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REGULATING SERVICES THROUGH TRADE AGREEMENTS – A COMPARATIVE ANALYSIS OF REGULATORY DISCIPLINES INCLUDED IN EU AND US FREE TRADE AGREEMENTS

BILLY A. MELO ARAUJO[*]

Developed countries, led by the EU and the US, have consistently called for 'deeper integration' over the course of the past three decades i.e., the convergence of 'behind-the-border' or domestic polices and rules such as services, competition, public procurement, intellectual property ("IP") and so forth. Following the collapse of the Doha Development Round, the EU and the US have pursued this push for deeper integration by entering into deep and comprehensive free trade agreements ("DCFTAs") that are comprehensive insofar as they are not limited to tariffs but extend to regulatory trade barriers. More recently, the EU and the US launched negotiations on a Transatlantic Trade and Investment Partnership ("TTIP") and a Trade in Services Agreement ("TISA"), which put tackling barriers resulting from divergences in domestic regulation in the area of services at the very top of the agenda. Should these agreements come to pass, they may well set the template for the rules of international trade and define the core features of domestic services market regulation. This article examines the regulatory disciplines in the area of services included in existing EU and US DCFTAs from a comparative perspective in order to delineate possible similarities and divergences and assess the extent to which these DCFTAs can shed some light into the possible outcome and limitations of future trade negotiations in services. It also discusses the potential impact of such negotiations on developing countries and, more generally, on the multilateral process.

[*] Dr. Billy Melo Araujo, Lecturer, Queen's University Belfast, School of Law. E-mail: B.Melo-Araujo[at]qub.ac.uk. The usual disclaimer applies.

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I. INTRODUCTION

Since the 1970s, services have increasingly become an important aspect of global commerce. In gross terms, services account for 23% of international trade and in value-added terms they account for a staggering 47% of world exports.1 It is no surprise then, that the removal of barriers to trade in this area has become a key priority, especially for developed countries that remain by and large the main exporters of services. However, tackling trade barriers in services is no easy matter since, unlike goods, most barriers to trade in services are not border measures such as tariffs and quotas but rather non-discriminatory domestic regulation.

During the Uruguay Round Negotiations leading to the creation of the World Trade Organisation ("WTO"), the EU and the US were the principal proponents of the General Agreement on Trade in Services ("GATS"),[2] and have continuously advocated further liberalisation in service sectors which represent key offensive interest (e.g., telecommunications, financial and transport services). However, with trade talks at the WTO level nearing a halt, both parties have been intensively pursuing a policy of concluding free-trade agreements ("DCFTAs"). The US has, since 2001, pursued a policy of 'competitive liberalisation' which has sought to

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[1] Hubert Escaith, *Measuring Trade in Goods and Services*, 1 INT'L TRADE F. 2 (2013).

[2] General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 [hereinafter GATS].

conclude DCFTAs with countries willing to open their markets and adopt US-style business friendly regulation.[3] The DCFTAs concluded under this policy include the 2004 Chile-US FTA,[4] the 2004 Singapore-US FTA,[5] the 2004 Dominican Republic-Central America-United States Free Trade Agreement ("CAFTA-DR"),[6] the 2005 Australia-US FTA,[7] the 2006 Bahrain-US FTA,[8] and the 2012 Korea-US FTA ("KORUS").[9] In 2006, the EU, initially reluctant to conclude commercially-driven DCFTAs, notwithstanding a sliver of hope of a successful conclusion of the WTO Doha Development round, launched the 'Global Europe Strategy'. This sought to conclude commercially-driven DCFTAs which would be WTO plus in character, and comprehensive both in terms of scope and breadth. To date, the EU has signed the 2008 EU-CARIFORUM Economic Partnership Agreement,[10] the 2011 EU-KOREA FTA ("KOREU"),[11] the 2012 EU-Colombia and Peru FTA ("COPE"),[12] the 2012 EU-Central America FTA ("EU-CA FTA"),[13] the 2013 EU-

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[3] Simon Evenett & Michael Meier, An Interim Assessment of the US Trade Policy of 'Competitive Liberalization', 31(1) WORLD ECON. 31-66 (2008); Alberta Sbragia, The EU, the US, and Trade Policy: Competitive Interdependence in the Management of Globalization, 17(3) J. EUR. PUB. POL'Y 368-382 (2010).

[4] U.S.-Chile Free Trade Agreement, U.S.-Chile, June 6, 2003, 42 I.L.M. 1026 [hereinafter US-Chile FTA].

[5] U.S.-Singapore Free Trade Agreement, U.S.-Sing., May 6, 2003, 42 I.L.M. 1026 [hereinafter US-Singapore FTA].

[6] Central American-Dominican Republic-U.S. Free Trade Agreement, Aug. 5, 2004, 43 I.L.M. 514 [hereinafter CAFTA-DR].

[7] U.S.-Australia Free Trade Agreement, U.S.-Austl., May 18, 2004, 43 I.L.M. 1248 [hereinafter US-Australia FTA].

[8] Agreement between the Government of the United States and the Government of the Kingdom of Bahrain on the Establishment of a Free Trade Agreement, U.S.-Bahr., Sept. 14, 2004, 44 I.L.M. 544 [hereinafter US-Bahrain FTA].

[9] U.S. -Korea Free Trade Agreement, U.S.-S. Kor., June 30, 2007, 46 I.L.M. 642 [hereinafter KORUS].

[10] EU-CARIFORUM Economic Partnership Agreement, signed 15 October 2008, OJ L289/1/3, 30 October 2008 [hereinafter EU-CARIFORUM EPA].

[11] Council Decision of 16 September 2010 on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, 14 May 2011, O.J. (L 127) [hereinafter KOREU].

[12] Council Decision of 31 May 2012 on the signing, on behalf of the Union, and provisional application of the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, 21 Dec., 2012, O.J. (L 354) [hereinafter EU-COPE FTA].

[13] Council Decision of 25 June 2012 on the signing, on behalf of the European Union, of the Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other, and the provisional application

Singapore FTA and the EU-Canada Comprehensive Economic Trade Agreement ("CETA"),[14] all of which comply with the Global Europe Agenda. These DCFTAs contain comprehensive chapters on services which not only address discriminatory trade barriers but also include horizontal and sectoral regulatory disciplines, intended to iron out regulatory divergences which may inhibit market access for service suppliers. The culmination of such policies could possibly take the form of a bilateral trade agreement between the EU and the US - the Transatlantic Trade and Investment Partnership ("TTIP"), and even a plurilateral Trade in Services Agreement ("TISA") both of which put tackling barriers resulting from divergences in domestic regulation at the very top of the agenda[15] Should these agreements come to pass, they may well set the template for the rules of international trade and define the core features of domestic services market regulation.

The purpose of this article is to address from a comparative perspective, the content of the regulatory disciplines in the area of services included in existing EU and US DCFTAs in order to delineate possible similarities and divergences and assess the extent to which these DCFTAs can shed some light into the possible outcome and limitations of future trade negotiations. Part II explains the rationale behind the inclusion of deep rules in the area of services as well as the multiple difficulties generally encountered in disciplining domestic regulation in trade agreements. Part III examines the GATS regulatory framework with a particular focus on provisions disciplining non-discriminatory measures. Part IV provides a comparative analysis of the regulatory disciplines typically included in EU and US DCFTAs. Part V discusses the extent to which new initiatives such as the TTIP and the TISA may build upon what is currently found in EU and US DCFTAs and draws some general conclusions relating to the impact of such agreements on services regulation at the multilateral level.

