2 December 2014

**Trade in Services Agreement (TISA)**

**Submission by Switzerland at the Meeting of 1-5 December 2014:**

# Ten questions on the Most-Favored-Nation clause

The topic of this paper, submitted by Switzerland for the consideration of other Tisa Parties, is the legal consequences of a particular type of Most-Favored-Nation clause (MFN). Trade agreements may or may not contain an MFN clause, and if an MFN clause is included it may be of different types. A common type of MFN clause is the one contained in the WTO (GATT and GATS), whose main characteristic is to cover more favorable treatment accorded by a Member except if the treatment derives from an FTA that liberalizes substantially all trade (in GATS: Article V agreements). But there are some types of MFN clauses that depart form the WTO. Such MFN clauses would not exclude FTAs, or they would exclude only "past" FTAs but not "future" ones from their scope.

The present paper focuses on the latter type of MFN clause. Whenever MFN is mentioned in this paper, it refers to an MFN that covers treatment accorded under "future" FTAs.

The objective of this paper is limited not only because it focuses on a very specific type of MFN clause, but also because it raises a specific category of questions. The questions below are all focusing exclusively on the legal meaning and consequences of that particular MFN clause. It is assumed that answers to the questions will help to understand the aims and implications of the proposals for that type of open-ended MFN clause.

As a matter of fact, other questions were raised in the discussion, including questions related to the detrimental systemic impact of such MFN clause for the progressive liberalization of Trade in Services in the longer term: when a country is bound by such MFN clause, it would tend to be more constrained in its ability to undertake improved obligations and commitments with future negotiating partners, and as a reverse consequence would become a less interesting potential partner to negotiate with in the future. For the same reason, it would hamper countries to "experiment" new types of obligations and rules just on a small scale, on a reciprocal basis, if the consequence is that such new rules would be immediately and unilaterally extended to third countries.

Yet another array of questions concern the relation to GATS and the consequence for future inclusion of Tisa into the WTO.

**Question 1: Future revisions and amendments of FTAs:**

FTAs are "living" institutions. Over time, they may be amended, and sometimes they may be modernized in depth during a revision process. In some cases, parties to an FTA concluded in the past may subsequently include a full Chapter on Trade in Services into that FTA.

What is the exact intention of the proposed MFN language in respect of future amendments or revisions of an FTA of a particular Tisa Party ("Party A") which was in force since before the conclusion of Tisa? Could other Tisa Parties claim to Party A to obtain the treatment of such FTA based on the argument that it was revised after Tisa, and thus it is a "future" one? Or would any FTA concluded before Tisa be outside the scope of the Tisa MFN in respect of all future revisions and amendments? Or would the answer differ according to whether the changes made in the FTA are considered to be modest improvements of the treatment accorded or, to the contrary, to constitute substantial improvements?

Or would the answer depend on the format and procedure of the revision, e.g. the revision would be covered by the Tisa MFN clause if it has the format of an act subject to formal ratification (e.g. exchange of instruments of ratification), but would not be covered if the improved treatment is incorporated in a Decision of the Joint Commission?

In general, would all Joint Commission Decisions containing improved treatment and taken after the entry into force of Tisa be covered by the Tisa MFN or none of them, or some of them?

As well, Services Chapters contain Annexes (or Sections, or parallel sectoral Chapters). Thus there may be, for example, a future FTA that contains a particular Annex that had not been included in Tisa negotiations. How would the Tisa MFN clause apply if a new sectoral Annex is added to a "past" FTA? Is it the idea of an MFN on future agreements to import such annexes' obligations into the Tisa? Would the proposed MFN exclude particular types of annexes that by their nature are not meant to be extended unilaterally, for example annexes on mutual recognition of qualification of service suppliers?

Of course, the most relevant case to clarify is the case where an FTA was concluded before Tisa without containing a Chapter on Trade in Services, and after Tisa such chapter in included into it. Would this "new" chapter but "old" FTA be covered by the Tisa MFN or not?

**Question 2: Future Accessions to old FTAs:**

FTAs are not always concluded between only two countries. Some are between a country and a grouping of countries, or between two such groupings. Over time, such groupings' membership may expand. In such cases, a legal act is concluded between the new entrant and

the original members. The legal effect of such legal act is that original members take the obligation to grant to the new entrants all their obligations under the FTA, and the new entrant to undertake the commitments negotiated in the accession process. For the newly acceding country, it is clear that if it's a member of TISA, it will have to grant the commitments undertaken to all Tisa Parties.

