

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

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*Trade, Law & Development: A Year in Review*

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## THE GATS – A SLEEPING BEAUTY?

RUDOLF ADLUNG\*

**'You ain't a beauty  
but hey you're all right.'**

Bruce Springsteen, Thunder Road (1975)

*To a certain extent, the WTO's General Agreement on Trade in Services (GATS) has remained in the shadow of its precursor in merchandise trade, the General Agreement on Tariffs and Trade (GATT). Apart from some sector-specific liberalization moves in the wake of the Uruguay Round (UR), i.e. after January 1995, it has attracted relatively little attention as a multilateral instrument to further advance and bind liberalization in services trade. Moreover, there are still gaps in the Agreement's framework of rules which remain to be filled. By the same token, the GATS has given rise to far fewer trade disputes than the GATT, despite its particularly broad structure in terms of permissible trade policy measures, application to product and factor flows (capital and labour), co-ordination problems within and between national administrations, and overlaps with other policy instruments, in particular investment treaties. This article intends to provide an overview assessment of what has been achieved under the Agreement and the many remaining challenges and uncertainties. In the end, it would be for forward-looking WTO Members, as in the past, to promote and defend a 'public good' called multilateralism in all its facets. Unfortunately, such Members are in short supply at present.*

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## I. INTRODUCTION

International trade agreements provide a framework for governments to identify and exchange ‘concessions’ in pursuit of national policy objectives. Though the underlying - mercantilist - concept appears quite dubious from an economic perspective, it may nevertheless help promote more liberal market conditions. By the same token, trade agreements also offer an opportunity to bind and, thus, add credibility to national policy reforms - regardless of what happens elsewhere.<sup>1</sup> In

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<sup>1</sup> Frieder Roessler and Kym Anderson referred to Ulysses, a hero in Greek mythology, to describe the benefits of self-bindings. On returning home from the Trojan War, Ulysses had himself lashed to the mast of his ship in order to withstand the luring songs of the sirens. See Frieder Roessler, *The Scope, Limits and Function of the GATT Legal System*, 8(3)

any event, the absence of internationally co-ordinated moves is not an argument, convincing enough to sit tight and perpetuate outdated regimes.

The GATS' performance to date is mixed in both regards- as a negotiating platform and as a binding mechanism. The last negotiations to liberalize and/or bind market conditions in services, in extension of the Uruguay Round (UR, 1986-1993/94), were concluded in 1997. One of them dealt with basic telecommunication services, and the other with financial services.<sup>2</sup> In turn, this meant that the main liberalizing elements in more recent years consisted of the commitments expected from, and undertaken by, acceding countries (As of February 2020, thirty six of the current 164 WTO Members had acceded after the UR). A closer look into individual services schedules reveals that the commitments of countries such as the Kyrgyz Republic and Moldova are significantly more ambitious, both in terms of sector coverage and levels of liberalization, than those of any Organisation of Economic Cooperation and Development (OECD) country. While there have been numerous autonomous openings, almost all non-accession schedules remained as they had been submitted some twenty-five years ago. The only major exceptions were adjustments in the European Commission (EC) schedule reflecting the admission of new member States.

Virtually all available studies thus indicate that the existing GATS commitments include significant amounts of 'water', meaning that the actually applied regimes are far more open, overall, than the scheduled levels of access. According to a report by the OECD Secretariat, the water levels are particularly high in broadcasting, motion picture and rail transport services where many Members had refrained from undertaking GATS commitments, thus reserving the right even to ban all trade.<sup>3</sup> In turn, the commitments on telecommunication services, followed by those on distribution, construction, and computer services, were found to most closely reflect actual market conditions.<sup>4</sup> Another report, prepared by World Bank experts, suggests that GATS commitments are 2.3 times more restrictive, overall,

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WORLD ECON. 287, 287 (1985); Kym Anderson, *Globalization, WTO, and ASEAN*, 18(1) ASEAN ECON. BULL. 12, 17 (2001).

<sup>2</sup> Also extended beyond the timeframe of the Round were negotiations on mode 4 (presence of natural persons) and on maritime transport. While the former was concluded in late July, 1995, with very limited results, the latter was suspended in mid-1996 to be taken up again in the following round of services negotiations. See *infra* Table A1, note(a).

<sup>3</sup> The study was based on trade restrictiveness estimates for fifteen large service sectors, except financial services, in forty countries. See Sébastien Miroudot & Kätlin Pertel, *Water in the GATS: Methodology and Results*, OECD: WORKING PARTY OF THE TRADE COMMITTEE, TAD/TC/WP (2014) 19/FINAL (Aug. 6, 2015) [hereinafter Miroudot & Pertel].

<sup>4</sup> *Id.*

than the actually prevailing terms of access.<sup>5</sup> A following study by the World Bank, covering over a hundred countries, confirms that the existing GATS commitments are no reliable indicator of actual trading conditions and that even with implementation of the Doha-Round offers, actual trading conditions would have remained twice as restrictive as the scheduled levels of market-access and participation.<sup>6</sup>

In a similar vein, GATS obligations only played a minor role, in quantitative terms at least, in WTO dispute settlement. According to the author's count, no more than 5% of the 570-odd WTO disputes initiated between January, 1995 and December, 2018 involved GATS provisions. Nevertheless, since there was little movement on the negotiating front, these rulings provided the most significant contributions to the development of GATS to date.<sup>7</sup>

The modest relevance of existing GATS obligations and commitments for actual trading conditions is attributable to several factors, which may vary across countries and sectors.<sup>8</sup> Some are time-specific, reflecting the situation towards the end of the UR, while others may continue to matter:

- To prepare adequately for services negotiations, given the novelty of many of the concepts involved, UR-participants were confronted with a challenging information-gathering and learning exercise.<sup>9</sup> Small administrations in particular might have been pushed to their limits, despite the availability of technical support from various sources. To ensure their effective participation and avoid shallow and/or technically flawed outcomes, more time and resources might have been needed than were available towards the end of the Round. (As noted below, there are clear indications, looking at the schedules submitted in more recent

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<sup>5</sup> The study was conducted in 2008 for a selected group of countries and sectors. See Batshur Gootiiz & Aaditya Mattoo, *Services in Doha: What's on the Table?*, 43(5) J. WORLD TRADE 1013, 1020 (2009).

<sup>6</sup> Ingo Borchert et al., *Policy Barriers to International Trade in Services: Evidence from a New Database*, 28(1) WORLD BANK ECON. REV.162 (2013) (the offers were submitted mostly between 2003 and 2007).

<sup>7</sup> For a detailed assessment, see Eric H. Leroux, *Twenty Years of GATS Case Law: Does it Taste Like a Good Wine?*, in RESEARCH HANDBOOK ON TRADE IN SERVICES, 191 (Pierre Sauvé & Martin Roy ed., 2016) [hereinafter Sauvé & Roy].

<sup>8</sup> For a negotiator's perspective, see Alejandro Jara & M. del Carmen Dominguez, *Liberalization of Trade in Services and Trade Negotiations*, 40(1) J. WORLD TRADE 113 (2006).

<sup>9</sup> See also Robert Wolfe, *Can the Trading System be Governed? Institutional Implications of the WTO's Suspended Animation* (CTR. INT'L GOV'T. INNOVATION, Working Paper No. 30, 2007), [www.files.ethz.ch/isn/39556/WP\\_30.pdf](http://www.files.ethz.ch/isn/39556/WP_30.pdf).

accession cases, of closer compliance with relevant guidelines and treaty obligations over time.)

- When the ‘old’ schedules were put together in the first half of the 1990s, the prevailing expectation was that there be successive rounds of trade liberalising negotiations in services. Pursuant to GATS Article XIX:1, the first such round was expected to begin ‘no later than five years from the date of entry into force of the WTO Agreement’, i.e., on January, 2000, and further negotiations should have followed periodically. Thus, even if they had been well prepared, governments might have hesitated on the first occasion to put all cards on the table. Yet, in late 2001, the GATS-mandated negotiations were integrated into the Doha Development Agenda (DDA), which some years later fell into sort of an eternal sleep.<sup>10</sup>
- The fact that the GATS was, and still is, an incomplete Agreement in certain respects was not a motivating factor either. There are negotiating mandates, but no established rules, on a range of issues, including disciplines on domestic regulation (pursuant to GATS Article VI:4), the question of emergency safeguards measures (Article X), the treatment of government procurement (Article XIII), and the need for, and shape of, any necessary disciplines for subsidies (Article XV).<sup>11</sup> The uncertainties involved, whether perceived or real, have certainly not worked in favour of ambitious liberalization moves. The same may be true for high-profile dispute cases, which, according to some analysts, have cast doubts on governments’ continued ability, in GATS-scheduled sectors, to regulate trade in pursuit of national policy objectives (*see part III C*).
- The diversity of the services economy complicates government-internal communication and coordination processes more than in merchandise trade. The respective competencies are scattered across many ministries and agencies, from commerce, finance and justice to transport, education, communication, health, etc., which are not used to cooperate in a trade policy context. And they may be reluctant to do so in any event if the respective mandates are owed to the existence of exclusivity rights in the sectors concerned. In quite a number of federally organized States, regional sensitivities and policy constraints might come into play as well.

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<sup>10</sup> The Financial Times, somewhat more bluntly, referred to the DDA’s ‘merciful death’, *see The Doha Round Finally Dies a Merciful Death*, THE FINANCIAL TIMES (Dec. 22, 2015), <https://www.ft.com/content/9cb1ab9e-a7e2-11e5-955c-1e1d6de94879>.

<sup>11</sup> In addition, Members are also mandated under Article XV to “address the appropriateness of countervailing procedures”. However, to the author’s knowledge, there have been no such efforts to date.

Moreover, problems in international services trade, actual or potential, tend to draw less public attention than similar problems in traditional mining or manufacturing industries.<sup>12</sup> This may be due to, *inter alia*, lower levels of sector-specific specialization and, thus, greater flexibility of the resources involved (equipment and personnel) as well as to the more abstract/intangible nature of the resulting products. It also appears, at first glance at least, that the services economy is less exposed to external trade. Indeed, if counted on a cross-border basis, services represent less than one-quarter of total world trade. Yet, this does not cover the services incorporated in traded goods. Statistics on trade in value-added, which capture the importance of services as inputs across all economic sectors, indicate a significantly higher share.<sup>13</sup> It amounts to close to one-half of the value of international goods and services trade, and it is growing.<sup>14</sup>

The following observations are structured in four parts, starting with a description, in Part II, of the GATS' main building blocks and their interaction in a Member's services regime. For various reasons, the Agreement provides more room for policy discretion than would be permissible in merchandise trade under the GATT. Part III then provides examples of definitional misunderstandings and uncertainties which, in addition, may hamper the interpretation of Members' obligations and commitments under the Agreement. Many problem cases date back to the time of the UR, while more recent accession schedules tend to be more carefully conceived. In turn, Part IV focuses on persistent consistency problems attributable particularly to poorly designed provisions in preferential trade agreements and the Agreement's overlap with investment treaties. In conclusion, Part V then seeks to provide a long-term perspective of the challenges confronting WTO Members, in services and beyond. While the GATS might not succeed in a beauty contest, it would certainly provide a suitable structure to advance services liberalization on a multilateral basis. In turn, this presupposes, of course, that the

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<sup>12</sup> Typically, there are fewer publications analysing the services-related implications of Brexit, the United Kingdom's separation from the European Union, than publications covering the effects in merchandise trade. A possible exception is the adjustment needs encountered in the financial sector as discussed, for e.g., in BREXIT AND FINANCIAL SERVICES (Kern Alexander et al. eds., 2018) [hereinafter KERN ALEXANDER]. See also Rudolf Adlung, *BREXIT from a WTO/GATS Perspective: Towards an Easy Divorce?*, 52(5) J. WORLD TRADE 721 (2018).

<sup>13</sup> More detailed information is contained in *World Trade Report 2019 - The Future of Services Trade*, WORLD TRADE ORG. (2019), [https://www.wto.org/english/res\\_e/booksp\\_e/02\\_wtr19\\_1\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/02_wtr19_1_e.pdf) [hereinafter World Trade Report 2019].

<sup>14</sup> *Id.*



Membership remains committed to the paradigm of an open, rules-based trading system.<sup>15</sup>

## II. WHAT IS SPECIAL ABOUT THE GATS?

### *A. Main Characteristics: Four Modes of Supply, Three Types of Commitments*

Pursuant to its Article I:1, the GATS applies ‘to measures by Members affecting trade in services’. In turn, trade in services is defined as the supply of services through any of four different modes: (i) from the territory of one Member into the territory of any other Member (cross-border supply); (ii) in the territory of one Member to the service consumer of any other Member (consumption abroad); (iii) by a service supplier of one Member, through commercial presence in the territory of any other Member (commercial presence);<sup>16</sup> and, finally, (iv) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member (presence of natural persons).

The GATS is thus definitely wider in scope than its precursor in merchandise trade, the GATT of 1947, which concentrates on the conditions governing cross-border trade. In turn, the Agreement’s extended modal coverage is also reflected in a definitional expansion from the treatment of products (services) to that of producers (service suppliers); and the supply of a service is broadly defined to include its production, distribution, marketing, sale and delivery (Article XXVIII(b)).<sup>17</sup>

By the same token, the Agreement does not cover services that have been used for the production of, and are embodied in, traded goods. One-third of the manufacturing value-added exported by OECD countries is estimated to consist of such embodied services (29% in other countries).<sup>18</sup> The fact that these are

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<sup>15</sup> In the words of Cordell Hull, US Secretary of State from 1933 to 1944, “enduring peace and the welfare of nations are indissolubly connected with friendliness, fairness, equality, and the maximum practicable degree of freedom in international trade”. See *The Birth of The GATT*, WTO: GATT, 2 (Oct. 30, 1937), [https://www.wto.org/gatt\\_docs/English/SULPDF/91320039.pdf](https://www.wto.org/gatt_docs/English/SULPDF/91320039.pdf) [hereinafter WTO: GATT].

<sup>16</sup> For the definition of ‘commercial presence’, see *infra* Part II.3(iii).

<sup>17</sup> Yet the focus of WTO documents dealing with services transactions tends to be on the delivery stage. See *e.g.*, *infra* Part II.3(ii).

<sup>18</sup> For a discussion of the role of services trade, relevant data and developments over time, as reflected in recent publications, see Martin Roy, *Elevating Services: Services Trade Policy, WTO Commitments, and their Role in Economic Development and Trade Integration*, 53(6) J. WORLD TRADE 923, 941 (2019) [hereinafter Roy].

subjected to GATT, rather than GATS-rules has inspired proposals to create a fifth mode of supply.<sup>19</sup> Mode 5 would apply to domestically-produced services that form part of the value of a good prior to its exportation. The concept has not yet gained much momentum, however, in trade policy circles. The question arises, *inter alia*, whether a definitional variation of mode 1 (cross-border supply), which recognizes the services content integrated in goods, could be a more straightforward alternative.<sup>20</sup>

Reflecting the absence of tariff barriers in services trade and the diversity of the transactions involved, the GATS allows for a multitude of non-tariff instruments of protection. They are specified in Articles XVI and XVII.

- Article XVI covers six types of market access (MA) restrictions, which are mostly quantitative in nature. Articles XVI:2(a)-(d) and (f) refer, respectively, to limitations on the number of service suppliers; the total value of service transactions or assets; the number of service operations or quantity of service output; the number of natural persons employed; and the level of foreign capital participation. Such measures may also be implemented via an Economic Needs Test (ENT) which; however, is not further defined in scope (see part II E). Articles XVI:2(a)-(d) apply regardless of whether the measures concerned are operated on a discriminatory basis or not. Article XVI:2(e) deals with restrictions on the form of legal incorporation and joint-venture requirements.
- Article XVII provides for the possibility, openly defined, to deny national treatment (NT) and, thus, modify the competitive conditions to the detriment of like foreign services and service suppliers. Accordingly, what ultimately matters, and must otherwise be covered by limitations, is the absence of measures that are discriminatory in fact. For example, language or residency requirements, even if universally applicable, might well prove inconsistent with full NT (*see part III C*).

