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LESS THAN THE GATS: 'NEGATIVE PREFERENCES' IN REGIONAL SERVICES AGREEMENTS

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> We will continue to resist protectionist pressures, and to promote liberalisation of trade and investment under the WTO, through the national reduction of barriers, as well as through bilateral and regional negotiations.
>
> G8 Summit, *Muskoka Declaration*, 26 June 2010

> Acting like termites, PTAs are eating away at the multilateral trading system relentlessly and progressively.
>
> Jagdish Bhagwati, *Termites in the Trading System*, 2008

ABSTRACT

Regional trade agreements in services are a relatively recent, but rapidly expanding phenomenon. Their relationship with commitments undertaken under the General Agreement on Trade in Services (GATS) or offered in the Doha Round has attracted some attention in the literature. Relevant publications tend to focus on the 'value added' that such agreements might generate through broader sectoral coverage or deeper levels of liberalization. This article takes a different perspective, however, and focuses on provisions that fall short of the same countries' GATS commitments. Such 'negative preferences' are more than an isolated occurrence: they can be found in most recent agreements, including agreements involving some of the largest World Trade Organization (WTO) Members. The existence of 'negative preferences' or 'GATS-minus commitments' may prove relevant for several reasons: in particular, they could impinge on an agreement's legal status under the GATS and help create a trading system beyond the WTO. It is conceivable that such minus-commitments are mutually conceded in 'sensitive' sectors or tacitly accepted in view of 'side-payments' in non-WTO currency (including development finance). Those who subscribe to Bhagwati's comparison of PTAs with termites might thus have additional reason to be alarmed: the bugs' unconventional table manners.

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I. INTRODUCTION

Regional agreements in services have proliferated since about 2000, largely mirroring developments in merchandise trade. Of the 70-odd notifications made under Article V:7 of the General Agreement on Trade in Services (GATS) since the Agreement's entry into force in January 1995, some 60 have been submitted only since January 2000. In other words, 'regionalism' in services trade is a relatively recent development.[1] Somewhat surprisingly, it manifested itself mainly after the mandated start of the services negotiations, pursuant to Article XIX:3 of the GATS, in January 2000 and their incorporation into the wider Doha-Round context in late 2001. It is thus tempting to associate this phenomenon, apart from a variety of other political and economic factors, with expectations or, rather, frustrations associated with the state of (non-)play in the Doha Round.[2]

The move towards regionalism in services trade has inspired studies assessing the content of individual agreements from various perspectives. Several recent publications compare the obligations assumed under regional/preferential trade agreements (PTAs) with the parties' existing commitments under the GATS and, occasionally, the offers submitted in the Doha-Round negotiations.[3] The focus is on sectoral coverage and levels of liberalization. Four scenarios are normally distinguished on a sector-by-sector basis: no commitments in either context, same commitments under a PTA as under the GATS (and Doha-Round offers), a PTA improves on the level of existing GATS commitments (Doha-Round offers) and a PTA extends sectoral coverage by adding services not included in the parties' GATS schedules (Doha-Round offers).[4] A fifth scenario tends to be ignored in this context, perhaps because it seems not to serve any obvious

[1] To a somewhat lesser degree, this applies to merchandise trade as well. Though the relevant GATT provisions (Article XXIV) date from the late 1940s, two-thirds of the 160-odd agreements notified to the WTO were put into effect between January 2000 and December 2009. For an overview of the notifications made and a description of the relevant process in the WTO, including the role of the Transparency Mechanism for Regional Trade Agreements in this context, see http://www.wto.org/english/tratop_e/region_e/trans_mecha_e.htm (visited 27 June 2010).

[2] See, for example, Sherry M. Stephenson, 'Regional versus Multilateral Liberalization of Services', 1 World Trade Review 187 (2002), at 209; John Whalley, 'Recent Regional Agreements: Why So Many, Why So Much Variance in Form, Why Coming So Fast, and Where Are They Headed?', 31 The World Economy 517 (2008), at 532; or Kenneth Heydon and Stephen Woolcock, *The Rise of Bilateralism* (Tokyo: United Nations University Press, 2009), 88–122.

[3] The terms 'Regional Trade Agreements (RTAs)', 'Free Trade Agreements (FTAs)' and 'Preferential Trade Agreements (PTAs)' are employed alternately throughout this article, reflecting their use in the literature, and carry the same connotations.

[4] Martin Roy, Juan Marchetti and Hoe Lim, 'Services Liberalization in the New Generation of Preferential Trade Agreements (PTAs): How Much Further Than the GATS?', 6 World Trade Review 155 (2007), at 92; Carsten Fink and Martin Molinuevo, *East Asian Free Trade Agreements in Services: Roaring Tiger or Timid Pandas?*, East Asian FTAs in Services—Policy Research Paper, The Word Bank (June 2007); Henrik Horn, Petros C. Mavroidis and André

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purpose: PTA commitments by at least one party that, in one or more sectors, fall short of their counterparts scheduled under the GATS.

The existence of this fifth scenario is more than hypothetical, however. As shown below (under Section III), some of the largest World Trade Organization (WTO) Members, in terms of their shares in world trade (European Communities, USA, China), are involved in PTAs with GATS-minus provisions. Preliminary information from an ongoing research project conducted by the Organization for Economic Co-operation and Development (OECD) Secretariat points to many more such cases.[5]

Yet, what is the nature of such GATS-minus commitments and what are their implications for the signatories, for non-participating WTO Members and, more basically, for the status of the relevant PTAs under the GATS? These are the issues covered by the following section, starting with an introduction of the provisions in GATS Article V setting out the (minimum) disciplines that preferential agreements in services are expected to meet. The third section, based mainly on three PTAs involving 'big players', then presents GATS-minus features in some detail. The fourth section discusses various factors that might explain the existence of such 'negative preferences', including the complexity of the GATS and related interpretation problems; the parties' wish to avoid repeating over-ambitious commitments unintentionally (?) assumed in the Uruguay Round; the objective to balance another party's limitations with similar own limitations even if these are without equivalents under the GATS; the prevalence of political motivations over economic (trade-liberalizing) considerations; absence of thorough government-internal verification due to self-imposed time constraints in negotiating PTAs; or the acceptance of GATS-minus commitments as part of a broader deal that includes financial and other benefits not covered by WTO Agreements. The fifth section raises implications of GATS-minus PTAs for non-participants and the multilateral system as a whole, distinguishing between three types of agreements: PTAs remaining mostly below the parties' GATS commitments, others combining potentially many GATS-plus with some GATS-minus elements, and a third group complementing such features with WTO-extra benefits relating, for example, to development funding. Comments on the need for future research conclude.

II. WTO PROVISIONS DEFINING (MINIMUM) DISCIPLINES FOR PTAS

Starting with a brief explanation of the background and purpose of WTO provisions governing PTAs, the following observations focus on what might

Sapir, *Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements*, Bruegel Blueprint Series, Vol. VII (Bruegel: Brussels, 2009); and Heydon and Woolcock, above n 2.

[5] See n 64 below.

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be considered minimum requirements that such agreements in services are expected to meet. While these requirements are defined in the GATS as 'absolute' standards, concerning sectoral coverage and levels of national treatment (Section II.B below), the parties' compliance cannot be assessed in isolation. In our view, the scope and depth of their GATS schedules of commitments matter as well.

Potentially complex issues of interpretation may be involved. For example, PTA provisions may be couched in more restrictive terms than relevant GATS commitments without, in the view of the Members concerned, entailing more restrictive conditions of access. It might be argued, for example, that relevant entries simply serve an explanatory purpose and do not imply elements that would need to be covered by limitations.[6] For a proper understanding of PTA disciplines, especially the non-discrimination requirement of Article V:1, it is thus also important to clarify the actual scope of relevant GATS provisions. Particularly challenging in this context is the existence of four modes of supply and, thus, the Agreement's definitional extension beyond cross-border trade in products, GATT-type, to services consumed abroad as well as to the presence of service suppliers (companies and professionals) in a host market (Section II.C).[7] Finally, we seek to clarify, from the parties' perspective, the interaction between the 'negative preferences' contained in their PTAs and the commitments assumed in their GATS schedules (Section II.D).

A. From GATT (Article XXIV) to GATS (Article V)

If there is one common element that the GATS has inherited from its counterpart in merchandise trade, the General Agreement on Tariffs and Trade (GATT) of 1947, it is the central role of the Most-Favoured-Nation (MFN) principle. In many other respects, including its (almost) complete ban on quantitative import restrictions and its (almost) cross-the-board commitment to national treatment, the GATT is more rigid than the GATS. This may be attributed mainly to the more limited coverage of the GATT, with its focus

[6] There have been such claims with regard to entries contained in GATS schedules. See n 44 below.

[7] Article I:2 of the GATS defines four modes of supply through which services may be traded: cross-border supplies into a Member's territory (mode 1), consumption of services by its nationals abroad (mode 2) as well as the presence of foreign-owned or -controlled companies (mode 3) and of foreign natural persons (mode 4) that supply services within the Member's jurisdiction. Mode 3 tends to be closely associated with inward investment flows. For an overview of key features of the GATS, see for example, Rudolf Adlung and Aaditya Mattoo, 'The GATS', in Aaditya Mattoo, Robert M. Stern and Gianni Zanini (eds), *A Handbook on International Trade in Services* (New York: Oxford University Press and World Bank, 2008), 48–83.

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on cross-border trade (imports and exports of goods) and the tariff mechanism, as compared to the four modes of supply defined to constitute trade in services under the GATS. Also, the GATS was created in the comparatively vibrant trading environment of the late 1980s, which meant that its drafters had more policy constraints to accommodate—in terms of already widespread trade practices—than the 'fathers' of the GATT in the late 1940s.

Nevertheless, there are facets where the GATS appears to be more restrictive than the GATT. In particular, while the latter explicitly excludes subsidies to producers from its national treatment obligation (Article III:8(b)), the GATS does not contain an equivalent clause.[8] Rather, the scope of the Agreement is defined broadly as extending to 'measures by Members affecting trade in services' (Article I:1) which, of course, include trade-related subsidies. However, the application of the national treatment obligation itself is more limited in reach than under the GATT. First, it is confined to the sectors a Member has inscribed into its schedule of specific commitments and, second, it applies only to the extent that no limitations have been attached.[9] Of course, such limitations may provide cover for discriminatory subsidies as well (Section II.B.3).

As far as the MFN obligation is concerned, both Agreements allow for departures in specified circumstances. Again, except for the Enabling Clause, which is a recognized exception to Article I:1 of the GATT[10], the GATS offers more options in this regard. These include in particular the possibility of listing MFN exemptions, which for the original WTO Members existed only in 1995, but is still available to acceding countries (Article II:2 and a related Annex); a provision offering relatively wide scope for the recognition of foreign standards, certificates, etc. (Article VII)[11]; and a so-called

[8] Efforts to discipline agricultural and industrial subsidies started only later to culminate in the Uruguay Round (Agreement on Agriculture and Agreement on Subsidies and Countervailing Measures). For an overview, see Thomas Cottier and Matthias Oesch, *International Trade Regulation* (Berne and London: Staempfli Publishers and Cameron May, 2005), 719–26 and 990–8.

[9] On average, WTO Members have undertaken commitments in only about one-third of the subsectors contained in a widely used Sectoral Classification List (MTN.GNS/W/120, see Section II:B.1), although there is a lot of variation between individual schedules. See Rudolf Adlung and Martin Roy, 'Turning Hills into Mountains? Current Commitments under the General Agreement on Trade in Services and Prospects for Change', 39 Journal of World Trade 1177 (2005).

[10] Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries (EC—Tariff Preferences)*, WT/DS246/AB/R, adopted 20 April 2004, at para 99.

[11] There are also some—more strictly defined—recognition-related provisions contained in the GATT Agreements on Technical Barriers to Trade (TBT Agreement, Article 6) and on Sanitary and Phytosanitary Measures (SPS Agreement, Article 4). For an overview, see Cottier and Oesch, above n 8, at 368–81.

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prudential carve-out for financial services (Annex on Financial Services).[12] Other permissible departures are largely similar in purpose and content, including not only General Exceptions and Security Exceptions (GATT Articles XX and XXI, GATS Articles XIV and XIV*bis*), but also the provisions governing PTAs between two or more WTO Members in the form of customs unions and free-trade areas (GATT Article XXIV) or economic integration agreements (GATS Article V). The latter provisions are mutually independent; Members may negotiate preferential agreements covering goods or services only or combining both areas.

Articles XXIV (GATT) and V (GATS) both seek to establish framework conditions for PTAs that strike a balance between the parties' economic and political motivations, and the interests of 'outsiders' in unimpeded access and undistorted conditions of competition. This is reflected, *inter alia*, in the requirement 'not to raise barriers to the trade' of other Members (GATT Article XXIV:4 and, in similar terms, GATS Article V:4) and, as far as the GATT is concerned, the obligation to eliminate duties and other restrictive regulations with respect to 'substantially all the trade' between the parties (Article XXIV:8(a)(i)). Given the particular features of services trade—such as the widespread absence of tariff protection, the non-tangibility of services and associated measurement problems—it was clear that the latter obligation needed to be modified for the purposes of GATS Article V. Though desirable, this process has not led to definitional clarification, however. Whoever had hoped that vague concepts such as 'substantially all the trade' could be given clearer meaning, would have been disappointed. One of the possibly weakest provisions of the GATT, judged by its lack of clarity, has thus found its equivalent in the GATS.[13]

[12] A detailed discussion is contained in Rudolf Adlung and Antonia Carzaniga, 'MFN Exemptions under the General Agreement on Trade in Services: Grandfathers Striving for Immortality?', 12 Journal of International Economic Law 357 (2009), 392, at 363–8.

