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POISON IN THE WINE?
TRACING GATS-MINUS COMMITMENTS IN REGIONAL TRADE AGREEMENTS

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Mortimer Brewster: "Aunt Abby, how can I believe you?
There are twelve men down in the cellar and you admit you poisoned them."
Aunt Abby: "Yes, I did. But you don't think I'd stoop to telling a fib."

Joseph Kesselring (1939), Arsenic and Old Lace (crime/comedy, filmed in 1944).

ABSTRACT

Commitments in regional trade agreements (RTAs) that fall short of the same countries' obligations under the General Agreement on Trade in Services (GATS) are a relatively frequent phenomenon. However, they have gone widely unnoticed in the literature to date and drawn very little attention in relevant WTO fora either. Nevertheless, 'minus commitments' are potentially poisonous and, for various reasons, would deserve close attention. Given the broad definitional scope of the GATS, extending *inter alia* to commercial presence, such commitments may impinge upon the rights of third-country investors in the RTA economies. Their existence casts doubts on the legal status of the respective agreements under the GATS and can have severe implications for the trading system overall. If not complemented by comprehensive Most-favoured-Nation clauses, the RTAs concerned are disconnected from the WTO and virtually impossible to multilateralize. Based on a review of some 80,000 commitments in 66 agreements, this study seeks to develop a reasonably comprehensive picture of the frequency of 'minus commitments' and their dosage in terms of sectors, measures and modes of supply. It also discusses potential remedies from a WTO perspective.

Keywords: Trade in Services, GATS, Regionalism
JEL Classifications: F13, F15, K33, L80

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I. INTRODUCTION

Mortimer: "How did the poison get in the wine?"
Aunt Martha: "Well, we put it in wine, because it's less noticeable.
When it's in tea, it has a distinct odour."

Access commitments in regional/preferential trade agreements that do not match their multilateral /non-preferential counterparts appear like a contradiction in terms. Indeed, the authors are not aware of any such cases in merchandise trade as governed by the General Agreement on Tariffs and Trade (GATT). However, while GATT commitments and related preferential obligations are typically straightforward, focusing on cross-border supplies of goods subject to tariff protection under centralized (federal-government) regulation, the issue has gained relevance in the far more complex world of the GATS, the General Agreement on Trade in Services. Commitments in services are 'multi-dimensional'; they relate to four types of transactions (modes of supply), allow for virtually unlimited possibilities of non-tariff protection, and may need to be coordinated between many disparate ministries and agencies. The scope for inconsistencies, intentionally or otherwise, between regional and multilateral treaty obligations has thus increased significantly.

Nevertheless, despite a recent tide of publications examining regional trade agreements (RTAs) in services, there seem to be only two studies at present that deal with the phenomenon of GATS-minus commitments in some detail. One discusses the potential motivations and GATS-related implications of 'negative preferences' in regional services agreements, against the backdrop of three proto-typical cases[1], while the other provides an overview of such agreements and their respective shares of GATS-plus, GATS-equivalent, and GATS-minus commitments.[2] The latter were found to exist, to varying degrees, in 80 per cent of the 56 agreements covered. Similarly, reflecting the apparent lack of research interest, despite the potentially profound implications for the GATS and the multilateral trading system overall, the existence and implications of 'minus commitments' have been given scant attention only in competent WTO fora, including in particular the Committee on Regional Trade Agreements (CRTA). Though several of the WTO Secretariat's factual presentations of individual RTAs contain references to GATS-minus commitments (section III.B), these have not been discussed in any depth.[3]

This paper presents and analyses, from different perspectives, the patterns of 'minus commitments' as they currently exist in a sample of 66 services RTAs covered by a dataset recently developed at the OECD as part of a project on 'Multilateralising Regionalism'.[4] The sample represents close to 80 per cent of the 84 RTAs notified to the WTO under relevant GATS provisions, Article V:7, by late August 2011 and covers all agreements in which China, India or an OECD country participate (excluding the EC Treaty and subsequent EC enlargements).[5]

One issue to be addressed, *inter alia*, is whether any particular group of WTO Members, service sectors or types of commitments are particularly prone to 'negative preferences'. For example, while it has been suggested that the larger partner in RTA negotiations (typically the developed country partner in North - South agreements) will be able to extract relatively more access benefits

[1] Adlung and Morrison (2010). The three agreements are the EC-CARIFORUM Economic Partnership Agreement (EPA), the Australia - United States Free Trade Agreement (FTA), and the China - ASEAN Agreement on Trade in Services.

[2] Miroudot, Sauvage and Sudreau (2010).

[3] For an overview of issues raised in the CRTA, see Crawford and Lim (2011).

[4] See Miroudot, Sauvage and Sudreau (2010). The analysis presented in this paper is subject to the caveats typically associated with the use of heterogeneous information. Accordingly, the identification of 'minus commitments' in RTAs is indicative and, as noted before, the views provided are only those of the authors.

[5] As the agreements are often signed with third countries, their geographic coverage reaches significantly beyond these economies.

from the smaller one[6], the question arises whether the former is also intent on, and capable of, securing more significant GATS-minus commitments for itself. From a different angle, it might also be asked whether the shares of such commitments have varied significantly over time, reflecting for example changes in the composition and motivation of the administrations involved.

A second issue to be explored are the implications for the multilateral system and, possibly, the need for action in competent WTO fora. Departures from existing GATS schedules, in the form of minus commitments, cast clouds on the GATS-legal status of the agreements concerned and, by the same token, their compatibility with the WTO system. To the extent that RTAs entail significant GATS-minus elements, they remain disconnected from, and might prove irreconcilable with, the multilateral framework. In turn, this would significantly affect the RTAs' ability to provide inspiration, let alone guidance, for a process of progressive services liberalization as mandated under Article XIX of the GATS.[7] It appears highly unlikely that the parties concerned, ignoring the existence of minus elements, would be ready simply to multilateralize the GATS-plus features of their RTAs. From this perspective, WTO Members face the challenge of 'regionalising multilateralism', that is ensuring that regional integration moves in services remain governed by a set of commonly respected concepts and principles. An important issue in this context is the inclusion of third-party MFN clauses in RTAs that extend to the GATS and, thus, ensure that any more favourable GATS commitments, including those resulting from future multilateral liberalization, are integrated into, and rendered enforceable under, the agreements concerned.

In keeping with the relevant benchmarks for RTAs, under Article V of the GATS, the focus of this paper is on disparities between RTA commitments and those that the parties concerned had inscribed in their GATS schedules. No further attention is given to definitional or conceptual variations, that may have similar effects, i.e., driving a wedge between RTA disciplines and their multilateral counterparts, but are even more difficult to identify and assess in the light of the GATS.[8] In the same vein, we do not deal with initiatives beyond the scope of Article V or of the GATS altogether, whether in areas such as regulatory harmonization, competition disciplines, procurement rules or infrastructural projects.

The following discussion is structured in four parts, starting with an outline of key GATS provisions. Section III then introduces the concept of 'minus commitments' against the backdrop of GATS Article V ('Economic Integration'), which sets the standards for regional trade agreements in services, and provides an overview of the (non-)treatment of such commitments in the WTO to date. It is followed by a detailed analysis of currently existing 'minus commitments' contained in the reviewed 66 RTAs. The focus is on the sectors, measures and types of transactions (modes of supply) involved. Section V then discusses WTO Members' scope for action - should they be willing to face the review their PTA commitments in the light of GATS Article V.

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[6] See VanGrasstek (2011). Looking at the shares of GATS-plus commitments agreed between partners of different size, the author finds the initial hypothesis only partly confirmed. The biggest players, the United States and the European Communities, at least fitted the expected pattern insofar as they obtained the deepest concessions. Roy (2011) also observed, based on a limited sample of RTAs, that the larger trading powers, in particular the United States, tended to receive more concessions in their RTAs than smaller participants.

[7] In a similar vein, there have been proposals in the RTA-related literature to devise a sunset policy with a view to integrating RTAs gradually into, and thus protecting the pivotal role of, the multilateral system (Lee, 2011).

[8] For example, the national treatment and MFN obligations in various RTAs, including those promoted by the United States, refer to the treatment of foreign service suppliers which must not be less favourable than that accorded to domestic or other foreign suppliers *in like circumstances*. In contrast, MFN and national treatment under Articles II and XVII of the GATS relate to the treatment of *like services and service suppliers.* To the extent that the former approach captures a wider range of factors, including the policy context in which a service is provided, it might be considered to be less biting than the latter (according to Ortino, 2009). In some agreements, including the Economic Partnership Agreement between Japan and the Philippines, the national treatment obligation refers to like services and service suppliers, while MFN treatment is predicated on the existence of like circumstances (section III.B below, second case).

II. THE GATS: KEY INGREDIENTS

Aunt Martha: "One of our gentlemen found time to say 'How delicious'!"

