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BILATERALISM IN SERVICES TRADE: IS THERE FIRE BEHIND THE (BIT-)SMOKE?

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ABSTRACT

In most of the current literature, the spread of regionalism in international trade relations is discussed in terms of a rapidly rising number of preferential trade agreements (PTAs). Far less attention is given to the even more rapid proliferation of bilateral investment treaties (BITs) and their overlap with obligations assumed by WTO Members under the General Agreement on Trade in Services (GATS). About 60 per cent of world foreign investment stocks are in services and, thus, covered by mode 3 (commercial presence) of the GATS. A closer look reveals that BITs generally apply across a far wider range of sectors, in particular in the case of LDCs and developing countries, than those scheduled under the GATS. Furthermore, a number of obligations enshrined in BITs go beyond their potential counterparts under the GATS. At the same time, since most WTO Members have not listed relevant exemptions from the Most-Favoured-Nation (MFN) clause of the Agreement, their BIT obligations are to be applied on an MFN basis. While this extension may not cause problems in many cases, given generally liberal investment regimes and the focus of most treaties on protecting rather than liberalizing access, inconsistencies remain between the two frameworks. Based on an assessment of relevant provisions, this article discusses options on how WTO Members could proceed.

Keywords: Trade in Services, GATS, Investment Treaties, Bilateralism

JEL Classifications: F13, F15, F21, K33, L80

'What has been termed the "spaghetti bowl" of customs unions, common markets regional and bilateral free trade areas, preferences and an endless assortment of miscellaneous trade deals has almost reached the point where MFN treatment is exceptional treatment. Certainly the term might now be better defined as LFN, Least-Favoured-Nation treatment. Does it matter? We believe it matters profoundly to the future of the WTO'.

Report by the Consultative Board, chaired by Peter Sutherland
to the WTO Director-General, 'Sutherland Report' (2004).

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Rudolf Adlung and Martin Molinuevo*

INTRODUCTION

The proliferation of preferential trade agreements (PTAs), among WTO Members and beyond, has attracted increasing attention in recent years. By the end of 2006, close to 370 notifications of such agreements had been registered under relevant GATT/WTO provisions - Article XXIV of the General Agreement on Tariffs and Trade (GATT), the Enabling Clause, and Article V of the General Agreement on Trade in Services (GATS) - of which over 210 agreements are currently in effect. Two-thirds of the notifications have been submitted only since January 1995, i.e., since the entry into force of the WTO.[1] A notable feature is the rapid increase in preferential agreements covering services. Of the more than 40 agreements currently in force, some 30 have been notified since 2003, i.e., during key phases of the services negotiations under the Doha Development Agenda. Dedicated multilateralists may view this phenomenon as the spread of a contagious disease - regionalism or bilateralism - which has the potential of eroding the WTO system. Others tend to be more cautious and see less reason, at least from an economic perspective, to worry about this trend.[2] However, the focus of recent discussions has been mostly on agreements notified under relevant GATT and GATS provisions. Little attention has been paid to another type of treaties that applies to factor movements only and, thus, to trade which, within the framework of the GATS, falls under mode 3 (commercial presence) and mode 4 (presence of natural persons).

Given the wide definition of services trade in the GATS, capturing four modes of supply, there is significantly more scope for departures from most-favoured-nation (MFN) treatment in services than in

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[1] Interestingly, bilateral agreements account for over 80 per cent of all preferential agreements notified and in force. See Fiorentino, Verdeja and Toqueboeuf (2007), at 3-8, and Roy, Marchetti and Lim (2007), at 157.

[2] Pomfret (2007), at 929, feels that, for mainly three reasons, a simple count of the RTAs notified to the WTO does not appropriately reflect the extent of regionalism in the trading system: It does not take into account the unequal significance of the individual agreements, disregards the numerical impact of the transformation process in Eastern Europe, and fails to acknowledge the limited potential for trade diversion given the existence of already low MFN tariffs in many cases. In view of such qualifying factors, Abbott (2007), at 583, considers that the most troubling aspect of this phenomenon 'is the exercise of virtually unconstrained political and economic power by the United States and the EU to seek concessions from developing (and developed) countries'. See also Messerlin (2005), at 304.

merchandise trade.[3] WTO Members have complemented 'an endless assortment of miscellaneous trade deals' (Sutherland Report, see above) with bilateral agreements facilitating, for example, transfers of certain specialized professionals, including in the health sector, and, far more frequently, agreements intended to encourage investment flows through guaranteed standards of treatment and protection.

This study focuses on the latter type of arrangements, bilateral investment treaties (BITs), which have been signed as stand-alone instruments. Particular attention is given to their interaction with potentially relevant GATS provisions, in particular the MFN requirement pursuant to Article II. For the vast majority of WTO Members, which has not listed relevant exemptions under the GATS, the Article provides that any BIT disciplines that exceed the parties' GATS obligations are to be extended on a multilateral basis.[4] A few other BITs have been concluded in the context of broader PTA negotiations, involving, for example, Singapore and Jordan as well as Korea, Iceland, Liechtenstein and Switzerland. These treaties, as well as the investment chapters featuring in a number of PTAs, may fall under Article V of the GATS which exempts, under specified conditions, economic integration initiatives from the MFN requirement. Nevertheless, some observations, especially in Section II.C below, may apply to such types of agreements as well.

The following discussion is structured in five sections, starting with an overview of current investment treaties and recent trends. Section II presents main policy disciplines generally contained in BITs against the background of similar GATS provisions. Section III puts the spotlight on GATS disciplines, in particular the MFN requirement under Article II and transparency obligations, which may prove to be relevant for investment treaties involving WTO Members. How potential frictions between the two areas could be avoided is then analysed in Section IV. It is followed by a final Section which contains the main conclusions.

I. OVERVIEW OF CURRENT INVESTMENT TREATIES: WHO WITH WHOM?

Since the mid-1990s, the number of BITs has increased dramatically. In less than five years, from 1995 to the end-1999, about 900 treaties had been concluded; an additional 600 treaties were added by 2005.[5] Egypt, Italy, China, Germany, Netherlands, Republic of Korea and Switzerland have each signed some 50 or more treaties since 1995 (Annex Table A1). It is very difficult to find any large economy, developed or developing, that has stayed out of the fray. The most hesitant developed countries have been Ireland, Norway and New Zealand with less than five treaties each since 1995.

The proliferation of investment treaties stands in surprising contrast with the failure of multilateral initiatives to create an international framework for investment (or trade *and investment*) under the auspices of the OECD and/or the WTO. In the latter context, while negotiations on the relationship between trade and investment had initially been envisaged in the Doha Ministerial Declaration of November 2001, a General Council Decision of July 2004 put an end to any such negotiations in the current Round.[6] What could explain this apparent difference in emphasis? For example, is it attributable to insufficient domestic co-ordination between the Ministries involved, aversion against pursuing *'trade and ...'* negotiations in the WTO, and/or governments' deliberate preference for more discrete bilateral settings, given the fate of the OECD's

[3] The scope of services trade under the GATS and, thus, of Members' trade obligations under the Agreement is defined to include cross-border imports (cross-border trade: mode 1), the consumption of services in another Member's territory (consumption abroad: mode 2) as well as the services-related activities of foreign established suppliers (commercial presence: mode 3) and foreign natural persons (presence of natural persons: mode 4) in the Member's territory. See Adlung et al (2002), 259-279. Mode 3 alone is estimated to account for 50 per cent of all services transactions falling under the Agreement, followed by mode 1 (35 per cent), mode 2 (10-15 per cent), and mode 4 (1-2 per cent). See WTO (2005), at 8.

[4] The relatively few WTO Members that are covered by such MFN exemptions are listed in Section III.A.3.

[5] For the sake of simplicity, the term 'treaties' is used synonymously with bilateral investment treaties.

[6] The Ministerial Declaration (WT/MIN(01)/DEC/1 of 20 November 2001, at 4f) explicitly foresaw that the negotiations should take account, as appropriate, of existing bilateral and regional arrangements on investment. For the General Council Decision, see WTO document WT/L/579 of 2 August 2004, at 3.

Multilateral Agreement on Investment?[7] Or, more generally, have there been concerns that, for whatever reasons, a multilateral instrument could have deeper (liberalizing) effects than the obligations typically enshrined in investment *protection* treaties?

Over the past couple of years, however, the BIT frenzy seemed to have cooled off. Alternative instruments, preferential trade agreements (PTAs), have moved centre stage. A recent UNCTAD study finds an inverse relationship between the proliferation of PTAs containing investment provisions and the conclusion of new investment treaties.[8] Yet, given the numbers involved - some 2'500 BITs have been signed to date of which about 1'900 have been put into effect - saturation effects may have also played a role at least in relations between developed and developing countries. On the other hand, the number of investment treaties among developing countries has continued to rise significantly, from some 160 in the mid-1990s to over 640 ten years later. This is commensurate with a rapid increase in South-South investment flows.[9] Overall, however, more than half of the current BITs still capture investment relations between developed and developing or transition economies.[10]

Investment relations among developed countries have instead been governed by mainly two instruments: the OECD Code of Liberalisation of Capital Movements and the OECD National Treatment Instrument. The former focuses on the liberalization of international capital flows, including those pertaining to foreign direct investments, while the latter features a non-binding post-establishment national treatment principle. However, both instruments lack the broad disciplines on investment protection, including the requirement of fair and equitable treatment, compensation for expropriation and provisions on investor-State dispute settlement, that are typically contained in BITs. Although investment treaties between OECD countries are rare - only Mexico, Korea and Turkey have concluded such treaties with other OECD Members -,five of the seven most frequent signatories of investment treaties are European OECD members, with well over 500 BITs combined.[11] Foreign investment within the European Communities is governed by the disciplines of the Treaty of Rome, which is far more ambitious in approach and substance than typical investment treaties.

PTAs differ from investment treaties as they are intended to remove or reduce trade barriers by ultimately establishing a free trade area or customs union among the parties. Recent agreements extend to services and also provide for non-discriminatory treatment of investment across *all* sectors of the economy. The relevant disciplines mirror or, in many cases, expand on the provisions found in BITs. In turn, most investment treaties, especially those focusing on investment protection, recognize the existence of PTAs and the prevalence of relevant obligations. The MFN provision typically contained in such treaties - requiring either party to extend to the other party any better treatment it may have conceded in other contexts - is frequently complemented by a clause exempting obligations agreed to under PTAs (see, however, Section II.C.1).

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[7] As noted by Peterson (2005), at 25, this is not without irony: 'While proposed agreements such as the OECD Multilateral Agreement on Investment (MAI) were subjected to rigorous public scrutiny, many hundreds of bilateral agreements have entered into force without public notice or scrutiny. [...] For those who take the extreme view that investor protection is an illegitimate international goal, the sober reality is that there have been rather more "losses" than "victories" of late, as bilateral treaties have proliferated with surprisingly little public notice.'

[8] UNCTAD (2007a), at 1.

[9] UNCTAD (2007b), at xxiv, estimates that such flows rose from US$4 billion in 1985 to US$61 billion in 2004.

[10] UNCTAD (2006a), at 5, and (2007a), at 1.

[11] UNCTAD (2005a), at 9, and Annex Table A3. Some of the co-signatories, such as the three Baltic States and several Central European countries, have meanwhile joined the European Union.

II. INVESTMENT TREATIES AND THE GATS

A. General observations

There can be little doubt that BIT disciplines overlap with GATS provisions insofar as both apply to 'measures by Members affecting trade in services' within the meaning of Article I:1 of the GATS. Since the coverage of investment treaties tends to be broader in many aspects, as explained below, it might be difficult to find scenarios falling under mode 3 (commercial presence) of the GATS that are not captured by such treaties.[12]

Potentially relevant GATS obligations may be divided into two main categories. First, there are the sector-specific commitments on market access (Article XVI) and national treatment (Article XVII), as well as any additional commitments that a Member undertakes in the sectors listed in its schedule of commitments. The actual scope of market access and national treatment is determined by the limitations that may be inscribed under one or more mode of supply. The commitments assumed in schedules are complemented, second, by a broad set of general obligations that apply as specified in the Agreement and, unlike the commitments on market access and national treatment, cannot be modified by way of limitations. Some obligations apply across the board to all services, whether scheduled or not (horizontal or 'unconditional obligations'), while others are confined to the services that have actually been scheduled ('conditional obligations'). The former category consists mainly of the MFN principle and various transparency requirements. Conditional obligations, in turn, are intended essentially to protect the commercial value of commitments. They consist of disciplines governing, for example, the administration of services-related laws and regulations, the use of services standards and licensing and authorization requirements, and the treatment of international payments and capital transfers.

Under Article I:2(c) of the GATS, trade under mode 3 is defined as the supply of a service 'by a service supplier of one Member, through commercial presence in the territory of any other Member'. In turn, the term *commercial presence* refers to 'any type of business or professional establishment, including through the constitution, acquisition or maintenance of a juridical person, or the creation or maintenance of a branch or representative office within the territory of a Member for the purpose of supplying a service' (Article XXVIII(d)). In order to be covered, the investor concerned must be either a national (or, in certain circumstances, a permanent resident) or a juridical person of another WTO Member. The only service-related activities that are excluded *per se* from the scope of the GATS are so-called governmental services as well as measures regarding air traffic rights and directly related services (Annex Table A2).[13]

The relevance of BITs in governing international trade in services, as captured by mode 3, is obvious, given that more than 60 per cent of world FDI stocks (2004) pertain to service-related investments.[14]

B. Scope and coverage

Many investment treaties are largely similar in structure and content, at least those concluded over the past decade, although scope and reach of individual obligations may vary widely.[15] A cursory glance suggests that, depending on the status of two core disciplines, MFN and/or national treatment, there are at least two prototypical types of treaties.