[13] Sherry M. Stephenson, 'GATS and Regional Integration', in Pierre Sauvé and Robert M. Stern (eds), *GATS 2000 – New Directions in Services Trade Liberalization* (Washington, DC: Brookings Institution, 2000), 509–29, at 509. Nevertheless, despite the uncertainties involved, it was only in 1999 that WTO Panel and Appellate Body reports interpreted provisions of Article XXIV (Appellate Body Report, *Turkey—Restrictions on Imports of Textile and Clothing Products (Turkey—Textiles)*, WT/DS34/AB/R, adopted 19 November 1999); see Section II.B.1. Up to then, while the number of PTAs expanded rapidly, such matters were 'almost entirely left to trade diplomacy' (according to Cottier and Oesch, above n 8, at 373). Interestingly, the unadopted report of the pre-WTO Panel in *EEC—Bananas II* (1994) had already sought to define one outer limit to free trade agreements in conformity with the GATT. The report found that the Lomé Convention could not constitute a free-trade area consistent with GATT Article XXIV:8(b), since 'only agreements providing for an obligation to liberalize the trade in products originating in *all* of the constituent territories could be considered to establish a free-trade area within the meaning of Article XXIV:8(b)'. (GATT Panel Report, *EEC—Import Regime for Bananas*, DS38/R, 11 February 1994, unadopted.)

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B. Article V:1: Substantial sectoral coverage and non-discrimination

The GATS sets out in Article V:1 two key requirements for a PTA in services: 'substantial sectoral coverage' and 'absence or elimination of substantially all discrimination' in the sectors concerned. Further guidance is provided in a footnote, which specifies that the former condition is to be understood in terms of numbers of sectors, volume of trade affected and modes of supply, and that there should be no 'a priori exclusion' of any mode.

The issue arises as to whether shortcomings in sectoral coverage in a PTA—such as the omission of some GATS-committed sectors—could be equated with the existence of minus-commitments and, thus, fit into the scope of this article. Can sectoral exclusions, in comparison to the GATS commitments undertaken, be considered as giving rise to lesser, GATS-minus commitments? The point may be made, it is true, that sectors omitted from a PTA remain subject to the parties' GATS obligations. Yet, as argued below (Section II.D), the legal situation is more complex. Also, in at least some cases, there are indications that the parties have intentionally modified a PTA's sectoral coverage with a view to gaining additional room for manoeuvre.

It is interesting in this context to consider two PTAs, the EC–CARIFORUM Economic Partnership Agreement (EPA) and the China–ASEAN Agreement on Trade in Services. Under the former agreement, as in its GATS schedule, the EC has assumed commitments on health and social services (Section III.B below). However, the Communities' EPA commitments do not cover this sector in full, but are reduced to 'privately funded services' for which they otherwise replicate the content of the EC 12 schedule submitted at the end of the Uruguay Round. The omission of publicly funded segments from the EPA seems to make sense only, from the Communities' point of view, if it is understood to allow for an element of policy discretion—or minus-treatment—compared to what had been committed under the GATS. As regards the second example, the China–ASEAN Agreement, Indonesia's commitments contained in the first package under this Agreement (Section III.D) essentially mirror the content of the country's GATS schedule, but for a far lower number of subsectors. As before, the authorities may have thought they would not be bound by their GATS commitments in those subsectors they omitted from the PTA.

By the same token, it cannot be taken for granted that explicit exclusions of certain types of measures, such as subsidies, from a PTA's coverage are meant *by the parties* to imply, nevertheless, that relevant GATS commitments continue to govern their mutual trade relations. Had the GATS commitments been intended to define the 'baseline' for treatment in such cases, the PTA might have remained silent or simply confirmed these commitments. Yet, the agreements discussed below (Sections III.B and C)

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not only depart from the parties' GATS commitments, but significantly curtail the MFN obligation as well.[14] The China–ASEAN Agreement (Section III.D) does not contain an MFN requirement at all. In such cases, the GATS-minus elements in PTAs may become more significant over time, as GATS commitments are improved in successive trade rounds.

1. Sectoral coverage: how substantial is 'substantial'?

The sectoral structure of service schedules, whether under the GATS or in PTAs, is normally based on a classification the WTO Secretariat had developed in the early 1990s (MTN.GNS/W/120, in the following: W/120). It distinguishes 11 broadly defined sectors—such as business services, communication, construction, distribution and education—which, in turn, are subdivided into some 160 subsectors. Though not mandatory, Members are advised to use the list as a basis for scheduling commitments under the GATS.[15]

Against this backdrop, how many sectors would need to be committed under a PTA in order to meet the criterion, in GATS Article V:1, of 'substantial sectoral coverage'? Unfortunately, the individual elements of this criterion are not easily interpreted, even when read in conjunction with an associated footnote. Cottier and Molinuevo opine that the exclusion of more than one or two sectors from an agreement—out of the 11 large sectors identified in the Sectoral Classification List W/120—would most likely imply that its coverage is less than 'substantial'.[16] In this context, the authors point to the Appellate Body ruling in *Turkey—Textiles*, which examines the scope of the analogous term ('substantially all the trade') found in Article XXIV:8(a)(i) of the GATT and applied to PTAs covering trade in goods.

[14] The parties' MFN obligation in the EC–CARIFORUM EPA is essentially confined to economic integration agreements signed *after* the signature of this EPA (Section III.B). The Australia–United States Free Trade Agreement (AUSFTA, see Section III.C) goes even further in explicitly excluding all subsidies from the scope of its MFN obligation.

[15] Para 23 of the Scheduling Guidelines (S/L/92, see n 32 below) provides that '*[i]n general*, the classification of sectors and sub-sectors *should* be based on the Secretariat's Services Sectoral Classification List' (emphasis added).

[16] Thomas Cottier and Martin Molinuevo, 'Article V GATS: Economic Integration', in Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle (eds), *WTO – Trade in Services*, Max Planck Commentaries on World Trade Law, 6 (Leiden: Martinus Nijhoff Publishers, 2008), at 131. However, the 11 major headings in the Classification List do not reflect activities of comparable economic weight, even in the abstract. Some sectors, like business services, cover a far broader array of significant economic activities than others, such as recreational services. Thus, the exclusion of publicly funded hospital services, a seemingly small segment out of health-related and social services, from the EC's commitments under the CARIFORUM EPA may have a stronger impact on *bilateral* trade flows than the exclusion of three or four of the 11 major sectors identified in the Classification List. Though still subject to uncertainties, it would therefore be preferable to use at least the coverage of subsectors contained within major headings as an indicator of a PTA's significance to its parties.

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The Appellate Body held in this case that the meaning of the term is not the same as '*all* the trade' but 'something considerably more than merely *some* of the trade'.[17] The ruling does, it is true, refer to a provision of the GATT with slightly different wording from its analogue under the GATS. However, the Appellate Body has drawn on several occasions on provisions in the GATT in order to interpret GATS requirements having a similar wording and function. In particular, it has used the extensive jurisprudence on general exceptions under GATT Article XX in order to shed light on the analogous provisions in Article XIV of the GATS.[18]

To us, the words 'substantially all', in the light of the Appellate Body's ruling, shift the range of trade coverage needed in a goods PTA significantly towards the 'all trade' end of the spectrum. Applying the Appellate Body's considerations to PTAs in services, the same would be true for 'substantial sectoral coverage'. The only sectors that might be ignored in this context are air transport services as specified in the relevant Annex to the GATS.[19]

Interpretative problems arise also with respect to the footnote concerning sectoral coverage which precludes, subject to a softening 'should not', the '*a priori* exclusion' of any mode of supply. No similar terms are used with respect to the other two elements mentioned in the footnote—number of service sectors and volume of trade affected. This might suggest a different degree of flexibility in this regard.[20] However, compliance with any of these elements is of little value *per se* as long as it is not combined with

[17] Italics in the original. See Appellate Body Report, *Turkey—Textiles*, above n 13, para 48.

[18] In *US—Gambling*, the Appellate Body applied interpretations developed under GATT Article XX to GATS Article XIV on the basis that both provisions have the same objective and that each uses 'similar language'. (Appellate Body Report, *United States—Measures Affecting the Supply of Cross-Border Gambling Services*, WT/DS285/AB/R, adopted 20 April 2005, para 291.) Since both the GATT and the GATS are formally annexes to the same treaty instrument, the WTO Agreement, a GATT provision may be considered as 'context' in interpreting a GATS provision. Pursuant to Article 31.2 of the Vienna Convention on the Law of Treaties (VCLT), the context for the purpose of treaty interpretation comprises any annex to the treaty.

[19] Interestingly, according to Sauvé and Ward, the EC has argued *vis-à-vis* CARIFORUM negotiators that an agreement 'liberalising 80% of covered trade' would meet the Article V:1 threshold, leaving it unclear, however, whether the volume of trade, number of subsectors included or a combination of both would be relevant. (Pierre Sauvé and Natasha Ward, *The EC-CARIFORUM Economic Partnership Agreement: Assessing the Outcome on Services and Investment*, European Centre for International Political Economy (ECIPE): Brussels (January 2009), at 22.)

[20] On various occasions, Panels and the Appellate Body have sought to specify the levels of flexibility implied by the use of 'should' in lieu of 'shall' and other conceivable options. For example, in *US–FSC*, the Appellate Body opined that 'many binding legal texts employ the word "should" and, depending on the context, the word may imply either an exhortation or

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more liberal commitments than those inscribed in the parties' GATS schedules.[21]

On modes of supply, Cottier and Molinuevo opine that liberalization commitments 'may be undertaken with regard to some modes of supply more than others, provided that the lack of commitments with regard to one or more modes of supply does not impair the liberalization of substantial volumes of trade'.[22] This leaves open the question of how to deal with zero or negative changes in particular sectors. A recent paper by the Asian Development Bank takes a stricter view on this matter, putting the requirement of substantial sectoral coverage in the context of the second criterion, absence or elimination of substantially all discrimination. The Bank maintains that the term 'substantial' requires an agreement to be comprehensive in coverage, without sector exclusions, *and* to remove nearly all discrimination between the parties. Accordingly, 'an FTA that reproduces commitments in the GATS with only a limited number of improvements would, on the face of it, not qualify'.[23] This sets a very high standard, however, and would have significant implications for many existing PTAs.

2. Absence/elimination of substantially all discrimination

As noted before, national treatment is negotiable under the GATS. Relevant obligations are assumed only in the sectors that a Member inscribes in its schedule of specific commitments and only to the extent that no qualifying limitations are added under any of the four modes of supply. The distinction

express an obligation'. (Appellate Body Report, *United States–Tax Treatment for 'Foreign Sales Corporations'*, WT/DS108/AB/R, adopted 20 March 2000, footnote 124 to para 111.)

[21] In this respect, it is instructive to examine the PTAs recently concluded by the USA, including the Agreements with Peru and Oman, which entered into force in early 2009, and the Australia–US Free Trade Agreement (AUSFTA) of 2005. While these agreements do contain chapters on cross-border trade in services, covering in particular modes 1 and 2, and on investment, largely overlapping with mode 3, there are no separate chapters on mode 4. However, the chapters on cross-border trade, containing national treatment and MFN obligations on a cross-sectoral basis, extend to elements of mode 4 as well. They explicitly include 'the supply of a service by a national of a Party in the territory of the other party', except for the supply by a 'covered investment'. Thus, contrasting with foreigners employed by foreign-invested companies, other groups of persons for whom the USA has assumed GATS commitments under mode 4, such as services salespersons employed by foreign-based companies or (self-employed) fashion models, would fall under this definition. They do not qualify for improved market access, since the USA has expressly reserved the right 'to adopt or maintain any measure that is not inconsistent with [its] obligations under Article XVI of the General Agreement on Trade in Services' (Annex II). Nonetheless, in terms of national treatment, a—possibly minor—advantage remains: While the USA has not assumed any national-treatment obligation for mode 4 in its GATS schedule ('unbound'), the PTAs provide for national treatment with the—important—exception of subsidies and grants. Yet, this is more than nothing. The texts of these Agreements, like those of all other PTAs notified to the WTO, are available at: http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx (visited 27 June 2010).

[22] Cottier and Molinuevo, above n 16, at 134.

[23] Asian Development Bank (ADB), *How to Design, Negotiate, and Implement a Free Trade Agreement in Asia* (Manila: Asian Development Bank, 2008), at 60.

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between these modes is based in large part on the presence of the service supplier, the service consumer or the service within the regulating Member's jurisdiction.[24] In turn, the national treatment obligation as spelled out in Article XVII:3 focuses on any differences in treatment that would modify 'the conditions of competition' to the detriment of like foreign services or service suppliers. As indicated before, the explicit extension of the Agreement's disciplines to the treatment of service *suppliers* reflects its broad modal structure, which includes the presence of foreign producers (companies and service professionals) in a host market.