Given the specificities of services trade, including the need in many cases for suppliers and consumers to directly interact in performing a transaction, the GATS contains a variety of novel features compared to conventional trade agreements covering goods. These include in particular a far broader concept of trade which reaches beyond cross-border supplies (mode 1 under the GATS) to capture as well services consumed abroad (mode 2), with tourism as a typical example; the establishment and operation of a commercial presence in a host country (mode 3), normally involving foreign direct investment; and the presence of foreign professionals providing services, for example, as independent suppliers or employees of foreign-owned service companies (mode 4).[9]

By the same token, reflecting its broad modal coverage and the virtual absence of tariff protection in services trade, the GATS is able to accommodate a broad range of protective measures, from the operation of quantitative restrictions to denials of national treatment in whatever form. Article XVI (Market Access) specifies, in an exhaustive way, six types of restrictions, including quotas on the number of suppliers or natural persons as well as well as foreign equity ceilings or joint venture requirements, which Members may maintain in committed sectors if properly inscribed in their GATS schedules.[10] The quota-type restrictions need to be indicated regardless of whether they are employed on a discriminatory basis or not. In turn, Article XVII (National Treatment) is defined in an open way and applies to any measure in committed sectors that modifies the conditions of competition, in law or in fact, to the detriment of foreign like services or service suppliers. Again, a Member must indicate any departures from full national treatment in order to preserve its right to maintain or introduce the respective measure.

Concerning the measures that might be deemed inconsistent with national treatment, it is illuminating to look at the cases Members have actually inscribed in their respective schedules of commitments. The list of the most frequently used national-treatment limitations is led by discriminatory subsidies, followed by taxes and other discriminatory financial measures (e.g., differential licensing fees), nationality requirements for agents or managers of a company, residency requirements for board members, etc.[11]

Commitments are not only sector-, but also mode-specific. In other words, for every scheduled sector, a Member needs to specify for all four modes of supply the conditions of both market access and national treatment. These may vary between a full commitment, a commitment subject to limitations and the retention of full policy discretion. Further, there is a possibility to undertake policy obligations relating to measures not falling under either the market access or national

[9] Among the first to discuss different types of service transactions from a rule-making perspective were Sampson and Snape (1985). Their proposed classification consists of services crossing borders like goods (similar to mode 1 under the GATS), transactions as a consequence of factor movements, i.e., capital and/or labour (roughly comparable to modes 3 and 4, respectively), transactions where only the receiver of a service moves (mode 2) and, finally, transactions involving movements of the production factors and of the service receiver to a third country (e.g., doctors from A treat patients from B in a foreign-invested hospital in C). Under the GATS, the latter transactions would fall under mode 2 (in B's schedule of specific commitments) and modes 3 and 4 (in C's schedule); outflows of capital and labour are not covered by the commitments undertaken by the respective countries of origin.

[10] For introductory and background information on scheduling principles see, for example, http://www.wto.org/english/tratop_e/serv_e/guide1_e.htm (visited 12 January 2012).

[11] This list is attached to the so-called Scheduling Guidelines, a document adopted by Members in 2001 (WTO document S/L/92 of 28 March 2001). The Guidelines explicitly clarify, *inter alia*, that "Article XVII applies to subsidies in the same way as it applies to all other measures" and that "[s]ubsidies are also not excluded from the scope of Article II (MFN)" (para 16).

treatment provisions of the Agreement. Such 'additional commitments' could consist, for example, of the acceptance of relevant international standards or the enforcement of specified competition disciplines.

A horizontal section at the top of their schedules allows Members to inscribe any entries, concerning market access, national treatment or additional commitments, which apply equally across all included sectors. The sole purpose of such horizontal limitations is to avoid unnecessary repetition. Conversely, in non-scheduled services, Members are completely free to grant market access or national treatment or to comply with additional commitments under any of the modes of supply. It does not matter in this context who exactly operates a particular measure. According to its Article I, the scope of the GATS extends "to measures by Members affecting trade in services" and these are further defined to include measures taken by central, regional or local governments and non-governmental bodies exercising delegated powers. However, it would be possible in scheduled sectors to inscribe limitations that qualify the applicability of a commitment to particular regions or government levels.

The assumption of market access and national treatment obligations triggers a range of additional disciplines, relating *inter alia* to transparency, proper regulatory and administrative practices, or absence of foreign exchange restrictions. These disciplines, which cannot be modified by way of limitations, essentially serve to protect the commercial value of access commitments from being eroded by measures that, while affecting trade, are not subject to scheduling.

The GATS-typical combination of broad coverage, in terms of modes and measures, with a particularly high degree of flexibility, concerning the assumption of trade obligations, has left its imprints also on the Agreement's Most-favored-Nation (MFN) requirement.[12] On the one hand, comparable to its role under the General Agreement on Tariffs and Trade (GATT), MFN treatment is a horizontal obligation which applies regardless of the existence of access obligations in any particular sector. On the other hand, again, the GATS offers flexibilities that do not exist under the GATT. These include, in particular, the possibility for Members, at the date of the Agreement's entry into force or acceptance (in the case of new Members), to list exemptions with a view to grandfathering existing departures from MFN treatment for a vaguely defined ten-year period. A second element of increased flexibility exists under Article VII, which governs the recognition of foreign standards, licenses, educational degrees and the like. The Article has an equivalent in merchandise trade, under the Agreement on Technical Barriers to Trade, but offers more leeway concerning the (non-)use of existing international standards as a basis for bilateral or plurilateral recognition measures.[13]

Finally, comparable to Article XXIV of the GATT, the GATS allows Members, regardless of the MFN obligation, to form regional agreements if certain conditions are met. Unfortunately, the vagueness that characterizes Article XXIV, dubbed by some observers as one of weakest GATT provisions, is also a prevailing feature of its counterpart in services, GATS Article V (Economic Integration).[14] Existing differences between GATT Article XXIV and GATS Article V may be attributed mainly to the structural specificities of the two Agreements, in particular the types of transactions covered (including investment and labor flows in services) and permissible trade measures (use of country-internal restrictions in lieu of border tariffs), rather than to any achievements in terms of definitional clarity.[15]

[12] Adlung and Carzaniga (2009).

[13] Importantly, the scope of Article VII is confined to facilitating the recognition of standards and the like, but does not allow for variations in their substantive content (see Article VII:3).

[14] Stephenson (2000); see also Cottier and Molinuevo (2008).

[15] According to some commentators, GATS Article V provides even more leeway than Article XXIV of GATT; see Islam and Alam (2009).

III. GATS-MINUS COMMITMENTS: POISON IN THE WINE

Mortimer: "This is developing into a very bad habit! I don't know if I can explain it to you. It's not only against the law, it's wrong!"

A. A closer look at Article V

While the GATT requires participants in a customs union or free-trade area to eliminate 'duties and other restrictive regulations of commerce ... with respect to substantially all the trade' (Article XXIV:8), GATS Article V:1 uses a two-pronged criterion for what is called Economic Integration. Accordingly, respective Agreements must have "substantial sectoral coverage" and provide for the "absence or elimination of substantially all discrimination, in the sense of Article XVII, between or among the parties". Interestingly, the focus here is on measures inconsistent with GATS Article XVII, i.e., departures from national treatment. While this certainly includes measures that limit market access as well, such as discriminatory quotas, Members' ability to operate non-discriminatory access restrictions, including monopoly arrangements, remains unaffected.

A second element that is worth noting in the current context is the requirement in Article V:1 for the *Agreement* concerned to meet the relevant conditions; it is thus not sufficient, obviously, for actually applied policies to be conducted in a non-discriminatory manner. Accordingly, if an Economic Integration Agreement (EIA) contains GATS-minus provisions, it is not only these provisions that could be challenged, regardless of their implementation in practice, but the Agreement altogether. A non-party might thus be able to insist that any GATS-plus elements, which might have been agreed between the signatories, be extended multilaterally, pursuant to the MFN obligation under GATS Article II. Moreover, it would be irrelevant whether all parties to an RTA, or only one among others, have scheduled GATS-minus elements. The *Agreement* would be flawed in either case.

It does not matter in this context, of course, how an EIA is structured. The standards applicable to 'top-down' agreements modelled on the North American Free Trade Agreement (NAFTA), which provide for market access and national treatment across all services, unless specifically excluded, are no different from those governing GATS-type agreements where access commitments are assumed only in scheduled sectors ('bottom-up scheduling'). However, departures from the sectoral coverage of GATS schedules are more difficult to identify in NAFTA-type agreements which, for the purposes of this article, needed to be converted into a GATS schedule.[16] Similar problems also arise in the case of hybrid EIAs, such as the Australia - Chile Free Trade Agreement of 2008, where the two approaches are combined.[17]

As already indicated, Article V leaves much room for interpretation. This includes not least the meaning of *substantial* sectoral coverage and *substantially* all discrimination. What is the definitional scope of these terms?[18] Article V:1(b) further specifies that the "absence or elimination of substantially all discrimination" is to be achieved through: "(i) elimination of existing discriminatory measures, and/or (ii) prohibition of new or more discriminatory measures, either at the entry into force

[16] Additional challenges arise from the existence of standstill and ratchet-in provisions in NAFTA-type agreements that lock in current levels of openness and future liberalization measures, respectively, but are qualified by reservations listed in annexes. Occasionally the scope of these reservations is broader than what would be permissible under the limitations inscribed for the same sector(s) and modes in a party's GATS schedule.