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[12] See, for example, Sauvé (1997), at 63-65. Mode 4 may also prove relevant insofar as the entry and stay of foreign nationals, in particular executives and specialists, is related to the investments concerned.

[13] For more details see Adlung (2006).

[14] UNCTAD (2007b), at 266.

[15] UNCTAD (2007a), at xiii.

One approach, followed mostly by European countries and developing countries, focuses primarily on the protection of foreign investors and investments once established in the host country. The origins of this approach can be traced back to the Abs-Shawcross Draft Convention model endorsed by OECD countries in 1962. Another approach has been developed by North American countries, in particular the United States and Canada, expanding on the initial model to include disciplines that may provide for the opening of host markets to foreign investment. Some other countries, such as Japan and Finland, recently also adopted a BIT model with such liberalizing provisions. For ease of reference, the two approaches are referred to in this study as 'investment protection treaties' and 'investment liberalization treaties', respectively.[16]

Both approaches typically feature obligations on most-favoured-nation and national treatment as well as fair and equitable treatment of foreign investors and investments, provisions on free transfers of funds, and access to investor-to-State arbitration, *inter alia*. Additionally, liberalizing treaties provide for non-discriminatory conditions of entry and prohibit the use of certain performance requirements.

Finally, there are treaties that cannot easily be associated with either approach in view of their unique features. Thus, for instance, the majority of the BITs signed by Australia do not contain a binding national treatment obligation at any stage of the investment, while those traditionally promoted by China not only dispense with the national treatment standard, but also limit access to international arbitration.

1. Sector coverage

Investment *liberalization* treaties allow for core obligations - such as MFN or national treatment, disciplines on performance requirements, and provisions on the movement of key personnel - to be subjected to sector reservations. In contrast, investment *protection* treaties typically provide for unfettered sector coverage, hence applying to all 160-odd sub-sectors contained in the Classification List generally used for scheduling purposes under the GATS (MTN.GNS/W/120).[17] This may result in significant gaps *vis-à-vis* GATS schedules, whose scope varies between averages of 24 sub-sectors in the case of least-developed countries (LDCs) and over 100 for developed economies.[18] Also, unlike the GATS, most investment protection treaties do not exclude core segments of air transport, i.e. traffic rights and directly related services, from coverage.

Comparable to the GATS, some obligations of *liberalization* treaties are general in scope and apply to all sectors, while others are confined to sectors specified by each partner individually. The former obligations include rules on good governance, such as fair and equitable treatment, as well as on expropriation and transfer of funds. In contrast, provisions pertaining to foreign entry and the promotion of competition (i.e., national treatment and performance requirements) apply only to sectors specifically covered.

The *liberalization* BITs promoted by North American countries and, more recently, Japan tend to exceed the sector coverage of most GATS schedules. However, as already indicated, these treaties allow the parties to introduce and/or maintain restrictions in a number of sectors. Japan's BITs with Korea (2002) and Vietnam (2003) exclude a number of services from their main disciplines (national treatment and performance requirements), including whole service sectors such as telecommunication or transport services. Canada's BITs, in turn, have long maintained a grandfathering clause so as to reduce the scope of the treaty.

[16] It could be argued that 'investment liberalization treaties' do not in fact have a substantial liberalizing effect, since the opening up to foreign investment is most frequently the result of a unilateral change in domestic economic policies, while the treaties only provide guarantees that those policies will not be reversed. Even from this perspective, however, there is a substantial difference from 'investment protection' treaties, which do not entail an obligation to admit foreign investors and investments on a national-treatment basis.

[17] No sector reservations were found among a sample of 32 treaties concluded by Germany, 18 treaties concluded by China and 24 treaties concluded by the United Kingdom. In a review of 41 BITs concluded by Switzerland, the only relevant reservation concerned entertainment services and was contained in a treaty with Mexico. The samples consisted of all publicly available treaties concluded after January 1995.

[18] There are, however, strong variations within these groups as well. See Adlung (2006), at 873.

The United States has retained a relatively consistent range of sector exclusions, mostly consisting of maritime and air transport services, various telecommunication services as well as banking and insurance services.[19] (The three latter exclusions, despite the United States' significant GATS commitments under mode 3 in these sectors, appears due mainly to the fact that most of its BITs were signed prior to the conclusion of the extended Uruguay Round negotiations on telecommunications and on financial services, in February and December 1997, respectively.) Overall, despite these differences, the United States' GATS schedule and its investment treaties apply both to some 110 service sectors.[20]

The sector coverage is significantly greater for many of the United States' BIT partners. A closer look at the treaties concluded by WTO Members with the United States also reveals far less variation in coverage than the commitments undertaken by these Members under the GATS. No traces of 'special and differential treatment' are discernible. On average, LDCs have committed as many sectors, although with some differences in scope, as developing countries and transition economies, respectively. In turn, this implies that the lower the income levels of the countries concerned, the wider the gap between GATS commitments and BIT coverage. While four LDCs (Bangladesh, Democratic Republic of Congo, Mozambique and Senegal) have undertaken national treatment obligations across some 130 sectors in investment treaties with the United States, their GATS schedules contain less than 20 sectors on average (Table 1).[21] Remarkably, one of these LDCs has not excluded any sector or policy area from its treaty.

Table 1
BITs concluded and ratified by WTO Members with the United States: Comparison of sector coverage in services with GATS commitments, as of 1 June 2006

Country group	Number of BITs All / *Signed after '95*	Sector coverage of BITs [a]		GATS commitments [b]	
		Average	Range [c]	Average	Range [c]
Least-developed countries	4 / *1*	~ 130	~ 86-157	17	9-29
Developing countries	17 / *4*	~ 131	~ 93-157	40	3-110
Transition economies [d]	15 / *5*	~ 131	~ 94-157	120	37-147
Total	**36 / *10***	**~ 131**	**~ 86-157**	**63**	**3-147**

a Estimated number of sub-sectors subject to national treatment obligations, based on the Classification List generally used for scheduling purposes under the GATS (MTN.GNS/W/120). The List contains 157 sub-sectors.
b Number of sub-sectors committed by the respective groups of BIT signatories in their GATS schedules.
c Lowest/highest number of sub-sectors committed within the relevant group.
d Including recent EC accessions (Bulgaria, Czech Republic, Estonia, Latvia, Lithuania, Poland, Romania and Slovak Republic).
Source: Authors' estimates based on the BITs available at www.unctadxi.org/templates/DocSearch____779.aspx, and WTO (2007).

Interestingly, two of the United States' BIT partners - Georgia and Bahrain - reserved the right to exclude certain services from national treatment during an implementation period. While Georgia remained entitled for three years from the date of entry into force of the treaty to deny US investors national treatment in financial services, Bahrain excluded the purchase of shares on its stock exchange from national and MFN treatment until January 2005. In a similar vein, Poland reserved the right to take what might be considered safeguard measures in covered sectors during a specified period. (However, the relevant date had already expired when the treaty finally entered into force.) Such provisions are generally very rare in BITs, testifying

[19] In this context, the term 'sector exclusions' refers to sectors fully exempt from BIT coverage as well as to sectors that have been made subject to national treatment limitations.

[20] See Adlung (2007a), at 564-566.

[21] The precise sector-coverage of these treaties is subject to an element of uncertainty, however, since it is difficult in many cases to associate broad references to particular services (banking, telephone and telegraph services, etc.) with the sub-sectors contained in the Classification List for GATS commitments. In cases of doubt, sectors were not counted as being covered by a BIT. Also, Table 1 does not reflect any policy-related reservations that may have been inscribed in BITs; for example, the United States has consistently excluded government subsidies or grants from its national treatment obligations.

to a high degree of ambition in these treaties. Similarly, 'phase-in' provisions have been used only occasionally in GATS schedules and, if so, mostly in WTO accession cases.[22]

2. Policy coverage and exceptions

As noted before, the GATS applies to all government measures 'affecting trade in services', subject to two exclusions concerning governmental services and air traffic rights, respectively (Section II.A). The breadth of the Agreement has been acknowledged by the Panel and the Appellate Body in the 'Bananas case', noting that the language used 'reflects the intent of the drafters to give a broad reach to the GATS' and that therefore 'no measures are excluded a priori' from its scope.[23]

Although investment treaties do not usually contain similar language, they are understood to apply to all measures affecting covered investments. Only the more recent BITs promoted by the United States and Canada contain explicit provisions to this effect. The great majority of treaties define investment in broad terms, so as to encompass every kind of assets owned by the foreign investor.

Unlike the GATS, most investment treaties do not feature general carve-outs for particular areas or sectors (governmental services and air transport), nor are there special exclusions for government procurement from core provisions.[24] Under BIT disciplines, foreign investors in services are given non-discriminatory access to public contracts, unless particular reservations have been taken. Similarly, foreign investors could arguably claim treatment equal to that afforded to state-owned enterprises. Also, unlike Article XIV of the GATS, many investment treaties do not contain 'public policy clauses' that permit signatories to take non-conforming measures in exceptional circumstances (Annex Table A3).[25] A number of BITs allow, however, measures deemed necessary for national security reasons and measures concerning the application of international conventions on double taxation, mirroring GATS Articles XIV*bis* and XXII:3, respectively. A few treaties go further by completely exempting taxation measures from their scope, thus seriously undermining the reach of core obligations, such as national treatment.

The most recent liberalization treaties promoted by Canada and the United States expressly exclude subsidies and grants from national treatment.[26] These BITs also contain a provision allowing the parties to introduce or maintain nationality requirements for the composition of the boards of directors in established companies. Such requirements might be deemed inconsistent with the national treatment obligation pursuant to Article XVII of the GATS. However, it would be possible for WTO Members as well to schedule relevant limitations and, thus, obtain legal cover under the Agreement for any such measures in scheduled sectors.[27]

Some more recent BITs, such as those promoted by Canada, Japan and the United States, also contain specific disciplines on financial services. The relevant provisions are complemented by a prudential carve-out closely modelled on para. 2(a) of the GATS Annex on Financial Services.[28]

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[22] See Adlung (2007a), at 565.

[23] Appellate Body Report on *EC – Bananas III*, para. 220, and Panel Report on *EC – Bananas III (Ecuador)*, para. 7.285.

[24] Article XIII:1 of the GATS exempts government purchases of services from the application of Article II (MFN), Article XVI (market access) and Article XVII (national treatment). While Article XIII:2 provides for negotiations, very little has been achieved in more than ten years.

[25] UNCTAD (2007a), at 80-99, provides a detailed overview of exceptions clauses in recent BITs.

[26] While recent BITs concluded by Japan apply in principle to subsidies and grants, Japan has inscribed a national treatment reservation for such measures (see, for instance, the treaty with Vietnam, Article 2 and Annex I).

[27] Indeed, both the United States and Canada have inscribed a horizontal limitation with regard to subsidies and grants for mode 3 in their GATS schedules. These limitations, however, do not go as far as the relevant carve-outs in their BITs. Canada's national treatment limitation is confined to subsidies related to research and development, while the United States' schedule only excludes from national treatment certain insurance and loan guarantees granted by the Federal Overseas Private Investment Corporation (OPIC).

[28] UNCTAD (2007a), at 90.

As indicated before, protection treaties tend to contain fewer sector- and policy-related reservations than liberalization treaties. Indeed, only around one-third of the protection BITs examined in the context of this study actually feature policy exclusions (Annex Table A3). They relate, *inter alia*, to taxation measures, the acquisition of land and real estate, and measures concerning investment in border areas.[29] Interestingly, only two of the reviewed treaties contain general exceptions similar to GATS Article XIV. Furthermore, sector exclusions are rare in investment protections treaties.[30]

C. Main policy disciplines

Investment treaties are generally intended to improve business conditions through binding obligations on the protection of foreign investments and, as the case may be, liberalization of relevant conditions. To this end, BITs typically provide for most-favoured-nation and national treatment. In addition to these comparative standards of treatment, virtually all investment treaties feature obligations to afford 'fair and equitable treatment' to foreign investors, ensure due process in case of expropriation, and grant investors access to international dispute settlement fora. A number of treaties contain further disciplines governing issues such as performance requirements or transfers of funds. In the same vein, and with similar intentions, the GATS features a range of counterpart provisions, as summarized in Table 2. The following Section seeks to explore the relationship between these two sets of legal obligations.

1. Most-favoured-nation treatment

The MFN obligation, a typical feature of investment treaties, essentially protects treaty partners from information asymmetries, reduces the transaction costs implied, and helps to equalize differences in negotiating leverage. As under Article II of the GATS, the best conditions afforded by a country to investors from any other country must be extended to all other BIT partners (or WTO Members). Under BITs, the coverage of the MFN principle extends beyond the treatment effectively granted to investors from third countries to capture as well the rights and obligations entered into by the country concerned under any other investment treaty. Reflecting the exclusive focus of most BITs on post-establishment treatment, the scope of the MFN obligation is constrained accordingly. Any problems of interpretation are largely the same as discussed below for national treatment.