The second core criterion for a valid PTA in services relates to this concept of national treatment. According to Article V:1(b), an agreement is expected to provide for the 'absence or elimination of substantially all discrimination in the sense of Article XVII'.[25] Article V:1(b) further clarifies that this is to be achieved through: '(i) elimination of existing discriminatory measures, and/or (ii) prohibition of new or more discriminatory measures'. The latter option ('and/or') has led some commentators to infer that a party might satisfy the relevant condition simply by locking in its status-quo regime.[26] However, it is difficult to see how such a course of (non-)action could ensure compliance with the basic requirement—to provide for the 'absence or elimination of substantially all discrimination'—in an environment characterized by high initial levels of discrimination.[27]

Article V does contain several explicit elements of flexibility, although their scope is not always delineated clearly. For example, there can be no doubt that the 'absence or elimination of substantially all discrimination' need not be achieved immediately at an agreement's entry into force, but can be phased-in 'on the basis of a reasonable timeframe' (Article V:1(b)). In this situation, however, what could be considered to be 'reasonable'? Article 3 of the Understanding on the Interpretation of Article XXIV of the GATT, annexed to the WTO Agreement ('Marrakesh Agreement'), specifies that the 'reasonable length of time', within which an interim agreement is to be transformed into a full-fledged PTA, should exceed ten years 'only in

[24] The term 'regulating Member' as used in this article refers to an 'importing' or 'recipient' Member that seeks to influence the conditions under which foreign services or service suppliers compete with its own services/suppliers under any of the four modes.

[25] As discussed elsewhere, the terms chosen ('...in the sense of...') seem to capture all measures that fall under the definition of Article XVII (National Treatment), whether or not these are to be inscribed in the national treatment or the market access column of a schedule. For example, pursuant to Article XX:2, restrictions that are inconsistent, at the same time, with Article XVI (Market Access) and Article XVII, for example quotas on the number of *foreign* service suppliers, are to be scheduled under market access only. See Adlung and Carzaniga, above n 12, at 379.

[26] See, for example, Aaditya Mattoo and Pierre Sauvé, 'Regionalism in Services Trade', in Mattoo et al., above n 7, at 263.

[27] This is consonant with the position taken by the European Communities (WTO document WT/REG/W/35 and S/C/W/124 of 20 September 1999, at 2) and by Cottier and Molinuevo, above n 16, at 136–7.

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exceptional cases'.[28] Yet, there is no similar understanding concerning the 'reasonable timeframe' provided for under Article V:1 of the GATS. In the absence of precise wording, it could be assumed that the timeframe would be the same or similar to that explicitly provided for in the analogous situation under the GATT.[29]

During an agreed phase-in process, the parties' failure to provide for the ultimately envisaged level of national treatment would probably not be significant. What happens, however, if there are no clearly defined timelines and implementation stages—for example, if an agreement simply refers to 'future negotiations'—or if the parties fall behind an initially agreed schedule (see China–ASEAN Agreement on Trade in Services, Section III.D)? In the case of goods PTAs, Article 10 of the Understanding on the Interpretation of Article XXIV of the GATT directs the working party examining the agreement to recommend a 'plan and schedule'. Should the parties be unable to comply with an initially agreed timetable, it would seem that the 10-year 'reasonable timeframe' provided for in the Understanding would set at least an outer limit to the permissible implementation period. Afterwards, the MFN obligation would apply again. In the case of an interim services PTA, it would be difficult to find systemic reasons why, in the absence of explicit language, similar concepts within the WTO would not be interpreted in a similar manner. Certainly, in order not to undermine completely the disciplines on services PTAs, the absence of a clear timeframe cannot be understood to give *carte blanche* to the signatories.

Some commentators have held that the criterion of a 'reasonable timeframe' also applies to the achievement of 'substantial sectoral coverage'.[30] However, given the wording and structure of Article V:1, there can be little doubt that the latter criterion must be met from day one.[31] It is true that Article V:3 contains an element of flexibility for developing countries, in

[28] See also the discussion in Lorand Bartels, '"Interim agreements" under Article XXIV of GATT', 8 World Trade Review 339 (2009), 350, at 346–7, and in Cottier and Molinuevo, above n 16, at 137–8. Of the 34 agreements reviewed under the WTO's Transparency Mechanism for Regional Trade Agreements between October 2008 and October 2009, about three-quarters actually provided for implementation periods of 10 years or less. See WTO document WT/TPR/OV/12 of 18 November 2009 ('Overview of Developments in the International Trading Environment').

[29] See also above n 18.

[30] For example, Fink and Molinuevo, above n 4, at 71, and Cottier and Molinuevo, above n 16, at 137.

[31] Article V:1(a), concerning sectoral coverage, and V:1(b), concerning the absence/elimination of discrimination, are both indented. The fact that the following provision '... or on the basis of a reasonable timeframe' remains indented at the level of V:1(b) seems to confine its scope accordingly. Also, the latter provision continues: '..., except for measures permitted under Articles XI [Payments and Transfers], XII [Restrictions to Safeguard the Balance of Payments], XIV [General Exceptions] and XIV *bis* [Security Exceptions]'. Again, this addition is more easily compatible with the requirement of eliminating substantially all discrimination than with the need for substantial sectoral coverage.

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accordance with their overall and sectoral development, regarding the conditions of 'substantial sectoral coverage' and, particularly, of absence/elimination of 'substantially all discrimination'. Yet, in our view, the former provision refers to the *level* of sectoral coverage only, which may be lower in the case of less economically advanced countries, but would not allow for it being phased-in over time which, as such, is not foreseen in Article V:1. Nevertheless, the fact that the sectors that are deemed to ensure 'substantial coverage' of a PTA must be specified from the very beginning, does not prevent the parties from including additional sectors, spontaneously or according to an agreed schedule, at later stages.

3. Further (minimum) disciplines on PTAs in services

Another interesting question is whether there are additional standards that PTAs can reasonably be expected to meet as a minimum. For example, can PTAs be compatible with Article V if they explicitly exempt subsidies from national treatment disciplines under any of the modes of supply (see EC–CARIFORUM EPA and Australia–United States Free Trade Agreement (AUSFTA), Sections III:B and C)? Subsidy-related limitations inscribed in particular under modes 1 and 2 leave Members a powerful tool to restrict trade. Since there are few other types of measures that could be employed effectively to deny national treatment in cross-border trade or consumption abroad, the effects are almost tantamount to excluding these modes from coverage (Section III.A).

Though Article XV of the GATS mandates Members to enter into negotiations on subsidies, this cannot be understood to imply that the core discipline governing the granting of subsidies, national treatment, is weakened in any way. Whenever subsidies 'affect' trade in services within the meaning of Article I:1, they are covered by the Agreement without qualification. Indeed, the Scheduling Guidelines unequivocally provide that 'Article XVII applies to subsidies in the same way that it applies to all other measures'.[32] The Article XV mandate focuses on (additional) disciplines that may be necessary to avoid the trade-distortive effects that subsidies may have 'in certain circumstances'. Any successful outcome of these negotiations that

[32] The initial version of the Guidelines was compiled and circulated by the then GATT Secretariat in late 1993 (MTN.GNS/W/164 of 3 September 1993) and its revision in early 2001, following adoption by the Council for Trade in Services (WTO document S/L/92 of 28 March 2001). The above quote is contained in both versions (paras 9 and 16, respectively). In *US—Gambling*, the Appellate Body found that the 1993 Scheduling Guidelines as well as the Sectoral Classification List (MTN.GNS/W/120) constituted supplementary means of interpretation according to Article 32 of the VCLT. (Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting* Services, WTO document WT/DS285/AB/R, adopted 20 April 2005.) For further discussion, see Eric H. Leroux, 'Eleven Years of GATS Case Law: What Have We Learned?', 10 Journal of International Economic Law 749 (2007), 793, at 760–2.

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does not simply confirm existing disciplines would thus entail additional or more stringent elements.[33]

Somewhat surprisingly, however, a majority of the preferential agreements notified under Article V exclude subsidies from the scope and coverage of their obligations.[34] An overview of relevant provisions, completed end-March 2009 and covering the period since November 2003, counts 36 agreements with relevant exclusions. Thus, in this regard, the EC—CARIFORUM EPA and AUSFTA represent only the tip of an iceberg.[35]

The question also arises whether 'tradeoffs' are permissible. In other words, could an element falling short of a particular requirement of Article V:1 be balanced by another element that exceeds the expected standard? For example, could particularly extensive sectoral coverage, beyond what might be deemed 'substantial', be offered in exchange for softer national-treatment disciplines? Probably not, given the explicit wording of Article V:1. Or, to take another case, could very substantial elimination of discrimination by one party be balanced by less ambitious strides by the other party? Certainly, the wording of Article V:1 makes clear that a party to a PTA cannot escape completely the obligation to remove discrimination.[36] However, there still remains the issue of whether a significant difference in the elimination of discrimination between the signatories is permissible.

Further types of trade-offs could arise. What about wider sectoral coverage of a party's PTA obligations overall versus exclusions of certain subsectors that are inscribed in its GATS schedule? Or higher levels of national treatment overall versus deterioration in individual cases? Concerning the relationship between the parties, these issues are addressed below in Section II.D. Moreover, the question arises whether, if challenged by a non-participant, the mere existence of GATS-minus commitments could undermine the parties' claim to be consistent with Article V:1. At the very least, it would seem to us that GATS-minus commitments could affect negatively an assessment of 'absence or elimination of substantially all discrimination', and certainly add no weight to the demonstration of 'substantial

[33] Such an outcome is not currently in sight, however. The reports of the Working Party on GATS Rules (WPGR) which, *inter alia*, conducts the negotiations on subsidies are circulated as WTO documents S/WPGR/M/[...]. See also Rudolf Adlung, 'Negotiations on Safeguards and Subsidies in Services: A Never-Ending Story?', 10 Journal of International Economic Law 235 (2007), 265, at 256–63.

[34] WTO document S/WPGR/W/46/Add.1 of 11 May 2009.

[35] Of course, this does not imply *per se* that PTAs with subsidy-related exclusions are 'GATS-minus'. Consideration would need to be given to the parties' GATS commitments and the scope of the agreements' MFN clauses, if any. See also n 71 and 85 below.

[36] With respect to the analogous GATT provision, this was the view of the Panel in *EEC—Bananas II* (see above n 13).

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sectoral coverage'. Given the sometimes different architecture of PTAs, the existence of such GATS-minus commitments would, of course, have to be carefully assessed.

Another interesting feature of Article V:1 is its failure to distinguish between the parties' GATS commitments, possibly undertaken more than a decade ago, and their applied policies at the date of the PTA. This being the case, would it suffice simply for a party to bind a less discriminatory *status quo* regime in the sectors concerned, while leaving other instances of scheduled, long-entrenched discrimination unchanged?[37] If one accepts that actual and potential trade flows have their place in the assessment under Article V:1, then simple bindings of the regulatory *status quo*, where it is more liberal than a party's commitments under the GATS, would be a significant factor in this context.

C. Meaning of 'non-discrimination' in a modal context

The broad structure of the GATS requires that the national treatment standard ('substantially eliminate all discrimination, in the sense of Article XVII') be applied to transactions involving services or service suppliers under any of the four modes of supply. As indicated before, this may involve complex issues of interpretation, which are important for the purposes of this article. Many of the GATS-minus commitments identified in Section III hinge on the scope of existing subsidy disciplines in services trade as well as their meaning for transactions under different modes.

Under mode 1 (cross-border supply) and mode 2 (consumption abroad), the supplier is not present within the territory of the regulating Member. From this flows an important consequence: for these two modes of supply, the Member is not in a position to exercise full regulatory jurisdiction over the foreign-based *supplier*, notably with respect to the 'conditions of competition' this supplier faces with respect to its counterparts, that is, domestically owned suppliers in the Member's territory. For this reason, national treatment under GATS Article XVII may be understood not to have practical meaning with respect to the treatment of a foreign-based *supplier* under modes 1 and 2.[38]

Nonetheless, the national treatment commitment would still have meaning with respect to the supply of the *service*. A service supplied under these two modes is, by definition, either delivered directly into the Member's territory

[37] Interestingly, the CARIFORUM signatories of the EPA are committed to maintaining at least their applied regimes, concerning market access and national treatment, which existed when they signed the Agreement. The fact that the EC has not assumed equivalent obligations may be attributed, according to Sauvé and Ward (above n 19, at 13), to its EPA commitments typically reflecting or improving on the regulatory *status quo*. Doubts remain, however, given the existence of GATS-minus commitments (Section III.B below).

[38] See n 41 below.

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(mode 1) or received by a consumer who, although typically abroad for a period of time, remains through nationality or residency within the jurisdiction of the regulating Member (mode 2).[39] In both cases, this Member can effectively influence the treatment of the foreign *service*. Thus, in many cases, a transaction under modes 1 or 2 can effectively be covered by GATS disciplines as far as the treatment of the *service* is concerned, even though this may prove problematic with regard to the supplier. It is important to note, however, that national treatment owed with respect to the service will in some cases have the effect of requiring that treatment to be extended at least partially to the supplier as well.

