Working Paper 117 – August 2013

THE SCOPE OF GATS AND OF ITS OBLIGATIONS

**Bregt Natens
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ABSTRACT

The GATS preamble already highlights the inevitable conflict between on the one hand achieving progressively higher levels of liberalization of trade in services in order to expand trade in services and promote growth, and on the other hand the right to introduce new regulation to meet national policy objectives. Hence, it was clear from the outset that the balance between trade liberalisation and domestic regulatory autonomy would be key in interpreting the constructively ambiguous GATS. The outcome of this exercise depends on three factors: the interpretation of (i) GATS' overarching objectives, (ii) of the general scope of GATS and of the obligations arising from it (and the exceptions to them) and (iii) of the inherent individual flexibility of GATS. Whilst also touching on the first, this contribution mainly focuses on the second factor by addressing the scope of GATS, of its unconditional obligations, of obligations applying to sectors for which specific commitments have been scheduled and of obligations in GATS Annexes. Additionally, it provides an overview of the structure of GATS obligations. The third factor is mainly addressed throughout textboxes which provide an illustrative insight into how the European Union has used the inherent GATS flexibility to shape its obligations.

KEYWORDS

WTO, World Trade Organization, GATS, General Agreement on Trade in Services, services, scope, obligations, governmental authority exception

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INTRODUCTION

'All understand that the GATS represents a complex and multi-faceted compromise between these twin goals of trade liberalization and regulatory autonomy. The contours of this compromise are defined by a variety of rules and understandings [...]. Where proponents of the GATS [...] express confidence in the ability of the trade regime to interpret and apply its rules within the bounds of reasonableness, GATS critics tend to see them as inadequate and indeterminate, and are suspicious of the tendency of ambiguity to be resolved in the interests of the powerful.'²

On the multilateral level, global trade is mainly governed by the World Trade Organization (WTO). After very difficult negotiations³, the General Agreement on Trade in Services ('GATS' or 'the Agreement') was concluded as the key WTO agreement on trade in services, providing a basic framework for the liberalisation of trade in services and a platform for further negotiations.⁴ However, the Agreement is the textually unclear result of an elaborate political compromise⁵, highlighting from its preamble on that it is concluded between parties with almost diametrically opposite views on an inherently complex issue. Moreover, because of this ambiguity and the possibly very broad scope of GATS and some of its obligations, some civil society actors have expressed grave concerns on the impact of GATS – reminiscent of the criticism on the Services Directive.⁶

Although the GATS preamble states that the achievement of progressively higher levels of liberalisation of trade in services is desired to promote 'the interests of all participants on a mutually advantageous basis', the subsequent paragraph also recognises the right of Members to regulate and to introduce new regulation to meet national policy objectives.⁷ Moreover, while

¹ This paper is also published (August 2013) in the working paper series of the [Policy Research Centre on "Foreign Affairs, International Entrepreneurship and Development Cooperation"](#) of the Flemish Government. We thank the Flemish Government for their interest and support.

² Andrew Lang, 'The GATS and Regulatory Autonomy: a Case Study of Social Regulation of the Water Industry' (2004) 7 *Journal of International Economic Law* 801, 804.

³ See, on the drafting and negotiation history of GATS: Juan A. Marchetti and Petros C Mavroidis, 'The Genesis of the GATS (General Agreement on Trade in Services)' (2011) 22 *European Journal of International Law* 689.

⁴ Alejandro Jara and M del Carmen Domínguez, 'Liberalization of Trade in Services and Trade Negotiations' (2006) 40 *Journal of World Trade* 113, 114.

⁵ Marchetti and Mavroidis 719. Additionally, this explains the extreme variety of positions on GATS in civil society. These positions reach from believing GATS is only shallowly liberalizing trade in services to perceiving GATS as a threat to basic public services, or preventing governments of fulfilling their international human rights obligations. See: Lang 802; 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, 513.

⁶ See Peter Timmerman, *Legislating amidst Public Controversy: The Services Directive* (Egmont Paper 22, 2009). In his critical appraisal of the Services Directive, the author states that the political sensitivity of the subject matter led to problematic issues which could lead to legal uncertainty. Also see Michele Chang, Dominik Hanf and Jacques Pelkmans, 'The Services Directive: Trojan Horse or White Knight?' (2010) 32 *European Integration* 97 and Jon Erik Dølvik and Anne Mette Ødegård, 'The Struggle over the Services Directive: The Role of the European Parliament and the ETUC' (2012) 53 *Labor History* 69.

⁷ Preamble of the General Agreement on Trade in Services, Annex 1B to the Marrakesh Agreement.

expanding trade in services and promoting growth can be considered the main goals of GATS, the preamble foresees the possible conflict between these goals and regulatory autonomy.⁸ The preamble's hybrid character illustrates that both of these concepts are to be balanced in the multifaceted GATS framework which includes GATS and its Annexes and Protocols.⁹ As WTO rules by nature impinge on other policy areas and trade restriction is an 'inevitable corollary' of policies with non-trade objectives,¹⁰ this equilibrium will be key. However, such a balance is more complicated for trade in services compared to goods due to three reasons.¹¹ First, services sectors are incredibly diverse from a political, institutional, and economic perspective. Second, there is an almost unlimited number of trade measures which may be legitimately applied to protect markets but which may affect trade in services. Third, because of the broad scope of GATS, more national regulating bodies such as ministries or agencies are likely to be involved. Moreover, many services sectors are typically at least partly regulated at sub-central governmental levels.

The outcome of this difficult balancing exercise between regulatory autonomy and liberalisation depends on three factors.¹² However, these factors are very open to interpretation, again complicating the balancing exercise. The first factor is the interpretation of GATS' overarching objectives. The interpretation of these objectives can range from a view with substantial regard for national regulatory autonomy to a wholly opposite neoliberal market integration approach.¹³ Depending on the issue at hand, there have been almost opposite interpretations of the objectives. The Appellate Body took a stance when reviewing the object and purpose of GATS. It referred to the various objectives of GATS and subsequently determined that one of those objectives, the principle of progressive liberalisation, does not lend 'support to an interpretation that would constrain the scope and coverage of specific commitments that have already been undertaken by Members and by which they are bound.'¹⁴ According to one author, this means specific commitments should be given a broad scope, favouring trade liberalisation over domestic regulatory autonomy.¹⁵ On the other hand, it has been argued that preference should be given to domestic regulatory autonomy in order for governments to retain the right to ensure affordable and equal access to essential services, ensuring GATS compatibility with human rights. This reflects that international trade law not only impacts on border measures but also on non-tariff measures in a wide array of domestic policies.¹⁶ The second factor is the interpretation of the general scope of GATS, of the obligations arising from it and the exceptions to them,

⁸ Markus Krajewski, *National Regulation and Trade Liberalization in Services* (Kluwer Law International 2003) 56.

⁹ Lang 804.

¹⁰ Panagiotis Delimatsis, 'The Fragmentation of International Trade Law' (2011) 45 *Journal of World Trade* 87, 96.

¹¹ Rudolf Adlung and Martin Roy, *Turning Hills into Mountains? Current Commitments under the GATS and Prospects for Change* (World Trade Organization Economic Research and Statistics Division Staff Working Paper ERSD-2005-01, 2005) 6. The authors mention these issues in the context of services negotiations. However, they appear equally applicable in general terms.

¹² As deduced from Lang 804.

¹³ Krajewski 57.

