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**THE DOHA ROUND AND THE FUTURE ARCHITECTURE
OF THE MULTILATERAL REGULATION
OF TRADE IN SERVICES**

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ABSTRACT

At the multilateral level, the General Agreement on Trade in Services (GATS) regulates trade in services. Considered a framework agreement, GATS contains a built-in negotiation mandate to further develop disciplines on services trade. These negotiations have, in the context of the Doha Round, been going on since 2001. Although nowhere near conclusion, a potential deal on trade in services is likely to have a substantial impact on the architecture of GATS. This paper analyses the Doha Round services negotiations in order to provide an insight into these possible changes. It first addresses the two parallel tracks on which the services negotiations are being conducted. The first track consists of multilateral negotiations on domestic regulation, emergency safeguards, government procurement and subsidies. The second track involves a bi- or plurilateral request-offer approach on market access. Subsequently, the paper focuses on a 'third track' of service negotiations, comprised of talks on electronic commerce and on modalities for least-developed countries. Lastly, the negotiations on the plurilateral international services agreement are addressed. The paper concludes that, while the different subjects require different solutions, plurilateral negotiations within the multilateral framework might be an, albeit difficult, way forward in unblocking the multilateral stalemate.

KEY WORDS

World Trade Organization, WTO, General Agreement on Trade in Services, GATS, Doha Round, Doha Development Agenda, DDA, negotiations

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THE DOHA ROUND AND THE FUTURE ARCHITECTURE OF THE MULTILATERAL REGULATION OF TRADE IN SERVICES¹

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WHAT'S ON DOHA'S SERVICES TABLE?

Almost half a century after the original 1947 General Agreement on Tariffs and Trade (GATT) was adopted, the Uruguay Round of negotiations resulted in the 1994 WTO Agreement, adopting the first multilateral agreement regulating international trade in services: the General Agreement on Trade in Services (GATS).² Article III:2 of the WTO Agreement states that the World Trade Organization 'shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement'.³ At the WTO's Doha Ministerial Conference, Article III:2 of the WTO Agreement, obliging Members to enter into successive trade negotiation rounds, and Article XIX GATS, of which the first negotiation deadline had passed in 1999, were carried through. This resulted in the Doha Ministerial Declaration of 14 November 2001 which undertook 'an expanded negotiating agenda and other important decisions and activities necessary to address the challenges facing the multilateral trading system', which created the mandate for the Doha Round of negotiations – also known as the Doha Development Agenda (DDA).⁴ After the failed Cancun Ministerial Conference, the so-called 'July 2004 Package' was adopted, targeting revised Members' offers in 2005 and making new recommendations.⁵ In the 2005 Hong Kong Ministerial Declaration, Annex C on services, was adopted including a new time frame for revised offers taking into account Mode-specific objectives set forth by the Annex.⁶ The relatively positive feeling after the adoption of the Annex hushed⁷ as little progress has been made since.⁸

As was clear from the outset of GATS, the downside of its flexibility is the lack of legal clarity on many key issues. Hopefully, DDA results will address some of these concerns through the abolishment of certain existing exceptions through negotiations

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² Marrakesh Agreement Establishing the World Trade Organization.

³ These annexes include three main agreements: GATT, the General Agreement on Trade in Services (GATS) and Trade-Related Aspects of Intellectual Property Rights (TRIPS), with the WTO Agreement acting as an umbrella.

⁴ WT/MIN(01)/DEC/1, Ministerial Declaration (Adopted 14 November 2001) 11 & 15 Paragraph 7 of the Doha Declaration expressly reaffirms "the right of Members under the General Agreement on Trade in Services to regulate, and to introduce new regulations on, the supply of services", thus re-establishing the importance of a balance between trade liberalization and sufficient autonomy for governments to regulate.

⁵ WT/L/579, Doha Work Programme (Adopted by the General Council 1 August 2004).

⁶ WT/MIN(05)/DEC, Ministerial Declaration (Doha Work Programme) (Adopted 18 December 2005).

⁷ Rudolf Adlung, 'Services Negotiations in the Doha Round: Lost in Flexibility?' (2006) 9 Journal of International Economic Law 865, 866.

⁸ With the exception of the adoption of a waiver, allowing deviation from WTO obligations to provide preferential treatment to least-developed countries, in accordance with the flexibility for developing countries enshrined in article XIX:2 GATS. See *infra*.

while newly acquired experience with the relatively novel GATS framework will prevent repeating scheduling errors made in the past. The negotiations also provide the chance to technically alter existing schedules without changing their content in order to improve clarity.⁹ Thus, GATS not only includes further negotiation obligations but the DDA mandate is key in adding flesh to GATS bones, as the services agreement currently consists of a framework that is potentially too flexible and incorporates some ambiguous key provisions.¹⁰ The most important elements of the services liberalisation negotiations mandate are improving market access for foreign services suppliers and disciplines on domestic regulations, emergency safeguard mechanisms, government procurement, subsidies, electronic commerce, and services trade specific modalities for least-developed countries. If the DDA can be concluded, it will most certainly alter the current structure of the multilateral regulation of trade in services by establishing certain new provisions or agreements. This paper attempts to provide insight into possible GATS architectural framework changes by analysing current negotiation paths on important services issues and addressing some central substantive matters. The paper will also analyse the legal nature and possible place in the GATS framework of any such new disciplines. Therefore, it starts with an overview of the DDA's key stages before going into the main services negotiation subjects. The GATS negotiations are, in accordance with the Negotiation Guidelines adopted in 2001 and endorsed by the Doha Declaration,¹¹ being conducted on two parallel tracks. The first track consists of multilateral negotiations on domestic regulation, emergency safeguards, government procurement, and subsidies. The second involves a bi- or plurilateral request-offer approach on market access.¹² Lastly, the Article focuses on two more important service negotiations mandates: electronic commerce and modalities for least-developed countries.

1. THE FIRST TRACK: MULTILATERAL NEGOTIATIONS

With regard to multilateral negotiations on services, the Council for Trade in Services coordinates the negotiations that are being conducted by the Working Party on Domestic Regulation and the Working Party on GATS Rules. The Council has been given a mandate to negotiate on three GATS provisions that were not yet agreed on when concluding GATS: emergency safeguard mechanisms, government procurement and subsidies.

1.1 WORKING PARTY ON DOMESTIC REGULATION

In the words of the GATS preamble, domestic regulation is part of 'the right of Members to regulate, and to introduce new regulation [...] to meet national policy objectives'.¹³ The disciplines on domestic regulation are crucial in the balance between domestic regulatory autonomy and trade liberalisation as they directly limit

⁹ Adlung 883.

¹⁰ Geza Feketekuty, 'Assessing and Improving the Architecture of GATS' in Pierre Sauvé and Robert M. Stern (eds), *GATS 2000: New Directions in Services Trade Liberalization* (The Brookings Institution 2000) 111.

¹¹ WT/MIN(01)/DEC/1, Ministerial Declaration (Adopted 14 November 2001) 15.

¹² S/L/93, Guidelines and Procedures for the Negotiations on Trade in Services (Adopted by the Council for Trade in Services 28 March 2001).

¹³ Preamble of the General Agreement on Trade in Services, Annex 1B to the Marrakesh Agreement.

regulatory autonomy whenever domestic regulation on qualification requirements and procedures, technical standards, and licensing requirements is considered abusive or protectionist.¹⁴ Article VI:4 GATS on domestic regulation provides that the Council for Trade in Services shall develop necessary disciplines to ensure that such domestic measures are not unnecessarily trade restrictive.¹⁵ The Working Party on Domestic Regulation (WPDR) was established to do so¹⁶ and Draft Disciplines were put forward as a starting point for further negotiations.¹⁷ Since 2001, these negotiations have been incorporated in the DDA. Pending results, Article VI:5 GATS includes a standstill obligation for new regulations using a 'nullification or impairment' test. This explicitly rejects a necessity test^{18,19} which is one of the key difficulties in the negotiations on Article VI:4 GATS. That Article states that the envisaged disciplines ought to make sure that domestic regulations *inter alia* be (a) based on objective and transparent criteria, (b) not more burdensome than necessary to ensure the quality of the service, and (c) in the case of licensing procedures, not a restriction on the supply of a service in itself. In practice, domestic regulation can be used to attain a broad palette of policy goals, such as consumer protection, equitable access to certain services, reduction of negative externalities, macroeconomic stability or avoidance of anti-competitive conduct in any services sector.²⁰ It is important to emphasise that in principle, disciplines on domestic regulation only apply to measures that are qualification requirements, qualification procedures, technical standards and licensing requirements.²¹ Still, the WPDR's mandate could have a very broad impact as disciplines on domestic regulation could seriously alter the balance between trade liberalisation and regulatory autonomy fundamental to GATS.²² Additionally, such disciplines could have an impact on the delicate regulatory autonomy balance between federal and sub-federal competences²³ as many domestic regulations are the result of regional authorities exercising their competences.²⁴ In principle, Article I.3 GATS confirms that GATS applies to all levels of governmental authority and that this is the preferable way to go from a legal certainty point of view, however, future disciplines could be limited to measures taken by certain levels of government to reassure Members that face difficulties of guaranteeing compliance at all levels of authority.²⁵

¹⁴ Joel P. Trachtman, 'Lessons for the GATS from Existing WTO Rules on Domestic Regulation' in Aaditya Mattoo and Pierre Sauvé (eds), *Domestic Regulation & Service Trade Liberalization* (World Bank & Oxford University Press 2003) 58.

¹⁵ Article VI:4 GATS.

¹⁶ S/L/70, Decision on Domestic Regulation (Adopted by the Council for Trade in Services 26 April 1999).

¹⁷ The latest version of this draft is the 2007 Second Revision, Draft Disciplines on Domestic Regulation Pursuant to GATS Article VI.4, Informal Note by the Chairman, Room Document, 20 March 2009.

¹⁸ Trachtman 66.

¹⁹ Joost Pauwelyn, 'Rien ne Va Plus? Distinguishing Domestic Regulation from Market Access in GATT and GATS' (2005) 4 *World Trade Review* 131, 138

²⁰ World Trade Organization, *Disciplines on Domestic Regulation Pursuant to GATS Article VI.4: Background and Current State of Play* (2011) 3

²¹ In principle, as there is some uncertainty on the exact scope, see *infra*.

²² Jan Wouters and Dominic Coppens, 'GATS and Domestic Regulation: Balancing the Right to Regulate and Trade Liberalization' in Kern Alexander and Mads Andenas (eds), *The World Trade Organization and Trade in Services* (Martinus Nijhoff 2008) 261.

²³ Panagiotis Delimatsis, 'Due Process and 'Good' Regulation Embedded in the GATS – Disciplining Regulatory Behaviour in Services through Article VI of the GATS' (2006) 10 *Journal of International Economic Law* 13, 48.

²⁴ Wouters and Coppens 240.

²⁵ *Ibid.*

For guidance on how domestic regulation negotiation issues could be addressed by the WPDR, the 1998 Disciplines relating to the Accountancy Sector (Accountancy Disciplines) could be of help^{26,27} both for future general disciplines – even though the Accountancy Disciplines only apply to one sector – and possible sector specific disciplines.²⁸ Up until now, the Accountancy Disciplines are the only established Article VI:4 disciplines.²⁹ They will be adopted at the end of the DDA³⁰ and are not yet applicable.³¹ The disciplines provide some evidence that a sector specific approach to disciplining domestic regulation may be more easily negotiated than a horizontal approach and could better cater for diverse regulatory needs in different services sectors³² even though the WPDR are tackling the issue on a horizontal level in the Draft Disciplines. Moreover, sectoral disciplines might not be as disadvantageous to multilateral negotiations as regulation differs from sector to sector. A middle position complementing the horizontal negotiations with sectoral ones could help avoid concluding weak disciplines as a sectoral lowest common denominator.³³ Additionally, complimentary disciplines to more general horizontal disciplines could be necessary to cater to sector specific features.³⁴ Such disciplines could go beyond the negotiating mandate of Article VI:4 GATS where necessary.³⁵ With regard to domestic regulation negotiations, four further relevant Article VI:4 issues stand out from the Accountancy Disciplines.

Firstly, Article VI:4 (b) GATS aims to safeguard that regulatory requirements are not more burdensome than necessary to ensure the quality of the service. Thus, under the current language of Article VI:4 (b) GATS, quality of the service is the only justifiable policy goal. Even more, in order to justify a measure through its impact on the quality of the service, it must be necessary. Recourse to GATS exceptions must be sought for all other policy goals or unnecessary measures on the quality of the service. Two key elements in WPDR negotiations are: adding a necessity test to the disciplines or not as well as incorporating just one policy goal or more and then deciding on which ones are suitable. A necessity test as proposed in the language of Article VI:4 (b) GATS can possibly limit regulatory autonomy to such an extent that policy means as well as various policy goals that are aimed at remedying other externalities than the quality of the service could be restricted.³⁶ One author plainly states this provision should therefore be revised.³⁷ The Accountancy Disciplines already include a binding general necessity test: measures cannot be more trade-

²⁶ Delimatsis 38.