In a way similar to relevant GATS provisions (Article V), the great majority of investment treaties contains an exemption from MFN treatment for benefits extended under preferential trade agreements. Accordingly, any more favourable conditions granted to investors from countries with whom a BIT-party has entered into a free trade area, customs union or PTA need not be extended to investors from the other BIT-party. The wording of such clauses implies that privileges granted under other BITs are captured by the MFN obligation.

Nonetheless, not all BITs feature an MFN exception for PTAs. For instance, some 15 liberalization treaties concluded by the United States do not contain such exclusion for benefits granted in trade agreements with third parties.[31] Other countries too have occasionally omitted such clauses in individual cases.[32] Arguably, these treaties provide for the extension of investment-related benefits that may have been negotiated by under a PTA with a third-country to investors from the other BIT-party. Indeed, amongst the country sample reviewed for this study, Chile has been the only WTO Member that has consistently excluded PTAs from its MFN obligation in investment treaties.

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[29] Annex Table A3. See also Adlung and Roy (2005), at 1179-1182.

[30] Some BITs concluded by France exempt from coverage measures that are destined to preserve or promote cultural and linguistic diversity.

[31] The countries involved are Albania, Bolivia, Azerbaijan, Bahrain, Bangladesh, Cameroon, Croatia, Democratic Republic of Congo, Egypt, Georgia, Mongolia Morocco, Mozambique, Nicaragua, Senegal, and Turkey.

[32] Examples include the treaties of Denmark with Indonesia; Italy with India; Japan with Vietnam and Korea; Jordan with Syria; Korea with Cambodia, Hong Kong/China, India, Laos, and Tajikistan; and some older treaties signed by Turkey.

Table 2
Main disciplines: Investment treaties vs. the GATS

Investment treaties	Potential equivalent under the GATS	Comments
MFN treatment	Art. II (MFN)	A number of BITs extend MFN obligation to benefits granted under PTAs.
National treatment	Art. XVII (national treatment) [SC] Art. XVI:2(e) - (f) (joint venture requirements, foreign equity ceilings) [SC]	Scope of BIT obligation depends on the standard of 'likeness' used to compare foreign and domestic investors.
Fair and equitable treatment		
Transparency	Art. III:1 (domestic publication) Art. III.3 (notification to WTO) [CON] Art. IV:2 (contact points for suppliers)	Elements of fair and equitable treatment are dispersed over various GATS provisions. Substantial coverage may not differ significantly.
Procedural fairness and due process	Art. VI:1 (reasonable, objective & impartial administration of measures) [CON] Art. VI:2 (access to judicial mechanisms) Art. VI:5 (domestic regulatory disciplines) [CON]	
Absence of arbitrary or discriminatory conduct Good Faith	Art. VI:1 (reasonable, objective & impartial administration of measures) [CON] Art. VI:5 (domestic regulatory disciplines) [CON]	
Free transfers of funds	Art. XI:1 (transfers and payments) [CON] Arts. XI:2, XVII (capital transactions) [SC] footnote 8 to Art. XVI (capital transfers that are an essential part of a service) [SC]	No significant differences if sectors have been scheduled under the GATS without relevant limitations.
Expropriation		
Due process	Art. VI:1 (reasonable, objective & impartial administration of measures) [CON] Art. VI:2 (access to judicial mechanisms)	GATS Art. XVI may capture expropriations that limit the number of service suppliers. However, BIT disciplines seem to be stronger in general.
Compensation	No direct equivalent. Possibly captured by Art. XVII (national treatment) [SC] and Art. VI:1 (reasonable, objective & impartial administration of measures) [CON]	
Non-discrimination	Art. VI:1 (reasonable, objective & impartial administration of measures) [CON] Art. XVII (national treatment) [SC]	
Public purpose requirement	Art. XIV (exception for measures necessary to maintain public order)	
Absence of performance requirements	Art. XVII (national treatment) [SC] Possibly Art. XVI:2(b) (market access) [SC]	
Government procurement National treatment for foreign companies	None. Arts. II, XVI, XVII are not applicable. However, some 30 WTO Members have assumed obligations under the 'Understanding on Commitments in Financial Services'.	BIT disciplines are not 'multilateralized' via GATS Art. II.
Dispute Settlement		
Inter-governmental	Art. XXIII (dispute settlement) WTO Dispute Settlement Understanding	
Investor-State	None	

[CON] Conditional on existence of specific commitments.
[SC] According to the terms, conditions and qualifications provided for in the schedule of specific commitments.

The interaction of BITs with the MFN clause in Article II of the GATS raises a number of additional issues, which are further explored in Section III.A.

2. National treatment

(a) Rights of admission and establishment

The defining characteristic of investment *liberalization* treaties are binding disciplines for the admission of foreign investments in the host countries' market. Investment *protection* BITs, instead, typically recognize the ability of a host government to limit access and allow foreign investments only to the extent that the domestic regulatory framework so provides.

Only a handful of countries have concluded *liberalization* treaties. These treaties typically provide that each party accords to investors of the other party and to their investments treatment no less favourable than the treatment accorded to its own investors and investments (and to investors and investments of any third State) 'with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment, and sale or other disposal of investments.'[33] The terms 'establishment, acquisition and expansion' clearly indicate the treaties' extension to the pre-establishment phase. Such investment treaties featuring entry rights represent less than 4 per cent of all BITs signed to date.

As noted above, the United States pioneered this approach in the early 1980s with the launch of its Bilateral Investment Treaty Program. Canada followed in the mid-1990s to promote Foreign Investment Protection and Promotion Agreements (FIPAs) largely based on NAFTA Chapter 11. Other countries, like Finland and Japan, have incorporated substantial elements of the investment liberalization approach into their recent BITs.[34] However, some of these countries have significantly reduced the scope of entry rights through different mechanisms. Canada's treaties signed between 1994 and 2001, for instance, grandfather all existing limitations to (pre- and post- establishment) national treatment, hence reducing the coverage as well as the transparency value of these BITs.[35] The treaties signed by Finland, while featuring a pre-establishment national treatment obligation, include a provision which permits the parties to admit foreign investment in accordance with their laws and regulations, a characteristic clause of investment protection treaties. Finally, Japan's treaties are subject to broad sector reservations as explained above.

While the GATS terminology differs from that found in such treaties, the substantive obligations are very similar. As noted above (Section II.A), the definition of commercial presence in Article XXVIII(d) of the GATS includes the constitution, acquisition or maintenance of a juridical person, or the creation of a branch or a representative office. These activities merely represent different forms of direct investment in a host country's territory. Therefore, where Members have undertaken full commitments on national treatment under mode 3 (commercial presence), they are bound to allow entry and establishment of foreign investors/investments in services on the same footing as their domestic counterparts. Furthermore, GATS Articles XVI:2(e) and (f) expressly prohibit measures, in the absence of scheduled limitations, that would restrict the ability of foreign investors in services to select the desired form of establishment - e.g., through the constitution of a new juridical person or the creation of a branch of representative office - or curb the participation of foreign capital. Finally, certain prohibitions on entry and establishment of foreign investors/investments may amount to 'zero quotas' inconsistent with the obligation not to limit the number of service suppliers enshrined in GATS Article XVI:2(a).[36] While investment liberalizing BITs do not expressly

[33] Japan - Vietnam BIT, Art. 2.

[34] Other countries have on occasions extended admission and establishment rights to foreign investors in their treaties, especially on an MFN, rather than national treatment, basis. However, this has not been a consistent practice. See, for instance, China - Turkey BIT of 1990 and China - Korea BIT of 1992.

[35] See for instance, Canada's BITs with Barbados of 1997 and Armenia of 1999.

[36] See Appellate Body Report on *US - Gambling*, paras. 214-238.

feature such obligations, relevant measures are captured, given the discriminatory elements implied, by the national treatment obligation with regard to admission and establishment.

Subject to any particular policy reservations, a liberalizing investment treaty thus rules out any *discriminatory* market access restrictions that are inconsistent with both Articles XVI:2(a)-(c) and XVII of the GATS as well as of joint venture requirements or foreign equity ceilings pursuant to Article XVI:2(e) and (f).[37] The parties to such treaties thus have dispensed with, *inter alia*, the possibility of protecting 'infant' domestic industries from foreign entrants or from foreign takeovers and acquisitions. Of course, a pre-establishment national treatment obligation would not prevent signatories from maintaining non-discriminatory quotas, including in the form of government monopolies, hence falling short of relevant commitments that might have been undertaken under the GATS. The introduction of new such restrictions in sectors with foreign participation would need to be assessed, however, in light of the BIT provisions governing expropriation or fair and equitable treatment (Section II.C.3 and 5).[38]

As noted before, the entry rights conferred in some investment liberalization treaties do not match the levels scheduled by the parties under the GATS. For example, the grandfathering provisions contained in the BITs signed by Canada between 1994 and 2001 reduce their 'liberalizing effects' to measures taken after their conclusion.[39] Also, a handful of treaties concluded by Finland limits pre-establishment national treatment to the 'acquisition' of existing companies, without expressly covering the direct 'constitution' or 'establishment' of a company, thus arguably allowing solely for mergers and acquisitions and excluding greenfield investments.[40]

(b) Post-establishment national treatment

Concerning the extension of national treatment to established companies, no substantial differences can be found between the relevant GATS obligations (for scheduled services) and those contained in a broad majority of BITs. Article XVII of the GATS applies to any measure that modifies the conditions of competition in favour of domestic services or service suppliers, regardless of whether it entails formally identical or formally different treatment. While BITs do not normally include such specific language, it is understood that the national treatment obligation covers both *de facto* and *de jure* discrimination. Indeed, in the context of a NAFTA dispute, the arbitral tribunal considered that Article 1102 of the NAFTA requires parties to take into account whether the measure, on its face, appears to favour nationals over non-nationals who are protected by the Agreement, as well as whether its practical effect is to create a disproportionate benefit for nationals over non-nationals.[41]

In contrast to liberalization BITs, protection treaties usually do not expressly define the operations covered. Rather, the relevant provisions confirm the parties' ability to admit foreign investment into their territory in accordance with their legislation. Some treaties, however, explicitly refer to the post-establishment stage, indicating that national treatment applies with regard to the 'management, operation, maintenance, use, enjoyment, sale and liquidation of an investment' (Austria - Jordan, 2001, Article 3.3). Constitution and acquisition of a company are obviously exempt.

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[37] Article XVI:2(a)-(c) of the GATS captures quantitative restrictions limiting, respectively, the number of suppliers, value of transactions or assets, and number of operations or quantity of output. Pursuant to Article XX:2, Members are held to inscribe such measures, should these be inconsistent with Article XVII (national treatment) as well, under Article XVI only.

[38] The latter observations also apply to investment protection treaties.

[39] As far as services under the GATS are concerned, pursuant to the MFN requirement in Article II (Section III.A below), the carve-out would apply only to measures taken prior to the date of entry into force of the first BIT concluded by Canada that contains such provisions. Moreover, any commitments scheduled under the GATS would need to be respected in any event.

[40] Molinuevo (2007), at 29.

[41] *S.D. Myers vs. Canada*, First Partial Award, 13 November 2000, para. 252.

The distinction between pre- and post- establishment appears less clear when the national treatment principle is applied to specific investment-related measures. The GATS, through its provisions on market access and national treatment, covers a wide number of measures ranging from entry prohibitions and limitations on the form of establishment, to typical post-establishment measures such as the use of production-related subsidies and grants, or limitations on the value or number of operations that can be performed by a service supplier.

It is difficult to assess whether certain measures relate more directly to the establishment or to the management of a company. Limitations on branching or the access to certain subsidies, for instance, arguably affect both stages of the investment. Similarly, geographical limitations on foreign presence or restrictions on the ownership of land and property impinge not only on the initial stage, but may also negatively affect future management decisions. It is thus unclear whether and to what extent investment protection treaties apply to these types of restrictions, which are either expressly or implicitly constrained under GATS Articles XVI and XVII. For example, more than 20 per cent of the national treatment limitations scheduled by WTO Members under mode 3 pertain precisely to ownership of land and real estate.[42] Thus, while the BITs' national treatment obligation is generally far broader in sector scope than GATS commitments, the policy coverage of the GATS may reach significantly beyond that of investment protection treaties.

Interestingly, various WTO Members have reserved the right, in their GATS schedules, to confer subsidies and grants only to domestic service suppliers. Six Members have done so by inscribing a national treatment limitation under mode 3 in the horizontal section of their schedule, which applies across all committed sectors.[43] Yet, the same countries have promoted BITs with unrestricted post-establishment national treatment provisions; three have even assumed national treatment obligations pre-establishment as well. This raises the question whether GATS commitments have been phrased too cautiously in these cases or, rather, whether BIT obligations are being ignored *vis-à-vis* the co-signatories concerned. Would more intensive government-internal coordination have helped to produce mutually consistent undertakings?

