade volume. If the TISA is constituted as an FTA, then the concept of critical mass will be irrelevant, but if it is not constituted as an FTA, sufficient coverage by participating nations will be an important element in the formation of the agreement. Low (2011) takes critical mass to refer to the intention among participating nations to reach an agreement, irrespective of the existence of non-participating free riders.

to develop into a foundation for a new GATS.

As a plurilateral framework including the major developed countries, such as the U.S., the EU, and Japan, a successful conclusion of TISA would mean that common rules amongst the participating members would be created on services. However, TISA is presently a framework mainly for the developed countries and the RGF, with its effects restricted to them. Nevertheless, if a broader membership of developing members could be realized, the effects of the framework would indeed be global.

The possibility of extending the benefits of a TISA agreement to non-participating members on the basis of the MFN principle will be discussed in Section II: 3, noting that if the benefits of the agreement is extended to non-participants on an MFN basis, the conditions would be similar to the those of the Agreements on Financial Services and Basic Telecommunications (i.e. critical mass and extension on MFN basis), and the potential of an agreement within the WTO will come back into the picture.

As noted, the Doha Round is bogged down and its prospects cannot be predicted, and TISA is the only framework that offers the possibility of a global agreement on services. However, it is essential that the consideration of the agreement is advanced in such a way as to ensure that it becomes a truly global services trade framework. From this perspective, its legal form (in particular whether or not it is a FTA) has an important meaning. The FTAs (and in particular mega-FTAs) are essential in promoting trade in services, but the TISA has the potential to become a more global in its reach, and the benefits of using both avenues in parallel (while clearly distinguishing the difference between TISA and FTAs) would be significant.

Second, rule-making and liberalization in the services sector would have great potential

to offer a foundation for the creation of business opportunities for Japan overseas, and the TISA could be a powerful means of achieving these goals.

If the WTO GATS negotiations had proceeded smoothly, it would have represented the most desirable framework from the viewpoint of the number of participating nations, but unfortunately there has been absolutely no progress in the GATS negotiations, and at present there is little hope for future progress.¹⁶

Against this background, the use of a plurilateral initiative such as TISA in which all the major developed nations are participating as the next-best alternative opens up the possibility of rulemaking and liberalization at a level that would be impossible for Japan to achieve in isolation. In this context, the considerable improvements to the business environment by the ITA, Agreements on Financial Services and Basic Telecommunications on their respective sectors should be recalled. In the view of various service industries, TISA is a framework worthy of a full-fledged effort towards realization, given its potential to improve the business environment overseas.

Third, it can be assumed that the TISA will function as “insurance policy,” providing significant leverage to realize and protect Japan’s national interests in its mega-FTAs.

Because consensus will at least be formed between the participants in the TISA (thus developed economies), it could function as a check on the occurrence of differences or

¹⁶ Based on the results of the WTO Ministerial Conference held in Bali at the end of 2003, the future work program will be drawn up over the course of a year. It would be desirable to be able to expect as part of this process the active submission of proposals towards realizing progress in the GATS negotiations, but at present the formulation of direct measures towards solutions can be considered extremely difficult. In order to advance the GATS negotiations, what would be more desirable would be discussion of the fundamental issues that have created difficulties in advancing the rounds, including the rigidity of procedures for the incorporation of plurilateral agreements in the WTO and problems in decision-making. (The rigidity of the conditions for incorporation of plurilateral agreements like the TISA in the WTO has been the cause of severe delays in decision-making by the WTO.)

contradictions between disciplines or the level of liberalization among different mega-FTAs. Compared to FTAs, in which discrimination between participants and non-participants is an essential principle, TISA is a framework that is able to seek more global solutions, reducing concerns over the imposition of contradicting rules originating from superpowers like the U.S. and the EU. It is of particular importance that the EU and the U.S. are both participating in TISA – as in the TPP and the Japan-EU FTA, these fierce rivals (especially in the area of regulations), the TISA will reduce the risk of Japan being sandwiched between them.^{17,18}

It must be assumed that if mega-FTAs, such as the TPP or TTIP, proceed without joint coordination, spaghetti bowls will also be produced in services that would be impossible to untangle.¹⁹ This is not the outcome that the business community desires. The TISA has the potential to act as a support that will mitigate the spaghetti-bowl effect anticipated as a result of mega-FTA, and help to create globally harmonized frameworks. In a situation without any guarantee of joint coordination between mega-FTAs, TISA could play a significant role in setting of global rules.

At the same time, we must also anticipate that if Japan does not correctly grasp the movement towards the TISA and become part of that movement, the superpowers will

¹⁷ Readers should recall the case in which the EU complained to GATT regarding procurement targets in the U.S.-Japan Semiconductor Trade Agreement, with the result that they were ruled to contravene GATT. In addition, the recent case in which South Korea applied different definitions of standards in the electric and electronics and automotive fields in relation to FTA with the U.S. and the EU should also be considered. See Nakatomi (2013d).

¹⁸ The TISA can be expected to function as a lever for the creation of rules that will contribute to the full-fledged advancement of international industrial collaboration and the formation of truly global supply chains. It can be predicted that the advancement of the TISA based on collaboration between the Coalition of Services Industries (CSI), the European Services Federation (ESF), and the Japanese business community centering on the Japan Services Network (JSN) will represent a significant asset in future industrial collaboration and the expansion of global value chains.

¹⁹ See Nakatomi (2013a).

introduce the contents of the TISA into its mega-FTAs and force Japan to accept them, stressing the fact that they are therefore international rules.

The U.S. and the EU have already initiated responses that take both mega-FTAs (in particular the TPP and TTIP) and TISA into consideration. It will be essential for Japan to also shift its focus from exclusively working on mega-FTAs, and to utilize both mega-FTAs and the TISAs effectively and in parallel as indispensable forums for services negotiations.

These three points above indicate the importance for Japan to make more serious efforts in TISA. While both the government and the private sector have recently displayed increased interest in the agreement²⁰, it will be necessary to follow through these developments more strategically.

3 FTA vs GATS

There is still no agreement within the RGF as to the form the TISA should have, a discussion which the U.S. and the EU in particular have engaged in. Marchetti and Roy (2013ab) consider that there are four possibilities in terms of the legal structure of TISA: 1) A GATS Protocol approach, on an MFN basis; 2) going alone, on an MFN basis; 3) a plurilateral agreement within the WTO; or 4) a plurilateral agreement outside the WTO.