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of Part IV thereof concerning trade matters 15 Dec., 2012, O.J. (L 346) [hereinafter EU-CAFTA].

[14] The negotiations for the EU-Singapore FTA and the CETA have been concluded but the agreements are yet to be ratified. *See* European Union, *Overview of FTA and Other Trade Negotiations*, http://trade.ec.europa.eu/doclib/html/118238.htm (last updated Jan. 27, 2015).

[15] Simon Lester & Inu Barbee, The Challenge of Cooperation: Regulatory Trade Barriers in the Transatlantic Trade and Investment Partnership 16(4) J. INT'L. ECON. L. 847-867 (2013) [hereinafter Lester & Barbee]; Harold Godsoe, The Depth of the Trade in Services Agreement, 10(1) BYU INT'L L. & MGMT. REV. 1, 16-18 (2014).

II. REGULATION OF SERVICES IN TRADE AGREEMENTS: THE RATIONALE

Behind-the-border measures or domestic regulations, are typically the most important barriers to trade in services. Firstly, since services are largely intangible products, the imposition of border measures such as tariffs and quotas are in most instances not feasible.[16] Secondly, most services are not delivered through cross-border trade but rather through local presence of foreign service suppliers, foreign direct investment, movement of capital or labour and increasingly, via electronic means.[17] However, the regulatory diversity and intensity that characterizes trade in services means that disciplining behind-the-border measures in services through trade agreements is no easy feat. Different sectors are regulated differently, and such rules will vary considerably from one country to another depending on societal, political, historical and cultural preferences.[18] And, in most instances, services regulations are adopted to pursue a raft of wholly legitimate public interest objectives.[19] For example, in network industries (e.g., telecommunication, postal and electricity services) anti-competitive safeguards are needed to curb abuses by natural monopolies and the imposition of universal services obligations ensure that the vital public services are delivered at reasonable prices to all users independent of their geographical location. Likewise, because of the information asymmetries that prevail between suppliers and customers with respect to certain services (e.g., health and legal services), the imposition of minimum standards of quality may often be required.[20]

From a trade perspective, services regulations can represent up-front costs to market entry, such as licensing and qualification requirements, or seek to address

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[16] JOHN H. JACKSON, INTERNATIONAL COMPETITION IN SERVICES: A CONSTITUTIONAL FRAMEWORK 4 (1988); Juan Marchetti & Petros Mavroidis, *What are the Main Challenges for the GATS Framework? Don't Talk About Revolution*, 5(3) EUR. BUS. ORG. L. REV. 547 (2004).

[17] Philippa Dee & Alexandra Sidorenko, *The Rise of Services Trade: Regional Initiatives and Challenges for the WTO, in* RESHAPING THE ASIA PACIFIC ECONOMIC ORDER 206 (Christopher Findlay & Hadi Soesastro eds., 2006); Panagiotis Delimatsis, *Concluding the WTO Services Negotiations on Domestic Regulation – Hopes and Fears,* 9(4) WORLD TRADE REV. 643-673 (2010).

[18] Nicholas Diebold, Non-discrimination in international trade in services: 'likeness' in WTO/GATS (2010).

[19] Markus Krajewski, National Regulation and Trade Liberalisation in Services 11-19 (2003) [hereinafter Krajewski].

[20] Carsten Fink & Marion Jansen, *Services Provisions in Regional Trade Agreements: Stumbling or Building Blocks for Multilateral Liberalisation?, in* MULTILATERALIZING REGIONALISM: CHALLENGES FOR THE GLOBAL TRADING SYSTEM 221 (Richard Baldwin & Patrick Low eds., 2009).

the operation and conduct of services suppliers who have entered the domestic market, such as competition laws and requirements pursuing equity concerns.[21] Historically, trade agreements have sought to address barriers created by such regulations by imposing national treatment obligations that require countries to not discriminate between domestic and foreign services suppliers or services. However, even in the absence of discriminatory treatment, mere differences in regulations between countries can create additional costs for foreign services suppliers that significantly inhibit market access.[22] The EU, the most ambitious experiment in regional economic integration, applies an obstacle-based approach to services liberalization prohibiting non-discriminatory measures that affect or hinder access to markets in services.[23] This approach also presents certain limitations, notably the fact that the prohibition is subject to multiple exceptions and derogations, which allow States to maintain trade restrictive measures.[24] Beyond non-discrimination and market access requirements, mutual recognition and regulatory harmonization are alternative tools that have also been envisaged to remove barriers created by domestic regulation.[25] However, to the extent that services rules are a reflection of factors such as national preferences and the level of economic development, the regulatory approximation or convergence that is entailed by mutual recognition or harmonization arrangements are, in many cases, not only unrealistic targets but also undesirable.[26] Moreover, since different countries have different regulatory needs, there is no one-size-fits-all approach to services regulation, which would automatically generate positive effects on a global scale.[27]

In light of the limitations of traditional approaches to liberalising trade in services and the obstacles faced in pursuing regulatory harmonisation and mutual recognition arrangements, trade negotiators are increasingly resorting to alternative methods to address market access issues resulting from regulatory diversity. This includes, in particular, the establishment of formal and informal institutional processes that are intended to encourage cooperation, transparency and dialogue

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[21] KRAJEWSKI, *supra* note 19, at 13-16.
[22] Alan O. Sykes, The (Limited) Role of Regulatory Harmonisation in International Goods and Services Markets, 2(1) J. INT'L. ECON. L. 53-57 (1999).
[23] Case C-384/93, *Alpine Investments v Minister van Financien* [1995] ECR I-1141; Case C–518/06, *Commission v. Italy* [2009] ECR I–3491.
[24] Gareth Davies, *Trust and Mutual Recognition in the Services Directive, in* REGULATING TRADE IN SERVICES IN THE EU AND THE WTO 102-104 (Ioannis Lianos & Okeoghene Odudu eds., 2012).
[25] Jacques Pelkmans, Policy Paper, *Mutual Recognition: Economic and Regulatory Logic in Goods and Services*, 24 BRUGES EUR. ECON. RES. PAPERS 5 (2012).
[26] Kalypso Nicolaidis & Gregory Shaffer, Transnational Mutual Recognition Regimes: Governance Without Global Government, 68 LAW & CONTEMP. PROBS. 287 (2005).
[27] Sykes, *supra* note 22, at 62.

between regulatory authorities in order to create trust between national regulators. By promoting "increased levels of institutional trust (or system trust) between actors across national boundaries",[28] these institutional mechanisms provide a forum for discussion and exchange of information in the area of services regulation which allow regulators to address each other's concerns arising from regulatory diversity on a case-by-case basis and assess areas where regulatory convergence may be envisaged.[29]

