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HOW TO DESIGN TRADE AGREEMENTS IN SERVICES: TOP DOWN OR BOTTOM UP?

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ABSTRACT

This paper deals with claims, recently raised in various circles, that structural faults in the General Agreement on Trade in Services (GATS) have prevented WTO Members from advancing services liberalization under the Agreement. The GATS is generally associated in this context with a bottom-up (positive-list) scheduling approach where the sectors on which trade commitments are undertaken are selected individually. This is claimed to be less efficient, in terms of liberalization effects, than alternative approaches under which everything is considered to be fully committed unless specifically excluded (top-down or negative listing). However, a closer look at services negotiations conducted in various settings, including the Doha-Round process, WTO accession cases and different types of regional trade agreements, suggests that such structural issues have limited, if any, impact on the results achieved. What ultimately matters are not negotiating or scheduling techniques, but the political impetus that the governments concerned are ready to generate.

Keywords: GATS, trade in services, liberalization commitments

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'I hate intellectuals. They are from the top down. I am from the bottom up.'
Frank Lloyd Wright, American architect (1867-1959).

I. INTRODUCTION

The purpose of this paper is to provide some perspective on the impact of negotiating approaches in services, among possible other determinants, on the outcome of the resulting agreements. Is there a link, as has been claimed by various commentators, between the low levels of openness currently bound by most WTO Members under the General Agreement on Trade in Services (GATS) and the negotiating and scheduling technique used at the time (commitments are assumed only in sectors inscribed in a Member's schedule of commitments and to the extent that no limitations are attached)? Would alternative modalities, based on a negative-list approach, modelled on the North American Free Trade Agreement (NAFTA), help generate higher levels of bindings (everything is committed, including future initiatives, if not explicitly subjected to reservations)? And, finally, would the latter type of agreements make it easier to advance economic harmonization among participants in areas such as competition policy or domestic regulation than is reasonably conceivable within the current GATS framework?

To clarify the purported impact of negotiating and scheduling modalities, the following discussion proceeds in four steps, starting with a quick glance into the rear-view mirror: developments in services, within the WTO's remit, since the conclusion of the Uruguay Round in 1993. Section III then explores the basic distinction between the legal framework of the GATS and comparable trade agreements on the one hand, and the modalities that participants may adopt for subsequent negotiating rounds on the other. Elements of such modalities, actual or potential, are discussed, drawing on examples at multilateral and regional levels.

Focusing more closely on the content of the commitments assumed on various occasions, including the Uruguay Round, recent WTO accessions and different types of regional trade agreements (RTAs), section IV then discusses the implications, if any, of the underlying scheduling approaches. A distinction is made between proto-typical cases of positive (bottom up) and negative listing (top down) of sectors. Finally, section V briefly summarizes the main findings with a view to inspiring further reflection on these issues.

II. A BRIEF HISTORY OF SERVICES NEGOTIATIONS IN THE WTO

Concerning services, the focus of the Uruguay Round negotiations (1986-1993) was on the creation of completely new set of rules, as enshrined in the GATS. Tailored to the specificities of services trade, the Agreement's definitional scope and legal structure differ significantly from its long-standing counterpart in merchandise trade, the General Agreement on Tariffs and Trade (GATT).

The GATS extends beyond conventional cross-border exchanges to include three more modes of supply (consumption abroad, commercial presence, and presence of natural persons). Reflecting this modal extension, the Agreement's disciplines reach beyond the treatment of products (services) to cover that of producers (service suppliers) as well. Moreover, the range of legitimate policy interventions has been broadened considerably. Departing from the tariff-focused GATT regime, governments are permitted to employ quantitative restrictions and similar non-tariff measures as standard instruments of trade regulation. Such measures may be inscribed in a Member’s schedule of commitments as limitations on market access under any of the four modes. Further, the extension of national treatment, while guaranteed under the GATT (Article III) on duty-paid imports, has become negotiable as well. As a result, access to any particular service sector, if subjected to specific

commitments, is defined by eight parameters, specifying the levels of market access and national treatment for each of the four modes of supply.[1]

These structural innovations absorbed a lot of negotiating energy. Little time and resources were thus left in the Uruguay Round to achieve actual liberalization within the newly created framework and, given the novelty of the terms and concepts involved, there might also have been limited appetite to do so in many cases. The levels of openness ultimately bound in the resulting schedules thus remained quite shallow overall.

The only exceptions, to some degree, were the commitments undertaken on basic telecommunications and financial services. Negotiations on both sectors were extended into 1997, due to frustration of some economically advanced Members, in particular the United States, over what they considered to be insufficient contributions on the part of some dynamic developing economies. The negotiations were conducted among groups of interested Members, some 70 if the EU member States are counted individually, which then upgraded their schedules under the Fourth and Fifth Protocols to the GATS on a most-favoured-nation (MFN) basis. The results of these extended negotiations, in particular those on basic telecommunications, are widely considered to go significantly beyond those achieved in other areas.[2]

The drafters of the Agreement were apparently aware of the need for continued liberalization moves. As a novelty in GATT/WTO history, the Agreement itself, in Article XIX:1, expressly provides for successive rounds of trade negotiations 'with a view to achieving a progressively higher level of liberalization'. The first such round was due to begin no later than five years from the entry into force of the GATS, that is 1 January 2000.

However, the stars were not well aligned in early 2000, a few weeks after the failed Seattle Ministerial Conference. While the services negotiations formally started as required in Article XIX, it took Members until March 2001 to come up with a mandate ('Guidelines and Procedures for the Negotiations on Trade in Services').[3] There was a widespread perception at the time that the draft that had initially been prepared for the Seattle meeting, while generally deemed acceptable as part of a larger-scale project, needed to be reconsidered for the purpose of what now appeared to be stand-alone services negotiations. However, as a result of the Doha Ministerial Conference, in December 2001, the fledgling services negotiations were then integrated, based on the March-2001 mandate, into the wider context of the Doha Development Agenda (DDA).

For the first six years of the DDA, up to a 'mini-ministerial meeting' in July 2008, negotiators did not generally perceive services as a high-profile item. Yet this perception had little, if anything, to do with the architecture of the GATS or any particular scheduling approach. Rather, it reflected Members' assessment of negotiating priorities within the framework of a 'single undertaking' where nothing is agreed until everything has been agreed upon. Paragraph 24 of the Hong Kong Ministerial Declaration, in December 2005, even gave the impression that the services negotiations were of lesser importance or, at least, deserved less political attention and resources than, especially, those on agriculture and non-agricultural market access (NAMA). The envisaged sequencing of the negotiating

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[1] For further explanations of the modal structure of the Agreement, its provisions governing market access (Article XVI) and national treatment (Article XVII) and related obligations, see for example Rudolf Adlung and Aaditya Mattoo (2008), 'The GATS', in Aaditya Mattoo, Robert M. Stern and Gianni Zanini (eds), *A Handbook of International Trade in Services*, Oxford UK: Oxford University Press, p. 48-83.

[2] See for example Laura B. Sherman (1998), '"Wildly Enthusiastic" About the First Multilateral Agreement on Trade in Telecommunications Services', Federal Communications Law Journal, 51(1), p. 61-110.

Available evidence indicates that, in financial services, participants mostly aligned their commitments with the currently applied regimes, thus removing 'water' from their schedules, while many commitments in basic telecommunications went further to capture and lock-in reform processes that were still ongoing.

[3] WTO document S/L/93 of 29 March 2001.

modalities in the latter two areas, both to be agreed by 30 April 2006, i.e., three months prior to the submission of revised services offers, reflected that perception (Box 1).