- 1) First option considers a protocol, like the previous Agreements on Financial Services and Basic Telecommunications; the protocol would become effective based on the assent of the members forming a critical mass, and the details of commitments

²⁰ See Keidanren Proposal (2013).

would benefit other members through the MFN principle.

- 2) Second option is a method in which the members participating in the negotiations would voluntarily improve their commitments, the details of which would be multilateralized through the MFN principle.
- 3) Third option would make TISA, on the basis of a consensus among WTO members, a plurilateral trade agreement within the WTO framework to which only participating nations are subject (an Annex 4 agreement), like the Agreement on Trade in Civil Aircraft and the Agreement on Government Procurement.
- 4) Final option represents a services FTA based on Article V of GATS.

In addition, Hufbauer, et al. (2012) further suggests the possibility of being granted waivers based on Article IX(3) of the Marrakech Agreement, the consensus of at least three-quarters of WTO members would be necessary for this.²¹

Which path is chosen will depend on the future discussions between the participants in TISA, but because there is no guarantee that all participants would improve their commitments, option 2 have little possibility of realization. Marchetti and Roy²² also refer to a prisoner's dilemma scenario, in which participants do not know whether other participants will behave in the same way.

In the case of option 3, in the absence of multilateralization of the agreement based on the MFN principle, the idea that this option would be the subject of a consensus among WTO members is almost entirely unrealistic.

²¹ See Hufbauer et al. (2012) and Harbinson et al. (2012). The latter provides a concise overview of the legal forms of plurilateral agreements, including waivers, offering a useful reference.

²² Marchetti and Roy (2013a).

Marchetti and Roy do not offer any evaluation of which of the four options discussed above should be chosen, but realistically, discussion would proceed on options 1 or 4.²³ Initially, TISA was proposed by the U.S. as an FTA based on GATS Article V, and today, the negotiations are now taking place as an FTA. The idea here, leveraged on the fact that the RGF hold an enormous share of global services trade, is to put pressure on non-participating developing countries by pioneering a services-only FTA and not multilateralizing it through the MFN principle. The sense of caution to free riders discussed above is the foundation of this concept.²⁴

However, the FTA approach based on GATS Article V also involves considerable danger²⁵.

First, there is the risk of an arbitrary interpretation of requirements such as “substantial sectoral coverage” under GATS Article V.

GATS Article V(1), concerning economic integration in the services field, stipulates the requirement for substantial sectoral coverage. In addition, “this condition is understood in terms of number of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the *a priori* exclusion of any mode of supply” (Article V(1)(a)).

Further, Article (1)(b) “provides for the absence or elimination of substantially all discrimination, in the sense of Article XVII, between or among the parties, in the sectors

²³ See Reference Materials 3: Perspectives on the Legal Form of the TISA. Here, the author provides an evaluation of the options discussed above.

²⁴ See Hufbauer et al. (2012) and European Commission (2013).

²⁵ See Bosworth (2014). Like the author, Bosworth expresses strong concern regarding the constitution of the TISA as an FTA.

covered under subparagraph (a)...either at the entry into force of that agreement or on the basis of a reasonable time-frame...”

Within a framework such as the TISA, participated in by the U.S., the EU, and Japan, in addition to all of the other advanced major economies, a responsible approach by participating nations to the interpretation of GATS Article V is essential.²⁶

GATT Article XXIV, which stipulates disciplines for FTA covering trade in goods, specifies coverage of “substantially all trade in products” as the standard. Discussion of this standard has continued over an extended period, and this has acted to a certain extent as a check on a proliferation of “FTA of convenience.”

By contrast, there has been almost no discussion concerning the interpretation of GATS Article V. GATS Article V specifies exceptions to the MFN principle. Taking into consideration their importance for the interpretation of the article and their impact on the entire GATS/WTO legal system, a careful and sufficiently detailed discussion of the requirements for these exceptions is essential.²⁷

In the absence of such discussion, there is a strong possibility that the stipulations of the article will not act as a check on discriminatory treatment in services FTA. Compared to GATT, the disciplines on services, such as MFN, national treatment (NT), and market

²⁶ Unless the participating nations realize full-fledged liberalization in accord with GATS Article V (it is to be hoped that the realization in this context would be driven chiefly by the participating developed nations. If substantial sectoral coverage in the strict sense was realized and discriminatory measures were eliminated, the agreement would follow the spirit of GATS Article V, and there would be no reason for objections.), if gradual liberalization were to be pursued in the TISA based on arbitrary interpretations, the agreement would violate the fundamental concept assumed by GATS Article V. If the RGF seek to formulate the TISA as an FTA, they will have a responsibility to face the interpretation of GATS Article V squarely and engage in appropriate discussion.

²⁷ See Materials 4: Legal Structure of Exceptions to MFN Treatment, concerning the legal structure of exceptions to MFN treatment in GATT and GATS. It will be clear to the reader that the GATS disciplines are particularly vague with regard to exceptions to MFN treatment, and that there has been insufficient discussion of their details.

access (MA), are relatively weak in GATS. If a WTO member were to introduce discriminatory systems in a comprehensive manner, such measure would represent a significant impediment to the future development of the GATS system.

If the process of formation of services FTA is simple, there is a strong danger that liberalization and rulemaking in the services sector will avoid the laborious multilateral process and will in practice proceed on the basis of a FTA exclusively. FTAs are fundamentally structured around discrimination between participants and non-participants, and are therefore not conducive to integrated rule-making on a global level.

Discussion concerning GATT Article XXIV has continued over a long period of time, and its interpretation is agreed upon to a considerable degree. However, there has been insufficient accumulation of discussion regarding GATS Article V, which was stipulated in 1995, during the era of competition amongst FTAs.

Given that the language of GATS Article V and GATT Article XXIV differ, and that the level of services liberalization in FTAs compared to goods is low, a considerable danger exists that similarly unrigorous interpretations would be allowed in the case of TISA and mega-FTAs.²⁸

The uncomplicated recognition of a framework like TISA that cover the entire range of services, and also in which major economies participates, has the potential to shake the foundations of GATS itself. In other words, there is a possibility that the TISA may come to replace GATS as “WTO 2.0” (Baldwin, 2011 and 2012)²⁹ on services.^{30,31}

²⁸ Services FTA negotiations incidental to goods FTA and the TISA differ in terms of the scope of member nations and their effect on GATS, and cannot be discussed in the same category. The fact that conventional FTA in services incidental to goods FTA are not subject to dispute settlement procedures in the WTO would not represent a deciding factor with regard to the conformity of the TISA with GATS Article V.