[17] Accessible via http://rtais.wto.org/UI/PublicShowRTAIDCard.aspx?rtaid=157 (visited 12 January 2012).

[18] A footnote provides that the condition of substantial sectoral coverage is to be understood "in terms of numbers of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the *a priori* exclusion of any mode of supply." In turn, the latter stipulation raises the question, *inter alia*, whether it is sufficient for an agreement to simply reproduce, possibly with some minor changes, the GATS commitments a Member has undertaken under a particular mode; see also Adlung and Morrison (2010).

of that agreement or on the basis of a reasonable timeframe …" This implies that both conditions must be met simultaneously wherever discrimination exists; in other words, its elimination must be combined with a prohibition of new or, at least, of more discriminations.[19] Obviously, this offers little room, if any, for the introduction of GATS-minus elements in services RTAs.

The requirement for RTAs to comply, as a minimum, with existing GATS commitments is further clarified by Article V:5 which provides that if "a Member intends to withdraw or modify a specific commitment inconsistently with the terms on conditions set out in its of its [GATS] Schedule, … the procedures set forth in paragraphs 2, 3 and 4 of Article XXI shall apply". (The respective paragraphs provide for the renegotiation of affected GATS commitments and, if unsuccessful, recourse to arbitration.)

Though the GATS contains flexibility provisions, these may not prove relevant in the current context. First, in applying the conditions of Article V:1(b), Article V:2 allows for consideration to be given "to the relationship of the agreement to a wider process of economic integration or trade liberalization among the countries concerned". Such a process certainly includes, though not specifically mentioned, the possible existence of parallel measures liberalizing merchandise trade under Article XXIV of the GATT.[20] And this is potentially relevant for virtually all agreements examined in this study which, barring one, also extend to merchandise trade, as well as for services-only agreements that coexist with separate agreements for goods. Second, referring specifically to developing countries, Article V:3(a) requires that flexibility be provided with regard to both conditions governing EIAs, that is "substantial sectoral coverage" and, in particular, "absence or elimination of substantially all discrimination", in accordance with the countries' level of overall and sectoral development. Yet, it appears doubtful, to say the least, whether these provisions would provide legal cover for the introduction of new discriminatory elements in RTAs that are not contained in the parties' respective GATS schedules. Had this been the drafters' intention, they would certainly have qualified the reference to Article XXI accordingly, that is lessened the need for the countries concerned to renegotiate any adversely affected GATS commitments.

Flexibility for developing countries would still exist in two respects, nevertheless: first, in eliminating existing discriminatory measures and, second, in defining the "reasonable timeframe" for implementation. Interestingly, this phase-in possibility exists only with regard to one of the two benchmarks in Article V, that is the elimination of "substantially all discrimination", but does not extend to the achievement of "substantial sectoral coverage". The latter condition applies from day one.[21] Further, for RTAs signed by developing countries only, the Agreement provides scope for what might be considered tighter rules of origin: third-country investors must not be granted the same treatment as investors from an RTA party even if they are constituted as juridical persons and conduct substantive business operations in the territory concerned.[22]

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[19] The "and/or" link between the two courses of action has sometimes been misunderstood to imply that a simple standstill, i.e., a prohibition of new or more discriminatory measures, would already suffice to satisfy the conditions of Article V (for example, Farasad, 2008). Yet this ignores that the basic requirement under the Article is to provide "for the absence or elimination of substantially all discrimination" which can definitely not be achieved, in an initially discriminatory environment, by way of a standstill only. See also Cottier and Molinuevo (2008).

[20] For more details see Cottier and Molinuevo (2008).

[21] As noted before, Article V:1(b) explicitly provides for the possibility that "the absence or elimination of substantially all discrimination" be achieved at the entry force of the agreement or "on the basis of a reasonable timeframe", while Article V:3(a) stipulates that, in applying these conditions, developing countries be granted flexibility in accordance with their overall and sectoral levels of development. However, the condition of "substantial sectoral coverage", in Article V:1(a), has not been subjected to a timeframe. Of course, the possibility remains for the RTA parties to conduct further consultations with a view to broadening the range of sectors committed. However, as long as such attempts fail to achieve what might be considered "substantial coverage", the agreement would remain deficient. For more details see Adlung and Morrison (2010).

[22] The basic requirement, i.e., non-discrimination of foreign-owned juridical persons engaged in substantive business operations, is to be found in Article V:6, the flexibility provision in Article V:3(b).

A further element that needs to be considered in this context is the modal scope of the GATS and its extension, *inter alia*, to commercial presence (mode 3). GATS-minus commitments may well affect the trading opportunities of third-country suppliers that are established within the area concerned. For example, if an RTA contained GATS-minus provisions impinging on the parties' bilateral exchanges under modes 1 and 2 (cross-border trade and consumption abroad, respectively) this would affect as well any foreign-invested supplier established within their territory. Yet, the RTA parties have no mandate, of course, to downgrade under a bilateral agreement the GATS-protected trading opportunities of other Members. Article 34 of the Vienna Convention on the Law of Treaties (VCLT) expressly clarifies that "[a] treaty does not create either obligations or rights for a third State without its consent", and Article 41 of VCLT permits parties to a multilateral treaty to modify a treaty between themselves only if this "does not affect the enjoyment by other parties of their rights under the treaty or the performance of their obligations" or if the modification "does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole".

B. (Non-) Treatment in the WTO to date

The only instance in which a WTO panel commented, in general terms, on the benchmarks of Article V is to be found in the report on *Canada - Autos*¸ dating from 2000. The Panel stipulated that "[t]he 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".[23]

One might have thought that the Doha Round, launched in late 2001, could provide an opportunity for Members to further reflect on the scope and limits of services RTAs under Article V. Concerning the definition of 'substantially all discrimination', an earlier submission from the European Communities had already indicated that "[w]ork on this would be needed in order to agree on possible parameters".[24] Indeed, based on a Background Note by WTO Secretariat, a range of definitional issues relating to this Article were raised in the Negotiating Group on Rules in 2004. This Group had been set up under the Doha Ministerial Declaration to conduct negotiations aimed, *inter alia*, at "clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements".[25] Yet, its discussions remained inconclusive[26], and no relevant initiatives have been launched since in any other WTO forum either.

Nevertheless, in the context of the Transparency Mechanism for Regional Trade Agreements, the issue of 'GATS-minus' commitments has been brought to the attention of the Committee on Regional Trade Agreements (CRTA) on various occasions. The Transparency Mechanism was set up on a provisional basis in 2006 to consider RTAs upon their notification to the WTO. To assist Members, the WTO Secretariat was mandated to prepare, "on its own responsibility and in full consultation with the parties", a factual presentation of the RTA, refraining "from any value judgement".[27] However, the Committee paid little heed to the GATS-minus elements identified in these presentations, and the number of interventions remained quite limited. Apart from the RTA parties, less than three delegations took the floor on average during the 30-odd reviews conducted between January 2010 and end-September 2011.

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[23] *Canada - Certain Measures Affecting the Automotive Industry (Canada - Autos)*, Report of the Panel, WT/DS139/R and WT/DS142/R of 11 February 2000, adopted 19 June 2000, para 10.271. The Appellate Body has not pronounced on this issue.

[24] WTO document WT/REG/W/35 and S/C/W/124 of 21 September 1999.

[25] WTO document WT/MIN(01)/DEC/1 of 20 November 2001.

[26] A non-attributable summary is contained in WTO document TN/RL/M/19 of 26 October 2004.

[27] WTO document WT/L/671 of 18 December 2006.