National treatment obligations, even if confined to the post-establishment stage, may have significant policy ramifications. For example, a group of WTO Members that endorses the creation of an emergency safeguards mechanism under Article X the GATS would like to extend its scope beyond conventional cross-border trade to apply at least to mode 3 as well. In this context, it has been proposed to exempt the ongoing activities of already established foreign suppliers from the safeguards measure, while preventing them from further expanding during its operation. It is difficult to see, however, how this 'freeze' squares with an unconditional obligation of post-establishment national treatment as assumed by a large majority of countries under investment treaties (Annex Table A1).[44] Overall, taking into account such obligations within the current framework of BITs, it appears that less than 10 per cent of WTO Members could make use of such a mechanism under mode 3.[45]

(c) Scope of the national treatment obligation

While the concept of national treatment is essentially the same in investment treaties and the GATS, the substantial scope of the ensuing obligation remains to be clarified. To the extent that national treatment

[42] Adlung and Roy (2005), at 1181.

[43] Adlung (2007a), at 247.

[44] See Adlung (2007b), at 251-253.

[45] This percentage would increase slightly if those Members were added whose BITs are covered by MFN exemptions under the GATS. The governments concerned might still be able to invoke a future safeguards mechanism under the GATS, without infringing on their international obligations, should the 'injury' have been caused by investments from non-BIT partners. However, this possibility is subject to various uncertainties. These are related, for example, to the extent to which the negotiating mandate under Article X of the GATS, requiring that relevant measures be based on the 'principle of non-discrimination', would actually be filled with legal content. Also, since the main source countries of FDI are likely to be covered by the BITs concerned, this scenario may not prove highly economically relevant.

(similarly to MFN treatment) is based on a comparison between domestic and foreign services and service suppliers, the reach of the obligation is determined by *which* groups or categories are to be compared. The broader their delimitation and, thus, the reach of the national treatment discipline, the more restricted a host government's ability to differentiate between domestic and foreign investors.

The GATS refers to treatment extended to foreign 'like services and service suppliers'. However, the underlying concept of likeness has remained somewhat elusive to date, and only few and incomplete inferences can be drawn from relevant jurisprudence.[46] In any case, foreign services and services suppliers must be 'like' their domestic counterparts in order for the national treatment obligation to apply.

The standards of comparison used in BITs vary widely. The vast majority of treaties does not feature a specific definitional benchmark, but rather requires that foreign investors and investments receive treatment no less favourable than that accorded to domestic investors and investments - without any further qualification.[47] According to an UNCTAD study, this approach offers the widest scope for comparison since it captures any matter that is relevant to determining whether a foreign investor is given national treatment.[48] In contrast, liberalization BITs mostly contain language based on NAFTA Article 1102, which requires foreign and domestic investors to be in 'like circumstances' in order for the national treatment obligation to apply. Other treaties refer to the 'same situation' or 'a comparable situation'.[49] The interpretation of these terms poses challenges similar to those surrounding the concept of 'like services and service suppliers'.

Arbitral tribunals have ruled on the existence of 'like circumstances' in the context of NAFTA and 'like situations' in BITs involving the United States. Under the former agreement, it has been established that the authorities need to compare investors in the same economic or business sector.[50] In contrast, the arbitral tribunal in Occidental Explorations vs. Ecuador considered that in case of 'like situations' the comparison must not necessarily be limited to investors in the same business sector, thus arguably widening the scope beyond the NAFTA concept of 'like circumstances' and the similar GATS notion of 'like services and service suppliers'. This extension ultimately allowed the tribunal to conclude that the situation of the claimant, involved in the production and exportation of oil, liked that of companies exporting goods, particularly flowers, minerals, seafood, lumber, bananas and African palm oil.[51]

It thus appears that, while some investment treaties adopt a standard of comparison similar to the concept of 'likeness' under the GATS, the majority of treaties relies on a broader context or uses no definitions at all. As a result, the national treatment obligation might be extended beyond situations covered by the GATS.

3. Fair and equitable treatment

Despite its long-standing and wide-spread use in investment treaties, the concept of 'fair and equitable treatment' has remained vague. On the one hand, the question has been raised whether it entails any commitments beyond those stemming from international customary law. While such an extension has been ruled out in the case of the NAFTA and recent investment treaties signed by the United States and Canada, no authoritative guidance exists for most part of the BIT universe.[52]

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[46] On the concept of 'likeness' in the GATS, see Cossy (2006).

[47] See, for instance, Iceland - Chile BIT (2003), Article IV.

[48] UNCTAD (1999a), at 34.

[49] See UNCTAD (1999a), at 28-33, for a review of the different standards of comparison found in BITs.

[50] See *S.D. Myers vs. Canada*, First Partial Award, 13 November 2000, para. 252. Implicitly, this was also the approach followed in *Pope & Talbot Inc. vs. Canada*, Award on the Merits 10 April 2001, para. 73-104, and *Methanex vs. United States*, Final Award, 3 August 2005, Part IV - Chapter B paras. 11-17.

[51] *Occidental Exploration and Production Company vs. Ecuador,* LCIA Case No. UN3467, Final Award, 1 July 2004, paras. 168, 173 and 176-178.

[52] On the scope of the fair and equitable treatment obligations and a review of relevant jurisprudence, see, *inter alia*, UNCTAD (1999b), Schreuer (2005), Westcott (2007) and OECD (2004). BITs promoted by the US specify that, while no treatment is required in addition to or beyond what is required by the international minimum standard, the

Arbitral tribunals have found 'fair and equitable treatment' to entail obligations with regard, *inter alia*, to transparency and the protection of legitimate expectations; procedural fairness and due process; absence of arbitrary or discriminatory conduct; and good faith.[53] According to relevant jurisprudence, it must be adapted flexibly to the circumstances of each case and, hence, cannot be limited, *in abstracto*, to a given set of situations.[54] There seems to be a common denominator, however, which relates to the notion of 'good governance'. Counterparts of this concept can be found in Part II (General Obligations and Disciplines) of the GATS as well. Potentially relevant are the following provisions:[55]

- Transparency: Article III:1 calls on WTO Members to provide for the prompt publication of general measures relating to trade (and investment) in services. In sectors subject to specific commitments, GATS Article III:3 requires Members to inform the Council for Trade in Services of any new or changes to existing laws and regulations etc., which 'significantly affect' trade in these sectors (Section IV.A). Further, pursuant to Article IV:2, developed WTO Members, and to the extent possible other Members, are required to establish contact points to facilitate developing countries' service suppliers access to information on their respective markets. It appears that these GATS obligations do not go as far as the transparency requirements associated with fair and equitable treatment, which have been interpreted to ensure that foreign investors should be able to readily access 'all relevant legal requirements' affecting their investments, including general laws, decisions and regulations as well as concrete measures in relation one particular investor.[56] Interestingly, the counterpart provisions in merchandise trade, under the GATT, tend to be more rigorous and have been interpreted in a way similar to those embedded in the concept of fair and equitable treatment.[57]

- Administration of measures: Article VI:1 requires Members, in sectors subject to specific commitments, to ensure that all measures of general application that affect trade (and investment) in services are administered in a 'reasonable, objective and impartial manner'. In the absence of further definitional clarification in the GATS and relevant jurisprudence, it is difficult to circumscribe these obligations more precisely and compare them with what might be implied by the principle of 'fair and equitable treatment'. In any event, the requirements of reasonable and impartial administration seem to rule out arbitrary or discriminatory measures that may be covered by this principle as well.[58]

- Availability of legal remedies: Article VI:2 mandates Members, subject to certain caveats, to ensure that service suppliers have access to judicial, arbitral or administrative procedures in order to challenge, and seek remedies for, administrative decisions. In principle, these procedures need to be

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concept of fair and equitable treatment includes 'the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process'.

[53] Schreuer (2005), at 373-374, and Choudhury (2005), at 305-315.

[54] *Waste Management, Inc. vs. United Mexican States (Number 2)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 99.

[55] The following overview cannot aspire to be complete. Other provisions that might need to be added include Article VI:3 (information requirement *vis-à-vis* suppliers/investors that have applied for a license) or Article VIII (disciplines on the business conduct of monopolies and exclusive service suppliers).

[56] See *Metalclad Corporation vs. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, para. 76, *Técnicas Medioambientales Tecmed S.A vs. Mexico*, ICSIS Case No. ART(AF)/00/2, para. 154.

[57] The Panel on *Argentina - Hides and Leather* (para. 11.76) highlighted that 'the focus [of the transparency obligation] is on the treatment accorded by government authorities to the traders in question', so as to allow private parties to become acquainted with the relevant regulation that concerns their activity. In contrast, Article III of the GATS lacks a specific reference to business operators ('traders') as featured in GATT X:1, and refers only to transparency obligations *vis-à-vis* other WTO Members.

[58] GATT Article X:3 (conceptually analogous to GATS Article VI:1) has been considered to apply in situations pertaining to lack of procedural fairness, due process, disclosure of confidential information, and non-compliance with a Member's regulatory regime for no apparent reason. It could be argued that the fair and equitable treatment principle covers similar situations. See, *inter alia*, Appellate Body Report on *US - Shrimps*, para. 182-183; Panel Report on *Argentina - Hides and Leather*, para. 11.94, Panel Report on *Dominican Republic - Cigarettes*, para.. 7.384-88.

independent of the government agencies involved or, at least, provide for an objective and impartial review. Interestingly, Article VI:2 applies across the board, regardless of the existence of specific commitments. While not expressly mentioned, its underlying rationale is to ensure due process of law in the administration of justice, a key element of the obligation of fair and equitable treatment.

- Disciplines on domestic regulation: Article VI:5, comparable with Article VI:1, is essentially intended to protect legitimate expectations arising from the existence of specific commitments under the GATS. Accordingly, domestic regulatory measures - licensing and qualification requirements, qualifications procedures and technical standards - must not be based on non-objective and non-transparent criteria or made more burdensome than necessary for quality purposes. These requirements have been given effect on a provisional basis pending the conclusion of the negotiations on regulatory disciplines as mandated under Article VI:4.

4. Transfers of funds

The protection afforded by investment treaties, similar to the GATS, also extends to international transfers of funds pertaining to an investment. Relevant guarantees on payments and transfers typically encompass: (i) movements relating to 'returns' on investments, which are normally defined as including all profits, dividends, interest, capital gains, royalty payments related to intellectual property rights, management, technical assistance or other fees or returns in kind; (ii) proceeds from sale or liquidation; (iii) payments due under loan agreements (including payments arising from cross-border credits); and (iv) earnings and other remuneration of personnel engaged from abroad in connection with an investment.[59] It follows that BITs commonly entail the obligation to allow the movement of funds arising from both current and capital transactions related to the investment. In addition, investment treaties commonly require that such transfers be permitted without delay and in a freely convertible currency.

While the BITs provisions on transfers of funds apply across the board to all covered sectors, the relevant GATS obligation is limited to sectors where specific commitments have been undertaken. Furthermore, Article XI:1 dealing with the free transfer of funds covers only transfer related to *current* transactions. Restrictions on *capital* transactions can instead be scheduled as national treatment limitations, or may be imposed in specified (exceptional) circumstances. Finally, nothing in the GATS requires Members to allow transactions in a given currency or types of currency as long as existing national treatment obligations are respected.[60]

5. Expropriation

Virtually all investment treaties provide for guarantees against unlawful expropriation. The relevant provisions cover measures pertaining to outright dispossession of an investor's title over its investments (direct expropriation) as well as other measures whose impact on property is sufficient to effectively deprive the investor of the benefits stemming from the investment, inhibit its management, use or control, or substantially depreciate its value (indirect expropriation).[61] Measures leading to indirect expropriation can, in turn, take the form of regulatory expropriation - where a regulatory measure has an impact with such effects - or so-called creeping expropriation where not an individual act, but a series of measures brings about the expropriatory result.[62]

Investment treaties do not prohibit the adoption of expropriatory measures, a sovereign right of States, but rather set conditions in order for the expropriation to be legitimate under international law.

[59] See on this, UNCTAD (2000b) at 30-32

[60] Footnote 8 to GATS Article XVI:1 further provides that inward transfers of capital related to commercial presence are to be allowed where commitments on market access have been undertaken. However, unlike the majority of BITs, the provision says nothing about possible restrictions on outward transfers.

[61] UNCTAD (2004), at 64-70.

[62] UNCTAD (2005b), at 41-42.

Accordingly, expropriations are permissible if done (i) for public purposes, (ii) in a non-discriminatory manner, (iii) on payment of compensation, and (iv) in accordance with due process of law.[63] While these conditions have been developed for measures pertaining to direct expropriation, they are deemed to apply to indirect expropriations as well.

Unlike investment treaties, the GATS does not feature any provisions on expropriation. However, this does not mean that expropriations are beyond the scope of the Agreement. Of course, insofar as they constitute measures affecting trade in services, pursuant to Article I:1, they are covered and can be scrutinized under potentially relevant disciplines. From that perspective, it is interesting to note that the Agreement contains several obligations similar to the requirements that an expropriation must meet under investment treaties. Actions that might be considered unlawful under BITs due to their discriminatory nature could be deemed inconsistent as well with the GATS' national treatment obligation or with the requirement of 'impartial administration' of regulatory measures set out in Article VI:1. Similarly, expropriations in contravention of the principles of due process would possibly fall foul of the Article VI:1 obligation of 'reasonable and objective' administration of measures. Moreover, regulatory measures tantamount to expropriation could effectively reduce the number of service suppliers or limit the value of service transactions in a manner inconsistent with GATS Article XVI:2(a) or (b).