III. GATS AND DOMESTIC REGULATION

The inherent tension between trade liberalization and the need for States to maintain a degree of regulatory autonomy in services is evident throughout the text of the GATS.[30] The recitals recognize the right of WTO Members to regulate and to introduce new regulations in order to meet national policy objectives. These are national treatment and market access obligations. However, unlike the GATT system, GATS applies a positive-list approach to scheduling which means that only those sectors for which specific commitments have been made are covered by such obligations.[31] Moreover, disciplines addressing non-discriminatory regulatory barriers to trade in services are few and far between. Article III, GATS, contains rules on transparency which require WTO Members to promptly publish all measures of general application that may affect trade in services and to establish enquire points that must respond to requests from other WTO Members for specific information on such measures. Article VII allows WTO Members to enter into mutual recognition arrangements as long as other members are afforded the possibility of joining such arrangements and that recognition is not accorded in a manner that would constitute a means of discrimination. But by far, the most ambitious provision relating to non-discriminatory regulation is Article VI, GATS, which contains procedural rules, as well as disciplines that may impact the content of domestic regulation.[32] For example, with regard to the procedural rules, WTO

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[28] Ioannis Lianos & Johannes Le Blanc, *The Trust Theory of Integration, in* REGULATING TRADE IN SERVICES IN THE EU AND THE WTO, *supra* note 24, 46-52.

[29] Nicolaidis and Shaffer, *supra* note 26, at 317.

[30] Robert Howse, Importing Regulatory Standards and Principles into WTO dispute settlement: the Challenge of Interpreting the GATS Arrangements on Telecommunications, in REGULATING TRADE IN SERVICES IN THE EU AND THE WTO, supra note 24, 446-452.

[31] Patrick Low & Aaditya Mattoo, *Is There a Better Way? Alternative Approaches to Liberalization under the GATS, in* GATS 2000: NEW DIRECTIONS IN SERVICES TRADE LIBERALIZATION 449 (Pierre Sauvé & Robert M. Stern eds., 2000).

[32] Jan Wouters & Dominic Coppens, Domestic Regulation Within the Framework of GATS (Institute for International Law, Working Paper No 93, 2006); Panagiotis Delimatsis, Due Process and 'Good' Regulation Embedded in the GATS – Disciplining

Members must ensure that measures of general application are administered in a reasonable, objective and impartial manner,[33] and that practicable judicial, arbitral or administrative tribunals providing the prompt review and appropriate remedies for any administrative decision affecting trade in services are instituted.[34] With regard to the substance of domestic rules on services, Article VI:4, GATS creates a mandate for the negotiation of horizontal disciplines on domestic regulations that would apply across all services sectors.[35] Such disciplines would require, *inter alia*, that measures relating to qualifications, requirements and procedures, technical standards and licensing requirements are based on objective and transparent criteria,[36] not more burdensome than necessary to ensure the quality of the service and in the case of licensing requirements,[37] not in themselves a restriction on the supply of services.[38] The obligation to ensure that measures are "not more burdensome than necessary to ensure the quality of the services" is potentially very significant. This is because it seems to espouse an obstacle-based approach to trade liberalization by imposing a proportionality or necessity test whereby measures covered under Article VI:4, GATS could be struck down if found to impose added regulatory burdens that are not necessary in order to ensure the quality of the service. To date, the WTO has encountered little success in developing such horizontal disciplines. First, in 1998, WTO Members negotiated disciplines on domestic regulation in the accountancy sector which included a requirement that domestic rules covered by Article VI:4, GATS are not more trade restrictive than necessary in order to fulfil a legitimate objective.[39] However, the accountancy disciplines are not yet legally binding as they were supposed to enter into force after the conclusion of the Doha Round negotiations, which were suspended in 2006.[40] The WTO also established a Working Party on Domestic Regulation to negotiate cross-sectoral disciplines back in 1999, but progress in these negotiations has been slow, with considerable divergences persisting between WTO Members, namely on the issue of the operation of a necessity test with regard to non-

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Regulatory Behaviour in Services Through Article VI of the GATS, 10(1) J. INT'L. ECON. L. 18 (2007).

[33] GATS, *supra* note 2, at art. VI: 1.

[34] *Id.* at art. VI:2.

[35] KRAJEWSKI, *supra* note 19, at 130-131.

[36] GATS, *supra* note 2, at art. VI: 4(a).

[37] *Id.* at art. VI: 4(b).

[38] *Id.* at art. VI: 4(c).

[39] WTO Council for Trade in Services, *Disciplines on Domestic Regulation in the Accountancy Sector*, S/L/63 (Dec. 14, 1998).

[40] WTO Press Release, WTO adopts disciplines on domestic regulation for the accountancy sector, PRESS/118 (Dec. 14, 1998).

discriminatory regulation.[41]

Finally, the WTO has also developed disciplines that apply to the financial and telecommunications sectors. With regard to financial services, there is the Understanding on Commitments in Financial Services ("Financial Services Understanding") which imposes optional enhanced national treatment and market access commitments to WTO Members, and the GATS Annex on Financial Services ("Financial Services Annex"), which includes a prudential carve out allowing WTO Members to derogate from GATS in order to adopt prudential measures such as measures ensuring the protection of depositors and the maintenance of financial stability. In the telecommunications sector, the WTO has developed the Reference Paper on Telecommunications Services ("Reference Paper") – a unique GATS instrument in that it includes a number of pro-competitive and regulatory disciplines that go beyond non-discriminatory concerns. It includes requirements to adopt anti-competitive safeguards, to establish and maintain independent regulatory authorities and transparent procedures for the granting of licenses. It also recognizes the right of WTO Members to adopt universal service obligations and imposes minimum standards regarding interconnection in order to ensure that new entrants to domestic telecommunications markets are able to access existing infrastructure networks.[42] In other words, the Reference Paper promotes a regulatory framework for telecommunications services based on principles of openness and competition and reflects, in particular, the experiences of developed nations in liberalizing the telecommunications sector in the final two decades of the twentieth century.[43] These regulatory principles, whilst broad, have the potential to significantly undermine the regulatory autonomy. For example, the requirement that interconnection rates be "cost-oriented" may undermine the ability of governments to apply additional charges to fund universal services obligations.[44] Likewise, the obligation to maintain independent regulators can be problematic in countries whose constitutions require parliamentary accountability of administrative bodies.[45] However, the impact of the Reference Paper is lessened by the fact that it is a plurilateral instrument which provides a significant degree of

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[41] WTO Working Party on Domestic Regulation, *Disciplines on Domestic Regulation pursuant to GATS Article VI:4,* Chairman's Progress Report, S/WPDR/W/45 (Apr. 14, 2011); *See also* Juan Marchetti & Petros Mavroidis, *The Genesis of the GATS (General Agreement on Trade in Services)*, 22(3) EUR. J. INT'L L. 689 (2011).

[42] WTO, Negotiating Group on Basic Telecommunications (NGBT), Reference Paper, ¶ 3, Apr. 24, 1996, 36 I.L.M 367.

[43] Andrew Lang, World Trade Law after Neoliberalism: Re-Imaging the Global Economic Order, 285 (2011).

[44] KRAJEWSKI, *supra* note 19, at 176.