¹⁴ *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Products* WT/DS363/AB/R, AB report adopted 19 January 2010 §392-§394.

¹⁵ Nellie Munin, *Legal Guide to GATS* (Wolters Kluwer 2010) 41.

¹⁶ Krajewski 59.

summarised in the catchphrase ‘Tight rules or broad reach?’¹⁷ This second factor is the main scope of this contribution, although in order to keep things manageable, the scope of GATS exceptions are hardly addressed. The third factor is the inherent individual flexibility of GATS. The interpretation of Member’s individual exemptions, specific commitments, and any limitations to these commitments make the agreement very flexible.¹⁸ In the end, the crucial question is: ‘how much incidental trade restriction is tolerable’ when a government decides to take measures?¹⁹

This contribution consists of two main parts that examine the interpretation of the general scope of GATS and its obligations. First, the scope of GATS is analysed. It determines the outcome of ‘the fundamental bargain between the Members of the WTO regarding their obligations’,²⁰ but is also subject to many uncertainties. Second, the scope of GATS’ unconditional obligations and obligations that apply to sectors in which specific commitments have been undertaken is examined. Throughout this contribution, it will become evident that the flexibility of the GATS structure (as is evident from the existence of unconditional and conditional obligations and specific commitments, exemptions, schedules of commitments and limitations to these schedules) is indicative of its scope,²¹ allowing Members to create a unique scope for GATS and of its obligations. Therefore, the added textboxes provide an insight into how the European Union (EU) has used the GATS flexibility and approached some – by no means all – of the uncertainties regarding the scope of the agreement and of its obligations. They also highlight that GATS may have an influence in some perhaps unexpected situations.

1. THE SCOPE OF GATS

A. THE INITIAL SCOPE

Article I:1 GATS states that the agreement applies to measures by Members affecting trade in services. Articles I:3 *juncto* XXVIII (a)-(c) GATS provide further guidance as to what this provision means. Although there is no definition of the concept of services in GATS,²² ‘trade in services’ is the supply of services through one of four modes of supply defined in Article I:2 GATS.²³ All four modes of supply require an international dimension to the trade in services

¹⁷ Rudolf Adlung, ‘Services Negotiations in the Doha Round: Lost in Flexibility?’ (2006) 9 *Journal of International Economic Law* 865, 892.

¹⁸ *Ibid.*

¹⁹ Lang 836.

²⁰ J Anthony VanDuzer, ‘Health, Education and Social Services in Canada: The Impact of the GATS’ in John M. Curtis and Dan Ciuriak (eds), *Trade Policy Research 2004* (Minister of Public Works and Government Studies Canada 2004) 377.

²¹ This is also the basic argument in Rupa Chanda, ‘Social Services and The GATS: Key Issues and Concerns’ (2003) 31 *World Development* 1997.

²² It is in essence very difficult to do so in a way that encompasses all forms of services. See, for an overview of attempts at defining services, Michael J Trebilcock and Robert Howse, *The Regulation of International Trade* (3rd edn, Routledge 2005) 350.

²³ *Canada - Certain Measures Affecting the Automotive Industry* WT/DS139/AB/R, WT/DS142/AB/R, AB report adopted 19 June 2000 §170; Diana Zacharias, ‘Article I GATS’ in Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäggle (eds), *Max Planck Commentaries on World Trade Law: WTO - Trade in Services*, vol 6 (Martinus Nijhoff 2008) 38.

because borders between Members must be crossed.²⁴ With regard to the movement of natural persons, which could come within the scope of Mode 4, the Annex on Movement of Natural Persons Supplying Services under the Agreement holds that Members are not prevented from regulating the entry into or temporary stay in its territory. This includes measures that are necessary to protect the integrity of and ensure the orderly movement of natural persons across the Member's borders. However, such measures may not nullify or impair the benefits of another Member flowing from the Member's schedule of commitments.²⁵ The meaning of the two other elements of Article I:1 GATS, namely 'measures by Members' and 'affecting', require further attention.

First, 'measures by Members' includes measures taken by central, regional and local authorities. They include laws, regulations, rules, procedures, decisions, administrative actions or any other form of measures, and thus include measures that are not legal nor administrative but rather factual.²⁶ The exact scope of 'authorities' may be derived from GATT case law. The Appellate Body held that the 'essence of "government" is that it enjoys the effective power to "regulate", "control" or "supervise" individuals, or otherwise "restrain" their conduct, through the exercise of lawful authority'.²⁷ Accordingly, one can argue that measures by non-governmental bodies exercising delegated powers are to be considered as measures by Members.²⁸ For example, this could include self-regulating private associations that license certain liberal professions.²⁹ It appears from the GATS text that an explicit delegation of powers is necessary; this means self-regulating bodies which do not exercise formally delegated powers are probably exempted from the scope of the agreement, however, this reasoning is not likely to hold in the case of bodies that are only formally non-governmental.³⁰ Additionally, Article I:3 (a) GATS requires Members to take reasonable measures to ensure that their commitments are observed by all bodies taking measures that fall within the scope of GATS. According to one author, this means GATS does not require governments to bear exaggerated extra-administrative efforts or exceptional costs to prevent infringement by bodies other than the central government.³¹ Measures by private actors are exempted in principle from the agreement unless they are encouraged and supported rather than just tolerated by the government.³² However, this may be difficult to establish. Although Article XV GATS may give the impression that subsidies are not (yet) covered by GATS at first sight, they fulfil the condition set out above and are to be

²⁴ Zacharias 44.

²⁵ See, on any ambiguities resulting from the text of the Annex and their impact on the scope of GATS, see Jürgen Bast, 'Annex on Movement of Natural Persons Supplying Services Under the Agreement' in Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle (eds), *Max Planck Commentaries on World Trade Law: WTO - Trade in Services*, vol 6 (Martinus Nijhoff 2008).

²⁶ This includes the implementation of international agreements, standards and decisions of international organisations and their administrative bodies. Zacharias 54.

²⁷ *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products* WT/DS103/AB/R, WT/DS113/AB/R, AB report adopted 13 October 1999 §97; Eric Leroux, 'What is a "Service Supplied in the Exercise of Governmental Authority" Under Article I:3(b) and (c) of the General Agreement on Trade in Services?' (2006) 40 *Journal of World Trade* 345, 351-352.

²⁸ Markus Krajewski, 'Patient Mobility Beyond Calais: Health Services Under WTO Law' in Johan van de Gronden and others (eds), *Health Care and EU Law* (T.M.C. Asser Press 2011) 462-463.

²⁹ Zacharias 55-56.

³⁰ Krajewski, *National Regulation and Trade Liberalization in Services* 63.

³¹ Munin 67.

³² Zacharias 56. Private trade barriers are addressed in Articles VIII and IX GATS.

considered as measures by Members. Although GATS requires negotiations on specific provisions dealing with subsidies, for now these measures are governed by general GATS rules.³³

Second, since the Appellate Body decided that assessing whether a measure is prohibited by GATS first requires examining whether it is 'affecting' trade in services,³⁴ the interpretation of that term is key to the scope of GATS. 'Affecting' implies that all measures having an effect on trade in services are covered, giving GATS a broad reach.³⁵ In practice, this interpretation could mean that non-final or indirect measures are subject to GATS regulation.³⁶

B. EXCEPTIONS TO THE SCOPE

As set out above, in principle GATS applies to any service in any service sector. However, the broad scope is mitigated by some exceptions. First, implicitly and contrary to what is the case for goods,³⁷ GATS does not apply to measures related to export such as export quotas, restrictions, or incentives.³⁸ The scope of this exception is not to be underestimated in terms of policy space for domestic regulators.

