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SERVICES LIBERALIZATION FROM A WTO/GATS PERSPECTIVE: IN SEARCH OF VOLUNTEERS

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Abstract:

There has been virtually no liberalization under the General Agreement on Trade in Services (GATS) to date. Most existing commitments are confined to guaranteeing the levels of access that existed in the mid-1990s, when the Agreement entered into force, in a limited number of sectors. The only significant exceptions are the accession schedules of recent WTO Members and the negotiating results in two sectors (financial services and, in particular, basic telecommunications) that were achieved after the Uruguay Round. The offers tabled so far in the ongoing Round would not add a lot of substance either. Apparently, negotiators are 'caught between a rock and a hard place'. For one thing, the traditional mercantilist paradigm, relying on reciprocal exchanges of concessions, seems to be provide less momentum than in the goods area. For another, there are additional - technical, economic and political - frictions that tend to render services negotiations more complicated, time-consuming and resource-intensive. The novelty of the Agreement adds an additional element of legal uncertainty from a negotiator's perspective. This paper discusses various options that might help to overcome the ensuing reticence to engage. Few appear within reach at present, however. The bare minimum that would need to be achieved is to revive work on scheduling and classification issues with a view to putting both existing commitments and new offers on a safer footing, and to improve compliance with long-existing information/notification obligations.

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I. WHAT WTO MEMBERS MIGHT WANT TO ACHIEVE IN TRADE ROUNDS

Quite a number of economists wonder about the *economic* rationale underlying the WTO and its various Agreements. In the words of Paul Krugman: 'If economists ruled the world, there would be no need for a World Trade Organization'. More specifically, Krugman stresses that 'the implicit mercantilist theory that underlies trade negotiations does not make sense on any level ... but it nonetheless governs actual policy'.[1] Though he recognizes the potential incentive for large countries to manipulate exports and imports with a view to improving their terms of trade, against the collective interest, Krugman feels that such motives and the related need for coordinated action carry little political weight in practice.[2]

A glance at basic WTO documents confirms indeed this *mercantilist* interpretation of the WTO system. In particular, the Preambles to GATT and GATS refer, respectively, to the concept of '*... reciprocal and mutually advantageous arrangements* directed to the substantial reduction of tariffs and other barriers to trade ...' and Members' desire to achieve 'progressively higher levels of liberalization through successive rounds of multilateral negotiations aimed at promoting the interests of all participants on a *mutually advantageous basis*'. From this perspective, a participating government is expected to sacrifice the protectionist interests of its import-substituting industries on the altar of other sectors' export expansion. The narrow mercantilist (or commercial) concept of reciprocity may be complemented by a broader-based variant, which emphasises the 'public good' character of the multilateral system as a whole, and its evolution via trade rounds, rather than any particular elements.[3] Relevant considerations are contained in the Marrakesh Declaration as well. Its signatories expect, *inter alia*, that the creation of the WTO 'ushers in a new era of global economic cooperation, reflecting the widespread desire to operate in a fairer and more open multilateral trading system for the benefit and welfare of their peoples' (para 2).

Additional expectations may need to be added. Relevant WTO documents also refer to objectives - gains in transparency, stability and predictability ('Ulysses effect') - which are not directly captured by the paradigm of negotiated exchanges of concessions.[4] Most notably, the Marrakesh Ministerial Declaration expressly welcomes 'the *stronger and clearer legal framework* ... for the conduct of international trade, including a more *effective and reliable dispute settlement mechanism*' as well as 'the *increased predictability and security* represented by a major expansion in the scope of tariff bindings'. In the same vein, the GATS puts the notion of progressive liberalization, as contained in its Preamble, into the broader context of establishing a rules-based system for services trade 'with a view to the expansion of such trade under *conditions of transparency*'. The trade-off implied for participating governments: relinquishing some 'policy space', and the related scope for satisfying protection-seekers, in return for more stable and predictable access conditions abroad.

Implicitly at least, Krugman recognizes the importance of policy bindings as well, noting that 'the true purpose of international negotiations is arguably not to protect us from unfair foreign competition, but to protect us from ourselves'.[5] Yet, in order for such protective effects to materialize, negotiated 'concessions' must be kept stable over time. WTO-negotiated liberalization makes sense

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[1] Krugman (1997) at 113 and 114.

[2] While Krugman brushes aside the empirical significance of terms-of-trade manipulation, as captured by Bagwell and Staiger's seminal analysis, Regan (2006) provides a detailed discussion and comparison with the (conventional) protectionist/mercantilist paradigm. In his view, the latter is superior on empirical and theoretical grounds.

[3] See Finger (2005) at 35, who, in turn, builds on Hudec (1987).

[4] On the way back to Ithaca, in order to withstand the songs of the sirens, Ulysses ordered his crew to lash his hands to the mast of the ship (Roessler, 1985). The term 'Ulysses effect' was used later by Anderson (2001) at 17. In a similar vein, Horn (1998, at 18) associates such self-bindings – 'the triumph of reason over impulse' - with constraints on short-term action that are deliberately accepted in return for long-term gains.

[5] Krugman (1997) at 118.

only if combined with bindings. In turn, however, there is no need *per se* for bindings to be combined with liberalization. Their mere existence could already serve a useful purpose - enhancing predictability, transparency, etc. - even if they confirm only prevailing conditions of access.

Interestingly, mercantilist instincts were *not* a dominant force of trade liberalization over the past two decades. According to a World Bank study, the tariff-reducing effects of the Uruguay Round were far more modest than those of autonomous moves. While the latter accounted for about two-thirds of developing countries' cuts in tariff protection between 1983 and 2003 (percentage reduction in average weighted tariffs), the Uruguay Round's contribution remained limited to one-quarter. The liberalization effects of preferential trade agreements ranked third.[6] Moreover, a closer look at the Uruguay Round outcome, in terms of the tariff reductions achieved and conceded by individual WTO Members, is said to provide 'little evidence of either equal sacrifice or of mercantilist balance'.[7]

What about the 'Ulysses factor', however? Recent research corroborates the trade-generating effects associated with tariff bindings under both preferential trade agreements (PTAs) and the GATT. According to Mansfield and Reinhardt, 'PTAs and GATT/WTO reduce the volatility of exports', and 'lower export volatility itself increases the level of exports'.[8] The gains associated with bindings in both fora are estimated to be comparable to an autonomous cut of the average nominal tariff by 1.5 percentage points. Further, the authors expect additional benefits to arise from changes in the composition of trade (associated, for example, with a shift from barrier-hopping foreign investment to 'vertical or export-platform investment') and more diversified export portfolios.[9]

Of course, governments' interest in the multilateral system is not necessarily confined to the objectives and intentions promulgated in WTO documents. International trade negotiations and subsequent bindings might be motivated as well by country-internal considerations, such as the intention to smooth out policy fluctuations over the election cycle and contain the disproportionate influence of well-organized interests (from agriculture to mining and shipbuilding)[10] or to rebalance central-regional relations within federally organized units, including the European Communities. Finally, it would be too narrow a view to attribute the WTO's raison-d'être only to economic, administrative or domestic political considerations. In the words of Jacob Viner, one of the intellectual stalwarts of the system: 'The great political virtue of multilateralism, far exceeding in importance its economic virtues, is that it makes it economically possible for most countries, even if small, poor and weak, to live in freedom and with chances of prosperity without having to come to special terms with some Great Power'.[11]

The following discussion revolves around the impediments that render services negotiations more complicated and resource-intensive than 'conventional' trade negotiations for goods. The next section starts with a comparison of main structural elements of the two relevant WTO Agreements, the General Agreement of Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS) in order then to be followed, in the third section, by an overview of the services-related commitments undertaken in different negotiating contexts. The existence of so-called phase-in commitments is taken as an indicator of negotiated liberalization, i.e., of commitments in excess of simple bindings of already existing regimes. Given the modest results achieved in the Uruguay

[6] Newfarmer (2006). In contrast, tariff-reduction formulae appear to have contributed significantly to the 'productivity' of the Kennedy Round. See Martin and Messerlin (2007) at 350-2.

[7] Hufbauer (2005) at 35.

[8] Mansfield and Reinhardt (2008) at 645-6.

[9] Ibid at 629.

[10] As emphasized by Roessler (1985, at 297), '[t]he function of the GATT as a negotiating forum is to enable countries [or, rather, governments] to defend the national economic interest not against the national interest of other countries but against sectional interests within their own and other countries'. From a similar perspective, Regan (2006, at 967) argues that the combined outcome of many policy decisions on small issues, which favour (and mobilize) particular groups, might well differ from a big decision, such as the acceptance of a trade agreement, which mobilizes all groups at the same time.

[11] Quoted in Sally (2008) at 99.

Round and the sobering level of the offers submitted in the Doha Round to date, the fourth section seeks to identify the factors that might have operated, and are likely to continue operating, against more ambitious moves in trade rounds.