[45] *Id.* at 171.

flexibility for WTO Members. The regulatory principles included in the Reference Paper only bind WTO Members to the extent that they are included as part of their scheduled commitments. Moreover, WTO Members have the option to select which specific regulatory principles they wish to be bound by or even modify the Reference Paper in their commitments so as to reflect their particular interests and needs.[46]

IV. EU AND US DCFTA DISCIPLINES ON SERVICES: A COMPARATIVE ANALYSIS

A. Domestic regulatory disciplines

The disciplines on domestic regulation included in both EU and US DCFTAs tend to be GATS minus in nature in that they only replicate certain elements of Article VI, GATS. Whilst most DCFTAs include the administrative requirements of Article VI, GATS,[47] the key obligations of Article VI:4, GATS aimed at ensuring that qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, are only partially replicated. With regard to US DCFTAs, there seems to be a tendency to reproduce the text of Article VI:4, GATS in its entirety. For example, Articles 8.8(2) of the US-Singapore FTA and 11.8 CAFTA-DR provide:

With a view to ensuring that measures relating to qualification requirements and procedures, technical standards, and licensing requirements do not constitute unnecessary barriers to trade in services, each Party shall endeavour to ensure, as appropriate for individual sectors, that any such measures that it adopts or maintains are: (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; and (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

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[46] Peter Cowhey & Mikhail Klimenko, Telecommunications Reform in Developing Countries after the WTO Agreement on Basic Telecommunications Services 12 J. INT. DEV. 275 (2002).

[47] US-Australia FTA, *supra* note 7, at art. 10.7(1); US-Bahrain FTA, *supra* note 8, at art. 10.7(1); CAFTA-DR, *supra* note 6, at art. 11.8(1); US-Chile FTA, *supra* note 4, at art. 11.8(1); KORUS, *supra* note 9, at art. 12.7(1); US-Singapore FTA, *supra* note 5, at Article 8.8(1); KOREU, *supra* note 11, at art. 7.23(1)(2); EU-COPE FTA, *supra* note 12, at art. 132(1)(2)(3); For example, the obligation to ensure that measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner or that, where an authorisation is required for the supply of a service, the competent authorities must inform the applicant of the decision concerning the application within a reasonable deadline.

Although the necessity requirement is included, the usefulness of this provision is limited in two regards. First, it merely creates a best endeavour obligation and, second, it does not expand on the manner in which the necessity test would work in practice. In other words, the US DCFTAs do not create any additional obligations to what is already included under GATS. This is evidenced by the fact that these provisions are typically followed by a paragraph requiring the parties to amend the text of the FTA to reflect the results of current negotiations at GATS level.[48]

The EU DCFTAs are even less ambitious than their US counterparts. The DCFTAs concluded with developing countries do not include the text of Article VI:4, GATS. Whilst the KOREU includes an Article VI:4, GATS-like provision, it omits the necessity test by not including Article VI:4(b), GATS obligation to ensure that qualification requirements and procedures, technical standards and licensing requirements are "not more burdensome than necessary to ensure the quality of services":

With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, while recognising the right to regulate and to introduce new regulations on the supply of services in order to meet public policy objectives, each Party shall endeavour to ensure as appropriate for individual sectors that such measures are: (a) based on objective and transparent criteria, such as competence and the ability to supply the service; and (b) in the case of licensing procedures, not in themselves a restriction on the supply of the service.[49]

Moreover, like the US DCFTAs, not only does the KOREU create an obligation of best endeavours, it also requires parties to incorporate the results of any negotiations at GATS level into the agreement.[50] Therefore, generally speaking, both the EU and the US refrain from using their DCFTAs as an opportunity to develop new disciplines on domestic regulations and are satisfied to simply defer to ongoing negotiations that are taking place under the auspices of the GATS Council for Trade in Services and, more specifically, the WPDR. Departing from this

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[48] US-Australia FTA, *supra* note 7, at art. 10.7(3); US-Bahrain FTA, *supra* note 8, at art. 10.7(3); CAFTA-DR, *supra* note 6, at art. 11.8(3); US-Chile FTA, *supra* note 4, at art. 11.8(3); KORUS, *supra* note 9, at art. 12.7(3); US-Singapore FTA, *supra* note 5, at art. 8.8(3).
[49] KOREU, supra note 11, at art. 7.23; See Eugenia Laurenza & James Mathis, Regulatory Cooperation for Trade in Services in the EU and US Trade Agreements with the Republic of Korea: How Deep and how Compatible? 14(1) MELB. J. INT'L L. 34 (2013).
[50] KOREU, *supra* note 11, at art. 7.23(4).

general trend, the recently concluded EU-Singapore FTA and the CETA include a number of disciplines on licensing requirements and procedures or qualification requirements which go beyond what is currently provided under GATS and which are the subject of current negotiations in the context of the WPDR. This includes rules relating the conditions and procedures for licencing and qualifications,[51] such as the requirement that: (i) procedure and qualification requirements are "pre-established and accessible to the public and interested persons",[52] (ii) that competent authorities must, within a reasonable period of time after receipt of an application which it considers incomplete, inform the applicant, and to the extent feasible, identify the additional information required to complete the application, and provide the opportunity to correct deficiencies,[53] or (iii) authenticated copies should be accepted in lieu of originals.[54] The significance of the approach adopted in these two agreements should not, however, be overplayed. Whilst the inclusion of the aforementioned obligations is a novel feature of EU DCFTAs, they remain largely unproblematic to the extent that the regulatory systems of both the signatories to the agreement already uphold such minimum standards. More significantly, neither agreement makes any mention of the controversial issue of the Article VI:4, GATS necessity test. In that sense, at least, the EU-Singapore FTA and the CETA can still be viewed as another example of the conservative approach adopted in EU FTAs towards disciplines on domestic regulation.

B. Regulatory Transparency

The regulatory and administrative transparency obligations included in EU and US DCFTAs typically relate to publication and notification requirements as well as minimum procedural standards in the context of administrative and review proceedings. Such transparency obligations are peppered throughout these DCFTAs, with some being horizontal requirements applicable to all regulatory areas covered by the agreement, whilst others apply only to areas covered by the services chapters or to specific service sectors. One key distinguishing feature between EU and US DCFTAs, however, is that the former imposes lesser transparency requirements with regard to developing country signatories whereas the latter does not differentiate between trading partners on the basis of their

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[51] EU-Singapore FTA, *supra* note 14, at art. 8.19-20; CETA, *supra* note 14, at art. X.2 (Domestic Regulation).
[52] EU-Singapore FTA, *supra* note 14, at art. 8.19.1(c); CETA, *supra* note 14, at art. X.2(2)(c) (Domestic Regulation).
[53] CETA, *supra* note 14, at art. X.2(14) (Domestic Regulation).
[54] *Id.* at art. X.2(12).

respective level of development.[55] Whilst the US tends to adopt a one-size-fits-all approach to transparency and regulatory cooperation by including GATS plus obligations in all of its DCFTAs, neither the EU-CARIFORUM EPA, the EU-COPE FTA nor the EU-CAFTA go beyond what is currently prescribed under GATS. The analysis that follows will therefore focus exclusively on those EU DCFTAs concluded with developed countries, namely the KOREU and the EU-Singapore FTA.