²⁷ Wouters and Coppens 223.

²⁸ Markus Krajewski, *National Regulation and Trade Liberalization in Services* (Kluwer Law International 2003) 131.

²⁹ S/WPPS/W/21, Draft Disciplines on Domestic Regulation in the Accountancy Sector (Adopted 30 November 1998).

³⁰ S/L/63, Decision on Disciplines Relating to the Accountancy Sector (Adopted by the Council for Trade in Services 14 December 1998) 2.

³¹ Members must “to the fullest extent consistent with their existing legislation, not take measures which would be inconsistent with these disciplines”. Ibid

³² Krajewski 138.

³³ Juan A. Marchetti and Petros C. Mavroidis, ‘What Are the Main Challenges for the GATS Framework? Don’t Talk About Revolution’ (2004) 5 *European Business Organization Law Review* 511, 550.

³⁴ Wouters and Coppens 243.

³⁵ Marchetti and Mavroidis 551.

³⁶ Trachtman 68.

³⁷ Ibid.

restrictive than necessary to fulfil a legitimate objective.³⁸ An open-ended list of such objectives follows. It seems that a necessity test that can bring Members' interests together is not likely to include measures, as does the Accountancy Disciplines necessity test, that restrict trade *de facto* but not *de jure*. Such a provision will be much harder to settle in a horizontal agreement than the sectoral example of the Accountancy Disciplines.³⁹ It is clear from the 2011 WPDR Progress Report, which comments on negotiation progress based on the Draft Disciplines, that negotiators have not reached an understanding on the necessity test with regard to the horizontal disciplines. There remain fundamental differences between the Members. Hence the WPDR calls the question of whether a necessity test should be included one of the most difficult subjects in the negotiations.⁴⁰ This lack of agreement is obvious from the text of the Draft Disciplines. Paragraph 2 does not contain a general necessity test, but rather states that measures cannot constitute 'disguised restrictions on trade'. But this formulation is not agreed upon, as alternative options have been taken up in the Draft Disciplines. A first alternative version adds to the existing paragraph 2: 'while guaranteeing the right of Members to regulate in order to achieve public policy objectives'. Such language clearly focuses on domestic regulatory freedom, leaving open what the policy goals are. On the other hand, two more alternative proposals do embrace the necessity test as foreseen by Article VI:4 (b) GATS and as agreed upon in the Disciplines relating to the Accountancy Sector. The second alternative does so by replacing 'disguised restrictions' with 'unnecessary barriers' to trade, thereby smuggling in necessity. The third alternative does the same in the form of a literal adoption of Article VI:4 (a)-(c). In any case, adoption of a necessity test should converge with sufficient legal certainty both for it to function properly and to provide clear insight into the extent of such an agreement. In order for a necessity test to provide 'guidance for the design of a regulatory regime', it must thus become more detailed.⁴¹ Some issues to be addressed in that respect are a more precise meaning of necessity, the conditions enabling the necessity test,⁴² and which internationally agreed benchmarks are to be used in its interpretation.^{43,44} Aside from the Accountancy Disciplines, other necessity tests in the WTO context could also provide guidance⁴⁵ even though the fundamental differences between goods and services should not be underestimated.⁴⁶ In their turn, WTO dispute settlement bodies developed a necessity test as a balancing exercise between trade restrictiveness of a measure and the policy objective at hand

³⁸ S/WPPS/W/21, Draft Disciplines on Domestic Regulation in the Accountancy Sector (Adopted 30 November 1998) 2.

³⁹ Panagiotis Delimatsis, 'Determining the Necessity of Domestic Regulations in Services: The Best is Yet to Come' (2008) 19 *European Journal of International Law* 365, 400.

⁴⁰ S/WPDR/W/45, Disciplines on Domestic Regulation Pursuant to GATS Article VI:4 (Progress Report by the Chairman of the Working Party on Domestic Regulation 14 April 2011) 14.

⁴¹ Marchetti and Mavroidis 552.

⁴² Aaditya Mattoo and Pierre Sauvé, 'Domestic Regulation & Trade in Services: Looking Ahead' in Aaditya Mattoo and Pierre Sauvé (eds), *Domestic Regulation & Service Trade Liberalization* (World Bank & Oxford University Press 2003) 227.

⁴³ Marchetti and Mavroidis 552.

⁴⁴ Delimatsis, 'Determining the Necessity of Domestic Regulations in Services: The Best is Yet to Come' 397.

⁴⁵ Such as articles XII:2 (d) GATS, XIV GATS, XX GATT, 2(2) TBT, 5(6) SPS, 3(2), 8 (1) and 27(2) TRIPs, §5 (e) of the Annex on Telecommunications and 23(2) GPA. For an extensive overview of necessity tests in the WTO in the light of article VI:4 negotiations, see *ibid*.

⁴⁶ Wouters and Coppens 262. Crucial issues are the much more recent trade rules for services, the link between services and the national identity of a state, the spill-over of services on other aspects of economy and an impact on the population's well-being.

in the GATT context in *Korea-Beef* and with regard to GATS in *US-Gambling*.⁴⁷ Other possibilities include a necessity test based on economically efficient policy outcomes or a necessity test based on the case law of the European Court of Justice on proportionality.⁴⁸ But at this point in the negotiations, as four variants spanning much of the spectrum—which range from introducing a liberal necessity test with one justifiable policy goal to explicitly recognizing regulatory autonomy for the broad category of undefined public policy objectives and without even agreeing on whether a necessity test should be added—are to be found in the latest Progress Report, it is too early to predict which type of necessity test could become part of disciplines on domestic regulation. The EU, the United States and Brazil are hesitant to include a horizontal necessity test and seem to focus on transparency disciplines and procedural requirements on licensing and qualification instead.⁴⁹ However, according to one author, negotiations will result in some kind of necessity test as ‘a necessity test is crucial for effective and operationally useful disciplines’.⁵⁰ Therefore, the suggestion of a sort of negative necessity test that sufficiently ensures that a measure is ‘not obviously unnecessary’ to obtain the policy objective might be worth looking into for negotiators.⁵¹ The negotiations are a crucial aspect of the DDA for domestic regulators as ‘the extent and elements of a necessity test in future disciplines developed under Article VI:4 will greatly determine the impact of these disciplines on national regulation’.⁵² The importance could even go beyond Article VI:4 GATS as a such a test might also be relevant in reaching reasonable outcomes with respect to other GATS obligations, such as national treatment and most-favoured-nation.⁵³

As concerns justifiable policy goals, paragraph 2 of the Accountancy Disciplines includes an exemplary list of legitimate objectives consisting of consumer protection, professional competence, integrity of the profession and, as Article VI:4 (b) GATS, the quality of the service. It can be argued that even though the list is undoubtedly open by the introduction of ‘*inter alia*’ in the text, only objectives similar to those could be added to these.⁵⁴ The approach of listing policy objectives was not followed in the Draft Disciplines as paragraph 2 does not explicitly mention any policy goals. Such language is likely to be interpreted by the WTO’s dispute settlement organs as referring to just one policy goal: namely the quality of the service as mentioned in Article VI:4 (b) GATS.⁵⁵ Again, there was no agreement among Members on this provision and alternatives were added to the final draft text. The first alternative adds the broad notion of ‘public policy objectives’, the second alternative does not mention

⁴⁷ Ibid Also see the authors’ reference to Krajewski 143.

⁴⁸ Mattoo and Sauvé 227.

⁴⁹ Wouters and Coppens 222.

⁵⁰ Delimatsis, ‘Determining the Necessity of Domestic Regulations in Services: The Best is Yet to Come’ 399.

⁵¹ Mattoo and Sauvé 227.

⁵² Krajewski 145.

⁵³ Mattoo and Sauvé 226. The authors give the example of a Greek doctor moving to Canada. In the traditional WTO-approach to national treatment, first, likeness must be examined. Is a Greek doctor like a Canadian doctor? Answering this question in the negative leads to effective non-application of national treatment, as any measure can be imposed upon the dentist. If the answer is yes, the Canadian government cannot impose a greater burden on the Greek doctor, which could thus threaten regulatory autonomy. A necessity test could lead to a more satisfactory solution, balancing between Canadian public health concerns and national treatment obligations.

⁵⁴ Krajewski 133.

⁵⁵ Ibid.

policy goals at all, while the third option echoes Article VI:4 (b)'s only policy goal: quality of the service. Two more proposals were added: the first one combines a necessity test with 'specific national policy objectives including [...] the quality of a service', the second states that '[t]he content of the measures should be reasonable in light of ensuring the quality of the service'.⁵⁶ Based on his analysis of seven Members' proposals, one author concludes that there's a preference for an indicative list of objectives whose legitimacy is not to be questioned.⁵⁷ It is clear from the multitude of variants added to the draft that again, the water between Members is deep. The proposals lie much apart, but in the name of legal certainty and to aid WTO panellists, an exemplary list of objectives might be a desirable goal.⁵⁸

Secondly, the Accountancy Disciplines can be relevant with regard to the complementarity between disciplines on domestic regulation and the market access principle of Article XVI GATS. The extent to which a market access commitment liberalises trade can be lessened by non-discriminatory domestic regulatory measures that impede market access for foreign service suppliers.⁵⁹ Conversely, the relationship could also limit the broad scope of the WPDRs mandate^{60,61} as an overlap between the provisions could limit domestic regulatory autonomy. The wide interpretation of both provisions in GATS, as compared to GATT, could lead to such an overlap with a preference for market access. This is contrary to what the case is under GATT.⁶² Measures in accordance with Article VI:4, or in the meantime VI:5, GATS could thus be subject to the prohibition of limiting market access of Article XVI GATS.⁶³ Consequently, if market access under GATS is defined too broadly, the scope of disciplines on domestic regulation and regulatory autonomy is limited.⁶⁴ Paragraph 1 of the Accountancy Disciplines explicitly excludes measures subject to scheduling under Article XVI GATS on market access, thus providing for mutual exclusivity between domestic regulation and market access with a preference for market access.⁶⁵ Such mutual exclusivity is advocated by some authors, who, in order to grasp their relation, define market access and national treatment as 'the trade restrictions targeted by liberalisation negotiations and commitments' and domestic regulation as encompassing 'all the other regulations that are neither a market access limitation nor a *de jure* or *de facto* national treatment violation'.⁶⁶ Earlier on in the negotiations, Members seemed to have agreed on mutual exclusivity,⁶⁷ but this changed with paragraph 10 of the Draft Disciplines on which an agreement was reached *ad referendum* in the 2011 Progress Report. It states that the disciplines on domestic regulation 'do not apply to measures to the extent that

⁵⁶ S/WPDR/W/45, Disciplines on Domestic Regulation Pursuant to GATS Article VI:4 (Progress Report by the Chairman of the Working Party on Domestic Regulation 14 April 2011) 18.

⁵⁷ Delimatsis, 'Determining the Necessity of Domestic Regulations in Services: The Best is Yet to Come' 392.

⁵⁸ Mattoo and Sauvé 227.

⁵⁹ Krajewski 130.

⁶⁰ Delimatsis, 'Due Process and 'Good' Regulation Embedded in the GATS – Disciplining Regulatory Behaviour in Services through Article VI of the GATS' 49.

⁶¹ See extensively Pauwelyn, *supra*.

⁶² As market access measures are more transparent and cheaper than unnecessary domestic regulation. See *ibid* at note 93.

⁶³ *Ibid*.

⁶⁴ *Ibid*.

⁶⁵ *Ibid*.

⁶⁶ Marchetti and Mavroidis 548.