²⁹ See Baldwin (2011, 2012).

³⁰ In the same way that the urging of the choice between GATT 1947 and GATT 1994 on GATT member nations in the closing stage of the Uruguay Round later increased

Second, the constitution of TISA as an FTA would mean that the application of the agreement would be restricted to participating members in order to prevent free riding by non-participants, in particular developing nations. An FTA is a framework restricted to its participants, and could not immediately become a global legal framework.

Even assuming that TISA allowed non-participating members to join the framework, reaching critical mass would require a long period of time.³² This is not only inconsistent with the demands of the business community, who has a preference for rules on a global level, but it also presents serious concerns given the importance of developing countries in the world economy and the market in services. The fact that the constitution of TISA as an FTA would render the path to global rule-making utterly non-transparent represents a significant issue.

Third, the fact that broad introduction of a non-MFN approach may offer preferential treatment to the inefficient services industries of TISA member nations represents a significant issue in terms of economic welfare. It is possible that this could become an impediment to the efficient allocation of resources through trade with countries with services sectors possessing comparative advantage.³³

suspicion among developing nations, it is inevitable that the constitution of the TISA as an FTA would result in a backlash from developing nations.

³¹ The interpretation of GATS Article V (the interpretation of “substantial sectoral coverage”, etc.) should be defined by the WTO, but given that the trend towards mega-FTA is in actuality being driven by the developed nations and that the TISA negotiations are in progress, there is limited possibility of any discussion of the issue in Geneva.

³² Until then, the TISA would be a framework for the liberalization of services among the RGF (centering on the developed nations). A scenario in which proceeding with the TISA as an FTA invites a backlash from developing nations, resulting in a suspension of global rulemaking, is another concern.

³³ Miroudot et al. (2010).

Fourth, there are doubts as to the extent to which a non-MFN approach is feasible, given the horizontal nature of services regulations.³⁴ In fact, in many cases services regulations are implemented domestically on an MFN basis.

In addition, the origin of services (of the service supplier) is defined in GATS Article V(6); for parties to an FTA, “A service supplier of any other Member that is a juridical person constituted under the laws of a party to an agreement referred to in paragraph 1 shall be entitled to treatment granted under such agreement, provided that it engages in substantive business operations in the territory of the parties to such agreement.”

This requirement has a binding effect on the subjects of exceptions to MFN treatment in FTAs, but if we consider the status of its application, we find that it is applied liberally.^{35,36} Because a juridical person constituted under the laws of one of the parties to the agreement is easily able to become subject to the terms of an FTA, even if MFN treatment is denied to the non-participants of an FTA, it is possible to circumvent this condition.

However, given that many FTAs stipulate the sharing of benefits with its members on an MFN basis, there are also many FTAs that stipulate the sharing of its benefits to other countries who have concluded FTAs with the parties in question; for example, if there is a clause specifying sharing of benefits with participating country on a MFN basis in the first FTA (between countries X and Y), then it is necessary to share the

³⁴ In the case of market access, discriminatory application is possible (licenses, etc.), and is sometimes necessary.

³⁵ Miroudot et al. (2010), pp 16-21; Mattoo and Sauvé (2010), pp 39-41.

³⁶ For example, the Australia-New Zealand FTA only features the requirement for establishing legal entities in the region, and does not demand the “substantive business operations” requirement. The inadequacy of the “substantive business operations” requirement in NAFTA is treated as creating the opportunity for denial of benefits. See Miroudot et al. (2010).

benefits of a second FTA with a third country (between countries X and Z) with the signatories of the first agreement. It is no exaggeration to say that clauses that deny MFN treatment are becoming eroded.

In spite of the possibility of additional members and eventually reaching critical mass, and sharing the benefits on an MFN basis, there is no rationality in introducing a discriminatory system.^{37,38}

By contrast, if a similar approach like the Agreements on Financial Services and Basic Telecommunications, where reaching the critical mass is considered as fundamental, and the sharing of the benefits of the agreement with non-participating nations forms the basis of the agreement, the possibility of securing an approval from the developing country members and producing a global agreement would increase³⁹. In addition, if the agreement is pursued in this form, a global solution would be formed within GATS, producing international standards in both substantive and legal sense, creating power incentives to participate in the framework. By comparison, the abandonment of critical

³⁷ This argument is taken by supporters of the concept of the TISA as an FTA (Hufbauer et al. (2012)) as providing a rationale for the constitution of the TISA as an FTA. The argument goes that because regulations are after all normally implemented on an MFN basis, it makes no difference whether or not the TISA is an FTA.

Assuming that the benefits of the FTA for participants were multilateralized through MFN, opposition to the constitution of the TISA as an FTA would be eased, and the danger of GATS taking on a bipartite structure, surely a grave situation, would be reduced.

However, assuming that multilateralization of benefits through MFN was possible, given the flexible character of the GATS Schedules of Commitments, it would be enough for countries to simply modify their Schedules of Commitments, and there would be no reason to adopt an FTA structure predicated on discrimination between participants and non-participants.

³⁸ As indicated by Miroudot et al. (2010), the issue of multilateralization through MFN is an issue of political will, and in the case of services FTA also, the correct course of action is to move ahead with extending benefits of FTA through MFN as a fundamental principle.

³⁹ See Warwick Commission (2007).

mass approach and thereby forming an FTA within the RGF alone, this mode of proceeding could possess tremendous potential for a rapid global rule-making without wasteful coordination costs.⁴⁰

In case of difficulties to achieve critical mass across all services sectors as a whole, an approach in which TISA narrowed its focus to the important sectors and seeking an agreement in sectors where it can be reached, would also be a practical and meaningful alternative.⁴¹

Japan does not withhold any of the services sectors from MFN treatment, providing it with a freedom to pursue each of these options, like the U.S. and the EU. In addition, Japan has made a principle out of sharing with all its services liberalization in future FTAs with its present FTA partners, meaning that it is applying MFN treatment at a high level.

As the discussion above suggests, whether or not TISA takes the form of an FTA will have a powerful impact on the GATS system and its future developments. Hopefully, the issues will be discussed seriously in the future, both in the domestic and international debate.⁴²

It is understandable that TISA is being pursued as an FTA as a negotiation strategy in order to encourage participation by the major developing economies – i.e. as a stick (rather than a carrot) to encourage participation. There are suggestions that the

⁴⁰ See Sauv  (2013) for legal issues associated with the incorporation of the TISA in GATS.