Box 1. A glance at the Hong Kong Ministerial Declaration (paras 24 and 25)

Balance between Agriculture and NAMA	24. We recognize that it is important to advance the development objectives of this Round through enhanced market access for developing countries in both Agriculture and NAMA. To that end, we instruct our negotiators to ensure that there is a comparably high level of ambition in market access for Agriculture and NAMA. This ambition is to be achieved in a balanced and proportionate manner consistent with the principle of special and differential treatment.
Services negotiations	25. The negotiations on trade in services shall proceed to their conclusion with a view to promoting the economic growth of all trading partners and the development of developing and least-developed countries, and with due respect for the right of Members to regulate. […]

Source: WTO document WT/MIN(05)/DEC of 22 December 2005.

Nevertheless, if judged only by the numbers of initial and revised services offers tabled in the DDA context, mostly between 2003 and 2006, the negotiating process advanced largely according to plan. Overall, a total of 71 initial and 31 revised offers were submitted, covering 95 and 55 WTO Members, respectively (counting the EU member States individually). Taking into account that the Hong Kong Declaration expressly exempted LDCs from the expectation to submit offers, this implies that well over 80% of the Members that could have been expected to do so, presented at least an initial offer.[4] Yet, the substance remained quite modest. Available estimates suggest that, while currently scheduled commitments are about 2.3 times more restrictive than the actually applied regimes, they would still remain 1.9 times more restrictive if these offers were implemented.[5]

During the 'mini-ministerial' in July 2008, when agreement on the modalities for agriculture and NAMA seemed to be within reach, the outlook of the services negotiations brightened up significantly. Towards the end of the meeting, some 30 ministers representing a broad range of WTO Members met in a 'Signalling Conference' on services. According to the chairman's summary of the statements made, the sectoral and modal coverage of the envisaged offers was impressive; several participants expressed willingness to close the gap between applied regimes and existing commitments in a number of sectors and to grant new market opportunities beyond status quo conditions.[6]

However, the whole DDA process came to a halt soon afterwards over the issue of a special safeguard mechanism in agriculture. The rest is history. The Signalling Conference has remained the high-water mark in the services negotiations - although the structural/scheduling framework had, of course, remained unchanged since the low tide post Seattle. Obviously, the difficulties in achieving progress did not reside mainly within services, and could not be attributed to the framework of the

[4] The share would be about two-thirds if all Members were counted. We thus see no basis for assertions that 'only one-third of WTO members presented an initial or revised offer during the decade of the Doha Round so that services had already become a de facto plurilateral undertaking among self-selected countries that chose to submit offers.' See Clyde Gary Hufbauer, J. Bradford Jensen, Sherry Stephenson (2012), *Framework for the International Services Agreement*, Peterson Institute - Policy Brief, p. 8.

[5] Ingo Borchert, Batshur Gootiiz and Aaditya Mattoo (2011), 'Services in Doha: What's on the Table?', in Will Martin and Aaditya Mattoo (eds), *Unfinished Business? The WTO's Doha Agenda*, Washington D.C.: CEPR and The World Bank, p. 115-34.

[6] See www.wto.org/english/tratop_e/dda_e/job08_93_e.doc, accessed 18 June 2013. EU Trade Commissioner Peter Mandelson was later quoted as saying, in a Committee meeting at the European Parliament, that the European Union's key partners 'have demonstrated engagement in the Signalling Conference on key sectors. This is very relevant for our economies' (www.eu-un.europa.eu/articles/en/article_8139_en.htm, accessed 18 June 2013). In turn, the Global Services Coalition, representing the business associations of major services economies, considered the Conference to be 'a milestone' that has put participants 'on a path to complete the Doha Round Services negotiations' (www.hkcsi.org.hk/submission/2008/GSC080726release.pdf, accessed 18 June 2013).

GATS, but resulted from linkages with other areas, in particular agriculture and NAMA. Claims that services 'are the subject on which least progress has been made during the past decade of Doha Round talks' are thus unfounded in our view.[7] In any event, the absence of tangible results, in the form of upgraded services offers, does not imply that no progress was made.

From their initial stages, the DDA negotiations were surrounded by a proliferation of regional trade agreements (RTAs) which increasingly extended to services. The number of agreements notified under the relevant GATS provision, Article V, virtually exploded: from 4 in 2000 to 79 in 2010 and 103 by end-2012.[8] (Comparable to Article XXIV of the GATT, governing free trade areas and customs unions, Article V of the GATS allows Members, if specified conditions are met, to depart from the Agreement's cross-cutting obligation of MFN treatment.) It would go beyond the scope of this paper to discuss the underlying reasons, but disappointment about repeated stalemates in the DDA was certainly among them. Assuming that the newly negotiated RTAs were intended, *inter alia*, to go beyond what the DDA could be expected to achieve within a reasonable timeframe, it is interesting to see that a significant share continues to follow the bottom-up scheduling modalities used in the Uruguay Round and agreed for the DDA. For example, according to a recent study looking more closely into the RTAs that were notified to the WTO, positive-list agreements were almost as frequent as negative-list agreements, accounting each for some two-fifths of the total; the remaining agreements did not clearly fall into either category.[9]

There is thus little reason to blame 'institutional deficiencies' in the GATS for the problems facing the services negotiations in the DDA.[10] What is certainly outdated is the vast majority of the commitments that the initial WTO Members scheduled at the end of the Uruguay Round, but not the GATS itself as a legal framework. As will be shown later (section IV), the architecture of the Agreement did not in any way constrain the levels of ambition displayed by governments on other occasions, including the extended negotiations on financial services and basic telecommunications

[7] Hufbauer et al, above n 4, p. 1 and 3.

[8] Excluding the EC Treaty and subsequent enlargements.

[9] In fact, the precise number of positive-list agreements was slightly smaller (29 as against 32 negative-list RTAs). See Pierre Latrille and Juneyong Lee (2012), *Services Rules in Regional Trade Agreements - How Diverse and How Creative as Compared to the GATS Multilateral Rules?*, WTO Staff Working Paper ERSD-2012-19.

[10] See various claims in Hufbauer et al, above n 4. In a similar vein: Christopher Findlay, Sherry Stephenson and Francisco Javier Prieto (2005), Services in Regional Trading Arrangements, in Patrick F.J. Macrory, Arthur E. Appleton and Michael G. Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis*, *Vol. I,* New York: Springer, p. 293-312.

Hufbauer et al strongly argue in favour of a negative-list approach to scheduling commitments which they expect would move 'the political arithmetic away from the problematic calculation of the mercantilist balance of benefits arising from "concessions" by partner countries to the somewhat less daunting task of identifying opportunities lost as a consequence of exceptions' (above n 4, p. 2). In their view, 'GATS is widely recognized as an outdated agreement, with a flawed modality for carrying out services liberalization' (p. 5). The authors thus propose that interested governments create an International Services Agreement (ISA) which would be 'akin to the Agreement on Government Procurement, in which the market access benefits are confined to the agreement's members, but the agreement itself is open to all WTO members that are willing to accept its disciplines and commitments.' The possibility of an unconditional MFN-based outcome, modelled on the extended negotiations on basic telecommunications and financial services (section II), takes second stage in their considerations since 'free riders' are deemed to constitute 'an overwhelming problem' (p. 3). The authors not only recommend that the ISA be negotiated under the provisions of GATS Article V (see, however, below n 26), but also be integrated into the WTO framework by way of a waiver. The latter move is purportedly intended to achieve coverage under WTO dispute settlement and 'help rejuvenate an institution that has suffered from the prolonged agony of the Doha talks' (p. 2). Yet, while Hufbauer et al envisage the waiver to be sought under Article IX:3 of the Marrakesh Agreement, the creation of a new plurilateral agreement, along the lines of the Agreement on Government Procurement, would need to be accepted by all Members pursuant to the amendment provisions of Article X:9 of the Agreement. Achieving consensus, however, would certainly not be an easy task...

and, in particular, recent WTO accessions. However, before discussing these cases in more detail, it might be helpful to clarify what tends to be ignored by some critics of the GATS: the fundamental difference between the framework provisions of an agreement and the negotiating modalities that participants may adopt for the purpose of successive trade rounds.