⁶⁷ See Wouters and Coppens 229 for an extensive analysis.

they constitute limitations subject to scheduling under Article XVI or XVII'. In the proposal the overlap between both provisions is present, but it is reduced by the scheduled limitations to market access commitments. This solution means that it remains crucial to not interpret the overlap too extensively. If measures falling within the ambit of the disciplines on domestic regulation are to be considered as prohibited market access restrictions that can only be justified using Articles XIV and XIV***bis*** GATS because they have an effect that quantitatively limits access to the market, the disciplines are no longer relevant as most of such domestic regulation would be prohibited.⁶⁸ Nevertheless, the scope of Article XVI GATS in its turn is effectively limited by its text: a measure that limits market access but cannot be categorised under the exhaustive list contained in Article XVI:2 is not caught by the provision.⁶⁹ The WTO dispute settlement Panel took another approach to relationship between both provisions. Confronted with the issue in *US-Gambling*, the Panel decided that a measure is covered by either Article XVI GATS or Article VI:4-5, thus declaring these provisions mutually exclusive.⁷⁰ The finding was criticised for a lack of textual support—an argument possibly supported by the Appellate Body's refusal to go into the matter.^{71,72} Such exclusiveness would require drawing a clear line between Article VI:4 and the provisions on market access and national treatment. Possible approaches to such a distinction include identifying the intent of the measure, installing a temporal distinction,⁷³ using discriminatory foreseeability as a dividing line, or adopting an empirical approach by listing examples.⁷⁴ Whether mutually exclusive or overlapping, in future domestic regulation disciplines a clear and unequivocal solution is preferable from the perspective of legal certainty. For example, Accountancy Disciplines are preferable from the perspective of legal certainty, especially for regulators adopting measures.⁷⁵ Ambiguities do not encourage national authorities to make further commitments as their implications and results for regulatory autonomy remain too unclear.⁷⁶

⁶⁸ Even though this is what the WTO's Appellate Body decided in *US – Gambling*, WT/DS285/AB/R, 2005, §238, by deciding that a ban is a zero quota and thus a quantitative restriction. By doing so, the Appellate Body created an overlap between article XVI and article VI:4 GATS that makes the latter redundant, states Pauwelyn. See Pauwelyn 160 For a critique of Pauwelyn's argument, see Stefan Zleptnig, 'The GATS and Internet-Based Services: Between Market Access and Domestic Regulation' in Kern Alexander and Mads Andenas (eds), *The World Trade Organization and Trade in Services* (Martinus Nijhoff 2008) 407.

⁶⁹ Krajewski 84.

⁷⁰ *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services* WT/DS285/R, Panel report adopted 10 November 2004 6.305.

⁷¹ *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services* WT/DS285/AB/R, AB report adopted 7 April 2005 250.

⁷² Pauwelyn 156.

⁷³ Gaëtan Verhoosel, *National Treatment and WTO Dispute Settlement: Adjudicating the Boundaries of Regulatory Autonomy* (Hart 2002) 97.

⁷⁴ See Wouters and Coppens 233 for a discussion of these arguments and citations of their authors.

⁷⁵ Both options have, according to Pauwelyn, benefits: mutual exclusivity between the scope of article VI:4 GATS disciplines and article XVI GATS leads to legal certainty that any exceptions scheduled under article XVI GATS are compatible with GATS. On the other hand, an overlap may be better suited to prevent unbridled protectionism as in case of exclusivity all market access measures, also those not committed or scheduled exceptions, would be unaffected by the disciplines on domestic regulation and could be imposed at will. See Pauwelyn 158 at note 93.

Krajewski sees both options as viable alternatives, but sees no need for an overlap because of legal certainty, the general structure of the GATS and the various aims of other obligations. See Krajewski 139.

⁷⁶ Bernard M. Hoekman, Aaditya Mattoo and André Sapir, 'The Political Economy of Services Trade Liberalization: A Case for International Regulatory Cooperation?' (2007) 23 *Oxford Review of Economic Policy* 367, 386.

Thirdly, the scope of the mandate in Article VI:4 GATS is unclear. The text of the Article explicitly mentions qualification requirements and procedures, technical standards and licensing requirements but consensus exists that licensing procedures should be included, too.⁷⁷ Broadening the scope any further seems to go against the language of the Article, though an approach parallel to the Accountancy Disciplines' provisions on transparency, which are not limited to the above listing, could possibly be considered too.⁷⁸ Furthermore, the question of whether Article VI:4 GATS applies either only to sectors in which commitments have been made or to all sectors regardless of commitments, is not answered. According to some commentators, careful reading of Article VI:4 GATS indicates it should apply to all sectors.^{79 80 81} Another author claims Article VI:4 does not explicitly address the matter and interpretation can go both ways, but his argumentation seems to favour a sector specific scope.⁸² Another position states that the disciplines should apply to all sectors, but that nothing stops Members from devising disciplines that only apply to one or more specific sectors.⁸³ This approach can be aligned with practice, as the WPDR has negotiated disciplines for the accountancy sector and thus can do this again.⁸⁴ Such an approach might even be the preferable route, as sector-specific regulation in services can facilitate negotiations with developing countries by aligning and strengthening domestic regulatory capacity and their pursuit of social policy goals with GATS commitments.⁸⁵ In the end, Members have the last word on the matter and they seem to agree the disciplines should only apply to committed sectors.⁸⁶

Lastly, the Accountancy Disciplines indirectly address the issue of the legal status of future disciplines which is not specified by Article VI:4 GATS. Disciplines can become legally binding through two paths. Firstly, a binding nature can be achieved through integration in the GATS framework by creating an additional Annex. This requires an amendment of GATS. A second option is through a Reference Paper, such as the Reference Paper on Basic Telecommunications, which could guide negotiators.^{87 88} Whereas an Annex is binding on all Members, the Reference Paper

⁷⁷ Wouters and Coppens 226.

⁷⁸ Ibid.

⁷⁹ Delimatsis, 'Due Process and 'Good' Regulation Embedded in the GATS – Disciplining Regulatory Behaviour in Services through Article VI of the GATS' 39 & 49.

⁸⁰ Trachtman, 'Addressing Regulatory Divergence through International Standards: Financial Services' 31.

⁸¹ Wouters and Coppens 240.

⁸² Krajewski 137. Krajewski states that the place of article VI:4 GATS in the GATS part containing the general obligations suggests it applies to all sectors. But the language of article VI:1, 3, 5 and 6 GATS only apply to specific commitments. Then again, the absence of explicit reference to specific commitments in article VI:4 GATS could be interpreted as meaning it should apply to all sectors. But such a view was, with regard to article II GATS, not adopted by the Appellate Body in EC – Bananas, WT/DS27/AB/R, 1997, §233. Another contextual argument in favour of a sector specific scope for article VI:4 GATS is found in article VI:5 GATS, that refers to article VI:4 in the wording "disciplines developed in these sectors pursuant to paragraph 4". Lastly, the author argues that the aim of the disciplines on domestic regulation is to avoid hollowing out market access and national treatment commitments, which means it is only to be seen in the context of commitments made under these provisions. In that sense, the goal of article VI:4 only applies to specific commitments.

⁸³ Wouters and Coppens 240.

⁸⁴ Krajewski 138.

⁸⁵ Hoekman, Mattoo and Sapir 389.

⁸⁶ Delimatsis, 'Determining the Necessity of Domestic Regulations in Services: The Best is Yet to Come' 396.

⁸⁷ Wouters and Coppens 225.

⁸⁸ Rolf H. Weber, 'International E-Trade' (2007) 41 *The International Lawyer* 845, 861.

would only be applicable to Members that make additional commitments in their schedules on the basis of Article XVIII GATS. While substantively comparable,⁸⁹ scheduling provides Members with typical GATS flexibility and could therefore ease negotiations. The downside of such an approach could be liberalisation *à deux vitesses*, with generally applicable provisions on one hand and additionally applicable obligations on the other. Secondly, as additional commitments are negotiated bilaterally, the bargaining power of Members is crucial as well.⁹⁰ Even though fragmentation and comprehensibility is an issue, especially with regard to important provisions such as domestic regulation, one can argue that this merely reflects the current GATS structure and scheduling practice. Even more, it might be an answer to the proliferation of preferential trade agreements from the WTO. Bringing negotiations for which no universal acceptance between WTO Members exists to the multilateral table—instead of letting them be dealt with in preferential trade agreements with all their economic disadvantages and possible negative impact on multilateral negotiation interests—could help the WTO to re-establish enthusiasm for the multilateral level via plurilateral agreements. Securing an economically sufficient interest in a Reference Paper by appealing to strong Members could help create a move away from a lowest common denominator-style approach on the multilateral level. Even though such an approach is surely less efficient than true multilateral liberalisation economically, it is possibly much more efficient than the preferential trade agreements.⁹¹ Moreover, it could well be a trigger for the creation of more Reference Papers, accession to which could become a bargaining chip in other negotiations—both in the present and the future. The flexibility of such an approach is in line with general GATS principles and through quasi-universal adoption by the WTO Members, a Reference Paper could in time reach the same legal status as an Annex. This would allow each Member to become party to it at its own speed. A sufficiently ambitious first Reference Paper would be necessary to avoid more fragmentation as or else there might be too much of an incentive to restart and negotiate new, more specific Reference Papers with deeper integration each time a group of like-minded Members is prepared to take negotiations to the next level. Surely an opt-out or opt-in could provide for some more flexibility on such issues. Objections like the idea that such agreements would complicate the regulatory framework unnecessarily are correct, but may be remedied if the disciplines prove to be sufficiently clear. Then, the structure of the multilateral services regulation framework may be complicated but it becomes substantively more robust and better interpretable. Secondly, the question is whether such complicated negotiations can be resolved in a simple way at all and whether complicated liberalisation is not better than none at all. Stability and reliability of the disciplines is another argument against such plurilateral agreements, and one can only agree with the statement that ideally disciplines should apply equally to all Members,⁹² however, such an ideal seems to be unreachable in the current climate.

⁸⁹ William J. Drake and Kalypso Nicolaïdis, 'Global Electronic Commerce and GATS: The Millennium Round and Beyond' in Pierre Sauvé and Robert M. Stern (eds), *GATS 2000: New Directions in Services Trade Liberalization* (The Brookings Institution 2000) 405.

⁹⁰ Mario Marconini, *Emergency Safeguard Measures in the GATS: Beyond Feasible and Desirable* (United Nations Conference on Trade and Development 2005) 28.

⁹¹ See *infra*, on the new GPA and its impact on government procurement negotiations.

⁹² Richard Janda, 'GATS Regulatory Disciplines Meet Global Public Goods: the Case of Transportation Services' in Aaditya Mattoo and Pierre Sauvé (eds), *Domestic Regulation & Service Trade Liberalization* (World Bank & Oxford University Press 2003) 121.

Nonetheless, truth is that the Accountancy Disciplines were not agreed as a Reference Paper nor as an Annex, and were the result of disagreement between Members.⁹³ In effect, they were finally adopted through a decision of the Council for Trade in Services leaving them unenforceable until they are formally integrated into GATS. This integration could possibly happen in the form of an Annex, the ultimate preference of most Members, at the closure of DDA negotiations.⁹⁴ Of course, as the Accountancy Disciplines merely concern accountancy, they only apply to Members scheduling commitments in that sector. This also impacts on their flexibility, which might have been an argument in favour of concluding them as an Annex.

As the above examples illustrate, many difficult issues surround negotiations on domestic regulation. Even though the positions on different provisions of the Draft Disciplines are still far apart, there seems to be a consensus between Members to continue work on revising the text as Members appear to agree that an agreement on domestic regulation is necessary in order to ensure the effectiveness of scheduled commitments.⁹⁵ Disciplines should probably include a necessity test to fulfil the mandate of Article VI:4 GATS, connect GATS and other WTO agreements, and strike a balance between regulatory autonomy and trade liberalisation.⁹⁶ The legal form of the disciplines might prove to be key in closing the negotiations, although the importance of the debate does not make reaching an agreement more likely.

1.2 WORKING PARTY ON GATS RULES

The Working Party on GATS Rules (WPGR) coordinates negotiations on Article X GATS on emergency safeguard mechanisms (ESM), Article XIII GATS on government procurement, and Article XV GATS on subsidies. The outcome of these negotiations will have considerable impact on the GATS architecture.⁹⁷ Members are far from reaching a consensus on either subject as objectives and expected outcomes of the negotiations diverge so fundamentally that it is unclear whether disciplines should be negotiated or not.⁹⁸ It is evident that there is a basic divide between Members who want more liberalisation and those who are in favour of even more flexibility. There is also an added difficulty concerning misinformation and a lack of concrete data.⁹⁹ It seems that the last five years of DDA negotiations have not led to breakthroughs in solving these key DDA GATS issues even though the focus on technical work might be conceived as a way to resuscitate the negotiations.¹⁰⁰

⁹³ Dale Honeck, *Background to the Accountancy Disciplines* 3.

⁹⁴ Wouters and Coppens 226.

⁹⁵ TN/S/36, Negotiations on Trade in Services (Report by the Chairman of the Council for Trade in Services 21 April 2011) 76.

⁹⁶ Delimatsis, 'Determining the Necessity of Domestic Regulations in Services: The Best is Yet to Come' 401.

⁹⁷ Kasturi Das, 'GATS 2000 Negotiations and India: Evolution and State of Play' (2007) 41 *Journal of World Trade* 1185, 1186.

⁹⁸ TN/S/36, Negotiations on Trade in Services (Report by the Chairman of the Council for Trade in Services 21 April 2011) 80.

⁹⁹ Alejandro Jara and M. del Carmen Domínguez, 'Liberalization of Trade in Services and Trade Negotiations' (2006) 40 *Journal of World Trade* 113, 127.