⁴¹ See Section III concerning the importance of sectoral agreements.

⁴² The idea of constituting the TISA as an FTA and applying the MFN principle conditionally (the concept is to multilateralize commitments if the participation of sufficient nations to constitute critical mass is obtained (Hufbauer et al. (2012))) puts the cart before the horse. European Commission (2013) also indicates that multilateralization of the agreement will be suspended until critical mass is reached, but is unclear on the legal constitution of the agreement (FTA, waiver, etc.) or its details (e.g., conditions for introduction of multilateralization based on MFN).

strategy might be working, as China is said to consider participating in TISA. Concerns on market access, i.e. free riding by non-participants, are understandable. However, before the use of the FTA format, the RGF members ought to make adequate efforts to promote of participation of the major developing economies and multilateral rule-making, rather than simply abandon such efforts predicting a failure.

It is essential for TISA to not to compete with mega-FTAs, and instead secure the participation of a larger number of countries and develop a negotiation framework that will lay the foundation for future GATS rules. Such potentials represent a valuable opportunity (and presently, the only one). In order to realize this opportunity, it will be necessary to consider the time dimension of the negotiations well in advance, and to examine certain flexibilities, for example by restricting the scope of the negotiations, as future developments eventuate.

Japan and other participating members in TISA must understand the strategic importance of TISA in global rule-making, and make relevant proposals following a careful examination of its nature and goals.

III The importance of sectoral agreements and the use of TISA

The objective of TISA is to conclude a high-level plurilateral services agreement against the background of a deadlock in the GATS negotiations. However, plurilateral agreements that have produced significant outcomes already exist in the form of the Agreements on Financial Services and Basic Telecommunications. This section will discuss the importance of (possibility for) sectoral agreements in the wake of those agreements.

1 What are the Agreements on Financial Services and Basic Telecommunications?

As we have seen above, the Agreements on Financial Services and Basic Telecommunications could be considered as one of the major outcomes produced since the establishment of the WTO.

At the time of the Uruguay Round agreement, it was agreed to commence reviews in the financial services and telecommunications sectors as a built-in agenda (a prescribed work program). Interested countries commenced work in these two sectors following the establishment of the WTO in 1995.

The fact that agreements were reached in these two sectors is often attributed to the fact that they were 'built-in agendas', but given that a variety of items were eliminated from the negotiation agenda and suffered severe setbacks (for example the work to harmonize non-preferential rules of origin), there is little meaning in emphasizing this point.⁴³ Notably, the negotiating parties persisted in reaching the political resolution implied by the built-in agenda.

The rapid changes and the globalization of the economic environment, induced by the internet and the global financial architecture, were the factors behind the negotiations on financial services and telecommunications sectors. The fact that the countries involved and their business communities sought a systematic legal structure to facilitate these developments was a strong rationale of these negotiations. This is similar to the case of the ITA: the parties shared the recognition that free distribution of semiconductors, telecommunications devices, computers, etc. is the fundamental

⁴³ However, the fact that the negotiations were held after the expiry of fast track negotiating authority and that the U.S. possessed residual negotiating authority are important points.

structure for the IT sector, which contributed significantly to the realization of the agreement.⁴⁴

The functioning of a shared political will to provide international public goods can be indicated as a significant element in the background of the Agreements on Financial Services, Basic Telecommunications or the ITA. These agreements cannot be explained by means of negotiation dynamics based on reciprocity in the strict sense of the term. They represent trailblazing examples for future negotiations.

2 Distinguishing Features of the Agreements on Financial Services and Basic Telecommunications

1) Adhering to sectoral characteristics

As a result of discussions concerning the financial services and telecommunications sectors between the U.S., Japan, the EU and other interested nations, financial services and telecommunications protocols were adopted by the WTO on a consensus basis. By appending revised commitment schedules and MFN exemption schedules to the protocols, the nations participating in the agreements modified the sections corresponding to their commitment schedules and MFN exemption schedules.

Turning our attention to the content, while the GATS disciplines display a simple structure based on MFN, NT and MA, a distinctive feature of the Agreements on Financial Services and Basic Telecommunications is that a variety of additional disciplines were defined in response to the characteristics of the telecommunications

⁴⁴ Negotiations towards the expansion of the products subject to the ITA commenced in 2012 and are ongoing, and continuous efforts are being made to formulate an agreement.

and financial services markets, and these were accepted by participating WTO members.⁴⁵

It is necessary to pay attention to the fact that these agreements added disciplines on issues that were not covered by the MA and NT disciplines in GATS (or lacked clarity in the details), and significantly advanced the basic structure of GATS through sectoral negotiations in each sector. The evolution of a legal framework that had not been realized by GATS in response to the characteristics of specific sectors is an important outcome of both agreements, and is an approach that provides a touchstone for future negotiations.⁴⁶ A sectoral approach is able not only to expand market access and national treatment disciplines, but can also dramatically increase the potential for the introduction of additional disciplines in response to the characteristics of specific sectors.⁴⁷

2) The relationship of participating and non-participating members (critical mass and extension of benefits on the MFN principle)

The next point focus on is the relationship between participants and non-participants of the agreement. Basically, the benefits of both agreements are in principle extended to non-participating members on an MFN basis, in accordance with the commitments of each nation concerned. A significant distinguishing feature of both agreements is the

⁴⁵ The reference paper that formed the foundation of the Agreement on Basic Telecommunications Services established a number of disciplines in response to the characteristics of the sector, including competitive safeguards, mutual connection, universal services, licensing conditions, independent regulatory authorities, and allocation of scarce resources.

⁴⁶ For a comparison of goods and services disciplines, see Reference Materials 1: A Comparison of Goods and Services Disciplines. These materials make clear the significant progress in disciplines in the goods sectors, compared with services.

⁴⁷ In the case of the ITA, in 1996 the EU stressed that not only tariff but non-tariff measures should form a subject of the negotiations; it is possible that the majority of the associated issues were issues of services negotiations, centering on the telecommunications sector. See Nakatomi (2012a).

fact that their basis is the formation of critical mass by the major nations and extension of their benefits based on the MFN principle.

At that point in history (in 1997), the adverse effect on competitiveness by sharing the benefits of the agreements with non-participating members (the free ride problem) did not attract a great deal of attention as a sensitive issue.