In the same vein, the 'Guidelines for the Scheduling of Specific Commitments under the GATS' explicitly confirm that '[t]here is no obligation in the GATS which requires a Member to take measures outside its territorial jurisdiction. It therefore follows that the national treatment obligation in Article XVII does not require a Member to extend such treatment to a service supplier located outside its territory' (para 15). The Guidelines further specify that 'a binding under Article XVII with respect to the granting of a subsidy does not require a Member to offer such a subsidy to a service supplier located in the territory of another Member' (para 16).[40]

To illustrate, take the example of telecom services supplied cross-border under mode 1. With respect to the *supplier* of these services, a regulating Member cannot effectively ensure national treatment pursuant to Article XVII (conditions of competition no less favourable than those enjoyed by a like domestic telecom firm) since it cannot directly regulate, and create an equally competitive environment for, a firm that is located outside its territory. The Member concerned is, however, in a position to regulate directly, and ensure equal conditions of competition for, the telecom *service* (on price, quality, standards) which enters into its territory.

Other examples concern educational health services that might be consumed abroad under mode 2 or, in the case of distance learning courses, delivered cross-border under mode 1. Again, a Member cannot easily ensure national treatment for the university, language school or hospital, which are located abroad. However, the Member can create, from its nationals' perspective, equal conditions of competition with respect to the educational or health *services* they receive from or consume abroad. The authorities are in a

[39] In order to facilitate the following discussion, the supply of a service is equated with its delivery. However, many more activities might be involved given that, according to Article XXVIII(b), '"supply of a service" includes the production, distribution, marketing, sale and delivery of a service'. In other words, even though a particular service might be delivered cross-border, related activities, for example, marketing or sale, may fall under other modes.

[40] The above quotes from the 2001 version of the Guidelines are already contained in the initial version of 1993 (see above n 32).

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position, for example, to ensure that educational grants or healthcare reimbursements apply also to like services supplied under modes 1 or 2.[41]

The scope for effective national treatment under modes 1 and 2 contrasts with that under mode 3 (commercial presence) and mode 4 (presence of natural persons), both of which presuppose that the service supplier is present within the territory of the regulating Member. The Member thus has effective jurisdiction to ensure an equal competitive environment for the producer/supplier as well as for the product/service. For this reason, in conformity with the wording of Article XVII of the GATS, national treatment is understood to apply in a meaningful sense to both the service *and* the supplier involved in trade under modes 3 and 4. A foreign bank established and supplying services in the regulating Member's territory may thus benefit from national treatment with respect to itself as a service *supplier* (concerning capital requirements, for example) and to a financial *service* (such as the nature or amount) that it provides.

However, not all WTO Members appear to share this view. A comparison of the limitations on national treatment that appear in the horizontal sections of current schedules points to interesting differences. (The horizontal sections of schedules contain limitations that apply across all sectors for which the Member concerned has undertaken commitments.) Overall, such limitations are far more frequent for mode 3 than for either modes 1 or 2.[42] Concerning subsidies in particular, while about one-quarter of Members have scheduled national treatment limitations under mode 3, with variations in scope, there are less than ten such cases under modes 1 and 2.[43]

[41] Tellingly, both the 1993 and 2001 Scheduling Guidelines state that the GATS relates to service consumers only 'insofar as services and service suppliers of other Members are affected. It should be noted that a Member may only be able to impose restrictive measures affecting its *own* consumers, not those of other Members, on activities taking place outside its jurisdiction' (para 30 in document S/L/92, emphasis in the original). In line with this interpretation, for example, the GATS schedule submitted by the USA contains national treatment limitations under mode 2 that restrict public reimbursement of medical expenses to the treatment provided by domestically established facilities and limit the international portability of scholarships and grants. Concerning the reimbursement of healthcare costs, only three other schedules—those of Poland, Latvia and Slovenia (prior to their EC accession)—contain similar limitations.

[42] Moreover, a detailed examination of sector-specific limitations inscribed for a representative sample of sectors showed that the share of partial commitments on mode 3 is higher than the combined shares of no ('unbound') and partial commitments scheduled under either modes 1 or 2. See Adlung and Roy, above n 9, at 1172–3.

[43] Horizontal limitations related to subsidies have been inscribed by the USA, Armenia, Jordan, Liechtenstein, Macedonia (FYROM), Norway and Switzerland. One or two other countries, whose schedules leave room for interpretation, might need to be added. In a similar vein, a further group of Members, including Uruguay, Dominican Republic, Hong Kong (China) and India, has not undertaken any national treatment commitments for subsidies under modes 1 and 2 in most or all of the sectors inscribed in their schedules (the relevant entry reads: 'unbound').

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At first glance, these disparities are surprising since Members might be expected in general to prefer assuming national treatment obligations under mode 3, where services and suppliers are under domestic regulatory control, to doing so *vis-à-vis* services produced in or supplied from a foreign jurisdiction. One possible explanation of this phenomenon is differences in the interpretation of the national treatment obligation under individual modes and, in this context, of the distinction to be made between the treatment of services and that of service suppliers. Some governments might have felt that the absence of obligation *vis-à-vis* foreign-based service suppliers also holds for the services they provide under modes 1 or 2.[44] Given the novelty of the Agreement and the involvement of many Ministries/agencies without WTO-related experience, such problems of interpretation are by no means rare; they are reflected, *inter alia*, in a significant number of dubious entries in current GATS schedules.[45]

D. Relationship between GATS commitments and PTA obligations

Having discussed the effects of GATS-minus provisions on the overall conformity of a PTA with Article V of the GATS, one issue needs further exploration. Even if the presence of some minus-provisions were not viewed as undermining the basic validity of a particular PTA under GATS Article V, could they nonetheless have legal effect on the parties' commitments contained in their GATS schedules? In practical terms, could one PTA party rebut another party's GATS claim under WTO dispute settlement provisions by invoking the lower commitments (for national treatment, market access or

[44] For example, a submission from the European Communities to the Council for Trade in Services, in 2006, does not distinguish between the treatment of services and that of service suppliers under modes 1 and 2. Rather, the EC considered '[i]n accordance with Article XVII of the GATS, and with the scheduling guidelines, . . . that the fact that subsidies provided to services suppliers of a Member are not extended to services suppliers located outside the territory of that Member does not require to list a National Treatment limitation under Modes 1 and 2'. Consistent with this interpretation, the EC further noted that other national treatment limitations under mode 2, initially inscribed by some of its new Member States in their respective GATS schedules, served an 'explanatory purpose' only and, thus, could be omitted from the consolidated EC schedule. Cases in point are entries by Poland, Latvia and Slovenia that exempted hospital treatment abroad from cost coverage under public health insurance programmes (WTO document S/C/W/273 of 9 October 2006, at 306). On the other hand, however, the EC sought to ensure that the commitments it undertook on cross-border supply under the CARIFORUM EPA, covering modes 1 and 2 of the GATS, exclude any form of subsidies (Section III.B).

[45] An analysis of close to 10,000 measures scheduled by WTO Members as market access limitations under mode 3 of the GATS, showed that over one quarter should have been inscribed under national treatment only, while an additional 20% could not be associated with any of the six types of restrictions listed under GATS Article XVI:2 (Market Access). See Adlung and Roy, above n 9, at 1177. This observation also raises the question of how the studies comparing GATS-scheduled commitments with their equivalents under PTAs or Doha-Round offers (above n 4) have dealt with dubious entries: have these simply been ignored or treated like any other limitation?

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sectoral coverage) agreed between them in their PTA? If such commitments did constitute a valid defence under WTO dispute settlement, Members would have further motivation to agree on GATS-minus elements in their PTAs.

1. Scope of jurisdiction and applicable law

There are two key elements to consider.[46] Would a WTO Panel have *jurisdiction* to examine a dispute in which a party relied on a PTA provision? And, if so, could that PTA provision be *applied* by a Panel in a manner that would trump a WTO provision? If this were the case, then WTO dispute settlement could be used as enforcement mechanism for GATS-minus provisions *vis-à-vis* PTA partners.

On the first element (jurisdiction), a WTO Panel is subject to a fundamental limitation: it may only examine a claim arising from an agreement covered by the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and not some other source such as a PTA. The DSU states explicitly that a dispute must be brought under ('pursuant to') the relevant provisions of a covered agreement.[47] This requirement would clearly exclude any attempt by a PTA party to launch a WTO dispute based solely on a trade-in-services commitment in a PTA. In addition, however, a WTO Panel might be subject to other jurisdictional limitations relating to a PTA. These could include a provision in a PTA establishing precedence for its own dispute settlement rules, or an existing decision by a PTA tribunal that had already made a ruling on the matter, through a *res judicata* effect.[48] Similarly, a WTO Panel might decline jurisdiction where the two parties had made a bilateral agreement neither to appeal a PTA ruling nor invoke WTO dispute proceedings.[49] Importantly, though, there would appear to be no other overall jurisdictional bar preventing a WTO Panel from hearing a defence, based on a provision in a PTA, to a claim arising under a WTO-covered agreement.[50]

[46] Lorand Bartels, 'Applicable Law in WTO Dispute Settlement Proceedings', 35 Journal of World Trade 499 (2001), 519, at 501; and Joost Pauwelyn, 'How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law? Questions of Jurisdiction and Merits', 37 Journal of World Trade 997 (2003), 1030, at 997–8.

[47] Article 1.1 of the DSU stipulates: 'The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement rules and procedures of the agreements listed in Appendix 1 of this Understanding hereinafter referred to as the "covered agreements"'.

[48] Pauwelyn, above n 46, at 1006 and 1028. A treaty could contain different types of jurisdiction clauses: it could allocate exclusive jurisdiction to another tribunal, provide for choice of forum but make the choice exclusive, or give compulsory (but not exclusive) jurisdiction to another tribunal.

[49] Ibid, at 1017–19.

[50] In *Mexico—Taxes on Soft Drinks*, WT/DS308/AB/R (adopted 24 March 2006), the Appellate Body found that the Panel had no discretion to decline jurisdiction over a WTO dispute brought by the USA against Mexico in a case that was similar, but not identical, to one brought by the same parties under the NAFTA. The Appellate Body decided to 'express no

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On the second element (applicable law), the matter is less straightforward. Under its standard terms of reference, a Panel is required to 'address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute'.[51] This requirement does not, however, indicate in clear terms whether a Panel may apply international law arising *outside* the WTO-covered agreements. The ambiguous language in this and related provisions of the DSU has led to a lively debate on the applicability of non-WTO law by a WTO Panel.[52] Trachtman takes the view that international law arising outside the WTO-covered agreements is not generally applicable by a WTO Panel, pointing to textual evidence in the DSU, the limited use of other international law in WTO dispute settlement, past practice under the 'old' GATT system, and the lack of implicit jurisdiction of international tribunals.[53] Pauwelyn, on the other hand, argues that the absence in the WTO Agreement of any explicit 'contracting out' from other international law means that such law would by default apply (but not necessarily prevail) in a WTO dispute, and that WTO jurisprudence presents examples of this application.[54] Given the lack of any clear provision in the WTO Agreement showing that Members intended to exclude other international law as a defence to a claim, and set against the background of an increasing overlap among trade law treaties and between these and other fields of international law, the present authors are hesitant, to say the

view as to whether there may be other circumstances in which legal impediments could exist that would preclude a panel from ruling on the merits of the claims before it'. The Appellate Body confirmed, however, that it could 'see no basis in the DSU for panels and the Appellate Body to adjudicate non-WTO disputes'. In *US–Mexico Tuna*, WT/DS381 (Panel established 20 April 2009, report not yet issued), the USA has contested the jurisdiction of the Panel to hear the case, based on a US invocation of NAFTA Article 2005.4. This provision requires that a complainant, at the request of the respondent, proceed solely under the NAFTA with respect to certain categories of measures.

[51] Article 7.2 of the DSU.

[52] Pauwelyn, above n 46; Lorand Bartels, above n 46; Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge: Cambridge University Press, 2003), 457–72; Joost Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?', 95 The American Journal of International Law 535 (2001), at 578; Gabrielle Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions', 35 Journal of World Trade 1081 (2001), 1131, at 1128–31; and Joel P. Trachtman, 'The Domain of WTO Dispute Resolution', 40 Harvard International Law Journal 333 (1999), 377, at 342.

[53] Joel P. Trachtman, 'Book Review: Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law (by Joost Pauwelyn)', 98 American Journal of International Law 855 (2004), at 861; also Joel P. Trachtman, 'Jurisdiction in WTO Dispute Settlement', in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement: The First Ten Years* (Cambridge: Cambridge University Press, 2005), 132–43. Trachtman also argues that the amendment and waiver rules in the WTO Agreement leave no possibility for amendments by a subgroup of WTO Members and, thus, exclude any application of Article 41 of the VCLT allowing *inter se* modifications of their WTO obligations.

[54] Pauwelyn, *Conflict of Norms,* above n 52, at 465–72.

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least, to subscribe to the traditional vision of the GATT/WTO as a hermetically sealed, 'self-contained' regime. It is entirely another issue, of course, whether the PTA provision raised in defence of a particular GATS claim would actually prevail.