III. LEGAL FRAMEWORK PROVISIONS VERSUS NEGOTIATING MODALITIES

A. General observations

In our understanding, the legal/institutional framework of an agreement specifies scope, content and mutual relationship of basic disciplines (MFN treatment, market access, national treatment, domestic regulation, etc.), which essentially remain stable over time. In contrast, the negotiating modalities consist of commonly accepted objectives, tailored to a particular negotiating project, and the process to achieve these. For example, the parties may want to start from the assumption of unfettered liberalization across all sectors and modes of supply in order then to agree on exclusions and reservations (top down) or, conversely, from an empty slate in order then to specify the sectors/modes on which bindings are undertaken (bottom up).

Typically, negotiating modalities also deal with the development of additional disciplines that, while not directly access-related, may help create a more transparent, reliable and predictable trading environment. The importance of such disciplines is being emphasized, in particular, in recent studies discussing the proliferation of international supply chains and the ensuing need for deeper economic integration.[11] Issues frequently mentioned in this context include regulatory harmonisation, common competition rules and subsidy disciplines. At least two of the four rule-making mandates inherited from the Uruguay Round, in Articles VI:4 (domestic regulation) and XV (subsidies) of the GATS, capture potentially relevant areas.[12]

GATS Article XIX requires that for each round of negotiations, guidelines and procedures be established. The guidelines agreed in March 2001 for the current round (S/L/93), the first one since the entry into force of the GATS, set out the objectives and principles as well as the scope and modalities for the negotiations. The Hong Kong Ministerial Declaration further developed and specified these elements at modal and sectoral level and established timelines for the Agreement's rule-making agenda. While the liberalization mandate of Article XIX has been predominantly associated by Members with new and improved commitments on market access and national treatment, as governed by Articles XVI and XVII of the GATS, there is nothing in the Agreement, nor in later declarations, that would exclude initiatives to remove or reduce perceived economic distortions, anti-competitive practices and other barriers to closer market integration. The results could be bound in the form of Additional Commitments under GATS Article XVIII, which allows for the negotiation and incorporation of whatever disciplines of a regulatory nature.[13] The reference paper on basic telecommunications is the currently most salient example (section III.C(b)).[14]

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[11] See, for example, Richard Baldwin (2012), 'WTO 2.0: Global governance of supply-chain trade', CEPR Policy Insight No. 64 (available at www.cepr.org).

[12] The remaining mandates concern the question of emergency safeguard measures (Article X) and government procurement of services (Article XIII).

[13] The Article provides the basis for Members to negotiate, and inscribe in their schedules, commitments 'with respect to measures affecting trade in services not subject to scheduling under Articles XVI [Market Access] and XVII [National Treatment], including those regarding qualifications, standards or licensing matters'. The Scheduling Guidelines (see below n 15) further clarify that such commitments 'can include, but are not limited to, undertakings with respect to qualifications, technical standards, licensing requirements and procedures, and other domestic regulations that are consistent with Article VI'.

[14] See, for example, the discussion in Marco Bronkers and Pierre Larouche (2008), 'A Review of the WTIO Regime for Telecommunications Services', in Kern Alexander and Mads Andenas (eds), *The World Trade Organization and Trade in Services*, Leiden and Boston: Martinus Nijhoff, p. 319-79.

B. Binding market openness

Most statements on scheduling methods, mainly by proponents of the negative-list (top-down) approach, refer to the GATS as a positive-list (bottom-up) agreement. This is somewhat misleading; the Agreement itself does not prescribe any particular negotiating or scheduling approach. In fact, the only positive-listing element that WTO Members have actually employed in building-up their GATS schedules consists of the selection of sectors/subsector for commitments. However, the Agreement does not preclude any alternative approach. Article XX:1 of the GATS merely requires each Member to 'set out in a schedule the specific commitments it undertakes' and, within the sectors concerned, to 'specify '(a) terms, limitations and conditions on market access; (b) conditions and qualifications on national treatment; …' No government would be prevented under these provisions from selecting and identifying its committed sectors in a negative (top-down) way.

The same is true for the Scheduling Guidelines, adopted by the Council for Trade in Services in 2001, which are intended to assist Members in the scheduling process.[15] While the Guidelines strongly recommend, *inter alia*, that the committed sectors be defined as clearly as possible, they do not express any preference on how this should be done, whether top down or bottom up. Once the sectors are chosen, limitations on market access and national treatment are then entered on a negative-list basis.

Negotiating modalities may specify whatever level of ambition the parties would like to achieve and the relevant procedures. There could be general statements to the effect that the sectoral scope of current schedules should be extended, and existing limitations on market access and national treatment be reduced or removed. More specifically, the modalities could also stipulate, for example, a minimum number of sectors to be included, in overall terms or with particular reference to the widely used Services Sectoral Classification List W/120. Participants would be free, whether collectively or in groups, to start from the assumption of comprehensive sectoral coverage and unfettered liberalization and, on this basis, specify the sectors they feel unable to commit on and/or to attach any necessary limitations to the remaining ones. In this case, the sector column of the schedules prepared by Members could initially embrace the 155-odd subsectors as identified in W/120 in order then to be scaled down (Annex, Box A.1).

The use of formula approaches to assess current schedules of commitments and, eventually, define numerical benchmarks for negotiated liberalization has been discussed, without gaining traction, in the run-up to the Hong Kong Ministerial Conference in late 2005.[16] The GATS would impose no constraints in this regard either. Rather, Article XIX:4 explicitly provides for the possibility of advancing 'the process of progressive liberalization through bilateral, plurilateral and multilateral negotiations', with the two latter options generally being associated with, or at least facilitated by, the use cross-cutting formulae or benchmarks. The Hong Kong Ministerial Declaration moved in that direction in stipulating, *inter alia*, mode-specific negotiating objectives with a focus on Article XVI (market access).

In addition, of course, negotiators are free to agree on any complementary scheduling obligations with a view to making the resulting regimes more commercially meaningful and economically balanced, and/or to prevent them from being eroded by technical or legal changes over time. Examples are listed below.

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[15] WTO document S/L/92 of 28 March 2001. As stated in their introduction, the Guidelines aim 'to explain, in a concise manner, how specific commitments should be set out in schedules in order to achieve precision and clarity'. A previous document ('Scheduling of Initial Commitments in Trade in Services: Explanatory Note', MTN/ GNS/W/164 of 3 September 1993), circulated at the scheduling stage of the Uruguay Round, essentially contained the same elements.

[16] See, for example, WTO document TN/S/M/16 of 28 October 2005 containing the report of a meeting of the Council for Trade in Services in Special Session.