Nevertheless, services trade has been liberalized significantly in recent years, in particular the conditions governing commercial establishment. Relevant moves have been driven mainly by *domestic* user demands for internationally competitive inputs of so-called intermediate or infrastructural services. While the GATS offers the opportunity to bind such autonomous moves, Members have rarely seized it, except in the extended negotiations of 1997 on basic telecommunications and, to a more limited degree, financial services (fifth section). Against this backdrop, the sixth section discusses various options to reduce the (perceived) risks of GATS bindings and encourage the submission of meaningful offers that would add credibility to and, thus, improve the effectiveness of, domestic services reforms. Unfortunately, however, most of these options have never been discussed, let alone tried, in a WTO/GATS context. The concluding section suggests, as a minimum, to revive discussions of technical issues with a view to solidifying the basis for both current and future commitments and, second, to explore ways of promoting compliance with existing transparency obligations.

II. THE 'GATT SCENARIO': RELEVANT FOR SERVICES TRADE?

Services liberalization, with a focus on infrastructural services, might prove more economically beneficial than (further) tariff reductions in merchandise trade, given high continued barriers in many sectors.[12] However, services are more difficult to negotiate. This is due to various sectoral peculiarities - prevalence of behind-the-border measures, governments' heavy regulatory involvement, etc. - which, in turn, are also reflected in the structure of the GATS. In particular, while the scope of GATT is confined to one mode of supply (cross-border trade) and one negotiable type of restriction (tariffs), the GATS covers three additional modes, including consumer movements and factor flows (capital and labour), and permits a variety of negotiable restrictions that apply to the treatment of products (services) and/or their suppliers.[13] Tellingly, Article XXVIII(b) of the GATS defines the 'supply of a service' to include 'production, distribution, marketing, sale and delivery'.

The Agreement's broader and deeper coverage is counterbalanced, however, by additional elements of flexibility. For example, it is far easier for WTO Members to navigate their way around, or fully avoid, core trade obligations in services, such as Most-Favoured-Nation (MFN) treatment or national treatment, than would be possible in merchandise trade. [14] In a similar vein, the breadth of the Agreement and, in particular, its toleration of a wide range of trade restrictions, at the border and behind, implies that its transparency effects are more limited than those of the GATT (Table 1).

In order to protect the GATS' particular combination of extended coverage *and* greater flexibility from being exploited by vested interests, transparency matters even more than under the GATT. Yet, unfortunately, the Agreement's particular structural features are compounded by Members' poor notification record. Core transparency obligations are taken quite lightly, including the requirement to inform the Council for Trade in Services of new laws and regulations that significantly affect trade in sectors subject to specific commitments (Article III:3 of the GATS) and of

[12] See, for example, World Bank (2002), Hoekman (2006) at 16-26, and Hoekman, Mattoo and Sapir (2007) at 371.

[13] Modes 3 and 4 deal, respectively, with commercial presence and the presence of natural persons in the territory of the Member concerned. The other two modes are defined in terms of (conventional) cross-border imports into a Member's territory (mode 1) and the consumption abroad of services by a resident of one Member in the territory of another Member (mode 2).

[14] See, for example, Adlung (2006) and Adlung and Carzaniga (2009).

recognition initiatives, whether autonomous or mutually agreed, concerning foreign standards, educational degrees or certificates (Article VII:4).[15]

Table 1. GATT vs. GATS: Main features in a nutshell[16]

GATT	GATS
Coverage: Cross-border trade in products (goods).	Three additional modes of supply: consumption abroad, commercial presence, and presence of natural persons. **(+)** Related extension of core disciplines to treatment of suppliers **(+)** and, by implication, to behind-the-border measures. **(~)**
Tariffs are the only negotiable instruments of protection.*	All conceivable types of trade and investment barriers are negotiable. **(<>)** Absence of a commonly agreed measure of protection. **(~)**
Relatively strict compliance with MFN obligation, subject to one major exemption (Preferential Trade Agreements).	Additional scope for MFN departures, including in the form of 'Article II Exemptions' and recognition measures concerning foreign standards, certificates, etc. **(<>)**
Automatic extension of national treatment to imports.	All types of departures from national treatment are permissible. **(<>)**
International product standards are widely available as templates for domestic regulation; Members are held to use such standards.	International service standards are relatively scarce; there are no particular incentives in GATS to encourage their use. **(<>) (~)**
Core disciplines (concerning use of quotas, subsidies, etc.) extend to exports as well.*	No constraints on export-generating or -restricting policies. **(<>)**
General exceptions for overriding policy reasons (protection of life and health, public morals, public safety, etc.)	Additional exceptions for prudential measures (financial services) and visa and labour-market policies; blanket exclusion of 'governmental services'. **(<>)**
Possibility of contingent protection in the event of subsidized or dumped imports or in 'safeguards situations' (sudden import surges that would cause serious injury).	No similar instruments. The 'question of emergency safeguards measures' and the 'appropriateness of countervailing measures' are covered by negotiating mandates under Articles X:1 and XV:1, respectively. **(> <)**

Legend:
(+) = Wider coverage than GATT; (<>) / (> <) = More / less flexibility; (~) = Less transparency
* Subject to exceptions for natural resource-based products.

[15] For example, since its accession in 2000, Albania has submitted 100 notifications under Article III:3, as compared to 50 by Switzerland, 42 by China, 12 by Japan, four by the United States, and none by EC15 and Canada (January 2000 to mid-February 2009). In the context of its Trade Policy Review in 2008, the United States pointed out, in reply to a question from China, that few Members had recently notified under these provisions. Thus, from the US perspective, 'the absence of Article III:3 notifications would not appear to support a conclusion that they have neither introduced nor changed existing measures in a manner that significantly affects trade in services covered by their specific commitments'. WTO document WT/TPR/M/200/Add.1 of 9 September 2008, at 213.

Concerning recognition measures under Article VII, among the Members listed before, only Switzerland (10 cases) and Japan (1) submitted notifications between January 2000 and February 2009.

[16] For a more detailed discussion see Adlung (2006 and 2007b).

III. EXPERIENCE WITH SERVICES NEGOTIATIONS (DOHA ROUND AND ALTERNATIVES)

The liberalizing content of the offers submitted to date in the Doha Round, like that of the initial Uruguay Round schedules, has remained shallow. As summarized by Jara and Domínguez, the offers provide 'few, if any, new business opportunities, foreshadowing no new liberalization in this area as a result of the Round'.[17] This assessment of early 2006 is essentially still valid. Very little has happened since due to the temporary suspension of all negotiations in the Doha Round between July 2006 and February 2007, and persistent tensions over agriculture and non-agricultural market access (NAMA).

If there has been *negotiated* services liberalization in the past, it has not occurred in broad-based negotiations. Table 2 provides an overview of pre-commitments to future services liberalization in different contexts. Such pre- or phase-in commitments may serve as a proxy for negotiated outcomes that are more liberal than currently prevailing conditions of access. The governments concerned guarantee, in specified sectors, compliance with a particular regime from a future date. Phase-in commitments are conspicuously more frequent in WTO accession cases and in PTAs than in the schedules initially submitted in the Uruguay Round and current offers in the Doha Round. (It needs to be taken into account, however, that many current offers might still be upgraded. Prior to the conclusion of the Round, there would be at least one more call for improved offers.)

Table 2. Phase-in commitments in services (Number of countries concerned / share of participants)

I. Uruguay Round (1994)		17 / 13% [5 / 4%][a]
II. Extended Uruguay Round negotiations, 1997		
	A. Financial Services:	2 / 3%
	B. Basic Telecommunications:	42 / 60% [38 / 54%][a]
III. Preferential Trade Agreements, 2001 - 06[b]		21 / 67%
IV. WTO Accessions (1996 – 2007)[c]		19 / 86 %
V. Doha Round offers, 2003 – 2007		13 / 9% [5 / 4%][a]

a Excluding commitments by EC Members that seem to consist mainly of adjustments to a common Community regime.
b In the context of the US-CAFTA Agreement, the CAFTA Members (Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua) are counted individually.
c Excluding obligations that might be contained in the reports of the relevant Working Parties.
Source: Adlung (2007a) at 566.

Apparently, accession to the WTO or conclusion of PTAs are worth paying a 'price', from the perspective of applicant countries, that current WTO Members might find utterly inappropriate. For example, in China's accession schedule of 2001, 60 per cent of all committed sectors had been subjected to phase-in commitments, which were to be implemented within six years at most.[18] The

[17] Jara and Domínguez (2006) at 113. Alejandro Jara, the then permanent representative of Chile to the WTO, chaired the services negotiations until October 2005.