2. Can PTA provisions modify the parties' GATS commitments?

In what circumstances could a PTA provision provide an effective defence to claims brought in the WTO? Such a defence would amount to an assertion of an *inter se* modification between the PTA parties of their GATS commitments.[55] The customary international law principles on *inter se* modifications, expressed in Article 41 of the Vienna Convention on the Law of Treaties (VCLT), would suggest that the relevant PTA provision would need to meet three criteria: (i) be binding on both parties to the WTO dispute; (ii) not be expressly prohibited by the WTO Agreement; and (iii) not affect the rights of other WTO Members.

In practice, though, a Panel would first determine whether the GATS provision could be interpreted in harmony with a PTA provision raised as a defence. In effect, Article 3.2 of the DSU requires a Panel to clarify a provision of a WTO-covered agreement 'in accordance with customary rules of interpretation of public international law', referring to the rules contained in Articles 31 and 32 of the VCLT. These rules might allow a Panel to arrive at a harmonious interpretation that avoids apparent conflict. Of course, the Panel would not be free to change the clear meaning of the terms of a GATS commitment since, under Article 3.2 of the DSU, the Panel is engaged purely in the *interpretation* of a GATS provision. One interpretative rule, set out in Article 31.3(c) of the VCLT, deserves special mention. It directs a Panel to take into account 'any relevant rules of international law applicable in the relations between the parties'. To the extent that PTA obligations constitute such 'relevant rules', a Panel might use the GATS-minus provision in the PTA to arrive at an interpretation of a GATS commitment that is not in conflict with the PTA. However, there could be a serious impediment to the approach under Article 31.3(c) insofar as the meaning of 'parties' may refer to *all* the parties to the agreement (in this case, the WTO) and not simply to the parties to the dispute.[56] Under this interpretation, a PTA would never come within the scope of Article 31.3(c) of the VCLT since, by definition, it would never comprise all WTO Members. Were it not possible for a Panel to arrive at a harmonious interpretation under Articles 31 or 32 of the VCLT, it would then need to decide whether the PTA provision

[55] See Pauwelyn, above n 46, at 1005, and the detailed discussion in Pauwelyn, 'The Role of Public International Law…', above n 52, at 547–50.

[56] The Panel in *European Communities—Measures Affecting the Approval and Marketing of Biotech Products* (WTO/DS291/R, adopted 21 November 2006) accepted that treaties are 'rules of international law' within the meaning of Article 31.3(c), but that the 'parties' referred to in that Article mean all the parties to the WTO.

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prevailed over the conflicting GATS provision, in accordance with the three listed criteria.

With respect to the first criterion under Article 41 of the VCLT, it is a given under the current scenario that the parties to the dispute would be bound by both the WTO Agreement and the PTA. As for the second criterion, the extent to which a GATS-minus provision in a PTA could be considered as impairing the validity of the PTA itself was discussed earlier. In the authors' view, an individual GATS-minus provision in an otherwise valid PTA is not prohibited *per se* by the terms of Article V of the GATS. The third criterion for the effective invocation of a PTA defence is more troublesome. It would require the PTA provision not to affect the rights of third parties—in our hypothesis other WTO Members. This criterion reflects the general principle found in Article 34 of the VCLT: 'A treaty does not create either obligations or rights for a third State without its consent'. Article 41 of the VCLT permits parties to a multilateral treaty to modify a treaty between themselves only if this 'does not affect the enjoyment by other parties of their rights under the treaty or the performance of their obligations' or if the modification 'does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole'.[57] The obvious question arises: is a PTA obligation that *permits*, but does not obligate, its parties to maintain market access or national treatment at levels more restrictive than those they must maintain under their GATS commitments, something that will 'affect the enjoyment' by other WTO Members of their rights.

The conventional view is that the WTO Agreement, although a multilateral instrument, contains a bundle of obligations that are bilateral in nature. This is largely based on the perception that conditions of trade between two Members generally affect only those Members and not third parties.[58] On this view, a modification of scheduled access conditions between PTA parties would not be seen as affecting other WTO Members. However, this assumption may need to be re-examined with respect to GATS commitments. Compared to trade in goods, the purely bilateral nature of trade in services is much less evident. As noted before, trade in services is defined in the GATS to cover four modes of supply, including transactions which may affect factors of production (juridical or natural persons) belonging to third parties. For example, minus-commitments under mode 1 (cross-border supply) would affect not only the domestically owned exporters of a PTA

[57] VCLT Articles 41.1(b)(i) and (ii).

[58] Joost Pauwelyn, 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?', 14 Journal of International Economic Law 907 (2003), 951, at 930–1. See also Pauwelyn, 'The Role of Public International Law...', above n 52, 548–9.

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party, but also suppliers of other Members that are established there, or are seeking to establish, under mode 3 (commercial presence) or mode 4 (presence of natural persons). The interests of non-PTA suppliers thus figure more prominently under the GATS than they do in the 'one-mode-only' framework of the GATT: services obligations are much less bilateral in nature than trade obligations for goods. In turn, this suggests that WTO Panels are more likely to consider GATS-minus provisions to affect other Members in their 'enjoyment' of WTO rights than they would do in merchandise trade under the GATT.

Moreover, there is not only the possibility that a third party might launch a case to ensure the continued extension of the trading conditions between the PTA signatories as laid down in their respective GATS schedules, but also that one of the signatories, possibly in view of deterrent effects on international inward investment into its territory, might later insist on the other signatory applying its GATS-committed regime to bilateral trade again.

3. If a PTA modified GATS commitments, what would be the consequences?

If the three conditions stipulated in Article 41 of the VCLT for the validity of an *inter se* modification by a PTA provision were considered to be satisfied, a determination would still need to be made as to whether this provision would prevail over the conflicting WTO norm. This issue of precedence would be decided either through an explicit rule in either the WTO Agreement or the PTA, or because the PTA provision was later in time (*lex posterior*) or more specific to the subject matter (*lex specialis*).[59]

In deciding whether there is precedence of a PTA provision, a Panel would need to examine as a preliminary issue whether a 'conflict' exists at all between the two provisions when read together. In the matter at hand, would the Panel consider that a *permission* in a GATS-minus provision in a PTA (to impose market access or national treatment conditions less liberal than under the GATS) would 'conflict' with an *obligation* in the GATS not to do so? A traditional view holds that where, as in this case, it is possible to meet the requirements of both provisions simultaneously (by maintaining actual access

[59] Article 41.1 of the VCLT provides that '[t]wo or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if: (a) the possibility of such a modification is provided for by the treaty; or (b) the modification in question is not prohibited by the treaty and: (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.'

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at the level of GATS commitments), then no conflict exists.[60] This narrow view of conflict is questioned by other authors.[61]

Should the WTO Panel take the view that actual conflict exists, it would need to determine whether either treaty provides an explicit conflict rule that gives precedence to or excludes WTO rules. If so, this would effectively settle the issue. Otherwise, precedence would need to be accorded on the basis of the later-in-time rule (expressed in Article 30 of the VCLT) or on the basis of more specific subject matter (*lex specialis*, a principle of interpretation of public international law).[62] In fact, many of the PTAs would be considered as later-in-time with respect to the WTO Agreement, if the reference date for the latter were taken to be 1995, when it entered into force for original WTO Members. However, the issue could arise as to whether the relevant moment for comparison was instead the entry into force of the WTO Agreement for the particular PTA party, or the date of entry into force of the GATS commitment concerned.[63] With respect to the *lex specialis* rule, a Panel would need to examine whether the terms of the particular PTA actually contained more specific rules (and not simply higher levels of liberalization) in relation to the GATS. In our view, the more specific nature of a PTA could not be taken for granted.

Summarizing the relationship between GATS commitments and PTA obligations in WTO dispute settlement, there would appear to be no *a priori* jurisdictional impediment to using the PTA as a defence (but not as a claim). However, on the issue of applicable law in case of conflict between the two sets of obligations, some uncertainties arise. The Panel might reject a GATS-minus provision in the PTA as applicable law insofar as it could be seen as unduly affecting third-party rights under the GATS or, more broadly, under the WTO Agreement. Or a WTO Panel might find that no conflict exists between the two provisions, where it is possible to meet the stricter GATS commitment by not exercising the permission in the PTA to apply the GATS-minus elements. Finally, in the exercise of the conflict rules, uncertainty could arise as to the proper dates for comparison, or as to the relative specificity of the subject matter covered in the GATS and the PTA.

[60] According to Jenks, '[a] conflict of law-making treaties arises only where simultaneous compliance with the obligations of different instruments is impossible'. (Wilfred Jenks, 'The Conflict of Law-Making Treaties', 30 British Yearbook of International Law 401 (1953), at 451.) See also Marceau, above n 52, at 1083ff.

[61] Erich Vranes, 'The Definition of 'Norm Conflict' in International Law and Legal Theory', 17 European Journal of International Law 395 (2006), 418, at 401–7; and Pauwelyn, *Conflict of Norms*, above n 52, at 176ff.

[62] Marceau, above n 52, at 1091–2.

[63] For example, most Members' WTO commitments on basic telecommunications and financial services date only from the extended negotiations in these sectors that were concluded in the course of 1997, and the national ratification processes took additional months, in some cases years, to complete.

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III. RECENT EXAMPLES OF 'NEGATIVE PREFERENCES'

A. Main focus

The following section provides some evidence of GATS-minus provisions in PTAs to illustrate the issues raised above. The spotlight is on three relatively recent agreements; one between developed and developing countries (the EC and the CARIFORUM States), one between developed countries (the USA and Australia), and one between developing countries only (China and the ASEAN members). Their selection does not imply any judgement on the frequency or intensity of 'negative (GATS-minus) preferences' in these as compared to other agreements, but simply reflects our intention to discuss cases that, given the composition of participants, may be considered proto-typical for recent developments. Also, since they involve some of the largest players in world services trade, the three agreements could be viewed by others as a model or potential template for any of their own initiatives. There are clear indications that GATS-minus elements already are a widespread, though largely ignored, phenomenon. According to the preliminary results of an ongoing research project, covering 56 PTAs in services, 46 contain some form of minus-commitments in either their horizontal or sectoral sections.[64]

Special attention is given in the following discussion to subsidy-related provisions, reflecting the fact that, in several instances, these provisions depart conspicuously from the parties' GATS commitments on national treatment and, second, that *discriminatory* tax and subsidy regimes may prove highly effective in denying national treatment for trade protective purposes, given the absence of tariff regimes in services trade. An attachment to the 2001 Scheduling Guidelines lists the following examples of frequently scheduled national treatment restrictions[65]: (i) subsidy measures; (ii) tax measures; (iii) other financial measures (such as fees and charges); (iv) nationality requirements; (v) residency requirements; (vi) licensing and qualification requirements; (vii) registration requirements; (viii) authorisation requirements; (ix) technology transfer or training requirements; (x) local content requirements; and (xi) ownership of property or land. Among these, subsidies, taxes and other financial measures are possibly the only instruments that can be used effectively across all service subsectors and modes of supply, including modes 1 and 2. The impact of other measures,

[64] Information provided by Sébastien Miroudot and Marie Sudreau (OECD Secretariat). Such research projects tend to be far more resource-intensive than comparable attempts in merchandise trade, given the existence of significant differences in the sector classifications used in individual agreements (there is no compulsory classification system for WTO Members' GATS schedules, see above n 15), very subtle modifications in sectoral coverage (see also Section III.B) and the inscription of vague, non-harmonized terms and concepts (for example, in specifying exceptions for 'public services' or defining the groups of natural persons covered by individual agreements).

[65] Above n 32, WTO document S/L/92, at 16–18.

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though potentially highly trade distortive (such as nationality, registration and authorization requirements), tends to concentrate on services that typically require some form of local presence.

Reflecting the relative economic importance of individual modes, in terms of their shares in overall services trade under the GATS, the focus of the following considerations is on modes 1 to 3, which are estimated to account for over 95% of the total.[66] Moreover, given the highly restrictive nature of virtually all GATS commitments on mode 4, it might prove difficult to find GATS-minus provisions that would be as evident as those discussed below.[67]

B. EC—CARIFORUM EPA

Observers have lauded the EC–CARIFORUM EPA for featuring many WTO/GATS-plus provisions.[68] Reportedly, the EC has ultimately undertaken commitments under this Agreement in over 90% of the 160-odd subsectors contained in the Sectoral Classification List W/120, as compared to about 115 subsectors, or 70% covered by its GATS schedule. The respective averages for some CARIFORUM states are estimated to be in the order of 50%,[69] as compared to coverage ratios of between 5 and close to 40% of the relevant GATS schedules. The EPA commitments are surrounded by significant obligations that are either broader or deeper than those resulting from, or assumed under, relevant WTO provisions ('WTO plus') or relate to areas not addressed in WTO Agreements, such as Aid-for-Trade, or compliance with international labour or environmental standards ('WTO extra').[70]

Title II of the EPA contains various chapters dealing, *inter alia*, with commercial presence (investment) across all sectors, subject to specified exemptions (Chapter 2); cross-border supply of services (equivalent to modes 1 and

[66] According to Joscelyn Magdeleine and Andreas Maurer, *Measuring GATS Mode 4 Trade Flows,* WTO Staff Working Paper ERSD-2008-05 (2008), at 18.

[67] See also Antonia Carzaniga, 'A Warmer Welcome? Access for Natural Persons Under PTAs', in Juan A. Marchetti and Martin Roy (eds), *Opening Markets for Trade in Services – Countries and Sectors in Bilateral and WTO Negotiations* (Cambridge: Cambridge University Press, 2008), at 475–502.

