

Can Services RTAs Facilitate Global Services Trade?



Author Ken Ash

By Ken ASH

Since the mid-1990s, regional trade agreements (RTAs) with services provisions have proliferated. According to the WTO database, there were 88 agreements in force notified to WTO under the General Agreement on Trade in Services (GATS) at the end of July 2010. One-quarter of these RTAs are North-North (among OECD countries), and one-half are North-South agreements; the remaining one-quarter are South-South. Some 90% of these services RTAs involve OECD or other high-income, non-OECD, countries (such as Singapore or Hong Kong China); only about 10% are between middle-income countries.

This is far fewer than the 213 notified RTAs dealing with goods, but the share of cross-border services trade covered by WTO members who are parties to RTAs is now higher than that for goods (see Chart 1). The reason is that trade in services is more concentrated than trade in goods and the main services exporters and importers have engaged in deep regional trade agreements that go beyond tariff elimination and cover “behind the border” trade barriers. More than 50% of world trade in services is between countries that are parties to RTAs. (One cannot infer from this figure that half of world trade in services is under preferential terms, as services RTAs do not systematically provide better treatment than the GATS in all services sub-sectors.)

This increased coverage raises the issue of whether the services provisions in RTAs can be “multi-lateralised,” that is, incorporated under the GATS and thereby benefit all WTO members. This article summarises the results of recent OECD research on this issue.

How Preferential Are Services RTAs?

As limited progress has been recorded at the multilateral level since the entry into force of GATS, many countries have turned to RTAs to further liberalise trade in services. But to what extent has the spread of services RTAs delivered benefits to services suppliers? The OECD has conducted an analysis of services commitments in 56 RTAs to answer this question (OECD Trade Policy Working Paper No. 106). The study identifies commitments going beyond GATS that are expected to provide more liberal treatment to services providers from the parties to the RTAs. It should be noted that these commitments are “legal bindings,” comparable to “bound tariffs” for trade in goods. As such, the actual trade regime might be more liberal than suggested by the provisions of the RTA. Moreover, a characteristic of barriers to services trade is that, unlike tariffs, services regulations do not necessarily discriminate between trading partners – the same regime is often applied to all foreign services suppliers. Having preferential commitments inscribed in an RTA does not always translate *de facto* into better access for services providers from the countries to the agreement.

Overall, the OECD analysis confirms that RTAs in services go

beyond GATS and have introduced preferential bindings in a significant number of sub-sectors. In our sample, 72% of services sub-sectors have market access and national treatment commitments and in 42% of the sub-sectors the RTA commitments are preferential (going beyond the GATS). The level of commitment differs across modes of supply with cross-border trade (mode 1) and consumption abroad (mode 2) having fewer commitments but more often in new sectors, while commercial presence (mode 3) and movement of natural persons (mode 4) cover more sub-sectors and mainly with improved commitments. The sectors that offer a higher degree of preferential treatment are ‘distribution’ and ‘business services.’ The number of new commitments is particularly high in ‘transport services,’ ‘recreational, cultural and sporting services’ and ‘health and related services.’

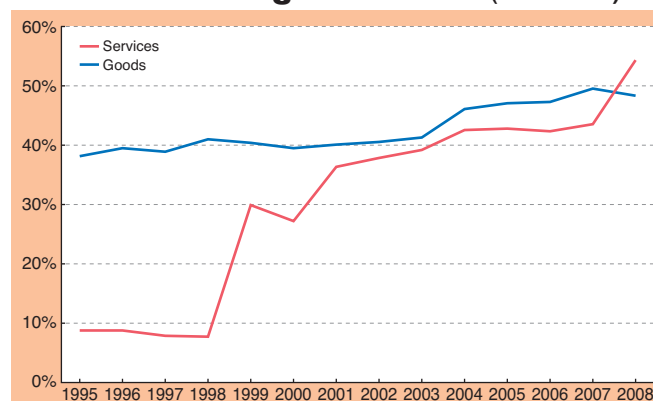
RTAs can serve a useful purpose by providing a means by which earlier reforms that were not yet consolidated in the original GATS schedule are now inscribed in an RTA schedule (“removing the old water”). Moreover, RTAs can consolidate services reforms that have been enacted since the end of the Uruguay Round (“removing the new water”). In order not to introduce trade distortions between countries that participate in RTAs and countries that have not signed similar agreements, all these new and improved commitments would have to be “multi-lateralised.”