But if Party A happen to be an original member of such FTA concluded before Tisa, would the MFN oblige it to grant to all Tisa Parties the commitments undertaken in that old FTA?

**Question 3: Addition of new trade topics:**

FTAs are structured with several components. They contain several chapters, each being dedicated to a specific trade topic.

Would a future FTA that contains aside the Services Chapter also a chapter with Investment rules covering all sectors, in particular pre-establishment rules, be captured by the Tisa MFN obligation? If this is the case, what is the consequence for a provision like the "investor-state dispute settlement" (ISDS)? Clearly, a share of "investors" covered by an Investment chapter are also service suppliers. Thus, would ISDS be captured and "exported" into Tisa in favor of that class of entities?

Another Chapter that may be found in FTAs is about Government Procurement. In the same manner as an Investment Chapter, the benefits of a Government Procurement Chapter may accrue to "services" or to "service suppliers" according to the Tisa definitions thereof. The text of the proposed MFN obligation is very broad since it captures (any) "treatment to services and service suppliers".

The question is, if Party A concludes in the future an FTA containing a Government Procurement Chapter, would Party A be obliged to grant immediately and unconditionally the provisions of that Chapter to services and service suppliers of other Tisa Parties?

Obviously, Question 3 and Question 1, and to some extent question 2, share commonalities, because the answer may be on one of the two extreme (yes in all cases or not in all cases) or somewhere in between. If the answer is in between, it will be necessary to define exactly where the dividing line is, and to clarify all criteria used in the application of FTAs that have such clause to determine when the MFN applies and when it does not.

**Question 4: "MFN treatment on an MFN":**

As explained in the *incipit*, FTAs may or may not contain an MFN. When they contain an MFN obligation, the MFN obligation may be WTO-conform (not covering Article V agreements) or may depart from the WTO model. In the latter case it may either cover all comprehensive trade agreements or cover only future agreements.

Assuming the Tisa MFN would cover only future agreements and “Party A” concludes in the future an FTA that contains an MFN covering all agreements (past and future). What treatment could other Tisa Parties claim from Party A? Could they claim that Party A should extend to all Tisa Parties all the benefits contained in its past agreements? Or would it be argued that since the Tisa MFN (possibly) explicitly excludes past FTAs there is no way to claim past FTAs even to Party A?

**Question 5: Two similar provisions with different scope:**

When parties negotiate an FTA an important objective it to determine an appropriate balance. The “appropriate balance” has to be determined at the level of the whole agreement or chapter. But an appropriate balance also needs to be determined in a single provision. Thus, the strength of the content of a particular provision of a Trade in Services Chapter often is calibrated to the scope of that very provision. For example, taking the typical example of “domestic regulation” type of provisions, a same kind of discipline may in a FTA apply to “all sectors” while it may in another FTA apply only to “committed sectors”. Arguably, when the scope of application of that provision is extended to all sectors the parties may rebalance the provision by softening the provision itself.

Assuming that Tisa contains a given provision of that type that applies to all sectors (or to all subsectors covered by a particular sectoral annex), and is therefore rather weak, and at a future stage a Tisa Party (“Party A”) concludes an FTA containing the same sort of provision but limited in scope to committed sectors and with a stronger language. What treatment could the other Tisa Parties, based on the Tisa MFN clause, claim from Party A? : (a) the stronger discipline in respect of the committed sectors and the weaker one in respect of all other sectors? (b) the stronger discipline of the FTA but applied to all sectors in accordance with the scope of the Tisa provision? Or (c) nothing at all because each discipline, seen globally, strikes its own internal balance and the two balances are different and cannot be directly compared in terms of which one is really the most favorable altogether?

The question is amplified when, over time, the number of future FTAs of “Party A” become high, and for this reason the same type of provision exists in a variety of alternative languages that may contain little pluses and little minuses. How would that affect the application of the Tisa MFN clause? Would that mean that “the” most favorable among all the existing alternatives has to be determined once and for all, and that one would be “imported” into Tisa? Or could individual other Tisa Parties continue to claim treatments, as they feel opportune, on the various alternatives. What happens if one Tisa party claims the treatment under a given FTA of Party A, and another Tisa Party – at the same time or later – claims the treatment under another FTA of Party A? Is there a sort of “fork in the road” that would bind all Tisa Parties, or not?

Examples of provisions relevant to this question are typically Domestic Regulation types of disciplines (e.g. deadlines to process an application; obligation to provide information to services suppliers upon request; etc.).