Arbitral decisions commonly defer the determination of 'public purpose' in the context of expropriatory measures to the acting State. Arguably, not only the legislation giving rise to the expropriation must be based on public interest, but the individual act as well.[64] This requirement seems to relate to the GATS exceptions for measures necessary to maintain public order, pursuant to Article XIV(a).

Notwithstanding these GATS provisions, the relevant BIT disciplines seem to cover takings of property in a broader way. In particular, the GATS fails to capture the compensation requirement contained in investment treaties, at least if compensation has been denied to both domestic and foreign investors. An expropriation conducted in a non-discriminatory manner, according to the principles of due process and serving a public purpose might be considered GATS compatible, albeit the investor may have received no compensation for the seizure of property. Therefore, while GATS provisions such as Articles VI, XVI and XVII may play a role in protecting an investor's property against unlawful expropriations in certain circumstances, investment treaty disciplines are more specific and, hence, more immediately relevant.

6. Dispute settlement

Virtually all investment treaties grant foreign investors access to international arbitral tribunals, such as the International Centre for Settlement of Investment Disputes (ICSID), the International Chamber of Commerce (ICC) or *ad hoc* panels. The option of investor-State arbitration, whenever a measure is considered inconsistent with a host country's international obligations, allows investors eventually to by-pass the domestic legal system and may therefore protect them from undue political interference and/or bias in favour of national companies in the dispute resolution process. Neither the GATS nor any other WTO Agreement offer similar possibilities. Private parties cannot bring claims to the WTO dispute settlement system, but would need to mobilize their home country authorities to launch a case. From that perspective, investment treaties offer a significant advantage over the GATS.

Additionally, investment treaties typically provide for State-to-State dispute settlement in regard to the interpretation and application of relevant disciplines. While conceptually similar to the WTO dispute settlement mechanism, the procedures envisaged in investment treaties typically lack the institutional

[63] See, for instance, Finland - Algeria BIT of 2005, Article 4.

[64] The arbitral decision on *Siemens vs. Argentina* (ICSID Case No. ARB/02/8, para. 273) questioned the link between the particular decree leading to the expropriation, suggesting that the expropriatory measures had been taken on political grounds, rather than for alleviation of the ongoing financial crisis, as alleged. The arbitral decision, however, noting that the compensation requirement had not been met, refrained from exploring further the purpose of the measure.

underpinning and the compliance mechanisms provided for under the WTO Dispute Settlement Understanding.

Overall, however, dispute settlement mechanisms under investment treaties have been invoked far more frequently than their WTO counterpart. While the latter was used for no more than a handful of services-related disputes since the WTO/GATS entry into force in January 1995, some 100 such cases were brought under investment treaties over the same period.[65]

The 'popularity' of the BIT mechanism may be due mainly to investors' direct access and the absence of a government filter, but other factors are likely to have played a role as well. These include, in particular, the BITs' far wider coverage of service sectors in many cases, if compared to GATS commitments, and investors' possible interest in 'GATS-plus' features. Indeed, most investor-State arbitrations have been decided on breaches of expropriation-related disciplines and/or fair and equitable treatment obligations, which may not have full-fledged GATS equivalents (Table 2). While the prevailing focus of investment treaties on the post-establishment phase might constrain their commercial value, many GATS commitments are subject to limitations that could have similar effects.[66] Interestingly, the two GATS-only disputes brought in the WTO to date did not even revolve around investment-related issues under mode 3, but concerned the responding Members' commitments on cross-border trade (mode 1).

7. Other disciplines

Recent investment treaties tend to contain a variety of additional features that may find an equivalent in and/or build on GATS provisions.

A number of investment treaties, especially liberalization BITs, ban the adoption or continuation of performance requirements imposed on foreign investors. Since the emphasis is on goods production, many of the measures concerned are captured by the Agreement on Trade-related Investment Measures (TRIMs). However, there are similar requirements in services as well.[67]

Ambitious treaties, such as those promoted by the United States, Canada or Japan, feature a list of measures that must not be enforced at the approval stage. The Japan-Korea BIT of 2003, for instance, prohibits mandatory performance requirements pertaining to exports and domestic content, the location of headquarters, research and development, domestic employment, and the local supply of goods or services. While the GATS does not prohibit such requirements *per se*, they might fall afoul of specific commitments. For example, rigid export performance requirements may be deemed to limit (domestic) transactions within the meaning of Article XVI:2(b). In any event, given their focus on foreign investors, such requirements tend to be incompatible with national treatment obligations under Article XVII. Again, however, the broader sector coverage of BITs (Table 1), compared to GATS commitments, may render these treaties more legally and commercially relevant.

Some liberalization treaties also protect foreign investors from nationality requirements concerning the appointment of senior managers and executives.[68] This discipline is comparable to the absence of relevant limitations on national treatment in a sector committed under the GATS.

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[65] UNCTAD (2006b), at 3, points to over 250 known arbitration cases by the end of 2006. Of the WTO disputes, only two dealt exclusively with alleged infringements of GATS commitments (namely, *Mexico - Telecoms*, and *US - Gambling*).

[66] Adlung and Roy (2005), at 166-167, find a relationship of over two limitations per each market access commitment undertaken on mode 3 (horizontal and sector-specific limitations combined). Most entries relate to foreign capital participation and restrictions on the type of legal entity.

[67] UNCTAD (2006c), at 56-58, observes that there is a higher share of performance requirements affecting investment in service industries as compared to goods sectors. For the most part, performance requirements in services relate to technology transfers, mainly in the form of training of local employees.

[68] However, recent BITs promoted by the United States and Canada expressly allow the parties to adopt or maintain nationality requirements for boards of directors. The GATS schedules of both countries feature narrower

III. APPLICATION OF GENERAL GATS DISCIPLINES TO INVESTMENT TREATIES

A. Most-favoured-nation treatment

1. Scope and coverage of Article II

Investment treaties attracted relatively little attention at final stages of the Uruguay Round when participants discussed the definitional scope of the GATS. Also, during the periodic MFN reviews conducted subsequently under the Annex on Article II Exemptions, BITs have not generated a great deal of interest.[69] Given the focus of most treaties on the protection of already established investors, Members may have felt that little, if any, benefits are involved beyond their GATS obligations. If there have been discussions at all, the focus has been on the status of their dispute settlement mechanisms, rather than on the substantive provisions extending national treatment, in various definitional guises, and other obligations among the parties.[70]

It may be worth recalling in this context that, according to the Appellate Body, 'measures [...] affecting trade in services', as provided by Article I:1, are not necessarily measures 'regulating' or 'governing' trade in services, nor measures taken 'in respect of' trade in services.[71] Rather, 'any measure bearing upon conditions of competition in supply of a service, regardless of whether the measure directly governs or indirectly affects the supply of the service' falls under the scope of the Agreement. [72] From this perspective, although BIT disciplines may not be directly aimed at governing services trade, they fall within the purview of the GATS to the extent that they *affect* trade (and investment) in services.

The MFN obligation pursuant to Article II is no different in scope, since the Article applies to 'any measure' covered by the GATS. Accordingly, any preferential treatment effectively granted to investors from one BIT partner would need to be extended not only to other, less privileged BIT partners, if any, but to all WTO Members as well. Potentially relevant in this context are, of course, the typical liberalization and protection clauses, concerning the extension of national treatment to treaty partners, but also other obligations, including the commitments to fair and equitable treatment, guarantees against expropriation, or access to investor-State arbitration. Indeed, to the extent that BITs ensure national treatment in sectors not covered by GATS commitments, or otherwise privilege investors of a particular nationality, they would need to be 'multilateralized' to investors from any WTO Member.[73] The only obvious exception, as far as services are concerned, is the extension under investment treaties of national treatment disciplines to government procurement. Any such benefits may remain confined to the parties, since Article XIII of the GATS exempts

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limitations. The US has inscribed nationality requirements concerning certain financial services only, while the horizontal section of Canada's schedule features such limitations solely with regard to privatized and 'federally incorporated' companies.

[69] Pursuant to paras. 3 and 4 of the Annex on Article II Exemptions, the Council for Trade in Services is tasked to review all exemptions granted for a period of more than five years. These reviews are destined to examine whether the conditions which created the need for the exemption still prevail.

[70] At a meeting of the Preparatory Committee for the World Trade Organization, in December 1994, the Chairman of the Sub-Committee on Services noted, *inter alia*, that it had not been possible for delegations to agree on whether the GATS applies to investor-State dispute settlement mechanisms in investment treaties. The continuation of relevant MFN exemptions, which refer specifically to dispute settlement under BITs (Annex Table A1), even after two MFN reviews, in 2000 and 2005, suggests at least that three Members - Canada, Chile and Poland - do not preclude this possibility (Section III.A.3). See also document MTN.GNS/W/177/Rev. 1 of 4 November 1993, and the minutes of the Preparatory Committee for the World Trade Organization, PC/M/11 of 16 January 1995.

[71] Appellate Body Report on *EC - Bananas III*, para. 220.

[72] Panel Report on *EC - Bananas III (Ecuador)*, para. 7.282.

[73] UNCTAD (1999c), at 38.

governments procurement of services not only from market access obligation and national treatment, but from MFN treatment as well.[74]

The multilateral extension of BIT disciplines may prove economically significant, given that about 60 per cent of world FDI stocks are in services.[75] The actual impact, however, essentially depends on the existence of gaps between a country's actual trade regime and the obligations it might have assumed and implemented under investment treaties and, as far as the secondary effects of MFN clauses in BITs are concerned, under preferential trade agreements (see below). For administrative reasons, governments may be loath in any event to operate a jumble of discriminatory investment rules and regulations.

2. Investment treaties versus preferential trade agreements

Some Members might have felt that the provisions covering preferential trade agreements, in Article V of the GATS (Economic Integration), might capture investment treaties as well. However, the relevant terms leave little scope for this interpretation. First, Article V:1(a) requires PTAs to have 'substantial sector coverage' and a related footnote further clarifies, *inter alia*, that relevant agreements 'should not provide for the *a priori* exclusion of any mode of supply'. Yet, the coverage of investment treaties does not exceed mode 3, except, possibly, for some elements falling under mode 4. A second condition, in Article V:1(b), refers to 'the absence or elimination of substantially all discrimination, in the sense of Article XVII' between the PTA parties in the sectors covered. Again, doubts are warranted whether this condition is met when investment treaties provide only for post-establishment national treatment or when more comprehensive obligations have been subjected to strong reservations.[76]

The discriminatory effects - and hence the potential economic distortions - that may arise from investment treaties are contained, however, by relatively liberal 'rules of origin' in many cases. BITs commonly extend their benefits to all companies established or having their seat in the territory of one of the parties, even if they are foreign owned. Third-country investors established in the territory of one of the parties thus benefit from the treaty's disciplines when investing in the other party.

As noted before, some BITs do not exclude the benefits accorded under preferential trade agreements from their third-party MFN clause (Section II.C.1). The BIT partner may thus be entitled to a 'free-ride' as far as the coverage of both agreements/treaties overlaps. And there may be a domino effect: Since the extension of PTA benefits to treaty partners would no longer be captured by Article V of the GATS, the MFN requirement of Article II becomes relevant. The national treatment obligation and other relevant provisions accorded under the PTA would thus have to be multilateralized. Interestingly, Turkey is the only WTO Member that seems to have taken this possibility into account and listed an MFN exemption under the GATS that is specifically intended to avoid this effect. The exemption refers to five BITs, concluded with Bangladesh, Germany, Japan, Poland, and the Republic of Korea, whose third-party MFN clauses do not exempt preferences accorded under free trade zones, customs unions, etc., with third countries.[77]

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[74] Notably, the counterpart provision in merchandise trade (GATT Article III:8) waives the national treatment obligation only. GATS Article XIII:2 provides for negotiations on government procurement in services, but these have made little progress, if any, in over ten years. However, some 30 Members have adopted an optional 'Understanding on Commitments in Financial Services' under which they are committed, *inter alia*, to extending MFN and national treatment to the procurement by their public entities of financial services under mode 3 (para. 2).

[75] In turn, as noted before (above n 3), mode 3 alone represents some 50 per cent of services trade falling under the GATS.

[76] See Ortino and Sheppard (2006), at 213.

[77] Some of these treaties are quite dated. In the case of Germany and Bangladesh, they were signed in 1964 and 1989, respectively.

3. 'Open-ended MFN exemptions'

In listing MFN exemptions under the GATS, WTO Members have various options to accommodate perceived policy needs in individual cases. Apart from the description of the measure itself, these options include, in particular, its duration and geographic extension.[78] Thus, exemptions have been listed for specified periods or, in the vast majority of cases, remained open-ended, and the recipient countries have been circumscribed exhaustively or left mostly undefined.