[18] According to Mattoo (2003, at 299), China's GATS commitments of 2001 represented 'the most radical reform program' that had been negotiated so far in the WTO.

accession schedules of Oman and of Vietnam contain even higher shares of phase-in commitments. Typically, such commitments are particularly frequent in intermediate or producer services, including telecommunications, banking and insurance. It is impossible to find anything comparable among initial WTO Members, except for the extended negotiations on basic telecommunications. These negotiations, concluded in February 1997, happened to coincide with a widespread trend towards privatization in the sector (see also section VI(i)). [19]

The trade effects that might be associated with policy bindings are certainly more difficult to trace in services than they already are in merchandise trade. Again, this is due to the particular structure of the GATS, including its four modes of supply and wide range of permissible trade restrictions, as well as the absence in general of homogenous products, which could be compared across countries.[20] One conceivable exception is basic telecommunications, where such problems appear less serious and where, owing to the extended negotiations in this sector, a significantly large number of test cases - liberal bindings under mode 3 (commercial presence) - exists. A study on this sector, comparing GATS-bound liberalization in certain countries with non-bound liberalization elsewhere, confirms indeed the existence of a positive link. The authors found that, if other determinants (location and income) are controlled for, WTO Members with GATS commitments in basic telecommunications 'tend to outperform those countries that have not made GATS commitments ... with respect to fixed and mobile penetration as well as sector revenues (as a percentage of GDP)'.[21] This is consistent with the assumption that investment decisions are influenced by the existence of specific commitments under the GATS and the associated stability effects. In this regard, such commitments might be expected to serve a similar purpose as is associated with international investment treaties. However, unlike the GATS commitments on basic telecommunications, it is very rare for such treaties to bind future liberalization measures. The scope of relevant obligations is normally confined to national treatment on a post-establishment basis.[22]

IV. NEGOTIATIONS UNDER THE GATS: THE MAIN IMPEDIMENTS

It is tempting to attribute the - widely acknowledged - lack of progress in the ongoing services negotiations to one main cause such as 'the acuteness of regulatory concerns'.[23] Such concerns are certainly more difficult to address in the WTO than, for example, in the context of regional/supranational organizations, such as the EC, which may issue their own regulations, combining for example minimum harmonization with mutual recognition, that are binding on participants.[24] The maximum that WTO Members might be able to achieve is to agree on common disciplines constraining their regulatory activities with a view, for example, to preventing relevant requirements from being 'more burdensome than necessary to ensure the quality of the service', according to the negotiating mandate in Article VI:4 of the GATS, or 'more trade-restrictive than

[19] In the late 1980s and early 1990s, many WTO Members had launched sweeping telecom reforms, for domestic policy reasons, which were still ongoing at the time. Moreover, the large participants had retained a particular 'stick' during these extended negotiations: the threat not to bind their own regimes on an MFN basis should no 'critical mass' of commitments emerge. See, for example, Bronckers and Larouche (2008) at 321-3.

[20] Moreover, even if relevant data were available, the price effects of locally required inputs (land, labour, etc.) would still need to be eliminated.

[21] Bressie, Kende and Howard (2005) at 20.

[22] Adlung and Molinuevo (2008). Interestingly, the results of available studies on the investment-generating effects of international investment treaties do not fit a clear pattern. According to Adlung (2007a, at 561), sceptical views seem to prevail.

[23] According to Hoekman, Mattoo and Sapir (2007, at 368), services differ from goods 'because of the acuteness of regulatory concerns that cloud the standard domestic economic calculus of the gains from liberalization. These regulatory concerns in combination with the usual political-economy forces have frustrated multilateral services negotiations because it is proving hard to design international rules and commitments that sift protectionist from legitimate policies'.

[24] For an overview of the European Communities' approach to services liberalization and its variations across sectors, see, for example, Pelkmans (2006) at 125-50.

necessary to fulfil a legitimate objective' as stipulated in the Disciplines on Domestic Regulation in the Accountancy Sector.[25] However, key elements of the regulatory disciplines to be negotiated under Article VI:4-negotiations are still undefined; it appears rather uncertain at present whether they would ultimately entail a 'necessity test' related to the means of ensuring the quality of the service or other conceivable policy objectives.[26]

The impact of regulation-related impediments may vary from sector to sector, depending not least on the dominant mode(s) of supply. For example, regulatory barriers may carry more weight in professional services, such as accountancy, architecture or medical services, which tend to rely strongly on mode 4 (presence of natural persons), than in capital-intensive sectors, where access interests revolve around mode 3 (commercial presence), with telecommunications and financial services as cases in point. Investors are flexible. They can usually buy or build up companies without experiencing significant *regulation-related* disadvantages based on their origin or nationality. In contrast, services professionals cannot simply shed their educational history and develop any required new skills within weeks or months; they are 'prisoners' of their own past.

It would be misleading, however, to blame the current state of the services negotiations on one factor only. A more comprehensive assessment needs to include at least the elements listed below. Many of them apply to, and could be expected to complicate, the negotiation of preferential trade agreements or of investment liberalization treaties as well.[27] However, these negotiations benefit, *inter alia*, from an additional (foreign-) policy boost, seem to offer more directly palpable advantages (including in non-WTO areas)[28] and, for whatever reasons, draw less public interest (and aversion) than longer-winded multilateral negotiations.

(i) Lack of political momentum

- Though the WTO is sometimes portrayed as a supra-national institution, it lacks the structural underpinnings to turn any of its Members' hortatory statements into concrete action. 'Geneva' is distinctly different from 'Brussels'. The increasing number and diversity of the WTO's membership has further complicated the definition of 'common ground' at any particular stage of a negotiating process.[29]
- Virtually all WTO Members have their own sensitivities, whether in audiovisual services, health services, maritime transport, or mode 4 (natural persons). Pushing too hard in areas of active interest thus risks triggering highly inconvenient counter-requests.[30]
- Regional and bilateral trade initiatives, including in the form of investment treaties, have multiplied in recent years. They may not only divert attention and resources from the Doha Round process, but also contribute to trade diversion, thus pandering to special interests and producing additional headwind for the Geneva-based negotiations. (The

[25] WTO document S/L/64 of 17 December 1998 (para 2).

[26] The relevance of such a test is discussed in detail by Delimatsis (2007).

[27] Concerning the implications of investment *liberalization* treaties see Adlung and Molinuevo (2008) at 371-6.

[28] See, for example, Horn, Mavroidis and Sapir (2009).

[29] In turn, this has led some observers to question the traditional 'mantras' and 'myths' of the WTO, including the principles of a single undertaking, consensus-based decision-making, and Most-Favoured-Nation treatment. See, for example, Steger (2007). On the other hand, any radical break with these 'mantras' might raise difficult issues of legitimacy. As noted by Wolfe (2007, at 24), the WTO's role as a central component of global governance seems to imply that its basic norms are binding on all Members and that everybody is able to fully participate in its deliberations.

[30] In this context, Jara and Domínguez (2006, at 120) refer to an 'exclusions game' with a snowball effect: The more *de facto* exclusions are claimed by any individual Member, the more difficult for others to resist their industries' calls for equivalent treatment.

economic costs of regionalism, however, might be lower in services than in merchandise trade.)[31]

(ii) Segmentation of policy competencies across ministries, agencies and government levels

- 'Centralized' negotiating structures in Geneva (Council for Trade in Services and subsidiary bodies) do not mesh well with the segmentation of political responsibilities at domestic level.[32] Also, it appears that the influence of specific interests on trade-policy making has increased over time, with a negative impact on the flexibility of negotiating positions.[33]

- The existence *per se* of many specialized ministries and agencies covering individual service sectors, from finance and telecommunications to health and education, provides more niches for political lobbying than exist in merchandise trade. (The main competencies for GATT-type negotiations are normally vested in one or two ministries only.)

- The chances of overcoming defensive positions are particularly slim if the competent experts/administrations are not involved directly in the negotiations, but interact via Geneva-based 'generalists'. Apart from the extended Uruguay Round negotiations in three sectors (maritime transport, telecommunications and financial services) and the plurilateral process launched after the Hong Kong Ministerial Conference, however, such direct interactions have been rare.[34]

(iii) Definitional difficulties associated with the diversity of the sectors, modes and measures covered by services agreements, in whatever context, and a related lack of precision (Table 1)

- The potentially intrusive nature of trade commitments in services, attributable mostly to their broad modal structure (Table 1), is generally counterbalanced by significant leeway for participants' domestic regulatory initiatives. This implies that the commercial value of access obligations, in the sense of Articles XVI and XVII of the GATS, is necessarily more uncertain, in particular in regulation-intensive sectors, than that of tariff concessions under the GATT.[35]
- The absence of a uniform indicator of protection (e.g., in the form of tariff equivalents) - across sectors, modes and measures - further limits the scope for, and the potential efficiency gains from, formula-based negotiations in services.[36]
- For various reasons, including their intangible nature, services are more difficult to classify than goods. The systems used for scheduling commitments thus tend to contain more ambiguities than, for example, the harmonized system in merchandise trade.

[31] In particular, it may prove difficult for governments to combine preferential deals with regulatory discrimination based on the origin of a service or its supplier. Moreover, the origin rules in Article V:6 of the GATS (Economic Integration) are genuinely liberal. Members are required to extend preferential benefits to *all* foreign-incorporated service suppliers that engage in substantive business operations in their territory. See also Cottier and Molinuevo (2008) at 146-8 and, for a review of preferential trade agreements in services, Fink (2008) at 113-48.

[32] See also Jara and Domínguez (2006) at 117-9.

[33] According to Zahrnt (2008, at 405-11), based on interviews with delegates.