The following observations relate to some typical cases of GATS-minus commitments, but are not intended to provide a complete picture of their treatment under the Transparency Mechanism.[28]

In one case, concerning the Comprehensive Economic Cooperation Agreement (CECA) between India and Singapore, the WTO Secretariat's factual presentation points out various horizontal limitations for market access and national treatment under mode 3, relating *inter alia* to the non-extension of subsidies to foreign suppliers, which are not contained in India's GATS schedule.[29] Interestingly, the Agreement does not contain an MFN obligation that would extend to any more ambitious GATS commitments; there is only a consultation clause should a party sign an agreement with a third country after the CECA's entry into force (Article 7.6). In a communication prior to the CRTA's meeting, the parties gave the view that the minus elements were more than compensated by GATS-plus bindings in other areas. (The statement reads: "These commitments are not intended to prejudge India's commitments under the GATS. India has bound a wider coverage of sectors under the CECA than it has under the GATS, and in that respect, greater market access and national treatment commitments were gained".)[30] The discussion during the following meeting of the CRTA revolved mostly around what some Members considered to be shortcomings in terms of tariff liberalization for goods; the existence of GATS-minus commitments in services played no role.[31]

In a second case, concerning the Economic Partnership Agreement (EPA) between Japan and the Philippines, the Secretariat's factual presentation indicates that parts of the Philippines' commitment on courier services fall short of their counterparts under the GATS.[32] In a written statement, responding to questions from other Members, the Philippines explained why, in its view, no "further substantive restrictions" were involved.[33] The reply was essentially repeated, but not further discussed, at the CRTA meeting considering this agreement.[34] Somewhat surprisingly, though the agreement contains an MFN clause that should neutralize such departures from the parties' GATS commitments, it was not mentioned in this context. (Article 11:2 provides that in the event of inconsistencies with the WTO Agreement, the latter "shall prevail to the extent of the inconsistency"; in addition, Article 76:1 commits each party to accord "to services and service suppliers of the other Party treatment no less favourable than that it accords, in like circumstances, to services and service suppliers of any non-Party".)

In a third case, the Secretariat's presentation of the Economic Partnership Agreement between Japan and Thailand points out two GATS-minus elements in the services schedule submitted by Thailand under this Agreement. One concerns the lowering of foreign equity ceilings for certain telecommunication services from 40 per cent (GATS) to 25 per cent, and the second consists of the introduction of additional limitations for computer and related services under

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[28] For example, GATS-minus commitments were also identified in the context of the Economic Integration Agreement between China and Chile (WTO documents WT/REG/230/3 of 19 August 2011, p. 10f, and WT/REG/230/4 of 18 October 2011, p. 2) and the Closer Economic Partnership Agreement between Hong Kong, China and New Zealand (WT/REG/291/1 of 6 January 2012, p. 25).

[29] WTO document WT/REG/228/1/Rev.1 of 1 October 2008. The full text of the agreement is available at http://commerce.nic.in/ceca/toc.htm (visited 12 January 2012).

[30] WTO document WT/REG228/2 of 15 September 2008.

[31] WTO document WT/REG228/M/1 of 27 October 2008.

[32] WTO document WT/REG257/1 of 19 March 2011, Table IV.5.

[33] WTO document WT/REG/257/2/Rev.1of 8 July 2010. The full reply reads: "It may be noted that the Philippines has horizontal limitations that affect Courier services under the Uruguay Round, which reflects constitutional provisions of the Philippines. The restriction cited in the Secretariat report therefore is more matter of form rather than further substantive restrictions in the sector".

[34] WTO document WT/REG/257/M/1 of 18 June 2010.

mode 4.[35] While the two governments replied to questions from other Members that the commitments concerned "are the result of the negotiations conducted by both Parties, taking into consideration each side's specific interests and concerns", they referred, at the same time, to the floor level introduced by Article 11:2 (same provisions as quoted above). The issue was not further discussed at the following meeting of the CRTA.[36]

A fourth case concerns the Economic Integration Agreement (EIA) between China and Pakistan. The Secretariat's factual presentation points out that Pakistan's schedule features a horizontal (cross-sectoral) entry under mode 3, not contained in the GATS schedule, which may limit the business scope of representative offices.[37] In reply to questions, the EIA parties asserted that Pakistan's multilateral commitments would not be undermined by these provisions, and China would not be subjected to less favourable treatment.[38] Nevertheless, it is interesting to see that the agreement contains sort of an 'anti-MFN clause' which, in the event of conflict, would ensure that RTA provisions prevail over any other international obligations assumed by the parties. ("*Except as otherwise provided in this Agreement*, this Agreement or any action taken under it shall not affect or nullify the rights and obligations of a Party under existing agreements to which it is a party"; Article 22:3.) By the same token, the clause implies that, whenever GATS-scheduled sectors have been omitted from the scope of the EIA, the relevant GATS commitments would govern the parties' mutual trade relations. During the EIA's consideration in the CRTA, one delegation referred to the introduction of some new limitations, beyond those scheduled under the GATS, while noting that, using an existing mechanism under the agreement, the parties intended to improve coverage over time.[39] Again, no attention was given to the broader systemic implications of such 'minus commitments', including the question whether the mere possibility of their future abolition is sufficient to ensure the agreement's compliance with GATS Article V:1.[40]

None of these cases has ever been discussed, to our knowledge, in the RTA-related literature. The apparent lack of interest among WTO Members thus seems to be shared by the research community. Interestingly, however, the issue of GATS-minus commitments has drawn significant attention in a different context, in discussions surrounding the schedules that are expected to result from the Doha Round. It appears that a common understanding has emerged among WTO Members that there must be no backtracking (or 'rollback'), that is new entries that are less favourable than existing commitments.[41] By the same token, however, this implies that a significant number of current RTA schedules, given their GATS-minus content, could not be 'multilateralized' through simple integration into the GATS. A pre-condition in all such cases would be (time- and resource-intensive) renegotiations of minus commitments under GATS Article XXI which, however, cannot realistically be envisaged during the final stretches of a trade round.

[35] WTO document WT/REG235/1 of 18 April 2011. Text and schedules of the Agreement are available at http://www.mofa.go.jp/policy/economy/fta/thailand.html (visited 12 January 2012).

[36] WTO documents WT/REG235/ 2 and WT/REG235/ M/1 of 16 June and 7 July 2011, respectively.

[37] WTO document WT/REG237/3 of 23 March 2011. Text and schedules of the Agreement are available at http://fta.mofcom.gov.cn/topic/enpakistan.shtml (visited 12 January 2012). Further GATS-minus elements have been inscribed under hospital, medical and dental services for which Pakistan's GATS schedule guarantees full national treatment under mode 3, while the RTA requires prior registration and the reciprocal recognition of medical qualifications. In addition, unlike Pakistan's GATS schedule, the RTA commitments on medical and dental services (CPC 9312) explicitly exclude services provided by public institutions.

[38] WTO document WT/REG237/4 of 26 May 2011.

[39] WTO document WT/REG237/M/2 of 7 July 2011.

[40] See also above n 21.

[41] See the minutes of the competent body, the Committee on Specific Commitments, contained in WTO documents S/CSC/M/54 and 55 of 7 September and 10 November 2010, respectively.

IV. GATS-MINUS COMMITMENTS: COMPOSITION AND DOSAGE

Aunt Martha: "For a gallon of elderberry wine, I take one teaspoon full of arsenic, then add half a teaspoon full of strychnine, and then just a pinch of cyanide."

The focus of this section is on GATS-minus elements that (a) significantly depart from one or more of the parties GATS commitments and (b) can be assumed, if enforced, to have a noticeable impact on services trade between the parties and/or with third countries. In case of uncertainties, we opted for a conservative approach, focusing on what seemed to be clear departures from Members GATS schedules. Measures not disciplined under Article V, including various 'due process' obligations (references to the existence of registration procedures, etc.), have been ignored.[42]

The first issue to be discussed are the third-party MFN clauses contained in individual RTAs as it is crucial in the current context to distinguish "connected" agreements, where GATS-minus commitments are neutralized by provisions ensuring that GATS obligations prevail, from "disconnected" agreements without such provisions. Reflecting the complexity, and sometimes opacity, of various MFN clauses, a third category ("unclear") captures those agreements that could not be unambiguously associated with either category.

A. A closer look at third-party MFN clauses

There are essentially two variants how GATS-minus commitments can be neutralised by third-party MFN provisions in RTAs. Relevant clauses could focus either on the treatment actually extended to like services or service suppliers from non-parties or on the treatment committed under any other agreement signed by the parties.[43] The effects would essentially be the same insofar as existing GATS commitments, where these exist and are abided by, would define the minimum level of access under the RTA concerned. This is relevant not least in view of future multilateral liberalization initiatives under the GATS should the results turn out to be more ambitious than existing RTA commitments.

However, two-thirds of the agreements in our sample of 66 RTAs do not contain third-party MFN clauses that would be immediately applicable.[44] A first (sub-)category consists of 20 RTAs that are either without any such obligations, including the RTAs negotiated by China (except for a recent one with New Zealand), or without obligations that would be directly relevant. For example, agreements signed by India or Thailand condition the extension among the signatories of any more favourable treatment they might grant to third parties on the outcome of further consultations. A second (sub-)category of 21 RTAs features what might be called truncated MFN clauses. These exempt already existing agreements, including agreements that have not yet entered into force, from the MFN obligation. Since all current RTAs came into effect after the WTO Agreement, except for NAFTA, any more favourable treatment granted under the GATS remains irrelevant.[45] All RTAs signed by the United States have such truncated clauses, barring the agreement with Jordan, which is without any MFN obligation. In these cases, past agreements are excluded from MFN treatment by way of reservations that are annexed to the chapters on cross-border trade in services and investment.