(a) Guaranteeing existing levels of access (standstill). Standstill clauses are intended to lock-in the applied regime at the time an agreement enters into force and, thus, preclude a 'binding overhang'. They are normally subject to reservations for certain existing measures which, for example, might have been introduced on a trial basis only. Again, such clauses are not specific to a particular scheduling technique, whether top down or bottom up. For example, a standstill is contained in the Understanding on Commitments in Financial Services, which has been used by some 30 Members (counting the then EC 15 as one) as a common template to harmonize their GATS commitments and assume additional obligations beyond those currently contained in the Agreement. Paragraph A ('Standstill') of the Understanding expressly provides that '[a]ny conditions, limitations and qualifications to the commitments noted below shall be limited to existing non-conforming measures'. Of course, Members would also be free to inscribe similar obligations directly in their schedules, whether for individual sectors, as Korea did (Box 2), or horizontally across all committed services. In a similar vein, the Hong Kong Declaration calls on participants to undertake commitments on modes 1 and 2 'at existing levels of market access on a non-discriminatory basis across sectors of interest to Members'.

Box 2. Standstill obligations in GATS schedules: Korea

Sector or Subsector	Limitations on Market Access	Limitations on National Treatment
All financial services covered by this schedule, including Insurance	(1), (2), (3) Korea undertakes a standstill commitment for limitations on market access, where specific commitments are undertaken, in financial services listed in this schedule as of 31 August 1997.	(1), (2), (3) Korea undertakes a standstill commitment for limitations on national treatment, where specific commitments are undertaken, in financial services listed in this schedule as of 31 August 1997.

Source: WTO document GATS/SC/48/Suppl.3 of 26 February 1998.

(b) Automatic binding (ratcheting) of on-going liberalization initiatives. Governments might agree to lock-in liberalization moves undertaken autonomously after the entry into force of a commitment. Again, for such a provision to be accepted, it might need to be combined with reservations for specified sectors or categories of measures. Though there are currently no ratchet clauses in GATS schedules, from a merely technical perspective they could easily be incorporated in a scheduling template along the lines of the Financial Services Understanding. The scope would not need to be confined to one or more sectors, but could theoretically cover the entire schedule. Indeed, ratcheting is one of the oldest concepts in the multilateral trading system. Paragraph 1(b) of the Protocol of Provisional Application of the GATT 1947 already provides that the Contracting Parties apply 'Part II of that Agreement to the fullest extent not inconsistent with existing legislation'. Subsequent jurisprudence, notably the adopted Panel Report, in 1984, on *United States - Manufacturing Clause,* confirms that the Protocol operates both as a standstill and what is now called a 'ratchet mechanism'. In this context, the panel noted that 'one of the basic aims of the General Agreement was security and predictability in trade relations among contracting parties'.[17]

(c) Commitments to future liberalization measures (phase-in commitments). The flexibility of the Agreement, and its ability to cover ambitious liberalization moves, is also reflected in the 'phase-in commitments' that Members undertook in various contexts. Such commitments normally consist of the abolition of currently existing restrictions or the assumption of new bindings by specified dates after a schedule's entry into force.[18] Phase-in commitments are as

[17] *The United States Manufacturing Clause*, Report of the Panel adopted on 15/16 May 1984, L/5609 - 31S/74, para 39.

[18] Para 1 of Article XX of the GATS ('Schedules of Specific Commitments') explicitly provides that, in sectors subject to commitments, each schedule specifies '…(d) where appropriate the timeframe for implementation of such commitments; and (e) the date of entry into force of such commitments'.

legally binding as any other commitments. Reflecting the broader policy context, and related variations in negotiating interest and energy, their use has fluctuated strongly over time. For example, while quite rare in the 1993 Uruguay Round schedules and in the offers submitted in the Doha Round, such commitments can be found in over one-half of the schedules resulting from the extended negotiations on basic telecommunications (1997) and in virtually all recent WTO accession schedules (section IV.A and Table 1). It appears that phase-in provisions have been used even more frequently on the latter occasion than in RTAs.

(d) Automatic coverage of new services. Among the perceived benefits of top-down agreements, in view of the proponents, are their on-going liberalization effects. And these consist essentially not only of locking-in future policy changes, but also of the quasi-automatic liberalization of new services that might emerge over time. Again, however, there are equivalents, though of limited sectoral coverage, in current GATS schedules. Cases in point are the commitments on financial services that have been undertaken in accordance with the Understanding. Its para B.7 obliges the governments concerned to permit foreign financial service suppliers that are established in their territory to offer any new financial service. While such an obligation, again, appears to be relatively modest in comparison with the expectations surrounding top-down RTAs, there are no impediments that could prevent Members from adopting it as a template for whatever other sectors as well. By the same token, it needs to be borne in mind that the seemingly broad sectoral reach of top-down agreements might, in turn, be subjected to significant reservations.[19]

(e) Government procurement-related obligations. While GATS Article XIII exempts government purchases of services from the scope of Articles II, XVI and XVII (MFN, Market Access and National Treatment), it calls for negotiations without, however, further specifying their objective. The question arises whether Members, if they so wished, could currently assume multilateral commitments on government procurement. Again, the Financial Services Understanding might provide inspiration. Its para B.2 requires the Members concerned, notwithstanding Article XIII, to ensure that their public entities respect MFN and national treatment in purchasing or acquiring financial services from domestically-established foreign suppliers. This obligation applies, of course, on an MFN basis. There is no reason to assume that it could not be extended, in negotiations, to a broader range of sectors and, possibly, modes of supply.

The real challenge in services negotiations obviously lies in reaching agreement, from the outset, on what might be considered a satisfactory outcome and the process to achieve it. How this outcome is then documented in schedules of commitments appears quite irrelevant. Assuming similar degrees of political energy and legal scrutiny, why should it matter whether the finally adopted schedules list sectors positively or negatively (Annex, Box A.1)? By the same token, if governments feel strongly about transparency, relevant provisions could be integrated into whatever negotiating and scheduling approach. What about the superiority of top-down schedules, strongly emphasized by the proponents ('transparency is very much enhanced … since every exception must be listed')[20], if

[19] For example, in Annexes to its Free Trade Agreements with Bahrain, Chile, Morocco and Singapore (Table 2(b)), the United States reserved the right, with regard to market access regarding investment and cross-border services across all sectors, 'to adopt or maintain any measure that is not inconsistent with [its] obligations under Article XVI of the General Agreement on Trade in Services'. Concerning the admission of new products, the United States is thus not required to go beyond the scope of para B.7 of the Financial Services Understanding by virtue of the latter being part and parcel of its GATS schedule. Similar clauses, limited to cross-border services, are contained in the negative-list RTAs with Australia, Oman and Peru. The definitional scope of 'cross-border services', alternately also referred to as 'cross-border trade in services' and 'cross border supply of services', covers both modes 1 and 2 of the GATS.

[20] Hufbauer et al, above n 4, p. 5. It may be worth noting in this context that WTO Members in general have been hesitant to comply with existing transparency obligations under the GATS, including the notification requirement under Article III:3 (see also below n 29).

reservations are couched in sweeping terms only or in the form of cross-references to current GATS schedules?[21] The 'bookkeeping' method chosen for recording commitments does by no means ensure that the underlying negotiations produce clear and ambitious results.

Of course, it is conceivable, in the absence of thorough government-internal evaluation and co-ordination, that the bindings assumed under a top-down approach might, unintentionally, be more ambitious than those assumed deliberately sector-by-sector. This possibility is likely to be higher in services than in merchandise trade, given the wide range of ministries and agencies involved, at various government levels, which might have never considered 'their' sectors to be affected by international trade obligations. Some administrations may be unaware, or misinterpret the consequences, of what the lead department offers and accepts in relevant negotiations. Yet, the possibility of unintended liberalization effects is certainly no compelling argument in favour of a particular negotiating approach.