¹⁰⁰ TN/S/35, Negotiations on Trade in Services (Report by the Chairman of the Council for Trade in Services 22 March 2010) 35.

1.2.1 Emergency safeguard mechanisms

A safeguard is a provision that allows domestic measures to be shielded from the application of GATS to relieve problems following from GATS commitments, for example as exceptions do, or is a way of modifying such commitments, such as the escape clause of Article XXI GATS.¹⁰¹ Usually, safeguards are temporary, react to injury caused to the domestic industry, apply on a non-discriminatory basis to all other WTO Members, apply only to a specific service or sector and may result in compensation being owed to other Members affected by the ESM.^{102 103} Although other WTO agreements—such as GATT—do have ESM provisions, GATS does not. Negotiations on GATS ESM are not producing optimistic results. Members eager for more liberalisation and those in favour of more protectionist possibilities are even divided on whether an ESM should be adopted or not.¹⁰⁴ Three arguments in favour of an ESM in services are made by prominent authors.¹⁰⁵ First, ESM could help the protection of infant industries from foreign competition before they become internationally competitive; second, ESM could partly remedy adjustment costs that follow from trade liberalisation, such as temporary unemployment before jobs are recreated in comparatively more advantageous sectors; third, the public choice approach states that politicians—who fear that the political cost of liberalisation could be higher than their political gains from it—might be ESM proponents in order to limit their personal political cost when agreeing on more ambitious agreements. In the GATS context these arguments may be less convincing since they focus on ESM for the exemption from binding commitments while the multiple exceptions inherent to the GATS framework may already provide for such exemptions.¹⁰⁶ Additionally, opponents argue that an ESM is undesirable as the schedules of commitments already allow sufficient flexibility and an ESM would undermine the stability of existing commitments.¹⁰⁷ They also feel the lack of precise trade data makes an ESM very difficult to preserve. This is illustrated by the 2011 Report by the Chairperson of the WPGR's revelation that the state of the art on these negotiations is still essentially focused on the availability and adequacy of national statistics with regard to ESM.¹⁰⁸ Additionally, free trade agreements have not included safeguards for services either.¹⁰⁹ Proponents of ESM feel these data problems are exaggerated. They claim that strict procedural disciplines prevent the undermining of existing commitments and claim that an ESM would encourage more liberal commitments.¹¹⁰ The ESM could thus become valuable bargaining material in an attempt to persuade Members to make serious liberalisation progress¹¹¹ in return for new market access

¹⁰¹ Gilles Gauthier, Erin O'Brien and Susan Spencer, 'Déjà Vu, or New Beginning for Safeguards and Subsidies Rules in Services Trade?' in Pierre Sauvé and Robert M. Stern (eds), *GATS 2000: New Directions in Services Trade Liberalization* (The Brookings Institution 2000) 166.

¹⁰² Ibid.

¹⁰³ Jara and Domínguez 126.

¹⁰⁴ Ibid.

¹⁰⁵ Marchetti and Mavroidis 540.

¹⁰⁶ Ibid.

¹⁰⁷ World Trade Organization, *Market Access: Unfinished Business - Post Uruguay Round Inventory* (Special Studies N°6, 2001) 119.

¹⁰⁸ And on the definition of "domestic industry". See S/WPGR/22, Annual Report of the Working Party on GATS Rules to the Council for Trade in Services (Adopted 10 November 2011) 3.

¹⁰⁹ Jara and Domínguez 126.

¹¹⁰ World Trade Organization, *Market Access: Unfinished Business - Post Uruguay Round Inventory* 119.

¹¹¹ Gauthier, O'Brien and Spencer 176.

commitments. This could happen on a case by case basis to tailor to specific Member's needs—even¹¹² on a sector based approach¹¹³—as ambitious liberalisation would require significant domestic institutional or legal reforms in many settings.¹¹⁴

Article X GATS requires multilateral negotiations but does not address the legal nature of any ESM disciplines. As concerns the legal nature of such disciplines, proposals point towards the inclusion of a relatively straight-forward horizontal article in the GATS framework that sets out the general framework and whereby sectoral issues are to be addressed *ad hoc* by the parties when establishing or attacking safeguard measures.¹¹⁵ A proposal addressing ESM in such a way was tabled by ASEAN countries in 2000.¹¹⁶ GATT Article XIX could provide a template although such a provision might prove difficult to transfer to GATS.¹¹⁷ An alternative option proposes including ESM in the schedules, for each sector separately, with some general principles guiding their application.¹¹⁸ Such an approach would probably strengthen the arguments against plurilateral agreements addressed above. Even more, Members could 'experiment more narrowly with safeguard-like instrument in sectors where concerns over the potentially disruptive effects of trade and investment liberalisation may be particularly strong', after which other sectors could be included or horizontal disciplines could be created.¹¹⁹ A reference paper could be an option to conclude ESM as well, creating the possibility for interested countries to create such disciplines without having to reach an agreement with all Members.¹²⁰ As the expectations of many developing countries are that there should be some form of ESM provisions in GATS,¹²¹ such a reference paper might prove insufficient without the support of the developing countries' main trading partners. This leads again to the argument made *supra* on the bargaining value of multilateral ESM disciplines in the GATS framework.

1.2.2 Government procurement

According to economic literature, discrimination in procurement may be necessary to minimize the average cost of procurement, but the net welfare gain of such discriminatory measures is small and can easily be overturned by higher prices of the actual procured services provided by domestic undertakings.¹²² Non-discriminatory and competitive bidding leads to a higher procurement cost but may lead to much higher savings on the services themselves.¹²³ Still, some authors feel that it is unlikely that even explicitly discriminatory government procurement in

¹¹² Adlung 889 & 891.

¹¹³ Jara and Domínguez 126.

¹¹⁴ Rudolf Adlung, 'Negotiations on Safeguards and Subsidies in Services: A Never-Ending Story?' (2007) 10 Journal of International Economic Law 235, 265.

¹¹⁵ Marconini 27.

¹¹⁶ See, for a discussion of the proposal, Pierre Sauvé, 'Completing the GATS Framework: Addressing Uruguay Round Leftovers' (2002) 57 Aussenwirtschaft 301, 320.

¹¹⁷ Ibid.

¹¹⁸ Gauthier, O'Brien and Spencer 177.

¹¹⁹ Sauvé 323.

¹²⁰ Marconini 28.

¹²¹ Sauvé 338.

¹²² Anirudh Shingal, 'Services Procurement under the WTO's Agreement on Government Procurement: Whither market access?' (2011) 10 World Trade Review 527, 528.

¹²³ Ibid.

services measures have a detrimental impact on welfare, both domestically and internationally, which ‘undermines the case for standalone disciplines’.¹²⁴ Increased market access and national treatment would greatly remove the need for separate procurement disciplines even though such disciplines could be useful to combat corruption.¹²⁵ Aside from the economic argument pro procurement disciplines, non-economic policies such as protection of domestic industries, state companies or small and medium enterprises, promotion of technology transfers, and national security play an important role in the debate on whether such disciplines are necessary in a multilateral context.¹²⁶ Also, an earlier proposal submitted by the EU to amend schedules of commitments to accommodate government procurement was rejected by a majority of Members because of the high complexity of the schedules.¹²⁷ For now, Article XIII GATS still explicitly exempts laws, regulations or requirements on government procurement of services purchased for governmental purposes from the most-favoured-nation, market access, and national treatment disciplines. The article also requires multilateral negotiations to be conducted on the matter. The EU, which has regulated procurement internally, has taken the forefront in these negotiations by putting forth proposals for an annex to GATS on procedural rules for government procurement¹²⁸ which are still being discussed.¹²⁹ The WPGR 2011 annual report describes ‘a series of dedicated discussions on the broader economic and developmental importance of government procurement in services based on a proposal [for discussion] by the European Union’.¹³⁰

Reaching a multilateral framework on government procurement thus does not seem attainable any time soon. Therefore, recourse seems to have been sought to the 1994 plurilateral Agreement on Government Procurement (GPA)¹³¹ which currently contains the only disciplines on government procurement in the WTO framework. The GPA only applies to its signatories and is thus exempted from most-favoured-nation treatment. The EU, the United States, Canada, the EFTA Member States, Japan, Korea, and six more WTO Members are party to the GPA. China and some other Members are negotiating accession. The GPA has adopted a horizontal approach that applies to goods, services, or a combination thereof.¹³² After ten years of negotiating, a renegotiated GPA that thoroughly revised the agreement, expanded its scope, and took into account evolutions in government procurement was adopted in March 2012.¹³³ The revised agreement includes future work programmes on various topics,¹³⁴ such as on small and medium enterprises in government procurement.¹³⁵ It shall enter into force thirty days after the deposit of the instruments

¹²⁴ Simon J. Evenett and Bernard M. Hoekman, ‘Government Procurement of Services and Multilateral Disciplines’ in Pierre Sauvé and Robert M. Stern (eds), *GATS 2000: New Directions in Services Trade Liberalization* (The Brookings Institution 2000) 144 & 156.

¹²⁵ Ibid.

¹²⁶ Shingal 528.

¹²⁷ Jara and Domínguez 118.

¹²⁸ The last proposal dates from 2006: S/WPGR/W/54, Communication from the European Communities: Government Procurement in Services (Adopted 20 June 2006).

¹²⁹ S/WPGR/21, GATS Rules (Report by the Chairperson of the Working Party 14 April 2011) 5.

¹³⁰ S/WPGR/22, Annual Report of the Working Party on GATS Rules to the Council for Trade in Services (Adopted 10 November 2011) 5.

¹³¹ Part of Annex IV, Plurilateral Trade Agreements, of the WTO Agreement.

¹³² GPA/113, Adoption of the Results of the Negotiations under Article XXIV:7 of the Agreement on Government Procurement (Adopted by the Committee on Government Procurement 2 April 2012) 9.

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Ibid.

of acceptance by two thirds of the Members to the original GPA.¹³⁶ The new GPA adopts a positive list approach taken up in each Member's 'Final Appendix I Offers of the GPA Parties in the GPA Coverage Negotiations'. With regard to the European Union's Appendix I, the new GPA's scope of application includes a list of central government entities subject to the provisions is attached per Member (Annex 1). Annex 2 defines sub-central entities that fall within its scope as all regional or local contracting authorities and all contracting authorities which are governed by public international law as defined by the EU procurement directive. An indicative list of such entities is added that includes many Flemish funds, holdings, institutions, and centres dealing with Flemish competences. Annex 3, which brings certain utilities into the new GPA, expressly adds certain Flemish utility providers—such as the *Vlaamse Maatschappij voor Watervoorziening* and *De Lijn* and air- or seaport undertakings—to the GPA's scope. As concerns services, Annex 5 elaborates on the coverage of the agreement in a sector-based services schedule that only applies insofar as another Member has also underwritten commitments in these sectors. The EU's commitments are on services in maintenance and repair; land transport; air transport; mail transport; telecommunications; insurance, banking and investment; computer; accounting, auditing and bookkeeping; market research; management consultancy; architecture, engineering, urban planning and landscape architecture; advertising; building-cleaning and property management; publishing and printing; sewage and refuse disposal and sanitation.¹³⁷ Still, the results of the GPA with regard to improved market access are doubted. Statistical analysis of government procurement practice of Japan and Switzerland under the previous GPA agreement shows that the GPA has not been able to improve or even maintain market access for government procurement. This is probably due to weak enforcement and incomplete or ineffective provisions as there are too many exceptions, reminiscent of GATS flexibility, and discrimination is allowed on other grounds than price.¹³⁸ According to some commentators, one of the new GPA's strong points, aside from being a boost for negotiators in turbulent times, is that it allows for more flexibility with regard to best practices and for emerging economies.¹³⁹ This is in line with the DDA's starting point as a development round and conform with Article XIX:3 GATS.

It remains to be seen whether the new GPA will better succeed at reaching its goals and how it will reflect on GATS negotiations on procurement disciplines. The current EU legal proposal on GATS procurement disciplines that has been discussed for years now seems to have been dismissed and suggestions for future action are only aimed at identification and measurement of government procurement.¹⁴⁰ It can be argued that the conclusion of the new GPA, which addresses the sense of urgency felt by the acceding Members and reflects the lack of understanding on the multilateral level, means GATS disciplines on government procurement are still far away. GATS negotiations may become even less attractive if some more large economies, such as China or Russia, accede to the GPA. It can even be doubted

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ Shingal 545.

¹³⁹ Robert D. Anderson, Steven L. Schooner and Collin D. Swan, 'The WTO 's Revised Government Procurement Agreement - An Important Milestone toward Greater Market Access and Transparency in Global Public Procurement Markets' (2012) 54 *The Government Contractor* 1, 3.