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[42] On the other hand, references to authorization requirements or the need for concessions, in lieu of a GATS-scheduled full commitment, have been counted as GATS minus.

[43] As noted in above n 8, various agreements use the benchmark of 'like circumstances' rather than that of 'like services and service suppliers'.

[44] In the context of this section, no further attention is paid to specified MFN-exemptions in RTAs that essentially mirror those listed under the relevant Annex to the GATS.

[45] An element of uncertainty remains whether, possibly against the intensions of the governments involved, a Protocol incorporating the results of the Doha Round into current GATS schedules or amendments to pre-existing RTAs would be considered under these provisions to constitute a new agreement and, thus, qualify for MFN treatment.

In addition, not all of the remaining RTAs, 25 in total, do contain unqualified MFN provisions. Eleven agreements explicitly exclude specified types of measures, namely subsidies and/or measures at sub-federal or sub-national level, from MFN treatment. Cases in point are the subsidy-related exemptions in the Australia - New Zealand CER, Chile - Costa Rica FTA, Chile - El Salvador FTA, EC - CARIFORUM EPA and in most of the agreements signed by Mexico.[46] Moreover, there are no provisions in these agreements that would clearly provide that, in case of inconsistency with GATS commitments, the latter prevail. On the contrary, some agreements feature the anti-MFN clause previously mentioned that would prioritize any conflicting RTA provisions (section III.B). Apart from the agreement between China and Pakistan, such clauses can be found in RTAs involving Latin American countries, such as those between Chile and Costa Rica, Chile and El Salvador, and El Salvador and Mexico.

We are thus left with a mere 14 RTAs that are clearly connected with the GATS through an unequivocal MFN clause. This includes the agreements signed by Japan which clarify that in the event of inconsistencies, "the WTO Agreement shall prevail to the extent of the inconsistency".[47] In addition, there are a number of borderline cases for which it is difficult to establish the precise relationship with the GATS. Different authors might well draw different conclusions in individual cases. In our view, the status of conflicting GATS provisions remains unclear in 12 agreements, that is about one- fifth of the sample. This includes five RTAs concluded by the United States that contain a 'truncated MFN clause' as explained above, while at the same time stipulating that relevant provisions "(…) shall not be construed to derogate from any legal obligation between the Parties that entitles goods or services, or suppliers of goods or services, to treatment more favourable than that accorded by this Agreement".[48]

B. Patterns of GATS-minus commitments

(i) Main types

Three main types of GATS-minus commitments can be identified in RTAs: first, general provisions in the services chapters (and, where relevant, investment chapters) might already depart from the commitments assumed by one or more parties under the GATS; second, GATS-minus entries could be contained in the horizontal section of the services schedules; or, a third possibility, they form part of the sector-related commitments.[49] As all parties have agreed on these commitments and as the Agreement *per se* is subject to the relevant GATS obligations (section III.A), any such minus-elements affect, and are attributable to, the RTA as a whole rather than to any individual party.

While GATS-minus commitments might have been thought of as 'outliers', hidden in annexes or footnotes of some RTAs, this is not what the analysis suggests. Rather, such commitments are almost omnipresent. They are already contained in the horizontal sections or the general provisions of the services and related investment chapters of some four-fifths of the agreements reviewed. In turn, this implies that all services sub-sectors covered by the schedule are affected.

[46] Concerning the EC - CARIFORUM EPA see Adlung and Morrison (2010).

[47] We have also included in this group four of the Stabilisation and Association Agreements signed by the EC (with Albania, Croatia, the Former Yugoslav Republic of Macedonia and Montenegro) where MFN provisions cover the GATS, but apply only to establishment.

[48] The agreements are with Australia, Bahrain, Morocco, Oman and Singapore.

[49] The distinction between horizontal and sector-related commitments is straightforward in the case of GATS-based RTAs. When analysing NAFTA-inspired RTAs, GATS-minus commitments may be contained in the lists of reservations for existing and future non-conforming measures. Reservations applying to all sectors are regarded as "horizontal".

(ii) General provisions and horizontal commitments

The most prevalent horizontal 'minus commitment' - *arsenic* in Aunt Martha's words - is the complete exclusion of subsidies and other forms of financial support from the scope of the RTA schedules; such exclusions exist in no less than 47 out of the sample of 66 RTAs (Table 1).[50] Twenty-one agreements contain other departures from GATS-scheduled national treatment limitations, such as new residency requirements or discriminatory limitations on land ownership. Almost equally frequent are new carve-outs for measures taken at sub-federal level, again falling below the corresponding GATS obligations which do not feature similar exemptions. New limitations on market entry and establishment feature in the horizontal section of 16 agreements in our dataset, followed by mode 4-related minus commitments.[51]

Table 1. Overview of horizontal GATS-minus commitments in RTAs

	Number	**Percentage**
Agreements with horizontal GATS-minus provisions	49	79%*
Breakdown by type		
Subsidies not covered by the services chapter	47	96%
Other limitations on national treatment	21	43%
Sub-federal or sub-national measures not fully covered	20	41%
Limitations on establishment (market access, mode 3)	16	33%
Limitations on the presence of natural persons (market access, mode 4)	9	18%
Other market access limitations	3	6%
Breakdown according to third-party MFN provisions (section IV.A)		
Disconnected agreements	34	69%
Unclear agreements	10	20%
Connected agreements	5	11%

* As a share of a dataset of 66 RTAs.

Table 1 also records the numbers of "connected", "unclear" and "disconnected" RTAs containing horizontal 'minus commitments'. Out of the 14 "connected" agreements identified above, only five have horizontal commitments falling short of their counterparts under the GATS. There is thus some consistency in the way RTAs define their relationship with the GATS and their ability to contain minus commitments. Agreements with provisions clearly ensuring the prevalence of GATS commitments are obviously less prone to 'poison' than agreements with unclear or anti-MFN clauses. Thirty-four of the "disconnected" agreements have minus elements already in the general provisions governing services or in the horizontal section of their services commitments. This implies that, overall, the contribution of MFN clauses to neutralizing GATS-minus elements is quite limited. Only five RTAs in our sample are clearly concerned, while ten additional RTAs are borderline cases with unclear MFN status.

[50] Typically, the national treatment limitations in the horizontal section of RTAs are more sweeping, in terms of the modes and measures covered, than the - relatively many - subsidy-related limitations inscribed in GATS schedules. Of course, the existence *per se* of horizontal limitations for subsidies was not counted as GATS-minus, but only those limitations that exceeded their GATS-scheduled counterparts in coverage.

[51] This observation might need to be qualified since, as described earlier, the disciplines in GATS Article V refer only to national treatment, rather than to market access. However, the exclusion *per se* of GATS-committed parts from the scope of an RTA necessarily entails an element of discrimination vis-à-vis the partner country. Moreover, two categories of measures covered by the market access provisions of the GATS are discriminatory by nature - joint venture requirements and restrictions on foreign equity participation (Articles XVI:2(e) and (f) - and, thus, fail the benchmark of Article XVII as well.

(iii) Sectoral and modal patterns

Turning to sector-related GATS-minus commitments, a similar proportion of RTAs, about three-quarters, is affected. Out of the 80,000-odd commitments contained in the sample, over 3,100 feature GATS-minus elements (Table 2). This is certainly more than a negligible dose of poison... Barring four exceptions, all RTAs with horizontal GATS-minus provisions also have sector-specific minus commitments. [52] There are only seven RTAs in our sample where the GATS-minus elements remain confined to the sectoral part of the schedules. The MFN status of these agreements is either "connected" or "unclear", thus confirming the previous observation that "disconnected" RTAs are more poison-prone. As indicated at the bottom of Table 2, a relatively small share (12 per cent) of the sector-related minus commitments is neutralized by MFN clauses that cover, and thus integrate into the RTA concerned, existing GATS obligations.

Table 2. Overview of sectoral GATS-minus commitments

	Number	**Percentage**
Total number of GATS-minus sectoral commitments	3,113	4%*
Breakdown by type**		
Sub-sectors omitted	1,707	55%
Additional limitations listed	1,015	33%
Tightening of GATS-scheduled restrictions	546	18%
Elements of reciprocity or unbound for a specific partner country	20	1%
Breakdown according to third-party MFN provisions (section IV.A)		
Disconnected agreements	2203	71%
Unclear agreements	543	17%
Connected agreements	367	12%

* As a share of all sectoral commitments contained in a dataset of 66 RTAs.
** Since the same commitment may contain several types of GATS-minus elements, the numbers given exceed the total of 3,113 commitments and the breakdown does not sum up to 100%.