The possibility of scheduling flaws, out of inexperience and/or lack of government-internal coordination, should not be underestimated as well. Available studies suggest that close to 20% of the commitments contained in current GATS schedules do not fully conform to the scheduling norms as specified in the GATS and the Scheduling Guidelines.[22] With a view to correcting such flawed entries, the editorial conventions developed for the submission of DDA offers expressly provided for the opportunity of technical refinements that do not alter the scope or substance of an existing commitment. This possibility has been used by Members, to a certain degree, in their initial and revised offers. The ongoing stalemate in the DDA has thus not only resulted in an ever increasing binding overhang, but also in the continuation of problematic scheduling patterns - and, quite likely, their replication in an ever increasing number of RTAs.

C. Promoting economic efficiency and deeper market integration

Apart from governing the assumption of new or improved access commitments, negotiating modalities might also provide for a variety of additional disciplines to achieve deeper integration and/or remove competitive distortions among the participating economies. Again, any such elements could be integrated into, and pursued under, either positive- or negative-list scheduling approaches. The following examples are indicative of the broad array of policy measures, well beyond the realm of market access and national treatment obligations, which could be addressed under the Agreement. It is worth bearing in mind in this context that, pursuant to its Article I:1, the GATS 'applies to measures by Members *affecting* trade in services' (emphasis added).[23]

(a) More harmonized and predictable access conditions across modes of supply. In the interest of economic efficiency, potential market participants should ideally be able to choose, in an open and predictable environment, between supplying services cross-border (mode 1), through moving professionals into the markets concerned (mode 4) and/or via locally established

[21] See above n 19.

[22] Rudolf Adlung, Peter Morrison, Martin Roy and Weiwei Zhang (2013), 'FOG in GATS Commitments - why WTO Members should care', World Trade Review, 12(1), p. 1-27. Concerning the Scheduling Guidelines, see above n 15.

[23] According to a frequently quoted Appellate Body Decision, '…the use of the term "affecting" reflects the intents of the drafter to give a broad reach to the GATS. The ordinary meaning of the word "affecting" implies a measure that has 'an effect on', which indicates a broad scope of application. This interpretation is further reinforced by the conclusions of previous panels that the term 'affecting' in the context of Article III of the GATT is wider in scope than such terms as 'regulating' or 'governing'". WTO Appellate Body Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas (EC - Bananas)*, WT/DS27/AB/R, adopted 25 September 1997, para 220.

branches or subsidiaries (mode 3).[24] Of course, the complete elimination of mode-specific limitations, including those reflecting constitutional constraints (e.g., prohibition of foreign land ownership, employment quotas for ethnic minorities, nationality requirements in strategically or culturally sensitive sectors) appears not to be a realistic target. Rather, the negotiating parties might agree on not resorting to particularly restrictive types of measures and/or curtailing the scope for discretionary action. For example, pursuant to Annex C of the Hong Kong Ministerial Declaration, Members should strive, to the maximum extent possible, to eliminate existing requirements of commercial presence (scheduled as limitations under mode 1), remove or substantially reduce economic needs tests (modes 3 and 4), and ensure that any remaining such tests adhere to the Scheduling Guidelines (i.e., indicate the main criteria).

(b) Subsidy-related constraints beyond MFN and national treatment. Like any other measure affecting trade in services, subsidies are subject to the MFN obligation (Article II) across all sectors falling under the Agreement and, depending on a Member's respective commitments, national treatment (Article XVII). Yet there are doubts, as reflected in a negotiating mandate in Article XV of the GATS, whether current disciplines are stringent enough to avoid the 'trade-distortive effects' that subsidies may have 'in certain circumstances'.[25] A submission from the Swiss delegation, in 2010, identified missing constraints on export subsidies as a potential gap in the Agreement.[26] Pending consent on the need for, and scope of, new horizontal rules, it would be possible for groups of interested Members to coordinate and undertake pertinent bindings as Additional Commitments under GATS Article XVIII (see (c) below).

(c) Competition disciplines. Relevant obligations are already contained in several GATS provisions, including Articles VIII and IX, and the Annex on Telecommunications. For example, according to Article VIII:2, Members are required, if they allow a monopoly supplier to compete in open market segments on which specific commitments exist, to ensure that the supplier does not abuse its position and act inconsistently with these commitments, possibly including national-treatment obligations. In addition, the GATS Annex on Telecommunications requires Members, *inter alia*, to respect specified competition disciplines in providing access to public telecommunication networks and services. The reference paper on basic telecommunications goes further in this regard, committing signatories, *inter alia*, to prevent major suppliers from engaging in anti-competitive practices and to set up an independent telecom regulator. (The reference paper was developed during the extended negotiations in this sector and inscribed by some 90 Members *tel quel* as Additional Commitment in their GATS schedule).[27] It is easily conceivable, if there is political will, that other competition-related concerns are addressed in a similar way. These could include constraints on the behaviour of state-owned enterprises (SOEs), as recently proposed in various contexts.

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[24] The former two options are typically preferred by small- and medium-sized enterprises. See, for example, Rudolf Adlung and Marta Soprana (2013), 'SMEs in Services Trade - A GATS Perspective', Intereconomics, 48(1), p. 41-50.

[25] These are the terms used in Article XV:1.

[26] See WTO documents S/WPGR/M/67 and 69 of 23 April and 15 September 2010. In a similar vein, Hufbauer et al, above n 4, p. 42, while proposing that a future ISA generally exempts subsidies from cover, call for a prohibition of subsidies that are 'specifically targeted on service exports'.

The general exemption of subsidies from ISA disciplines could be problematic, however, since many Members have not inscribed corresponding exemptions in their GATS schedules. According to some studies, laxer RTA-disciplines on subsidies are the currently most frequent cases of 'GATS-minus commitments'. See Sébastien Miroudot, Jehan Sauvage and Marie Sudreau (2010), 'Multilateralising Regionalism: How Preferential are Services Commitments in Regional Trade Agreements?', OECD: Working Paper of the Trade Committee, TAD/TC/WP(2010)18/FINAL; and Rudolf Adlung and Sébastien Miroudot (2012), 'Poison in the Wine? Tracing GATS-minus Commitments in Regional Trade Agreements', Journal of World Trade, 46(5), p. 1045-82. See also section IV.B.

[27] Situation as of end-2012. Seven more Members adopted the reference paper with modifications.

(d) Deeper commitments on regulatory issues. Comparable to the negotiations in other rule-making areas under the GATS (emergency safeguard measures, government procurement and subsidies), the negotiations on regulatory disciplines, pursuant to Article VI:4, have made relatively little headway to date. Thus, not surprisingly, tighter constraints on what might be considered to be excessive regulatory interventions, or at least the creation of more transparency, are a frequently proposed negotiating item for RTAs. The question arises, however, whether some of the same WTO Members that strive to develop common ground in the GATS Working Party on Domestic Regulation would find it easier to advance in a smaller preferential setting - let alone to emulate the obligations that some recently acceded Members undertook in the reports of their WTO Accession Working Parties.[28] In any event, those who are ready to assume tighter disciplines on a multilateral basis, individually or in groups, could easily do so by way of Additional Commitments under Article XVIII. In defining its scope of application, the Article explicitly refers, *inter alia*, to commitments regarding qualifications, standards or licensing matters. In a similar vein, stricter compliance with already existing notification obligations could constitute a meaningful first step towards improving transparency about new regulatory initiatives (pursuant to GATS Article III:3, Members are held to notify at least once a year any legislative changes that 'significantly affect' their trade in sectors subject to specific commitments).[29]