**Question 6: Meaning of "committed sectors":**

As said above, an obligation from a Services Chapter may contain a scope that is limited to committed sectors only. Assuming that a future FTA of Party A contains such obligation. What could other Tisa Parties claim from Party A on the basis of the Tisa MFN obligation? Two typical scenarios may occur. First, the future FTA adds new sectors compared to Tisa but does not subtract sectors. Then most probably Tisa Parties could claim the same treatment as provided by the obligation of the FTA and limited to those sectors that are committed in the FTA, not those of Tisa. Second, the future FTA adds but also subtracts sectors, subsectors or activities. Then, could other Tisa Parties claim to Party A to apply Tisa obligations to each added sector? Or would it be concluded that none of the two sets of sectors (Tisa and FTA) is globally bigger in size, or the FTA may even be a smaller set, and thus the balance is different but not "more favorable" and the Tisa MFN does not apply?

A complex situation arises if Party A has several bilateral FTAs with the said provision (or slight variations thereof), but the array of committed sectors is not identical in all FTAs.

This question is particularly relevant in relation to lists of sectors attached to commitments on Contractual Service Suppliers (CSS).

**Question 7: Exception articles and similar clauses:**

In an agreement, reservations and so-called "carve-outs" appear to, in a sense, "lie above" other provisions to the extent that their purpose is to interact with substantial obligations of the agreement. Thus, a typical formulation of a carve-out such as "Nothing in this agreement shall prevent a Party to …" or "Notwithstanding any provision of this agreement …", then the terms "nothing" and "any" include of course the MFN obligation itself. It implies in particular that the MFN cannot be used to reduce the scope of the carve-out or reservations. As a consequence a lesser carve-out contained in a "future" FTA by "Party A" would not be importable by virtue of the MFN clause of the previous agreement given that it would be inconsistent with the broader carve-out of that agreement.

It would be interesting to know if there are any views diverging from the above explanations.

**Question 8: Interaction between various provisions across the Treaty:**

As said earlier, agreements are always a matter of determining an appropriate balance. The same way that two elements of a particular provision may balance each other, also two or more provisions in an agreement may balance each other. A typical case are “exception” types of provisions and “carve-outs” versus substantial obligations. If an FTA concluded after Tisa contains a higher number of, or more permissive, exceptions then the parties to that FTA may feel more comfortable to agree on languages for substantial provisions that are more stringent.

Assuming that Tisa contains a limited number of exceptions with a limited level of permissivity, and “Party A” concludes in the future an FTA containing more exceptions or “carve-outs” and at the same time some obligations that are formulated in stronger terms than in Tisa. What treatment could other Tisa Parties claim from Party A by virtue of the Tisa MFN? The stronger level of obligation? The stronger level of obligation but conceding to Party A the right to apply the FTA exceptions unilaterally to all Tisa Parties? Nothing, on the ground that seen in its entirety it is not obvious that the treatment deriving from the FTA is better, in sum, than the treatment under Tisa? The same question applies if a future agreement contains a clause providing for measures such as “safeguard measures”.

The conclusions of Question 7 above are also relevant here.

**Question 9: Provisions ruling “new services”:**

In trade treaties there are sometimes provisions relating to “new services” (either to ensure their inclusion, or to provide for exclusion). Thus, there is a likelihood that “future FTAs” may contain provisions on new services, and that the number of such FTAs will gradually increase over time. Such provisions may well in some cases be considered as more favorable than the Tisa and thus be “imported” into Tisa by the Tisa MFN clause. The question is thus, what would the concept of “new services” encompass if the original FTAs are scattered over the time-line and thus the importation of the corresponding “new services” are legally effective at successive points in time. For example, a Tisa Party’s Schedule may contain a limitation on new services, and in the future that Party (“Party A”) may conclude an FTA with a limitation formulated with exactly the same terms, but in between time a given service is no longer “new”. Could another Tisa Party claim that Party A should no longer be able to apply its Tisa limitation to that service? If this were the case, it could render any wording on new services in schedules (and in treaty texts) ineffective, since they would in practice capture new services only during the time period between their first introduction in the market and the conclusion of Party A’s next FTA.

**Question 10: Definitions:**

Definitions play an important role in agreements. Often they do determine the breadth and depth of the agreement. So, a future FTA may be found to be more liberal already on the

ground of more liberal definitions. For example, the definition of, inter alia, “service supplier”, a definition that may or may not include the fact of “seeking to supply”. Given the high number of definitions existing in the field of Trade in Services, and the great variability of those definitions, there is a potential that a future FTA contains some definitions that would be considered more favorable that the corresponding definition contained in Tisa. In some such cases the question of their importation via the MFN clause of a previous FTA can arise and it is interesting to know how this is approached.

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