Over one-half of the sector-related GATS-minus commitments consist of omitted sub-sectors or sector segments. Some agreements, such as the EC - Mexico EPA or the Thailand - Australia FTA, cover a small number of sub-sectors only. The former contains only commitments on financial services, while Thailand's schedule under the latter agreement merely lists new or improved commitments and leaves unbound sub-sectors already committed under the GATS. As a consequence, a large number of sub-sectors appear as GATS-minus.[53] However, has this been done on purpose? It cannot be ruled out that cells or lines unintentionally disappeared in the editing process of the RTA schedule. Or, rather, have some 'sensitive' sub-sectors been dropped whenever the parties could not agree on how to treat them under the agreement?

Many RTAs combine significant increases in total sectoral coverage, compared to the parties' GATS schedules, with some downward modifications of individual sectors that might be deemed

[52] The exceptions are the Australia - New Zealand CER, EFTA - Mexico FTA, Mexico - Nicaragua FTA and EC - Mexico EPA.

[53] However, in the current context, only the Thailand - Australia FTA has been actually counted as GATS-minus. Since the EC - Mexico EPA foresees the negotiation of more commitments, the currently existing deficiencies have been ignored. It was our intention, as noted before, to adopt a conservative approach in identifying GATS-minus commitments.

sensitive.[54] Agreements using classifications different from the widely applied Services Sectoral Classification List (MTN.GNS/W/120), developed by the then GATT Secretariat in the early 1990s, are particularly prone to such practices, not least in telecommunication sectors which can be broken down in various ways.[55] However, is this compatible with the standards of Article V, including the requirement to invoke GATS Article XXI ('Modification of Schedules') if a Member intends to withdraw or modify a specific commitment inconsistently with its GATS schedule (section III.A)?

The second most frequent category of sector-related GATS-minus commitments consists of *additional limitations* inscribed in the RTAs. Nationality and residency requirements, discriminatory licensing requirements, and reductions in the scope of mode-4 commitments (presence of natural persons) are the most common cases.[56] Nevertheless, there are also measures falling under GATS Article XVI (market access), mostly quantitative restrictions on the number of suppliers and foreign ownership limitations.[57] The *tightening of GATS-scheduled restrictions* accounts for about one-fifth of the sector-related 'minus commitments'. Mode 4 is a main contributor. Also relatively frequent are omissions of individual sub-sectors or sector segments as noted above.

A few agreements contain reciprocity provisions or non-bindings vis-à-vis individual RTA partners. Of course, reciprocity-related considerations are not problematic insofar as they are intended to achieve a balanced outcome in terms of removing GATS-scheduled national-treatment limitations and extending sectoral coverage. There are, however, cases where the RTA seems to entail the possibility to deny co-signatories the benefits of existing GATS obligations. A case in point is the Dominican Republic - Central America - United States FTA (CAFTA-DR).[58]

Finally, Table 3 provides an overview of affected modes of supply and service sectors. A breakdown is provided according to the typology used in Table 2: additional restrictions not listed in GATS ("additional"), the tightening of existing GATS limitations ("tightening"), the omission of sub-sectors or sector segments ("omitted") and reciprocity elements ("reciprocity"). Clearly, mode 3 and 4 (commercial presence and presence of natural persons, respectively) account for higher shares of GATS-minus commitments than modes 1 and 2 (cross-border trade and consumption abroad). The latter two modes have drawn less partial commitments, that is commitments subject to limitations, than modes 3 and 4 and are thus less sensitive in the current context.[59] In turn, mode 3 accounts for over one-half of services trade and has certainly been the key motivator of many RTAs. The existence of relatively many 'minus commitments' might thus come as a surprise. The underlying reductions in scope of already GATS-committed sub-sectors could have been the 'price' that parties were willing to pay for the inclusion of possibly many more sectors than those scheduled under the GATS. In contrast, mode 4 represents a small portion of services trade covered by the GATS, estimated at less

[54] A case in point is the European Communities' reduction of the scope of health and social services, committed without further qualification in the EC 12 GATS schedule, to "privately funded services" in the EC - CARIFORUM EPA. For a detailed discussion see Adlung and Morrison (2010).

[55] The Sectoral Classification List is attached to the Scheduling Guidelines (S/L/92, see above n 11).

[56] Cases in point are exclusions of certain GATS-committed categories of workers from RTA commitments which provide scope, at the same time, to operate new restrictions on market access and national treatment.

[57] See also above n 51.

[58] See also Section V.B and the discussion of the Costa Rica - Mexico FTA that excludes financial services from the scope of its services chapter and, thus, from the MFN obligation. In the case of NAFTA, some US commitments in financial services are extended only to Mexico and not to Canada, regardless of GATS bindings. However, NAFTA entered into force prior to the GATS and the MFN provisions in Chapter 14 cover investment and cross-border trade in financial services, thus neutralizing any GATS-minus elements.

[59] A significant number of Members have avoided any bindings on mode 1 in sectors where they considered cross-border supplies to be technically difficult or even non-feasible (hotel and restaurant services, etc.). In contrast, mode 2 accounts for more full (unrestricted) commitments than any other mode, possibly reflecting the view that consumption abroad is largely beyond the regulatory control of home-country governments. The shares of full, partial and none-bindings for individual modes are described in Adlung and Roy (2005).

than 5 per cent, but the movement of persons is politically sensitive and subject to frequent legislative changes.[60]

Table 3. GATS-minus commitments by mode of supply and service sector

	Number	Percentage	Additional	Tightening	Omitted	Reciprocity
By mode of supply						
Mode 1	483	16%	45%	7%	49%	1%
Mode 2	397	13%	24%	8%	68%	0%
Mode 3	1,104	35%	35%	11%	59%	1%
Mode 4	1,129	36%	27%	31%	49%	0%
By sector						
Business services	594	19%	43%	20%	43%	2%
Communication services	760	24%	43%	21%	40%	0%
Construction & engineering	56	2%	63%	39%	18%	0%
Distribution services	39	1%	33%	26%	41%	0%
Education services	61	2%	70%	15%	21%	0%
Environmental services	40	1%	50%	30%	40%	0%
Financial services	1,195	38%	15%	10%	78%	1%
Health-related & social s.	17	1%	41%	47%	12%	0%
Tourism & travel-related s.	69	2%	38%	29%	42%	0%
Recreational, cultural, sport	34	1%	53%	26%	26%	0%
Transport services	248	8%	35%	23%	49%	0%

Note: The terms "additional", "tightening", "omitted" and "reciprocity" refer to the categories of GATS-minus commitments as described in Section IV.B (iii). As these categories are not mutually exclusive, the breakdown by category does not always sum up to 100%. The sector definitions are based on the widely used classification list MTN.GNS/W/120.

The focus of 'minus commitments' on only three sectors - financial services (38 per cent), communication services (24 per cent) and business services (19 per cent) - may be explained in large part by political sensitivities and regulatory complexity. Financial services and business services are possibly the most tightly regulated service sectors. Otherwise, if scheduling frequency had played a dominant role, tourism which shows up in some 95 per cent of all GATS schedules, followed by financial services (some 80 per cent), would be the main contributor of GATS-minus commitments.

C. What types of Members and RTAs are particularly GATS-minus prone?

At the outset, it might be assumed that the risk of scheduling GATS-minus elements in RTAs is positively related to the number of sectors covered by a Member's GATS schedule. First, more commitments imply more scope for errors. Second, Members with extensive GATS schedules have relatively lesser room for preferential liberalization than others. To the extent that RTAs are driven by reciprocity considerations, the governments concerned might be tempted to renege on their GATS commitments if they cannot obtain what they consider to be a matching level of RTA liberalization.

In turn, this would suggest that developed countries are more GATS-minus prone in their RTA schedules than developing countries. However, the patterns emerging from Table 4 do not corroborate such expectations. Despite their generally lower number of GATS commitments, developing countries overall have been at least as vulnerable as developed countries. The differences are less pronounced if horizontal (cross-sectoral) limitations are taken into account. Both developed

[60] Estimates of world services trade by mode of supply are contained in Maurer and Magdeleine (2012).

and developing countries tend to exclude subsidies and, though to a lesser extent, sub-federal or sub-national measures from the scope of their commitments. Moreover, when looking at the numbers of connected, unclear and disconnected agreements (Columns 3 to 5 in Table 4), there is no clear pattern either. While the EU, Japan, Norway and Switzerland have mostly signed "connected" agreements, Chile and Mexico - two other OECD economies - have the highest number of "disconnected" agreements.