[34] The successful conclusion of the extended negotiations on telecommunications and on financial services, in the course of 1997, might have been facilitated by their sector focus. Nevertheless, the negotiations on maritime transport, beset by political difficulties, remained inconclusive. See WTO (2001a) at 111.

[35] See above n 23.

[36] Adlung (2006) at 885.

Additional classification problems have resulted from rapid technical and institutional innovation in sectors such as telecommunications, banking and insurance.[37]

(iv) Cost of reform (time and resources)

- Services reforms tend to require more profound legislative and institutional changes, with far longer implementation periods, than tariff reductions for goods.[38] Policy-induced inertia (see (i) above) is complemented by additional deterrents: time and resources.
- Governments may need to invest significant political capital, over extended periods, in order for relevant projects to succeed. However, the democratic majorities in many developing countries have become thinner and more fragile since the 1980s.[39]

(v) Scant public support for market-oriented reforms

- The potential benefits of increased competition in sectors such as public transport or health, may accrue to treasuries in the form of budget savings, but be less palpable for consumers/voters than the price effects of tariff cuts.
- Ill-conceived reforms in some high-profile cases have contributed to widespread fatigue with privatization and/or commercialization initiatives (Heathrow, British Rail, water distribution (Bolivia), etc.), in whatever context.[40]

What could or, rather, should be done in these circumstances? Bernard Hoekman et al point out the (potential) virtues of reciprocity concepts to foster liberalization beyond what has been achieved autonomously. Accordingly, 'exchanges between developed and developing countries could involve trading mode 4 against mode 3, given that modes 1 and 2 tend to be mostly unconstrained by policies'.[41] Acknowledging that mode 4 is 'virtually non-negotiable' for OECD countries, the authors consider establishing linkages between these negotiations and those on agriculture and on non-agricultural market access to enable broader-based exchanges of concessions.[42]

Apart from regulation-related barriers, however, there are further impediments that could seriously undermine the actual impact of deeper commitments on mode 4: wage-parity and similar requirements. In order to compete effectively in a host market, despite language- and education-related disadvantages, foreign professionals may have little option but to compromise on wages.[43] This appears particularly important for those categories - contractual service suppliers and, to some extent, intra-corporate transferees below the senior management level - that are not strongly covered by current commitments, but constitute negotiating priorities for many developing countries.

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[37] Jara and Domínguez (2006, at 118) opine that the classification list generally used by Members for scheduling purposes is 'incomplete and outdated'. However, negotiators had possibly no better option than to build on what was available in the UN context at the time and to leave it to individual Members to vary the resulting structure according to their needs. The relevant list (MTN.GNS/W/120 of 10 July 1991) is contained in attachment 8 to the Scheduling Guidelines (WTO document S/L/92 of 28 March 2001).

[38] According to Wolfe (2008) at 33-4, 'services negotiations cannot drive domestic policy reform'. Rather, 'endogenous regulatory reform makes it easier for a country to participate in exogenous multilateral negotiations'.

[39] See the discussion in Messerlin (2008) at 3-7.

[40] Of course, the GATS has played no role in the three cases listed in parentheses.

[41] Hoekman, Mattoo and Sapir (2007) at 381. The transport sector may not fit this pattern, however. Concerning the modal structure of the GATS, see above n 13.

[42] Ibid. It may need to be added that, in general, the commitments undertaken by developing countries on mode 4 are not more liberal that those scheduled by developed countries.

[43] The relevant section of the collective request on mode 4, tabled by a number of developing countries, reads: 'Wage parity will not be a pre-condition of entry. However, this does not preclude fixation of certain minimum wages and/or salary thresholds based on average salaries in the host country' (available at: www.uscsi.org/wto/crequests.htm.).

(Services provided by independent professionals, e.g., physicians, architects or lawyers, may be subject to regulated prices, with similar effects on competition.)

Several Members have expressly reserved the right in their current GATS schedules to operate wage-parity and/or minimum-wage requirements. For example, the EC's schedule provides that 'laws and regulations regarding entry, stay, work and social security measures shall continue to apply, including regulations concerning period of stay, minimum wages as well as collective wage agreements'. The United States and Switzerland have scheduled similar limitations. Their absence in other cases does not necessarily imply, however, that such measures do not exist or are not envisaged. Some Members might have felt that wage-related requirements do not matter for the categories covered by their current commitments, e.g., business visitors and independent professionals.[44] Others might have considered such measures not to constitute market-access or national-treatment restrictions in the sense of Articles XVI and XVII, but to fall within the ambit of Article VI (Domestic Regulation).[45] Be that as it may, the prospects appear slim for major target countries to ease, let alone liberalize, wages and other employment conditions any time soon. So far, this has not even been possible among the EC member States. Tellingly, the Internal Market Directive of 2006 explicitly exempts from coverage 'terms and conditions of employment, including ... minimum rates of pay ...'.[46] Against this backdrop, how far can the Communities (and others) be expected to move in the Doha Round?

V. A MORE MODEST OPTION: PROTECTING AUTONOMOUS LIBERALIZATION FROM REVERSALS

The pattern of current commitments suggests that past services liberalization was mostly self-generated within individual countries/governments.[47] Relevant moves might have been instigated by industrial users, equipped with a significant degree of policy access, rather than by private consumers whose interests tend to be more vaguely defined and softly articulated. Over time, many user industries, whether goods or services producers, have experienced stiffening competition as a result of efficiency-enhancing reforms abroad; access liberalization in own markets, domestic or foreign, including in the wake of negotiated tariff reductions; and/or a fall in distance-related barriers attributable to modern transport and communication technologies. In turn, improved transport and communication links have also broadened the scope for locational adjustment, thus adding to the political significance of user discontent with prevailing infrastructural conditions.[48] And, finally,

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[44] For a brief overview of current patterns of mode-4 commitments see Carzaniga (2003) at 23-6.

[45] Wage-parity or minimum-wage provisions fall under the Agreement whenever they are (a) imposed by governments or government-mandated bodies and (b) affect trade in services. (According to Article I:1, the GATS applies to 'measures by Members affecting trade in services'.) While such requirements do not possibly constitute any of the six types of market-access restrictions listed under Article XVI:2, they may prove difficult to reconcile with the benchmark set in Article XVII:3: *'Formally identical treatment* ... shall be considered to be less favourable if it modifies the *conditions of competition* in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member' (emphasis added). Of course, the actual economic impact of minimum-wage requirements ultimately depends on the levels set and the difference from otherwise prevailing market rates.

An attachment to the Scheduling Guidelines (S/L/92, above n 37) contains an illustrative list of national treatment limitations that show up in current schedules; minimum-wage, minimum-price and similar requirements have not been included. Also, there no national-treatment limitations in the horizontal (cross-sectoral) sections of current schedules that would cover discriminatory effects arising from regulated prices.

[46] Article 14 of Directive 2006/123/EC. See Official Journal of the European Union, L 376/36 of 27 December 2006.

[47] In this context, Hoekman and Messerlin (2000, at 492) refer to WTO Members' particular need in services negotiations to supply '"a large dose of unilateralism" if they are to achieve the goal of uniform protection'.

[48] There is a similar story in merchandise trade suggesting that the emergence of international supply chains, in the wake of dramatically expanding foreign investment flows, has created a strong constituency for liberal tariff regimes. See, for example, Pauwelyn (2008) at 567.

rapid technical innovation in capital-intensive sectors, such as telecommunications, has exposed the limits of government-mandated and -funded exclusivity regimes.

Of course, there are also 'consumer services', such as higher-end tourism, which traditionally have been open and where governments are keen in any event to bind prevailing conditions with a view to attracting international investors. Such considerations may be particularly relevant in low-income economies where the competitiveness-related concerns of downstream user industries might be less immediately pressing, given generally higher levels of protection, than in developed countries.

The fact that regulatory barriers are less acute in (capital-intensive) producer services may have facilitated relevant commitments, as indicated before. While mode 3-oriented suppliers could simply acquire existing companies, their counterparts in professional services, including lawyers, accountants, architects or physicians, might be deterred by qualification-related barriers and the associated time and resource requirements. The commercial value of bindings in financial, telecommunications and similar services is thus more immediately evident than in typical mode 4-related sectors. Moreover, large-scale investors not only tend to have better government access, in home and host countries, than relatively small groups of service professionals (architects, veterinarians, plumbers, etc.), but are also better informed of and, thus, interested in relevant international obligations, whether under the GATS or in the context of preferential trade agreements or investment treaties.

In retrospect, the vision of increasingly liberal *and* harmonized services regimes, moving towards 'the goal of uniform protection'[49] across sectors and, possibly, even across modes of supply, thus appears overly ambitious. (Insofar as a country's institutional arrangements reflect prevailing social values, e.g. an intrinsic preference for government over private provision of certain basic services, such goals might be mistaken in any event.) The outcome that reasonably could be expected from broad-based trade rounds, however, would be bindings of past and envisaged liberalization moves in basic infrastructural services that have been triggered by the country-internal forces outlined above. Implementation would be secured against possible slippages and reversals.