The GATS does not prescribe any particular timeframe for such exemptions. The relevant provisions in the Annex on Article II Exemptions clearly entail an element of flexibility: '*In principle*, such exemptions *should* not exceed a period of 10 years' (emphasis added). A vast majority of the 100-odd Members that listed MFN Exemptions inscribed 'indefinite' in the column dealing with the duration of the measure, thus seeking to avoid binding effects. All current MFN exemptions concerning BITs have been phrased accordingly.[79]

'Open-ended MFN exemptions', in terms of future beneficiaries, have been listed by Canada and Chile (confined to the dispute-settlement provisions under BITs), the United States (covering only BIT provisions related to the movement of natural persons)[80] as well as Costa Rica, Kuwait, Poland, Singapore, Trinidad and Tobago, and Uruguay (no limits in scope). In these latter cases, the MFN exemption applies to 'all countries'. In contrast, exemptions with limited geographic coverage, essentially confined to existing treaty partners, have been listed by Guatemala (covering a Convention on Investment Guarantees with the United States and Agreements on Trade and Investment between Central American countries, Colombia and Venezuela), Jordan (*vis-à-vis* 19 listed WTO Members), Sweden (*vis-à-vis* three Members), and Turkey (44 countries, including some non-WTO Members). In addition, a few Members, including Brunei Darussalam and Malaysia, have submitted broader-based MFN exemptions, not directly related to investment treaties, which provide leeway for the operation of discretionary foreign equity ceilings.[81] Again, the potential beneficiary countries have not been further specified.

What is the status under the GATS of these openly defined MFN exemptions? Are relevant entries compatible with the requirement of Article II:2, which provides that Members 'may *maintain*' an MFN-inconsistent measure they have listed at the time the Agreement entered into force? The answer hinges essentially on whether investment treaties can be considered to constitute one single measure and their extension by the same Member to new BIT-partners as its continuation, despite variations in sector and policy scope.[82] If this were the correct reading, then the governments that inscribed investment treaties in their MFN Exemption Lists in 1993/94 would have obtained a virtually permanent departure from relevant GATS disciplines (Article II and/or Article V) with regard to the conclusion of investment treaties.

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[78] Lists of MFN Exemptions are set up in standard format, consisting of five columns: Sector or sub-sector; description of measure indicating its inconsistency with Article II; countries to which the measure applies; intended duration; and conditions creating the need for the exemption.

[79] Moreover, given the heading of the relevant column - '*Intended* duration' - it might be argued that even if a date had been specified, its expiry would not automatically invalidate the exemption concerned as long as the termination of the measure has not been notified. Para. 7 of the Annex on Article II Exemptions requires Members 'to notify the Council for Trade in Services at the termination of the exemption that the inconsistent measure has been brought into conformity ... '

[80] The United States' exemption refers to the issuance of special visas to nationals of treaty partners engaged in carrying out 'substantial trade' or developing and directing the operations of enterprises set up under BITs (GATS document GATS/EL/90 of 15 April 1994).

[81] See, for example, the overview provided in Sauvé (1997), at 74-77.

[82] During the 2005 review of MFN exemptions, the United States gave the view that MFN exemptions could also apply to future measures, which fell within the scope of what had been listed. Consequently, exemptions could cover the negotiation of future agreements, provided their type was clearly described. See WTO document S/C/M/18 of 17 May 2005, paras. 82f.

B. Transparency obligations

Article III of the GATS contains essentially two types of transparency requirements. One consists of an obligation to publish all generally applicable measures, which pertain to or affect the operation of the Agreement (Article III:1). This obligation is already met, without any further effort, whenever governments circulate relevant information in their official journals or gazettes. However, such domestic publication requirements might be of limited value to potentially interested foreign investors.

In addition, Article III:3 of the GATS relates to the introduction of, or changes in legislation in sectors covered by specific commitments. Whenever such changes 'significantly affect' trade in the services concerned, they need to be notified promptly, and at least annually, to the Council for Trade in Services. Similar references to, and transparency requirements for, measures which may have *significant* effects on trade can also be found in the Agreement on Technical Barriers to Trade (Articles 2.9, 5.6, and 10.7), and there is some guidance as to their precise meaning.[83] In any event, BITs are certainly intended to have an impact, whether significant or not, on investment flows and, thus, on services trade under mode 3. Somewhat surprisingly, however, none of the over 280 notifications submitted under Article III:3 by WTO Members between January 1995 and October 2007 concerned investment treaties. Even the Members that had listed in 1993/4 open-ended MFN exemptions for their BITs apparently saw no need to notify the entry into force of new treaties.

There is one further transparency-related instrument within the remit of the WTO: Trade Policy Reviews (TPRs). Relevant reports are prepared for virtually all Members at regular intervals of two, four or six years, depending on their share in world merchandise trade.[84] It is not rare for investment treaties to be listed and summarized in the Chapter dealing with a Member's policy framework for trade and investment. However, the broad scope of the issues covered by TPR reports necessarily limits further information and analysis. The question thus arises whether there could (or should) be an additional opportunity for Members to take stock of, and exchange views on, developments concerning their investment treaties and how these relate to GATS obligations and commitments.

IV. PROPOSALS FOR ACTION FROM A WTO/GATS PERSPECTIVE

A. Promoting transparency

A new framework intended to generate information on preferential trade initiatives has been put into effect recently, on a provisional basis, in the form of a Transparency Mechanism for Regional Trade Agreements.[85] Of course, the mandate of this Mechanism is strictly limited to preferential agreements falling under Article XXIV of the GATT and/or Article V of the GATS. Nevertheless, the question arises whether some of the underlying motives are not equally applicable to investment treaties as well. (The Preamble to the relevant Decision by the General Council refers to the fact that 'trade agreements of a mutually preferential nature ... have greatly increased in number and have become an important element in Members' trade policies and developmental strategies' and expresses the conviction 'that enhancing transparency in, and understanding of, PTAs and their effects is of systemic interest and will be of benefit to all Members'.) In any event, the

[83] A recommendation adopted by the Committee on Technical Barriers to Trade reads as follows: 'When assessing the significance of the effect on trade of technical regulations [for the purposes of Articles 2.9 and 5.6], the Member concerned should take into consideration such elements as the value or other importance of imports in respect of the importing and/or exporting Members concerned, whether from other Members individually or collectively, the potential growth of such imports, and difficulties for producers in other Members to comply with the proposed technical regulations. The concept of a significant effect on trade of other Members should include both import-enhancing and import-reducing effects on the trade of other Members, as long as such effects are significant.' See WTO document G/TBT/1/Rev. 8 of 23 May 2002.

[84] Four Members - United States, European Communities, Japan and China - are due to be reviewed every two years, another 16 Members every four years, and the remaining Members every six years.

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

economic importance of some investment treaties may come close to that of preferential agreements under Article V of the GATS, keeping in mind the contribution of mode 3, commercial presence, to services trade. Moreover, it is precisely mode 3 that offers scope for governments to effectively extend access preferences, e.g. in the form of exemptions from entry quotas and equity ceilings, while trade under modes 1 and 2, in particular in the case of electronic transactions, may largely go unnoticed.[86]

Any new transparency disciplines might be kept simpler than those of the Mechanism for Regional Trade Agreements. Since most investment treaties are subject to the MFN obligation under the GATS, they must comply with GATS Article II from the date of entry into force, whether intended by the signatories or not (Section III.A.1). In turn, the BITs covered by the relatively few Article II Exemptions under the GATS could be addressed, as before, during the reviews mandated under the relevant Annex.[87]

Information provided under a transparency mechanism for investment treaties might thus remain confined, for instance, to explaining the status of some core policy obligations, ranging from MFN and national treatment to fair and equitable treatment, etc., as well as any reservations. For a more efficient procedure, the review process could be based on a standard format as has been developed for other notification/information purposes under the GATS. Apart from the 'external' transparency effects, to the benefit of all WTO Members, such a mechanism would also help to sensitize the ministries involved in negotiating and administering investment treaties to potentially relevant GATS disciplines and the ensuing need for government-internal co-ordination. More ambitiously, a WTO-based mechanism may even entail a notification requirement for regulatory changes, if any, that signatories may take in implementation of a BIT.[88]

As a first step, the question arises how stricter compliance at least with existing notification obligations might be achieved.[89] This issue arises not only with regard to investment treaties and Article III:3, but concerns similar obligations under other GATS provisions as well.[90] One possibility would be to introduce a general reporting requirement under which all Members would notify once a year, under all relevant provisions, whether measures have been taken. This could trigger a process of intra-government information sharing which, under the current system, might never take place. To create some peer pressure, the names of non-notifying Members might be conveyed in regular intervals to the General Council. Additionally or alternatively, the Services Council could try to produce an illustrative list of measures, possibly including investment treaties, which would need to be notified in any event under Article III:3. However, the chances of such initiatives appear modest at best, given the apparent preference among WTO Members, at least in the past, for not rocking the (notification) boat.

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[86] Mode 4 (presence of natural persons) is estimated to represent no more than 1 or 2 per cent of total services trade under the GATS; see above n 3.

[87] While the Agreement establishes no firm timeframe for the conduct of these reviews, apart from the first review, which was to be held within five years from the date of entry into force of the WTO, Members agreed at the end of the second review in 2005 that the following one would start no later than June 2010. See WTO document S/C/M/80 of 17 October 2005.

[88] A similar proposal has been made with regard to PTAs, see Roy, Marchetti and Lim (2007), p.188.

[89] It might be argued that transparency procedures for investment treaties already exist in other fora, keeping in mind in particular UNCTAD's extensive activities in this area. A mere duplication under the WTO would certainly prove redundant. However, UNCTAD's investment treaty database, which essentially depends on voluntary contributions from the governments concerned, features the text of some 1'800 BITs out of more than 2'500 currently recorded treaties (http://www.unctadxi.org/templates/Page____1006.aspx). ICSID provides a list of concluded BITs, without providing access to their texts, which is also limited in coverage (http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewBilateral&reqFrom=Main).

[90] For example, India has repeatedly raised doubts about Members' principle compliance with the notification requirement under Article VII and perceived information gaps in the notifications actually made. See WTO documents S/C/M/67, 68 and 69 of 17 September, 28 November and 15 December 2003.

B. Creating a GATS carve-out in investment treaties?

Individual WTO Members have sought to immunize their more recent investment treaties from challenges under the GATS by excluding services from the BITs' scope, thus precluding any overlap with relevant GATS commitments.

A case in point is a recent treaty between Canada and Peru, signed in November 2006. In an Annex to this treaty, Canada has reserved the right 'to adopt or maintain any measure that is not inconsistent with [its] obligations' under GATS Articles XVI (market access), XVII (national treatment) and XVIII (additional commitments). Interestingly, Peru is not covered by an equivalent provision. This apparent imbalance in obligations might have been intended to avoid an imbalance in treatment. While the carve-out for Canada has reduced the BIT's coverage, in terms of the three GATS Articles, by one-third, from 157 to 105 sectors, a similar provision for Peru would have produced a reduction of more than two-thirds, from 157 to 49 sectors. Of course, the treaty's MFN obligations as well as its general policy disciplines, concerning fair and equitable treatment, etc., remain in force across all service sectors that have not been made subject to specific reservations. Such reservations apply to less than 30 sectors in both cases.

Russia and Thailand have used comparable language in an investment treaty signed in 2002. Accordingly, the treaty's *national treatment* provision does not oblige the parties to grant more favourable treatment than required under WTO agreements including, in particular, the GATS. With a focus on national treatment only, the scope of this exception is thus even more narrowly defined than the 'Canada - Peru clause'. However, it applies to both countries.

Such carve-outs could be phrased in more general terms, reaching beyond the indicated GATS provisions, to accommodate other incompatibilities as well. More comprehensive language could provide, for example, that neither party is required to take measures or accept claims that are not covered by its obligations under the GATS. [91] Certain politically and economically important facets of a BIT for which no direct GATS equivalents exist, including compensation for expropriation and, in this context, recourse to investor-State dispute settlement (Section II.B.3), might be retained nevertheless. It would not be too difficult to find language that would ensure their continued applicability to services.

Reducing the sector scope of new BITs would not, however, defuse the MFN implications of existing treaties in the case of the many WTO Members that have not listed relevant exemptions under Article II:2 of the GATS. A number of BITs might thus need to be renegotiated by those governments that have reason to be concerned about such implications. Unlike PTAs, investment treaties are concluded for limited periods of time, mostly 10 years, with a provision for automatic renewal. The expiry of such a ten-year cycle may afford an appropriate opportunity for reconsidering the scope of a treaty. In any event, renegotiations are not particularly rare. A recent UNCTAD study even refers to a recent trend, with 13 such cases in 2005 only.[92] As indicated before, there is a potential problem of balance, however. In the event of major gaps in coverage between BITs and GATS, some governments may first need to bring their GATS commitments up to a level comparable to what they have already accepted under relevant BITs. It is unlikely that all BIT partners would condone the otherwise resulting imbalances in sector coverage.

[91] Canada is a special case insofar as it had listed an MFN Exemption for the dispute settlement provisions of its investment treaties.

[92] UNCTAD (2006a), at 2. A number of BITs signed by EC Member States, including Bulgaria, Poland and Romania, have been or are currently being renegotiated in light of possible inconsistencies with EC law, especially in relation to transfer of funds. Also, the European Commission has reportedly filed a complaint at the European Court of Justice against Austria, Finland and Sweden for failing to adjust their investment treaties accordingly. (Investment Treaty News, 30 June 2007, published by the International Institute for Sustainable Development; available under http://www.investmenttreatynews.com (visited November 2007)).