With regard to publication requirements, the US DCFTAs go further than GATS, in that they not only enjoin the parties to promptly publish all measures of general application but also require them to establish, where possible, a prior comments procedure whereby proposed measures are published in advance and interested parties are allowed to comment on such proposals. In some cases the publication requirements are spelled out in more detail. For example, under the KORUS, the publication of proposed regulations must occur, where possible, at least 40 days before the date where public comments are due and must be done through an official journal and include an explanation of the rationale and purpose of the regulating.[56] Likewise, the publication of the actual regulation must be done in an official journal and must include an explanation of the rationale of the regulation and address substantive comments.[57] The KOREU and the EU-Singapore FTAs also include GATS plus obligations relating to the timing, means and content of publication. Although no time-period is specified, both agreements provide that publication must occur prior to the entry into force of the measure, in an officially designated medium and include a description of rationale and purpose of the measure.[58] Like the US DCFTAs, these two agreements (as well as the CETA) do not require but rather encourage the parties to adopt prior comments procedures[59]. Article II, GATS also provides that WTO Members must promptly respond to requests for information of other Members with regard to measures of general application and establish specific enquiry points for this purpose. The US DCFTAs, the KOREU and EU-Singapore FTAs replicate the obligations to establish enquiry points and further provide that each party has an obligation to notify to the other party any proposed or actual measure which may affect the operation of the agreement or substantially affect the interests of the other party

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[55] Stephen Woolcock, Differentiation within Reciprocity: The European Union Approach to Preferential Trade Agreements, 20(1) CONTEMP. POL. 36-48 (2014).

[56] KORUS, *supra* note 9, at art. 21.2.

[57] *Id.* at art. 21.3.

[58] KOREU, *supra* note 11, at art. 12.3(1)(a); EU-Singapore FTA, *supra* note 14, at art. 14.3(1)(a).

[59] KOREU, *supra* note 11, at art. 12.3(1)(a); EU-Singapore FTA, *supra* note 14, at art. 14.3(1)(a); CETA, *supra* note 14, at art. X.01 (Transparency).

and, upon request, promptly provide information and respond to questions regarding an actual or proposed measure.[60]

With regard to the conduct of administrative proceedings relating to requests for an authorization to supply services, Article VI:3 GATS currently provides that once a final decision is taken, WTO Members must inform applicants of their decision within a reasonable period of time. The US DCFTAs add, *inter alia*, that where such proceedings are initiated, each party must provide reasonable notice with an explanation of nature of the proceeding, legal authority and nature of the issue and ensure that affected persons are given reasonable opportunity to present facts and arguments.[61] Article VI:2, GATS already provides that WTO Members must establish judicial, arbitral or administrative tribunals or procedures which provide prompt review and adequate remedies for administrative decisions affecting trade in services. The US DCFTAs generally build on this obligation and add further requirements, *inter alia*, by requiring that the parties to the proceedings afforded a reasonable opportunity to support or defend their respective positions and that any ruling must be made on evidence and submissions.[62] Out of the existing EU DCFTAs, only the CETA replicates the aforementioned due process and procedural transparency obligations whilst the KOREU adds to Articles VI:1 and 2, GATS by requiring parties to issue a final decision on an application to supply services within a deadline of 120 days and, in the event where compliance with such deadline is not feasible, the decision must be made within a reasonable period of time.[63]

C. Sectoral disciplines

The services chapters in EU and US DCFTAs include subsections that deal with specific service sectors relating to areas of key offensive interests such as telecommunication, financial, and postal services. These sectoral provisions are not intended to create detailed regulatory frameworks but rather to ensure that domestic rules incorporate pro-competitive regulatory principles which place emphasis on non-discrimination, transparency and the implementation of competitive safeguards aimed at preventing abuses of market power.

In the cases of financial and telecommunication services, these regulatory disciplines are borrowed directly from existing WTO plus rules that are yet to be

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[60] *See, e.g.*, US-Australia FTA, *supra* note 7, at art. 10.8; US-Bahrain FTA, *supra* note 7, at art. 10.8; KORUS, *supra* note 9, at art. 12.8; KOREU, *supra* note 11, at art. 12.4(1), (4); CAFTA-DR, *supra* note 6, at art. 11.7; EU-Singapore FTA, *supra* note 14, at art. 14.4(3), (7).

[61] *See, e.g.*, KORUS, *supra* note 9, at art. 21.3; CAFTA-DR, *supra* note 6, at art. 18.4.

[62] *See, e.g.*, KORUS, *supra* note 9, at art. 22.2; CAFTA-DR, *supra* note 6, at art. 18.5.

[63] KOREU, *supra* note 11, at art. 7.22(6).

multilateralised. Many of the FTA provisions on financial services are effectively taken from the WTO Financial Services Understanding and the Financial Services Annex. These include the prudential measures exception of the Financial Services Annex, as well as rules relating to new financial services and access to self-regulatory organisations from the Financial Services Understanding. The DCFTAs deviate from the WTO texts in some instances. For example, with regard to the treatment of "new financial services", the Financial Services Understanding provides that WTO Members must "permit financial service suppliers of any other Member established in its territory to offer in its territory any new financial service".[64] This means that a home State is required to allow the supply of a new financial service provided in the territory of another WTO Member even if such services are not provided in the territory of the former.[65] However, both the EU and the US DCFTAs significantly reduce the scope of this obligation by adding that the supply of the new financial service is only required if the host State allows the supply of such service under domestic law.[66] The upshot is that the FTA parties are not obliged to accept the supply of new financial products in their territories simply because their trading partners have decided to do so. However, the US DCFTAs differ from their EU counterparts in that they regulate issues that are not included in the WTO instruments. They generally include more detailed regulatory transparency requirements (e.g., prior comments procedures),[67] as well as provisions prohibiting laws that require financial institutions to only engage individuals of any particular nationality as senior managerial or other essential personnel, or those that require that more than a minority of the board of directors of a financial institution be composed of nationals.[68] The CETA represents a minor departure from the EU's existing practice, in that it adds certain provisions that are not found in any existing WTO instrument. There are, for example, rules

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[64] Understanding on Commitments in Financial Services, Uruguay Round Final Act, GATT Trade Negotiations Committee Document MTN/FA II-AIB, General Agreement on Trade in Services, Apr. 15, 1994 at ¶ 7.

[65] Christian Tietje, Jasper Finke & Diemo Dietrich, Liberalization and Rules on Regulation in the Field of Financial Services in Bilateral Trade and Regional Integration Agreements 30 (2010).

[66] *See, e.g.*, US-Australia FTA, *supra* note 7, at art. 13.6; US-Bahrain FTA, *supra* note 7, at art. 11.6; CAFTA-DR, *supra* note 6, at art. 12.6; KORUS, *supra* note 9, at art. 13.6; US-Singapore FTA, *supra* note 5, at art. 10.6; EU-CARIFORUM EPA, *supra* note 10, at art. 15.6; KOREU, *supra* note 11, at art. 7.42; EU-COPE FTA, *supra* note 12, at art. 156; EU-CAFTA, *supra* note 13, at art. 197; EU-Singapore FTA, *supra* note 14, at art. 8.53; CETA, *supra* note 14, at art. 13 (Financial Services).