(e) Cross-border data flows. Concerns about government interventions perceived to impede international information flows have gained prominence recently and are increasingly addressed in RTAs. A case in point is the agreement between the United States and Korea (2012): 'Recognizing the importance of the free flow of information in facilitating trade, and acknowledging the importance of protecting personal information, the Parties shall endeavor to refrain from imposing or maintaining unnecessary barriers to electronic information flows across borders' (Article 15.8). In a similar vein, the Financial Services Understanding contains an obligation, *inter alia*, not to prevent transfers of financial information where these are necessary for the conduct of a financial service supplier's ordinary business. Again, it is easily conceivable that similar provisions, whether sector-specific or otherwise, are adopted by larger groups of Members and incorporated, via Article XVIII, in their GATS schedules - provided there is sufficient political tailwind.[30]

As a matter of legal architecture, any of the above elements, though typically associated with negative-list (top-down) RTAs, would be perfectly compatible with positive-list (bottom-up) agreements as well. As mentioned, there are quite a number of precedents, including in particular the Annex on Telecommunications, the telecom Reference Paper, and the Financial Services Understanding. The process used to determine the sectoral coverage of negotiated commitments

[28] In the case of China, for example, the services section of the Report includes a necessity criterion for licensing procedures and conditions, stipulating that these 'would not act as barriers to market access and would not be more trade restrictive than necessary'. With respect to scheduled service sectors, China is committed to ensure that licensing fees 'would be commensurate with the administrative costs of processing an application' and, barring two sectoral exceptions, that the regulators 'would be separate from, and not accountable to, any service suppliers they regulated'. The necessity criterion, in particular, might prove difficult to accept for some other WTO Members, regardless of the negotiating forum. See Report of the Working Party on the Accession of China, WTO document WT/MIN(01)/3 of 10 November 2001, paras 308 and 309.

[29] Between January 2000 and December 2012, some 420 such notifications were submitted. Of these, more than one-half came from three Members only (Albania, China and Switzerland).

[30] The value-added generated by such provisions would need to be assessed in the light of already existing obligations. In particular, pursuant to para 5(c) of the GATS Annex on Telecommunications, Members are required to ensure, *inter alia*, 'that service suppliers of any other Member may use public telecommunications transport networks and services for the movement of information within and across borders, including for intra-corporate communications of such service suppliers, and for access to information contained in data bases or otherwise stored in machine-readable form in the territory of any Member.'

obviously has no bearing on the application of such additional (GATS-plus) elements. As indicated before, the real challenge in services negotiations, whether under GATS Article XIX or in RTAs, is certainly not one of legal architecture, but of reaching agreement on a commercially meaningful agenda - and preventing difficulties in other negotiating areas from undermining the process. Naturally, this is easier to achieve in a bilateral or regional context than multilaterally.

IV. A CLOSER LOOK AT COMMITMENTS IN GATS AND RTA SCHEDULES

A. GATS: Uruguay Round schedules and subsequent achievements

The services schedules submitted under the GATS are often criticised for their lack of ambition. And this appears to be a fair reflection of what has (not) been achieved under the Agreement, for various reasons (section II). Yet averages can also be misleading, in particular if there is a lot of variation within individual categories. The overall picture is still dominated by the 128 GATS schedules submitted some 20 years ago, at the end of the Uruguay Round. These tend to dwarf the (limited) improvements made in extended sectoral negotiations, in particular those on basic telecommunications and financial services, as well as the far more liberal commitments undertaken by some 30 acceded WTO Members, in particular those that joined over the past decade. And the signals given at the 'mini-ministerial' in 2008 never have been tested in the form of newly revised or final offers, as the DDA languished over disagreement in other areas.

One conceivable indicator of liberalization moves is the existence of phase-in commitments, i.e. of obligations to comply with pre-defined levels of market access and/or national treatment from specified future dates. Such obligations, which are as legally binding as any immediately applicable commitments, are likely to be scheduled only if they go beyond currently prevailing market conditions. The governments concerned would thus be provided some breathing space to prepare and implement relevant legislation.

As reflected in Table 1, there are two occasions on which phase-in commitments have been widely used on a multilateral basis: in the telecom negotiations concluded in early 1997, where they can be found in some 60% of the schedules concerned and, even more frequently, in WTO accessions.[31] Although precise comparisons are difficult to make, given large structural differences between individual agreements, it appears that such commitments are even more widespread in the latter context than in RTAs.

The higher levels of ambition achieved by or, rather, expected from newly acceded Members are further confirmed by a closer look into individual schedules. Particularly impressive, with regard to both sectoral scope and liberalizing substance, are those submitted by some Eastern European and Central Asian countries. For example, out of the Services Sectoral Classification List W/120, comprising about 155 subsectors, Moldova undertook commitments in 147, the Kyrgyz Republic in 136 and Georgia in 125 subsectors. This compares with 110, 112 and 115 subsectors covered by the current GATS schedules of the United States, Japan and the European Union, respectively. Moreover, the commitments assumed by recently acceded Members tend to be very substantial. For example, since 2003, after the expiry of a relatively short implementation period in telecommunications, Moldova maintains full commitments in over 110 subsectors on market access and national treatment across modes 1 to 3 (cross-border supply, consumption abroad, and commercial presence), subject only to a relatively minor national-treatment limitation concerning land lease and ownership.[32] It

[31] Given the resource implications of a more detailed assessment, the count in Table 1A considers only the existence of one or more phase-in commitments in a schedule and their general sectoral focus, regardless of how frequently they have been used in individual subsectors.

[32] WTO document GATS/SC/134 of 21 December 2001.The term 'full commitments' signifies that there are no limitations that would qualify the committed levels of liberalization (entry: 'none').

would be next to impossible to find other Members that have bound comparable levels of openness, whether under the GATS or any type of RTAs.

Table 1. Phase-in commitments in services schedules: Negotiating context, number of cases, sectoral coverage[a]

Phase-in Commitments (Number of Members concerned / % of all participants)	**Sectoral Coverage** (Number of Members concerned)
I. Uruguay Round, 1994 17 / 13% [5 / 4%][b]	Construction (2) Financial services (1), Rental services (1) Road transport (13 / 1[b])
II. Extended Uruguay Round negotiations, 1997 A. Financial Services: 2 / 3% B. Basic Telecommunications: 42 / 60% [38 / 54%][b]	Insurance (2) Banking (1) Basic Telecommunications (42 / 38 [b])
III. WTO Accessions, 1996 – 2012[c] 26 / 90 %	Telecommunications (21) Insurance (17) Banking (11) Distribution (7) Business Service (5), Transport (5) Construction (4) Other, incl. horizontal (13)
IV. Doha Round offers, 2003 – 2007 13 / 9% [5 / 4%][b]	Telecommunications (2) Postal and Courier Services (1), Tourism (1) Horizontal – Mode 4 (9 / 1[b])

a Excluding 'soft' commitments that are couched, for example, in best-endeavours language. EC Member States are counted individually.

b Excluding phase-in commitments by EC Member States that seem motivated mainly by the need to establish a common Community regime.

c Not covering obligations that might have been inscribed in the reports of the relevant Working Parties.

Source: An earlier version of this Table is contained in Rudolf Adlung (2007), 'The Contribution of Services Liberalization to Poverty Reduction', The Journal of World Investment and Trade, 8(4), p. 565.

B. Regional Trade Agreements: Top-down versus bottom-up scheduling

Studies comparing the scope and depth of GATS commitments with those inscribed under RTAs point to significant achievements in the latter context.[33] Though there is some variation between individual agreements, the overall picture is quite clear: RTA commitments trump their multilateral counterparts.