The *perpetuation* of existing levels of access, as far as mode 3 is concerned, is already guaranteed in many countries under investment treaties. If the GATS is relevant in this context, this is not due predominantly to WTO Members assuming deliberate policy bindings, by way of scheduled commitments, but to the multilateralization effect brought about by the MFN requirement under Article II. Since very few Members have listed MFN exemptions for their investment treaties, they are required to extend the benefits involved, including in most cases national treatment on a post-establishment basis, to investors from all WTO Members. GATS commitments thus add an element of credibility to policies that must be implemented on an MFN-basis in any event.

Surprisingly, however, many Members do not seem to be aware of these implications. Otherwise, they should have been ready to move on three fronts: First, to offer the alignment of their current commitments with what has been conceded under bilateral investment treaties (BITs);[50] second, to notify the entry into force of new BITs pursuant to the relevant transparency provisions under Article III:3; and, finally, to acknowledge the impact of treaty-bindings in the still ongoing negotiations on an emergency safeguards mechanism under Article X of the GATS. (The national-treatment guarantee extended under most investment treaties, post establishment, is difficult to

[49] See above n 47.

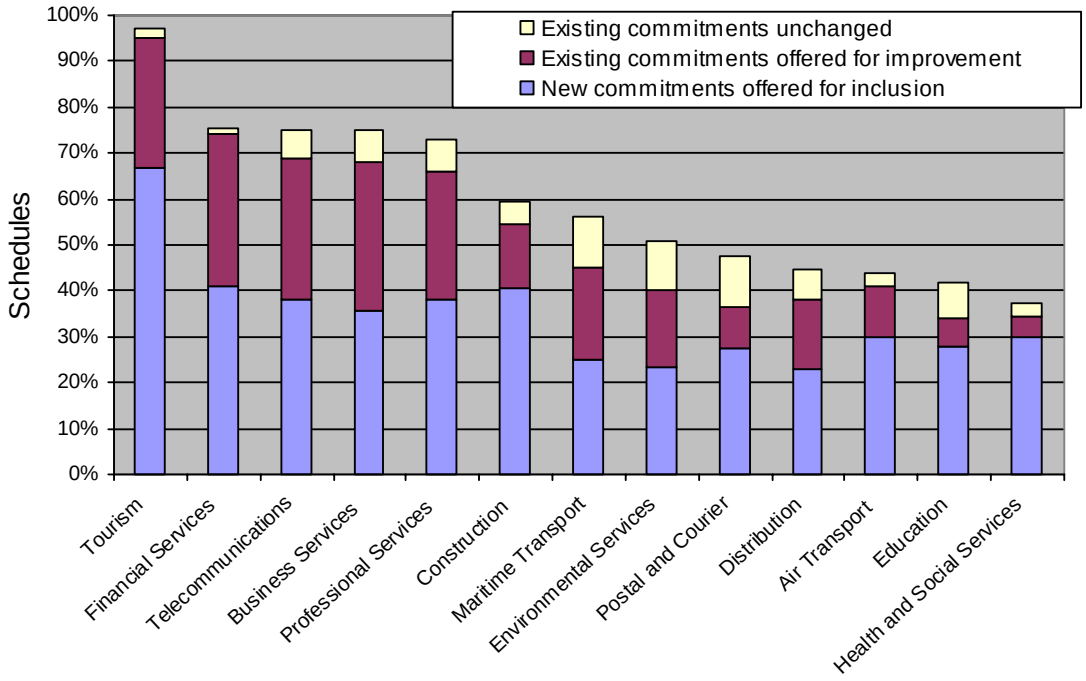
[50] The liberalizing impact of investment treaties tends to be stronger for developing countries, given their generally lower number of GATS commitments and, possibly, wider gaps between committed and actually applied regimes, than for developed countries. For example, according to a recent study for the banking sector, developing countries are 'significantly more open' in practice than their GATS commitments would oblige them to be, whereas developed countries as a group were found to be 'somewhat less open' than their commitments imply (Barth, Marchetti and Nolle, 2009).

reconcile with the intention, mentioned in support of a safeguards mechanism, to prevent the further expansion of foreign-invested suppliers in emergency situations.)[51]

Since there is no full-fledged mode 4 equivalent to BITs, the potential benefits of GATS bindings would prove particularly relevant in professional and similar services. However, as argued before, such bindings are not only more politically challenging to achieve, but also more difficult to protect from regulatory interference, including via regulated prices or wages.

The services offers submitted in the Doha Round to date are remarkable not only for the relatively low number of new sector inclusions (Chart 1), but also for the absence of liberalizing substance.[52]

Chart 1:
Patterns of commitments in selected service sectors: Existing schedules and Doha Round offers, September 2005



Note: 'Business Services' exclude Professional Services. Coverage of 'Air Transport' is confined to three auxiliary services (repair and maintenance, selling and marketing, computer reservation systems). 'Health and Social Services' consist mostly of hospital services and welfare services provided by social institutions.
Source: Author's calculations based on Adlung and Roy (2005).

There is a striking contrast between the level of aspiration set out in Article XIX of the GATS - to launch a process 'of progressive of liberalization ... directed towards increasing the general level of specific commitments' - and what is actually reflected in current offers. Even the 'Ulysses effect' would remain quite modest if these offers were to be implemented. Given the absence of significant new inclusions, the gap in commitments between countries that have acceded to the WTO since 1995 and the initial Members would remain almost as wide as it currently is. While the average number of commitments for the latter group would reach some 50 subsectors per schedule, this is still less than

[51] Adlung and Molinuevo (2008) at 382-3

[52] See also Jara and Domínguez (2006) in above n 17. As indicated before, although the Chart reflects the situation in mid-1995, there have been very little changes since due, *inter alia*, to the suspension of all negotiations between mid-July 2006 and January 2007.

half the average for the 25 Members, developing, transition or least-developed economies, which have joined the WTO since the Uruguay Round (January 1995 – March 2009).

VI. SUPPORTING INITIATIVES AT (AND AROUND) THE WTO

The binding of services regimes comes only at the end of a potentially lengthy process of country- and government-internal policy reflection and coordination. Growth- and adjustment-related objectives, revolving for example around investment promotion, are balanced in this context with a perceived loss of 'policy space' and the risks associated with unintended and/or ill-specified commitments.[53] Administrations interested in the continuation of 'their' sector regimes and the well-being of the beneficiary incumbents are inclined to emphasize such (potential) downsides - and they may well prevail over other agencies representing less well organized and protected industries. On special occasions, such as the conclusion of politically desirable agreements with selected trading partners or a country's accession to the WTO, governments are obviously able to make ambitious strides, nevertheless.[54] The pattern of phase-in commitments provides ample evidence (Table 2). Yet, the situation is different in 'ordinary' trade rounds when no extra policy premiums are available. In order to overcome government-internal reticence, there may be little option, but to reduce the risks, apparent or real, associated with new or more ambitious policy bindings.

The following initiatives are conceivable:[55]

(i) Information-exchange and discussion processes among Members

There is certainly more to trade negotiations than simple exchanges of concessions. In a recent paper, Robert Wolfe refers to constructivist concepts of negotiating processes, which essentially combine two elements: bargaining *and* learning. In turn, learning is meant not only to imply the acquisition of new information, but a gradual evolution of participants' initial positions towards consensual understanding (or interpretation) of common concerns.[56] Such processes may prove particularly important in the context of a young agreement, such as the GATS, which contains many still 'untested' concepts. The economic momentum of services production and trade, including more recently in the form of off-shoring, adds further relevance.

On several occasions in the history of GATS, Members have sought to deepen and codify their - collective - understanding of issues deemed to determine the Agreement's legal and/or commercial impact. Large-scale endeavours since the conclusion of the Uruguay Round include:

- The preparation of the *Guidelines for the Scheduling of Specific Commitments*, adopted in 1993, and their revision in 2001;[57]
- work on competition disciplines, transparency obligations and the like for basic telecommunication services, leading to the so-called *Reference Paper* (1995/96, Box 1);[58]

[53] Some of this 'policy space' might be more apparent than real, however, given the bindings assumed under investment treaties (above n 50).

[54] The extended negotiations in financial services and, in particular, basic telecommunications may need to be added. See above n 19 and 34.

[55] Calls for more technical assistance have been excluded deliberately. In the author's view, there is no genuine shortage of such assistance. It even appears that small countries find it difficult occasionally to absorb what is being offered at the same time through various channels (World Bank, WTO, UNCTAD, sector-specific international organizations, regional organizations, individual trading partners, etc.). What might be more important are initiatives to ensure the quality and neutrality of the advice provided, for example, through a general commitment to work through institutions independent from main trading partners. See also section VI(iv).

[56] Wolfe (2007) at 3 and 9-11.