Export measures, hospital services and medical tourism

The exemption of measures related to export from the scope of GATS has some perhaps unexpected practical consequences. For example, measures which reserve hospital beds for residents restrict the 'export' of hospital bed capacity and are thus in principle exempted from the scope of GATS and independent from scheduled concessions in the hospital services sector. Measures that tax 'exported' health services or oblige domestic health providers to provide certain mandatory services for domestic consumers before allowing them to move abroad are also consistent with GATS.³⁹

On the other hand, consider patients who go abroad in order to receive medical treatment, i.e. so-called 'medical tourists'. Services supplied to medical tourists fall within the scope of GATS, being services supplied in accordance with Mode 2: consumption abroad. Thus a

³³ Pietro Poretti, 'Article XV GATS' in Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle (eds), *Max Planck Commentaries on World Trade Law: WTO - Trade in Services*, vol 6 (Martinus Nijhoff 2008) 361.

³⁴ *Canada - Autos (AB)* §151.

³⁵ *European Communities - Regime for the Importation, Sale and Distribution of Bananas* WT/DS27/AB/R, AB report adopted 25 September 1997 §220; reaffirmed in *China - Measures Affecting Electronic Payment Services* WT/DS413/R, Panel report adopted 31 August 2012 §7.681; *Canada - Autos (AB)* §158.

³⁶ Zacharias 45.

³⁷ See Article XI GATT and, for the most recent case dealing with export restrictions, *China - Measures Related to the Exportation of Various Raw Materials* WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, AB report adopted 30 January 2012.

³⁸ Rudolf Adlung, 'The GATS Negotiations: Implications for Health and Social Services' [2003] *Intereconomics* 147, 151-152.

³⁹ *Ibid.*

government's refusal to reimburse the costs of the foreign treatment may discriminate against foreign services and violate national treatment obligations.⁴⁰ Of course, conditions apply to this analysis. First, specific commitments on national treatment in the relevant sector would have to have been scheduled without relevant limitations. Second, domestic and foreign services would have to be considered 'like'. Third, the treatment accorded to like foreign services would have to be less favourable. Fourth, an exception to GATS may provide a justification for the potential breach of national treatment obligations. However, from the point of view of the receiving or host state, there are no obligations to treat foreign patients like domestic patients. Mode 2 only applies to domestic patients moving abroad to receive a service. According less favourable treatment to a foreign patient entails disfavours domestic over foreign services or service suppliers – which is legitimate under GATS.⁴¹

Second, two sectors have been explicitly excluded from GATS: most services directly linked to air traffic rights⁴² and services supplied in the exercise of governmental authority. The exact meaning of the governmental authority exception, enshrined in Article I:3 (b)-(c) GATS, has been subject to much debate. Two prominent authors refer to it as an 'incomplete contract' as many uncertainties persist to its meaning and scope.⁴³ Nonetheless, it is a crucial aspect of the balance between regulatory autonomy and trade liberalisation as '[w]hat governments think the governmental authority exclusion means will guide them in developing law and policy in areas affected by the GATS in a good faith effort to comply with their obligations.'⁴⁴ Article I:3 (c) GATS contains the two conditions for the governmental authority exception. First, the service must not be supplied 'on a commercial basis' and second, the service must not be supplied 'in competition with' one or more service suppliers. It has been argued, as will be discussed *infra*, that a third condition, i.e. the presence of governmental authority, is implied.

The first condition, supply 'on a commercial basis', could be equated with a profit-seeking basis rather than simply determining whether a fee is charged for the service.⁴⁵ This argument is based on Article XXVIII (d) GATS, which defines 'commercial presence' in Mode 3 service supply as 'any type of business or professional establishment'. Because businesses or professional establishments necessarily seek profit, the GATS concept of what is 'commercial'

⁴⁰ Krajewski, 'Patient Mobility Beyond Calais: Health Services Under WTO Law' 9-18 examines this issue.

⁴¹ Richard Smith and others, 'Trade in Health Services and the GATS' in Aaditya Mattoo, Robert M. Stern and Gianni Zanini (eds), *A Handbook of International Trade in Services* (Oxford University Press 2008) 451. Also see, at various instances, Chantal Blouin, Nick Drager and Richard Smith (eds), *International Trade in Health Services and the GATS: Current Issues and Debates* (World Bank 2006).

⁴² Art. I:3 (b) GATS; §2 Annex on Air Transport Services. §3 of the Annex lists some specific services that are covered by GATS.

⁴³ Marchetti and Mavroidis, 'What Are the Main Challenges for the GATS Framework? Don't Talk About Revolution' 528.

⁴⁴ VanDuzer 368. The Chairman of the Group of Negotiations on Services remarked in 1993 that, considering the uncertain scope of the exception, 'participants must assume their own responsibilities in deciding whether any measures of this sort which they maintain should be scheduled or made the subject of MFN exemptions'. World Trade Organization, *MTN.GNS/49, Informal GNS Meeting: Chairman's Statement (11 December 1993)* (1993) §4.

⁴⁵ Krajewski, *National Regulation and Trade Liberalization in Services* 68; VanDuzer 378-383 and Leroux 349 defend the former, Chanda 2005 adopts the latter approach.

would imply profitability.⁴⁶ Nonetheless, the question remains concerning what is to be understood as a profit-seeking basis. National courts have sought to objectify the concept where it exists in national law by looking for examples at the sole objective of the supplier. A service that is not supplied on a profit-seeking basis should not be generating private financial benefits. However, it could be promoting or achieving another purpose such as the alleviation of poverty and in this sense the intention of the service supplier could play a role in fulfilling this condition.⁴⁷ For example, a service supplier who is not remunerated according to the amount of services supplied and therefore does not have an economic incentive to supply more or specific services might not be providing services on a commercial basis.⁴⁸ However, there should still be an objective element to determining the intention.⁴⁹ In any case, it remains unclear how the profit-seeking nature of a service is to be determined: does the earning of revenue exceeding costs affect the profit-seeking nature? Does the services supplier's wage structure? Can a service be provided without a commercial basis if the price covers the costs or should it also contain a profit margin? And are market conditions relevant for the price setting?⁵⁰

According to the proponent of a second interpretation of 'on a commercial basis', the profit-seeking basis approach limits the scope of GATS too much. Thus, based on the definition of 'juridical person' in Article XXVIII (I) GATS, it is argued that an element of strategic economic behaviour is sufficient to consider that a service is supplied on a commercial basis. Such strategic economic behaviour should occur in the conditions of the delivery of the service. However, the author admits, such an interpretation blurs the line between this condition and the second one.⁵¹ Furthermore, as a service supplier can supply one service on a commercial basis but another on a different basis,⁵² the evaluation of strategic economic behaviour is to be made case by case. Thus, any strategic economic behaviour concerning the conditions governing the operational basis of a service supplier does not render GATS applicable.⁵³ In a third interpretation of the first condition, it is argued that in order to avoid broadening the scope of GATS too much one should make an analysis of both the specific service delivered and of the profit intention of the service supplier.⁵⁴ More broadly, the degree of autonomy for the management that supplies a service and the financial autonomy of the service supplier may be

⁴⁶ Markus Krajewski, 'Public Services and Trade Liberalization: Mapping the Legal Framework' (2003) 6 *Journal of International Economic Law* 341, 351; Leroux 349, who, in support of this position also refers to GATT case law.