The liberalization of MA and NT is confined to those sectors that are listed in the respective Member's schedule of specific commitments (bottom-up approach) and to the extent that no qualifying limitations are attached. (There is even the possibility to deny any binding effects on MA or NT under a particular mode of supply; the entry then reads 'unbound'.) In turn, the absence of limitations under

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<sup>19</sup> Lucian Cernat & Zornitsa Kutlina-Dimitrova, *Thinking in a Box: A "Mode 5" Approach to Service Trade*, 48(6) J. WORLD TRADE 1109 (2014); Alessandro Antimiani & Lucian Cernat, *Liberalizing Global Trade in Mode 5 Services. How Much Is It Worth?*, 52(1) J. WORLD TRADE 65 (2018).

<sup>20</sup> *Id.*

Articles XVI and XVII does not, in principle, deprive a Member of its right to regulate for whatever policy purposes. Yet, the borderline between the respective disciplines (Articles XVI and XVII vs. Article VI) may prove difficult to draw in individual cases. Relevant dispute rulings, including in *US — Gambling*, sparked intense discussions.<sup>21</sup>

Further, Article XVIII provides a platform for Members to undertake additional commitments (ACs) with regard to measures not falling under MA or NT. Such commitments could consist, for example, of GATS-plus transparency obligations or more streamlined regulatory and administrative procedures. Current ACs mostly consist of regulatory disciplines, including competitive safeguards, transparency and institutional obligations (e.g., independence of the regulator), based on a so-called reference paper (RP) for telecommunication services.<sup>22</sup> Yet, Article XVIII would also allow for the adoption of obligations comparable to the Trade Facilitation Agreement (TFA) in merchandise trade;<sup>23</sup> or it could be used to

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<sup>21</sup> The dispute revolved around the prohibition, under US federal laws, of cross-border supplies of gambling and betting services. The Appellate Body upheld the Panel's finding that, since the US had undertaken commitments on these services, the prohibition constituted a 'zero quota' which was inconsistent with Article XVI. In turn, critics of the ruling argued, *inter alia*, that it amounted to an unjustifiable restriction of the US government's right to regulate in the public interest. Appellate Body Report, *United States — Measures affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/AB/R 7 (adopted Apr. 20, 2005) [hereinafter *US— Gambling*]. See also Joost Pauwelyn, *Rien ne Va Plus? Distinguishing Domestic Regulation from Market Access in GATT and GATS*, 4(2) WORLD TRADE REV. 131 (2005) [hereinafter Pauwelyn]; see also Markus Krajewski, *Playing by the Rules of the Game? Specific Commitments after US-Gambling and Betting and the Current GATS Negotiations*, 32(4) LEGAL ISSUES ECON. INTEGRATION 417 (2005) [hereinafter Krajewski]. For a wider spectrum of views, see also *infra* note 85.

<sup>22</sup> At the end of the extended UR negotiations on basic telecommunications, close to sixty Members inscribed such commitments. As a result of WTO accessions and unilateral upgrades of existing schedules, the number of the Members concerned meanwhile exceeds hundred.

<sup>23</sup> For background information on the TFA, see *World Trade Report 2015: Speeding up Trade: Benefits and Challenges of Implementing the WTO Trade Facilitation Agreement*, WORLD TRADE ORG., 32-135 (2015), [https://www.wto.org/english/res\\_e/booksp\\_e/world\\_trade\\_report15\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/world_trade_report15_e.pdf). Indeed, since late 2016, India has submitted various proposals for a Trade Facilitation in Services Agreement, see e.g., Aavek Chakravarty, *India's Proposal for Trade Facilitation of Services: A Breath of Fresh Air for Global Trade?* (CENT. FOR TRADE & ECON. INTEGRATION PAPERS & REP., Working Paper-2017-10, 2017), <https://repository.graduateinstitute.ch/record/295737?ln=en>.

implement the disciplines expected to result from the negotiations on domestic regulation (DR), mandated under GATS Article VI:4.<sup>24</sup>

The diversity of the protective instruments that can legitimately be applied under the Agreement, coupled with considerable leeway in interpreting relevant guidelines and definitions, complicates the use of cross-cutting liberalization formula comparable to those employed for tariff reductions in merchandise trade. This is certainly one among the many factors that could explain the difficulties in negotiating commercially meaningful services liberalization across sectors and modes of supply.

### *B. Schedules of Specific Commitments*

Each Member is required to submit a schedule of commitments, whatever its sector coverage and level of liberalization be. Pursuant to GATS Article XX:3, the schedules form an integral part of the Agreement; though binding only the Member concerned, they reflect the common intention of all Members.<sup>25</sup>

A schedule consists of four columns, with the first specifying the sector concerned, the second and third stipulating, respectively, any limitations on MA and NT by mode of supply and the fourth providing space for ACs. Measures that are inconsistent with both Articles XVI and XVII are to be inscribed under Article XVI only (Article XXII:2).

On an average across all Members, current schedules cover some fifty sectors, i.e. a little more than one-third of the 160-oddservice sectors contained in a generally used classification list (MTN.GNS/W/120). While there is lot of variation within country groups, least developed countries (LDCs) have scheduled less than thirty sectors on average, compared with over a hundred for developed economies as well as the post-1995 accession countries (Table 1). Moreover, the commitments of the latter countries tend to be significantly more liberal, i.e. subject to fewer limitations, than those posted by any other group. In terms of sectors, tourism,

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<sup>24</sup> In May, 2019, fifty nine Members confirmed their intention to conclude these negotiations by the Twelfth Ministerial Meeting in June, 2020 with the results to be incorporated in their schedules of commitments, *see Joint Statement on Services Domestic Regulation*, WTO Doc. WT/L/1059 (May 23, 2019)[hereinafter *Joint Statement on Services Domestic Regulation*].

<sup>25</sup> In *Peru — Agricultural Products*, the AB stipulated that “[w]hile an interpretation of the treaty may in practice apply to the parties to a dispute, it must serve to establish the common intentions of the parties to the treaty being interpreted”. Appellate Body Report, *Peru — Additional Duty on Imports of certain Agricultural Products*, ¶ 5.95, WTO Doc. WT/DS457/AB/R (adopted July 31, 2015) [hereinafter *Peru — Agricultural Products*].

financial and telecom services can be found in over a hundred schedules, while distribution, courier and higher education services have drawn less than seventy commitments (counting EC-12 as one).

**Table 1**

**Average share of sub-sectors committed under the GATS**

Developed Country Members	69%
Developing Country Members (DCs)	28%
Least developed countries (LDCs)	22%
WTO Accessions	65%
All original Members	26%
All Members	36%

*Source: WTO Secretariat, reproduced in Martin Roy, Elevating Services.*<sup>26</sup>

In the absence of diverging stipulations, all commitments apply from the date of a schedule's entry into force. Yet, GATS Article XX:1(d) explicitly provides for the possibility, 'where appropriate', to specify a timeframe for implementation. This has been done in particular on two occasions, the negotiations on basic telecommunication services, which continued after the UR to be concluded in February, 1997, and in a significant number of WTO accessions, especially after 2000.<sup>27</sup> Such 'pre-commitments' are indicative of a liberalization process that was ongoing or about to start at the date of scheduling. Not surprisingly, telecommunications also stood out as the sector with the smallest amount of water in the schedule (see above).<sup>28</sup>

Another characteristic element of the scheduling process is the flexibility it provides for addressing sector-specific policy concerns. Typical examples are MA commitments that exclude segments served by small and medium-sized enterprises (e.g. hotels below a certain number of beds, banks with a capital base of less than

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<sup>26</sup>Martin Roy, *Elevating Services – Services Trade Policy, WTO Commitments, and their Role in Economic Development and Trade Integration* 37 (WTO Staff Working Paper, ERSD 2019-01, 2019).

<sup>27</sup> For example, in the schedules submitted by Oman, Vietnam and China more than one-half of all sector commitments under mode 3 (commercial presence) are to be implemented at later dates. See Rudolf Adlung, *The Contribution of Services Liberalization to Poverty Reduction: What Role for the GATS?*, 8(4) J. WORLD INV. TRADE 549, 564 (2007).

<sup>28</sup> Miroudot & Pertel, *supra* note 3.

X, etc.),<sup>29</sup> or impose restrictions, e.g., in the form of an economic needs test (ENT) (*see part II E*), on new investments in already overcrowded regions.

In several Preferential Trade Agreements (PTAs) in services, also dubbed Economic Integration Agreements (EIAs), the bottom-up scheduling process has been replaced by a top-down approach, where all services are deemed liberalized in the absence of explicit qualifications. Proponents of this approach expect it to produce more ambitious commitments than conventional bottom-up scheduling. The evidence is mixed, however, to say the least. In quite a number of cases, the open-ended nature of the commitments concerned was subjected to sweeping qualifications. For example, in Annexes to its Trade Agreements with Bahrain, Chile, Morocco and Singapore, the United States reserved the right, with regard to MA for investment and cross-border services across all sectors, “to adopt or maintain any measure that is not inconsistent with [its] obligations under Article XVI of the General Agreement on Trade in Services”. Similar clauses, confined to cross-border services, are contained in the United States’ negative-list PTAs with Australia, Oman and Peru.<sup>30</sup> Hufbauer et al.’s claims that ‘transparency is very much enhanced ... since every exception must be listed’ thus appear quite optimistic.<sup>31</sup> Moreover, the levels of access provided in top-down PTAs were found to be subjected to more restrictions beyond those that participants had scheduled under the GATS (GATS-minus commitments), including reservations with regard to future measures, than the commitments inscribed in bottom-up schedules.<sup>32</sup>

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<sup>29</sup> See Rudolf Adlung & Marta Soprana, *SMEs in Services Trade - A GATS Perspective* (WTO Staff Working Paper, ERSD 2012-09, 2012).

<sup>30</sup> The definition of such ‘cross-border services’ covers both modes 1 and 2 of the GATS. See also Rudolf Adlung & Hamid Mamdouh, *How to Design Trade Agreements in Services: Top Down or Bottom Up?*, 48(2) J. WORLD TRADE 191 (2014) [hereinafter Adlung & Mamdouh].

<sup>31</sup> Gary Clyde Hufbauer et al., *Framework for the International Services Agreement*, PETERSON INST. - POLICY BRIEF (2012); see also Sherry Stephenson & Maryse Robert, *Evaluating the Contribution of Regional Trade Agreements to Governance of Services Trade*, (ASIAN DEV. BANK INST., Working Paper Series 307, 2011), <https://www.adb.org/sites/default/files/publication/156162/adbi-wp307.pdf> [hereinafter Stephenson & Robert].

<sup>32</sup> Rudolf Adlung & Sébastien Miroudot, *Poison in the Wine? Tracing GATS-Minus Commitments in Regional Trade Agreements*, 46(5) J. WORLD TRADE 1045, 1071 (2012) [hereinafter Adlung & Miroudot].

### *C. Modes of Supply: A Closer Look*

#### 1. Basic Patterns

Services trade, the traditional view suggests, requires the physical presence of supplier and consumer at the same place. It thus tends to be associated mostly with transactions under mode 3 (commercial presence) as well as in certain sectors, in particular tourism, with mode 2 (consumption abroad). Indeed, mode 3 is by far the most commercially important mode of supply. According to recent estimates by the WTO Secretariat, it accounted for 59% of total world trade in services in 2017, followed by mode 1 (28%), mode 2 (10%) and, with a large gap, mode 4 (3%).<sup>33</sup>

These shares essentially reflect four factors: the definitional scope of the modes as provided for in the Agreement; domestic production patterns and consumer preferences (tourism); the technical possibilities to exchange services over distance; as well as the restrictiveness of Members' trade and regulatory regimes. Unlike the commitments posted under modes 1 to 3, which often vary across sectors, the entries for mode 4, though particularly restrictive in virtually all schedules, show relatively few sectoral disparities.

Commitments under mode 2 are the most liberal overall. Close to 60% of all entries on MA and NT under this mode do not allow for the imposition of any restrictions ('none'), reflecting governments' limited ability, in many cases, to regulate the consumption of services abroad.<sup>34</sup> In turn, the shares of full commitments under other modes are in the order of 40% for mode 1 and some 35% for mode 3.<sup>35</sup>

The following observations are intended to clarify definitional/conceptual issues surrounding the application of individual modes.

#### 2. Modes 1 and 2

As described in a WTO Secretariat Note, the coverage of transactions under individual modes of supply essentially depends on the origin of both the service

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<sup>33</sup>*World Trade Report 2019*, *supra* note 14, at 24.

<sup>34</sup> Exceptions include the denial of cover under public insurance or subsidy schemes of like services consumed in other jurisdictions.

<sup>35</sup> See Roy, *supra* note 18, at 944.

supplier and consumer, and their territorial presence at the time of delivery.<sup>36</sup> Accordingly, the distinction between modes 1 and 2 hinges upon whether a service is delivered from abroad into the scheduling Member's jurisdiction (for example, legal advice), or whether it is delivered elsewhere to consumers of the Member concerned (example: international tourism). While this distinction does not appear to pose particular problems when services are traded directly between the parties involved, it is difficult to apply to electronic transactions. If a Swiss consumer opens a bank account in France via the internet, is the respective service (deposit-taking) delivered cross-border into Switzerland under mode 1 or provided in the supplier's territory, i.e. in France, under mode 2?

Several options were discussed among Members in the context of the extended UR negotiations on financial services in late 1997. Yet, no common definition emerged, nor has it been developed since. It was agreed at the time, however, that the responsibility for clarifying the relevance of either mode, possibly by way of a headnote, laid with the Members feeling the need to do so. Otherwise, the possibility always exists to avoid definitional uncertainties through the scheduling of identical commitments under the two modes or their combination into one mode. The latter approach was chosen for a variety of large-scale PTAs, including the North American Free Trade Agreement (NAFTA) between the United States, Canada and Mexico, Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, and Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) between Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore, and Vietnam:

Another issue related to the role of mode 1 and mode 2 transactions in individual sectors is the perception that no trade might be technically feasible under either mode. In a number of cases, Members that scheduled 'unbound' added an explanation referring to the non-feasibility of the respective supplies. But views may differ on this issue, and not everybody might be aware of the Scheduling Guidelines that the Services Council had adopted.<sup>37</sup> The Guidelines stipulate that "activities such as ship repair abroad, where only the property of the consumer 'moves' or is situated abroad", are also covered by mode 2. Nevertheless, somewhat surprisingly, a dispute panel later held the view that "the supply of some

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<sup>36</sup> The Secretariat Note is attached to the Scheduling Guidelines, see Council for Trade in Services, *Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS)*, WTO Doc. S/L/92 (Mar. 28, 2001) [hereinafter Scheduling Guidelines]. Interestingly, among the elements defined to constitute the supply of a service (*part II.1*), the focus has been put on the delivery stage.

<sup>37</sup> Group of Negotiations on Services, *Scheduling of Initial Commitments in Trade in Services: Explanatory Note*, MULTILATERAL TRADE NEGOTIATIONS: THE URUGUAY ROUND, WTO Doc. MTN. GNS/W/164, ¶ 19, (Sept. 3, 1993) [hereinafter Uruguay Round]; Scheduling Guidelines, *supra* note 36, ¶ 29.



repair and maintenance services on machinery and equipment through modes 1 and 2 might not be technically feasible, as they require the physical presence of the supplier...”.<sup>38</sup>In any event, the Scheduling Guidelines confirm that ‘unbound’ remains ‘unbound’ even if the service becomes tradable.<sup>39</sup>

### 3. Mode 3

The Agreement uses a relatively broad definition of commercial presence, through which the service supplier of another Member, which may be a natural or a juridical person, supplies a service in the territory of the scheduling Member. Pursuant to Article XXVIII(d), ‘commercial presence’ means “any type of business or professional establishment, including in the form of a juridical person or a branch or representative office, including through (i) the constitution, acquisition or maintenance of a juridical person, or (ii) the creation or maintenance of a branch or representative office, within the territory of a Member for the purpose of supplying a service”.