¹⁴⁰ S/WPGR/22, Annual Report of the Working Party on GATS Rules to the Council for Trade in Services (Adopted 10 November 2011) 6.

whether such disciplines would be desirable or necessary or whether the horizontal approach of the GPA is more beneficial and sufficient.¹⁴¹ Ratification of the GPA by the most important economies may mean the GPA's plurilateral nature in practice becomes almost-multilaterally binding. Even more, considering the difficulties in concluding agreements at a multilateral level, the conclusion of the new GPA might provide an incentive for certain other difficult negotiations, although the thirty years' experience with the agreement surely contributed greatly to the conclusion of the negotiations.

1.2.3 *Subsidies*

The GATS does not discipline subsidies as such. However, subsidies are considered to be measures under the GATS regime—which means that in principle most-favoured-nation and national treatment obligations apply to such measures,^{142,143} unless exceptions to the commitments have been scheduled. Most Members have done so as concerns subsidies in their national treatment obligations.¹⁴⁴ The EU has not done so as concerns most-favoured-nation obligations, however, it has for national treatment¹⁴⁵ and market access.¹⁴⁶ Article XV GATS, the only GATS provision that explicitly deals with subsidies, states that 'in certain circumstances, subsidies may have distortive effects on trade in services. Members shall enter into negotiations with a view to developing the necessary multilateral disciplines'. Such negotiations should, according to Article XV GATS, also address the appropriateness of countervailing procedures. Such a mandate inevitably provokes a parallel with the GATT Agreement on Subsidies and Countervailing Measures. But due to the nature of services and the impact of disciplines on governmental regulatory behaviour, subsidy disciplines in services should be matched with regulatory regimes and include prudential carve-outs from their scope for certain policy goals.¹⁴⁷ Additionally, experience with the GATT subsidies agreement has shown it is far from perfect in itself.¹⁴⁸ This reduces the appeal for its transfer to services. Aside from these issues, negotiations on subsidies in services that are coordinated by the WPGR have been slacking. In practice, Members are partaking in discussions that amount to agreeing on a definition for subsidy; investigating which subsidies distort trade; and how to identify, measure and where necessary discipline such subsidies.¹⁴⁹ If all this amounts to the conclusion that the trade restrictive outcomes of subsidies in trade are relatively weak, further negotiations might not even be worth the while.¹⁵⁰ The WPGR annual report echoes such concerns: some Members argue that no negotiations should be conducted before evidence of trade

¹⁴¹ Sauvé 336.

¹⁴² Gauthier, O'Brien and Spencer 177.

¹⁴³ For a case study on financial services, see Bart De Meester, 'The Global Financial Crisis and Government Support for Banks: What Role for the GATS?' (2010) 13 *Journal of World Trade* 27.

¹⁴⁴ Sauvé 326.

¹⁴⁵ In the subsidies subsectoral commitments in mode 3, the EU is unbound for research subsidies and excludes public services subsidisation from the scope of its commitments. Mode 4 for investments is excluded, too. France and Italy are not committed with regard to subsidising entertainment services

¹⁴⁶ Market access commitments in the subsidies subsector in mode 3 are limited to a certain extent for France, Spain, Portugal and Italy.

¹⁴⁷ Gary N. Horlick and Peggy A. Clarke, 'WTO Subsidies Disciplines During and After the Crisis' (2010) 13 *Journal of International Economic Law* 859, 872.

¹⁴⁸ *Ibid.*

¹⁴⁹ Gauthier, O'Brien and Spencer 176.

¹⁵⁰ *Ibid.*

distortion is found, others prefer starting negotiations.¹⁵¹ Members only agree on the fact that more and better information on the trade restrictive effects of subsidies is necessary.¹⁵² In practice, this is hampered by Members' unwillingness to provide such information.¹⁵³ Aside from talks concerning subsidies, there have not been proposals on countervailing procedures, however, under existing obligations such measures are incompatible with most-favoured-nation commitments.¹⁵⁴ The difficulties regarding subsidy disciplines negotiations can also be linked to ESM negotiations since the current situation in which subsidy measures are only disciplined indirectly and can be remedied through GATS exceptions. This means that the need for ESM is much less pressing.¹⁵⁵ As concerns the legal nature of such disciplines, Article XV GATS explicitly requires them to be multilateral. Thus while an agreement as such under GATT remains a possibility, a reference paper type approach is not. All in all, considering both the legal, political, and even economic issues concerned with it, reaching a multilateral agreement on subsidies in the WTO does not seem likely. Improving on current subsidy scheduling practice might prove to be the best achievable option.

2. THE SECOND TRACK: BILATERAL AND PLURILATERAL NEGOTIATIONS ON MARKET ACCESS

The second negotiating track in the DDA are the bi- and plurilateral negotiations, in which the Council for Trade in Services has a coordinating role. They are essentially structured around a request-offer approach, which consists of Members' liberalisation requests directed toward other Members and their liberalisation offers, in the form of an improved schedule of commitments under Articles XVI GATS, on market access, and XVII GATS, on national treatment. This builds on the existing schedules dating from the Uruguay round of negotiations. As part of the specific commitments of the GATS, current market access obligations only apply to Members' scheduled commitments which reveal the extent of commitments on both a horizontal and a sectoral level for each mode of supply. The extent of these existing commitments varies greatly from Member to Member. The EU made the most services commitments of all Members—about three times as many as for example India did.¹⁵⁶ Of course, current commitments will reflect to some extent the content of a Member's offers. The horizontal requests and offers are, mirroring the existing schedules of commitments, supplemented by sectoral requests and offers. The best offers on the negotiating table improve substantively on existing commitments, but those improvements appear to be sensitively lower than Members' actual current trade policy.¹⁵⁷ Although Members have pointed out they might increase their offer,¹⁵⁸ such a situation leaves the WTO lagging behind and merely codifying practice rather than substantively aiding liberalisation of trade in services. In considering the WTO as an institution where Members make policy commitments,

¹⁵¹ S/WPGR/22, Annual Report of the Working Party on GATS Rules to the Council for Trade in Services (Adopted 10 November 2011) 8.

¹⁵² Ibid.

¹⁵³ Jara and Domínguez 118.

¹⁵⁴ Adlung, 'Negotiations on Safeguards and Subsidies in Services: A Never-Ending Story?' 239.

¹⁵⁵ Ibid.

¹⁵⁶ Hoekman, Mattoo and Sapir 374.

¹⁵⁷ Jara and Domínguez 121.

¹⁵⁸ Bernard M. Hoekman, Will Martin and Aaditya Mattoo, 'Conclude Doha: It Matters!' (2010) 9 World Trade Review 505, 513.

securing existing the actual services liberalisation should be an aim of the DDA.¹⁵⁹ The number of requests and their content are kept confidential for political and negotiation technical reasons.¹⁶⁰ The number of offers and their content, on the other hand, is made available. Seventy-one conditional initial offers and thirty-one revised conditional offers were submitted to the WTO. The offers would, in accordance with the GATS principle of most-favoured-nation, apply to all Members. Through a so-called 'Services Signalling Conference' in which many of the most important WTO Members took part, Members were to provide information on their own improved commitments and their expectations to reflect 'real progress'.¹⁶¹ Sadly, such real progress is not evident from negotiation practice. However, comprehensive and binding commitments could favour both emerging economies' upcoming service sectors, such as outsourcing of customer service to India,¹⁶² Mexico or Brazil, and developed countries by securing market access for their exporters.¹⁶³ Members agree that a lot of work needs to be done before conclusion is possible and there is even disagreement on the current state of play.¹⁶⁴ The gap between requests and offers with regard to sectoral coverage and commitment level is still substantial. Additionally, as far as negotiations on most-favoured-nation exemptions go, there is a significant gap between the requests and offers and indications from Members.¹⁶⁵ To close such gaps, revising the offers to better cater to the expectations of other Members remains crucial. The Signalling Conference appears to have led to a reiteration of intentions to improve on offers,¹⁶⁶ but such intentions are not legally binding. Correspondingly, the Conference's outcome on market access—where some signals on improved offers and locking in current practice were sent out by Members—was not always confirmed afterwards in the plurilateral request-offer groups and most Members feel that no significant progress was made between 2008 and 2011.^{167,168} There is no consensus on how to proceed in tuning the requests and the offers.¹⁶⁹ One author proposes to make commitments conditional on specific conditions to be met by the source country rather than asking host countries to commit to all other Members.¹⁷⁰ Such an obligation to cooperate, which should be transparent and predictable, could include screening of service providers in their home country. This could be helpful in combating illegal immigration and assisting in

¹⁵⁹ Ibid.

¹⁶⁰ Jara and Domínguez 116 The EU has circulated an executive summary on its requests, see: European Union, 'Summary of the EC's Revised Requests to Third Countries in the Services Negotiations under the DDA' (2005) <http://trade.ec.europa.eu/doclib/docs/2005/january/tradoc_121197.pdf> accessed 20 August 2012.

¹⁶¹ JOB(08)/93, Services Signalling Conference (Report by the Chairman of the Trade Negotiations Committee 30 July 2008) 1.

¹⁶² See for more on India's position in GATS negotiations Das, *supra*.

¹⁶³ Aaditya Mattoo and Sacha Wunsch-Vincent, 'Pre-Emptying Protectionism in Services: The GATS and Outsourcing' (2004) 7 *Journal of International Economic Law* 765, 798.

¹⁶⁴ TN/S/36, Negotiations on Trade in Services (Report by the Chairman of the Council for Trade in Services 21 April 2011) 4.

¹⁶⁵ Ibid.

¹⁶⁶ JOB(08)/93, Services Signalling Conference (Report by the Chairman of the Trade Negotiations Committee 30 July 2008) 48.

¹⁶⁷ TN/S/35, Negotiations on Trade in Services (Report by the Chairman of the Council for Trade in Services 22 March 2010) 4 & 6.

¹⁶⁸ TN/S/36, Negotiations on Trade in Services (Report by the Chairman of the Council for Trade in Services 21 April 2011) 5.

¹⁶⁹ Ibid.

¹⁷⁰ Aaditya Mattoo, 'Services in a Development Round: Three Goals and Three Proposals' (2005) 39 *Journal of World Trade* 1223, 1224.

their return.¹⁷¹ The arguments brought forth are focused on Mode 4 but are applicable to all modes of supply. The proposed scheme is similar to mutual recognition; however, specification and compliance are unilaterally controlled. The conditions could also include factors that take into account the state of the domestic economy for yearly market access numbers. Even though there is risk of arbitrariness and labour-diversion, the author feels such flexibility would be a big improvement over the economic needs tests in current schedules.¹⁷² It could also, as was argued before in this report, bring back the negotiations from the tables of free trade agreements to the WTO.

The EU has made one substantial conditional offer,¹⁷³ which was revised in June 2005 but added little to the original 2003 offer.^{174,175} The offer does not include commitments in the health sector, education or audio-visual services. Furthermore, the EU offer does not prevent regulation of public services to obtain national policy objectives, nor does it privatise public undertakings.¹⁷⁶ The EU explicitly does not request such commitments either.¹⁷⁷ In both its request and offer, the EU is looking for a balance between the elimination of entry barriers and safeguarding the right to regulate with regard to public policy objectives, supporting sustainable development, and facilitating participation of developing countries.¹⁷⁸ Of course, the EU desires better market access and more transparent domestic regulations in foreign regulatory systems for its exporters.¹⁷⁹ In order to achieve these goals, the EU requests a reduction of existing limitations and new commitments.¹⁸⁰ Analysis of the offer shows it is analogous to the already quite liberal¹⁸¹ extensive existing commitments. The EU seems willing to level its commitments to current practice in the easiest, Modes 2 and 3, in which the original commitments were also the strongest, however, they were less so in Mode 1 and the least in Mode 4,¹⁸² which is an area of specific interest to developing countries.^{183,184,185} Developing countries' requests probably included longer working stay periods for foreigners under Mode 4, contract length, the number of sectors in which commitments are made, and also introducing economic needs tests and developing clear and transparent domestic

¹⁷¹ Ibid.

¹⁷² Ibid.

¹⁷³ Conditional on substantive offers by other Members linked to EU requests.

¹⁷⁴ TN/S/O/EEC/Rev.1, Communication from the European Communities and its Member States - Conditional Revised Offer (Adopted 25 June 2005).

¹⁷⁵ Hoekman, Mattoo and Sapir, 'The Political Economy of Services Trade Liberalization: A Case for International Regulatory Cooperation?' 375.

¹⁷⁶ Rafael Leal-Arcas, 'The Resumption of the Doha Round and the Future of Services Trade' (2007) 29 *Loyola of Los Angeles International and Comparative Law Review* 339, 394.

¹⁷⁷ See the Summary of the EC's Revised Requests to Third Countries in the Services Negotiations under the DDA by the European Union.

¹⁷⁸ Ibid.