⁴⁷ VanDuzer 379-381.

⁴⁸ Krajewski, 'Patient Mobility Beyond Calais: Health Services Under WTO Law' 458-462.

⁴⁹ Luff argues that 'it would be difficult to argue that the application of a provision in an agreement could vary according to the operators' subjective view of the purpose of their operations'. David Luff, 'Regulation of Health Services and International Trade Law' in Aaditya Mattoo and Pierre Sauvé (eds), *Domestic Regulation & Service Trade Liberalization* (World Bank & Oxford University Press 2003) 194.

⁵⁰ VanDuzer 380-382; Luff 194.

⁵¹ Rudolf Adlung, 'Public Services and the GATS' (2006) 9 *Journal of International Economic Law* 455, 462, especially footnote 20 and 463.

⁵² Krajewski, 'Public Services and Trade Liberalization: Mapping the Legal Framework' 351; Zacharias 65.

⁵³ Adlung, 'Public Services and the GATS' 463; Zacharias 65.

⁵⁴ Marchetti and Mavroidis, 'What Are the Main Challenges for the GATS Framework? Don't Talk About Revolution' 530-531. Such an approach could be comparable to tax regulation, in which a profit intention is used. Aside from legal structure, factors such as marketing might play a role too.

relevant factors.⁵⁵ In any case, and to bring at least some certainty to this analysis, a free service would be uncontestably non-commercial.⁵⁶

The second condition of the governmental authority exception requires that a service is not supplied 'in competition with' one or more service suppliers. As with the condition of 'on a commercial basis', various interpretations of this condition have been suggested. In a first interpretation, it must be determined whether more than one like service supplier is supplying a similar service in the relevant market.⁵⁷ This approach faces the difficulty of determining what like services or like service suppliers fit within the context of GATS. In its case law on Article XVII GATS on national treatment, the Panel has held that likeness is established when the only factor on which a measure bases a difference of treatment between domestic and foreign service suppliers is origin.⁵⁸ If other factors play a role, a more detailed analysis is necessary. In a subsequent case, the Panel did so and suggested that whilst the analysis is to be made on a case-by-case basis, like services are to be in a competitive relationship with each other which implies that they are the same in competitive terms.⁵⁹ To determine what a competitive relationship constitutes WTO case law on goods could be relevant, as the Panel notes.⁶⁰ In the context of Article III:2 GATT, it was said that for goods to be in competition, there must be a degree of elasticity of substitution between the goods.⁶¹ Additionally, it is unclear whether the competitive relationship extends across modes of supply: can services be like if they are delivered through different modes of supply?⁶² In the context of Article XVII GATS, the Panel has argued that services delivered through different modes of supply can be like.⁶³ More recently, the Panel stated that in the specific case at hand, the likeness analysis of Article XVII GATS would not be different depending on whether the foreign service was supplied through Mode 1 or Mode 3.⁶⁴ It would appear that this means that the mode of supply is not necessarily relevant to the likeness test. Thus, a domestic state monopoly could nonetheless be in a competitive relationship with foreign commercial cross-border services suppliers and GATS would apply.⁶⁵

In a second interpretation, it is argued that the omission of the word 'like' from the text indicates that the drafters did not intend to impose a likeness test.⁶⁶ Instead, a dictionary definition of

⁵⁵ Lang 820.

⁵⁶ Leroux 354; Krajewski, 'Patient Mobility Beyond Calais: Health Services Under WTO Law' 458-462. The former author argues that deciding otherwise would limit the exception beyond its *effet utile* and be out of line with regard to the balance between national regulatory autonomy and liberalisation set out in the GATS preamble.

⁵⁷ Krajewski, *National Regulation and Trade Liberalization in Services* 70.

⁵⁸ *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Products* WT/DS363/R, Panel report adopted 19 January 2010 §7.975.

⁵⁹ *China - Electronic Payment Services (Panel)* §7.700-7.702.

⁶⁰ *China - Publications and Audiovisual Products (Panel)* FN620.

⁶¹ Krajewski, 'Public Services and Trade Liberalization: Mapping the Legal Framework' 352-353.

⁶² Zacharias 67.

⁶³ *Canada - Certain Measures Affecting the Automotive Industry* WT/DS139/R, WT/DS142/R, Panel report adopted 11 February 2000 §10.307.

⁶⁴ *China - Electronic Payment Services (Panel)* §7.704.

⁶⁵ See *infra*, on monopolies, Adlung, 'Public Services and the GATS' 464 and Krajewski, 'Patient Mobility Beyond Calais: Health Services Under WTO Law' 458-462.

⁶⁶ Marchetti and Mavroidis, 'What Are the Main Challenges for the GATS Framework? Don't Talk About Revolution' 531; Adlung, 'Public Services and the GATS' 464.

'competition' could be used, which leads to assessing whether the services are directly competitive or substitutable – a concept which is broader than likeness.⁶⁷ Such a test is also an important part of the likeness test under GATT. By analogy, this would also require determining the relevant services and geographic market in which services are substitutable. Such tests could be approached by applying concepts used and accepted by national and international bodies such as the services end-uses, its customer base, price relationships including cross-price elasticity, and distribution channels.⁶⁸

A third interpretation has a variation to the second one as a starting point. The author claims that an analysis of competition necessarily entails that the service suppliers are in some sense mutually substitutable.⁶⁹ Considering that the text of Article I:1 (c) GATS does not explicitly refer to a likeness test, he pleads for a 'one-way conception' of competition. This entails that the scope of the exception becomes more extensive as it applies to service suppliers 'who do not, themselves, engage in competition'.⁷⁰ In this view, mere coexistence between services that fall within the scope of the governmental authority exception and services that do not does not mean that the first is in competition with the second. This approach finds some support in the Panel's interpretation of the concept 'anti-competitive practices' in Mexico's additional commitments on telecommunications under Article XVIII GATS. Therefore, the Panel turned to a dictionary definition of 'competition', namely 'rivalry in the market, striving for custom between those who have the same commodities to dispose of'.⁷¹ Thus, the absence of rivalry in the actions of a public service supplier could bring its services supplies within the ambit of the exception.⁷² In the same vein, it is argued that 'some' competition, which is the result of efficiency improvement rather than the introduction of market relationships, should not stand in the way of fulfilling this second condition.⁷³

According to a fourth interpretation, services are supplied 'in competition with' one or more service suppliers when two conditions are met. First, the consumer has a choice between service suppliers and second, the income of the service supplier depends on the amount of services supplied. Therefore, when competition between private service suppliers is evident, GATS may apply to a governmental service supplier supplying that service even if the latter by itself does not fulfil the consumer choice and supplier income conditions.⁷⁴

⁶⁷ Marchetti and Mavroidis, 'What Are the Main Challenges for the GATS Framework? Don't Talk About Revolution' 533.

⁶⁸ Ibid 531-534, where the authors propose a methodology to determine the relevant market in accordance with European competition law and GATT case law. Also see Leroux 368-384; who looks at national competition laws in Canada, the EU and the U.S. and the views of the OECD and UNCTAD on competition.

⁶⁹ VanDuzer 390.

⁷⁰ Ibid 390-395.

⁷¹ *Mexico - Measures Affecting Telecommunications Services* WT/DS204/R, Panel report adopted 2 April 2004 §7.230.