The relatively high shares of 'minus commitments' in the RTAs of countries that, on average, have few GATS obligations may be due in part to lack of information and experience on the part of the administrations concerned. At the time of the Uruguay Round, they could have been over-strained by the complexities of the new Agreement and thus, unintentionally, omitted inscribing limitations that would have fully covered the trade regime in place and any anticipated changes. For example, the negotiating mandate in GATS Article XV, concerning the development disciplines for trade-distortive subsidies, could have been misunderstood initially to imply that subsidies were exempt from already existing disciplines, including national treatment. Similarly, reflecting the practice in merchandise trade, many Members' GATS schedules have been drafted by government units, typically in the Ministries of Trade and Industry or Foreign Affairs, not familiar with the sub-federal competencies that might exist in service sectors, the sensitivities involved, and the ensuing need for coordination with other government levels.[61] Subsequent RTA negotiations might then be used to adjust the picture and scrupulously inscribe whatever limitations might be needed at present or in future and/or avoid treading again on regional governments' toes.

Our dataset also suggests that North-South RTAs (i.e., agreements between OECD members and non-members) are more GATS-minus prone than North-North or South-South RTAs. Is this due to the fact that North-South RTAs are normally based on templates developed by the northern participant, which the co-signatories might not always be able, within a limited time span, to thoroughly assess and consistently apply? However, any such inferences need to be very tentative, given the limited coverage of our dataset. Relatively few North-North RTAs are included at present, of which nine are NAFTA-type (top-down scheduling) and four GATS-type (bottom-up approach, see section III.A).

Interestingly, NAFTA-inspired RTAs, as a group, also feature relatively more 'minus commitments' than GATS-type agreements. One obvious reason are the technical peculiarities of top-down scheduling and the difficulties for the administrations concerned to convert their GATS commitments, and any intended improvements, accordingly. As indicated before, such difficulties could have affected our analysis as well. Nevertheless, a closer look at our dataset shows, somewhat surprisingly, that the share of omitted sub-sectors or sector segments does not vary significantly between GATS- and NAFTA-type agreements. Another source of GATS-minus commitments in the latter group of RTAs are reservations with regard to future measures that might reach beyond the scope of the limitations a party had attached to its corresponding GATS commitments.[62]

[61] Article I:3 of the GATS explicitly provides that the Agreement's coverage extends to measures taken by "central, regional or local governments and authorities". A following sentence recognizes that internal legal constraints could prevent federal governments from bringing sub-federal entities into line. Accordingly, "[i]n fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to ensure their observation by regional and local governments and authorities …" While exempting Members from the expectation to enforce compliance across all government levels, however, this provision does not modify the underlying obligation and the need, in the event of non-compliance, to compensate affected trading partners. Accordingly, while the Appellate Body dismissed the relevance of certain US state laws in the context of *US - Gambling*, this was due only to peculiarities of this case, but did not call into question the applicability of WTO/GATS disciplines to sub-federal legislation. Appellate Body Report, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US - Gambling)*, WT/DS285/AB/R, adopted 20 April 2005, paras 152 to 155. See also Zacharias (2008).

[62] See above n 16.

Table 4. GATS-minus commitments by WTO Member [a]

Member	Number of RTAs covered	Breakdown according to third-party MFN provisions			RTAs with horizontal GATS-minus provisions			Sector-related GATS-minus provisions (average share)
		Connected	Unclear	Dis-connected	Subsidy related	Exclusion of sub-national measures	Other	
Albania	1	1	0	0	0	0	0	0.0%
Australia	5	0	1	4	5	3	1	3.9%
Bahrain	1	0	1	0	1	1	0	2.3%
Brunei Darussalam	1	0	1	0	1	0	1	8.2%
Canada	3	0	0	3	3	3	3	7.7%
Chile	12	1	1	10	11	7	9	6.4%
China	7	0	3	4	5	1	3	6.9%
Costa Rica	3	0	0	3	3	1	3	6.1%
Croatia	1	1	0	0	0	0	0	0.0%
Dominican Repub.	2	0	0	2	2	1	2	2.5%
El Salvador	3	0	0	3	3	1	3	5.2%
EC	9	4	2	3	4	0	1	0.3%
FYROM	1	1	0	0	0	0	0	0.0%
Guatemala	2	0	0	2	2	1	2	2.5%
Honduras	1	0	0	1	1	0	1	2.9%
Iceland	2	0	0	2	1	0	0	0.0%
India	1	0	0	1	1	0	1	0.9%
Indonesia	1	1	0	0	1	0	0	1.8%
Jamaica	1	0	0	1	1	0	1	1.5%
Japan	10	6	1	3	7	2	5	3.0%
Jordan	1	1	0	0	0	0	0	1.1%
Korea	4	1	0	3	3	1	3	5.0%
Malaysia	2	1	0	1	2	0	1	2.4%
Mexico	10	0	1	9	10	3	7	3.2%
Morocco	1	0	1	0	1	1	1	2.5%
New Zealand	4	0	2	2	4	1	2	3.7%
Nicaragua	1	0	0	1	1	0	0	0.0%
Norway	5	3	0	2	1	0	1	1.7%
Oman	1	0	1	0	1	1	0	3.1%
Pakistan	1	0	0	1	1	1	0	3.1%
Panama	1	0	0	1	1	0	0	14.2%
Peru	3	0	0	3	3	2	3	5.0%
Philippines	2	1	0	1	2	0	1	2.6%
Singapore	10	1	2	7	8	3	9	3.8%
Switzerland	5	4	0	1	1	0	1	2.1%
Thailand	3	1	0	2	3	0	2	8.1%
United States	10	1	5	4	9	9	6	3.8%
Viet Nam	2	1	0	1	1	0	1	2.1%

a Based on a dataset of 66 RTAs.

Have scheduling techniques improved over time or, in other words, do more recent RTAs contain fewer minus elements than their predecessors? A comparison of 28 RTAs enacted before 2005 with 38 more recent agreements provides a somewhat sobering picture. The share of GATS-minus provisions is slightly higher in the latter group (4 per cent) than in earlier agreements (3.6 per cent). Various explanations are conceivable. For example, administrations might have become less mindful over time of their countries' GATS commitments and potentially relevant GATS provisions; government-internal legal concerns could have been trumped increasingly by political (and economic?) considerations militating in favour of RTAs; and/or the groundswell towards regionalism might have seized countries less well equipped with the experience and resources needed to properly negotiate RTA schedules. Interestingly, among the 60 signatories of the 38 post-2005 RTAs in our dataset, 35 were new to the game, and all are developing countries.

D. Main findings

The preceding observations may be briefly summarized as follows:

- GATS-minus commitments, i.e. commitments that fall short of their counterparts in the relevant GATS schedules, can be found in a vast majority of the 66 RTAs included in our dataset.

- Typically, the horizontal (cross-sectoral) sections of the agreements already contain such 'minus commitments'. Particularly frequent are denials of national treatment for subsidies and other financial measures, other departures from national treatment, and exclusion of measures taken by sub-federal entities.

- Concerning individual sectors, mostly affected are financial services, communication services, and business services. From a modal perspective, commercial presence and presence of natural persons (modes 3 and 4) stand out.

- In most RTAs, 'minus commitments' are *not* neutralized by an MFN clause that would ensure that, in the event of inconsistencies, the relevant GATS commitment prevails. The fact that disconnected (non-neutralized) RTAs are particularly prone to 'minus commitments' could imply that, in many cases, such commitments form part of an overall concept.

- There is no indication that scheduling practices have changed over time. RTAs enacted after 2005 contain at least as much 'poison' as earlier agreements.

- Preliminary evidence suggests that North-South RTAs are more vulnerable to 'minus commitments' than North-North or South-South agreements. Overall, GATS-type agreements tend to be less affected than NAFTA-type agreements.

Finally, these observations need to be contrasted with the profound technical, economic and regulatory changes that key service sectors have undergone over the past one or two decades. Many Uruguay-Round commitments might thus have been deprived of their initial substance (if any) and rendered economically obsolete.[63] By the same token, it is quite surprising to see the sheer extent of the GATS-minus commitments that RTA signatories have scheduled nevertheless, and the fact that recent agreements appear at least as affected as their predecessors some five or ten years ago.

[63] A study for a representative sample of WTO Members and service sectors suggests that Uruguay Round commitments are on average 2.3 times more restrictive than actual trading conditions; Gootiiz and Mattoo (2009).

V. CONCEIVABLE REMEDIES

Mortimer: "Get out of here! D'ya wanna be poisoned? D'ya wanna be murdered? D'ya wanna be killed?"