¹⁷⁹ Rafael Leal-Arcas, 'The GATS in the Doha Round: A European Perspective' in Kern Alexander and Mads Andenas (eds), *The World Trade Organization and Trade in Services* (Marinus Nijhoff 2008) 61.

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

¹⁸² See on Mode 4: Allison M. Young, 'Where Next for Labour Mobility under GATS?' in Pierre Sauvé and Robert M. Stern (eds), *GATS 2000: New Directions in Services Trade Liberalization* (The Brookings Institution 2000) 184.

¹⁸³ JOB(08)/93, Services Signalling Conference (Report by the Chairman of the Trade Negotiations Committee 30 July 2008) 47.

¹⁸⁴ Chin Leng Lim and Jiang Yu Wang, 'China and the Doha Development Agenda' (2010) 44 *Journal of World Trade* 1309, 1313.

¹⁸⁵ Hoekman, Mattoo and Sapir, 'The Political Economy of Services Trade Liberalization: A Case for International Regulatory Cooperation?' 375.

regulatory measures under Article VI:4 GATS.^{186,187} The Signalling Conference report states that most participants in that Conference are willing to improve market access conditions in Mode 4.¹⁸⁸ The EU offer responded to some Mode 4 requests¹⁸⁹ granted that these offers could have been expected as the European workforce is highly skilled. This also creates offensive interests in Mode 4 liberalisation for the EU.¹⁹⁰ In their turn, EU requests on Mode 4 echo these offensive interests as they seek commitments for intra-corporate transfers and instances of contractual service supplies without commercial presence—especially with regard to EU small and medium sized enterprises and independent professionals.¹⁹¹

Some groups of Members submitted collective requests attempting some plurilateral request-offer negotiations in accordance with Annex C of the Hong Kong Declaration.¹⁹² Even though the main component of the negotiations are these bilateral requests and offers, the plurilateral track informal ‘Friends-groups’ were formed by Members committed to liberalising certain modes of supply or sectors; such as audio-visual services, computer-related services, construction services, energy services, environmental services, express delivery services, financial services, legal services, logistical services, maritime services, Mode 3, Mode 4, and telecommunication.¹⁹³ They negotiate on technical issues and even formulate formal negotiating proposals.¹⁹⁴ The groups bundle interests in an attempt to advance negotiations as the complexity of negotiating complex matters with repercussions for many different industries in 159 Members simultaneously is a daunting task. Improving access to foreign markets is key to the request-offer negotiation approach as reducing limitations and improving commitments lead to more liberalisation.

3. THE ‘THIRD TRACK’

Aside from the two main GATS negotiation tracks, some matters related to services are being negotiated in different surroundings. Electronic commerce has been on the WTO agenda since the 1998 Work Programme on Electronic Commerce¹⁹⁵ which was reaffirmed in the Doha Declaration.¹⁹⁶ The negotiations on electronic commerce are being conducted on three fronts, one being the DDA services negotiations.¹⁹⁷

¹⁸⁶ Young 202.

¹⁸⁷ Leal-Arcas, ‘The GATS in the Doha Round: A European Perspective’ 54.

¹⁸⁸ JOB(08)/93, Services Signalling Conference (Report by the Chairman of the Trade Negotiations Committee 30 July 2008) 48.

¹⁸⁹ Such as short-term residence permits through mode 4 for specialist service providers, but under EU working conditions, minimum wages and collective wage agreements. The EU could refuse entry on grounds of public security or risk of abuse. Leal-Arcas, ‘The Resumption of the Doha Round and the Future of Services Trade’ 393.

¹⁹⁰ Leal-Arcas, ‘The GATS in the Doha Round: A European Perspective’ 53.

¹⁹¹ Summary of the EC's Revised Requests to Third Countries in the Services Negotiations under the DDA by the European Union.

¹⁹² WT/MIN(05)/DEC, Ministerial Declaration (Doha Work Programme) (Adopted 18 December 2005) 7.

¹⁹³ Jara and Domínguez 122 For example, there are the Friends of Environmental Goods, Friends of Fish, Telecom Friends, Friends of Financial Services or Very Close Friends of Services.

¹⁹⁴ Ibid.

¹⁹⁵ WT/L/274, Work Programme on Electronic Commerce (Adopted by the General Council 25 September 1998).

¹⁹⁶ WT/MIN(01)/DEC/1, Ministerial Declaration (Adopted 14 November 2001) 34.

¹⁹⁷ Sacha Wunsch-Vincent, *WTO, E-commerce, and Information Technologies: From the Uruguay Round through the Doha Development Agenda* (Report for the UN ICT Task Force, 2005) 2 The other main forums for negotiation are the Work Programme on Electronic Commerce and through the Information Technology Agreement.

This is not explicitly taken up in the Doha mandate, thus negotiations in the DDA will not lead to an Agreement on E-Commerce because market access negotiations in services involve electronic commerce for services covered by GATS.¹⁹⁸ The modalities for least-developed countries are also part of the DDA's services mandate but are not being conducted on one of both tracks discussed previously.

3.1 ELECTRONIC COMMERCE

In the age of the internet, many trade transactions are at least partly carried through electronically. Moreover, information technology or computer related services and business services and processes, such as customer interaction services, back office operations are being outsourced to foreign service suppliers.¹⁹⁹ Applying existing trade rules—largely created before the internet boom—to such transactions raises some important questions, even though no general conceptual problems arise.²⁰⁰ The Ministerial Declaration establishing the Work Programme on Electronic Commerce declared that current practice of not imposing customs duties on electronic transmissions was to be continued.²⁰¹ The structure of the Work Programme immediately points out the core difficulty of electronic commerce. Such transactions entail aspects of trade in services, in goods, in intellectual property and of trade and development.²⁰² More so, there is debate on whether electronic commerce is the provision of services or the trade in goods.²⁰³ The debate is especially relevant as the classification systems of both GATT and GATS are not conclusive on the matter.²⁰⁴ From a liberalising point of view, integral treatment of electronic commerce as trade in goods may have been preferable because of the advantages of the GATT system.²⁰⁵ Nevertheless, such classification is substantively unconvincing as it focuses on a transport medium that makes no inherent contribution to the service; illustrated by the unsuccessful negotiation practice on information technology products in non-agricultural market access negotiations.²⁰⁶ Additionally, the 1999 Progress Report adopted by the Council for Trade in Services clarified that the electronic delivery of services comes within the ambit of GATS.²⁰⁷ Thus, classifying electronic commerce at least partly as trade in services seems the better route. The WTO's superior dispute settlement body, the Appellate Body, confirmed this in *US-Gambling* by applying GATS to the electronic commerce in question.²⁰⁸ As that electronic commerce was not yet invented at the conclusion of

¹⁹⁸ Ibid.

¹⁹⁹ Mattoo and Wunsch-Vincent, 'Pre-Emptying Protectionism in Services: The GATS and Outsourcing' 767.

²⁰⁰ Zleptnig 390.

²⁰¹ WT/MIN(98)/DEC/2, Ministerial Declaration on Global Electronic Commerce (Adopted 25 May 1998).

²⁰² WT/L/274, Work Programme on Electronic Commerce (Adopted by the General Council 25 September 1998) 2.1.

²⁰³ Drake and Nicolaïdis 408.

²⁰⁴ Weber 854.

²⁰⁵ The GATT uses a negative list approach which requires express exemption for certain goods from most-favoured-nation and national treatment obligations while in the GATS system, a positive list approach is applied in which only those services sectors for which commitments are made fall under the obligations. Obviously, this raises the issue of adequate sectoral classification again. Secondly, the GATT system automatically applies to newly designed goods. See: *ibid* More elaborately, see: Mattoo and Wunsch-Vincent, 'Pre-Emptying Protectionism in Services: The GATS and Outsourcing' 775.

²⁰⁶ Weber 860.

²⁰⁷ S/L/74, Work Programme on Electronic Commerce Progress (Report by the Council for Trade in Services 19 July 1999) 4.

²⁰⁸ *US - Gambling (AB)*.

GATS, this means GATS also applies to electronic services for newly developed services, if such services can be classified under existing commitments.²⁰⁹ This decision must have certainly warned negotiators to take extra care when scheduling commitments as the schedules' clarity is crucial in determining the extent of the obligations arising from the commitments in times of vast technological advancement.²¹⁰ Going even further, some Members submitted that all products delivered electronically are services and are thus subject to GATS rules.²¹¹ It is clear that, aside from benefiting from legal certainty, the flexibility of the GATS framework plays a role in such statements. In a European context, cultural protection also plays a role and for that reason audio-visual services have been almost completely exempted from the EU's schedule of commitments.^{212,213}

If these arguments suffice in demonstrating the applicability of GATS to electronic commerce, it remains unclear whether within GATS electronic services are supplied either under Mode 1, in which both consumer and service provider stay in their home country but the service is provided across the border, or Mode 2, which entails movement by the consumer to the service provider's home country to consume the service.^{214,215} In principle, GATS is technologically neutral,²¹⁶ which means that the delivery method or carrier of a service does not alter the nature of relevant GATS commitments.²¹⁷ In practice, that neutrality applies only within a mode of supply as discrimination between different modes can be scheduled.²¹⁸ But should some electronic commerce services be treated under Mode 1 and others under Mode 2,²¹⁹ or should commitments be negotiated for both modes identically to eliminate uncertainty?²²⁰ A possibility would be to amend Article I:2 (b) GATS so that Mode 2 explicitly involves physical presence of the service receiver in another Member²²¹ thereby clearly differentiating from Mode 1's cross border supply. The Panel argued in the same sense that only Mode 1 service supply can be remote which incorporates a wider category than cross-border services but is a necessary prerequisite to be cross-border. At first glance this solves the modal issue.²²² However, as the US commitments in Mode 1 and Mode 2 in the dispute were identical and neither Panel or Appellate Body pronounced itself on the difference between the modes, the issue might not yet be settled. This is especially the case

²⁰⁹ Sacha Wunsch-Vincent, 'The Internet, Cross-Border Trade in Services, and the GATS: Lessons from *US-Gambling*' (2006) 5 World Trade Review 319, 324.

²¹⁰ Ibid.

²¹¹ S/L/74, Work Programme on Electronic Commerce Progress (Report by the Council for Trade in Services 19 July 1999) 6 & 25.

²¹² Drake and Nicolaïdis 408.

²¹³ Though the EU is not the only Member with such concerns. See, as concerns India, Das 1217.

²¹⁴ S/L/74, Work Programme on Electronic Commerce Progress (Report by the Council for Trade in Services 19 July 1999) 5.

²¹⁵ Drake and Nicolaïdis 411.

²¹⁶ S/L/74, Work Programme on Electronic Commerce Progress (Report by the Council for Trade in Services 19 July 1999) 4 & 24.

²¹⁷ Wunsch-Vincent, 'The Internet, Cross-Border Trade in Services, and the GATS: Lessons from *US-Gambling*' 329 Technological neutrality is linked to two unsettled issues: the intra-modal equality of different delivery techniques and the likeness of electronic services and non-electronic services.

²¹⁸ Ibid There is debate on whether limitations to schedules can explicitly exclude certain delivery methods within one mode of supply or whether technological neutrality is even more narrow in scope.

²¹⁹ Weber 856.

²²⁰ Mattoo and Wunsch-Vincent, 'Pre-Emptying Protectionism in Services: The GATS and Outsourcing' 780.

²²¹ Drake and Nicolaïdis 414.

²²² *US - Gambling (Panel)* 6.32.

as the service *in casu* was providing a service through a foreign hosted web page which might seem like a clear example of Mode 2 service supply in which the consumer ‘travels’ abroad by visiting the provider’s website.²²³

Concerning the inclusion of electronic commerce disciplines, the question remains whether the existing framework, possibly through selective revision, should be used to discipline electronic commerce; a new instrument should be added to GATS; or horizontal reform of the whole WTO system is the most desirable option.²²⁴ As discussed above, the existing framework contains some difficulties when applying GATS rules to electronic commerce. Touching on the fundamentals of GATS, for example by creating a fifth mode of supply, might prove to be a step too far. A new instrument could take the form of an Annex to GATS and become coherent, clear and aimed specifically at electronic commerce. However, it could also be made vague and bloated with unnecessary provisions or could be shaped as a Reference Paper. In being shaped as a Reference Paper, it would be substantively comparable to an Annex.²²⁵ For electronic commerce, guidance could be found in the Reference Paper on Basic Telecommunications²²⁶—to which eighty-two Members have committed themselves. Nonetheless, only a small reference to the Reference Paper on Basic Telecommunications was made during the negotiations, proposed by some Members as a possible Model for domestic regulation disciplines on electronic commerce under Article VI:4 GATS.²²⁷ Lastly, horizontal reform across WTO instruments is a possible path to disciplining electronic commerce which is especially interesting considering the current classification issues. Even though politically harder, from a logical perspective such an approach may be the most efficient as it can cater to new developments that may challenge the arbitrary delimitations between services, goods, and intellectual property that risk being made under the current framework.²²⁸ Of course, bringing all of electronic commerce rules within the scope of GATS would provide for that same advantage. The recently renewed GPA might be a source of inspiration for horizontal negotiations.