[67] *See, e.g.*, US-Australia FTA, *supra* note 7, at art. 13.11; KORUS, *supra* note 9, at art. 13.11; US-Singapore FTA, *supra* note 5, at art. 10.11.

[68] *See, e.g.*, US-Australia FTA, *supra* note 7, at art. 13.12; KORUS, *supra* note 9, at art. 13.8; US-Singapore FTA, *supra* note 5, at art. 10.8.

on the composition of senior management and board of directors of financial institutions[69] and the establishment of prior comments procedures.[70] Furthermore, any violations of the provisions on financial services are covered by the Investor-to-State dispute settlement mechanism established by the agreement.[71] Such provisions are very similar to those typically included in the US DCFTAs, something that can be explained by the fact that Canada, as a member of the North American Free Trade Agreement ("NAFTA"), tends to follow the US FTA model.

Nevertheless to the extent that these DCFTAs generally follow the template set by the Financial Services Annex, they are unlikely to represent a significant restriction on the regulatory space of the parties. In fact, with regard to financial services, the most contentious aspect of modern DCFTAs may be found outside the services chapters and relate to the capital account liberalisation provisions requiring parties to ensure that capital flows freely between them. Under GATS and most DCFTAs, this requirement is tempered both by the prudential measures exception and a balance of payments safeguard clause. This permits governments to adopt or maintain restrictions on payments and transactions relating to scheduled services where it is shown that the unrestricted movement of capital could cause serious economic or financial disruption. However, the US generally omits balance of payment safeguards from its texts, meaning that the parties are unable to impose restrictions on trade in order to address critical macro-economic problems.[72]

The disciplines on telecommunication services are also based on existing WTO rules. Both the EU and US DCFTAs reproduce large portions of the GATS Reference Paper on telecommunication services which includes provisions regulating interconnection, competitive safeguards, allocation of scarce resources, the status of regulatory authorities and the provision of universal services. In doing so, the DCFTAs remove the flexibility provided in the context of the WTO where Members are not only free to decide whether to be bound by the Reference Paper, but also to pick and choose which parts to comply with.[73] This is particularly problematic for developing countries since the Reference Paper, as discussed

[69] CETA, *supra* note 14, at art. 8 (Financial Services).
[70] *Id.* at art. 10.
[71] *Id.* at art. 20.
[72] Kevin Gallagher, Capital account regulations and the trading system, in REGULATING GLOBAL CAPITAL FLOWS FOR LONG-RUN DEVELOPMENT 120 (2012); Jane Kelsey, How The Trans-Pacific Partnership Agreement Could Heighten Financial Instability and Foreclose Governments' Regulatory Space, 8(3) NZYIL 3 (2010).
[73] Cowhey & Klimenko, *supra* note 46.

already,[74] includes requirements that can restrict the ability of governments to pursue legitimate policy objectives. The US DCFTAs include rules on number portability, access to unbundled network elements, resale of telecommunication services, provisioning and leasing of circuits services, co-location, and access to submarine cables, transparency and so forth. On the other hand, the EU DCFTAs have been more modest in their approach by generally focusing on providing further guidance on issues already covered in the Reference Paper such as licensing rules, interconnection, operation of regulatory authorities and confidentiality of traffic data. However, it should be noted that in its most recent DCFTAs – the EU-Singapore FTA and the CETA – the EU has embraced the more comprehensive approach adopted by US DCFTAs by including additional rules on transparency, independence of regulatory authorities, co-location, number portability and confidentiality of information obtained in the process of negotiating interconnection agreements.[75] Here again, the creeping influence of the US FTA model can be attributed to the fact that both Canada and Singapore have signed DCFTAs with the US.

In both financial and telecommunications services, it can be said that the EU and the US are using their FTAs to expand the reach of plurilateral WTO rules. As regards disciplines on service sectors for which there are no corresponding deep rules at WTO level, the US usually includes provisions that are intended to provide a general framework for domestic regulation on electronic commerce. These include, for example, general requirements to ensure that domestic rules are based on the UNCITRAL Model Law on electronic communications or more specific obligations relating to consumer protection, data protection and authentication, and digital signatures.[76] The EU DCFTAs contain provisions regulating postal and courier services, computer services, international maritime services and electronic commerce. In some cases such provisions focus exclusively on issues of market access (computer and international services), whilst others go no further than establishing regulatory cooperation processes (electronic commerce). However, the EU DCFTAs contain sections on postal and courier services which aim to replicate the pro-competitive disciplines included in the Reference Paper on Telecommunications, including provisions that prohibit anti-competitive practices, allow the imposition of universal services obligations and require procedural guarantees in licensing procedures and the establishment of independent regulatory

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[74] *See supra,* Part III.

[75] EU-Singapore FTA, *supra* note 14, at art. 8.24-8.49; CETA, *supra* note 14, at art. 17:2-17.13.

[76] Sacha Wunsch-Vincent & Arno Hold, *Towards Coherent Rules for Digital Trade: Building on Efforts in Multilateral Versus Preferential Trade Negotiations, in* TRADE GOVERNANCE IN THE DIGITAL AGE: WORLD TRADE FORUM 206 (Mira Burri & Thomas Cottier eds., 2012).

authorities. The EU-CARIFORUM EPA also provides competition law requirements that must be imposed in the tourism sector, namely prohibitions of any "abuse of dominant position through imposition of unfair prices, exclusivity clauses, refusal to deal, tied sales, quantitative restrictions or vertical integration".[77] Such provisions are a unique feature in the FTA landscape and were introduced at the specific request of CARIFORUM States, keen on ensuring that the larger EU service suppliers were not able to engage in unfair practices which would undermine the ability of CARIFORUM firms to participate in the market.[78]

V. FUTURE DEVELOPMENTS

A. The TTIP and TISA as tools to reshape global trade governance

On 21 February 2013, the EU and the US announced their decision to launch bilateral negotiations for the conclusion of a Transatlantic Trade and Investment Partnership (TTIP). The move signalled something of a departure from the EU's previous trade policy, which had targeted trade deals with emerging economies not only to remove barriers to fast-growing markets, but also to find common ground with countries that have been ringleaders of the opposition to the developed country proposals made during the Doha Development Round. This shift towards traditional economic powerhouses can be attributed in part to the EU's struggles to make much headway in negotiations with India and Mercosur, but it is also, in part, a response to the US's 'pivot' towards Asia and, in particular, the ongoing negotiations of the TransPacific Partnership ("TPP"), a trade agreement encompassing countries from the Asia-Pacific region (Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the US and Vietnam).[79] The negotiation of the TPP is problematic for the EU, not only because it could lead to EU firms being discriminated against in the lucrative markets covered by the projected agreement, but also because the rules enshrined in the TPP could possibly be held as a model to be emulated in future DCFTAs.[80] Therefore, the TTIP (as well as the recent EU-Japan FTA negotiations) has significant geopolitical implications for the EU. It is as much about market access as it is an opportunity for the EU to influence and develop the

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[77] EU-CARIFORUM EPA, *supra* note 10, at art. 127.1.