[57] Above n 37. For a discussion of the legal status of these Guidelines see Leroux (2007) at 760-2

- negotiations of *Guidelines for Mutual Recognition Agreements in the Accountancy Sector* and of *Disciplines on Domestic Regulation in the Accountancy Sector*, adopted in May 1997 and December 1998, respectively;[59]
- discussions during the *extended negotiation on financial services*, in the course of 1997, on the status of electronically supplied financial services under mode 1 (cross-border trade) and/or mode 2 (consumption abroad);[60] and
- the examination of GATS-related issues, including classification problems, in the context of the WTO *Work Programme on Electronic Commerce*, launched in 1998.[61]

Box 1. Sector-specific information exchanges in WTO/GATS fora[62]

The *Reference Paper* on telecommunications constitutes possibly the most important result, so far, of open (plurilateral) negotiating and/or learning processes surrounding the GATS. The odds were particularly favourable at the time: First, the direct involvement of sector experts who, against the backdrop of a worldwide trend towards more open telecom regimes, shared a common vision and, second, the privilege to work from a clean slate, i.e., without being constrained by pre-existing obligations and the perceived need to avoid potentially adverse (re-)interpretations. The project was initially launched by a small group of interested Members, mostly developed countries, but soon gained broader-based support. The results have meanwhile been adopted, in the form of Additional Commitments (Article XVIII), by over 80 Members. The voluntary nature of the project also enabled governments to adjust individual provisions of the Paper to their particular policy needs, although there have been relatively few such modifications.

The situation during the *Work Programme on E-Commerce* was different in both respects: Given its cross-cutting nature, the Programme had no clearly defined sector focus within services, and unequivocal conclusions might have modified the (product) scope and coverage of existing commitments. It is thus possibly more than coincidence that, at least in services, the Work Programme did not result in any clear recommendations that could govern the scheduling of commitments under the GATS.

At first glance, this applies as well to the - inconclusive - discussions surrounding the *distinction between modes 1 and 2 in financial services*. They took place, under significant time pressure, on the fringes of the extended negotiations in this sector. However, in this case, the deliberative process at least helped to identify the nature and extent of the problem - the contours of a 'no-go zone' -, thus assisting prudent Members in identifying suitable bypasses. (Any definitional problems could be avoided if the same commitments, whatever their content, were inscribed under both modes.) Strangely, however, the actual impact has remained limited. Of the 20 Members that have acceded to the WTO since the conclusion of these consultations and the circulation of the relevant documents, only three consistently scheduled the same commitments under modes 1 and 2 across all relevant subsectors. The question arises whether everybody has carefully weighed and balanced the scheduling options, in the light of potential repercussions, or whether other factors, including lack of proper information and advice, might have played a role.

No comparable initiatives have been taken since about 2001, after the mandated start of the new services round.[63] Like-minded delegations have formed friends-groups, without involving the

[58] See, for example, Bronckers and Larouche (2008) at 330-47 and WTO (2001a) at 128-130.

[59] The 'Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector' and the 'Disciplines on Domestic Regulation in the Accountancy Sector' are contained in WTO documents S/L/38 of 28 May 1997 and S/L/64 of 17 December 1998.

[60] Relevant documents - a Secretariat background note identifying scheduling options and a report of informal consultations - are contained in Attachments 2 and 3 to document S/L/92 (above n 37).

[61] WTO (2001a) at 127.

[62] The Recognition Guidelines and the Regulatory Disciplines for Accountancy (above n 59), although sector-specific, do not fit the pattern of the three - autonomous - initiatives listed in this Box. The relevant negotiations were based on a Decision on Professional Services, taken by Ministers already at the end of the Uruguay Round and annexed to the GATS, and their economic relevance remains confined to a relatively narrowly defined subsector. Attempts by some delegations to discuss the extension of core concepts at least to other professional services have remained unsuccessful.

WTO Secretariat, but these have essentially served to co-ordinate among group members, rather than reaching out to others.

The absence of large-scale endeavours does not come as a surprise. Proponents of services liberalization might not have wanted, once the negotiating process had started in earnest, to burden it with discussions of potentially difficult issues of interpretation, which could be used as delaying tactics.[64] Moreover, the Negotiating Guidelines and Procedures, which the Council for Trade in Services had adopted in early 2001, explicitly provide that the 'main method of the negotiation shall be the request-offer approach'.[65] According to traditional practice, this was viewed essentially as prioritizing bilateral exchanges over broader-based negotiations, possibly with the intention to prevent the development and application of sweeping, cross-cutting liberalization formulae. By the same token, it had the effect of segmenting the process, thus complicating initiatives to promote the collective interpretation and understanding of critical issues.

To a certain extent, the complementary option of a plurilateral request-offer process, explicitly foreseen in Annex C of the Hong Kong Ministerial Declaration of December 2005, marked a change of tack.[66] It reflected widespread frustration about the excessive time- and resource implications of previous 'bilaterals' and the absence of any tangible results in terms of meaningful offers. Possibly even more important was the fact that some initially hesitant participants had meanwhile developed an additional interest in substantive outcomes. (For example, since the early 1990s, India had become one of the world's leading providers of outsourced business services.) However, due mainly to subsequent 'hostage-taking' by the negotiations in other areas, first and foremost, agriculture and non-agricultural market access, virtually no new or improved offers have been submitted since.

Interestingly, several important issues of interpretation have never been examined in WTO fora. Cases in point are: the ambit of the 'governmental services carve-out' under Article I:3;[67] the status of investment treaties and labour migration agreements under Article II of the GATS (MFN treatment);[68] the threshold conditions governing preferential trade agreements pursuant to Article V of the GATS, i.e., the need for substantial sector coverage and absence/elimination of substantially all discrimination;[69] the relationship between Article VII, governing the recognition of foreign standards, certificates and the like, and Article V (i.e., are signatories of PTAs required to keep their recognition initiatives open for third-country participation?);[70] the definition of 'subsidies' for which many

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[63] Pursuant to Article XIX:1 of the GATS, Members are committed to entering 'into successive rounds of negotiation, *beginning not later than five years from the date of entry into force of the WTO Agreement ...* , with a view to achieving a progressively higher level of liberalization'.

[64] At about the same time, Members ceased to task the WTO Secretariat with papers exploring issues of potential relevance for the negotiations. Apart from the provision of background documents for the review of air transport regimes, mandated under the GATS Annex on Air Transport Services, virtually all new requests focused on compiling already existing information. Previous Secretariat contributions consisted, *inter alia*, of a series of sector studies subsequently published as 'Guide to the GATS' (WTO, 2001b) and a conceptual paper on 'Assessment of Services Liberalization' (WTO document S/CSS/W/117 of 15 November 2001).

[65] WTO document S/L/93 of 29 March 2001, para 11. Interestingly, the Agreement itself did not establish any priority among negotiating approaches. Article XIX:4 simply requires that 'the process of progressive liberalization' be advanced through 'bilateral, plurilateral or multilateral negotiations'.

[66] WTO document WT/MIN(05)/DEC of 22 December 2005.

[67] The relevant provision excludes 'services supplied in the exercise of governmental authority' from the ambit of the GATS. In turn, this is meant to apply to 'any service which is supplied neither on a *commercial basis*, nor in *competition* with one or more service suppliers' (emphasis added). The two key terms, 'commercial basis' and 'competition' are not further defined in the Agreement. See, for example, Leroux (2006).

[68] Adlung and Carzaniga (2009).

[69] See, for example, Cottier and Molinuevo (2008).

[70] Adlung (2006) at 870-3.

Members have inscribed national treatment limitations in their schedules;[71] the application of the national-treatment obligation to *services* supplied cross-border or consumed abroad (modes 1 and 2, respectively);[72] the status of minimum-price, minimum-wage and similar requirements under Article VI (Domestic Regulation) and/or Article XVII (National Treatment);[73] as well as the coverage under mode 4 of natural persons employed by foreign or domestically-owned companies, and related issues (e.g., the distinction between persons employed by service suppliers and others that are independent suppliers).[74]

Relevant initiatives, even if confined to clarifying the scope for interpretation, would benefit not only WTO-negotiators, but also their colleagues on the preferential agreements' front, where similar terms and concepts are used. Their treatment in WTO/GATS fora would thus enable significant externalities. However, for various reasons (section VII), there has been little appetite for such initiatives.

(ii) Work on scheduling and classification issues

The development of common templates for the scheduling of commitments geared to particular circumstances could help to reduce the risk perception of participants that are short of resources and relevant experience. The telecom Reference Paper is an exemplary case.[75]

In a similar vein, it is conceivable that interested (developing) countries jointly develop scheduling approaches that go beyond, and ease the constraints of, strictly time-bound phase-in commitments. For example, in order to avoid delays in domestic regulatory reform and institution-building from translating into premature adjustment pressures, a link could be established between implementation stages in the reform process and a country's trade obligations in the sector(s) concerned. Also, the phasing-in of commitments could be made contingent on the availability of 'Aid-for-Trade', i.e., of external support for regulatory or institutional modernization, such as the creation of a telecommunications regulator or a financial services agency. While Aid-for-Trade funding has tended to focus on creating or expanding physical infrastructures and productive capacities, its basic rationale applies as well to the implementation of 'intangible' projects.[76] (Interestingly, an ODI study defines Aid-for-Trade as '*any* assistance intended to help countries to trade and, in particular, to help them take advantage of trade agreements'.)[77]

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[71] Overall, close to 40 per cent of the 4'500 subsectors contained in current schedules carry national treatment limitations related to subsidies (including limitations inscribed in the horizontal section, which apply across all subsectors committed by the Member concerned). See Adlung and Roy (2005) at 1181-2.