[68] See, for example, Sauvé and Ward, above n 19, at 5. The Agreement was signed on 15 and 20 October 2008 and has been applied provisionally since 29 December 2008. The CARIFORUM signatories are 14 Members of CARICOM (Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, and Trinidad and Tobago) plus the Dominican Republic. The EPA schedules of the Bahamas and Haiti had not been submitted at the time of writing. As indicated before, the present article does not attempt to provide a comprehensive assessment of this or any other PTA, but to focus on the existence of GATS-minus elements and their potential relevance from a legal and (GATS-)systemic point of view.

[69] Ibid, at 21.

[70] This distinction between WTO-plus and WTO-extra obligations is inspired by Horn et al., above n 4. See also Section IV.

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2 of the GATS, Chapter 3); and the temporary presence of natural persons for business purposes (Chapter 4). Again, the scope of the latter chapter is broadly defined and reaches beyond services. An introductory chapter (General Provisions) sets the stage. Its most interesting clause, for the purposes of the present article, exempts subsidies granted by the signatories from national treatment and MFN obligations across all modes (Article 60.3).[71]

In contrast, the horizontal section of the Communities' GATS schedule does not contain any limitations on national treatment, whether subsidy-related or otherwise, for modes 1 and 2. Concerning mode 3, apart from subsidies for research and development and a carve-out for subsidies extended within the public sector, the horizontal section of the schedule implies no national-treatment constraints for subsidies that are destined for juridical persons established within the EC.[72] A closer look at the 115-odd subsectors scheduled by the Communities under the GATS, with a focus on Germany, the largest EC Member State, reveals some 30 cases under mode 1 (cross-border supply), less than 5 under mode 2 (consumption abroad) and less than 10 under mode 3 (commercial presence) where the relevant sector entries, mostly 'unbound', would provide scope for discriminatory subsidies.[73] In other words, with regard to modes 1 to 3, the Communities' GATS schedule offers more favourable national-treatment conditions in at least 80 subsectors than the EPA. On the CARIFORUM side, no country maintains subsidy-specific limitations on national treatment under the GATS, although there are various instances on non-commitments ('unbound').

As indicated before, the EPA offers significantly more leeway in this regard. Though the Agreement's General Provisions already exclude subsidies from MFN and national treatment, several CARIFORUM countries

[71] Similar cases can be found in other PTAs as well. For example, the services and investment chapters of the Free Trade Agreement between Mexico, El Salvador, Guatemala and Honduras of 2001 exempt subsidies in all forms from national treatment and MFN obligations. However, only one of the four signatories, Mexico, had inscribed a related national-treatment limitation in its 1995 GATS schedule; it is confined to 'research and development subsidies and incentives to small service enterprises' (WTO document GATS/SC/56 of 15 April 1994); see Adlung and Carzaniga, above n 12, at 385.

[72] Sauvé and Ward, above n 19, at 13, take the view that the EPA's approach 'is more straightforward and absolute than that found under the GATS where both the MFN and, in scheduled sectors, national treatment disciplines apply to services-related subsidies pending the completion of fuller disciplines envisaged under the Article XV negotiating mandate'. Yet, there is nothing in the GATS that would condition the application of the Agreement's MFN and national-treatment provisions on the outcome of the negotiations pursuant to Article XV (Section II.B.3).

[73] These figures are approximate only because some subsectors contained in the Sectoral Classification List W/120 have been split and/or re-allocated in the Communities' schedule. This is a common feature of many GATS schedules that complicates not only the counting of subsectors based on the Classification List, but also the identification of GATS-plus or -minus elements in PTAs.

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have reiterated this exclusion in the common CARIFORUM schedule. In a similar vein, the two lists of commitments submitted by the European Communities, covering commercial presence and cross-border supply, respectively, explicitly refer back to Article 60.3 of the Agreement and its exclusion of 'measures concerning subsidies by the Parties'. Sauvé and Ward take this as additional evidence of the signatories' intention not to assume any relevant disciplines under the EPA. While stressing that the Agreement exceeds in several regards the relevant thresholds of Article V of the GATS, the authors acknowledge that its treatment of subsidies is 'arguably GATS-minus'.[74] Yet, the question remains whether excess performance in many areas could offset shortfalls elsewhere and, thus, ensure compliance with the benchmarks set in Article V (Section II.B.3 above).

In addition, though the sectoral scope of the EPA is broader overall than any of the signatories' GATS schedules, there is at least one case in which the coverage of a subsector has been curbed. The Communities' current GATS schedule, still applying to 12 Member States only (EC 12), includes commitments on hospital services as captured by the relevant classification number (CPC 9311) contained in the Classification List W/120. In all cases, the commitments scheduled in this subsector are without limitations concerning national treatment for modes 2 (consumption abroad) and 3 (commercial presence).[75] These entries for the 'old' Member States will remain unchanged once the schedule for EC 25 enters into force.[76] In contrast, the Communities' EPA schedule reduces the scope of health and social services to 'privately funded services', thus excluding the public sector segment which—via portability of health insurance entitlements—could offer commercial potential for a number of CARIFORUM countries.[77] The exclusion might be attributable, *inter alia*, to increased sensitivities within the EC, following a number of high-profile rulings by the European Court of Justice (ECJ) that have dealt with the portability of public health insurance between EC Member States since the late 1990s.[78]

[74] Sauvé and Ward, above n 19, at 35.

[75] As discussed before, it appears reasonable to assume that full commitments on mode 2 are tantamount to guaranteeing insurance portability under public health schemes to nationals consuming like services abroad. As distinct from hospital services, the EC's GATS commitments on educational services are confined to 'privately funded education services' (WTO document GATS/SC/31 of 15 April 1994), thus excluding any government-sponsored scholarships from coverage.

[76] At the time of writing, while the schedule for the enlarged Communities (EC 25) had been certified under relevant GATS provisions, it was still awaiting ratification by all EC Members.

[77] The CARIFORUM schedule contains no corresponding modification. Concerning the economic potential of 'health tourism' for Caribbean countries, see Anthony Gonzales et al., *Health Tourism and Related Services: Caribbean Development and International Trade*, Final Report submitted to the Regional Negotiating Machinery (RNM) 2001. See http://www.iadb.org/intal/intalcdi/PE/2009/03451.pdf (visited 27 June 2010).

[78] Overall, the rulings tended to confirm the principle of insurance portability for both ambulatory treatment and, under specified conditions, hospital treatment. However, uncertainties

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Apart from obvious extensions of sectoral coverage under the EPA, not least in maritime transport, there are several instances, including in financial services, where definitional modifications apparently have broadened the reach of individual subsectors compared to their counterparts under the GATS.[79] These extensions in sectoral coverage, like the reduction in the case of hospital services, seem to accommodate predominantly trade interests of the EC. From a systemic point of view, again, the question arises whether Article V:1 would allow PTA Members to balance compromises in some areas (such as hospital services), as minor as these may appear, with additional coverage in many others. Should the response be in the negative, the EPA might hardly constitute a model for others to emulate.

Tellingly, the MFN clause in the CARIFORUM EPA does not refer to, and guarantee as a minimum, the levels of treatment assumed by the signatories under previous PTAs or the GATS. Rather, in the case of the EC, the relevant provisions (Articles 70.1(a) and 79.1(a)) refer to 'treatment no less favourable than the most favourable treatment applicable to like services and services suppliers of any third country with whom it concludes an economic integration agreement *after the signature of this Agreement*'.[80] Thus, in order to defend their level of treatment under the GATS, the CARIFORUM countries would need to invoke WTO dispute settlement provisions (Section II.D). However, in such a case, with its partners seeking redress outside the scope of the Agreement, could there be pressure within the EC to reconsider the 'WTO-extras' it provides under the EPA, including development funding?

C. Australia–United States Free Trade Agreement (AUSFTA)

The Australia–United States Agreement as well contains a variety of features that reach beyond the parties' GATS commitments, including sectoral coverage and levels of liberalization.[81] Also, concerning subsidies, AUSFTA

remained, reflecting the diversity of the national healthcare and health insurance regimes. For a discussion of relevant cases, see Vassilis G. Hatzopoulos, '*Killing* National Health and Insurance Systems but *Healing* Patients? The European Market for Health Care Services after the Judgements of the ECJ in VanBraekel and Peerbooms', 39 Common Market Law Review 683 (2002), at 729; and Gareth Davies, 'The Effects of Mrs. Watts' Trip to France on the National Health Service', 18 King's Law Journal 158 (2007), at 167. In July 2008, the Commission adopted a draft Directive with a view to establishing a common framework for supplies of healthcare between the Member States (http://ec.europa.eu/health/ph_overview/co_operation/healthcare/cross-border_healthcare_en.htm, visited 27 June 2010.) At the time of writing, the EU Council had reached a common position on the draft Directive which was then sent for a second reading to the European Parliament (according to *Europolitics*, 9 June 2010).

[79] Sauvé and Ward, above n 19, at 38 and 41.

[80] Articles 70.1(a) and 79.1(a) relate, respectively, to commercial presence and cross-border supply of services; emphasis added.

[81] The Agreement was signed on 18 May 2004 and entered entry into force on 1 January 2005. Main features are described in a WTO Secretariat Report, WTO document WT/REG184/4 of

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provides more definitional precision than the parties' GATS schedules or the GATS itself insofar as the term 'subsidy' is delimited to include government-supported loans, guarantees, and insurance. Although the wording of relevant AUSFTA obligations differs conspicuously from their counterpart GATS provisions, it might be argued that for most practical purposes, the differences do not matter strongly.[82] Again, however, a comparison with GATS schedules, in particular with Australia's commitments, reveals several GATS-minus elements.

The carve-outs for subsidies inscribed in AUSFTA are comparable in scope to those provided under the EC–CARIFORUM EPA. In particular, the chapter on cross-border trade (Chapter 10), essentially capturing supplies under modes 1 and 2 of the GATS, but also including measures 'affecting the presence... of a service supplier of the other Party', expressly exempts from coverage subsidies or grants. The national treatment and MFN obligations of the chapter, among others, thus do not apply. The chapter on investment (Chapter 11) contains a similar subsidy-related exemption across all covered sectors, except financial services.

The GATS commitments scheduled by the *United States* under modes 1 and 2 have been subjected essentially to the same limitations. Concerning subsidies, the relevant horizontal entry simply reads 'unbound'. Also, the limitations regarding the international portability of public health insurance entitlements and of scholarships, scheduled by the USA as national-treatment limitations under both educational and hospital services, have a

4 June 2007. For an in-depth analysis of the Agreement and its broader policy context from an Australian perspective, see Andrew D. Mitchell and Tania Voon, 'Australia–United States Free Trade Agreement', in Simon Lester and Bryan Mercurio (eds), *Bilateral and Regional Trade Agreements – Case Studies* (Cambridge: Cambridge University Press, 2009), 6–43.

[82] Articles 10.2 and 10.3 of the FTA read: 'Each Party shall accord to *service suppliers* of the other Party treatment *no less favourable* than that it accords, in *like circumstances*, to its own service suppliers' or, respectively, '...to *service suppliers* of a non-Party' (emphasis added.) Thus, the concept of 'likeness' no longer builds on the notion of 'like services and service supplier' as in the GATS, but on the existence of 'like circumstances'. The signatories might thus be able to differentiate between foreign and domestic producers/products for a wider range of factors than would be permissible under the GATS, including factors related to the public policy context in which a service is provided. (See Federico Ortino, 'Services', in Simon Lester and Bryan Mercurio (eds), *Bilateral and Regional Trade Agreements – Commentary and Analysis* (Cambridge: Cambridge University Press, 2009), 184–214, at 202.) Furthermore, the explicit reference, as in Article XVII of the GATS, to the treatment of both *services* and service *suppliers* has disappeared from this FTA; and the benchmark, in GATS Article XVII:3, of treatment that does not 'modify the conditions of competition' has been replaced by a simple reference to 'treatment no less favourable than...'. Nevertheless, it needs to be borne in mind that the scope of relevant AUSFTA obligations, specified in Article 10.1, extends to measures 'affecting cross-border trade in services by service suppliers of the other Party', including measures 'affecting the production, distribution, marketing, sale and delivery', as well as to measures '*affecting* the purchase or use of, or payment for, *a service*' (emphasis added).

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broadly phrased counterpart in the FTA; in an Annex, the authorities have reserved the right not to apply the Agreement's national treatment and MFN disciplines to 'Social Services' (Annex II). As indicated before, this begs the question whether a reiteration of GATS-scheduled national treatment limitations is consistent with the benchmark, in Article V:1 of the GATS, of eliminating 'substantially all discrimination in the sense of Article XVII' in the sectors that are covered by the PTA. It might prove difficult to provide an answer in the abstract, without considering the commercial significance of the measures involved.

Concerning mode 3, however, there is an obvious element of GATS-minus treatment. The subsidy-related national-treatment limitations the USA had scheduled under the GATS are confined to research and development subsidies and, thus, smaller in scope than those scheduled under the FTA.[83] Overall, the United States' GATS schedule covers 110 subsectors.