[78] Pierre Sauvé & Natasha Ward, *The EC-CARIFORUM Economic Partnership Agreement: Assessing the Outcome on Services and Investment* 42-43 (European Centre for International Political Economy (ECIPE) Working Paper Series, 2009) [hereinafter Sauvé & Ward].

[79] Patrick Messerlin, *The EU's Strategy for Trans-Pacific Partnership,* 28(2) J. ECON. INTEGRATION 285-302 (2013).

[80] Patrick Messerlin, *The Much Needed EU Pivoting to East Asia,* 10(2) ASIA PACIFIC J. EU STUD. 13-14 (2012).

rules of trade, which are increasingly being set outside of the multilateral context through mega-regional trade deals. In other words, the key objective of the TTIP is to set the future rules of global commerce. Commissioner de Gucht admitted as much by recognising that the EU's ambition is to "help shape the global rules of trade".[81]

The EU and the US have similarly been the main proponents of negotiations on the Trade in Services Agreement ("TISA"),[82] which was borne out of the increasing frustration felt by WTO Members with respect to the paralysis currently gripping trade in services negotiations at the multilateral level. Since 2013, these two economic powers, along with 21 other developed country WTO Members (so called "Really Good Friends") have thus sought to negotiate this plurilateral agreement which is intended to cover all service sectors and pursue both market opening and the establishment of regulatory disciplines. Although negotiations are currently being conducted outside of the auspices of the WTO, the agreement is open to all other WTO Members with the hope that the results of the negotiations will eventually be incorporated into the GATS.[83] Therefore, like the TTIP, the TISA must be understood in the context of the EU and the US's ongoing attempts to reform global trade governance by concluding mega-trade deals with like-minded trade powers.

B. TTIP and services regulation

Much has been made of the desire to use the Transatlantic Trade and Investment Partnership ("TTIP") to reduce regulatory barriers. However, none of the policy statements issued from either side of the pond reveal any intent to address the problematic GATS issues relating to non-discriminatory regulation.[84] There is no mention of the possibility of using the TTIP to explore horizontal disciplines on

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[81] European Commission, Statement by EU Trade Commissioner Karel De Gucht on the Transatlantic Trade and Investment Partnership (TTIP) ahead of the second round of negotiations (Sept. 30, 2013), http://trade.ec.europa.eu/doclib/press/index.cfm?id=969.

[82] European Commission, European Commission Proposes to Open Plurilateral Trade Negotiations on Services (Feb. 15, 2013), http://europa.eu/rapid/press-release_IP-13-118_en.htm; USTR, U.S. Trade Representative Ron Kirk Notifies Congress of Intent to Negotiate New International Trade Agreement on Services (Jan. 15, 2013), http://www.ustr.gov/about-us/press-office/press-releases/2013/january/ustr-kirk-notifies-congress-new-itas-negotiations.

[83] Sauvé & Ward, *supra* note 78.

[84] European Commission, EU – US Transatlantic Trade and Investment Partnership, Trade Cross-Cutting Disciplines and Institutional Provisions, Initial EU Position Paper [hereinafter European Commission, (2013a)]; Dan Mullaney, Opening Remarks by U.S. and EU Chief Negotiators for T-TIP Round Seven Press Conference (Oct. 3, 2014).

domestic regulation of the type envisaged under Article V:4, GATS, and little evidence that the parties intend to develop common regulatory disciplines on specific sectors. This approach is not entirely surprising with regard to the issue of horizontal disciplines, the rationale being that despite negotiations since 2005, significant divergences persist at the multilateral level "on important and basic issues", not least regarding the desirability and the operation of a necessity test.[85] With regard to regulatory disciplines in sector specific areas, the current practice of including broad regulatory principles in DCFTAs seems somehow redundant in the case of the TTIP, to the extent that both jurisdictions already have transparent and pro-competitive regulatory systems in place that go beyond anything currently required under WTO law.

Emphasis has instead been placed on the importance of regulatory cooperation as a tool to remove regulatory divergences. The negotiators of the TTIP have thus proposed the adoption of enhanced transparency rules and the establishment of institutional mechanisms promoting regulatory dialogue.[86] This includes, for example, requirements to notify proposed regulations, to implement prior comments procedures and to facilitate exchange of data,[87] as well as creation of an institutional body entrusted with the task of assessing the feasibility of implementing regulatory harmonisation, compatibility and mutual recognition arrangements.[88] There have also been proposals to establish regulatory cooperation on specific service sectors, most controversially in the area of financial services, where the EU would like to establish an institutional process through which the parties would work to ensure the "timely and consistent" implementation of international standards, conduct mutual consultations in advance of new financial measures that may impact on the supply of financial services, examine where existing rules may constitute unnecessary barriers to trade and assess the extent to which their respective rules on financial services are equivalent in outcomes.[89] The principle objective of such cooperative format for the EU would be to explore the possibility of securing recognition of equivalence in financial standards so as to ensure that EU service suppliers are not subject to the cumbersome US prudential

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[85] WTO, World Trade Report: The WTO and Preferential Trade Agreements: From Co-Existence to Coherence (2011).
[86] European Commission, (2013a), *supra* note 84.
[87] Lester & Barbee, *supra* note 15.
[88] European Commission, (2013a), *supra* note 84.
[89] European Commission, *Cooperation on Financial Services Regulation* (Jan. 27, 2014), http://trade.ec.europa.eu/doclib/docs/2014/january/tradoc_152101.pdf [hereinafter European Commission, (2013b)].

regulations that have followed the Dodd-Frank Act.[90] So far, the EU's proposal has been met with little interest on the part of US trade officials, who fear that a binding cooperative framework may hamper the ongoing reform of the US financial regulatory system or even be used to water down existing standards, and have stressed that any discussion on financial services regulation is off the negotiating table.[91] In other words, there are limits to how far DCFTAs can go in disciplining domestic regulation in the area of services. As the case of financial services in the TTIP illustrates, even in the context of negotiations between like-minded trade powers such as the EU and the US, the regulatory mistrust that persists between nations renders any proposal for regulatory convergence or significant cooperation a difficult sell.

C. TISA: The plurilateralisation of FTA disciplines on domestic regulation

The TISA is being envisaged as an opportunity to disseminate the types of disciplines typically included in EU and US DCFTAs. The EU has already stated that it intends to include disciplines on issues such as "independence of regulators, fair authorisation processes or non-discriminatory access to […] networks",[92] in the context of services sectors such as telecommunications, financial services or postal and courier services. In addition, the EU has revealed that negotiators would consider developing disciplines on international maritime transport, telecommunication services, e-commerce, computer related services, cross-border data transfers, postal and courier services, financial services, temporary movement of natural persons, government procurement of services, export subsidies and state-owned enterprises.[93]

Clearly then, the proponents of the TISA are not proposing the development of horizontal regulatory disciplines, which have proved so elusive in the context of the WTO. Rather, the agreement would seek to replicate the type of sector specific disciplines typically found in the most recent EU and US DCFTAs and expand their application to other services sectors (especially network industries).[94] This appears to be confirmed by the EU's proposal for an annex on financial services

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[90] Simon Johnson & Jeffrey Schott, *Financial Services in the Transatlantic Trade and Investment Partnership* 4, 5 (Peterson Institute for International Economics, Policy Briefs PB13-26, 2013).