In order to qualify as a juridical person of another Member, a company must be majority-owned or controlled by natural or juridical persons of that other Member.<sup>40</sup> Yet, not all schedules allow for majority ownership. For example, Thailand has scheduled a horizontally applicable foreign-equity limitation of 49% for MA under mode 3.<sup>41</sup> In India’s schedule, MA for voice telephone services under mode 3 is subjected to a foreign equity ceiling of 25% (51% in almost all other scheduled sectors).<sup>42</sup>In these cases, the relevance of the commitment hinges on whether the entity concerned is at least controlled by persons of another Member. Yet compliance with the latter criterion is certainly not easy to verify. Pursuant to Article XXVIII(n)(ii), the persons concerned must have “the power to name a majority of the company’s directors or otherwise to legally direct its actions”.

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<sup>38</sup> Panel Report, *Canada — Certain Measures Affecting the Automotive Industry*, ¶10.300, WT Doc. WT/DS139/R; WT/DS142/R (adopted June 19, 2000) [hereinafter *Canada — Autos*].

<sup>39</sup> Scheduling Guidelines, *supra* note 36, ¶47.

<sup>40</sup> General Agreement on Trade in Services, Art. XXVIII(m)(ii), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 [hereinafter GATS].

<sup>41</sup> General Agreement on Trade in Services, *European Communities and their Member States: Schedule of Specific Commitments*, Doc. GATS/SC/85 (Apr. 15, 1994).

<sup>42</sup> World Trade Organisation: Trade in Services, *India: Schedule of Specific Commitments: Supplement 3*, Doc. GATS/SC/42/Suppl.3 (Apr. 11, 1997).

## 4. Mode 4

In multiple GATS-related publications, mode 4 is referred to as the *temporary* presence of natural persons. The introduction of a time factor, temporariness, may have been inspired by provisions in the Annex on Movement of Natural Persons Supplying Services under the Agreement. In particular, the Annex stipulates that the GATS does not apply to “measures regarding citizenship, residence or employment on a permanent basis”. However, there is nothing in this Annex, nor elsewhere in the Agreement, that would give Members a free hand in imposing other types of measures, e.g. discriminatory levels of taxation, on natural persons who fall within the definitional scope of mode 4 and are present on a long-term or permanent basis.

As noted before, mode 4 is defined in GATS Article I:2(d) to consist of the supply of a service “by a supplier of *one Member*, through presence of natural persons of *a Member* in the territory of *any other Member*” (emphasis added).<sup>43</sup> This relatively complicated construct covers two scenarios: (i) natural persons of one Member acting as independent (self-employed) suppliers in another Member’s territory;<sup>44</sup> and (ii) natural or juridical persons of one Member acting as service suppliers and, for that purpose, employing nationals from whatever Member, except from the recipient country, to carry out the transaction.<sup>45</sup> In turn, this implies that the foreigners employed by domestically-owned companies, possibly the majority among the foreigners working in many countries, do not fall under mode 4. By the same token, it also means that the access opportunities provided under mode 4 may depend, to some extent, on the scale of what has been committed under mode 3. The link with mode 3 commitments is even more evident in cases, relatively frequent, where mode 4 commitments have remained confined in scope to ‘intra-corporate transferees’ and, possibly, to a few other professional categories.

These issues have proven less controversial in WTO fora than could have been expected in view of the economic stakes involved. And this might be for various reasons, including (a) the shallow content of most mode 4 commitments, regardless of the countries’ levels of development; (b) the possibility to use legal

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<sup>43</sup> For a more detailed presentation, see Antonia Carzaniga, *A Warmer Welcome? Access for Natural Persons under PTAs*, in *OPENING MARKETS FOR TRADE IN SERVICES* (Juan A. Marchetti & Martin Roy eds., 2008); Rupa Chanda, *Movement and Presence of Natural Persons and Developing Countries: Issues and Proposals for the GATS Negotiations* (South Centre T.R.A.D.E., Working Paper 19, 2004). For a Note by the WTO Secretariat on mode 4, see Council for Trade in Services, *Presence of Natural Persons (Mode 4)*, WTO Doc. S/C/W/301 (Sept. 15, 2009).

<sup>44</sup> Pursuant to GATS Article XXVII(k)(ii), persons that are permanent residents in another Member’s territory may qualify as well in certain circumstances.

<sup>45</sup> Note that the supplier must not necessarily be established in the recipient country.

constructs (e.g., sub-contracting of particular services to foreign-owned suppliers) with a view to bypassing definitional restrictions in certain circumstances (e.g., domestically-owned hospital operators may outsource nursing services to foreign-owned companies providing such services.); and (c) information problems due to the segmented nature of the approval and entry processes for natural persons — it is certainly easier for large-scale investors to make themselves heard by the competent authorities. Moreover, as in other areas, frustrated Members might have hesitated to launch a discussion in the WTO, given the challenge, for a start, to develop a common position at national level among the departments (potentially) concerned. The possible consequence: the sleeping beauty will be left asleep.

*D. Basic Obligations, Unconditional and Conditional*

1. Most-Favoured Nation Treatment and Other Unconditional (Horizontal) Obligations

As already indicated, there is no obligation in the Agreement to grant any particular level of MA and NT in a given sector. This does not imply, however, that Members have a free hand in non-scheduled sectors to modify the terms of MA and market participation as they see fit. There is a range of universally applicable obligations, first and foremost the extension of *Most-Favoured-Nation (MFN) treatment*, which have to be respected in any event. While NT would ensure what might be called ‘vertical non-discrimination’ between foreign and domestic services and service suppliers, MFN treatment provides for ‘horizontal non-discrimination’ among foreign services and suppliers. GATS Article II:1 requires each Member ‘with respect to any measure covered by this Agreement’ to accord “immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like service and service supplier of any other country”.

At the Agreement’s entry into force (date of ratification for newly acceding countries), Members had the opportunity to specify the MFN-inconsistent measures they wanted to maintain. Overall, about two-thirds of the WTO Membership did so, with an average of about five measures per Member.<sup>46</sup> (Maritime transport is a special case, insofar as the MFN obligation has remained suspended for those Members that had not undertaken commitments in this sector; *see* Table A1.) Although, in principle, such exemptions should not exceed a

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<sup>46</sup> Rudolf Adlung & Antonia Carzaniga, *MFN Exemptions under the General Agreement on Trade in Services: Grandfathers Striving for Immortality?*, 12(2) J. INT’L ECON. L. 357 (2009) [hereinafter Adlung & Carzaniga].

period of ten years, pursuant to para 6 of the GATS Annex on Article II Exemptions, and Members are held to notify their termination, not a single notification had been received at the time of writing. The Annex also provides, *inter alia*, that such exemptions are to be reviewed by the Council for Trade in Services and subjected to negotiation in any subsequent trade round. The Council has conducted four such reviews to date which, however, did not lead to the modification of any of the listed exemptions.<sup>47</sup>

Otherwise, in order to be exempt from whatever treaty obligations at a later stage, interested Members might apply for a waiver under Article IX:3 of the WTO Agreement. Yet, the bar is set quite high: the relevant provisions refer to the existence of ‘exceptional circumstances’ and require that the respective requests be approved by a three-fourths majority of Members.<sup>48</sup> There are only two such cases to date- the extension of a GATS-scheduled implementation date by one year (Albania), and the LDC Services Waiver which was approved at the WTO’s 8<sup>th</sup> Ministerial Conference in 2011.<sup>49</sup> In principle, waivers are subject to annual review (WTO Agreement Article IX:4). Yet, pursuant to a decision by the Nairobi Ministerial Conference in 2015, the Services Waiver is due to expire on December 31, 2030.<sup>50</sup>

Also excluded from the MFN obligation, without a time factor, are the preferences extended in PTAs pursuant to GATS Article V (*see part IV A*) as well as recognition measures concerning foreign standards, licences, etc. under Article VII. Table A1 summarizes the main elements.

Article VII (Recognition) allows a Member to recognize, notwithstanding the MFN obligation, the education or experience obtained elsewhere and the respective licences or certificates as fulfilling its own requirements and criteria. Nevertheless, the door must remain open. Pursuant to Article VII:2, participants in

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<sup>47</sup> For the list of reviews, see *Annex on Article II Exemptions*, WTO Analytical Index, [www.wto.org/english/res\\_e/publications\\_e/ai17\\_e/gats\\_annartiexemptions\\_oth.pdf](http://www.wto.org/english/res_e/publications_e/ai17_e/gats_annartiexemptions_oth.pdf).

<sup>48</sup> For a detailed presentation, see James Harrison, *Legal and Political Oversight of WTO Waivers*, 11(2) J. INT’L ECON. L. 411 (2008).

<sup>49</sup> World Trade Organization, Ministerial Decision of 17 December 2011, *Preferential Treatment to Services and Service Suppliers of Least-Developed Countries*, WTO Doc. WT/L/847 (Dec. 19, 2011); *see also* Miguel Rodriguez Mendoza et al., *The LDC Services Waiver - Operationalized?*, U.N. CONF. TRADE & DEV. (May 27, 2016), <https://unctad.org/meetings/en/SessionalDocuments/ditc-05072016-LDCWaiver-AssessmentPaper.pdf>.

<sup>50</sup> World Trade Organization, Ministerial Decision of 19 December 2015, *Implementation of Preferential Treatment in Favour of Services and Service Suppliers of Least-Developed Countries and Increasing LDC Participation in Services Trade*, WTO Doc. WT/MIN(15)/48, WT/L/982 (Dec. 21, 2015).

recognition agreements are required to afford other Members ‘adequate opportunity’ to accede to their agreements or to negotiate comparable ones. If recognition is accorded autonomously, others shall be allowed to demonstrate that their licences, certificates etc. should be recognized as well. In any event, the Article requires that recognition must “not be accorded in a manner that would constitute a means of discrimination ... or a disguised restriction on trade in services” (Article VII:3); and transparency must be ensured: relevant initiatives have to be notified to the Council for Trade in Services (Article VII:4).

If the existing notifications were taken at face value, they would suggest that recognition measures are quite rare, with a few exceptions. Overall, according to the author’s count, there have been sixty-two notifications between January, 1995 and December, 2018, including fourteen from Switzerland and eight from Australia.<sup>51</sup> (In contrast, the EU has submitted one notification to date, in 1997.) To a certain extent, the dearth of notifications may reflect an apparently widespread perception among Members, though there is no explicit exemption, that the above disciplines do not apply in the context of PTAs. Moreover, as in the case of other notification requirements, including under Article III:3 (*see part II D(iii)*), there is little incentive for governments to comply. Rather the opposite.

Significant commercial interests could be involved. In many cases, the (non-)recognition of foreign diploma and licences etc. might be a key determinant of market access and could be used to influence competitive conditions for whatever policy reasons. Governments might thus be hesitant to disclose their recognition measures and the underlying criteria. Motto: Let the beauty sleep (?). In addition, of course, there is the possibility of administration-internal information and coordination problems. Not all ministries and competent professional associations, that decide to recognise foreign degrees and certificates within their respective turfs, may be aware of GATS Article VII and the relevant procedures.

There is a further range of unconditional obligations, which are relatively easy to comply with. These include certain publication requirements (Article III:1), as well as the establishment of enquiry and contact points (Articles III:4 and IV:2). The latter are expected to provide specified types of economic and legal information to other WTO Members (Article III:4) and to service suppliers from developing countries (Article IV:2).<sup>52</sup> Further, under Article VIII (Monopolies and Exclusive

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<sup>51</sup>This information is from author’s own count based on WTO Documents on notifications filed pursuant to GATS Article III:3. *See also*, Council for Trade in Services, *Draft - Annual Report of the Council for Trade in Services to the General Council (2019)*, S/C/W/383 (Nov. 8, 2019) [hereinafter 2019 Draft – Annual Report].

<sup>52</sup> The latter obligation relates to developed country Members and ‘to the extent possible’ to other Members.

Service Suppliers), Members are held to ensure that monopoly and exclusive suppliers, which are established in their territories, respect both the MFN-obligation under Article II and any specific commitments, if they are allowed to compete in non-monopolized sectors.

Any of these obligations might be ignored, if the respective conditions are met, under General Exceptions (Article XIV), Security Exceptions (Article XIV *bis*) and the prudential carve-out in financial services.<sup>53</sup>

## 2. Exclusions

Two types of activities are explicitly excluded from the scope of the Agreement and, thereby, from its MFN clause and other unconditional obligations. These concern: (i) services provided in the exercise of governmental authority (Article I:3(b)); and (ii) measures affecting air traffic rights and services directly related to the exercise of these rights (Annex on Air Transport Services, para 2).<sup>54</sup> Both provisions offer room for interpretation.

For a service to fall under the exclusion of *governmental services*, a twin condition must be met: the service must be supplied neither on a commercial basis, nor in competition with one or more service suppliers. But what is the meaning of these terms ('commercial basis' and 'competition')?<sup>55</sup> In particular, the question arises

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<sup>53</sup>Article XIV played a major role in two GATS disputes to date. See *US — Gambling*, *supra* note 221; see also Panel Report, *Argentina — Measures Relating to Trade in Goods and Services*, WT Doc. WT/DS453/R (adopted on May 9, 2016) [hereinafter *Argentina — Financial Services*]; Article XIV *bis* was tested in a dispute between Russia and Ukraine, see Panel Report, *Russia — Measures Concerning Traffic in Transit*, WT Doc. WT/DS512/R (adopted on Apr. 26, 2019) & WT Doc. WT/DS512/R/Add.1 (adopted on Apr. 26, 2019). The *prudential carve-out* was a focal issue in *Argentina — Financial Services*. An analysis of the carve-out is also provided by Juan A. Marchetti, *The GATS Prudential Carve-Out*, in FINANCIAL REGULATION AT THE CROSSROADS: IMPLICATIONS FOR SUPERVISION, INSTITUTIONAL DESIGN AND TRADE 279 (Panagiotis Delimatsis & Nils Hergereds., 2011).

<sup>54</sup> Existing obligations under bilateral or multilateral agreements, at the date of the WTO Agreement's entry into force, are grandfathered under the Annex.

<sup>55</sup> For further discussion, see Eric H. Leroux, *What is a Service 'Supplied in the Exercise of Governmental Authority' Under Article I:3(b) and (c) of the General Agreement on Trade in Services?*, 40(3) J. WORLD TRADE 345 (2006); Rudolf Adlung, *Public Services and the GATS*, 9(2) J. INT'L ECON. L. 455 (2006).

Concerning financial services, there are three types of services for which the Annex on Financial Services (Article 1(b)) explicitly clarifies that they fall under the carve-out for governmental services: "(i) activities conducted by a central bank or monetary authority or by any other public entity in pursuit of monetary or exchange rate policies; (ii) activities forming part of a statutory system of social security or public retirement plans; and (iii)

whether loss-making activities might nevertheless be deemed to be of a commercial nature, and whether the co-existence of several types of service suppliers —e.g., of freely accessible public universities and revenue-generating private academies, of publicly provided and private health services, etc. —is already tantamount for the former being in competition.