[72] The Scheduling Guidelines (above n 37, at 6) stipulate that Members are not required to take measures outside their territorial jurisdiction. There is thus no obligation to extend national treatment pursuant to Article XVII to a *service supplier* located abroad. No similar exemption exists for *services* that are provided from or consumed abroad. Yet, the distinction between the treatment of (like) services and that of (like) suppliers may prove difficult in individual cases. Tellingly, there is a lot of variation in the national treatment limitations for subsidies that individual Members have inscribed in the horizontal (cross-sectoral) section of their schedules. Some have explicitly confined these limitations to subsidies provided to *service suppliers* competing under modes 3 and 4, others have used more general terms which extend as well to the treatment of *services* that are traded under these modes, while a third group has opted for even broader limitations that cover all modes and all forms of subsidies, whether services- or supplier-related.

[73] See also above n 45.

[74] Mode 4 is defined in Article I:2(d) of the GATS to consist of the supply of a service 'by a supplier of one Member, through natural persons of a Member in the territory of any other Member'.

[75] See, for example, Bronckers and Larouche (2008) at 330-47.

[76] For background information on the Aid-for-Trade concept in the Doha-Round context see Njinkeu and Cameron (2008). A discussion of GATS-related aspects in particular is provided by Sauvé (2008) at 293-9. Quantitative information is contained in OECD and WTO (2007).

[77] Phillips, Page and te Velde as quoted by Cameron and Njinkeu (2008) at 2. Emphasis added.

The draft Disciplines on Domestic Regulation Pursuant to GATS Article VI:4 as circulated in early 2008 do contain an obligation on developed country Members, upon request, to provide technical assistance to developing and, in particular, least-developed countries. The assistance is intended, *inter alia*, to help develop

However, in order for such proposals to materialize, somebody would need to provide the initial impetus with a view to constituting a 'critical mass' of demandeurs. So far, developing countries have focused mainly on articulating common *policy positions* in services, in favour or against particular concepts (special treatment of LDCs, formula-based negotiations, etc.), but there are also recent initiatives where they have substantiated common *trade interests*. A case in point is a detailed request on mode 4 submitted collectively by LDCs in May 2006.

In addition, there are more mundane scheduling and classification issues that would still benefit from discussion: a more precise delineation of some poorly defined subsectors and/or the status of 'new' services that have emerged since the submission of current schedules, including trading in emission certificates; the identification of clusters of services which, because of economic linkages, should ideally be scheduled in parallel (e.g. various tourism-, energy- and environment-related services); and the clarification of opaque entries in schedules which, nevertheless, have been used frequently (e.g., references to not further specified licensing and qualification requirements, to the titles of laws rather than to the restrictions implied, or to the need for local presence as a limitation under mode 1). It is disturbing that the latter group of 'other measures' that have been inscribed as market access limitations, although they cannot be clearly associated with any of the restrictions covered by Article XVI:2(a)-(f), represent about 20 per cent of current entries.[78]

While attempts have been made in competent WTO bodies, mostly the Committee on Specific Commitments, to clarify definitional and classification issues at earlier negotiating stages, little has been achieved in recent years. Members appear ready to risk the uncertainties of a future dispute ruling, rather than engaging in an open debate and, possibly, conceding some well-entrenched positions. However, given the high number of dubious entries, the systemic implications of any such ruling can be significant - let alone the reputational damage for the WTO/GATS system as a whole. The aftermath of the panel in *US - Gambling* should be warning enough.[79]

Though there is little enthusiasm at present, a collective discussion of scheduling and classification issues could also help to improve delegations' understanding of the Agreement and, thus, reduce any initial fears of the unknown. Comparable to the provision of (other) public goods, it would be mostly for the large participants to take the lead; they could capitalize on a strong(er) domestic base of legal expertise and would be able to internalize a significant share of the ensuing benefits.

(iii) Rule-making initiatives

The risks of premature commitments may be larger in services than in merchandise trade. The novelty of the Agreement is one factor. Another source of risks is the modal coverage, which not only adds further elements of complexity, but also broadens the conceivable range of unforeseeable events that might prevent a government from living up to the obligations assumed in its schedule. The fact that so far only one Member, Albania, has openly admitted an implementation problem, in the Council for Trade in Services, could be deceptive. Not all administrations might be equally aware of their GATS obligations and, should the situation arise, ready to concede their inability to implement in time what they had inscribed in their schedules. Also, accession countries such as Albania are special cases in so far as they have assumed broader and deeper commitments in general than initial WTO Members at similar levels of development.

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and strengthen the recipients' regulatory capacity. Yet, no link is established between actual availability of support and the application of the Disciplines to developing countries. (LDCs would not be covered.)

[78] Adlung and Roy (2005) at 1179.

[79] 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.

Should 'exceptional circumstances' prevent a government from living up to an obligation under the Agreement, of course, there is always the option to apply for a waiver pursuant to Article IX:3 of the Marrakesh Agreement. This was the course taken by Albania, in 2003, when it turned out that the situation was not yet ripe for the scheduled privatization of its telecom monopoly.[80] The Council for Trade in Services responded relatively swiftly, in no more than six months upon receipt of an explanatory note from the authorities, and postponed the envisaged implementation date by one year. However, such an easy solution is by no means guaranteed. The relevant process can prove heavy, in particular, if waivers are sought for periods of more than one year; any such waiver is to be subjected to annual review. Also, approval may be more difficult to obtain in situations when a country's predicament is less obvious than Albania's plight after the Balkan War and when the stakes are higher than in the case of a comparatively modest telecom operator.[81] The only other *legally* available option would be the invocation of Article XXI of the GATS with a view to renegotiating a commitment against compensation.

The question thus arises whether there should be a lighter and less deterrent solution for governments whose new or improved commitments turn out to be over-ambitious at the time of implementation. Such a solution could consist of an Understanding, adopted by the Ministerial Conference, which would allow Members, within a specified timeframe following the conclusion of a round, to suspend new or improved commitments for a period of, say, two or three years. This clause would apply on a non-discriminatory basis and, thus, affect all potentially interested market entrants in the same way. (In turn, this might help to mobilize a domestic constituency favouring timely termination.) Should the problem persist, Article XXI would need to be invoked. To prevent abuse, recourse to such a 'suspension clause' might need to be reported under a monitoring mechanism, and the frequency of invocation could be tied to the number of new or improved commitments.

This is a highly hypothetical issue, however. Unlike the 'question of emergency safeguard measures', which has been under negotiation for more than 12 years, pursuant to the mandate in Article X:1, the possibility of such a suspension clause has never been discussed in the WTO.

(iv) Institutional innovation

GATS-related advice is offered through many channels, including international organizations, donor-sponsored advisers, independent private consultancies, and the like. For example, the WTO Secretariat would be readily available to assist countries in translating their policy intentions into scheduling terminology. Nevertheless, there seem to be gaps. On the one hand, the Secretariat neither has the resources nor, possibly, the mandate to vet comprehensively whether the intentions, as expressed by national administrations, are fully consistent with obligations and commitments already undertaken in other (non-WTO) contexts, including bilateral investment treaties or labour migration agreements, or whether they make good economic sense. On the other hand, external advisers that are equipped to do so, may be (too) close to donors, thus raising questions of independence. Also, some might be tempted simply to propose interpretations that are politically convenient for the recipient(s) or consistent with the views held by some large Members, without necessarily exploring all reasonable options. Moreover, given the potential ramifications of ill-specified commitments, interested governments may simply feel the need for a second opinion.

Discussing the challenges for developing countries to negotiate preferential trade agreements, Jim Rollo points out two critical issues: first, information problems for small administrations to identify appropriate sources of expertise and advise; and, second, the risk that bad practices proliferate by emulation. His proposed solution hinges on the creation of an internationally agreed and sponsored 'Advisory Centre on Regional Trade Agreements', which would not only provide

[80] For more details see Adlung (2007b) at 254.

[81] According to Article XIX:3, the relevant Council Decision must be taken by three-fourths of the Membership or, in specified cases, by consensus (e.g., decisions to waive obligations that are subject to transition periods).

relevant intelligence, but also serve as an accreditation mechanism for independent consultants.[82] The proposal is inspired by, and modelled on, the Advisory Centre on WTO Law (ACWL), established in 2001 to advise developing countries in WTO law, support them in dispute cases, and provide training.[83] Yet, rather than creating parallel structures, it might be preferable to transform the AWCL into something of an 'Advisory Centre on Trade Law and Policy' and broaden its mandate to include additional functions such as economic analysis, economic and legal advice on preferential agreements and other manifestations of 'regionalism' (investment treaties, etc.) as well as the accreditation and/or certification of competent consultants.[84] A broadly-mandated external source of training and advice could also help to overcome, or at least avoid the pitfalls of, country-internal policy segmentation and its international consequences in the form of compartmentalized trade and investment regimes.