⁷² Adlung, 'Public Services and the GATS' 465. Adlung, referring to VanDuzer, gives the following example: 'as long as public universities or hospitals do not seek to poach students or patients, they cannot be deemed to be in competition.'

⁷³ Krajewski, 'Patient Mobility Beyond Calais: Health Services Under WTO Law' 458-462. This argument is derived from the case law of the European Court of Justice, namely Joined Cases C-264/01 a.o., *AOK Bundesverband* [2004] ECR I-2493.

⁷⁴ Luff 195.

It has been argued that, in addition to the conditions that a service is not supplied 'on a commercial basis' and 'in competition with' other service suppliers, a third condition could, in practice, emerge from the text of the exception. Such a third condition is based on the argument that the meaning of 'services supplied in the exercise of governmental authority' in Article I:3 (b) GATS is not to be equated with the two conditions of Article I:3 (c) GATS.⁷⁵ The expression 'in the exercise of' could indicate that a service must also be delivered by the government or on its behalf for the governmental authority exception to apply.⁷⁶ Authority requires both command and control; hence governmental action in a capacity that does not entail authority would not fall within the exception.⁷⁷ However, this condition could also be introduced as an element in the interpretation of the first condition: a high degree of government control could indicate that there is no commercial basis.⁷⁸

To conclude, it is interesting to note that

[t]he exception clause is based on the economic conditions of the supply of the service. Its scope may therefore vary between countries and at different points in time. [...] As these conditions depend on the regulatory framework of the particular framework, governments may influence the scope of the GATS by modifying the economic conditions of the supply of the service.⁷⁹

In the specific case of financial services, the Annex on Financial Services contains an exception to the three general conditions set out above for the purposes of Article I:3 (b) GATS. The relevant provisions indicate that they contain the exhaustive interpretation of the governmental authority exception regarding financial services, which does not cover financial services delegated by the government to private entities.⁸⁰ Paragraph 1 (b)(i) of the Annex states that activities conducted by a central bank or monetary authority or by any other public entity in pursuit of monetary or exchange rate policies are in any case to be considered as services supplied in the exercise of governmental authority. Paragraphs 1 (b)(ii)-(iii) of the Annex add that activities that are part of a statutory system of social security, or public retirement plans and other activities conducted by a public entity for the account, or with the guarantee or using the financial resources of the Government, are services in the exercise of governmental authority. Paragraph 1 (c) of the Annex adds that the financial services mentioned in Paragraphs 1 (b)(ii)-(iii) of the Annex are only considered to be supplied in the exercise of governmental authority insofar as they are not allowed by the government to be supplied in competition with a public entity or financial service supplier. This latter condition seems to indicate that governmental permission for private actors to compete amongst themselves or with the government is the decisive criterion. This means that the competitive behaviour of the government itself is not

⁷⁵ Krajewski, *National Regulation and Trade Liberalization in Services* 71; VanDuzer 393; Adlung, 'Public Services and the GATS' 465.

⁷⁶ VanDuzer 385.

⁷⁷ Zacharias 61.

⁷⁸ VanDuzer 384.

⁷⁹ Krajewski, 'Patient Mobility Beyond Calais: Health Services Under WTO Law' 458-462.

⁸⁰ VanDuzer 403 403.

relevant.⁸¹ This is in contrast to the one-way conception of competition described *supra*, in which that element is decisive.

Lastly, although not a true exception to the scope of the agreement, Article XIII GATS on government procurement limits the scope of GATS regarding its most important obligations. The article states that the most-favoured-nation (MFN) obligation and national treatment and market access commitments do not apply to laws, regulations or requirements governing government procurement of services, unless they are purchased with a view to commercial resale or use in commercial services sale.⁸² Consequently, government procurement that does not fulfil these conditions is subject to all GATS obligations. Moreover, the WTO's plurilateral Government Procurement Agreement contains disciplines on procurement. The EU is a party to this agreement which was renegotiated and entered into force in 2011.⁸³

C. PUBLIC SERVICES, MONOPOLIES AND UNIVERSAL SERVICE OBLIGATIONS

Most governments make extensive use of universal services obligations and public monopolies to ensure the supply of public services to the people. The hybrid nature of these services and the way in which they are supplied in conjunction with the preceding analysis of the governmental authority exception complicates the answer to the question of whether or not such services come within the scope of GATS.

Public services, in the words of the European Commission 'services of general interest',⁸⁴ have been defined as 'a specific subset of services provided by or under the control of a public authority, because these services are considered 'special' compared to other services'.⁸⁵ 'Special' refers to the fact that public services are supplied to pursue a public interest which is linked to governmental concerns such as social policies and distributional justice – for example through non-discriminatory access to and reasonable pricing for certain services.⁸⁶ They include sensitive key governmental services in sectors such as health care, education, and social security. Moreover, many public services appear in sectors with recognised market failures.⁸⁷ Although GATS does not contain an explicit reference to public services, its preamble explicitly recognises the Members' right to regulate to meet national policy objectives. Nonetheless, as discussed *supra*, the governmental authority exception does not apply when a service is supplied 'in competition with' one or more service suppliers. Thus, the mere fact that a public entity is supplying the service does not mean there is no competition.⁸⁸ Moreover, in a strict interpretation of the conditions of the governmental authority exception, perhaps few services

⁸¹ Adlung, 'Public Services and the GATS' 467.

⁸² The last part of the provision seems to have been added to prevent governments from reselling services 'with a view to affording them a competitive edge over alternative supplies', *ibid* at note 28.

⁸³ Arie Reich, 'The New Text of the Agreement on Government Procurement: An Analysis and Assessment' (2009) 12 *Journal of International Economic Law* 989.

⁸⁴ See the Green and White Papers, by the European Commission, on services of general interest. COM(2003) 270 final, European Commission, Green Paper on Services of General Interest and COM(2004) 374 final, European Commission, White Paper on Services of General Interest.

⁸⁵ Krajewski, 'Public Services and Trade Liberalization: Mapping the Legal Framework' 343 and 350.

⁸⁶ *Ibid* 344-345.

⁸⁷ Chanda 1997.

⁸⁸ Leroux 361.

which fulfil those criteria can be imagined. This has generated considerable debate on the extent to which public services might be exempt from the GATS.⁸⁹ For example, the European Parliament noted that ‘the GATS agreement has given rise to widespread concern regarding [...] its possible impact on public services and the regulation of services in general’.⁹⁰ Following the preceding analysis of the scope of Article I:3 (b)-(c) GATS, it is likely that public services and services supplied in the exercise of governmental authority do not overlap completely. This subjects some public services to GATS obligations..