Interestingly, the Agreement's definition of 'juridical person, in Article XXVIII(l), covers "any legal entity duly constituted or otherwise organized under applicable law, *whether for profit or otherwise ...*" (emphasis added). With this in view, it might be difficult to argue that loss-making activities are excluded per se from the Agreement. However, is there a time factor? Does the exclusion apply, for example, only to activities that are non-profitable over extended periods? Further, concerning the existence of competition, would the mere presence of a private start-up that seeks to gain a foothold in a hitherto government-dominated sector suffice to change the status of the service concerned? In this regard, VanDuzer introduced an appealing one-way concept of competition, focusing solely on the behaviour of the government-owned or -mandated entity and ignoring that of its private counterpart(s).<sup>56</sup> But all this remains to be tested.

Further, on the status of air traffic rights and directly related services, the Annex on Air Transport Services provides a definition of traffic rights, and it lists three types of measures that, nevertheless, are presumed to fall under the GATS—measures affecting (a) aircraft repair and maintenance services; (b) the selling and marketing of air transport services; and (c) computer reservation system (CRS) services.<sup>57</sup> Yet, questions remain. They concern, particularly, the status of various services that are not explicitly referred to in the Annex such as ground handling, airport management, and aircraft leasing. These services might be supplied regardless of any existing traffic rights. Does this imply that they are not directly related to the exercise of these rights, meaning, in turn, that they are covered by the GATS?

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other activities conducted by a public entity for the account or with the guarantee or using the financial resources of the Government". Concerning (ii) and (iii), this applies only as long as a government does not allow its financial service suppliers to conduct such activities in competition.

<sup>56</sup> J. Anthony VanDuzer, *Health, Education and Social Services in Canada: The Impact of the GATS*, in TRADE POLICY RESEARCH 2004 287-518 (John M. Curtis & Dan Ciuriak eds., 2004).

<sup>57</sup> 'Traffic rights' are defined to mean "the right for scheduled and non-scheduled services to operate and/or to carry passengers, cargo and mail for remuneration or hire from, to, within, or over the territory of a Member..." For further details, see e.g., Pierre Latrielle, *Air Transport Liberalization: A World Apart*, in OPENING MARKETS FOR TRADE IN SERVICES - COUNTRIES AND SECTORS IN BILATERAL AND WTO NEGOTIATIONS 264, 272ff (Juan A. Marchetti & Martin Roy eds., 2008).

Again, such definitional uncertainties about the precise scope of the Agreement might prompt governments — if they are aware of the pitfalls — not to undertake commitments in potentially sensitive sectors.

### 3. Conditional Obligations

Commitments, i.e. any scheduled entries that imply an element of MA, NT and/or ACs, trigger a range of conditional obligations in the sectors and modes concerned. The underlying rationale is to ensure transparency and protect the committed levels of access from being undermined by various types of non-schedulable policy interventions and/or market distortions. Accordingly, Members are held to comply with specified notification requirements (Article III:3), observe certain disciplines in domestic regulation (Articles VI:1, 2, 5 and 6), prevent monopoly and exclusive suppliers from violating existing commitments (Article VIII, *see also part II D(i)*), and dispense with restrictions on foreign-exchange transactions relating to commitments (Article XI:1). Moreover, in sectors subject to MA commitments under mode 1, Members must allow any essential capital flows in either direction, while mode 3 commitments must not be undermined by restrictions on capital inflows (footnote 8 to Article XVI).

A perennial concern: non-compliance with the *notification requirement of Article III:3* concerning legal, regulatory or procedural changes which ‘significantly affect trade’ in services covered by a Member’s specific commitments. More precisely, this Article requires each Member to “promptly and at least annually inform the Council for Trade in Services of the introduction of any new, or any changes to existing, laws, regulations or administrative guidelines which significantly affect trade in services covered by its specific commitments under this Agreement”.<sup>58</sup> Between January, 1995 and December, 2018, 655 notifications were received from sixty five Members.<sup>59</sup> While the total number may sound impressive, it conceals large disparities. There are countries like Albania and Switzerland, with 122 and sixty five notifications, respectively, and there are others that have not submitted a single notification over the same period (including Argentina, Malaysia, Mexico, Singapore and Turkey).<sup>60</sup> Overall, there is no positive trend in the number of notifications made over time.<sup>61</sup>

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<sup>58</sup> GATS, *supra* note 40, art. III.3.

<sup>59</sup> 2019 Draft – Annual Report, *supra* note 51.

<sup>60</sup> Twenty-five notifications were received from the EC and an additional thirty-three from individual EC members, in some cases prior to their EC accession. The United States submitted two notifications.

<sup>61</sup> The number of notifications made from 2016 to 2018, thirty-five, is the second lowest of all three-year periods since 1995.



Indeed, as in the case of recognition measures, Members have little incentive to cooperate; non-compliance does not carry any risk of penalties. Quite the contrary. A notifying government concedes that the measures concerned ‘significantly affect trade in services’. In turn, this could lead to follow-up enquiries from interested Members and complicate matters in the event of disputes. If there is a motive to notify, nevertheless, it is the overriding interest in keeping the system functioning in all its facets.

While the transparency-related obligations of Article III, including the notification requirement under para 3, are not directly related to the extension and protection of trade benefits, the situation is different for the other types of obligations referred to above. A particularly sensitive issue in this context are the regulatory disciplines under Article VI, which remain to be completed (*see part II E*). Inevitably, the respective negotiations touch upon a basic distinction under the Agreement, i.e. the borderline between trade restrictions as covered by Articles XVI and XVII, and Members’ legitimate right to regulate in pursuit of national policy objectives. According to Lang, while Article XVI applies to measures that accord protection in more explicit or direct ways, the precise limits of what counts as Domestic Regulation (DR) were left unclear in the Agreement.<sup>62</sup> Yet, though the extended negotiations under Article VI might help specify key regulatory principles, the borderline between Articles VI and XVI/XVII remains to be drawn on a case-by-case basis.

#### *E. Room for Policy Discretion*

The Agreement does not currently contain trade remedy provisions allowing for safeguard, anti-dumping or countervailing duty actions, while offering broad scope for the operation of (non-discriminatory) regulations and the extension of (non-discriminatory) subsidies. Nevertheless, as noted in part I, there are rule-making mandates concerning Emergency Safeguard Measures (Article X), DR (Article VI:4), Government Procurement (Article XIII) and Subsidies (Article XV). According to the Negotiating Guidelines for Services, as approved by the Council or Trade in Services in 2001, Members ‘shall aim to complete’ the negotiations mandated under Articles VI:4, XIII and XV prior to the conclusion of the negotiations on specific commitments.<sup>63</sup> Concerning the negotiations under Article X on the question of emergency safeguard measures, another Council

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<sup>62</sup>Andrew Lang, *The “Default Option”? The WTO and Cross-Border Financial Services Trade after Brexit*, in KERN ALEXANDER et al., *supra* note 12, at 186 [hereinafter Andrew Lang].

<sup>63</sup>Trade in Services, *Guidelines and Procedures for the Negotiations on Trade in Services*, WTO Doc. S/L/93 (Mar. 29, 2001).

Decision envisages that the results, if any, shall enter into effect not later than the results of the DDA.<sup>64</sup>

No concrete outcome is in sight, however, in any of these negotiations with the possible exception of those dealing with DR.<sup>65</sup> In a Joint Statement of May, 2019, fifty nine Members (counting EU members individually) confirmed their intention to conclude by the Twelfth Ministerial Meeting in June, 2020, with the results to be inscribed in their services schedules.<sup>66</sup> Yet, any realistically conceivable outcome is likely to leave governments with more regulatory leeway than what exists in merchandise trade under the Agreement on Technical Barriers to Trade (TBT).<sup>67</sup> Nevertheless, two ‘heavyweights’, the United States and India, refrained from signing the Joint Ministerial Statement on Services Domestic Regulation.

A precursor of the envisaged Article VI:4-disciplines, developed by the then Working Party on Professional Services, already exists for the accountancy sector. The ‘Accountancy Disciplines’ were adopted by the Council for Trade in Services in 1998 and are to be integrated into the GATS “no later than the conclusion of the current services trade negotiations”.<sup>68</sup> Interestingly, these disciplines do contain a ‘necessity test’ which, though forming part of the negotiating mandate in Article VI:4(b), has proved particularly controversial in the ongoing negotiations.

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<sup>64</sup> Council for Trade in Services, *Fifth Decision on Negotiations on Emergency Safeguard Measures*, WTO Doc. S/L/159 (Mar. 17, 2004).

<sup>65</sup> Concerning subsidies, for a detailed analysis of existing disciplines and the absence of any negotiating momentum under GATS Article XV, see Pierre Sauvé & Marta Soprana, *Disciplining Service Sector Subsidies: Where Do We Stand and Where Can We (Realistically) Go?*, 21(3) J. INT’L ECON. L. 599 (2018). See also, Pietro Poretti, *Waiting for Godot: Subsidy Disciplines in Services Trade, in GATS AND THE REGULATION OF INTERNATIONAL TRADE IN SERVICES* (WORLD TRADE FORUM) 466 (Marion Panizzon et al. eds., 2008); Rudolf Adlung, *Negotiations on Safeguards and Subsidies in Services: A Never-Ending Story?*, 10(2) J. INT’L ECON. L. 235 (2007) [hereinafter Adlung (2007)]. For an overview of current disciplines on government procurement of goods and/or services under various WTO provisions, NAFTA and EU law, see Kamala Dawar, *Government Procurement in the WTO: A Case for Greater Integration*, 15(4) WORLD TRADE REV. 645 (2016).

<sup>66</sup> Joint Statement on Services Domestic Regulation, *supra* note 24.

<sup>67</sup> See e.g., Hoekman & Mavroidis (2016), in Sauvé and Roy, *supra* note 7, 243-267. For an overview of the negotiating history, and the possible content of the envisaged disciplines, see ICTSD, *Negotiating Disciplines on Domestic Regulations in Services*, INT’L CENT. TRADE & SUSTAINABLE DEV.: POLICY BRIEF (June, 2018), [https://www.ictsd.org/sites/default/files/research/wto\\_paths\\_forward-negotiating\\_disciplines\\_on\\_domestic\\_regulations\\_in\\_services-policy\\_brief\\_final.pdf](https://www.ictsd.org/sites/default/files/research/wto_paths_forward-negotiating_disciplines_on_domestic_regulations_in_services-policy_brief_final.pdf) [hereinafter ICTSD]

<sup>68</sup> Trade in Services, *Disciplines on Domestic Regulation in the Accountancy Sector*, WTO Doc. S/L/64 (Dec. 17, 1998).

This may appear somewhat surprising insofar as it is not the existence of a test *per se*, but the underlying criteria that ultimately matter.<sup>69</sup>

There are two further peculiarities in the GATS, which tend to increase governments' flexibility in conducting services trade:

- *Export subsidies* are not constrained by MFN or NT disciplines as long as they do not modify the competitive conditions to the detriment of domestically established foreign suppliers, nor among them. Restraints on the type or amount of such subsidies could conceivably result from ACs under Article XVIII or obligations assumed in accession protocols or reports of accession working parties. Yet, the author is not aware of any such initiatives. In contrast, export restrictions may be covered, in committed sectors, by limitations on MA under mode 3.<sup>70</sup>
- *ENTs* constitute an option, as noted before, to operate MA limitations under Articles XVI:2(a)-(d). No further interpretative guidance is given, however. For example, it remains open whether and to what extent perceived cultural, social or environmental needs would also be covered by these provisions. A Note by the WTO Secretariat confirms that the term 'economic needs test' is not defined in the GATS, nor does it have a well-defined meaning in the literature.<sup>71</sup>

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<sup>69</sup> As a General Provision, the 'Accountancy Disciplines' require that the measures concerned are "not more trade-restrictive than *necessary* to fulfil a legitimate objective". An openly defined list of such legitimate objectives follows. These stipulations would certainly provide more leeway for the administrations concerned than the respective clause in Article VI:4 ('not more burdensome than necessary to ensure the quality of the service'). *See also, part IV.1(iii)* and, for a broader picture, see Gilles Muller, *The Necessity Test and Trade in Services: Unfinished Business?*, 49(6) J. WORLD TRADE 951 (2015).

<sup>70</sup> Existing jurisprudence (*Mexico — Telecoms* and *China — Electronic Payment Services*) stipulates that a full commitment on MA under mode 3 prevents a Member from imposing limitations on (a) the number of established foreign service suppliers that are allowed to conduct exports and/or (b) the value of the services they provide either cross-border to recipients abroad or to foreign recipients within its own territory. *See also* Rudolf Adlung, *Export Policies and the General Agreement on Trade in Services*, 18(3) J. INT'L ECON. L. 487 (2015).

<sup>71</sup> Council for Trade in Services: Special Session, *Economic Needs Tests*, WTO Doc. S/CSS/W/118 (Nov. 30, 2001).

In total, some 280 ENTs have been inscribed by close to a hundred Members to date, either in the horizontal or sectoral sections of their schedules.<sup>72</sup> In many cases, the criteria are described in vague terms only, and for more than one-third of all ENTs no indications are given at all. The ultimate impact of such entries may come close to scheduling ‘unbound’, i.e. to retaining the right to deny any access, except that the conditional obligations apply as described above. Even if the criteria are indicated, they are normally described only in general, non-enforceable terms.<sup>73</sup>

The Scheduling Guidelines for the Doha Round offers, adopted by the Council for Trade in Services, aim to limit the scope for discretion. They stipulate that the respective commitment “should indicate the main criteria on which the test is based, e.g., if the authority to establish a facility is based on a population criterion, the criterion should be described concisely”.<sup>74</sup> Nevertheless, non-specified ENTs can even be found in several post-UR accession schedules.<sup>75</sup>

### III. INTERPRETATIONAL UNCERTAINTIES AND RELATED CHALLENGES

#### A. Classification problems<sup>76</sup>

Most of the current schedules date back to the negotiating stages of the UR, over twenty-five years ago. In organizing their commitments, virtually all Members relied on the sector structure provided for in the Services Sectoral Classification

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<sup>72</sup> Council for Trade in Services: Special Session, *Economic Needs Tests*, WTO Doc. S/CSS/W/118/Add.1 (Nov. 30, 2001); Council for Trade in Services: Special Session, *Economic Needs Tests*, WTO Doc. S/CSS/W/118/Add.2 (Mar. 16, 2006).

<sup>73</sup> Typically, Canada’s schedule contains the following limitation on MA under mode 3: ‘Courier services (Nova Scotia and Manitoba): Economic needs test. Criteria related to approval include: examination of the adequacy of current levels of service; market conditions establishing the requirement for expanded service; the effect of new entrants on public convenience, including the continuity and quality of service, and the fitness, willingness and ability of the applicant to provide proper service’, see *Canada: Schedule of Specific Commitments*, Doc. GATS/SC/16 (Apr. 15, 1994).

<sup>74</sup> Scheduling Guidelines, *supra* note 36. The preceding guidelines (MTN.GNS/W/164 of September, 1993), developed for the purposes of the UR negotiations, did not contain such a provision.

<sup>75</sup> Cases in point are the schedules of China (two tests of a horizontal and one of a sectoral nature) and Montenegro (one horizontally applicable test).

<sup>76</sup> A detailed presentation of classification issues and their treatment in WTO jurisprudence is provided in a Note by the WTO Secretariat, see *Services Classification in WTO Jurisprudence*, WTO Doc. S/CSC/W/61 (Mar. 12, 2013).

List (MTN.GNS/W/120) developed by the then GATT Secretariat in 1991.<sup>77</sup> It consists of some 160 sub-sectors which are based on the provisional UN Central Product Classification (CPC), adopted by the UN Statistical Commission in 1989. In turn, the Services Sectoral Classification List (W/120) is annexed to the Scheduling Guidelines of 2001.