Critical mass and MFN extension of the benefits also represented the basic framework of the ITA, an initiative to eliminate tariffs in the information and communication technology (ICT) sector, negotiated in the same year; these were the common distinctive characteristics of these three important agreements.

The reasons behind the success of the Agreements on Financial Services, Basic Telecommunications Agreement and ITA, while the WTO has produced no significant outcomes in the area of liberalization in the more than 15 years since, is still relevant today.

The cases of the Agreements on Financial Services and Basic Telecommunications (and similarly the ITA) represent an approach in which all major economies participated to create a global public good, in some specific sectors.

3) The endorsement and support of business communities

As in the case of the ITA, the support and assistance of the related business communities in the major nations in realizing the Agreements on Financial Services and Basic Telecommunications is worthy of special note.⁴⁸

⁴⁸ In the case of the ITA, close cooperation between the business communities of Japan, the U.S., the EU and Canada (the Japan Electronic Industry Development Association (JEIDA), the ITI (Information Technology Industry Council), the European Association of Manufacturers of Business Machines and Information Technology (EUROBIT), and the Information Technology Association of Canada (ITAC)) provided a powerful impetus for the realization of the agreement. See Nakatomi (2012a).

3 Subsequent development of the sectoral approach and the use of TISA

Unfortunately, any similar sectoral approach has not borne fruit in the services sector since these agreements were concluded.

As discussed in Section I, the holding back of negotiating chips, concern over free riders, and competition from FTAs are the factors behind the lack of progress in sectoral agreements since 1997.

With regard to holding back negotiating chips, at the 2011 WTO Ministerial Conference, a shared awareness that issues linkage would be abandoned and negotiations would be pursued on individual issues paved the way for an opportunity for genuine deals in the services sector also. The fact that an agreement regarding trade facilitation was reached at the 2013 Bali Ministerial Conference should also provide a significant impetus for sectoral negotiations.

At the same time, concern over free riding remained strong.

Because consensus is a principle of the WTO decision-making process, the application of the MFN principle will be the key to the future advancement of global rulemaking in the services sector. (If the MFN principle is not applied, it will be difficult to obtain consensus in the WTO. Readers should also recall the cases when sectoral protocols have been successfully established.⁴⁹

As indicated above, in most cases services disciplines are in practice applied on an MFN basis within each jurisdiction, and the issue of free riders is in many cases nothing more

⁴⁹ Consensus is basically a requirement for plurilateral agreements (revision of Annex 1, addition to Annex 4) within the WTO. The Agreements on Financial Services and Basic Telecommunications therefore adopted an approach based on critical mass and MFN extension of the benefits, in which protocols were formulated on the basis of consensus between WTO members. Without MFN extension of the benefits, it can be considered that it would be difficult to ensure a consensus.

than a mere conceptual concern. Nevertheless, the constitution of TISA as an FTA would be an attempt to eliminate the effort required to reach critical mass, due to concerns over free riding. TISA as an FTA is an agreement outside the WTO.

Irrespective of the number of participants, the agreement is outside GATS allowed under its Article V, and would not form part of GATS. It can be foreseen that there will be a long period of numerous complications before the agreement would become part of the GATS system.

As seen in Section II, the great value of TISA is its potential to enable global rule-making in the future. In doing so, the sectoral approach would be an extremely powerful tool.

If the agreement was based on reaching critical mass and extending the benefits according to the MFN principle, following the precedents of the Agreements on Financial Services and Basic Telecommunications, there is a potential to advance global services liberalization and rule-making in specific important sectors using the TISA framework.⁵⁰ By means of the adoption of protocols by all of the WTO member nations, the legal system created for the agreement could become part of GATS, and thus become a truly global framework. Such agreements based on critical mass and MFN principles are *ipso facto* global agreements.

As seen above, the GATS disciplines are a product of compromises made during the Uruguay Round, and due to strong resistance to venturing into domestic measures the disciplines are extremely unsatisfactory, centering on MA and NT. Ideally, the

⁵⁰ Because the inclusion of the major developing nations would form the basis for critical mass for sectoral proposals of this type, the mounting of initiatives to explain the benefits of the agreement to the developing nations and the presentation of frameworks that sufficiently address the concerns of the developing nations would be important factors.

improvement of the system should have been planned during the GATS negotiations in the Doha Round, but the outlook at present is gloomy.

Against this background, disaggregated agendas in each services sector (i.e. sector by sector, or by issue by issue) represents an extremely important initiative and could become powerful tools for liberalizing and establishing disciplines in the services sector.⁵¹ TISA represents an excellent opportunity for such initiatives.

Hopefully, Japan will not limit its responses (and request lists for MA and NT) solely to the mega-FTAs, but will give an earnest consideration to individual sectors and issues where it has interests, and similarly prepare its responses, resulting in international proposals.⁵²

Narrowing down the number of sectors also limits the constituency of interested parties in the negotiations. It would be possible to seek solutions in sectors of mutual concern while avoiding the wasteful concept of reciprocity.

The sectoral approach represents an effort towards the provision of a global public good, and is an approach that should be pursued more wholeheartedly.⁵³ Hopefully, the participating economies, including Japan, will actively make sectoral proposals within the TISA towards the realization of global rule-making.

4 Elements of sectoral proposals and candidate sectors

⁵¹ Naturally, the existence or non-existence of NT and MA disciplines are also extremely important factors, but in a situation in which there is inadequate provision of horizontal disciplines in the services sector (e.g., disciplines related to domestic regulations based on Article VI (corresponding to TBT in goods) have not yet been established), it will be more efficient to conduct focused discussion of disciplines by limiting the scope to important sectors of concern.

⁵² It is necessary to recall that since the Uruguay Round, the elimination of tariffs by sector (0-0 or harmonization approaches) has become a standard negotiating method in the arena of goods.

⁵³ See Nakatomi (2012a, 2013a) and Nakatomi (2013c).

1) Examination of issues based on collaboration between industry, government and academia and international cooperation

It will be necessary to concretely examine each service sector under the progress of mega-FTAs and TISA in parallel, and the foundation for doing so will be provided by close cooperation between industry, government, academics and lawyers.

The sectoral proposals should be means of liberalization and rule-making based on industry demands, international development within the sector and a grasp of obstacles.