Contrasting with the US approach, *Australia* has undertaken full commitments under the GATS on national treatment for modes 1 and 2 (cross-border trade and consumption abroad, respectively) across virtually all subsectors it has scheduled under the GATS, 103 in total. There are some minor exceptions concerning mode 1, which has been left unbound in 16 subsectors, mostly for a perceived lack of technical feasibility to supply these services cross-border.[84] In contrast, all commitments on mode 2 are without limitations. Mirroring the United States' schedule, Australia's only subsidy-related limitation under mode 3 consists of a horizontal carve-out for subsidies destined for research and development. At the level of individual subsectors, Australia has assumed full commitments on national treatment under mode 3 across all GATS-committed services, apart from three educational services (secondary, higher, and other education).

In other words, as far as subsidies are concerned, the gap between Australia's GATS commitments—in particular the almost complete absence of limitations on cross-border trade and consumption abroad—and its AUSFTA obligations is significantly wider than that of the USA.[85]

[83] In addition, the GATS commitments feature some (possibly minor) limitations under mode 3 concerning federal government support for outward direct investment, trade and development financing, and loans for small businesses.

[84] The subsectors are: placement and supply services of personnel; building-cleaning services; construction (four subsectors); environmental services (four subsectors); health and social services; hotels and restaurants; aircraft maintenance and repair; road passenger and road freight transport (two subsectors); and storage and warehouse services.

[85] Australia has concluded further PTAs under Article V with similar exclusions for subsidies from national treatment, such as the Agreements with Thailand in 2005 and Chile in 2009. In turn, Thailand's GATS schedule (75 subsectors) excludes mode 1 from national treatment in most subsectors, while often providing for full national treatment under mode 2; the limitations scheduled under mode 3 do not relate to subsidies. In the case of Chile, national treatment under both modes 1 and 2 is unbound in most GATS-scheduled subsectors (42 in total); mode 3 is bound without subsidy-related limitations.

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It might be argued that some of these minus-commitments exist simply on paper, reflecting requests expressed by the USA, and will not ever be implemented by Australia. Nonetheless, even non-utilized limitations may affect the legal status of the PTA. Article V:1 of the GATS explicitly requires the *agreement*, rather than the parties' actual trade practices, to provide for 'the absence or elimination of substantially all discrimination'.

Since the MFN provisions of Chapters 10 and 11, dealing with cross-border trade and investment, respectively, exclude subsidies from coverage, it would be impossible for either the USA or Australia to insist *under AUSFTA* that the other party comply with any more stringent disciplines it might have undertaken in other contexts, including the GATS.

D. China–ASEAN Agreement on Trade in Services

The national-treatment obligations of the China–ASEAN Agreement on Trade in Services (Article 19) are modelled largely on Article XVII of the GATS and, accordingly, set the same benchmarks: no modification of 'the conditions of competition' between 'like services and service suppliers'.[86] As under the GATS, the scope of these obligations is confined to sectors listed in individual country schedules and can be curbed by limitations. Interestingly, there is no MFN clause concerning the extension of more favourable conditions individual signatories might have negotiated in other contexts.

Article 21 provides for the negotiation of 'packages of specific commitments' under the Agreement, in which the parties 'shall endeavour' to improve on their GATS schedules. A first package of commitments was annexed to the Agreement and a second package was due to be submitted within one year from the Agreement's entry into force, that is, by July 2008.[87] However, subsidies and grants are completely exempt from virtually all disciplines. The Agreement merely features (i) a consultation clause,

[86] The Agreement was notified by China and, acting on behalf of the ASEAN Members of the WTO, by Singapore (WTO document S/C/N/463 of 2 July 2008). It had been signed on 14 January 2007 to enter into force on 1 July 2007. The ASEAN signatories are: Brunei Darussalam, Cambodia, Indonesia, Lao, Malaysia, Myanmar, Philippines, Singapore, Thailand and Viet Nam. For a discussion of core features, in the context of other preferential agreements in services involving East-Asian countries, see Fink and Molinuevo, above n 4. An overview of the framework agreement on comprehensive economic co-operation between ASEAN and China of 2002 and the following agreements on goods and services is provided by Jiangyu Wang, 'Association of South Asian Nations – China Free Trade Agreement', in Simon Lester and Bryan Mercurio (eds), *Bilateral and Regional Trade Agreements – Case Studies* (Cambridge: Cambridge University Press, 2009), 192–225. However, as indicated before, both publications, like others, pay no attention to the existence of GATS-minus commitments.

[87] It proved impossible in preparing this article to trace a second package of commitments using the links provided by China and Singapore in their notification to the WTO (S/C/N/463) and the ASEAN Secretariat's Website. The latter source merely confirms the intention to conduct successive rounds of market access negotiations 'over the next one year as the Agreement

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modelled on GATS Article XV:2, in case subsidies significantly affect trade in committed sectors; (ii) an obligation to provide information on service-related subsidies, on request; and (iii) a commitment to reviewing the treatment of subsidies 'when relevant disciplines are developed by the WTO'. Article 14 expressly confirms that the exemption for subsidies and grants from substantive disciplines applies regardless of whether these are offered to domestic services, service consumers or service suppliers.

The sectoral range of the commitments submitted by China for the first package has been kept significantly smaller than the country's GATS schedule. For example, the submission does not contain any commitments on professional services (accounting for eight subsectors in China's GATS schedule), various other business services (seven subsectors), communication services (18 subsectors), distribution services (five subsectors), educational services (five subsectors), financial services (12 subsectors), tourism services (two subsectors) and maritime and inland waterways transport (six subsectors). In virtually all of these subsectors, China has assumed full commitments on national treatment for modes 1 to 3 under the GATS.[88] (A horizontal limitation under mode 3, contained in China's GATS schedule, relates only to *existing* subsidies for service *suppliers* in three broadly defined sectors, which overlap with two subsectors contained in the first package.) On the other hand, China has extended the categories of persons covered by its horizontal commitments on mode 4 (presence of natural persons) and newly included some 10 subsectors in the first package, mostly business services, that are not covered by its GATS schedule. In virtually all cases, however, national treatment under modes 1 to 3 has been left unbound. Overall, compared to China's GATS schedule (93 subsectors), the sectoral scope has thus shrunk by more than one-half and, in addition, the related national treatment disciplines have been curbed in depth.

The schedule that Indonesia, the largest ASEAN Member, has submitted under the first package consists of less than a dozen of the subsectors contained in the Classification List W/120.[89] Coverage is thus far below the 45 subsectors inscribed in Indonesia's GATS schedule. Apart from tourism and some energy-related activities, national treatment under modes 1 and 2 has been left unbound, while various limitations of a horizontal and, in some cases, sector-specific nature apply to mode 3. This pattern is typical for Indonesia's GATS commitments as well.

contains a built-in agenda for the conclusion of a second package of commitments one year from its entry into force'. See http://www.aseansec.org/19294.htm (visited 27 June 2010).

[88] Exemptions exist in subsectors of construction, distribution, educational, financial and transport services.

[89] As in a number of other PTAs, the comparison with the Classification List W/120 is complicated by the fact that Indonesia has used different classifications in various instances. See also above n 73.

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IV. WHY DO GOVERNMENTS SETTLE FOR 'NEGATIVE PREFERENCES'?

At first glance, GATS-minus commitments in PTAs could be deemed largely irrelevant. In particular, they are not applicable to trade with non-parties which, in turn, might relish any newly arising market opportunities. Otherwise, if subjected to GATS-minus treatment as well, 'outsiders' are given a lever, potentially, to challenge the PTA's status under Article V of the GATS. Such outsiders may include the home-country governments of foreign-invested companies within the PTA area. Furthermore, as argued before (Section II.D), a PTA signatory might be confronted with its co-signatory taking legal action in the WTO, with reasonable chances of success, in order to ensure that any more favourable GATS commitments are being honoured. If so, however, what factors or combinations of factors could explain the scheduling of 'negative preferences'?

— First, interpretation problems related to relevant GATS provisions. The existence of such problems should not come as a surprise, given administrations' still limited experience with the concepts involved. For example, some Members may have initially committed fewer sectors under the PTA than under the GATS assuming, like some commentators[90], that it is sufficient to meet the requirement of 'substantial coverage' over an undefined timeframe. The risk of such misinterpretations may have subsided over the years, but cannot be ignored completely since WTO Members have remained reticent, possibly for tactical reasons related to the ongoing negotiations and associated resource constraints, to use existing GATS fora with a view to deepening their understanding of the Agreement.[91] In particular, issues of interpretation related to Article V never have been addressed in depth in the potentially competent Committee (Committee on Specific Commitments).
— Second, over-ambitious commitments in current GATS schedules. PTA parties might be tempted to undercut their existing GATS commitments, including in areas such as subsidies, if these appear too generous with hindsight. For example, the drafters of some initial GATS schedules, in the early 1990s, might have misunderstood the negotiating mandate on subsidies, in Article XV, to imply that subsidies were exempt from national treatment obligations in scheduled sectors. Also, some 'old' commitments, for instance on hospital services, may nowadays be viewed from a different legal perspective; and public perceptions might have changed concerning the appropriate

[90] Above n 30 and 31.
[91] See Rudolf Adlung, *Services Liberalization from a WTO/GATS Perspective: In Search of Volunteers*, WTO Staff Working Paper ERSD-2009-05 (2009), at 14–17.

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role of markets (and trade) in socially relevant services. In such cases, GATS-minus commitments may be expected to reduce, in terms of potentially affected Members, the scope for friction and, possibly, the 'costs' of future renegotiations. From a legal perspective, of course, such expectations appear overly optimistic.

— Third, non-economic considerations. Some PTAs may predominantly, if not exclusively, serve a political purpose as symbols of wider regional cooperation, with economic objectives taking back stage.[92] Depending on the context, participants might be ready, in their mutual trade relations, to compromise on the access conditions they are normally committed (or entitled) to under the GATS. From a political perspective, such agreements may still be termed 'preferential', although their impact on services trade, if any, rather points to the opposite. The inclusion of GATS-minus obligations in agreements involving recently acceded WTO Members, including low-income economies and LDCs (such as Viet Nam and Cambodia), might have been motivated by these countries' comparatively challenging commitments under the GATS, which are certainly more difficult to honour than most of those undertaken by original WTO Members at the end of the Uruguay Round.[93]

— Fourth, political or economic sensitivities. One of the PTA parties may not be able or willing, for domestic institutional or political reasons, to discard its GATS-scheduled national treatment limitations, and insist on some of them being inscribed in the PTA as general, mutually applicable exclusions. (The subsidy-related limitations scheduled by the USA might be a case in point.) The other signatory may be ready to condone such demands either because general exclusions, unlike country-specific exemptions, help to avoid the—politically inconvenient—impression of lopsided obligations or because of comparable own interests in excluding other areas. In extreme cases, the quest for symmetry (or 'negotiating reciprocity') could ultimately result in a PTA containing more limitations than the parties' GATS schedules individually.[94]

[92] An analysis of recent PTAs even suggests that they have been motivated mostly by political rather than economic considerations. See Olivier Cattaneo, 'The political economy of PTAs', in Simon Lester and Bryan Mercurio (eds), *Bilateral and Regional Trade Agreements - Commentary and Analysis* (Cambridge: Cambridge University Press, 2009), at 47 and 50.

[93] For example, Viet Nam's GATS schedule contains commitments in 105 service subsectors, compared to an average for other developing countries of slightly over 40, while Cambodia's 94 GATS-committed subsectors compare with an average of 24 for other LDCs. See WTO Secretariat, *Trade Profiles 2009* (Geneva: World Trade Organization, 2009), at 31 and 181, and Adlung and Roy, above n 9, at 1170.

[94] Of course, the likelihood of such an outcome hinges on the signatories' relative economic weight and their political and economic interest in negotiating a PTA. Concerning AUSFTA see, for instance, Richard E. Feinberg, 'The Political Economy of United States' Free Trade

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— Fifth, time constraints. In view of the political motivations underlying many preferential agreements, these are prepared within a rather short timeframe.[95] For example, the average negotiating time of the eight PTAs covering goods and services that the USA concluded between January 1995 and November 2005 was 2.2 years, ranging from a mere 0.7 years in the case of Oman to 3.1 years for the agreements with Singapore and Chile.[96] The parties' interest in sending a (political) signal might prevail in some cases over conflicting considerations, including those calling for thorough government-internal verification in the light of relevant WTO obligations. In the end, a coordinating entity may be inclined to take on board ('copy and paste') the interests expressed by different ministries without engaging in potentially time- and resource-intensive consultation processes.

— Sixth, GATS-minus commitments are put into a broader economic or developmental policy context. There might be instances where the minus-commitments by one party are more than offset, in the other party's view, by 'payments' in non-GATS and, possibly, non-WTO currency.[97] Or, from a different perspective, the conclusion of an agreement involving particular policy benefits, including development assistance, may depend on the recipient party accepting certain (GATS-minus) trade constraints. Of course, in order for any such constraints to be effective, the service suppliers concerned must account for significant shares in the relevant markets, the resulting niches be difficult to fill by other external suppliers, and the envisaged measures be suitable for discriminatory implementation.

The findings of a recent study by Horn, Mavroidis and Sapir are instructive in the latter context.[98] Based on a comparison of the PTAs concluded by the European Communities and the USA between 1995 and October 2008, 14 agreements each, the authors submit that in particular the former set of

Arrangements', 26 The World Economy 1019 (2003), at 1032, and Mitchell and Voon, above n 81, at 8.