What is a ‘service’? While the GATS delineates how services are supplied, via four modes, it does not seek to define the substantive scope of the Agreement. (By the way, this is true for merchandise trade under the GATT as well.) Nevertheless, since most schedules are based on W/120, the potential for definitional uncertainties may appear to be limited.<sup>78</sup> However, there are several large sectors in W/120, including professional, telecommunication, audio-visual, health-related and tourism services, that are made up not only of relatively well defined sub-sectors, but include a residual category of ‘other’ services which are not further described. Even in the absence of commitments, the existence of these services may matter as an indication that the coverage of the respective sectors, and thus the scope of the Agreement’s MFN and other unconditional obligations, is broader than that of the expressly enumerated professional services, telecommunication services, etc. Moreover, the sectors listed in W/120 are completed by a major category of ‘Other services’ (CPC 970) which, again, are not further defined.

There is also an additional element of uncertainty: the status of services that were unknown or unused at the time the respective schedules were submitted. Let us assume that 3D printing is a service. Using W/120, would it constitute a sub-category of ‘Computer and related services’ (e.g. CPC 849), fall under ‘Services incidental to manufacturing’ (CPC 884 and 885, except for 88442) or be covered by ‘Printing, publishing’ (CPC 88442)? Or could it be deemed to consist of a combination of various such services? Yet, even if this issue were solved, would the respective commitments bind those Members that had submitted their schedules before 3D printing was even deemed to exist—in their territory or anywhere else in the world?

In *China — Audiovisual Products*, the Appellate Body (AB) adopted what might be called an evolutionary approach in interpreting the coverage of existing commitments over time. Accordingly, the terms used in China’s schedule for the

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<sup>77</sup> Group on Negotiations on Services, *Services Sectoral Classification List*, WTO Doc. MTN.GNS/W/120 (July 10, 1991). The list is annexed to the Scheduling Guidelines that the Council for Trade in Service adopted 10 years later, see Scheduling Guidelines, *supra* note 36.

<sup>78</sup> In *US — Gambling*, the AB confirmed the relevance of W/120 in identifying service sectors in GATS schedules, while noting that it ‘does not appear to assist in the task of ascertaining within which subsector of a Member’s Schedule a specific service falls’, see *US — Gambling*, *supra* note 21, ¶181.

sectors concerned in this case (sound recording and distribution services) were “sufficiently generic that what they apply to may change over time”. In this regard, the AB further noted “that GATS Schedules, like the GATS itself and all WTO Agreements, constitute multilateral treaties with continuing obligations that WTO Members entered into for an indefinite period of time, regardless of whether they were original Members or acceded after 1995”.<sup>79</sup>

There are several modern services — from cloud computing and internet access to carbon capture and storage — where similar issues arise. A potential for more disputes?

### 1. Scheduling problems

Scheduling practices tend to differ between Members. This might be due to not only the complexity of the Agreement, but also lack of experience and/or government-internal coordination problems at the time when most commitments were made, i.e. towards the end of the UR. To give just three examples:

- Some Members have scheduled (horizontal) NT limitations for subsidies only under modes 3 and 4, while others did so for all four modes. In the former case, the question arises as to whether this is due to a misinterpretation of the modal scope of the Agreement’s disciplines? Otherwise, if a Member reserves the right not to extend benefits under domestic subsidy schemes (e.g., tax deductibility of insurance premiums, mortgage spending or tuition fees) to purchases from foreign established suppliers, why would it commit to grant such support if *like* services were imported cross-border or consumed abroad?<sup>80</sup> The introduction of more comprehensive NT limitations for subsidies under many PTAs indicates that the assessment of quite a number of administrations has changed over time. Yet, the ensuing proliferation of GATS-minus commitments raises new problems (*see part IV A(ii)*).
- It is not difficult to find excessively vague entries (foggy commitments) in current schedules.<sup>81</sup> Cases in point are references to the existence of licensing and qualification requirements or to the titles of laws and

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<sup>79</sup> Appellate Body Report, *China — Measures affecting Trading Rights and Distribution Services for certain Publications and Audiovisual Entertainment Products*, ¶396, WT Doc. WT/DS363/AB/R (adopted on Jan. 19, 2010) [hereinafter *China — Audiovisual Products*].

<sup>80</sup> See also Adlung (2007), *supra* note 65.

<sup>81</sup> Rudolf Adlung et al., *FOG in GATS Commitments - Why WTO Members Should Care*, 12(1) WORLD TRADE REV. 1 (2013) [hereinafter Adlung et al. (2013)].

regulations rather than to the restrictions concerned.<sup>82</sup> While over-scheduling, i.e. the listing of measures that are in tune with relevant treaty obligations, does not pose any particular problems, the situation is different for the former type of entries that are too imprecise to serve their purpose, i.e. to allow a Member to use measures in scheduled services that are inconsistent with full commitments under Articles XVI (MA) or XVII (NT).

- The borderline between MA and NT limitations and the relevant modes may prove difficult to draw in individual cases. For instance, consider nationality or composition requirements for company boards. They have been inscribed by some Members as NT limitations under mode 3, while others might have considered them to constitute MA limitations under mode 4. This may not matter as long as the measure concerned is clearly specified under either option. But there are cases where full commitments (none) on MA and/or NT under one mode coincide with non-bindings (unbound) under the other mode. Then definitional subtleties come into play, and different interpreters might well arrive at different conclusions.<sup>83</sup>

## 2. Domestic Regulation vs. Specific Commitments (Articles XVI and XVII)

The Agreement, upfront in its Preamble, explicitly recognizes “the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right”. Accordingly, governments are not prevented, even in fully

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<sup>82</sup> Article XVI:2 clearly refers to “the *measures* which a Member shall not maintain ... unless otherwise specified in its Schedule”, while Article XVII:1 requires each Member, “subject to *any conditions and qualifications set out in its Schedule*”, to accord treatment no less favourable than that accorded to its own like services and service suppliers (emphasis added). *See also*, Scheduling Guidelines, *supra* note 36, ¶38 (confirm that “according to the agreed scheduling procedures, schedules should not contain general references to laws and regulations as it is understood that such references would not have legal implications under the GATS”).

<sup>83</sup> For example, pursuant to Article XVI:2(d), a discriminatory quota limiting the number of foreigners permitted to sit on a company board might be covered by an ‘unbound’ on MA, mode 4, if these persons are ‘necessary for, and directly related to’ the supply of the service concerned. (As noted before, measures inconsistent with both Articles XVI and XVII are to be inscribed under Article XVI only.) Yet, views may differ on whether board members really meet the respective criterion (‘necessary for, and directly related to’). If not, the measure might rather fall under NT, mode 3.

committed sectors, from operating regulatory measures —minimum capital requirements, qualification requirements, building standards, etc. — for domestic policy reasons. And, as indicted before, such measures may be subjected to commitments under Article XVIII.

By way of example, even in professional services that are fully liberalized under Articles XVI and XVII, a government would still be free to impose whatever obligations, in terms of minimum age, education, training and so forth, deemed adequate to protect consumers and ensure the competence of the providers involved. However, this general principle needs to be put in a sector/policy context. Take language requirements. It is beyond doubt that interpreters or translators, regardless of their nationality, must be fluent in the languages they deal with on a professional basis. Yet, what about foreigners who want to work as computer programmers, architects, taxi drivers, bricklayers, etc.? Expecting them to have a similarly strong command of their host-country language, spoken and written, might modify the competitive conditions to their disadvantage. Thus, if a Member intends to maintain such (over-)ambitious regulatory requirements in a scheduled sector, of whatever type, a limitation on NT might be needed. Yet the distinction between schedulable and non-schedulable measures cannot be drawn in the abstract, but only after consideration of the specific circumstances in the sector and profession concerned.<sup>84</sup> Obviously, some sort of ‘necessity’ criterion, as unpopular as it may prove for quite a number of Members, may come into play (*see part II E*).

Similar uncertainties may arise, in certain cases, between measures constituting trade restrictions within the scope of Article XVI (MA) and others that may fall under Article VI (DR). The borderline between the two Articles has been extensively discussed in the wake of the Panel and AB reports on *US — Gambling*. The respective rulings imply, inter alia, that restrictions maintained in segments of a committed sector, e.g., a prohibition on electronic supplies, cross-border, of gambling and betting services that may serve public policy purposes (protecting minors, avoiding fraud etc.), could amount to a zero quota on such supplies. This, in turn, might be deemed inconsistent with full commitments on MA in the mode concerned. It would certainly go beyond the reach of this paper to discuss these findings in detail, suffice to note that the gambling-case has certainly not encouraged governments to undertake broad commitments on MA under the GATS.<sup>85</sup>

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<sup>84</sup> See also Andrew Lang, *supra* note 62.

<sup>85</sup> Cf. Pauwelyn, *supra* note 21; *similarly*, Krajewski, *supra* note 21 (argues that the rulings are based on an excessively broad interpretation of Article XVI, extending its scope beyond measures that impose quantitative ceilings on imports to those that have trade-limiting effects. According to Krajewski, the case showed that the GATS and, in particular, market



There is a related issue that, to the author's knowledge, has not yet been addressed in the literature: does the permissible scope for regulatory intervention under GATS vary between different types of Members, reflecting, for example, development-related disparities in their administrative capacity? Particularly, is it conceivable that DCs have more leeway than other Members for operating potentially restrictive regulations in committed service sectors? On the one hand, this appears unrealistic insofar as no relevant clauses exist in any of the Articles directly concerned (VI, XVI and XVII). There are no provisions comparable, for instance, to GATS Article V.3 which, in assessing participating Members' compliance with the conditions governing PTAs, explicitly provides flexibility for DCs in accordance with their respective levels of development. On the other hand, one might wonder, nevertheless, whether and to what extent the Agreement's preambulatory statement, highlighting 'the particular need of developing countries' to exercise the right to regulate and to introduce new regulations, could prove relevant in this regard.<sup>86</sup> The drafters might have had more in mind than simply providing moral support for developing countries' regulatory activities.

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access commitments under the Agreement, could severely restrict national regulatory autonomy. It may prove virtually impossible in some instances to schedule commitments in such a way that does not affect existing regulations and reserves enough regulatory space for new demands); *with* Donald H. Regan, *A Gambling Paradox: Why an Origin-Neutral 'Zero-Quota' is Not a Quota Under GATS Article XVI*, 41(6) J. WORLD TRADE 1297 (2007) (Regan argues that AB's interpretation is inconsistent with the meaning of the term 'quota' in the context of Article XVI, and he shares the concern that Members might be discouraged from undertaking commitments).

In contrast, Wunsch-Vincent maintains that several aspects of the ruling demonstrate that 'the relationship between GATS Articles VI and XVI has not been improperly damaged and that the "right to regulate" of WTO Members is not imperilled'. (Sacha Wunsch-Vincent, *The Internet, Cross-border Trade in Services, and the GATS: Lessons from US-Gambling*, 5(3) WORLD TRADE REV. 319, 344 (2006).) In a similar vein, Eric H. Leroux, *Eleven Years of GATS Case Law: What Have We Learned?*, 10(4) J. INT'L ECON. L. 749 (2007); Panagiotis Delimatsis, *Don't Gamble with GATS - The Interaction between Articles VI, XVI, XVII and XVIII GATS in the Light of the US - Gambling Case*, 40(6) WORLD TRADE REV. 1059 (2006). For a critical review of the AB's interpretative approach in the *US—Gambling* case, see also Federico Ortino, *Treaty Interpretation and the WTO Appellate Body Report in US - Gambling: A Critique*, 9(1) J. INT'L ECON. L. 117 (2006).

<sup>86</sup> Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331, reads: "(1) A treaty shall be interpreted in good faith in accordance with the *ordinary meaning to be given to the terms of the treaty in their context* and in the light of its object and purpose; (2) The *context* for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its *preamble* and annexes ..." (emphasis added).

### 3. Prospects for change (?)

Participation in a novel agreement, which contains a lot of conceptual innovation, is challenging. Several Members, it appears, have found it difficult to live up to this challenge at the GATS' entry into force in the mid-1990s. An analysis of close to ten thousand measures listed by Members as market access limitations under mode 3 of the GATS, showed that over one-quarter should have been inscribed under national treatment. However, as indicated before, such misplaced entries may nevertheless serve their intended purpose, i.e. to allow for departures from full MA or NT under Articles XVI or XVII of the GATS. This is less clear in the event of 'foggy' limitations, some 20% in total, which could not be associated with any restrictions falling under the two Articles.<sup>87</sup> The underlying measures might simply consist of technical standards (e.g., minimum capital requirements, expected professional experience, relevant educational degrees, etc.) that should normally be compatible with unimpeded MA and NT and, thus, would not need to be scheduled at all. However, in other cases, such ill-defined entries might have been expected, erroneously, to protect from challenges under the two former Articles should these prove relevant, at present or in future.

Ill-defined commitments could also affect comparisons of the degree of restrictiveness between schedules, including in the studies referred to in part I. Interestingly, the shares of such commitments are significantly lower, less than 10%, in the thirty-six post-UR accession schedules. Learning effects have apparently played a positive role in this context, keeping in mind that the accession schedules normally result from a multi-annual negotiating process that tends to be more intense and demanding than the negotiations, if any, that helped prepare the initial UR schedules. Another indication of a positive time factor is the listing of MFN exemptions for bilateral investment treaties (BITs). Such exemptions are far more frequent in recent WTO accession cases than among UR participants (*see part IV B*).

But how to correct existing misinterpretations? In the early days of the Doha Round, Members agreed on the editorial conventions for the submission of initial offers. Apart from the possibility of undertaking new or improved commitments, these explicitly provided for an additional option: the introduction of technical amendments that help clarify current commitments without changing their nature. Indeed, the initial offers submitted did contain a significant number of such (proposed) amendments.

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<sup>87</sup> Rudolf Adlung & Martin Roy, *Turning Hills into Mountains? Current Commitments under the GATS and Prospects for Change*, 39(6) J. WORLD TRADE 1161, 1177 (2005); Adlung et.al. (2013), *supra* note 81, at 9.

A note of caution may be needed, nevertheless. The interpretation of what constitutes a technical change and what would downgrade an existing commitment may differ among Members. From a purist's perspective, an ill-conceived entry might have been obsolete from the outset if it did not properly specify the measure concerned and its inconsistency with the relevant treaty provisions.<sup>88</sup> Anything less than a full commitment could therefore be viewed, and rejected, as a deterioration. The fact that there were (and still are) skeletons in a good number of cupboards might have helped to promote a sense of pragmatism and, thus, facilitated amendments at the time. Yet, the Doha Round came to a halt, and the old schedules have remained unchanged ...

Of course, there is always the option of modifying commitments pursuant to GATS Article XXI (Modification of Schedules).<sup>89</sup> Yet, the Article has been invoked rarely to date, mostly by the EU following changes in the composition of its membership.<sup>90</sup> For instance, in December, 2006, a modified schedule for the EU, covering twenty five Member States was adopted by the Council for Trade in Services. This modification was needed because some GATS commitments of the newly acceding EU members were more liberal than the respective entries in the EU schedule which were retained. Additional invocations of Article XXI were intended to accommodate the EU's enlargement to twenty seven members, the proposed exclusion of gambling services from the United States' schedule of commitments (in the wake of a dispute with Antigua and Barbuda), and Bolivia's intention to withdraw its commitments on hospital services. Apparently, governments are daunted by the procedural burden involved, given the requirement to negotiate compensation with any Member that might claim to be 'affected', and the possibility of an unfavourable outcome should the matter ultimately be referred to arbitration. Why would a government want to expose itself to such risks? By the same token, this implies that flawed commitments, mostly inherited from the UR, are unlikely to be clarified in the absence of a

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<sup>88</sup> For further discussion, see e.g., Rudolf Adlung, *Services Negotiations in the Doha Round: Lost in Flexibility?*, 9(4) J. INT'L ECON. L. 865 (2006).