Need for Greater Transparency

While the reasons underlying the inertia of multilateral services negotiations are manifold, one element that has received little attention is the transparency deficit under the GATS. The inter-

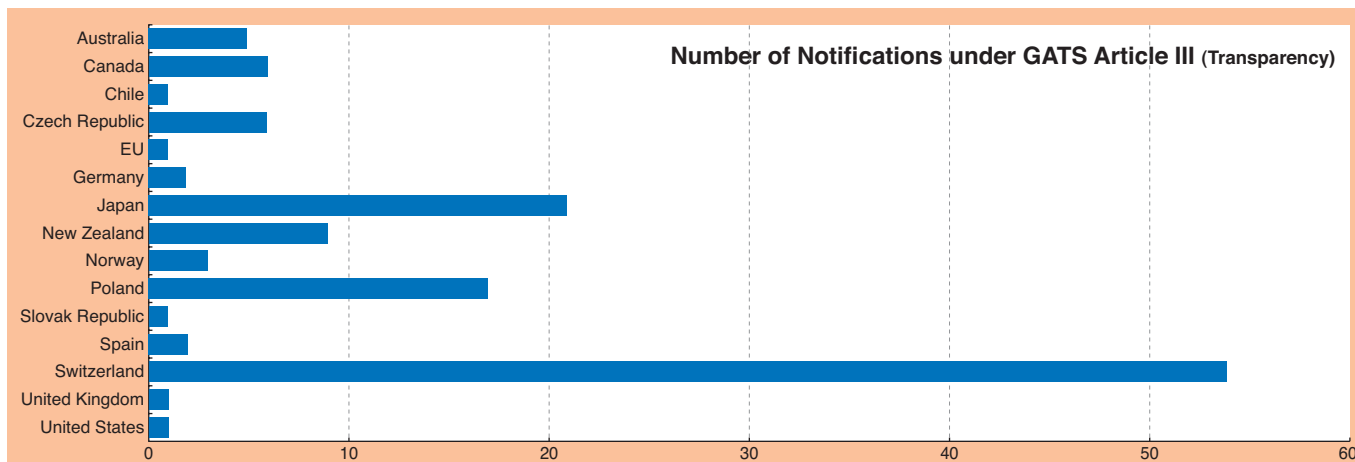
CHART 1

Share of (cross-border) services trade of WTO members having signed RTAs has overtaken goods trade (1995-2008)



Source: Miroudot, Sauvage & Shepherd (2010)

CHART 2

Total notifications of OECD countries under GATS Article III, 1995 -2010

Source: OECD, compiled from WTO document

relation between transparency and liberalisation is at the heart of the multilateral trading system, and was established in the letter of Article X of the GATT (1947). With the advent of the Tokyo Round (1973-'79), which brought non-tariff measures into the purview of international trade negotiations, countries understood that addressing more subtle forms of protectionism would require effective transparency mechanisms. As such, transparency disciplines were significantly strengthened on non-tariff measures in goods, leading to far-reaching disciplines in the TBT and SPS Agreements of the WTO.

Arguably, trade in services is more dependent on transparency. The nature of barriers to services differs from barriers to goods. Much of the discussion about liberalising trade in goods affects only foreign suppliers and focuses on progressively reducing the value of tariffs on imports. But measures affecting trade in services can apply to both local and foreign suppliers (e.g., a restriction on the number of pharmacies per head of population applies to both foreign and domestic pharmacies). Services tend to be subject to all sorts of regulations, including those to achieve important objectives of public interest, and not all regulations can be equated with barriers to trade. Equally importantly, services not only involve cross-border trade, but frequently entail the establishment of enterprise affiliates abroad, as well as the movement of services providers or consumers to a foreign market. These modes of supply intensify the informational requirements to enable trade, as well as to facilitate trade negotiations. The decision of an investor, for example, hinges on the availability of information on local laws, the predictability and non-discretion of administrative practices, and so on. From the standpoint of negotiators, the GATS is based on a "request and offer" process, which – unlike a tariff-cutting formula – requires detailed information on domestic regulations and their likely impact.