C. Adjusting WTO Members' obligations under the GATS?

WTO Members could, of course, also seek to address inconsistencies between their BIT obligations and the GATS from the perspective of the GATS. In most cases, the 'autonomous' extension to all WTO Members of any more ambitious obligations assumed under investment treaties would be the easiest solution. This is true not only for national treatment guarantees, but also includes BIT-provisions establishing absolute standards of treatment (see, for example, Section II.C.3), for which no direct equivalents exist under the GATS. Further thought might need to be given, however, to the status of investor-State dispute settlement procedures.

An additional option exists for newly acceding WTO Members, which are still entitled to list MFN exemptions pursuant to para. 1 of the relevant Annex. Such exemptions can be obtained only at the entry into force of the Agreement which, for new Members, is the date of accession. An interesting example in this context is an exemption attached by Poland to its Uruguay Schedule. It provides cover for notions of commercial presence 'contained in [...] promotion and protection of foreign investment treaties that go beyond limitations embodied in Poland's schedule of specific commitments'.[93] (Again, the question arises whether more general language that extends to other treaty guarantees might have been preferable.) For current Members, however, the only available solution, also referred to in the Annex on Article II Exemptions, would be a waiver pursuant to Article IX:3 of the WTO Agreement. Yet, waivers are not conceived for long-term use. Rather, they are destined for 'exceptional circumstances' (Article IX:3), should be invoked only for specified periods, and would need to be reviewed annually if granted for more than 12 months (WTO Agreement, Article IX:4).

Of course, the 'autonomous' extension of BIT obligations referred to above is not truly optional. As indicated before, Members without MFN exemptions are legally required, pursuant to Article II:1 of the GATS, to extend 'immediately and unconditionally' the benefits they accord to services and service suppliers of one country to like services/suppliers of all Members. Moreover, for purely practical reasons, many governments may hesitate in any event to operate different trade and investment regimes *vis-à-vis* different countries. The administrative costs may simply prove to be too high. However, if MFN treatment needs to be, and possibly is, granted in practice, what would militate against upgrading GATS commitments to the levels committed under BITs? The resulting improvements would essentially serve the same purpose - investment promotion - that had prompted governments to conclude investment treaties in the first place.

What could or should be done in regard of access to investor-State dispute settlement? To the extent that international arbitration helps to reduce investment-related risks and uncertainties in services, thus promoting commercial presence, it may be deemed to 'affect' trade in services in terms of Article I:1. Interestingly, Article VI:2 of the GATS requires Members at the domestic level to provide for legal mechanisms under which aggrieved suppliers could challenge administrative decisions affecting trade in services (Section II.C.3). It could be argued that this explicit reference to a dispute settlement mechanism in the text of the GATS confirms that such measures fall within the scope of the Agreement. Confining the availability of investor-State arbitration only to investors from BIT parties would thus prove incompatible with the GATS MFN obligation.

Yet, access to investor-State dispute settlement is a sensitive issue, not least among developed countries. The only legal instruments providing for this possibility between developed countries are the NAFTA and the Energy Charter Treaty which, however, do not cover investment flows between the United States and Canada, on the one hand, and Western Europe on the other.[94] Also, given the rapid increase of

[93] WTO document GATS/EL/71 of 15 April 1994.

[94] Unlike the European Communities and its Members States, the United Sates and Canada are not Members, but only observers of the Energy Charter Conference. Similarly, the United States - Australia Free Trade Agreement does not provide for an investor-State dispute settlement mechanism. Divergences over scope and content of such a mechanism also played an important role in the eventual failure of the MAI, in addition to other elements, such as that

arbitration cases in recent years[95], many more countries, especially developing countries, may be concerned about an avalanche of claims should access to arbitration be extended to investors from all WTO Members.

Is it necessary to address this particular problem in a WTO/GATS forum? The simple fact that many Members are potentially affected may prove reassuring for hesitant governments. Who would want to throw the first stone and refer its investors' exclusion from a dispute settlement mechanism to a WTO panel? However, not everybody is on the same legal footing since a few Members have listed relevant MFN exemptions (Section III.A.3 and Annex Table A1). A more reliable approach might thus be based on a Ministerial Decision that clarifies and, possibly, circumscribes the scope of the GATS in this regard. The Decision could stipulate, for example, that access to investor-State arbitration is not deemed to imply 'less favourable treatment' in the terms of Article II of the GATS. Alternatively, Ministers might simply agree not to challenge such provisions in the WTO, following a precedent established in the extended negotiations on basic telecommunications in 1997.[96]

V. CONCLUSION

There may be fire behind the BIT-smoke, but it is unlikely to cause much damage to the multilateral system. This is mainly for two reasons. First, the range of actually applied preferences tends to be limited, given most governments' intention to attract foreign investment from whatever source, and, possibly, with whatever incentives.[97] Second, the widespread absence of MFN exemptions under the GATS automatically ensures in many cases the 'multilateralization' of benefits that might be involved. A WTO Member's autonomous liberalization of national treatment and other trading conditions is thus not only 'bilateralized' under investment treaties but, via Article II of the GATS, extended to all WTO Members. In a number of cases, depending on the coverage of a treaty's third-party MFN clause, this even applies to the services-related provisions agreed to under preferential trade agreements. From that perspective, investment treaties effectively provide for open regionalism (or bilateralism) in a key segment of services trade, commercial presence.

Doubts are justified, nevertheless, whether all governments are equally aware of such implications under the GATS, and ready to act accordingly. The lack of transparency and the absence of notifications under relevant GATS provisions should be a matter of common concern. There are obvious solutions, but are Members prepared to act? Even more importantly, rather than multilateralizing investment-related policies in an indirect manner, it would certainly be preferable if the issue was addressed head-on, via equivalent commitments under mode 3 and, possibly, mode 4 of the GATS. The ongoing services negotiations under the Doha Development Agenda would provide an ideal opportunity, with political resolve. As discussed before, however, even the most liberal offers would not help to defuse all tensions between what may remain mutually inconsistent provisions in the GATS and in investment treaties, including in the areas of fair and equitable treatment, expropriation and, especially, dispute settlement. Governments might therefore be well advised, in anticipation of future problems, not only to balance their multilateral commitments and bilateral treaty obligations, but also to conceive an appropriate 'firewall' between the two systems.

The current jumble of miscellaneous investment deals does not augur particularly well for governments' ability to provide for a stable and consistent framework for international economic relations.

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the MAI contained elements of investment liberalization, an aspect absent of treaties signed by European countries (see UNCTAD, 1999d, at 19, and UNCTAD, 2003, at 8).

[95] See above n 65.

[96] The negotiating group concerned agreed that the use of differential accounting rates for the termination of international traffic, although potentially inconsistent with MFN treatment, 'would not give rise to action [...] under dispute settlement under the WTO'. The understanding was made subject to review prior to 1 January 2000. See WTO document S/GBT/4 of 15 February 1997.

[97] Based on a detailed review of the panoply of investment incentives operated by very many countries Subrahmanyam (2005), at 345, points to 'intense incentive competition' between governments and sees the need, in particular from the perspective of developing countries, to introduce effective disciplines.

The challenge thus remains in many countries to improve internal co-ordination and consultation procedures. There is an apparent gulf to be bridged between those ministries and agencies intent on retaining as much flexibility as possible for policy making and others ready to undertake sweeping bindings in expectation of positive investment effects. Given the current state of the Doha Round, another test is just around the corner...

ANNEX

TABLE A1

Overview of Bilateral Investment Treaties, as of 1 June 2006[a]

Country	Signed						Ratified	NT [b]		GATS
	-89	90-94	95-99	00-04	- 06	Total		Pre	Post	MFN ex[c]
Afghanistan	-	-	-	1	1	2	1	?	?	n.a.
Albania	-	16	13	6	-	35	29	●	●	-
Algeria	-	5	15	12	2	34	18	-	●	n.a.
Angola	-	-	2	3	-	5	1	?	?	-
Antigua & Barbuda	1	-	1	-	-	2	2	-	●	-
Argentina	-	34	20	4	-	58	54	●	●	-
Armenia	-	9	12	10	1	32	22	●	●	-
Australia	1	10	7	3	2	23	19	-	-	-
Austria (EC)	5	12	14	30	1	62	58	-	●	-
Azerbaijan	-	2	15	6	2	25	16	●	●	n.a.
Bahrain		1	4	10	1	16	10	●	●	-
Bangladesh	8	3	7	5	1	24	21	●	●	-
Barbados	-	3	5	1	-	9	9	-	●	-
Belarus	-	10	19	21	1	51	44	●[A]	●	n.a.
Belgium (EC)	18	10	28	17	10	83	57	-	●	-
Belize	1	-	3	3	1	8	4	-	●	-
Benin	3	-	-	10	-	13	3	-	●	-
Bolivia	4	8	7	3	-	22	18	●	●	-
Bosnia & Herzegovina	-	1	5	26	-	32	26	-	●	-
Botswana	-	-	2	5	1	8	1	-	●	-
Brazil	-	4	10	-	-	14	-	-	-	-
Brunei Darussalam	-	-	2	3	-	5	2	-	●	-
Bulgaria (EC)	8	16	28	12	1	65	56	●	●	-
Burkina Faso	1	1	2	9	-	13	6	-	●	-
Burundi	2	1	-	2	-	5	3	-	●	-
Cambodia	-	1	7	8	-	16	7	-	●	-
Cameroon	7	-	2	5	-	14	8	●	●	-
Canada	2	5	18	-	-	25	23	(●)	(●)	●[DS]
Cape Verde	-	5	4	-	-	9	8	-	●	n.a.
Central African Rep.	3	-	-	1	-	4	2	-	●	-
Chad	4	-	2	6	-	12	3	-	●	-
Chile	-	16	30	5	-	51	38	-	●	●[DS]
China	19	38	27	24	9	117	87	-	●	-
Chinese Taipei	-	8	9	2	-	19	13	-	●	-
Colombia	-	4	-	1	1	6	1	-	●	-
Comoros	-	1	-	5	-	6	1	?	?	n.a.
Congo	4	2	-	1	2	9	5	?	?	-
Congo, Dem. Rep. of	5	1	2	2	2	12	4	●	●	-
Costa Rica	2	1	9	7	-	19	13	(●)	●	●
Côte d'Ivoire	5	-	4	1	-	10	5	-	●	-
Croatia	-	6	28	22	1	57	42	●	●	-
Cuba	4	38	14	-	-	56	31	-	●	-
Cyprus	2	4	5	6	1	18	16	-	●	-
Czech Rep. (EC)	1	33	34	10	1	79	74	●	●	-
Denmark (EC)	5	21	16	11	-	53	40	-	●	-

Country	Signed						Ratified	NT [b]		GATS
	-89	90-94	95-99	00-04	- 06	Total		Pre	Post	MFN ex[c]
Djibouti	-	-	2	3	-	5	1	-	●	-
Dominica	2	-	-	-	-	2	2	-	●	-
Dominican Republic	-	-	6	7	-	13	5	?	●	-
Ecuador	2	10	10	6	-	28	23	●	●	-
Egypt	11	15	55	15	2	98	71	●	●	-
El Salvador	1	2	16	5	-	24	20	?	●	-
Equatorial Guinea	1	-	-	3	1	5	2	-	●	n.a.
Eritrea	-	-	1	2	-	3	1	?	?	n.a.
Estonia (EC)	-	15	8	-	-	23	23	●	●	-
Ethiopia	-	1	5	15	1	22	10	-	●	n.a.
Finland (EC)	4	14	16	25	4	63	52	●[A]	●	-
France (EC)	38	24	26	10	-	98	76	-	●	-
Gabon	4	-	5	3	1	13	5	-	●	-
Gambia	-	1	-	3	1	5	1	-	●	-
Georgia	-	6	17	1	1	25	23	●	●	-
Germany (EC)	54	25	34	16	4	133	114	-	●	-
Ghana	5	2	8	10	-	25	8	-	●	-
Greece (EC)	2	15	15	8	1	41	33	-	●	-
Grenada	2	-	-	-	-	2	2	●	●	-
Guatemala	-	-	4	8	3	15	12	-	●	●
Guinea	3	1	3	10	1	18	12	-	●	-
Guinea Bissau	-	1	-	-	-	1	1	-	●	-
Guyana	2	-	-	1	1	4	3	-	●	-
Haiti	4	-	1	-	-	5	3	-	●	-
Honduras	?	?	?	?	?	?	?	●	●	-
Hong Kong, China	-	5	9	-	1	15	14	-	●	-
Hungary (EC)	17	22	11	8	-	58	52	-	●	-
Iceland	-	1	1	4	1	7	5	-	●	-
India	-	2	33	21	-	56	45	-	●	-
Indonesia	5	17	28	8	1	59	41	-	-	-
Iran	1	-	26	23	3	53	40	-	●	n.a.
Iraq	1	1	-	1	-	3	1	-	-	n.a.
Ireland (EC)	-	-	1	-	-	1	1	-	-	-
Israel	3	8	16	9	-	36	29	-	●	-
Italy (EC)	14	22	34	24	2	96	74	-	●	-
Jamaica	1	8	4	3	-	16	10	●	●	-
Japan	3	1	4	4	-	12	12	●	●	-
Jordan	3	3	12	15	3	36	29	●	●	●
Kazakhstan	-	14	16	5	-	35	25	●	●	n.a.
Kenya	1	-	3	1	-	5	3	-	●	-
Korea, DPR	-	-	13	6	1	20	9	-	●	n.a.
Korea, Republic of	15	16	25	20	4	80	70	●	●	-
Kuwait	10	4	13	17	1	45	34	-	●	●
Kyrgyz Republic	-	7	13	5	-	25	17	●	●	-
Lao, PDR	1	6	10	4	-	21	17	-	●	n.a.
Latvia (EC)	-	13	21	3	6	43	40	●	●	-
Lebanon	-	1	26	19	-	46	37	-	●	n.a.
Lesotho	2	-	-	1	-	3	2	-	●	-
Liberia	4	-	-	-	-	4	3	-	●	n.a.
Libya	-	2	1	11	1	15	9	-	●	n.a.
Lithuania (EC)	-	20	16	5	2	43	42	●	●	-
Macedonia (FYR)	-	-	19	8	-	27	23	-	●	-