<sup>89</sup> Accordingly, Members are entitled to modify or withdraw any existing commitment after three years from its entry into force. A modifying Member must notify its intent to the Services Council and negotiate compensatory adjustments with other Members whose benefits under the Agreement might be affected. These adjustments are to be implemented on an MFN basis. In the absence of an agreed outcome between modifying and affected Member(s), the latter might refer the matter to arbitration. The relevant procedures are spelled out in a Decision of the Services Council, see *Procedures for the Implementation of Article XXI of the General Agreement on Trade in Services (GATS)*, WTO Doc. S/L/80 (Oct. 29, 1999).

<sup>90</sup> Council for Trade in Services, *Communication from the European Communities and its Member States: Certification*, WTO Doc. S/C/W/273 (Oct. 9, 2006); World Trade Organisation: Trade in Services, *Certification: Schedule of Commitments: The European Communities and its Member States*, WTO Doc. S/L/286 (Dec. 18, 2006).

broader initiative involving a significant number of Members. However, in the current environment, the probability of such an initiative is close to nil.

#### IV. OTHER TREATY OBLIGATIONS AND ASSOCIATED DISCIPLINES

As indicated before, there are alternative instruments that could be used to regulate trade, promote liberalization and/or bind prevailing levels of openness: PTAs and BITs. They have proliferated in recent years, both reflecting and, possibly, contributing to the stalemate at the WTO.<sup>91</sup> If there is one common feature among many of these agreements, it is the fact that they are driven mainly by the priorities of the larger participants. However, these priorities may differ significantly.

##### A. Preferential Trade Agreements (PTAs)

###### 1. Basic Features

The GATT rules governing PTAs in merchandise trade or, rather, the interpretational uncertainties involved, have generated a lot of discussion. This applies, in particular, to the requirement in GATT Article XXIV:8(a)(i) to eliminate restrictions on ‘substantially all the trade’ between the constituent territories.<sup>92</sup> (According to the AB Report in *Turkey — Textiles*, “it is clear ... that ‘substantially all the trade’ is not the same as all the trade”, but “something considerably more than merely some of the trade”). Yet, things have not become easier in service trade. GATS Article V may offer even more room for interpretation, due to, *inter alia*, the additional complexities of services transactions, including the prevalence of non-tariff measures and their application across four modes of supply.<sup>93</sup>

Under GATS Article V:1, EIAs are required (a) to have substantial sectoral coverage and (b) provide, in the sectors covered, for the absence or elimination of substantially all discrimination in the sense of Article XVII (NT). This is to be achieved through “(i) elimination of existing discriminatory measures, and/or (ii)

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<sup>91</sup> There is a wealth of studies on WTO/PTA relations and the future of the multilateral system. *See e.g.*, the contributions to THE PREFERENTIAL LIBERALIZATION OF TRADE IN SERVICES - COMPARATIVE REGIONALISM (Pierre Sauvé & Anirudh Shingal eds., 2014) [hereinafter Sauvé & Shingal].

<sup>92</sup> Appellate Body Report, *Turkey — Restrictions on Imports of Textile and Clothing Products*, ¶48, WTO Doc. WT/DS34/AB/R (adopted on Nov. 19, 1999).

<sup>93</sup> Patrick Low, *Preferentialism in Trade Relations: Challenges for the World Trade Organization*, 7 (ASIAN DEV. BANK INST., Working Paper 478, 2014), <https://www.adb.org/sites/default/files/publication/156333/adb-wp478.pdf>.

prohibition of new or more discriminatory measures”.<sup>94</sup> A related footnote further stipulates that, pursuant to the requirement of substantial sectoral coverage, agreements should not provide for the *a priori* exclusion of any mode of supply.<sup>95</sup> Further, there is a somewhat enigmatic clause in Article V:4, requiring that PTAs be designed to facilitate trade between the parties and not in respect of any outside Member raise the overall level of trade barriers within the respective sectors or subsectors compared to their initial level.

The Panel on *Canada — Autos* set a demanding benchmark in stating that “the purpose of Article V is to allow for ambitious liberalization to take place at a regional level, while at the same time guarding against undermining the MFN obligation by engaging in minor preferential arrangements”.<sup>96</sup> In a similar vein, though in a somewhat different context, the AB ruling on *China — Audiovisual Products* emphasizes the importance of the principle of progressive liberalization as reflected in the structure of the GATS. Accordingly, the AB disapproved of interpretations “that would constrain the scope and coverage of specific commitments that have already been undertaken by Members and by which they are bound”.<sup>97</sup> Though the ruling deals with the (non-)application of existing sector commitments to new product variants, it appears quite unlikely that the AB would consider the downgrading of GATS commitments in PTAs from a different perspective.

Overall, the situation looks quite satisfactory. Virtually all relevant studies confirm the existence of significant improvements of PTA commitments compared to the participants’ GATS schedules and the offers they had submitted in the UR.<sup>98</sup> While the commitments do not necessarily entail liberalizing elements compared to the actually applied regimes,<sup>99</sup> they might provide the respective treaty partners at least with access guarantees beyond what they are entitled to under the GATS.

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<sup>94</sup> These requirements have led to some interpretational difficulties. For instance, according to Hoekman and Mavroidis, “service PTAs must provide for the absence or elimination of substantially all measures violating national treatment *in sectors where specific commitments were made in GATS* at the entry into force of the agreement or within a reasonable time frame”(emphasis added). Yet, the link with existing GATS commitments does not really exist. See Bernard M. Hoekman & Petros C. Mavroidis, *WTO ‘à la carte’ or ‘menu du jour’? Assessing the Case for More Plurilateral Agreements*, 26(2) EUR. J. INT’L L. 319, 323 (2015).

<sup>95</sup> GATS, *supra* note 40, at fn 1.

<sup>96</sup> *Canada — Autos*, *supra* note 38.

<sup>97</sup> *China — Audiovisual Products*, *supra* note 799, ¶ 394.

<sup>98</sup> See e.g., Martin Roy, *Services Commitments in Preferential Trade Agreements: Surveying the Empirical Landscape*, in Sauvé & Shingal, *supra* note 91, at 15-31. The underlying dataset covers fifty-three WTO Members and sixty-seven PTAs.

<sup>99</sup> According to Hoekman and Mattoo, “very little progress has been made to date in the WTO either to expand the coverage of services disciplines much beyond what was

A full assessment of PTAs would also need to include a second variant of GATS-plus entries that have moved to the forefront in recent years: improvements in regulatory transparency as well as other cross-cutting disciplines concerning access to and participation in services markets (independence of the agencies involved, timeframes for processing applications, possibility to comment on regulatory changes, recognition of equivalent foreign standards, acceptance of international data flows, etc.).<sup>100</sup> In particular, PTAs might be viewed as an opportunity to address legal uncertainties related to the proliferation of modern information and communication technologies, which were still in their infancy in the early days of the GATS.<sup>101</sup>

Unfortunately, this is not the complete picture. There are also various cases of GATS-minus commitments, i.e. of PTA commitments falling below their counterparts in the respective Members' GATS schedule. The reference in Article V (Economic Integration) to Article XXI (Modification of Schedules) and, thus, to the potential need to re-negotiate affected GATS commitments, has been widely ignored in this context.<sup>102</sup> Similarly, while various PTAs have built upon and clarified definitions and framework provisions contained in the GATS, they also contain GATS-alien elements. This includes, for example, the national-treatment standard used in a significant number of PTAs.

Somewhat surprisingly, such departures from relevant treaty provisions, and their possible legal implications, have attracted little attention, if any, in many

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negotiated in the Uruguay Round in 1994 or to generate any real liberalization of services markets. The same is true for most preferential trade agreements (PTAs): despite the proliferation of regional agreements covering services trade, most do relatively little to open services markets<sup>7</sup>. See Bernard Hoekman & Aaditya Mattoo, *Liberalizing Trade in Services: Lessons from Regional and WTO Negotiations* (EUR. U. INST., EUI Working Paper RSCAS 2013/34, 2013), <http://cadmus.eui.eu/handle/1814/27061> [hereinafter Hoekman & Mattoo (2013)].

<sup>100</sup> See e.g., *World Trade Report 2019*, *supra* note 14, at 179.

<sup>101</sup> Hodson, for example, argues that PTAs such as the CPTPP significantly improve on existing GATS disciplines, striking an appropriate balance between trade interests and regulatory concerns, see Susannah Hodson, *Applying WTO and FTA Disciplines to Data Localization Measures*, 18(4) WORLD TRADE REV. 579 (2019). See also Nigel Cory & Robert D. Atkinson, *Financial Data Does Not Need or Deserve Special Treatment in Trade Agreements*, INFO. TECH. & INNOVATION FOUND (April, 2016), <http://www2.itif.org/2016-financial-data-trade-deals.pdf>.

<sup>102</sup> Pursuant to Article V:5, if in the conclusion, enlargement or significant modification of a PTA a Member intends to withdraw or modify a specific commitment inconsistently with its GATS schedule, the respective procedures of Article XXI apply (i.e. notification of the intention to modify, negotiation of compensation with affected Members, implementation of the negotiating outcome or, if invoked, the findings of arbitration).

publications dealing with preferential trade agreements in services.<sup>103</sup> By the same token, while the tendency towards regulatory cooperation tends to be positively acknowledged, little heed is given to the disciplines of Article VII (Recognition) that might come into play (*see part II D*). Reports comparing actual trading conditions with WTO-committed regimes and/or measuring the ‘progress’ made under PTAs should therefore be taken with a pinch of salt.

## 2. GATS-Minus Commitments

A study of PTA-scheduled regimes which took all options into account, including the deterioration of existing GATS-commitments, identified quite a significant number of such cases.<sup>104</sup> Among the fifty six treaties reviewed about ten years ago, only eight did not comprise any minus-commitments from either party.<sup>105</sup> Of these, five PTAs involved the European Union: agreement with Iceland and Norway on the European Economic Area as well as agreements with Albania, Croatia, FYROM (now: North Macedonia), and Mexico.<sup>106</sup> No more than one-third of a sample of agreements that was subjected to more detailed analysis did contain third-party MFN clauses that would be directly applicable and ensure the prevalence of more liberal UR commitments and of any GATS-scheduled improvements over time.

What is the legal impact of such minus-entries and to what extent, if any, may Members be allowed to fall below the levels of their WTO-scheduled commitments? Could it be argued, for example, that what ultimately matters are not the minus-commitments inscribed in a few sectors, but the overall balance of plus-and minus-elements across a PTA’s schedule?<sup>107</sup>

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<sup>103</sup> For e.g., the WTO Secretariat’s *World Trade Report 2019*, *supra* note 14, discussing the future of services trade, covers both variants of GATS-plus entries at some level of detail. In contrast, the existence of GATS-minus commitments is briefly mentioned in a footnote only, and cases of what might be called GATS-alien framework provisions are not brought up at all.

<sup>104</sup> See Sébastien Miroudot et al., *Multilateralising Regionalism: How Preferential are Services Commitments in Regional Trade Agreements?* (OECD TRADE POL’Y, Working Paper No. 106, TAD/TC/WP (2010) 18/FINAL, 2010) [hereinafter Miroudot et al.].

<sup>105</sup> *Id.*; See also Adlung & Mamdouh, *supra* note 30.

<sup>106</sup> Miroudot et al., *supra* note 104.

<sup>107</sup> For example, concerning certain minus-provisions in its Comprehensive Economic Cooperation Agreement (CECA) with Singapore, India stated that the respective commitments ‘are not intended to prejudge India’s commitments under the GATS’. As India had bound more sectors under CECA ‘in that respect, greater market access and national treatment commitments were gained’, see Committee on Regional Trade Agreements, *Questions and Replies, Comprehensive Economic Cooperation Agreement Between India and Singapore*, WTO Doc. WT/REG228/2, 11 (Sept. 15, 2008).

There is one potentially relevant dispute ruling, *Peru — Agricultural Products*, that deals with the relevance of PTAs as defences in WTO cases.<sup>108</sup> Yet, the AB dismissed the possibility that PTAs could be used to modify existing treaty provisions — in this case: GATT commitments — between the parties. (Both the GATT and the GATS provide that the respective schedules form an integral part of the Agreement.) According to the AB, a PTA does not constitute a subsequent agreement regarding the interpretation of WTO provisions within the meaning of Article 31:3(a) of the Vienna Convention on the Law of Treaties (VCLT). The AB also posited that a PTA would not be subject to Article 41 VCLT governing modifications of multilateral treaties between certain parties, but to the specific provisions in GATT Article XXIV dealing with free trade areas and customs unions.<sup>109</sup> Moreover, even if Article 41 were applicable, there is an additional snag in a trade-in-services context: pursuant to Article 41:1(b)(i), a multilateral treaty could be modified between some of the parties only if this “does not affect the enjoyment by the other parties of their rights under the treaty”. However, given the GATS’ broad modal coverage, extending to the commercial presence of foreign suppliers, such effects are virtually inevitable.

PTA signatories thus have a solid basis to insist that their co-signatories comply with relevant WTO disciplines, regardless of any departing PTA provisions. Nonetheless, *Peru — Agricultural Products* could prove of limited political relevance insofar as potential claimants might hesitate to admit, implicitly at least, that they had not carefully assessed a draft agreement before signing it. Moreover, there might be PTAs where the insertion of WTO-minus elements has been tacitly accepted by all parties with a view to addressing policy concerns that have arisen since the GATS’ entry into force.<sup>110</sup>

But what about third countries? Non-parties might use the existence of minus-elements to challenge a PTA’s compliance with relevant WTO provisions, i.e. GATS Article V as far as services are concerned. They could insist either on the removal or the multilateralization of any WTO-plus benefits.

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<sup>108</sup> *Peru — Agricultural Products*, *supra* note 25.

<sup>109</sup> Rudolf Adlung, *The Trade in Services Agreement (TISA) and Its Compatibility with GATS: An Assessment Based on Current Evidence*, 14(4) WORLD TRADE REV. 617, 622 (2015).

<sup>110</sup> Interestingly, according to Porges, the US challenged a Canadian excise tax on split-run magazines in the WTO rather than under NAFTA because the latter features a WTO-minus exception for measures affecting cultural industries, see Amy Porges, *Designing Common but Differentiated Rules for Regional Trade Disputes*, INT’L CENT. TRADE & SUSTAINABLE DEV. & INTER-AM. DEV. BANK: RTA EXCHANGE, 5, (May, 2018), <https://e15initiative.org/publications/designing-common-but-differentiated-rules-for-regional-trade-disputes>.



It is true that the likelihood of such third-party challenges appears low at present for various reasons, including the modest liberalization effects of many current PTAs.<sup>111</sup> Nevertheless, this is an overly pragmatic perspective that does not necessarily apply to more recent, increasingly comprehensive and ambitious agreements. Moreover, there are indications that the frequency of GATS-minus elements has not subsided over time, rather the contrary. According to the dataset used by Adlung and Miroudot, the share of GATS-minus commitments in the PTAs concluded before 2005 is lower (3.6%) than in the agreements concluded during the six following years (4%).<sup>112</sup>

One way of reducing the scope for complaints could consist of exempting certain types of measures, which are particularly vulnerable to minus-commitments, from relevant WTO disciplines. For example, Members might seek to exclude subsidies in some socially or economically sensitive service sectors from the NT obligation. (Note that some three-quarters of the PTAs covered by a sample of sixty six agreements contained GATS-minus commitments for subsidies.)<sup>113</sup> Cases in point include the cross-border provision and/or consumption abroad of health, social or education services, which might be exempted from domestic support schemes. Unfortunately, however, given a widespread sense of apathy among Members, it appears unrealistic to expect relevant initiatives to be launched any time soon.

### 3. Other Departures from GATS Provisions

As alluded to before, GATS-minus commitments are not the only deviation from the Agreement's definitions and disciplines. Quite a number of PTAs feature what might be called GATS-alien framework provisions.<sup>114</sup> The most obvious cases are variations of the NT standard enshrined in GATS Article V:1. The Article requires the PTA parties to extend NT 'in the sense of Article XVII', i.e. to ensure non-discrimination between foreign and *like* domestic services and service suppliers. Possibly inspired by provisions used in many investment treaties, about one-half of

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<sup>111</sup> See e.g., Hoekman & Mattoo (2013), *supra* note 99.