Despite the inherent need for transparency, there is a low frequency of informational exchanges under the GATS. In the course of 15 years, only 53 WTO members have submitted notifications under GATS Article III (Transparency), the main transparency obligation under the GATS. OECD countries account for over one-third of total submissions, led by Switzerland and Japan. However, a large number of OECD countries have submitted few or no notifications. Moreover,

while most countries have designated enquiry points pursuant to Article III, there is a broadly held impression that they are underused at best, obsolescent at worse. Overall, the record of transparency under the GATS is extremely modest.

GATS-plus Provisions on Transparency in RTAs

Against this backdrop, regional experiences illustrate options for invigorating transparency mechanisms under the GATS. A recent study by the OECD finds that many countries have pledged higher levels of transparency in their RTAs than in the GATS, introducing new commitments aimed at strengthening the disclosure, participation, and certainty of regulatory policies. A higher degree of trust developed in regional or bilateral relationships may have partly motivated greater ease in disclosing information and exposing decision-making. It is also evident that in bilateral or regional contexts many of the specificities that are engrained in diverse administrative cultures and legal traditions can be better accommodated.

Among OECD countries, the US and Australia display the strongest record of WTO-plus transparency for cross-border services, whereas Switzerland, New Zealand and Canada considerably strengthen transparency requirements for movement of people. There is often an inverse relationship between WTO-plus provisions and their legal enforceability: for instance, 40% of WTO-plus transparency provisions in RTAs signed by the US are cast in best-endeavour clauses. By contrast, the RTAs signed by the EU register fewer WTO-plus clauses, albeit rooted in firmer legal obligations. All the same, there is no implication that "hard" legislation ensures the workability of transparency provisions, and some degree of deference might facilitate compliance.

Options for Strengthening Transparency: Specificity, Outreach, Consultation

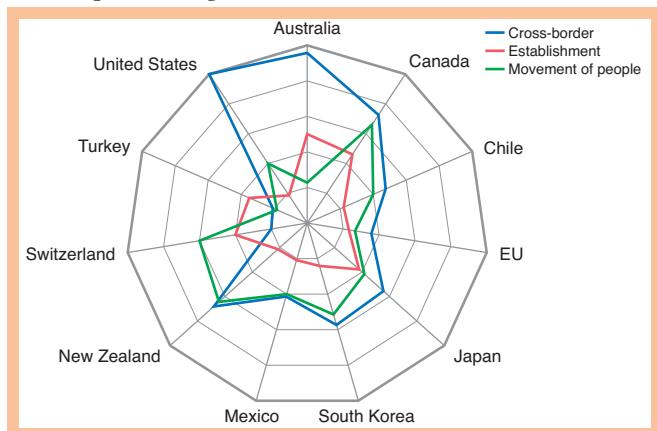
What elements of WTO-plus provisions in regional accords could help fortify transparency mechanisms under the GATS? One positive contribution of RTAs is the stipulation of precise terms for

implementing transparency obligations. RTAs often list illustrative, non-exhaustive sets of measures that must be published, such as taxation or licensing authorization criteria. In doing so, RTAs can be seen to be generating a shared understanding of what constitutes the scope of “relevant measures of general application pertaining to or affecting the operation of the [GATS] agreement” (GATS Art. III). Under the GATS, publication is to be “prompt,” but this can coincide with enactment of the measure, whereas RTAs specify timelines, generally 30-90 days prior to entry into force, so as to enable market players to adapt to changes. Lastly, RTAs introduce requirements on “electronic transparency” (i.e., making regulations available on the internet) and, where appropriate, on “English transparency” (i.e., providing translations).