From a practical point of view, the legal uncertainty regarding the position of public services in GATS covers two options: either the public service is supplied in a sector in which specific commitments have been scheduled or it is not.⁹¹ In the latter case, only GATS unconditional obligations – as discussed *infra* – apply. For now, it can be said that these obligations do not preclude favouring domestic service suppliers.⁹² Thus, argue two prominent authors, the only practical issue is in the case of ‘sloppy, imprecise scheduling’.⁹³ Still, technological and other evolutions may shape constellations of public services supply which were unforeseeable at the time of scheduling and which governments would prefer exempted from the scope of GATS. Therefore, although such an approach may have economic repercussions, governments may be inclined not to schedule commitments in sensitive sectors to avoid accidentally bringing public services within the scope of the agreement. It is to be noted that governments have been aware of this and retain policy space to pursue public services policies in, for example, health care and social services: it is not by coincidence that these sectors contain the lowest number of scheduled commitments of almost all large sectors.⁹⁴ Moreover, some WTO Members such as the EU have scheduled a horizontal limitation with regard to public services in their schedules of specific commitments although even this raises some questions with regard to the scope of

⁸⁹ Krajewski states that ‘it is safe to conclude that apart from air traffic rights and a limited set of governmental services (such as the police and the military), the notion of “services” in the context of GATS applies to all services.’ In a later publication, the author added that an example of the impact of a strict interpretation could be that even police services which could also be supplied by private entities are not covered by the exception. This has led to considerable concern by civil society actors that GATS makes no legal distinction between key public services and other services sectors, thereby failing to acknowledge differences in nature, function and social relations of such public services. See, respectively, Krajewski, *National Regulation and Trade Liberalization in Services* 71 and Krajewski, ‘Public Services and Trade Liberalization: Mapping the Legal Framework’ 353 and 358. Also see: Shawkat Alam, Pundarik Mukhopadhaya and David Randle, ‘The General Agreement on Trade in Services (GATS), Water, and Human Rights from the Perspective of Developing Countries’ (2011) 58 *Netherlands International Law Review* 43, 54-55 and the references there, and Elisabeth Türk and Markus Krajewski, ‘The Right to Water and Trade in Services: Assessing the Impact of GATS Negotiations on Water Regulation’ (CAT+E Conference “Moving forward from Cancún”, Berlin, 30-31 October 2003) 2.

⁹⁰ P5_TA(2003)0087, European Parliament Resolution on the General Agreement on Trade in Services (GATS) within the WTO, including cultural diversity, 12 March 2003 preamble, D.

⁹¹ Marchetti and Mavroidis, ‘What Are the Main Challenges for the GATS Framework? Don’t Talk About Revolution’ 535. Another option is for Members to issue a common understanding to clarify Article I:3 (b)-(c) GATS, but Adlung points at the fact that there is little support for such an understanding as an easier, country-specific approach, which will be discussed *infra*, amounts to the same results. Apparently, he argues, the consensus-based decision making process of the WTO is ill-suited to address such issues before they become a problem in practice. Adlung, ‘Public Services and the GATS’ 467-470.

⁹² And thus there are little issues. Adlung, ‘The GATS Negotiations: Implications for Health and Social Services’ 152.

⁹³ Marchetti and Mavroidis, ‘What Are the Main Challenges for the GATS Framework? Don’t Talk About Revolution’ 536.

⁹⁴ Adlung, ‘The GATS Negotiations: Implications for Health and Social Services’ 154; Chanda 2000. This is also exemplified by the absence of commitments on water distribution. Adlung, ‘Public Services and the GATS’ 468.

such a carve-out.⁹⁵ In any case, the scheduling of horizontal limitations could mean that these Members either interpreted the governmental authority exception narrowly,⁹⁶ or preferred to be sure their public services were exempt whatever the outcome of a possible dispute. An additional difficulty concerning the scheduling of specific commitments in sectors where public services are supplied is that because of the principle of effective treaty interpretation, scheduled sectors may not be covered by the governmental authority. This requires an interpretation of the scope of specific commitments: does the scheduling of a sector include the part of a service supplied in the exercise of governmental authority or only the private part?⁹⁷ Such a narrow construction of the scope of the governmental authority exception seems a stretch and may actually hamper one of the overarching aims of GATS and the WTO, i.e. trade liberalization, by scaring off Members from schedule commitments in further negotiations. To conclude, it can be said that sufficient practical flexibility exists to ensure that public services are only covered by GATS insofar as governments want it to, but careful drafting of the schedules of commitments is crucial – especially since modifying schedules is not an easy task.⁹⁸

Having established the scope of GATS concerning public services, two interlinked particular ways in which governments may pursue the distribution of public services are examined into more detail. First, monopolies may constitute a way for a government to ‘condition’ its specific commitments as to avoid public services falling under the scope of GATS.⁹⁹ Although Article VIII GATS regulates certain forms of monopolies, as discussed *infra*, the governmental authority exception may apply, exempting the monopoly in question from the scope of GATS and its obligations. While it may seem clear that in the case of a monopoly the service is by definition not supplied ‘in competition with’ another service supplier,¹⁰⁰ cross-border service supply could imply a domestic monopoly might be supplying services ‘in competition with’ a foreign service supplier.¹⁰¹ Considering that services supplied through different modes of supply can be ‘like’ as argued *supra*; by analogy such services can also perhaps be supplied ‘in competition’. Moreover, the first condition of the governmental authority exception may be even more difficult to satisfy. In any case, monopolies in which public or private actors supply services on a private contractual basis in protected market segments, for example through temporary exploitation concessions, would not fall under the governmental authority exception because of their commercial character.¹⁰²

In recent decades, many former governmental monopolies that supplied public services have been liberalised – a notable example would be the telecommunications sector.¹⁰³ In cases of

⁹⁵ Adlung, ‘Public Services and the GATS’ 476-476.

⁹⁶ Krajewski, ‘Public Services and Trade Liberalization: Mapping the Legal Framework’ 355.

⁹⁷ Marchetti and Mavroidis, ‘What Are the Main Challenges for the GATS Framework? Don’t Talk About Revolution’ 535.

⁹⁸ Krajewski, ‘Public Services and Trade Liberalization: Mapping the Legal Framework’ 361.

⁹⁹ Adlung, ‘Public Services and the GATS’ 470. The analysis put forth here is the basis of the following paragraphs.

¹⁰⁰ Marchetti and Mavroidis, ‘What Are the Main Challenges for the GATS Framework? Don’t Talk About Revolution’ 537.

¹⁰¹ Adlung, ‘Public Services and the GATS’ 465.

¹⁰² Lang 818-819; VanDuzer 293; Adlung, ‘Public Services and the GATS’ 466-467.

¹⁰³ Telecommunications services occupy a special place in the GATS framework, as it is not only the public service with the highest amount of scheduled commitments but is also the subject of an Annex on telecommunications and a Reference Paper on telecommunications.

partial liberalisation, the mere introduction of components of competitive or profitable behaviour into a government's supply of services might mean the governmental authority exception no longer applies.¹⁰⁴ Moreover, through privatisation the service may be supplied by a government body 'in competition with' private services suppliers, thereby possibly bringing the whole relevant sector – including the government body – within the scope of GATS.¹⁰⁵ Another author refutes this argument, stating that the exception is concerned with the supply of a particular service and does not have an effect on any parallel services supply that does not fall within the scope of GATS.¹⁰⁶ As is clear from the foregoing analysis of 'in competition with', the deciding factor for which argument is correct depends on the interpretation of that condition. In any case, as with public services, governments appear to have been cautious: scheduling practice reveals that although there are quite some specific commitments in typically monopolised public services sectors, they are mostly subject to limitations such as quantitative restrictions and economic needs tests.¹⁰⁷

Higher education in the EU

While basic primary and secondary education provided by the government is quite likely to fall within the scope of the governmental authority exception,¹⁰⁸ that may not be the case for certain aspects of higher education – a typical example of a partially liberalised services sector.¹⁰⁹ The interpretation of 'on a commercial basis' in the governmental authority exception may have far-reaching consequences. A wide interpretation could result in the conclusion that higher fees charged to foreign students by higher education institutions may constitute supplying services on a commercial basis, even if any subsequent profit is used to 'cross-subsidise' education for domestic students.¹¹⁰ A narrower interpretation could be that, even if the foregoing is the case, only that supply of services to foreign students comes within the scope of GATS.