<sup>112</sup> By the way, though frequently disregarded as well, similar types of minus-commitments also exist in GATT-based PTAs. Among a set of 240-odd PTAs, 44% were found to exempt certain sectors or products from the GATT's general ban on export restrictions. See Weiwei Zhang, *Tracing GATT-Minus Provisions on Export Restrictions in Regional Trade Agreements*, 11(3) GLOBAL TRADE & CUSTOMS J. 122 (2016).

<sup>113</sup> Adlung & Miroudot, *supra* note 32, at 1061.

<sup>114</sup> Rudolf Adlung, *WTO/GATS-Alien Framework Provisions in RTAs - A Closer Look*, WORLD TRADE REV. 1 (2019) [hereinafter Adlung (2019)].

the hundred agreements most recently notified to the WTO rather refer to non-discrimination between services and service suppliers in *like circumstances*.<sup>115</sup>

The Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada even introduces a further variant, referring to non-discrimination between services and service suppliers in *like situations*.<sup>116</sup> In turn, this implies that Canada is committed to three versions of the NT concept, one under GATS, one under NAFTA/USMCA and a handful of other PTAs, and one under CETA. And this is by no means CETA's only departure from GATS-based framework provisions. Further cases include the Agreement's prudential carve-out for financial services, definition of 'new financial services', and scope of regulatory disciplines, in particular their application to technical standards.<sup>117</sup>

Also, like most other PTAs, CETA's regulatory disciplines lack a necessity clause as contained in GATS Article VI:4(b) which, pursuant to Article VI:5(a), is already applicable on a rudimentary basis. (As long as the mandated negotiations on regulatory disciplines are underway, Members are prohibited in scheduled sectors from applying licensing and qualification requirements and technical standards that nullify or impair existing commitments in a manner which, inter alia, is 'more burdensome than necessary to ensure the quality of the service', and could not reasonably have been expected at the time the commitments were made.) According to a recent overview, necessity tests of various types feature in less than one-fifth of current PTAs.<sup>118</sup>

To the author's knowledge, there has not yet been any focused discussion of such variations in WTO fora. Yet, it would definitely be interesting to get the views of the governments involved on their meaning, underlying rationale and, in particular, compatibility with relevant GATS provisions.

#### 4. Additional Considerations

To a certain extent, PTAs fill a vacuum in dealing with newly emerging issues, relating particularly to digital trade (privacy, security, and localization of data), competition rules and the activities of State-owned enterprises. As noted by Janow and Mavroidis, the world trading system has shown "a remarkable inability to

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<sup>115</sup> For a detailed analysis of various concepts of likeness as used in trade agreements, see NICOLAS D. DIEBOLD, *NON-DISCRIMINATION IN INTERNATIONAL TRADE IN SERVICES* (2010).

<sup>116</sup> For an overview of the NT standards in some major PTAs, see Adlung (2019), *supra* note 114, at 3.

<sup>117</sup> See *id.*, at 9.

<sup>118</sup> World Trade Report 2019, *supra* note 14, at 179.

adjust to new business realities in its multilateral rules architecture".<sup>119</sup> In contrast, PTAs are frequently credited for providing a forum for regulatory innovation and cooperation. A typical case is e-commerce. Absent any tangible moves at the WTO over many years, approximately one-half of Members meanwhile participate in at least one PTA with relevant provisions.<sup>120</sup> However, there are also downsides to such initiatives, including stronger politicization of the negotiating process and increased fragmentation of trading conditions. Typically, there are no provisions comparable to Article VII:2 (Recognition) which would allow non-parties, if confident that their trade and regulatory regimes are comparable to those of participants, to knock at the door and seek membership.

What happened in recent years is a gradual proliferation of larger-scale agreements within and between regions.<sup>121</sup> Possibly the most impressive manifestations of this trend are the Comprehensive and Progressive Agreement on Trans-Pacific Partnership (CPTPP) between Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore and Vietnam as well as the proposed Regional Comprehensive Economic Partnership (RCEP) between the ten ASEAN members and Australia, China, Japan, Korea and New Zealand.<sup>122</sup> Yet, the country coverage of individual initiatives might well overlap, at the expense of consistency, and there are few, if any, initiatives to bridge gaps between PTAs and/or to ensure their compliance with relevant GATS conditions and definitions. And even if everything could be brought into line, there is still the challenge of preventing the same provisions, if contained in different agreements, from being interpreted in different ways.

The impact of a significant number of agreements could be affected by the absence of an independent and effective dispute-settlement mechanism (DSM) that applies across the full range of the issues covered. According to a review of 226 trade agreements by Chase et al., 30% provided only for what was called a political dispute-settlement model, 65% for a quasi-judicial model, and just 5% for a judicial

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<sup>119</sup> Merit E. Janow & Petros C. Mavroidis, *Digital Trade, E-commerce, the WTO and Regional Frameworks*, 18(S1) WORLD TRADE REV., 51 (2019); In a similar vein: Pierre Sauvé, *To Fuse, Not to Fuse, or Simply Confuse? Assessing the Case for Normative Convergence Between Goods and Services Trade Law*, 22(3) J. INT'L ECON. L. 355 (2019).

<sup>120</sup> Mark Wu, *Digital Trade-Related Provisions in Regional Trade Agreements: Existing Models and Lessons for the Multilateral Trade System*, INT'L CENT. TRADE & SUSTAINABLE DEV. & INTER-AM. DEV. BANK: RTA EXCHANGE, 7 (Nov. 2017), <http://e15initiative.org/wp-content/uploads/2015/09/RTA-Exchange-Digital-Trade-Mark-Wu-Final-2.pdf>. As regards recent attempts to advance the e-commerce agenda in the wake of the WTO's Eleventh Ministerial Conference, see ICTSD (2018), *infra* note 1433.

<sup>121</sup> See also Stephenson & Robert, *supra* note 31.

<sup>122</sup> *Id.*

model.<sup>123</sup> With this in view, it has been proposed to open and transform the WTO's DSM into sort of 'trade court for the world'. Starting point could be a plurilateral initiative among like-minded countries.<sup>124</sup> However, in current circumstances, there may be more urgent issues for Members to address.

While the recent tide of PTAs may have contributed to increasing diversity in the trading system, it needs to be acknowledged that there has been a harmonizing element as well: quite a number of recent PTAs provide for greater cross-sectoral uniformity in their treatment of merchandise and services trade. Following the NAFTA model, agreements such as CPTPP, CETA as well as draft versions of RCEP contain separate chapters on investment and, as far as covered, entry of persons which apply cross the full sector range. Since many international production chains combine manufacturing- and services-related elements, at different stages, an integrated system matters. The borderline between the two spheres is blurred in any event, keeping in mind that 'services incidental to manufacturing' (contract manufacturing) show up in the Services Sectoral Classification List generally used for scheduling purposes (WTO Doc.MTN.GNS/W/120) and have drawn commitments from close to thirty Members.<sup>125</sup> And what about the classification status of 3D printing and ...?

Doubts have been raised, nevertheless, whether the removal of mode 3 commitments from the services chapter of a PTA could amount to an exclusion of this mode, in contravention of the respective footnote to Article V:1 (*see part IV A(i)*).<sup>126</sup> However, such concerns might be exaggerated as long as the investment chapter fills the gap. But is this actually the case? The respective definitions, 'investment' (PTA) versus 'commercial presence' (GATS), certainly deserve further

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<sup>123</sup> Classified under the political model were PTAs that (i) had no dispute-settlement provisions at all, (ii) allowed only for negotiations among the parties or the involvement of a political body, or (iii) provided for independent adjudication while permitting parties to veto a dispute's referral to adjudicator. *See* Claude Chase et al., *Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements – Innovative or Variations on a Theme?*, 11f (WTO Staff Working Paper, ERSD-2013-07, 2013).

<sup>124</sup> Henry Gao, *The WTO Dispute Settlement Mechanism: A Trade Court for the World*, INT'L CENT. TRADE & SUSTAINABLE DEV. & INTER-AM. DEV. BANK: RTA EXCHANGE (MAY 2018), [www.ictsd.org/themes/global-economic-governance/research/the-wto-dispute-settlement-mechanism-a-tradecourt-for](http://www.ictsd.org/themes/global-economic-governance/research/the-wto-dispute-settlement-mechanism-a-tradecourt-for).

<sup>125</sup> *See* Rudolf Adlung & Weiwei Zhang, *Trade Disciplines with a Trapdoor: Contract Manufacturing*, 16(2) J. INT'L ECON. L. 383, 390 (2013).

<sup>126</sup> CHARLOTTE SIEBER-GASSER, *DEVELOPING COUNTRIES AND PREFERENTIAL SERVICES TRADE* 141 (2016). Yet, the respective obligation is couched in softer terms ('should not provide for the *a priori* exclusion of any mode') than most other stipulations in the Agreement ('shall not').

attention in this context.<sup>127</sup> Yet, there is another, possibly more pressing concern: the continued proliferation of bilateral investment treaties (BITs) which could render the mode 3/investment chapters of PTAs largely redundant.<sup>128</sup>

*B. Bilateral Investment Treaties (BITs)*

BITs are essentially intended to promote and protect foreign direct investment. The treaties typically guard against uncompensated expropriation, establish a range of good-governance provisions and extend NT on a post-establishment basis across virtually all sectors, from farming to mining, manufacturing and services. The ‘liberalization treaties’ signed by the United States even extend NT on a pre-establishment basis, subject to certain sector exclusions.<sup>129</sup>

As far as services are concerned, it is obvious, though frequently ignored, that BITs overlap with mode 3-related obligations and commitments under the GATS. In the absence of relevant exemptions, the respective obligations are thus subject to the MFN clause of GATS Article II (*part II D*).<sup>130</sup>

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<sup>127</sup> As already indicated, ‘commercial presence’ in Article XXVIII(d) is defined to mean ‘any type of business or professional establishment, including through (i) the constitution, acquisition or maintenance of a juridical person, or (ii) the creation or maintenance of a branch or representative office, ...’. In turn, the definition of investment in some recent PTAs tends to be more closely circumscribed. According to CETA, Article 8.1, it means ‘every kind of *asset* that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, which includes a certain duration and other characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk...’ (emphasis added). CPTPP’s definition of investment is very similar. However, the scope of cross-border trade, while excluding supplies by a covered investment, is defined to extend, *inter alia*, to services supplied ‘by a national of a Party in the territory of another Party’ (Article 10.1). NAFTA’s chapter on cross-border trade in services features a comparable extension to measures respecting ‘the presence in its [i.e. the Party’s] territory of a service provider of another Party’ (Article 1201:1(d)).

<sup>128</sup> E.g., Chaisse expects that no investment claims will be made under RCEP as frustrated investors will continue to rely on existing BITs to pursue their interests and challenge host-country policies. (The fifteen current RCEP members have concluded close to seven hundred BITs.) See Julien Chaisse, *The Regional Comprehensive Economic Partnership’s Investment Chapter: One Step Forward, Two Steps Back?*, COLUM. CENT. SUSTAINABLE DEV.: COLUMBIA FDI PERSPECTIVES, No. 271 (Feb. 10, 2020), <http://ccsi.columbia.edu/files/2018/10/No-271-Chaisse-FINAL.pdf>.

<sup>129</sup> *Id.*

<sup>130</sup> See e.g., MARTIN MOLINUEVO, PROTECTING INVESTMENT IN SERVICES – INVESTOR-STATE ARBITRATION VERSUS WTO DISPUTE SETTLEMENT (2012); Rudolf Adlung, *International Rules Governing Foreign Direct Investment in Services: Investment Treaties versus the GATS*, 17 J. WORLD INV.& TRADE 47, 67f (2016) [hereinafter Adlung (2016)]; Federico Ortino, *The Principle of Non-Discrimination and its Exceptions in GATS: Selected Legal Issues, in*

While there may be variations in individual cases, the treaties promoted by the ‘major players’, i.e. China, Germany, Switzerland and the United Kingdom, which have each signed over a hundred BITs, are largely symmetrical in sector and policy coverage.<sup>131</sup> They are thus far more uniform than the GATS commitments of the respective partners, mostly DCs. This is also true, to a certain extent, for the forty-odd liberalization treaties concluded by the US. While the co-signatories included between 55% and 100% of the ‘services universe’ in these treaties (average: 83%), the sector coverage of their GATS schedules varies between 2% and 94% (average 40%). Among the countries covered are five LDCs (Bangladesh, Democratic Republic of Congo, Mozambique, Rwanda and Senegal).<sup>132</sup>

Between 1995 and end-2018, some 720 disputes were raised by affected foreign investors under the investor-state dispute settlement (ISDS) provisions of BITs. An additional 220-odd investment disputes were dealt with under other treaties, including the Energy Charter Treaty (some 120 cases) and a few PTAs, including in particular NAFTA (sixty three cases).<sup>133</sup> About two-thirds of these cases concerned the tertiary sector.<sup>134</sup> As noted before (*see part I*), over the same period less than thirty disputes launched in the WTO referred to the GATS among the agreements concerned. Truly a sleeping beauty...

BITs are particularly attractive from an investor’s perspective since they are directly enforceable, without a ‘government filter’, and offer the possibility of monetary compensation for the damages suffered. And the respective amounts could be quite significant.<sup>135</sup> (In contrast, a WTO dispute ruling would call upon the

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THE WORLD TRADE ORGANIZATION AND TRADE IN SERVICES 173, 201 (Mads Andenas & Kern Alexander eds., 2007).

<sup>131</sup> Adlung (2016), *supra* note 130, at 56.

<sup>132</sup> *See id.*, at 76.

<sup>133</sup> Concerning the role of DSM in PTAs, see Robert McDougall, *Regional Trade Agreement Dispute Settlement Mechanisms: Modes, Challenges and Options for Effective Dispute Resolution*, INT’L CENT. TRADE & SUSTAINABLE DEV. & INTER-AM. DEV. BANK: RTA EXCHANGE (Apr., 2018), <http://e15initiative.org/wp-content/uploads/2015/09/Regional-Dispute-Settlement-Mechanisms-Robert-McDougall-RTA-Exchange-Final.pdf>.

<sup>134</sup> Overall, over six hundred cases had been concluded at the time of writing; some 35% in favour of the State and close to 30% in favour of the investor. Most of the remaining cases were discontinued or settled between the parties. *See Investment Dispute Settlement Navigator*, U.N. CONF. TRADE & DEV.: INV. POL’Y HUB, <https://investmentpolicy.unctad.org/investment-dispute-settlement>.

<sup>135</sup> For example, a tribunal at the International Centre for Settlement of Investment Disputes (ICSID) recently ordered Pakistan’s government to pay US\$5.84 billion in compensation to an Australian mining company. According to the tribunal, the government had denied the company’s licence to operate in breach of a BIT. The award amounts to around 2% of Pakistan’s GDP. *See Zoneroy v. Central Power Purchasing*

respondent Member to bring the disputed measure into conformity with its WTO obligations and, in the absence of compliance, could ultimately lead to the suspension of concessions or other obligations.) By the same token, the perceived dominance of commercial investor interests over other considerations, including the promotion of sustainable development goals, has drawn quite a number of critical comments in recent years.<sup>136</sup> Reform proposals are discussed in UNCTAD and other relevant fora.<sup>137</sup>

The relationship between BITs and GATS raises several questions. While virtually all WTO Members have signed BITs, less than twenty have listed MFN exemptions for these treaties.<sup>138</sup> The propensity to seek such exemptions has clearly increased over time. Among the ten most recent accessions to the WTO, seven have listed such exemptions, starting with Russia in August, 2012. Why not everybody? Have others not seen a need to avoid potential tensions? In any event, since BITs apply to one mode of supply only, commercial presence (mode 3), they would not qualify as PTAs, and thus be exempt from the MFN obligation pursuant to Article V. In contrast, the benefits extended under GATS-consistent PTAs would remain confined in scope to the respective parties.