Beyond specifying the modus operandi of traditional obligations, there is a fundamental shift in the outreach of transparency embodied in RTAs. In particular, the private sector features as a key target of transparency mechanisms. Whereas under the GATS the notification process is “state-to-state,” RTAs introduce procedures that provide the private sector with more direct and instantaneous information (e.g., government obligations to directly notify or respond to queries from services providers). A few RTAs also feature the obligation to issue explanatory materials aimed at generating awareness among a broader audience of interested parties, including civil society. Crucially, GATS notifications are circumscribed to sectors in which market-opening commitments have been made, whereas regional efforts to enhance transparency extend to non-scheduled sectors. After all, notifying measures on committed sectors may be redundant, given that transparency is already delivered by the schedules themselves.

A final pillar of GATS-plus transparency in RTAs comprises the public comment mechanism, prodding countries to institutionalize an informed public discussion on the cost and benefits of regulations. These RTAs impose the obligations to provide a rationale for new regulations, submit drafts of new measures to scrutiny through a public enquiry, and disclose information on the comments received and how they were taken into account. A participative, public enquiry is essential for building consensus for trade liberalization domestically, and is likely to lead to better domestic regulations.

CHART 3
Average number of WTO-plus transparency clauses in RTAs (2000-present)



Source: OECD, compiled from texts of RTAs

Services RTAs Can Facilitate Global Services Trade

The multilateral-friendliness of regional commitments hinges in part on the political economy motivations of the countries that crafted them. Some RTAs are deliberately designed with the multilateral system in mind, while others may be intended for purposes that inhibit multilateralisation (e.g., cementing a preferential relationship or offering a reward to a specific country). The bilateral agreements of major trading partners, notably the EU and the US, tend to offer little in the way of preferential treatment. This means that the services commitments inscribed in these RTAs should not, in principle, create disincentives to multilateral bargaining. The services commitments that countries have made in RTAs may indicate the types of concessions that they might be willing to multilateralise on either a *de facto* basis (by autonomously extending them to other parties) or a *de jure* basis (by inscribing these commitments in their GATS schedules.)

RTAs already include legal mechanisms that facilitate the multilateralisation of services commitments. One of them is a condition set by GATS Article V regarding rules of origin for juridical persons. Through its commercial presence, a service supplier from a non-party can benefit from the provisions of the RTAs signed by the country where it is established. In about 60% of the RTAs reviewed, there is also a non-party MFN rule. The more favourable treatment granted by a party in a new RTA can be extended to a party of former RTAs where this country is also a party.

An important feature of some of the foregoing WTO-plus services obligations under RTAs, particularly concerning regional transparency mechanisms, is that they share the characteristics of public goods: for the most part, they are non-excludable and non-exhaustible. In practice, it is hard to extend transparency on a discriminatory basis. Hence, these obligations are *de facto* applied on an MFN basis, even if they may be *de jure* preferential. Multilateralising regional transparency would not entail significant financial resources or complex domestic reforms. And yet, improving GATS transparency by diffusing these practices more widely could go a long way in facilitating negotiations, improving compliance, and enabling economic actors to take maximum advantage of opportunities created by new and improved commitments. In other words, beyond granting preferences, countries are using RTAs as mechanisms to build trust and enhance information exchange between them to increase trade flows.

Going further, services trade liberalization can be promoted by addressing the information deficit on applied-services trade barriers and by improving the understanding of the incidence and the impact of services regulations. The OECD has embarked on constructing an inventory of the laws and regulations affecting trade in the most important services sectors that are traded. From this regulatory database, a composite policy index, called the Services Trade Restrictiveness Index (STRI), is calculated by country and sector. The database and the STRI will go a long way towards filling the deficit of information about services policies and provide a tool for analysing the economic and social impact of services trade reform. It will be useful not only for services trade negotiators – both at the WTO and in the context of regional trade negotiations - but also for policymakers promoting reforms at the national level. **JS**

As OECD Director, Trade and Agriculture, Ken Ash develops and communicates evidence-based advice to governments, to help them improve their trade, agriculture and fisheries policies.