The EU schedule of specific commitment reflects a cautious approach as it specifies that only privately funded services fall within the educational services sector. Thus, market access and national treatment obligations do not apply to publicly funded educational

¹⁰⁴ Krajewski, 'Public Services and Trade Liberalization: Mapping the Legal Framework' 358.

¹⁰⁵ Debra Steger, *Dispute Settlement: World Trade Organization: 3.13 GATS* (United Nations Conference on Trade and Development Course on Dispute Settlement in International Trade, Investment and Intellectual Property, 2003) 9.

¹⁰⁶ Adlung, 'Public Services and the GATS' 463.

¹⁰⁷ See, for statistical data in some of these sectors, *ibid* 472.

¹⁰⁸ Jasmin Tacoa-Vielma, 'Education Services' in WTO Secretariat (ed), *Guide to the GATS: An Overview of Issues for Further Liberalization of Trade in Services* (Kluwer Law International 2001) 232.

¹⁰⁹ See, on the liberalisation and commercialisation of higher education in Belgium and Flanders, Jef C Verhoeven, Geert Kelchtermans and Kristien Michiels, *McOnderwijs in Vlaanderen: Internationalisering en Commercialisering van het Hoger Onderwijs* (Wolters Plantyn 2005), especially 46-62 and Jef C Verhoeven, 'Internationalization and Commercialization of Higher Education in an Era of Globalization' in Zhang Hui (ed), *Teacher Education, Education Policy, Innovation of Higher Education, Motivation and Evaluation of Students: a Comparative Approach* (Lianoning University Press 2006), especially 140-141. Also see Michael Moosberger, 'The Gats and Higher Education: Challenging the Nation State's Notion of the University' in Kern Alexander and Mads Andenas (eds), *The World Trade Organization and Trade in Services* (Martinus Nijhoff 2008).

¹¹⁰ Krajewski, *National Regulation and Trade Liberalization in Services* 70; reiterated in Zacharias 65.

services. As there is currently little private higher education, for example in Flanders, the scope of GATS may thus seem limited.¹¹¹ However, in the case of the supply of hybrid publicly-privately financed educational services the EU approach may 'raise more problems than it attempts to solve'.¹¹² For instance, in returning to the situation described above, does a certain amount of cross-subsidisation or private funding change the publicly funded character of the institution? Nonetheless, as concerns privately funded educational services covered by the sectoral commitments, the general trend in primary, secondary, higher and adult education services is that most EU Member States have made full commitments in Modes 1, 2 and 3. In Mode 4 and in the category 'other education services' there are very limited commitments by few EU Member States.

A second policy to pursue the distribution of public services is imposing universal service obligations by which a service supplier is required to provide basic service provisions to the whole population at an affordable price, for example in postal or telecommunications services sectors. Non-discriminatory universal service obligations are not prohibited by GATS.¹¹³ Nonetheless, over sixty Members undersigned the Reference Paper on Basic Telecommunications, a set of specific commitments on telecommunications services, of which Point 3 states '[a]ny Member has the right to define the kind of universal service obligation it wishes to maintain.' This might suggest that at least those Members feared that universal service obligations would need to be expressly exempted from specific commitments,¹¹⁴ although it appears more likely that governments preferred to retain the possibility of introducing discriminatory universal service obligations.¹¹⁵ Regardless of the scheduling of limitations, universal service obligations in sectors subject to scheduled specific commitments might also be disciplined by Article VI:5 GATS on domestic regulation, as discussed *infra*.

Public services, monopolies and universal service obligations in the EU schedule

The drafters of GATS were of course aware of the legal uncertainty of the scope of the governmental authority exception. Considering its importance, the EU has approached the issue with considerable care in modulating its obligations under the agreement. As concerns MFN, the EU's list of exemptions contains no mention of public services. However, regarding market access, the EU schedule of specific commitments does

¹¹¹ Verhoeven, Kelchtermans and Michielsen, *McOnderwijs in Vlaanderen: Internationalisering en Commercialisering van het Hoger Onderwijs* 58.

¹¹² Krajewski, 'Public Services and Trade Liberalization: Mapping the Legal Framework' 361 361, at footnote 86.

¹¹³ And should not even be scheduled in the schedules of specific commitments, see *infra*. Marchetti and Mavroidis, 'What Are the Main Challenges for the GATS Framework? Don't Talk About Revolution' 537-538.

¹¹⁴ Krajewski, 'Public Services and Trade Liberalization: Mapping the Legal Framework' 357.

¹¹⁵ Adlung, 'The GATS Negotiations: Implications for Health and Social Services' 151. According to Türk and Krajewski, national treatment issues could arise where a government decides to impose universal service obligations only upon newcomers in the relevant services sector (in their case, water services), but they do not elaborate on reasons why such an obligation should not apply to all relevant service suppliers equally. See Türk and Krajewski 9.

mention this. It contains a horizontal market access limitation in Mode 3, establishment, entitled 'public utilities', which states that 'services considered as public utilities at a national or local level may be subject to *public monopolies* or to *exclusive rights* granted to private operators'.¹¹⁶ In an explanatory note to this limitation, it is explained that:

'Public utilities exist in sectors such as related scientific and technical consulting services, R&D services on social sciences and humanities, technical testing and analysis services, environmental services, health services, transport services and services auxiliary to all modes of transport. Exclusive rights on such services are often granted to private operators, for instance operators with concessions from public authorities, *subject to specific service obligations*. Given that public utilities often also exist at the sub-central level, detailed and exhaustive sector-specific scheduling is not practical. This limitation does not apply to telecommunications and to computer and related services.'¹¹⁷

It should be noted that the listing of sectors is not exhaustive. This explanatory note ties together the foregoing theoretical analysis in practice: the uncertainty regarding the scope of the governmental authority exception has an influence on the legal treatment of public services which are often linked to public monopolistic service supply or its private alternative through exclusive rights and universal service obligations. This leads to a horizontal limitation of commitments regarding such services by the EU. Unfortunately, questions arise as to the scope of the limitation. It undoubtedly applies to pre-existing monopolies and exclusive rights. Moreover, it appears unlikely that the scope extends to future monopolies and exclusive rights considering that Article VIII:4 GATS, which is discussed *infra*, considers granting such rights to be a modification of schedules for which compensation is due. However, the hardest call is whether monopolies and exclusive rights envisaged but not yet in force at the time of scheduling are covered by the horizontal exemption.¹¹⁸

Aside from the reference in the explanatory note to the horizontal limitation, the EU Schedule refers to universal service obligations only in the context of additional commitments on telecommunications services. There, it is defined that

'[a]ny Member has the right to define the kind of universal service obligation it wishes to maintain. Such obligations will not be regarded as anti-competitive per se, provided they are administered in a transparent, non-discriminatory and competitively neutral manner and are not more burdensome than necessary for the kind of universal service defined by the Member.'¹¹⁹

These conditions are reminiscent of Article VI:4 GATS which is discussed *infra*. It suffices here to point out that these stringent conditions to impose universal service obligations appear to prohibit discrimination between domestic and foreign telecommunication services providers.

¹¹⁶ S/C/W/273, Communication from the European Communities and its Member States: Certification: Draft Consolidated GATS Schedule (9 October 2006) 306 - emphasis added.