As in the cases of the ITA, the Agreements on Financial Services and Basic Telecommunications, close international cooperation with overseas service industry organizations such as the Coalition of Services Industries (CSI) and the European Services Forum (ESF) and other industry organizations is an essential condition for success in these sectoral initiatives.

2) Creating axes for sectoral proposals

Past examples of success in sectoral agreements (in particular the plurilateral agreements) can be considered to offer a reference for making sectoral proposals.

In the services field, it is naturally the Agreements on Financial Services and Basic Telecommunications that provide the best reference. In addition, it is also necessary to consider the ITA as an example of success, while it is a tariff agreement. The Anti-Counterfeiting Trade Agreement (ACTA), an intellectual property-related agreement, is another plurilateral agreement that provides a reference.⁵⁴

⁵⁴ See Nakatomi (2012a). At present, only Japan has ratified ACTA.

It will be essential to formulate proposals that respond to the characteristics of services and that accord with the realities of the industry. The details will take on different forms depending on the specific sector, but it will basically be necessary to consider the following elements.

1) Creation of clusters

First, efforts to create clusters that match policy goals in the sector in question will be essential. It is no exaggeration to say that cluster design will decide the success or failure of sectoral proposals.⁵⁵

2) MA, NT and MFN disciplines

Market access and national treatment commitments are the pillars of liberalization in services, and it can be assumed that they will become central elements in sectoral agreements in the services field.

In addition, to achieve multilateralization of sectoral agreements other than in the form of an FTA, a MFN treatment is an unavoidable issue as seen above.

3) Horizontal disciplines that respond to the characteristics of the sector

Schedules of Commitments in GATS are organized around the simple elements of MA and NT; because of this, it can be assumed that there will be many cases in which it will be necessary to establish new disciplines in response to the characteristics of each specific sector. (See the WTO Telecommunications Reference Paper.) Because GATS allows additional commitments, identifying the horizontal commitments other than MA and NT that participating countries should comply with will represent a major issue, for

This situation originated in strong opposition from NGOs, particularly in the EU, and is an outcome that offers important lessons regarding the relationship between trade negotiations and civil society. An agreement was already formulated between the participating governments, and it can be considered to offer numerous points that should be used as a reference in the future formulation of plurilateral agreements.

⁵⁵ See OECD (2000).

example on screen quotas in cultural services, data localization requirements and data privacy protection in cross-border data flows, etc.

4) Support measures to enable the realization of the above

Support measures to enable participation in sectoral agreements, in particular capacity building and technical assistance to enable participation by developing economies, will be another important element. In the future, the participation of the major developing economies will be essential to the formation of the critical mass necessary. This makes it essential to consider support measures to enable their participation. With regard to dispute settlement procedures, in order to ease the burden on developing economies and avoid a sense of caution, it will be necessary in certain cases, to consider granting exemptions to developing economies.

5) Proof of economic benefits

In making sectoral proposals, adequate verification and explanation of the economic effects of their realization and the benefits of participation will be essential. With regard to this point, cooperation with academia will be important in addition to the involvement of industry and government.⁵⁶

6) Concrete sectoral proposals – perspectives on proposals by Japan

A concrete examination of each sector individually by the industry, the government, academics and lawyers alike will be essential in future, but a number of candidate sectors are suggested below. The suggestions below focuses on the sectors traditionally

⁵⁶ The further development of indicators of openness in services fields, such as the Services Trade Restrictiveness Index (STRI), by the OECD will be important in providing proof of the economic benefits of liberalization of services.

of interest to the Japanese business community. These areas should be discussed in future on the basis of close cooperation between the government and the business community, and where concrete proposals should be made. The examples below are also offered from the perspective of Japan advancing liberalization overseas. Naturally, it will be important for Japan to strategically organize its responses to sectoral proposals from overseas.⁵⁷

1) Retail and logistics sectors

Proposals restricted to a part of the retail and logistics sectors, sectors which Japanese companies seek to enter in the Asian market and in which Japan is competitive, could be considered. However, these sectors are characterized by a diverse range of internal regulations in numerous countries, and it would be essential to respond prudently, for example by selecting sectors in which there will be little conflict of interest with partner countries (e.g., setting standards for scale) or proposing frameworks that bring benefits to partner countries, e.g. rationalization of domestic industry, support for supply chains, etc.

2) Manufacturing-related services

Manufacturing-related services are a sector that Japan has focused in its FTA with Singapore, Malaysia, Indonesia, and Vietnam. The sector offers many potentials in itself, but in addition, it also provides the foundation for the ongoing overseas expansion of the Japanese manufacturing industry.

⁵⁷ Even if it proves difficult for Japan to directly make proposals, it can be adequately predicted that important sectoral proposals from the perspective of advancing reforms of domestic regulations will come from overseas. (Please refer to the sectors of interest to the EU discussed above, and the sectors of interest to the CSI, which will be discussed below.)

In the strictest sense, these are services incidental to the manufacturing industry, or 884 and 885 under the United Nations Central Product Classification (CPC), but Japan has also achieved a certain degree of liberalization of equipment maintenance and repair services (CPC 633; 8801 to 8806) in its FTAs with Singapore and Vietnam.

In addition, attempts should be made to survey the current status of the business community and include other services consequent upon establishing manufacturing facilities overseas in clusters. These would include a portion of telecommunications (e.g. CPC 842 to 844), data services (CPC 84) and other business services, e.g., management consulting services (CPC 865, 866), packaging services (CPC 876), and conference services (CPC 87909).

If it was possible to cluster services that are integral and closely associated with the overseas expansion of manufacturing industry, this sector would contribute to the promotion of investment and the expansion of value chains in developing economies, making the explanation of economic benefits a relatively easy task.

3) Cultural services

Cultural services is a sector wrapped up in domestic regulations in many countries, and it can be assumed that its liberalization will present difficulties. Despite this, this is a sector in which it will be important for Japan to advance internationally in future (the “Cool Japan” initiative being one example), and it should be considered as a candidate sector of sectoral proposals.

4) Environmental services

An APEC agreement for the elimination of tariffs on specified environmental goods was confirmed in 2012. Given that most nations support the development of environmental protection and environmental industries, sectoral proposals concerning environmental

services (an area in which Japan is competitive), in cooperation with *inter alia* the APEC countries, represents another possibility. It would be necessary to examine the potential for clustering, with CPC environmental services (9401-3) as the core.