[95] Note that the range of issues covered by a fully fledged PTA might be even broader than those negotiated in the Doha Round, which currently is in its ninth year.

[96] Michael J. Ferrantino, *Policy Anchors: Do Free Trade Agreements And WTO Accessions Serve As Vehicles For Developing-Country Policy Reform?* (Washington, DC: U.S. International Trade Commission, Office of Economics Working Party, 2006), at 9 and 26.

[97] Reportedly, alleged imbalances in the CARIFORUM EPA between non-enforceable development provisions and legally binding trade obligations have sparked much criticism in the region (Sauvé and Ward, above n 19, at 44). See also Allison Francis and Heidi Ullrich, 'Analysis of Economic Partnership Agreements: Trade in Services Case Study of the CARIFORUM-EU Agreement', in GTZ, *How to Ensure Development Friendly Economic Partnership Agreements – Lessons Across Regions* (Eschborn: Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ), 2009), at 74.

[98] Horn et al., above n 4. See also John Whalley, above n 2.

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agreements contains a high number of WTO-extra elements, that is, provisions on issues not currently covered by WTO mandates.[99] Reportedly, such cases are almost four times as frequent in the Communities' PTAs as in those signed by the USA. Moreover, 'a very significant amount' of the WTO-extra provisions in EC agreements were found not to be legally enforceable, in particular those dealing with development policy.[100] The fact that such development-related elements are a particular feature of the Communities' PTAs seems to suggest, according to Horn et al., that 'the EC has a greater need than the US to portray its PTAs as not driven purely by commercial interests'.[101]

In view of these observations, it might be argued that the EC and its negotiating partners have sought to deal with 'WTO extras'—for instance, commitments with regard to environmental and labour standards, on the one hand, and financial assistance on the other hand—independently of the commercial trade policies governed by WTO agreements. By the same token, however, a party that grants non-enforceable 'WTO extras' has a lever to prompt the other party, as deemed appropriate, to continue condoning WTO/GATS-minus trade practices. In a similar vein, the existence of GATS-minus provisions in one party's schedule might help to dissuade the other party from using 'WTO extras', such as development funding, to build up capacity in economically sensitive sectors (e.g. commercial universities or hospitals).[102] In a recent paper, Hoekman and Winters ask why developing countries sign PTAs containing policy disciplines they would not be willing to contemplate in the WTO.[103] Their presumed answer: the existence of a clear pay off that is not on offer in the WTO, for example, development assistance in the case of the EC. Is it conceivable that the same rationale

[99] Such 'extra obligations' also have been assumed, in the context of their WTO accession, by recently acceded WTO Members. See Simon J. Evenett and Carlos A. Primo Braga, 'WTO Accession: Lessons from Experience', World Bank Trade Note 22 (2009), 6 June.

[100] Horn et al., above n 4, at 6. According to this study, the CARIFORUM EPA does not entirely fit the pattern of previous agreements concluded by the EC: it contains fewer WTO-extra elements, and a higher share of these elements is legally enforceable. However, the authors also note that development cooperation is not enforceable under the EPA (ibid, at 32).

[101] Ibid, at 7.

[102] These observations are not meant to imply any judgement on the intentions underlying the EC-CARIFORUM EPA nor on its developmental impact overall. For a broader discussion see, for example, Louise Curran, Lars Nilsson and Douglas Brew, 'The Economic Partnership Agreements: Rationale, Misperceptions and Non-trade Aspects', 26 Development Policy Review 529 (2008), at 553. An overview of development-related provisions of the CARIFORUM EPA and the funding involved is also provided by Sauvé and Ward, above n 19, at 44–7.

[103] Bernard Hoekman and L. Alan Winters, 'Multilateralising Preferential Trade Agreements: A Developing Country Perspective', in Richard Baldwin and Patrick Low (eds), *Multilateralising Regionalism – Challenges for the Global Trading System* (Cambridge: Cambridge University Press, 2009), 636–80, at 659.

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applies to the acceptance, in some cases, of GATS-minus commitments?[104]

Minus-commitments could be addressed, and removed, through modification of a party's relevant GATS commitments. Pursuant to Article XXI (Modification of Schedules), schedules may be renegotiated against compensation of the affected trading partners. This possibility is available at any time after a commitment has been in force for at least three years.[105] The Article XXI option is no panacea, however. The Article has been invoked only on three occasions to date.[106] Members apparently are reticent to use it pro-actively, that is, without facing a legal challenge (see also following section). Moreover, as discussed before, the avoidance of minus-commitments *per se* is not sufficient to ensure a PTA's compliance with the disciplines of Article V:1 (Section II.B above).

V. REGIONAL SERVICES AGREEMENTS AND THE WTO: WORLDS APART?

Among the (so-called) PTAs that do not fully match the parties' GATS commitments, it might be useful to distinguish three variants. Based on the examples given in Section III, these are: Agreements that, at least for the time being, tend to remain mostly below these commitments (*'minus-PTAs'*), others that combine potentially many GATS-plus with some GATS-minus elements (*'plus/minus-PTAs'*), and a third group which, apart from possibly important GATS-plus elements, also entails WTO-extra and GATS-minus features (*'extra/minus-PTAs'*).[107] Of course, the impact of any such agreements on the trading system depends on signatories' ability and willingness to actually administer the agreed regimes on a preferential basis.

Since there is little, if any, liberalization involved, the first group of *minus-PTAs* might be intended mainly to serve two purposes: to help solidify

[104] Of course, it may in the end be a combination of several factors that determine the actual shape of a PTA, its relationship with the parties' GATS schedules and, thus, the emergence of 'minus-commitments'. As noted before, interpretation problems, ill-conceived commitments in the Uruguay Round, and changing public perceptions and sensitivities may play a role as well.

[105] In the absence of an emergency safeguard mechanism in services, this period is currently reduced to one year in certain circumstances (Article X:2).

[106] These are: the enlargement of the European Communities to 25 Member States and the related expansion of the EC, the dispute surrounding US measures affecting the cross-border supply of gambling and betting services (*US—Gambling, DS285)*, and an initiative by Bolivia to withdraw its commitments on various public services. The only negotiations to be completed so far are those on EC 25, which took more than two years. At the time of writing, the schedule was still awaiting ratification by all EC Member States.

[107] Again, it is important to note that the selection of three actual agreements in section III is not meant to be representative of the 'universe' of services-related PTAs. There may well be cases of 'GATS plus-only PTAs'. As indicated before, ten out of the 56 services PTAs included in a recent study (above n 64) do not seem to contain any 'minus commitments'.

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political links between the countries involved and, possibly at the same time, to reduce economic adjustment pressures ensuing from full compliance with relevant GATS commitments. Such agreements could prove relatively stable over time, even if actually implemented, since disadvantaged suppliers are unlikely to persuade 'their' governments to take legal action in the WTO. This presupposes, however, that these suppliers are not third-country-owned, but originate mainly from other PTA-member economies. It is also conceivable that directly affected companies seek to operate via subsidiaries in less-restricted countries ('treaty shopping'), with positive investment and production effects for these countries. In the longer-term, such secondary effects might prompt participating governments to re-consider their commitment to, or to push for amendments of, the PTAs concerned.

Among the agreements falling in the second group, *plus/minus-PTAs*, many of the GATS-minus commitments' may not actually be implemented in full. Quite a number might exist only on paper, motivated by tactical considerations or other factors (Section IV). Indeed, it could prove difficult under many subsidy programmes to differentiate between domestic and foreign beneficiaries, let alone between foreign services/suppliers of different origin/nationality. The agreements' 'dark side' might thus not materialize. In other cases, if all signatories have some minus-commitments on the books, their implementation might even be tolerated within limits; mutual deterrence could help to prevent excesses. An element of uncertainty remains, however.

Signatories to the third group of agreements, *extra/minus-PTAs*, are exposed to a somewhat lesser degree of uncertainty, given the disciplining role of WTO-extra benefits which could be withdrawn. The minus-elements might thus prove more tolerable to an affected party. However, it is difficult to see how such agreements could ever be integrated into, or made compatible with, the multilateral system. By definition, there are no WTO-extras available within the WTO context. The question whether regional agreements are building blocks or stumbling blocks for multilateral liberalization may thus need to be complemented by a third option: that they are worlds apart, disconnected from the WTO.

Even plus/minus-PTAs may develop a life of their own, incompatible with the parties' GATS obligations. WTO Members have reiterated on various occasions that the schedules emerging from the Doha Round should contain no 'rollback', that is, commitments below those contained in existing GATS schedules.[108] In very many cases, this rules out the possibility of simply integrating the content of current PTAs into the GATS. Any such attempts would need to be preceded by re-negotiations under Article XXI with a view to compensating adversely affected WTO Members for the GATS-minus elements taken over from the PTAs. However, this is unlikely to happen.

[108] See, for example, the minutes of the Committee on Specific Commitments contained in WTO documents S/CSC/M/49 to 51 of 8 September, 20 October and 18 December 2009.

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Article XXI could and, possibly, should have been invoked already prior to the entry into force of these PTAs.

It cannot be taken for granted that non-beneficiaries will tacitly accept plus/minus-deals in all cases. Whenever GATS-minus features are involved, these may be used as evidence of an agreement's inconsistency with Article V. 'Outsiders' could thus insist that, to the extent that the GATS-plus treatment has remained exclusive, it be extended on an MFN basis. The fact that, in case of the third variant, WTO-extra elements have formed part of the signatories' initial calculus plays no role in this context. It is abundantly clear that these elements will not be shared with other Members, given their status beyond the GATS (and any other WTO Agreement).

In order for a PTA to be challenged, it might suffice that only one PTA party has scheduled GATS-minus commitments, regardless of whether these are actually implemented or not. As noted before, Article V:1 is unequivocal in requiring the preferential trade *agreement*—rather than the parties' actual trade practices—to provide for the absence or elimination of substantially all discrimination. Also, it may be recalled that the significance of GATS-minus elements in PTAs is likely to increase with the entry into force of more liberal Doha Round results.[109] The question arises, however, whether a non-party is ready to take legal action. In the absence of particularly strong distortions, it might not be easy to find such a Member. As noted before, in a large majority of the 56 agreements examined in a larger-scale research project, elements of GATS-minus treatment have been found.[110] Thus, who could be confident enough to cast the first stone?

Nonetheless, the restoration of full MFN treatment might well be in everybody's economic interest, including the PTA parties. Not only would they be protected from the risks of trade diversion—the substitution of less competitive services supplies/suppliers of PTA origin for more efficient external supplies/suppliers—but this could come at lower costs, in terms of revenue foregone, than a similar move in merchandise trade.[111] Services protection relies virtually exclusively on non-tariff measures. From this perspective, the MFN obligation triggered by a PTA's non-compliance with Article V might

[109] As noted before (Section II.B), this is the case at least for those PTAs that do not automatically incorporate, via appropriate MFN-clauses, these results.

[110] See above n 64.

[111] It has been proposed that a truly development-oriented structure of the EPAs would seek to extend the agreed preferences on an MFN basis with a view to avoiding trade diversion and reducing administrative costs. According to Winters, the EC could or, rather, should facilitate such a move with technical assistance, analytical support and temporary compensation of the associated losses in tariff revenue. Of course, this is a goods-based scenario. Concerning services, the extension of the EPA preferences is unlikely to pose additional technical or analytical problems or to cause revenue shortfalls. (L. Alan Winters, 'Making the Economic Partnership Agreements More Poverty Friendly', 2(2) The Journal of International Trade and Diplomacy 1 (2008), at 20–1.)

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be boon rather than bane. An intriguing variant of a well-known theme: multilateralising regionalism.

VI. WHAT NEXT?

As noted before, the three agreements discussed in Section III were chosen as proto-typical examples, in view of the different groups of signatories involved. This does not necessarily imply that they are representative of the current universe of PTAs covering services. Nevertheless, since some of the world's main service traders are concerned, these agreements may be indicative of a more general trend and serve as models for others to emulate. Also, preliminary evidence from ongoing research points to the existence of GATS-minus commitments in most current PTAs.

The question remains, however, what types of minus-elements are legally relevant and, therefore, could possibly deal a fatal blow to the PTAs concerned. In other words, how many of the 70-odd preferential agreements notified to date might simply constitute grey-area departures from the parties' MFN obligation under the GATS? These issues are not easily dealt with, for two reasons. First, the identification of GATS-minus provisions is highly time- and resource-intensive, possibly even more than a search for liberalizing elements in PTAs; and second, comparable to their counterparts under the GATT, the benchmarks of Article V leave considerable scope for interpretation. How substantial are 'substantial sectoral coverage' and 'substantially all discrimination'; what departures from national treatment, in addition to GATS-scheduled limitations, are permissible between PTA parties; and to what extent can such departures be compensated by liberalization moves in other sectors or policy areas? And, finally, what happens should the 'negative preferences' become more relevant over time, due to multilateral liberalization under the GATS which is not captured by the MFN clauses of many PTAs?

It would be highly desirable if the WTO membership gave further thought to these issues. Unfortunately, however, while the stalemate in the Doha Round might have freed resources in relevant government departments, these are more likely to be used for negotiating additional PTAs rather than for exploring the legal implications in the WTO.

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