In practice, the negotiations on the services aspects of electronic commerce seem to be truly blocked. The Council for Trade in Services did not issue a report between 2000 and 2011. The two reports circulated since are limited to announcing a compilation of elements related to the electronic supply of services compiled from Secretariat Background Notes as a basis for discussion²²⁹ and referring to three communications from Members which were discussed.²³⁰ It seems that Members do not intend going beyond negotiations on scheduling commitments and thereby remain within the DDA mandate, towards new disciplines, in whatever form.²³¹ The

²²³ Wunsch-Vincent, ‘The Internet, Cross-Border Trade in Services, and the GATS: Lessons from *US–Gambling*’ 326.

²²⁴ Drake and Nicolaïdis 404.

²²⁵ *Ibid.*

²²⁶ Weber 861.

²²⁷ S/C/8, Work Programme on Electronic Commerce (Interim Report by the Council for Trade in Services 31 March 1999) 7.

²²⁸ Drake and Nicolaïdis 406.

²²⁹ S/C/35, Work Programme on Electronic Commerce (Report by the Chairman of the Council for Trade in Services 30 June 2011).

²³⁰ S/C/38, Work Programme on Electronic Commerce (Report by the Chairman of the Council for Trade in Services 6 July 2012).

²³¹ Wunsch-Vincent, *WTO, E-commerce, and Information Technologies: From the Uruguay Round through the Doha Development Agenda* 24.

many questions still to be addressed and the various choices left to make prove that it is unlikely that a multilateral framework for electronic commerce will emerge from the WTO any time soon.

3.2 MODALITIES FOR LEAST-DEVELOPED COUNTRIES

The DDA was initially conceived as a development round, thus with focus on the role in and benefits from the multilateral trading system of least-developed countries (LDCs), as is clear from the GATS itself. This mandate was criticised, stating that the WTO is not a development institution but a trade agency; that development is achieved by a multitude of factors of which trade is the only one for which the WTO has a mandate; and that subsequently the WTO's contribution to development should be concentrated around its core business, which is the opening up of markets and thereby increasing trade gains.²³² Up until the end of 2011, no real progress in favour of LDCs was made.²³³ At that time, a fifteen year waiver for preferential treatment in services trade and for service suppliers for LDCs was adopted in accordance with Articles IV:3 and XIX:2 GATS.²³⁴ The Ministerial Conference adopting the waiver by ministerial decision stated that LDCs are confronted with exceptional circumstances which justify a waiver from Article II:1 GATS.²³⁵ Substantively, the waiver allows non-LDC Members to deviate from their most-favoured-nation obligations and grant preferential treatment to every LDC, immediately and unconditionally, compared to like services and service suppliers of other Members.²³⁶ At first, the waiver only applies to market access measures under Article XVI GATS, but the preferential treatment could be expanded to other obligations after approval by the Council for Trade in Services. Preferential treatment is to be notified to the WTO. The waiver should promote the export interests of LDCs and should not increase trade barriers or create excessive difficulties for the trade of another Member. With a view toward negotiations, the preferential treatment should not impact on efforts to enhance market access barriers on a most-favoured-nation basis.²³⁷ It remains to be seen what the practical impact of the waiver will prove to be, however, the adoption could be seen as a positive signal in that Members are at least partly committed to the DDAs mandate flowing directly from GATS.

WHY IS THERE SO LITTLE PROGRESS?

All things considered, the results of the DDA after eleven years of negotiating are inadequate. Economists seem to agree on the enormous potential economic benefits of trade liberalisation in general and trade in services more specifically. Politicians chase more varied interests. Within the DDA, services negotiations do not seem to

²³² Petros Mavroidis, C., 'Doha, Dohalf or Dohaha? The WTO Licks its Wounds' (2011) 3 Trade, Law and Development 367, 376.

²³³ Ibid.

²³⁴ The adoption of a waiver for LDCs in the context of the so-called Modalities for the Special Treatment for Least-Developed Country Members in the Negotiations on Trade in Services was forged on article XIX:2 GATS, which was elaborated upon in TN/S/13, Modalities for the Special Treatment for Least-Developed Country Members in the Negotiations on Trade in Services (Adopted by the Council for Trade in Services 5 September 2003) and reaffirmed in paragraph 3 of Annex C of the WT/MIN(05)/DEC, Ministerial Declaration (Doha Work Programme) (Adopted 18 December 2005).

²³⁵ WT/L/847, Preferential Treatment to Services and Service Suppliers of Least-Developed Countries (Adopted by the Ministerial Conference 19 December 2011).

²³⁶ Ibid.

²³⁷ Ibid.

attract the most political will or are only used as a bargaining chip.²³⁸ But such treatment does not take into account that

*[w]e can no longer easily separate industry and services. In a world of global supply chains, the competitiveness of services has become a major component of the competitiveness of industry.*²³⁹

It seems that Members are not committed to achieve an ambitious services trade liberalisation package even though there is much progress to be made in the relatively new field of services liberalisation, both economically,²⁴⁰ (especially for the EU)²⁴¹ and legally, as the GATS framework needs further clarification and development. The 'not in my term of office' theory may explain why the political short-term local cost of a conversion period after trade liberalisation withholds more ambitious commitments. But there is more to it. Economic potential needs to be realisable for it to become a tangible opportunity. The disharmony between theoretical economic benefits and giving Members the possibility of actually reaping these benefits by giving in to some of their main concerns is resulting in frictions with regard to fairness and the developmental nature of the DDA.²⁴² Changes in bargaining power in the new world order since the start of the DDA emphasised this discord as the position and interests—and thus the potential benefits of the negotiations-of least-developed, emerging and developed Members are on many levels contradictory while the position of the latter has become weaker. The lack of a deal considered fair by all parties surely does not add to the political will to strike a deal. Even though completely dropping the DDA is still not completely excluded from the options list, failure would send grave negative signals to the global community. Weakened multilateral cooperation in the only multilateral trade institution and a total lack of consensus on addressing the issues faced by the LDCs even in a so-called development round cannot be defended as sufficient outcomes after more than a decade of negotiations.²⁴³ A realisable economic potential for all Members must be reached for the DDA to truly succeed. If not, political realism might undermine the credibility of the multilateral trade system once more. The DDA negotiations seem to be lacking momentum in 2012 and in the words of WTO Director-General Pascal Lamy: *'We have a heavy collective responsibility, not only for the Doha Round but for the multilateral trading system in these difficult times to make sure 2012 is not a*

²³⁸ Delimatsis, 'Due Process and 'Good' Regulation Embedded in the GATS – Disciplining Regulatory Behaviour in Services through Article VI of the GATS' 49.

²³⁹ World Trade Organization, 'Lamy Urges "Smart Policies" to Maintain European Competitiveness' (2012) <http://www.wto.org/english/news_e/sppl_e/sppl255_e.htm> accessed 22 October 2012.

²⁴⁰ Decreux and Fontagné calculated that *"there is more to be gained for the world economy from a 25% reduction of barriers in services than from a 70% tariff cut in agriculture in the North, 50% cut in the South, a reduction by half of domestic support, and the phasing out of export subsidies"*. See: Yvan Decreux and Lionel Fontagné, *A Quantitative Assessment of the Outcome of the Doha Development Agenda* (CEPII Working Paper, N°2006-10, 2006) 31.

²⁴¹ In a second study, Decreux and Fontagné reached the conclusion that in value, the EU would benefit the most, namely 50% of world gains, for its services exports in case of a 3% reduction in services trade barriers. See: Yvan Decreux and Lionel Fontagné, *Economic Impact of Potential Outcome of the DDA II* (CEPII Working Paper, N°2011-23, 2011) 28.

²⁴² See on this argument: Charles Sampford and others, 'Living Up to the Promises of Global Trade' in Ross P. Buckley (ed), *The WTO and the Doha Round: The Changing Face of World Trade* (Kluwer Law International 2003) 9. The authors argue that there are ethical reasons for developed countries to fulfil the promises of economic benefits through trade liberalisation. But, pragmatic reasons exist too: by liberalising sensitive sectors, developed Members can aid development, democracy and peace in developing countries.

²⁴³ Mavroidis 379.

wasted year.²⁴⁴ This is essentially not a legal matter but rather is a political one: *'The challenge does not lie principally in knowing how to improve the multilateral trading system but in summoning the political will to do it.'*²⁴⁵

Aside from the considerable cost of possibly failing to conclude the DDA negotiations,²⁴⁶ the DDA's lack of concrete results and Members' frustrations with that, have surely also played part in the increase in bilateral and regional trade agreements concluded outside the scope of the WTO.^{247 248} The ambiguous position of powerful WTO Members in the multilateral system perhaps illustrates the urgency of concluding bilateral or interregional trade agreements in a global race at the cost of loyalty to the multilateral trading system.²⁴⁹ Changing power balances between the old economic superpowers and the emerging economies combined with the greater possibility of strong-arming smaller economies in bilateral preferential trade agreements surely add to this dynamic. Still, debate is unsettled on the ultimate impact of such preferential trade agreements on the multilateral trade system.²⁵⁰ In any case, the EU claims multilateral negotiations are its priority, as historically has been the case, but are at the same time actively and successfully pursuing trade agreements with its trading partners on the bilateral or interregional level.²⁵¹

In the shadow of the DDA negotiations on services, a group of sixteen WTO Members, including the EU, the US, Japan, Canada, and South-Korea, started up talks on a plurilateral agreement: the so-called international services agreement.²⁵² The group, referred to as the 'Really Good Friends of Services Liberalisation', was then extended to twenty states.²⁵³ The idea of negotiations on a plurilateral services agreement has been endorsed since 2007—for example in the report of the high-level First Warwick Commission. In 2008, Australian companies organised a services roundtable which proposed locking in any DDA negotiation progress achieved at that time through a plurilateral agreement. Many more private actors followed suit in supporting further liberalising trade in services through a plurilateral services agreement.²⁵⁴ But what shape should such an agreement take? The Warwick report recommended reintroducing flexibility and so-called 'critical mass decision-making' in

²⁴⁴ World Trade Organization, 'Lamy Reports to General Council on Doha Round and Urges Negotiators to 'Change Gears'' (2012) <http://www.wto.org/english/news_e/news12_e/gc_rpt_25jul12_e.htm> accessed 16 August 2012.

²⁴⁵ Ross P. Buckley, 'Introduction: The Changing Face of World Trade and the Greatest Challenge Facing the WTO and the World Today' in Ross P. Buckley (ed), *The WTO and the Doha Round: The Changing Face of World Trade* (Kluwer Law International 2003) 8.

²⁴⁶ See, for example, Antoine Bouet and David Laborde, 'Assessing the Potential Cost of a Failed Doha Round' (2010) 9 *World Trade Review* 319.

²⁴⁷ Rafael Leal-Arcas, 'Proliferation of Regional Trade Agreements: Complementing or Supplanting Multilateralism?' (2010-2011) 11 *Chicago Journal of International Law* 597, 622.

²⁴⁸ Martin Roy, Juan A. Marchetti and Hoe Lim, 'Services Liberalization in the New Generation of Preferential Trade Agreements (PTAs): How Much Further than the GATS?' (2007) 6 *World Trade Review* 155, 155 & 185.

²⁴⁹ Leal-Arcas, 'The Resumption of the Doha Round and the Future of Services Trade' 410.

²⁵⁰ Many variables play a role in this assessment, see: World Trade Organization, *World Trade Report 2011: The WTO and preferential trade agreements: From co-existence to coherence* (2011) 14 & 166.

²⁵¹ Leal-Arcas, 'The Resumption of the Doha Round and the Future of Services Trade' 410 & 413.

²⁵² The Members are the EU, the US, Australia, New Zealand, Hong Kong, Taiwan, Singapore, Japan, Colombia, Chile, South Korea, Pakistan, Mexico, Norway, Switzerland and Canada.

²⁵³ Panama, Costa Rica, Israel and Turkey also joined.

²⁵⁴ For examples, see Gary Clyde Hufbauer, J Bradford Jensen and Sherry Stephenson, *Framework for the International Services Agreement* (Peterson Institute for International Economics Policy Brief PB12-10, 2012) 9.

services trade negotiations which would introduce some variable geometry in liberalisation. The report reiterates that such an approach is not new and has been used successfully in the WTO context in the basic telecommunications, financial services, and information technology agreements. It is important to note that the benefits from these agreements were extended to all WTO Members through unconditional MFN application which the Warwick Commission recommends. In conclusion, the Warwick Commission states that it believes that plurilateral critical mass agreements which fulfil certain criteria, such as MFN application,

*'can protect the varied but legitimate interests of all Members of the WTO, render decision-making more supple and efficient, and reduce the risk that Members will find themselves obliged to accept legal commitments they do not consider to be in their national interest.'*²⁵⁵

The Australian services roundtable added that even if the DDA services negotiations were concluded, there should be a built-in agenda for critical mass—MFN based negotiations on services.²⁵⁶ Deciding whether or not the benefits of the international services agreement may be extended to non-signatories through the MFN principle is a key decision in shaping the agreement. But critical mass, which is the combined economic weight of signatories of an agreement, plays a crucial role whatever the choice as concerns MFN would be.