[91] Shawn Donnan, EU-US trade talks hit roadblock over financial services, FINANCIAL TIMES, (June 16, 2014).

[92] European Commission, (2013a), *supra* note 84, at 2.

[93] Id.

[94] Pierre Sauvé, A Plurilateral Agenda for Services? Assessing the case for a Trade in Services Agreement (NCCR Trade Regulation, Working Paper No 2013/29, May 2013).

which follows the template set in it DCFTAs by copy pasting large swathes of the Reference Paper and the Financial Services Understanding with a few deviations and additions in certain areas (e.g., new financial services, transparency requirements, etc).[95] The objectives pursued by the TISA are, therefore, not too dissimilar to those currently pursued by the EU and the US in their DCFTAs, confirming the suspicions that these economic powerhouses are simultaneously using bilateral and plurilateral initiatives to impose rules for which there is no consensus at the multilateral level.

VI. CONCLUSION

This article has attempted to provide a general overview of the provisions disciplining domestic services regulation included in EU and US DCFTAs. The discussion has been deliberately descriptive with a view to highlight the very similar and increasingly converging approaches adopted by these two trade powers in their respective DCFTAs in relation to services. In general, whilst mostly GATS plus in nature, these DCFTAs do not represent a significant departure from the GATS framework, in that they focus mostly on non-discrimination and market access concerns. However, with regard to deep regulatory disciplines, although they eschew the controversial and unresolved issue of horizontal disciplines on domestic regulation, EU and US DCFTAs are increasingly focused on enhancing regulatory transparency and expanding the reach of the pro-competitive regulatory principles enshrined in plurilateral GATS instruments on financial and telecommunication services. More recent DCFTAs, and especially those concluded by the EU, have ventured into other services sectors and areas such as postal and courier services and tourism.

The current approach adopted in the DCFTAs covered in this article is beneficial in obvious ways. First, deep disciplines designed to ensure fair competition, transparency and the rule of law in the context of administrative and judicial proceedings, apply on a non-discriminatory basis, meaning they will not be of benefit only to nationals of the FTA parties but any person doing business within those territories. Second, the practice of replicating disciplines included in WTO texts can only serve to further reinforce the multilateral system and even create common ground for future multilateral negotiations. Of course, the flipside to this argument is that by resorting to DCFTAs, the EU and the US are using their increased leverage in the context of bilateral negotiations to impose disciplines that they would have otherwise not have been able to in a multilateral context. In this sense, at least, the current drive by large economic powers to include GATS plus

[95] European Commission, *The EU publishes TISA position papers* (July 22, 2014), http://trade.ec.europa.eu/doclib/press/index.cfm?id=1133.

provisions in DCFTAs is clearly a strategy to bypass a stalling multilateral process. This is evidenced in the area of services where the similarity between the content of DCFTAs and the proposals for the TISA show that not only are DCFTAs used to consolidate and expand existing deep WTO rules but also to develop new disciplines which can then be transposed into the plurilateral agreements and, eventually, the multilateral arena.

A key related question deserving further attention relates to the desirability and impact of such disciplines on the regulatory autonomy of FTA signatories. Here, it should be noted that the vast majority of regulatory disciplines included in DCFTAs covered by this paper are intended to ensure that the liberalisation commitments made by countries are not undone by overly burdensome and opaque non-discriminatory domestic regulation. Furthermore, because the regulatory principles included in the DCFTAs generally tend to be the broadly termed, the parties maintain a considerable margin of discretion in terms of how to implement such principles.[96] Nevertheless, the article has highlighted some areas of concern for developing countries, notably with regard to financial and telecommunication services. Therefore, in their attempts to expand and further develop the FTA regulatory disciplines in the area of services, the EU and the US must give more thought to the potential impact of such disciplines on developing nations and not just assume that these will inevitably be beneficial to all involved. In this respect, it is well established that even where there is ample evidence indicating that the pro-competitive disciplines are necessary in order to maximise the benefits of trade liberalisation, the welfare effects of such disciplines are highly contingent on the institutional and regulatory capacities of the developing countries involved.[97] In light of this, the technical assistance and capacity building programmes offered by wealthier nations in trade agreements take on a singular importance. However, beyond capacity building, trade agreements must tailor disciplines impacting on domestic regulations in accordance with the needs and peculiarities of developing country signatories. Such differentiation can be seen in the EU's more flexible approach to the negotiation of regulatory disciplines which takes into account the level of development of its trading partners and seems a better option than the one-size-fits-all approach adopted in the US DCFTAs. Whilst the disciplines imposed by the US vary little from one FTA to another, the EU has shown willingness to deviate from its standard template to accommodate demands from FTA partners. The disciplines typically included in DCFTAs with

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[96] Markus Krajewski, Environmental Services of General Interest in the WTO: No Love at First Sight, 1(2) JEEPL 172 (2004); Wunsch-Vincent & Hold, *supra* note 76.

[97] Bernard Hoekman, Aaditya Mattoo, & Andre Sapir, The Political Economy of Services Trade Liberalization: A Case For International Regulatory Cooperation?, 23(3) OXFORD REV. ECON. POL'Y 367-391 (2007).

developing countries are less onerous than those found in developed country DCFTAs and, in one instance, the EU has added regulatory disciplines at the specific request of developing nations.[98] However, by presenting the TTIP as an opportunity to shape the global rules of international trade (or, as the US Ambassador to the EU, Anthony Gardener put it, to "set the rules of world trade before others do it for us"),[99] and the TISA as an agreement that should eventually be multilateralised, the EU and the US appear to be going down the one-size-fits-all approach to disciplining trade in services. Both agreements are driven in part by an underlying assumption that others will eventually follow suit. However, as the continuous inability of the EU to conclude trade deals with India and Mercosur indicates,[100] convincing emerging economies to subscribe to rules that further undermine their regulatory autonomy and do little to address their most pressing concerns is far from a given. It may therefore be that these agreements will not be seen as models for the new rules of the international trading system but rather as agreements that further entrench the divisions that exist between developed and developing countries. In order to avoid the further fragmentation of the international trading system, the proponents of the TISA may wish to consider incorporating a substantive differentiation mechanism of the type already found in the Reference Paper, which, rather than imposing common regulatory frameworks en masse, permits developing countries to select which regulatory principles to include in their schedules and become legally binding. Such flexibility would encourage developing countries to participate in the TISA negotiations and shape the future rules of trade in services without the prospect of being bound by regulatory disciplines that may run counter to their interests.

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[98] Sauvé & Ward, *supra* note 78.

[99] Daniela Vincenti, *US Ambassador: Beyond growth, TTIP must happen for geostrategic reasons,* EURACTIV, (July 16, 2014), http://www.euractiv.com/sections/trade-industry/us-ambassador-eu-anthony-l-gardner-beyond-growth-ttip-must-happen.

[100] Patrick Messerlin, *The Mercosur–EU Preferential Trade Agreement: A view from Europe* (CEPS Working Document, No. 377/2013, 2013).