Yet, though instructive, comparisons of GATS with RTA schedules need to be put in a wider context. Object and purpose of the underlying negotiations, as well as the respective levels of ambition, differ. The GATS is designed not only to provide a reliable framework for successive rounds of negotiations, but also to accommodate the interests of close to 160 governments. Services RTAs, on the other hand, are often part of a larger project reaching beyond trade, and they have to address the needs of a limited number of parties only.

The nature of the negotiations thus tends to differ. In the case of the GATS, the schedules submitted are essentially intended to define and lock-in the progress achieved at particular points in time. In contrast, the institutional framework of an RTA and the related schedules are often developed and agreed upon simultaneously, even though there may be provisions concerning subsequent reviews.

[33] See Juan Marchetti and Martin Roy (2008), 'Services liberalization in the WTO and in PTAs', in ibid. (eds), *Opening Markets for Trade in Services - Countries and Sectors in Bilateral and WTO Negotiations*, Cambridge University Press: Cambridge, p. 61-112.

In other words, the negotiations normally take place in one go. Moreover, they must achieve, by definition, a higher level of ambition than reflected in the respective GATS schedules. This is not only to be expected, but required by Article V on Economic Integration.[34]

One possibility to test the perceived impact of scheduling techniques, however, is to compare the liberalizing content of different types of RTAs: top-down and bottom-up agreements. Indeed, on the surface at least, it appears that the bindings achieved under top-down agreements are significantly more ambitious (Table 2). On average of the RTAs contained in our dataset, 19 bottom-up and 21 top-down agreements, the latter contain about twice as many GATS-plus elements on market-access and almost three-times as many on national treatment as the former. The improvements in terms of national treatment are particularly meaningful given that, in order for regional trade agreements to qualify as legitimate departures from MFN treatment, one of the two benchmark requirements is 'the absence or elimination of substantially all discrimination in the sense of Article XVII', i.e. in the sense of national treatment.[35]

However, there are additional factors to be considered.

First, virtually all agreements in the dataset contain provisions that are less favourable than the corresponding GATS commitments in the sectors concerned. The share of such provisions is somewhat higher in top-down RTAs than in their bottom-up counterparts (4.7% as against 3.5% in the case of national treatment).[36] Also, all top-down agreements and most bottom-up agreements feature cross-cutting horizontal limitations that are more stringent than those listed in the respective GATS schedules; typical cases concern subsidies and the exclusion of sub-federal entities from coverage. Given their horizontal nature, these limitations affect the full sector spectrum covered by an agreement.

Second, while such entries could have been neutralized by cross-references to the parties' more favourable GATS commitments, this is not consistently the case. Rather, the scope of the MFN provisions contained in many RTAs is confined to future agreements that might be concluded by a party and does not extend to pre-exiting RTAs, let alone to GATS schedules.[37] Full-fledged MFN clauses that embrace the GATS are more widespread among the bottom-up than the top-down agreements in our dataset. If these clauses are taken into account, about 48% of the bottom-up RTAs continue to feature GATS-minus elements as against 70% of the top-down variant.

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[34] According to the panel decision in *Canada – Autos*, 'the purpose of Article V is to allow for ambitious liberalization to take place at a regional level, while at the same time guarding against undermining the MFN obligation by engaging in minor preferential arrangements'. See Panel Report, *Canada - Certain Measures Affecting the Automotive Industry (Canada - Autos)*, WT/DS139/R and WT/DS142/R of 11 February 2000, para 10.271. This finding was not addressed in the subsequent Appellate Body Report (WT/DS139/AB/R and WT/DS142/AB/R of 31 May 2000).

[35] Article V:1: 'This Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement, provided that such an agreement: (a) has substantial sectoral coverage, and (b) provides for the absence or elimination of substantially all discrimination, in the sense of Article XVII …'

[36] The existence of such entries is not unproblematic. According to Cottier and Molinuevo, participation in an RTA 'does not in substance justify the introduction of measures contrary to the specific commitments undertaken under the GATS'. Pursuant to Article V:5, the parties would need to renegotiate their respective commitments under the provisions of Article XXI ('Modification of Schedules') as the GATS provides no particular flexibility in this regard. (Thomas Cottier and Martin Molinuevo (2008), 'Article V GATS - Economic Integration', in Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle (eds), *WTO - Trade in Services*, Leiden and Boston: Martinus Nijfhoff, p. 145.) See also Rudolf Adlung and Peter Morrison (2010), 'Less than the GATS: "Negative Preferences" in Regional Services Agreements', Journal of International Economic Law, 13(4), p. 1103-43.

[37] This also raises the question whether RTA obligations that are less demanding than those assumed under previous agreements, including the GATS, would be in tune with the Panel Decision in *Canada – Autos* and provide for 'ambitious liberalization to take place at regional level' (see above n 34).

Table 2. Commitments in positive-list and negative-list RTAs compared to GATS schedules[a]

(a) Positive-list agreements ('bottom-up' scheduling)

Agreement	Year	Sector-specific departures from GATS schedules				Cross-sectoral GATS –	MFN clause
		Market Access (%)		National Treatment (%)			
		GATS +	GATS –	GATS +	GATS –		
ASEAN - Korea	2009	19.0	0.9	11.5	1.9	■	
China - Singapore	2009	28.6	0.4	20.0	0.0	■	
EFTA - Chile	2004	29.5	7.8	33.3	7.8		■
EFTA - Korea	2006	37.0	0.3	41.2	0.1		■
EFTA - Mexico	2001	0.9	0.0	0.4	0.0	■	■
EFTA - Singapore	2003	23.6	0.2	16.1	1.9	■	■
EC - Chile	2003	44.3	0.2	36.9	0.3	■	
EC - Mexico	2000	1.2	0.0	0.3	0.0	■	■
Japan - Brunei D.	2008	19.8	2.4	17. 5	2. 5	■	■
Japan - Malaysia	2006	28.3	1.9	25.8	1.6	■	■
Japan - Philippines	2008	34.6	2.4	33.7	2.1	■	■
Japan - Singapore	2002	46.2	1.8	34.8	9.1	■	
Japan - Thailand	2007	31.7	1.3	30.2	4.6	■	
Japan - Viet Nam	2009	15.6	1.4	14.9	1.3		■
Korea - Singapore	2006	62.0	7.3	56.7	6.0	■	
N. Zealand - China	2008	18.2	0.3	17.9	0.0	■	
N. Zealand - Singapore	2001	34.2	3.4	25.7	10.9	■	
Thailand - Australia	2005	13.3	15.4	13.1	16.6	■	
US - Jordan	2001	17.6	0.1	17.4	1.0		
Range		**0.9 - 62.0**	**0.0 - 15.4**	**0.4 - 56.7**	**0.0 - 16.6**		
Average (19 RTAs)		**26.6**	**2.5**	**21.9**	**3.5**		

(b) Negative-list agreements ('top-down' scheduling)

Australia - Chile	2009	38.5	0.8	63.1	0.5	■	
Canada - Chile	1997	75.0	5.9	71.9	6.9	■	
Canada - Peru	2009	65.7	4.0	82.6	6.2	■	
Chile - Mexico	1999	57.2	4.8	68.9	6.6	■	
Costa Rica - Mexico	1995	72.4	5.6	72.8	7.2	■	■
El Salvador - Mexico	2001	73.3	2.4	72.3	5.2	■	
Guatemala - Mexico	2001	70.2	0.8	70.7	5.6	■	■
Honduras - Mexico	2001	71.1	2.5	71.9	5.6	■	■
Japan – Chile	2007	57.3	1.6	59.8	1.4	■	
Japan - Mexico	2004	57.7	1.2	57.0	4.4	■	
Korea - Chile	2004	63.1	7.6	66.0	7.6	■	■
Mexico - Nicaragua	1998	0.6	0.0	0.6	0.0	■	■
NAFTA	1994	62.6	5.8	59.5	8.5	■	■
Panama - Chile	2008	42.0	13.7	48.5	13.0	■	
US - Australia	2005	54.1	1.2	54.2	1.6	■	
US - Bahrain	2006	60.1	0.0	66.9	2.4	■	
US - Chile	2004	47.3	1.9	60.6	1.7	■	
US - Morocco	2006	69.5	1.0	69.0	2.7	■	
US - Oman	2009	45.9	2.0	60.0	2.1	■	
US - Peru	2009	67.9	1.2	68.1	0.3	■	
US - Singapore	2004	63.8	1.4	62.3	9.3	■	
Range		**0.6 – 75.0**	**0.0 - 13.7**	**0.6 - 72.8**	**0.0 - 13.0**		
Average (21 RTAs)		**57.9**	**3.1**	**62.2**	**4.7**		

a For explanations of the concepts used see Box A.2 (Annex).