5) Cross-border data flows

The rapid globalization of data processing and the development of cloud computing present a variety of business opportunities. In order to facilitate the expansion of business in these areas, there is a movement towards the elimination of regulations such as the obligation for localization of data in order to realize free cross-border data flows, led by the U.S. business community.⁵⁸

Given that it presents the problem of harmonization with a range of domestic regulations (e.g., concerning the protection of privacy) and horizontal problems related to numerous services sectors in countries' Schedules of Commitments, it would be necessary to pursue discussions in the area of cross-border data transfer prudently and carefully.

Sectoral proposals in this sector would possess a different character to proposals in the other sectors discussed above, but this is a business sector in which Japan is competitive internationally, and could make relevant proposals in cooperation with the governments and the business communities of the U.S. and the Asia-Pacific region. At the same time, this would offer a test case in how the frameworks of service sector agreements should respond to technological progress.

The above are only examples, but it can be asserted that the clarification of important sectors and the formulation of proposals for each of those sectors would represent a

⁵⁸ See Meltzer (2013).

more efficient approach for the international expansion of Japan's services industry than pursuing discussion of the horizontal application of NT and MA without identifying important sectors. It is desirable that the TISA negotiations becomes the opportunity for such proposals from the perspective of contribution of global rule-making.^{59,60}

Focusing on plurilateral initiatives within the services sector, this paper has discussed the importance and the problems of TISA, the direction that should be aimed for, and the value of pursuing negotiations on sectoral basis. Hopefully, the discussion developed here will be helpful in encouraging the use of the plurilateral framework in advancing services sector negotiations in the future, as opposed to exclusively concentrate on liberalization and rule-making through FTAs.

In addition to being an important framework in terms of the international development of Japan's service industry, the TISA is also important from the perspective of the provision of global rules within GATS. It is highly desirable that negotiations proceed on sectoral basis within this framework, and that Japan offers its contributions.

⁵⁹ Independent plurilateral proposals and sectoral proposals within mega-FTA negotiations could similarly be considered, but from the perspective of the realization of global sectoral agreements, proposals within the TISA framework can be viewed as the most efficient method. Unfortunately, such proposals would be unrealistic in GATS negotiations within a round that has lost its cohesive force.

⁶⁰ Di Piazza, Jr. and Allgeier (2013) list electronic security systems, express delivery, financial services, insurance, Internet and computer-related services, media and entertainment services, retail and logistics services, and telecommunications services as sectoral targets for the TISA, and emphasize the importance of appropriate clustering and bundling (express delivery, etc.). These elements can be expected to be reflected in the future in concrete proposals by the U.S. in the TISA negotiations. It is essential for Japan to prepare its own sectoral proposals as quickly as possible.

The author hopes that this paper will serve as a reference in advancing both TISA and sectoral negotiations.

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A Comparison of Goods and Services Disciplines

	Goods	Services
Most-favored nation treatment	Most-favored nation treatment is the principle (GATT Article I).	Most-favored nation treatment is the principle (GATS Article II), but exceptions can be registered on the annex on exemptions.
Market access	Each country ordinarily binds tariff rates (GATT Article II) based on the harmonized system (HS) classification table formulated by the WCO. Developed countries have bound almost all products.	It is standard practice to offer commitments regarding market access only in specified sectors (GATS Article XVI). Commitments will not necessarily be made for the entire 155 sectors covered by the W120 services sectors list based on the Provisional Central Product Classification. The scope of commitments is limited.
National treatment	National treatment is the principle (GATT Article III).	As in the case of market access, it is standard practice to offer commitments only in specified sectors (GATS Article XVII). In the sectors in which commitments have been made, national treatment is guaranteed only within the scope of the commitments.
TBT	TBT Agreement exists in the WTO. It defines procedures for the introduction of regulations for goods, transparency, standards, and conformity assessment.	Negotiations are proceeding regarding domestic regulations (related to GATS Article VI), but there is not much progress. As the importance of BBM increases in the future, rules on domestic regulations will be extremely important for the development of services disciplines.
Subsidies	Agreement on Subsidies and Countervailing Measures exists in the WTO. Detailed disciplines related to elements including prohibited subsidies and countervailing duties exist.	Discussions concerning disciplines related to subsidies in the services sector are underway (GATS Article XV), but progress is not being made. The fact that no frameworks exist for countermeasures against the overseas expansion of services protected by subsidies, corresponding to countervailing duties in the case of goods, may become a significant issue in the future.
Safeguards	There is an agreement concerning safeguards in the WTO. The agreement provides disciplines for elements including conditions for the application of safeguard measures and the details of safeguard measures.	There are provisions for negotiations in GATS Article X, and discussions are underway, but progress is not being made. On the one hand, the fact that there are no provisions for safeguards has the effect of preventing members to withdraw commitments, but on the other, because it closes off the possibility of withdrawing or suspending commitments that have been made, it may make countries cautious to make commitments.
Anti-dumping	An anti-dumping agreement exists in the WTO. Detailed disciplines exist for elements such as the definition of dumping and the conditions for application of anti-dumping duties. Negotiations in the area of rules (anti-dumping, subsidies) are ongoing in the Doha Round, under the leadership of Japan.	No disciplines exist. There is also no provision for negotiations. In the goods sector, anti-dumping duties are frequently used improperly in a protectionist fashion, and it is therefore to be hoped that there will be no progress in discussions concerning dumping-related disciplines in the services sector. Availability of data in services sector also significantly differs from the goods sector, and it is difficult to obtain objective cost and trade data in services. At the same time, the fact that no countermeasures can be applied when services dumping occurs in the sectors covered by commitments may cause countries to become cautious in making commitments in the future.
Government procurement	The Agreement on Government Procurement (an Annex 4 agreement), a plurilateral agreement, exists. The transparency of government procurement fell off the agenda of the Doha Round negotiations. No agreements exist that discipline all WTO members. Increasing the number of participants in the Agreement on Government Procurement is therefore an important issue.	As at left
Competition rules	No disciplines exist in the WTO. Trade and competition (Singapore issues) fell off the agenda in the Doha Round. Competition rules will be important issues in the future for both goods and services.	As at left
Investment rules	With the exception of TRIM, there are no standard disciplines that function as investment rules in either GATT or GATS. Trade and investment (Singapore issues) fell off the agenda in the Doha Round. Investment disciplines will be important issues in the future for both goods and services.	As at left. Mode 3 has the character of investment-related rules (NT, MA) within its scope, but there is a fundamental limitation due to the scope of commitments.
FTA Exemption	A discipline exists in GATT Article XXIV. There is a long history of discussion of this discipline. "Substantially all trade in goods" is the basis. It allows for significant exceptions to MFN and MA rule in the WTO. On NT, because NT is the principle on goods, FTA does not produce significant difference	A discipline exists in GATS Article V. "Substantial sectoral coverage" is the basis. There is almost no history of discussion of this discipline. The fact that exceptions to MFN treatment are allowed (there are numerous cases of registration of exceptions to MFN treatment in the areas of marine transportation and AV) and that the application of NT and MA commences from the obligations within the scope of commitments represent significant differences with GATT. (The discipline commences from GATS and allows further preferential treatment to the participants in the FTA.)