Country	Signed						Ratified	NT [b]		GATS
	-89	90-94	95-99	00-04	- 06	Total		Pre	Post	MFN ex[c]
Madagascar	4	-	-	2	2	8	6	-	●	-
Malawi	-	-	3	3	-	6	1	?	?	-
Malaysia	15	19	28	4	-	66	43	-	●	-
Mali	3	-	3	6	1	13	5	-	●	-
Malta (EC)	6	-	4	9	-	19	18	-	●	-
Mauritania	5	-	-	11	-	16	3	-	●	-
Mauritius	3	-	10	20	2	35	17	-	●	-
Mexico	-	-	12	6	3	21	18	-	●	-
Moldova	-	6	21	8	-	35	32	●	●	-
Mongolia	-	12	14	13	-	39	33	●	●	-
Morocco	4	10	19	19	2	54	35	●	●	-
Mozambique	-	1	8	11	-	20	16	●	●	-
Myanmar	-	-	1	3	-	4	2	-	-	-
Namibia	-	3	2	6	-	11	5	-	●	-
Nepal	2	1	1	-	-	4	3	-	●	-
Netherlands (EC)	20	21	23	26	1	91	82	-	●	-
New Zealand	1	1	2	-	-	4	2	-	-	-
Nicaragua	-	2	10	6	1	19	12	●	●	-
Niger	2	1	2	-	-	5	3	-	●	-
Nigeria	-	5	4	9	1	19	9	-	●	-
Norway	4	10	2	-	-	16	16	-	-	-
Oman	3	3	9	9	1	25	21	-	●	-
Pakistan	7	4	27	9	-	47	26	-	●	-
Panama	5	1	6	4	1	17	14	?	●	-
Papua New Guinea	2	3	-	-	-	5	4	-	●	-
Paraguay	2	13	7	1	-	23	20	-	●	-
Peru	-	18	8	3	1	30	28	-	●	-
Philippines	3	8	18	6	-	35	26	-	●	-
Poland (EC)	10	38	13	-	-	61	60	-	●	●/●[DS]
Portugal (EC)	2	13	18	9	1	43	29	-	●	-
Qatar	-	-	13	9	-	22	11	-	●	-
Romania (EC)	8	38	30	7	-	83	79	●	●	-
Russian Federation	7	18	21	6	1	53	34	-	-	n.a.
Rwanda	3	-	-	1	-	4	3	-	●	-
St. Lucia	2	-	-	-	-	2	2	-	●	-
St. Vincent & Grenad's	1	-	-	-	-	1	1	-	●	-
San Marino	-	-	-	2	-	2	-	-	-	n.a.
Sao Tome	-	-	1	-	-	1	-	-	-	n.a.
Saudi Arabia	-	2	3	6	-	11	8	-	●	-
Senegal	11	1	5	3	-	20	8	●	●	-
Serbia & Montenegro	4	-	14	19	6	43	41	●[A]	●	n.a.
Seychelles	-	-	1	-	-	1	1	?	?	n.a.
Sierra Leone	1	-	-	2	-	3	1	?	?	-
Singapore	8	4	9	7	-	28	23	●	●	●
Slovak Rep. (EC)	1	24	12	4	3	44	40	●	●	-
Slovenia (EC)	-	4	23	11	-	38	34	-	●	-
Somalia	2	-	-	-	-	2	2	-	●	n.a.
South Africa	-	-	26	7	-	33	19	-	●	-
Spain (EC)	1	19	24	13	5	62	55	-	●	-
Sri Lanka	16	1	5	3	-	25	23	●	●	-
Sudan	4	-	9	10	2	25	9	-	●	n.a.
Suriname	-	-	1	-	1	2	-	-	-	-

Country	Signed						Ratified	NT [b]		GATS MFN ex[c]
	-89	90-94	95-99	00-04	- 06	Total		Pre	Post	
Swaziland	-	1	2	2	-	5	2	-	●	-
Sweden (EC)	12	15	19	19	2	67	58	-	●	● / ●^{M4}
Switzerland	35	27	27	18	4	111	101	-	●	-
Syria	5	1	10	14	2	32	24	-	●	n.a.
Tajikistan	-	4	8	9	1	22	12	-	●	n.a.
Tanzania	1	1	4	6	-	12	6	●^{A}	●	-
Thailand	4	9	7	15	4	39	31	-	●	-
Timor-Leste	-	-	-	1	1	2	-	-	-	n.a.
Togo	3	-	-	-	-	3	2	-	●	-
Tonga	-	-	1	-	-	1	1	-	●	-
Trinidad & Tobago	-	3	2	2	-	7	7	●	●	●
Tunisia	12	14	13	8	-	47	28	●	●	-
Turkey	8	23	27	13	4	75	59	●	●	●
Turkmenistan	-	7	12	-	-	19	13	-	●	n.a.
Uganda	2	-	3	10	1	16	5	-	●	-
Ukraine	-	23	26	11	1	61	48	●	●	-
United Arab Emirates	1	8	12	9	1	31	23	-	●	-
United Kingdom (EC)	37	32	24	9	-	102	91	-	●	-
United States	11	23	12	1	1	48	40	●	●	●^{M4}
Uruguay	5	8	10	4	1	28	26	-	●	●
Uzbekistan	1	12	19	9	-	41	36	-	●	n.a.
Venezuela	-	8	14	4	-	26	21	-	●	-
Vietnam	-	24	14	9	2	49	39	●	●	●
Yemen	4	-	14	14	1	33	15	-	●	n.a.
Zambia	1	1	1	8	1	12	2	-	●	-
Zimbabwe	-	3	15	11	-	29	6	-	●	-

Note: Member States of the European Communities (EC) carry the respective acronym. Individual treaties may vary in policy scope and sector coverage, depending on reservations made, and apply to trade relations which have since been liberalized in other contexts, such as preferential trade agreements (e.g., US-Jordan or US-Chile).

a Brunei Darussalam, Macedonia (FYR), Russian Federation, Saint Lucia, Saint Vincent & Grenadines, Seychelles, Sierra Leone, South Africa, Tonga and Tunisia: Situation as of 1 June 2005. '-' means either that no relevant treaties have been concluded or that the disciplines are not binding.

b '●' denotes the existence of at least one treaty with national treatment obligations on a pre-establishment or post-establishment basis ('Pre' or 'Post'), which has been put into effect. The relevant provisions refer either explicitly to national treatment or to treatment 'not less favourable' than that accorded to own investors. Less clearly defined concepts, including commitments not to impair the use of investments by discriminatory measures, have been ignored. '(●)' refers to national treatment obligations that allow for the continuation or prompt renewal of non-conforming measures. '●^{A}' signifies that national treatment is extended for the acquisition of investment, but not for new establishment (such treaties have been concluded by Finland). Treaties between EC Member States, concluded prior to EC accession (e.g. between Ireland and the Czech Republic), have been ignored in this context. '?' indicates that relevant treaties have not been available.

c '●' denotes the existence of an MFN exemption under the GATS, pursuant to Article II:2, for preferences extended under BITs (in some cases, coverage is confined to 'investment guarantees'); '●^{M4}' refers to MFN exemptions explicitly related to mode 4 under the GATS (presence of natural persons); and '●^{DS}' signifies that the exemption covers specifically the dispute settlement mechanisms contained in BITs. 'n.a.' means that the GATS MFN obligation is not applicable due to the country's non–membership of the WTO.

Source: Authors' compilation based on www.unctad.org/Templates/Page.asp?intItemID=2344&lang=1 and relevant WTO documents.

TABLE A2

Relevance of the General Agreement on Trade in Services for the supply of individual services

	Sectors without specific commitments	**Sectors subject to specific commitments**
A. <u>All services</u> (except B. and C.)	*<u>Unconditional obligations</u>:* Most-favoured-nation treatment (Art. II)[a] Transparency (Art. III:1 & 4, Art. VII:4) Availability of legal remedies (Art. VI:2) Monopoly control (Art. VIII:1)[b] Consultations in the event of - certain restrictive business practices (Art. IX:1) - subsidies with adverse effects (Art. XV:2)	*<u>Unconditional obligations</u> (see 2nd column)* *<u>Conditional obligations</u>:* Additional transparency obligations (Art. III:3 & 4)[c] Domestic regulation (Art. VI:1, VI:3, VI:5, VI:6)[d] Additional obligations concerning monopolies (Art. VIII:1, 2 & 4)[e] Unrestricted capital transfers and payments (Art. XI, fn 8 of Art. XVI) Non-discriminatory access to and use of public telecom networks and services (Annex on Telecommunications) *<u>Specific commitments as inscribed in schedules</u>:* Market Access (Art. XVI) and National Treatment (Art. XVII)[f] Additional Commitments (optional) (Art. XVIII)
B. <u>Special cases</u> (i) Maritime transport (Decision on Neg. on Maritime Transport Services) ---------- (ii) Government procurement (Art. XIII:1)	See above, except for most-favoured-nation treatment	(i) Like all other scheduled services (see above)[g] ---------- (ii) Non-application of market access and national treatment commitments (Art. XVI & XVII) and related conditional obligations
C. <u>Excluded sectors/measures</u>	(i) Services provided in the exercise of governmental authority (Art. I:3) (ii) Air transport (measures affecting traffic rights and directly related services, barring three exceptions)	

[a] Permissible departures: (a) MFN exemptions (Art. II:2); (b) Economic Integration or Labour Market Integration Agreements (Art. V & V*bis*); (c) recognition measures (Art. VII); (d) General Exceptions (Art. XIV); and (e) prudential measures in financial services (Annex on Financial Services).

[b] Purpose: Ensure compliance with MFN principle.

[c] More comprehensive transparency obligations, including notification requirements, than in sectors not subject to specific commitments.

[d] Purpose: Prevent excessive regulatory activities and/or particularly burdensome requirements from undermining the economic value of specific commitments.

[e] Purpose: Prevent market distortions (e.g. through anti-competitive cross-subsidization) in areas where specific commitments have been undertaken.

[f] Market access and national treatment may be made subject to limitations.

[g] Negotiations in this sector were suspended in 1996. Commitments that have been undertaken nevertheless may be withdrawn without compensation at the conclusion of the current round.

Source: Rudolf Adlung (2007b), at 571.

TABLE A3

Policy reservations in investment protection treaties, 1995-2007

	Germany	China	Switzer-land	United Kingdom	Egypt	France	Italy
Treaties without reservations	10	10	33	21	26	21	3
Reservations							
Number of treaties	22	8	8	3	6	6	9
Number of measures	26	15	10	3	16	6	10
Measures covered							
Financial measures	-	-	-	-	1	-	-
Fiscal measures	21	1	1	-	2	-	2
Acquisition of land / real estate	1[p]	1 [p]	1+1[p]	1[p]	-	1 [p]	1 [p]
Transfer of funds	-	-	1[p]	1[p]	-	-	-
Performance requirements	-	-	1+1[p]	-	-	-	-
Security / public order	-	2	1	-	-	1	-
Promoting dom. industry / SMEs	1	1	1+1[p]	-	-	-	1 [p]
Grandfathering clause	1[p]	4[o]	-	-	1	-	-
Investment in border areas	-	5	1	-	-	-	5
Regional co-operation projects	-	1[p]	-	-	2	-	-
Government procurement	-	-	-	-	1	-	-
Subsidies and grants	-			-	1	-	-
General exception	-	-	-	-	1	-	1
Other	2[p]	-	-	1	7	4	-
Total of above (1995-2007) [b]	38 (32)	32 (18)	43 (41)	25(24)	50 (32)	32 (27)	41 (12)
All treaties ([...]-2007)	133	117	111	102	98	98	96

a Unless otherwise specified, the reservations made cover both signatories. In contrast, "o" and "p" denote reservations that apply only to the country concerned or its BIT partner, respectively.

b First figure: Total number of treaties signed and ratified between January 1995 and June 2007 (according to the UNCTAD inventory); in parenthesis: number of treaties screened for the purposes of this overview.

Source: Authors' assessment based on www.unctadxi.org/templates/DocSearch____779.aspx,, www.sice.org., www.bilaterals.org, http://www.fdi.gov.cn/pub/FDI_EN/Laws/Laws2/default.jsp?type=622.

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