It appears that MFN exemptions could only provide cover for BITs that already existed at the time of the WTO's entry into force (date of ratification in the case of new Members). As indicated before (*see part II D(i)*), pursuant to GATS Article II:2, a Member may *maintain* an MFN-inconsistent measure provided it had been listed in, and meets the conditions of, the respective Annex on Article II Exemptions. Yet, the vast majority of BITs, over 70%, was signed only after January 1995.<sup>139</sup> Nevertheless, to the author's knowledge, there have been no attempts to date to enforce BIT-based benefits, including the extension of NT to third-country suppliers, in a WTO context. Yet, past discussions in WTO fora, in the context of

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Agency (of Pakistan), LONDON CT. INT'L ARB (2019), <https://www.iareporter.com/arbitration-cases/zonergy-v-central-power-purchasing-agency-of-pakistan/>.

<sup>136</sup> See e.g., Johannes Schwarzer, *Investor-State Dispute Settlement: An Anachronism Whose Time Has Gone*, COUNCIL ECON. POLICIES, POLICY BRIEF 2018/1(2018), [www.cepweb.org/wp-content/uploads/2018/09/CEP-Policy-Brief-ISDS-1.pdf](http://www.cepweb.org/wp-content/uploads/2018/09/CEP-Policy-Brief-ISDS-1.pdf).

<sup>137</sup> UNCTAD, *Investment Policy Framework for Sustainable Development*, U.N. CONF. TRADE & DEV. (2015), [https://unctad.org/en/PublicationsLibrary/diaepcb2015d5\\_en.pdf](https://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf); for a brief overview of reform initiatives and the underlying motives, see Karl P. Sauvant, *Promoting Sustainable FDI through International Investment Agreements*, COLUM. CENT. SUSTAINABLE DEV.: COLUMBIA FDI PERSPECTIVES, No. 251 (May, 2019), <http://ccsi.columbia.edu/files/2018/10/No-251-Sauvant-FINAL.pdf>.

<sup>138</sup> Adlung (2016), *supra* note 130.

<sup>139</sup> *International Investment Agreements Navigator*, U.N. CONF. TRADE & DEV.: INV. POL'Y HUB, <https://investmentpolicy.unctad.org/international-investment-agreements>.

the mandated reviews of MFN exemptions, indicate that the relevance of Article II for investment treaties is widely accepted at least among the services negotiators who meet in Geneva. The main issue that has remained unresolved, it appears, is the multilateralization of the treaties' Investor-State arbitration mechanisms.<sup>140</sup>

## V. CONCLUDING REMARKS

The existing pattern of trade rules and commitments in services, viewed through the lens of GATS, looks rather unsettled. There are various interpretational uncertainties, obvious problems of compliance, and a range of open negotiating mandates —twenty-five years after the Agreement's entry into force. A yet-to-do list would include, *inter alia*, initiatives to phase-out current MFN exemptions, ensure the GATS-compatibility of PTAs and BITs, explore the relationship between Articles V (Economic Integration) and VII (Recognition), correct legally dubious entries in schedules, specify the content of ENTs, improve observance of relevant transparency obligations, consider the implications of e-trade, and follow up on the rules-related negotiations beyond those on domestic regulation. And last but not least, the Agreement's liberalizing mission, as proclaimed in the Preamble and further specified in Article XIX:1, remains to be heeded.

The fact that very little, if anything, has been achieved on most of these issues may be blamed on a variety of factors. These certainly include the (relative) novelty of the Agreement; a sense of frustration over the fate of the DDA; country-internal communication and coordination problems; shortage of experienced trade negotiators (in Geneva and in capitals); availability of regional or bilateral treaty alternatives; and the existence of what has been called a 'co-operative equilibrium' between governments in tolerating disparate treaty interpretations.<sup>141</sup> Finally, the general negotiating climate appears to have changed —long-term supporters of the system have adopted a more sceptical, even hostile position.

If there are positive signs of movement in services, at last, this consist of attempts to (a) conclude the negotiations on domestic regulation and, thus, live up to at least one of the GATS-enshrined negotiating mandates,<sup>142</sup> and (b) breathe fresh life into the Work Programme on Electronic Commerce that the General Council had adopted some two decades ago.<sup>143</sup> In January, 2019, building on a Joint Statement of interested Members at the WTO's Eleventh Ministerial Conference, forty nine delegations (including China, the EU, Japan and the US) confirmed their intention "to commence WTO negotiations on trade-related aspects of electronic commerce ... with the participation of as many WTO Members as possible".<sup>144</sup> However, given the diversity of interests involved, compounded by a general lack of mutual

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<sup>140</sup> See Adlung (2016), *supra* note 130, at 70.



trust, it remains open, in either area, whether a substantially meaningful outcome could ultimately be achieved.

The same is true for ongoing discussions on a framework for ‘Investment Facilitation for Development’, launched under another Statement at the Eleventh Ministerial Conference.<sup>145</sup> In any event, there will be no attempts in this context to bridge the gap in scope and coverage between GATS and GATT; market access issues are explicitly excluded from the mandate.<sup>146</sup>

Nonetheless, despite the doldrums, a strong majority among the ‘mainstream’ Members certainly wants to keep the WTO alive and functioning, both for economic and wider (geo-)political reasons. Smaller countries, in particular, have no comparable forum to express and defend their economic interests (almost) at par with the ‘heavyweights’.<sup>147</sup> In turn, this has certainly motivated new accessions in the aftermath of the UR. Yet, the growing number of Members and their increasing diversity (with the accession of China, Chinese Taipei, Russia, etc.),

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<sup>141</sup> Andrew D. Mitchell & Nicolas J.S. Lockart, *Legal Requirements for PTAs under the WTO*, in *BILATERAL AND REGIONAL TRADE AGREEMENTS - COMMENTARY AND ANALYSIS* (Simon Lester et al. eds., 2015).

<sup>142</sup> See Joint Statement on Services Domestic Regulation, *supra* note 24; See also, Hoekman & Mavroidis (2016), in Sauv e and Roy, *supra* note 7, 243-267; ICTSD, *supra* note 67.

<sup>143</sup> Under the Work Programme, the Councils for Trade in Services and Trade in Goods, the Council for TRIPS and the Committee for Trade and Development are called upon ‘to examine all trade-related issues relating to global economic commerce’. See *Work Programme on Electronic Commerce*, WTO Doc. WT/L/274 (Sept. 30, 1998); for an overview of the negotiating history, see ICTSD, *Updating the Multilateral Rule Book on E-Commerce*, INT’L CENT. TRADE & SUSTAINABLE DEV.: POLICY BRIEF (Mar., 2018), [https://www.ictsd.org/sites/default/files/research/electronic\\_commerce\\_negotiations-ictsd\\_policy\\_brief\\_2018.pdf](https://www.ictsd.org/sites/default/files/research/electronic_commerce_negotiations-ictsd_policy_brief_2018.pdf) [hereinafter ICTSD (2018)].

<sup>144</sup> *Joint Statement on Electronic Commerce*, WTO Doc. WT/L/1056 (Jan. 25, 2019) (India and South Africa were the only larger Members to remain on the side-lines); For an assessment of the prospects, see Gary Clyde Hufbauer & Zhiyao (Lucy) Lu, *Global Talks Stumble on Data Issues, Privacy, and More*, PETERSON INST. INT’L ECON., PIIE POLICY BRIEF 19-14 (Oct., 2019), <https://www.piie.com/sites/default/files/documents/pb19-14.pdf> (pointing in particular to large differences, in the US’, EU’s and China’s position on key issues such as data flows, data localization requirements, privacy protection, transfers of source codes, customs duties, internet taxes and internet censorship).

<sup>145</sup> *Joint Ministerial Statement on Investment Facilitation for Development*, WTO Doc. WT/L/1072/Rev.1 (Nov. 22, 2019) (the Statement was endorsed by some 70 Members, counting the EU as one; India and the US remained behind the side-lines).

<sup>146</sup> Also excluded are investment protection and ISDS.

<sup>147</sup> See e.g., Eveline Herfkens, *Lost in a Spaghetti Bowl? Mega-regional Trade Agreements, Sub-Saharan Africa and the Future of the WTO*, FRIEDRICH-EBERT-STIFTUNG - DIALOGUE ON GLOBALIZATION (Mar., 2016), <https://library.fes.de/pdf-files/iez/global/12382.pdf>.

coincided with the vanishing status of a long-time hegemon and key driving force, the United States.

The United States' initial approach to international economic affairs, post-World War II, was motivated by a value-driven preference for open markets and equal competitive opportunities. Cordell Hull, the then US Secretary of State, was among the main protagonists.<sup>148</sup> In the earlier days of the GATT, this general policy stance was reflected in somewhat diffuse expectations of a balanced outcome, across sectors and participants, to the mutual benefit. Over time, these expectations have gradually given way to more specific claims of reciprocity, culminating in final stages of the UR.<sup>149</sup>

Yet, while the United States initially refused to subscribe to MFN-based deals on basic telecommunication and on financial services, dissatisfied with the modest offers that others had put on the table, the resulting prolongation ultimately led to fairly ambitious commitments. This was done via Protocols that provided for the entry into force of the negotiated changes once these were ratified by all participants within the agreed timeframe.<sup>150</sup> (Otherwise, in case of delays, the 'ratifying Members' were to meet and decide on how to proceed.)<sup>151</sup> Obviously, though certainly not the most striking beauty within the WTO's remit, the GATS obviously provided a suitable basis for a 'critical mass' of governments to move ahead. However, this is history, and there have been few similar achievements over the past twenty years.

During certain stages of the DDA, in particular at a Mini-Ministerial in July, 2008, core groups of Members, including the US, EU, India, China and Japan, came close to agreeing on what they considered to be a fairly satisfactory deal in services. Nevertheless, in its final hours, the meeting collapsed over disagreement in other areas, not least agriculture and non-agricultural market access (NAMA).<sup>152</sup> While there have been individual accomplishments at later stages — the acceptance of the LDC waiver for services (2011), the adoption of the Trade Facilitation Agreement for goods (2013) and the sectoral expansion of the Information Technology Agreement (2015) — the prospects of a broad-based, cross-sectoral deal have remained in the haze. Negotiating conditions, in the WTO and beyond,

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<sup>148</sup> See WTO: GATT, *supra* note 15.

<sup>149</sup> For a detailed discussion, see Anders Ahnliid, *Comparing GATT and GATS: Regime Creation Under and After Hegemony*, 3(1) REV. INT'L POL. ECON. 65 (1996).

<sup>150</sup> See Rudolf Adlung & Hamid Mamdouh, *Plurilateral Trade Agreements: An Escape Route for the WTO?*, 52(1) J. WORLD TRADE 85 (2018).

<sup>151</sup> *Id.*

<sup>152</sup> See Robert Wolfe, *Sprinting During a Marathon: Why the WTO Ministerial Meeting Failed in July 2008*, 44(1) J. WORLD TRADE 81 (2010); Robert Wolfe, *First Diagnose, Then Treat: What Ails the Doha Round?*, 14(1) WORLD TRADE REV. 7 (2015).

further deteriorated in recent years, not least between the US and China, with nobody else being able or willing to fill a widening leadership gap.<sup>153</sup>

Given a prevailing sense of paralysis in Geneva, many national policy agendas remain dominated by the perceived need to conclude PTAs with other Members. Relevant initiatives might be viewed from different angles, as indicated before. On the one hand, PTAs can serve as fora to remove restrictions, modernize regulatory systems and develop common positions among participants on the need for, and shape of, government involvement. And this is particularly relevant in services, for obvious reasons. On the other hand, regional agreements might further weaken the interest in, and support for, multilateral initiatives. Their proliferation could ultimately lead to a glut of mutually incompatible regimes — in services beset with GATS-minus commitments and GATS-alien framework provisions — that defy future integration.

MFN-based plurilateral agreements (PAs), implemented on a critical mass basis among key players, might help to attenuate such concerns. Supporting open plurilateralism also features among the proposals, recently submitted by an independent expert group, on how ‘*friends of the multilateral system*’ could revitalize the WTO. (Other proposals: promoting policy dialogue among Members, enhancing the Secretariat’s role to provide inputs, and reviewing the WTO’s institutional performance.)<sup>154</sup> But are there still enough ‘*friends*’ around? Can it realistically be assumed that large groups of Members, including the US, EU, China, India, Japan and others, are ready to join forces and pull in the same direction?

Multilateralism is in crisis, and everybody seems to concur that the WTO is in need of reform. Unfortunately, however, there is little agreement, in concrete terms, on what must be done and who could/should take the lead. As the saying goes, “Friends in need, are friends indeed ...”

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<sup>153</sup> Charnovitz blames in particular what he calls US ‘rejectionism’ for the WTO’s paralysis: rejection of the international rule of law, rejection of open markets, rejection of economic peace, and rejection of the global interest. See Steve Charnovitz, *How American Rejectionism Undermines International Economic Law*, 10(2) TRADE L. & DEV. 226 (2018); see also Ernst-Ulrich Petersmann, *How Should WTO Members React to Their WTO Crises?*, 18(3) WORLD TRADE REV. 503 (2019).

<sup>154</sup> Report of the High-Level Board of Experts, *Revitalizing Multilateral Governance at the World Trade Organization*, BERTELSMANN STIFTUNG: GLOBAL ECON. DYNAMICS TEAM (2018), [https://www.wto.org/english/news\\_e/news18\\_e/bertelsmann\\_rpt\\_e.pdf](https://www.wto.org/english/news_e/news18_e/bertelsmann_rpt_e.pdf).

**Table A1: Taxonomy of GATS provisions allowing for departures from MFN treatment\*\***

	<b>MFN Exemptions (Article II:2)</b>	<b>Preferential Trade Agreements (Article V)</b>	<b>Recognition Measures (Article VII)</b>
<b>Availability</b>	Once (date of the WTO's entry into force or ratification (acceding Members) <sup>155</sup>	At any time	
<b>Duration</b>	<i>Should not exceed 10 years in principle</i>	No constraints	
<b>Minimum coverage (sectors and modes)</b>	Undefined	Substantial sectoral coverage; no a priori exclusion of any mode	Undefined
<b>Extension to other Members</b>	No relevant obligations or constraints. <sup>156</sup>		Best endeavours (afford other Members 'adequate opportunity' to negotiate accession or demonstrate that their standards etc. should be recognized as well).
<b>Other obligations</b>	None. <sup>157</sup>	Absence of elimination of substantially all	Not to be applied as a means of

\*\* Source: Adlung & Carzaniga, *supra* note 46, at 362.

<sup>155</sup> The MFN obligation in international maritime transport has remained suspended for those Members that have not undertaken commitments in this sector, pending a successful conclusion of relevant negotiations in the Doha Round (*part II4(i)*).

<sup>156</sup> The range of Members affected by MFN exemptions essentially depends on the wording of each exemption. The GATS is silent in the regard.

<sup>157</sup> The levels of access that may be provided under specific commitments in the same sector must be respected, however.

		discrimination No increase in overall level of external trade barriers Extension of benefits to domestically established third-country suppliers. <sup>158</sup>	discrimination or a disguised restriction on trade in services
<b>Counterparts in GATT</b>	None	Article XXIV	Rudimentary [Agreement on Technical Barriers to Trade (TBT Agreement)] <sup>159</sup>
<b>Flexibility for developing countries</b>	No	Yes	No

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<sup>158</sup> This is contingent on the suppliers concerned conducting 'substantive business operations' in the territory of one of the parties (Article V:6).

<sup>159</sup> The TBT Agreement contains a best endeavors clause to 'give positive consideration to accepting as equivalent technical regulations of other Members' (Article 2.7).