Reference Materials 2

Apparent Level of Interest in Services Negotiations, by Country (Based on the author's personal opinions as of February 2014)

		Japan	U.S.	EU	Developing nations, etc.
WTO		△	—	△	—
TISA		△	◎	○	—
FTA	TPP (Trans-Pacific Partnership)	△~○	◎	/	—(Vietnam, Malaysia, etc.) △(Chile, etc.)
	EIA (Economic Integration Agreement: Japan-EU FTA)	△~○	/	◎	/
	RCEP (Regional Comprehensive Economic Partnership)	△	/	/	—
	Japan-China-Korea FTA	△	/	/	—(China, South Korea)
	FTA with ASEAN nations	△	/	/	—
	TTIP (Transatlantic Trade and Investment Partnership)	/	◎	○	/
Plurilateral agreements by sector	?	△	?	?	

Degree of interest: ◎ Extremely strong; ○ Strong; △ Standard; — Weak or opposed

While a finer mesh could be used for this study, based on the regions that are of interest to each country, it will be important for the development of Japan's services sector to select the most efficient framework, cooperate with other countries, and establish an appropriate sequence.

Perspectives on the Legal Form of the TISA

	Overview	Precedents	Level of difficulty	WTO dispute settlement procedures	Other
A GATS protocol approach, on an MFN basis	Participation of sufficient countries to constitute critical mass is obtained, and the benefits of the agreement are extended to all WTO members on the MFN principle. The agreement is formalized in the WTO as a protocol.	Agreements on Financial Services and Basic Telecommunications	If the participation of countries sufficient to constitute critical mass cannot be secured, concerns over free riders make extension of the benefits on an MFN basis difficult.	Can be used	Can be considered to be the most desirable approach from the perspective of global rulemaking. Extension of the benefits on an MFN basis is the key to the creation of a protocol based on the agreement of the WTO members.
Going alone, on an MFN basis	Participants in the negotiations voluntarily revise their commitments, which are extended to all WTO members on an MFN principle.	It is not a method of plurilateral implementation of agreements, but there are numerous precedents for individual initiatives.	Difficult. There is no guarantee that all participants in the negotiations will revise their commitments in accordance with the agreement.	Can be used	A high-level relationship of trust between participating nations is a precondition
A plurilateral agreement within the WTO	Establishment of a WTO Annex 4 agreement	Agreement on Trade in Civil Aircraft, Agreement on Government Procurement	Extremely difficult. A consensus among WTO member countries is necessary for the establishment of an Annex 4 agreement	Can be used	Relationships of rights and obligations exist only between participants in the agreement.
A plurilateral agreement outside the WTO	FTA based on GATS Article V	Many examples of GATS Article V FTA integrated with GATT Article XXIV FTA. There are no examples of services-only FTA.	Services FTA can be created by the agreement between the participating countries satisfying the requirements stipulated in GATS Article V. (In this sense it is easy)	Cannot be used	Fulfillment of the requirements of GATS Article V is an essential condition.
Waiver	According to Article IX(3) of the Marrakesh Agreement, a waiver can be obtained with the agreement of 3/4 of WTO member countries.		Agreement of 3/4 of WTO member countries is a challenging condition.	Able to be used? (Dependent on content of waiver)	Waivers are not suitable as ongoing exception measures. Periodic updating of the waiver is necessary.

Legal Structure of Exceptions to MFN Treatment

		GATT	GATS
Basic principle		Prohibited (GATT Article I)	Prohibited (GATS Article II)
Registration of exceptions		Not possible	Possible (Annex on Article II Exemptions) (Note: Japan has not registered exceptions)
Exceptions in FTA		GATT Article XXIV (Substantially all trade standard) 1) Sufficient discussion regarding interpretation. 2) The basic principle is elimination of tariffs on approximately 90% of trade within 10 years. (Unclear points exist in the details.)	GATS Article V (Substantial sectoral coverage standard) 1) Insufficient discussion regarding interpretation. 2) No consensus regarding how far the coverage of commitments should extend in FTA in excess of GATS commitments, or the depth of commitments, in relation to 155 categories and four modes of market access and national treatment. In addition, the period for elimination of discrimination in relation to national treatment among participating countries is defined only as “a reasonable time-frame” (Article V(1b)).
Market access			
	Commitments	Tariff rates lower than bound rates are allowed for participants in the FTA	Higher-level commitments than GATS commitments are allowed in relation to participating countries (However, MFN treatment can also be applied)
	No commitments		New commitments are allowed in relation to participating countries (However, MFN treatment can also be applied)
National treatment			
	Commitments	National treatment is a principle of GATT (Article III)	Conditions for commitments (GATS) are relaxed for participating countries (However, MFN treatment can also be applied)
	No commitments		New commitments are allowed in relation to participating countries (However, MFN treatment can also be applied)
Rules of origin		With regard to FTA, disciplined by preferential rules of origin (No relevant rules in WTO)	Existing juridical persons conducting substantive business operations in the territory of a party to the FTA can share the benefits of the FTA (GATS Article V(6))
Ease of discrimination by country		Discrimination in the areas of border measures and tariffs is easy	Discrimination against foreign investment can be applied as regulations on market entry, but uniform application is standard for domestic measures (It is not easy to discriminate by country)
Extension of the benefits on MFN basis			
	Towards participants in the FTA	Article XXIV FTAs can be classified into those with clauses specifying MFN extension, those with clauses specifying efforts towards MFN extension, and those without such clauses	As at left. (However, discrimination by country with regard to domestic disciplines is generally difficult.)
	Towards non-participants in the FTA	As a general rule, no MFN extension	Can be implemented with or without MFN extension. However, discrimination by country is generally difficult with regard to domestic disciplines