One problem might remain: If the Centre's advice is confined to providing background information as a *negotiating input* for beneficiary governments, asymmetries in negotiating resources and expertise might still affect the outcome of subsequent 'bilaterals' with better equipped Members. It is true that a collective verification process was conducted at the end of the Uruguay Round and will most likely be repeated at the end of the current round.[85] However, there was no provision at the time for independent inputs with a view to preventing negotiating interests or widely held misperceptions from coming into play. It is telling that, as mentioned before, about one-fifth of the limitations on market access inscribed in current schedules do not fall clearly under any of the relevant provisions in Article XVI:2 (section VI(ii)). Ideally, one could think of establishing an independent body with the mandate, upon request, to vet and provide views on the 'technicalities' of the draft schedules that are submitted at the end of trade rounds. (Relevant issues would include, in particular, a schedule's compliance with GATS provisions and the Scheduling Guidelines.) The body's assessment could be made available to all WTO Members on an informal basis, as an input for non-recorded collective consideration of the issues raised, or it could be conveyed only to the government concerned. In both cases, the authorities would then be in a position to reconsider dubious entries and, possibly, re-submit their schedule within a specified timeframe.

Yet, none of these ideas has ever been raised in a WTO forum, and no relevant initiatives appear in the offing.

VII. THE IMMEDIATE CHALLENGE: REVIVING 'TECHNICAL' DISCUSSIONS AND ENCOURAGING COMPLIANCE WITH TRANSPARENCY OBLIGATIONS

The number and intensity of meetings of two potentially relevant Committees and Working Parties, in particular the Committee on Specific Commitments (CSC) and the Working Party on GATS Rules (WPGR), have declined in recent years. For example, while the CSC met four times per year between 2001 and 2006, it only met twice in both 2007 and 2008.[86] The frequency of WPGR

[82] Rollo (2009).

[83] See http://www.acwl.ch/e/index_e.aspx.

[84] Alternatively, as suggested by Hoekman and Mattoo (2007, at 85 and 86), the *economic* monitoring and advisory function may be conferred on the WTO's Trade Policy Review Mechanism, which would need to be equipped with adequate resources. This might enable synergies with the TPRM's regular review activities and prove easier to achieve than outsourcing such functions to a newly created body. Also, the institutional separation of economic from legal support might be preferable to a centralized approach. On the other hand, there are natural limits to the WTO Secretariat's ability to serve as an impartial custodian of the Agreements and, at the same time, provide advice to individual Members.

[85] No similar possibility exists at the end of the accession process. The final draft schedule is submitted to the relevant Working Party for approval, together with other relevant documents, but never to the Council for Trade in Services or its subsidiary bodies.

[86] Note that the Committee on Specific Commitments is mandated to: '(a) Oversee the implementation of specific commitments in all modes of supply, including specific commitments relating to Movement of Natural Persons. (b) *Examine*, at the request of Members, *schedules of specific commitments lists of Exemptions from Article II of the GATS, particularly with a view to improving their technical accuracy and coherence in the*

meetings declined from five annual meetings between 2001 and 2005 to three meetings since.[87] The only subsidiary body to sustain a relatively intensive rhythm of meetings, with a gradual shift from formal to informal gatherings, is the Working Party on Domestic Regulation. This appears certainly re-assuring in view of the impact of domestic regulatory measures, within the meaning of Article VI of the GATS, on access opportunities under specific commitments. Nevertheless, levels of ambition tend to vary significantly among Members, reflecting, *inter alia*, their prime export interests (mode 3 versus mode 4) and, possibly even more important, the allocation of regulatory competences across government levels.[88]

Particularly surprising or, rather, disillusioning is Members' recent reticence to discuss scheduling and classification issues in the Committee on Specific Commitments. Relevant discussions would be useful not only for the elaboration of new or improved commitments, but also for the identification of current scheduling flaws and appropriate rectifications. A cursory glance at current offers suggests that a significant share of the proposed changes, possibly in the order of one-third, consists of technical clarifications that would not seemingly change the existing level of commitments. As noted before, there is certainly scope for additional discussion among Members with a view to putting both current schedules and new commitments on a safer footing. Why this apparent lack of interest?

Negotiating fatigue might be one factor: Since the launch of these subsidiary bodies in the mid-1990s, most Members are now represented by the fourth or fifth generation of delegates. The initial enthusiasm might have suffered, the relevance of the Committee's mandate may no longer be as evident as it was for Uruguay Round veterans in the mid-1990s, and negotiations on preferential agreements compete for the necessary back-up resources in capitals. And there are tactical considerations as well. The proponents of an ambitious services outcome might resent technical discussions, which could serve as a pretext to slow down the process. From their perspective, why should they help to clarify terms and concepts in the WTO that are readily accepted by co-signatories of preferential trade agreements? And why should they engage in government-internal consultations with potentially affected ministries and agencies which, for lack of familiarity with relevant concepts and fear of losing competencies, might be tempted to procrastinate? Other delegations may hesitate for strategic reasons: As long as their core concerns, revolving around agriculture in particular, are not sufficiently addressed, they may want to avoid anything that looks like progress being achieved in services. Finally, quite a number of participants might simply be 'lost in flexibility', without a compass to navigate safely from Uruguay to Doha.

An additional matter of concern, not least in the light of the recent economic crises and the ensuing policy risks and temptations, is Members' widespread disregard of long-existing transparency obligations.[89] Compliance with basic notification requirements under the GATS might be viewed as a litmus test on participants' commitment to a uniquely broad, deep *and* flexible agreement, which reaches far beyond the regulation of 'conventional' trade restrictions. Information on 'behind-the-border' measures is essential not only for surveillance purposes, but, even more so, as a reference point for the collective exploration of novel concepts.

Simple reminders of existing transparency obligations will not do the trick, however, since the lack of notifications essentially reflects a domestic problem: the dearth of government-internal

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future. (c) Oversee the application of the procedures for the modification of schedules pursuant to Article XXI of the GATS' (emphasis added). See WTO document S/L/16 of 24 November 1995.

[87] The Working Party on GATS Rules conducts the negotiations on the question of emergency safeguard measures (pursuant to Article X of the GATS); government procurement of services (Article XIII); and (additional) disciplines for subsidies that are necessary to avoid trade-distortive effects (Article XV).

[88] There are indications, for example, that US State regulators have been increasingly sensitized, in the wake of the ruling in *US - Gambling* (see above n 78), to the possibility of 'external encroachment' on sub-federal competencies.

[89] See above n 15. Tellingly, none of the bail-out initiatives taken during the 2008/09 financial crisis has been notified under Article III:3.

cooperation (section IV(ii)). The coordinating ministries are in need of a justification (or pretext) they could use to approach, and seek information from, reluctant sector ministries. A relatively minor procedural modification might help. Members could undertake to confirm positively once a year that they had not taken measures that would significantly affect their trade in scheduled sectors - or otherwise to specify any such measures.[90] The administrative burden on less economically and institutionally advanced countries would be eased by the fact that, on average, they have scheduled far fewer sectors than other groups; and a general exemption might be provided for least-developed countries.

Who could launch such initiatives? A potential inspirer might fit the following profile: Solid resource base, in terms of professional endowment and analytical skills; significant own (internal) transparency obligations on trade-related issues and, thus, relatively well established communication channels; a diversity of existing (inherited) scheduling and classification issues which may benefit from clarification; and a strong stake, including for domestic policy reasons, in the functioning of the WTO/GATS system. Are there any volunteers?

Behind this - situational - challenge looms a more genuine concern about the WTO's future role. An increasing number of sceptics no longer subscribe to the paradigm of large-scale trade rounds. Against the backdrop of repeated Doha-Round delays and an already liberal trading environment, by historic standards at least, they argue for a more modest approach. The WTO would act predominantly as sort of a notary or 'clearing house' to certify and oversee liberalization moves decided and implemented in whatever other contexts, and as a forum to adjudicate trade disputes.[91] Strangely, however, from today's perspective even the clearing-house concept appears fairly ambitious, given Members' reticence to bind upfront, by way of specific commitments, reforms they had completed years ago. Or are they holding back envisaged commitments as fuel for the final stretch of the Round? If so, the concept of trade rounds might in fact prove counter-productive. Yet, on the other hand, what stimulus, if not a high-profile event, could prompt sector ministries to contribute to, and tie their hands in, a trade agreement alien to their traditional mandates and 'stakeholders'?

Moreover, it is difficult to see how a bind-as-you-liberalize approach would provide an incentive for focused collective discussion and, possibly, clarification of critical issues. As noted before, at least the preparatory stages of the current Round were used for such purposes. Otherwise, there would certainly be more fog surrounding key concepts such as the modal structure of the GATS (and that of other services agreements), the distinction between access commitments and domestic regulatory sovereignty, or the treatment of anti-competitive practices. Conceptual work remains more important in services, given the novelty of many of the elements involved, than in other areas of the WTO. This does not necessarily call for large-scale trade rounds, but at least for some sort of common events, possibly in regular intervals, that would provide motivation and focus.

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[90] See also the discussion in Adlung and Molinuevo (2008) at 398.
[91] Pauwelyn (2008) at 563-8, and Sally (2008) at 99-120.

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