A. Adjustments in RTAs or renegotiation of 'poisoned' GATS commitments?

In discussing the preferences extended under current services RTAs, current studies tend to distinguish between the following scenarios: (i) Simple reproduction of GATS commitments; (ii) improvements over GATS without implying actual liberalization; (iii) improvements over GATS with liberalization effects implemented on an MFN basis; and the former scenarios with preferential liberalization extended under (iv) liberal rules of origin and (v) restrictive rules of origin.[64] In the light of the preceding discussion at least one, but possibly three additional options might need to be added: RTAs with (vi) GATS-minus commitments that are only on paper; (vii) GATS-minus commitments that, in the form of 'negative preferences', are actually enforced; and (viii) GATS-minus commitments that are implemented on an MFN-basis, implying that relevant GATS obligations are disregarded. In addition, attention could be given, again, to the restrictiveness of the RTAs' rules of origin and, more importantly in the current context, the existence of third-party MFN clauses, or equivalents, that would 'import' any more favourable GATS commitments into the RTA.

From a merely technical perspective, it would be relatively easy to eliminate any GATS-minus commitments and the associated uncertainties in the PTAs concerned or to renegotiate relevant GATS commitments. However, there is no silver bullet. Otherwise, we might have seen such initiatives in the past or, at least, a gradual diminution of GATS-minus elements over time. Yet there are no such indications. On the contrary, the RTAs concluded after 2005 appear at least as dubious in this regard as those concluded before (section IV.C). Moreover, there have been neither re-negotiations of GATS commitments under Article XXI with a view to neutralising the minus features in any of the disconnected agreements, nor amendments that would have removed these features or inserted a comprehensive MFN clause in the RTAs concerned.

By the same token, who would launch a legal challenge in the WTO? Apart from egregious cases, it is difficult to see why an affected third country, possibly with poison in its own preferential cellar, would take the initiative. The potential gains ensuing from a successful outcome might not compensate for the adverse repercussions on the complainant's own RTAs. Similarly, a frustrated party might think twice before challenging an agreement's 'negative preferences' in the WTO and, thus, jeopardizing the basic understanding on which it was built, including any exchanges of GATS- or WTO-plus elements.[65] Moreover, any such government would risk disqualifying itself as a partner of future regional/preferential agreements. According to Bhagwati, "it is not easy to find political backing for stringent discipline when almost every member nation seems to be joining the fray. A stone cast at another is likely to be thrown back at oneself".[66]

The immediate impact of a legal challenge under WTO provisions would be weak in any event. The 'costs' of sitting tight and waiting for other Members to take action are close to nil. As noted by Posner and Sykes, under WTO dispute settlement, a government has "a free pass of sorts"

[64] See Fink and Jansen (2009). In a similar vein, Marchetti and Roy (2008) provide an instructive comparison of individual WTO Members' GATS schedules with their best RTA commitments and Doha Round offers. Again, reflecting the specific focus of their research, no attention is paid to GATS-minus elements.

[65] For an overview of such GATS- or WTO-plus elements, see Horn, Mavroidis and Sapir (2010 and 2011).

[66] Bhagwati (2008). Though Bhagwati refers to what he considers a general lack of enforcement of the RTA disciplines under Article XXIV of the GATT, he would certainly not have moderated his view in the current context. See also Mavroidis (2010).

since it suffers no retaliation for harm caused before a case has been adjudicated and the 'reasonable' time for cure has lapsed.[67]

More generally, it is important to bear in mind that the driving forces behind WTO disputes are the commercial interests of economic operators, represented by their governments, that are affected by other countries' non-compliance with treaty obligations. Typical examples are perceived abuses of the GATT's trade remedy provisions in connection with anti-dumping, safeguards or countervailing duty actions. What is at stake in the current context, however, reaches beyond the commercial calculus of companies or individuals that might be harmed and the governments representing them: the integrity of the multilateral system and its ability to guide, and ensure the mutual compatibility of, its Members' trade policies.

B. Coordinated action in the WTO?

For various reasons, very many services RTAs now contain poisonous GATS-minus elements. As noted before, these can be traced, with varying dosage, in a clear majority of the agreements involving OECD countries, China or India. In turn, this also suggests that single initiatives would be too weak an antidote; coordinated action might be needed.

One conceivable option: A common initiative to address this issue in the competent WTO bodies, including the Committee on Regional Trade Agreements. The aim would be a decision, preferably at the level of the General Council, that confirms, first, that nothing in the RTAs involving WTO Members can be understood to qualify their WTO obligations and, second, committing participants to incorporate a clause to this effect in all past and future RTAs. Such a clause would ensure that GATS commitments set the floor level across a Member's RTAs, thus 'regionalise multilateralism', and remove any doubts about the mutual relationship. In a similar vein, Pauwelyn has proposed, for the sake of consistency, to include cross-references in RTAs that would automatically incorporate any 'updates' that might be agreed upon in the WTO.[68] However, the challenge in the current context is of a different order; first and foremost, it is about ensuring consistency between RTAs and WTO/GATS as they currently stand. At a secondary level, of course, an appropriate clause would also help prevent trade-liberalizing initiatives under the GATS from generating new or exacerbating existing GATS-minus commitments.[69]

The services chapter of the Free Trade Treaty between Costa Rica and Mexico, which entered into force in January 1995, may serve as an example.[70] The chapter does not cover financial services for which the parties later assumed new (Costa Rica) or significant improvements of existing GATS commitments during the extended Uruguay-Round negotiations in this sector, concluded in late 1997. Since financial services are completely excluded from this chapter of the treaty, *inter alia*, they are also excluded from its MFN clause that would otherwise require the parties to mutually apply any more favourable treatment they extend to other countries in similar circumstances. It could thus be argued that the results of the subsequent multilateral negotiations effectively created GATS-minus elements, in this case consisting of less than 'substantial sectoral coverage', that might prove difficult to reconcile with the benchmarks of Article V:1 of the GATS (section III.A).

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[67] Posner and Sykes (2011). In a similar vein, Evenett (2011) lists a variety of "loopholes" in the WTO dispute settlement system that might be exploited by "cynical governments".

[68] Pauwelyn (2009).

[69] Note that, independently of the Doha Round, Article XIX:1 of the GATS requires Members to enter into "successive rounds of negotiations, beginning not later than five years from the date of entry into force of the WTO Agreement [i.e. 1 January 1995 and 2000, respectively] and periodically thereafter, with a view to achieving a progressively higher level of liberalization".

[70] Available at http://www.comex.go.cr/acuerdos/mexico/Texto%20del%20acuerdo/Texto.pdf (visited 12 January 2012). The WTO Secretariat's Factual Presentation of the treaty is contained in document WT/REG218/2/Rev.1of 22 October 2010.

Insofar as inexperience has contributed to scheduling flaws in RTAs, independent intelligence and advice might help. It could be provided, for example, via an "Advisory Centre on Regional Trade Agreements (ACORTA)", modelled on the Advisory Centre on WTO Law (ACWL). Such a Centre, as proposed by Jim Rollo and others, could develop a basic framework to analyse the economic and legal aspects of regional agreements, conduct such analyses and advise its members (LDCs and developing countries) on their RTA negotiations.[71] Funding might be provided via fees from non-LDC members, possibly complemented by some start-up from developed countries. For such an initiative to materialize, however, potential donors would have to contain any selfish (mercantilist) instincts and accept in the end that officials from small and poor countries might be turned into more effective RTA negotiators.

With the stalemate in the Doha Round, and the ever increasing temptation to strike bilateral or regional deals, a thorough examination of the relevant WTO disciplines appears more desirable than ever before. Yet, by the same token, is it reasonable to expect WTO Members to mobilize the energy necessary to 'regionalize multilateralism'? The possibility at least should not be dismissed from the outset, although past levels of (non-)discussion in the competent WTO body, Committee on Regional Trade Agreements, do not augur particularly well. As noted before, apart from the signatories of the RTAs concerned, no more than two or three delegations normally participate in the Committee's considerations.

Should the GATS' liberalization agenda remain stalled for the time being, nevertheless, this does not necessarily imply that rule-making efforts will suffer as well. The fact that everybody has been in bargaining mode for over ten years has deflected attention from a variety of open definitional and conceptual issues in services trade that remain to be addressed. There might be an opportunity now. And there is at least one facilitating factor: The sectoral 'stakeholders' that might have instigated a variety of GATS-minus commitments in RTAs may not be as deeply involved in discussions of a horizontal nature in the WTO, if at all, as they are in the scheduling process in bilateral negotiations. By the same token, the existence of a common understanding, once reached, would certainly strengthen the position of the policy coordinators in capitals. Admittedly, however, they would need to prepare for a long-haul journey. So far, the intensity of Members' interest - and that of the research community - may be summarized as follows:

> *Aunt Abby: "Now, Mortimer, you know all about it and just forget about it.*
> *I do think that Aunt Martha and I have the right to our own little secrets."*

[71] Rollo (2009). Similar ideas are to be found in several other papers in the same volume. The Advisory Centre on WTO Law currently provides advice to 30 developing country members and 43 LDCs that are WTO Members or in the WTO accession process. See http://www.acwl.ch/e/index.html (visited 12 January 2012).

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