First, when adopting an MFN approach for the agreement, critical mass must be reached to marginalise free-riding by non-signatories. There would be little reason not to extend the agreement to all WTO Members if the combined economic weight of signatories is sufficiently large. In the past, this happened with the plurilateral agreements on telecommunications, financial services and information technology, which each covered over 90% of trade in that sector.^{257 258} That percentage can be seen as a target for an open agreement,²⁵⁹ although numerical criteria may differ.²⁶⁰ In any case, considering the weight of the BRICS countries, who are absent from the negotiations and together represent over 16% of worldwide services trade, such a high target cannot be reached. Some authors, who suggested in 2010 that the EU and the major emerging economies should create an enforceable services agreement, argued that as soon as some negotiation progress is made with BRICS-countries, 'no large country would want to run the risk of being left aside from negotiations which in the case of services are likely to shape future international regulations.'²⁶¹ But, regardless of percentages, it is hard to defend that critical mass is reached if no BRICS countries are involved in the agreement.²⁶² It also seems very

²⁵⁵ The First Warwick Commission, *The Multilateral Trade Regime: Which Way Forward?* (University of Warwick, 2007) 30.

²⁵⁶ Australian Services Roundtable, *Securing Australia's Place in the Global Services Economy* (Submission to the Mortimer Review, 2008) 17.

²⁵⁷ Hosuk Lee-Makiyama, 'The International Services Agreement (ISA) - from the European Vantage Point' (ECIPE/ESF Conference on Services Plurilaterals, Brussels, 6 March 2012) 4.

²⁵⁸ Michitaka Nakatomi, *Exploring Future Application of Plurilateral Trade Rules: Lessons from the ITA and the ACTA* (Research Institute of Economy, Trade and Industry Policy Discussion Paper Series 12-P-009, 2012) 51.

²⁵⁹ Lee-Makiyama 4.

²⁶⁰ Nakatomi 52.

²⁶¹ Bernard M. Hoekman and Patrick Messerlin, 'What's Needed is a WTO for Services' (2010) <http://www.europesworld.org/NewEnglish/Home_old/Article/tabid/191/ArticleType/articleview/ArticleID/21776/language/en-US/Default.aspx> accessed 22 October 2012.

²⁶² In an IMF ranking of global services trade share, Brazil is ranked 13th, Russia 11th, India 5th, China 3rd and South Africa 26th. See Lee-Makiyama 5.

unlikely that the signatories of such a plurilateral agreement would extend the benefits to BRICS countries on an MFN basis as this would deprive them of reasons to take up the commitments of the agreement in order to join it at a later stage.²⁶³ Large emerging economies like the BRICS do not appear keen on taking services liberalisation out of the single undertaking as they continue to have important offensive interests in other areas of Doha round negotiations. They fear, and rightly so, that a plurilateral services agreement would weaken their position in those negotiations. But the growing importance of domestic services sectors in the BRICS countries could perhaps persuade them to join the negotiations. In the meantime, Deputy US Trade Representative Michael Punke said that, because of the position of these countries, that 'nothing can be done without [the big emerging economies] means that nothing can be done'.²⁶⁴ He adds that the US is ready to move forth on the plurilateral agreement, approaching it as a stepping stone towards multilateral liberalisation. Even more, US Trade Representative Ron Kirk said that

*'the United States does not see utility in the WTO returning to the negotiating dynamic that existed before. [...] This requires fresh ideas, as well as learning from the past what has worked and what has not. One of those lessons is that strong plurilateral results can serve as stepping stones to broader multilateral measures.'*²⁶⁵

In this context, WTO Director-General Pascal Lamy stated that the negotiations on an international services agreement should be including as many WTO Members as possible, but still hold sufficient ambition.²⁶⁶ In that sense, creating an interest for important non-BRICS emerging economies—such as Egypt or Indonesia—to join the negotiations on the international services agreement, might be key to move things forward and even attract BRICS interest.²⁶⁷

Second, even if the agreement would not apply MFN treatment to non-signatories, the concept of critical mass remains important. A plurilateral agreement within the WTO framework that does not extend MFN treatment can be adopted as a WTO agreement which requires the adoption of a waiver. Granting a waiver, which is temporary in nature, is a decision to be taken by 75% of WTO Members.²⁶⁸ Additionally, such an agreement could be brought into the WTO framework as a Plurilateral Agreement in Annex IV of the Marrakesh Agreement which would require a hard to reach consensus.²⁶⁹ The benefits of concluding the agreement within the WTO framework are clear: the existing rules and dispute settlement can be

²⁶³ Hufbauer, Jensen and Stephenson 25.

²⁶⁴ Michael Punke, 'Remarks by Deputy USTR Punke, March 19, 2012 - Deputy U.S. Trade Representative Michael Punke Gave the Following Testimony before the U.S. Chamber of Commerce' (2012) 22 Foreign Policy Bulletin 144, 154.

²⁶⁵ Ron Kirk, 'Remarks by Ambassador Kirk, May 22, 2012 - Ambassador Ron Kirk Gave the Following Remarks at the London School of Economics' (2012) 22 Foreign Policy Bulletin 105, 107.

²⁶⁶ World Trade Organization, "Openness of trade and openness of minds" key to meeting challenges of the future - Lamy' (2012) <www.wto.org/english/news_e/sppl_e/sppl250_e.htm> accessed 26 October 2012.

²⁶⁷ Hufbauer, Jensen and Stephenson 43.

²⁶⁸ WTO Agreement art. IX:3 The Cotonou ACP-EC Partnership Agreement was an example of such a plurilateral agreement. The waiver was adopted by the WT/MIN(01)/15 Ministerial Decision European Communities - the ACP-EC Partnership Agreement (14 November 2001).

²⁶⁹ WTO Agreement art. X:9 Annex I contains the multilateral agreements, Annex II the Dispute Settlement Understanding and Annex III the Trade Policy Review Mechanism. Annex IV still embodies two plurilateral agreements that are in force, the Agreement on Trade in Civil Aircraft and the Agreement on Government Procurement.

maintained,²⁷⁰ and more parties might join an agreement in the WTO framework than outside of it.²⁷¹ The WTO itself might benefit from it as well and in that way it remains the focal point of negotiations.²⁷² To meet the 75% quorum for a waiver or the consensus for an Annex IV Plurilateral Agreement, some authors propose a ‘grand bargain’ although they admit this would be very difficult politically. Especially if the EU and the US accept the tabled DDA proposals on agriculture, non-agricultural market access, and some other subjects, a waiver for future plurilateral agreements on services and other timely issues could be granted.²⁷³ Another author sees two problems standing in the way of the success of such an approach. First, he asks why the cost of negotiating the waiver would be smaller than the cost to conclude the DDA services negotiations. Second, he claims that negotiating concessions to obtain the waiver before the benefits of the agreement are clear for the signatories and complicates the talks on the plurilateral agreement seriously.²⁷⁴ On the other hand, one must ask whether the BRICS can stop the conclusion of an agreement. It could be argued convincingly that refusing the waiver would lead to a deal outside the WTO framework which will be discussed next. For non-signatories, this has some disadvantages.²⁷⁵ An agreement outside the WTO framework would weaken the position of the WTO. This would probably be to the detriment of weaker parties if power balances are considered. An agreement outside the WTO would also be harder to join later on. Furthermore, the ‘grand bargain’ carrot may be sufficiently appealing as a deal outside of the WTO would not lead to such benefits at all and the BRICS countries might opt to get what they can. In any case, as stated, an agreement may also be concluded outside of the WTO framework. It should then comply with the conditions set out in Article V GATS. Footnote 1 to that provision states there can be no *a priori* exclusion of any mode of supply in order to meet the substantial sectoral coverage criterion. Furthermore, in the sense of Article XVII GATS, the agreement should provide for the absence or elimination of substantially all discrimination.²⁷⁶ These conditions might seem hard to fulfil, but have in practice not been strictly applied—however, this might change with the international services agreement which could serve as a test case.²⁷⁷ Another option, which perhaps is to be pursued in parallel to the plurilateral negotiations, entails returning to sectoral agreements in which critical mass can be achieved more easily in order to multilateralise services liberalisation sector by sector.²⁷⁸

Although it seems that the response to the negotiation of a plurilateral services agreement in the literature appears to be generally positive, one author points out that progress is slower than expected and the optimistic deadline of conclusion at the end of 2012 will most likely not be met. Even more, he asks whether we are, as in the DDA, ‘in for another long haul?’²⁷⁹

²⁷⁰ Lee-Makiyama 7.

²⁷¹ Hufbauer, Jensen and Stephenson 24.

²⁷² Ibid.

²⁷³ Ibid.

²⁷⁴ Lee-Makiyama 7.

²⁷⁵ Hufbauer, Jensen and Stephenson 25.

²⁷⁶ Art. V.1(b) GATS.

²⁷⁷ For example as to what is “substantially all trade” as concerns Mode 4. See Hufbauer, Jensen and Stephenson 24.

²⁷⁸ Lee-Makiyama 14.

²⁷⁹ Stuart Harbinson, *The WTO Must Bounce Back* (European Centre for International Political Economy Policy Brief 09/2012, 2012) 4.

CONCLUSION

This report has attempted to provide insight into some possible legal framework solutions for issues under negotiation at the Doha services negotiations. In trying to answer the question of what the future architecture of the GATS might look like, more questions than answers have been put forth. As concerns substantive provisions of possible disciplines, it is clear that there are still many uncertainties even with regard to questions such as the desirability of an agreement. Specifically focusing on the legal nature of the outcomes of negotiations, there does not seem to be a preferred way forward. As concerns negotiations on domestic regulation, a plurilateral approach may be preferable, however, no factual evidence really points in that direction. In the ESM negotiations, integration of the provisions into GATS, with additionally *ad hoc* sectoral solutions, seems to be the preferred path. With regard to government procurement, the horizontal plurilateral GPA probably excludes reaching a multilateral agreement. The negotiation mandate on subsidies requires such disciplines to be multilateral. Market access negotiations focus on scheduling commitments within the current schedules framework. The negotiations on electronic commerce are likely to not go beyond scheduling commitments. The only tangible result of LDC modalities, the waiver on preferential treatment, was adopted as a Ministerial Decision, conform Article IX:4 of the WTO Agreement. It is not surprising that there is not one formulae that caters for all negotiation paths. The complicated nature of the negotiations, the ambiguous position of trade in services within the DDA, diverging interests between powerful Members, and the lack of political will for an ambitious consensus seem apparent reasons for this. But amidst the diffuse negotiation practice, one approach might be a way out of the DDA deadlock because for certain negotiations a plurilateral negotiation tactic within the multilateral trading system might be the best way forth. Such a Model-based approach, for example through a Reference Paper, offers three advantages as opposed to the less structured and more *ad hoc* request-offer approach. Firstly, it partly remedies the strong-arming of Members with less bargaining power, therefore leading to more fair and efficient outcomes; secondly, the transaction costs of such negotiations can be lower than in bilateral request-offer negotiations; thirdly, it addresses freeriding under the most-favoured-nation principle of bilateral negotiations.²⁸⁰ It might also ease the difficulties of concluding a multilateral agreement in the current climate. However, the Model-based approach appears difficult to develop in services negotiations, because of, for example, the broad range of non-quantifiable measures that affect market access.²⁸¹ An added risk is that plurilateral agreements risk fragmenting and complicating WTO disciplines even more. Although the above analysis of negotiation practice reveals that there might not be a better solution at hand for the negotiations in which all options are still open, negotiations have possibly not progressed sufficiently enough to be addressing the legal nature of the future disciplines in some key negotiation areas. The international services agreement, for which quite some architectural options remain open, might prove to be the best chance at serious progress. But political sensitivities, economic rationale, and the fact that negotiating

²⁸⁰ Mattoo and Wunsch-Vincent, 'Pre-Emptying Protectionism in Services: The GATS and Outsourcing' 787 The authors add a fourth reason: it is, in their view, "the only credible way of granting credit to unilateral liberalizers."

²⁸¹ See *ibid.* The authors propose five approaches to commitments in order to obtain market access and national treatment in cross-border electronic services trade.

parties are nowhere near a deal yet showcase once more how difficult negotiations on such a complicated subject are.

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