Source: Calculations based on Miroudot et al (above n 26) and additional information provided by S. Miroudot.

Third, coincidence does not necessarily point to a causal link: the underlying scheduling approaches may have been chosen independently of an intended - more or less ambitious - outcome. Concerning the levels of existing GATS commitments, there is a lot of variation in the composition of the groups concerned. And it is certainly easier for Members with comparatively low numbers of GATS commitments - and these are well represented among participants in top-down agreements - to produce GATS-plus effects in their RTAs than for others.[38]

V. SUMMARY: DIFFERENT APPROACHES CAN LEAD TO SIMILAR COMMITMENTS - DEPENDING ON THE POLITICAL IMPETUS

Past discussions of the role of the scheduling techniques in services agreements tend to suffer from an element of confusion: the association of 'book-keeping approaches' that are used to record negotiating outcomes with the objectives and intentions that might have been pursued by the parties involved. Typically, the GATS is frequently associated with a bottom-up scheduling approach, with the generally shallow levels of commitments inscribed under the Agreement being attributed to 'a flawed modality for carrying out services negotiations'. Moreover, there is a widespread perception that any additional elements, beyond the key parameters of market access and national treatment as covered by Articles XVI and XVII, cannot be appropriately incorporated into conventional bottom-up schedules. Such additional elements might consist, for instance, of locking-in existing levels of openness, automatic bindings of future liberalization moves, or further initiatives to promote deeper market integration, whether through stricter competition disciplines, common procurement rules, harmonized regulations or mutual recognition schemes.

In our view, these are misinterpretations of the Agreement. First and foremost, the GATS itself does not prescribe any particular scheduling technique. It is as compatible with top-down approaches as it is with the bottom-up schedules that have been submitted by WTO Members to date. The definitional framework of the Agreement can be used either way to express any negotiated level of liberalization (Box A.1). Second, GATS Article XVIII explicitly allows for the binding of measures not subject to scheduling under market access and national treatment, including standards-related obligations and competition disciplines. The Agreement is also flexible enough to accommodate a wide range of additional negotiating interests concerning, for instance, government procurement, 'standstill' obligations binding current access conditions, the liberalization of new services, protection of international data flows, and so forth. And it is has been used to this effect: The schedules of some 30 Members, including the then EC 15, incorporate relevant provisions in cross-referring to the Understanding on Commitments in Financial Services. IF there is a will, there is a way.

In the final analysis, it seems evident that the challenge in reaching meaningful results, in whatever negotiating context, lies in in mobilizing the political resolve needed and articulating it properly in guidelines and modalities. What ultimately matters is not governments' preference for a particular architectural approach, but their strength of purpose.

[38] For example, Costa Rica, El Salvador, Guatemala and Honduras scheduled between 17 and 29 subsectors under the GATS, as compared to between 111 and 115 subsectors contained in the GATS schedules of three EFTA countries (Iceland, Norway and Switzerland).

ANNEX

Box A.1 Conventional (bottom-up) versus modified (top-down) GATS schedules

(a) Conventional (bottom-up) schedule – positive listing

Modes of supply: (1) Cross-border (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons

Sector or Subsector	Limitations on Market Access	Limitations on National Treatment	Additional Commitments
I. HORIZONTAL COMMITMENTS ALL SECTORS INCLUDED IN THIS SCHEDULE			
	(3) Foreign equity participation limited to 60 per cent (4) Unbound except for measures concerning entry and stay of the following categories of natural persons: […]	(1) - (4) Unbound for subsidies (4) Unbound except as indicated under 'Market Access'	
II. SECTOR-SPECIFIC COMMITMENTS			
1. BUSINESS SERVICES			
A. Professional Services (c) Taxation services (CPC 863) (?) […]	(1) None (2) None (3) Only as a juridical person (4) Unbound except as indicated in Part I. […]	(1) None (2) None (3) None (4) Unbound except as indicated in Part I. […]	

(b) Modified (top-down) schedule – negative listing

Modes of supply: (1) Cross-border (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons

Sector or Subsector	Limitations on Market Access	Limitations on National Treatment	Additional Commitments
SECTORAL COVERAGE ALL SERVICES LISTED IN MTN.GNS/W/120, EXCEPT THE FOLLOWING: 1. BUSINESS SERVICES A. Professional Services (a) Legal Services (CPC 861); (b) Accounting, auditing and bookkeeping services (CPC 862) 2. COMMUNICATION SERVICES D. Audiovisual Services (a) Motion picture and video tape production and distribution services (CPC 9611) (?) […]			
I. HORIZONTAL LIMITATIONS			
ALL COVERED SECTORS	(3) Foreign equity participation li (4) Unbound except for measures concerning entry and stay of the following categories of natural persons: […]	(1) - (4) Unbound for subsidies (4) Unbound except as indicated under 'Market Access'	
II. SECTOR-SPECIFIC LIMITATIONS			
1. BUSINESS SERVICES			
A. Professional Services (c) Taxation services (CPC 863) (?) […]	(3) Only as a juridical person […]	 […]	

Box A.2 Measuring GATS-plus and -minus elements (Table 2)

'GATS + ' indicates the existence of new or improved commitments as compared to the GATS schedule of at least one of the parties involved (the figures given for each RTA reflect the average for the parties). An improvement could consist of the conversion of a non-binding or of a partial commitment under the GATS into a full, a partial or an improved partial commitment under the RTA concerned. In order to measure new or improved bindings, the authors looked at the market access and national treatment commitments scheduled under the four modes of supply for any of the 155-odd sectors identified in the widely used Services Sectoral Classification List W/120. This means that 1'240 scheduling options were taken into account for each party (155 subsectors, 4 modes of supply and two types of commitments: market access and national treatment). In order to capture higher levels of partial commitments, the authors considered whether and how nine different types of limitations had been changed compared to a party's GATS schedule. The percentages reflect the shares of RTA commitments, out of the 1'240 options, which improve over a party's GATS schedule.
'GATS – ' reflects an opposite move: existing GATS commitments were downgraded in the RTA from full to partial commitments or to unbound.
'Cross-sectoral GATS – ' denotes the existence of horizontal GATS-minus provisions that apply across all sectors covered by the RTA concerned.
'MFN clause' indicates that the RTA contains a cross-reference to the parties' GATS schedules which clearly neutralizes any GATS-minus provisions. More general clauses, best endeavours-type, have been ignored in this context.
Selection of RTAs: Out of the 56 RTAs involving OECD Members, as examined by Miroudot et al, we selected 40 agreements that consistently used either a positive-list ('bottom up') or negative-list ('top down') scheduling approach. Agreements containing elements of both approaches were not taken into account.