¹¹⁷ Ibid - emphasis added.

¹¹⁸ Adlung, 'Public Services and the GATS' 476.

¹¹⁹ EU GATS Schedule 286.

In addition to the preceding remarks, it should be pointed out that the GATS contains unconditional obligations and obligations which apply in sectors where specific commitments have been undertaken regarding monopolies and exclusive service providers. These are respectively addressed in sections 2.A.4. and 2.B.3.

2. THE SCOPE OF GATS OBLIGATIONS

GATS obligations can be divided into two categories. First, the unconditional obligations apply to all services covered by the agreement, as established in the previous section. Second, other obligations apply only to sectors in which specific commitments have been scheduled by the Member.¹²⁰ This second grouping consists of two categories: provisions of Part II of GATS (so-called conditional obligations) and provisions found in Part III (specific commitments). The latter contains crucial provisions on market access and national treatment, and the additional commitments. These obligations only apply to sectors for which commitments have been undertaken in the schedules of commitments. However, as noted, these specific commitments may be limited by the concerned Member by inscribing limitations in the schedules.¹²¹ The former, however, contains provisions of Part II of GATS which, in contrast with the unconditional obligations, only apply to sectors in which specific commitments have been scheduled. However, a crucial difference with the previous category is that these obligations cannot be narrowed down by scheduling limitations.¹²² Therefore, they apply in full to a scheduled sector.

A. UNCONDITIONAL OBLIGATIONS

A.1. *Most-favoured-nation treatment*

The MFN obligation of GATS enshrined in Article II GATS is not only the structurally first but also the very practical and most important of the unconditional obligations. It contains a general principle of non-discrimination, based on the principle of reciprocity and applies to any measure covered by GATS.¹²³ According to the first paragraph of the provision, a Member must (i) immediately and unconditionally (ii) accord treatment no less favourable to services and service suppliers of a Member (iii) than to like services or service suppliers of any other Member. Although these steps raise many legal questions which go beyond the scope of this contribution, it suffices here to highlight two crucial issues regarding the scope of the obligation.¹²⁴ Regarding

¹²⁰ For a very clear schematic overview of the structure of GATS obligations, see Adlung, 'Public Services and the GATS' 459.

¹²¹ As explicitly recognised by the Panel in *Mexico - Telecoms (Panel)* §7.359-7.362.

¹²² Benedict F Christ and Marion Panizzon, 'Article XI GATS' in Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle (eds), *Max Planck Commentaries on World Trade Law: WTO - Trade in Services*, vol 6 (Martinus Nijhoff 2008) 252-253.

¹²³ Rüdiger Wolfrum, 'Article II GATS' in Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle (eds), *Max Planck Commentaries on World Trade Law: WTO - Trade in Services*, vol 6 (Martinus Nijhoff 2008) 77. See *European Communities - Regime for the Importation, Sale and Distribution of Bananas* WT/DS27/R, Panel report adopted 25 September 1997 §7.298, where the Panel held that 'this provision constitutes a general obligation which is, in principle, applicable across the board by all Members to all services sectors, not only in sectors or sub-sectors where specific commitments have been undertaken.'

¹²⁴ See for an extensive overview of how to interpret these conditions, Wolfrum 70-91.

the second condition, the obligation to accord no less favourable treatment applies to both *de jure* and *de facto* discrimination.¹²⁵ In essence, this test requires providing no less favourable conditions of competition.¹²⁶ Deciding otherwise would have made the obligation rather easy to circumvent. As concerns the third condition, the interpretation of like services or service suppliers in the context of MFN is highly controversial.¹²⁷ The MFN obligation thus does not prevent a Member from precluding market access in that sector to all foreign service suppliers, but might discourage granting beneficial treatment to third states as such treatment must be extended to all third Members.¹²⁸ In other words, it prohibits discrimination between foreign service suppliers. Furthermore, the provision contains exceptions to the MFN obligation. First, Article II:2 GATS refers to a key component as concerns the scope of the obligation which is namely a Member's list of exemptions. These exemptions had to be listed at the time of conclusion of GATS in the Annex on Article II Exemptions. The exemptions only apply to measures that existed at the entry into force of the agreement. However, in practice, some future exemptions 'were presented as existing ones'.¹²⁹ Paragraph 6 of the Annex on Article II Exemptions clarifies that, in principle, the exemptions were to extinct after maximum ten years. In reality many exemptions seem to have been scheduled indefinitely.¹³⁰ Second, Article II:3 GATS exempts Members from extending more favourable treatment in the case that such treatment is given to facilitate an exchange of services that are locally produced and consumed. The exchange must be limited to contiguous frontier zones of adjacent countries.

The impact of the scope of the MFN obligation on domestic regulatory autonomy 'seems relatively minor' as most national regulations do not apply solely to foreign service suppliers but to national ones as well. Thereby, creating a difference in treatment is usually done between domestic and foreign services or service suppliers.¹³¹ However, if national measures accord more favourable treatment to national services or service suppliers and to certain foreign ones, the MFN and national treatment obligations both apply.¹³²

The EU's MFN exemptions

The EU list of MFN exemptions contains eight exemptions related to audio-visual services (which highlights this sector's sensitive nature) and three exemptions related to publishing on a total of nineteen sector-specific exemptions. The other sectors for which an exemption was listed are road transport and internal waterways transport (two listings

¹²⁵ *EC - Bananas III (AB)* §234; *Canada - Autos (AB)* §141.

¹²⁶ *EC - Bananas III (Panel)* §7.304.

¹²⁷ See Nicolas Diebold, *Non-Discrimination in International Trade in Services: 'Likeness' in WTO/GATS* (Cambridge University Press 2010).

¹²⁸ Wolfrum 76.

¹²⁹ *Ibid.*

¹³⁰ See the EU's list of exemptions: GATS/EL/31, European Communities and Their Member States: Final List of Article II (MFN) Exemptions (15 April 1994), which contains twenty-six exemptions scheduled for an indefinite period of time.

¹³¹ Krajewski, *National Regulation and Trade Liberalization in Services* 122.

¹³² As was the case in the *EC – Bananas* case, where EU and ACP banana wholesale sellers were treated more favourably than others. *Ibid.*

each); computerised reservation systems and air transport sales and marketing services; rental and leasing of ships; and direct non-life insurance and financial services. Not all exemptions apply to all EU Member States, as some Member States such as France and Italy have negotiated specific exemptions. For example, it appears that France's persistence on protecting cultural diversity required EU negotiators to list a specific exemption.¹³³ Likewise, not all exemptions address all third countries. In some cases, the beneficiary third countries for which the exemption applies are listed. For instance, an indefinite MFN exemption is listed for the production and distribution of cinematographic works and television programmes in Nordic countries. This exempts Denmark from an obligation to extend the treatment accorded to Finland, Norway, Sweden and Iceland – note that these are both EU and non-EU Member States – regarding benefits provided in conformity with support programmes that enhance the production and distribution of audio-visual works produced in Nordic countries to third countries. The rationale for the exemption is the preservation and promotion of the regional identity. The recent success of Scandinavian television series such as *Borgen*, *The Bridge*, *The Killing*, *Those Who Kill* and *Wallander* may well be influenced by these financial possibilities. In any case, one listed support programme, the Nordisk Film & TV Fond, has partially funded *The Bridge*, *The Killing* and *Those Who Kill*.¹³⁴

Furthermore, the EU list of MFN exemptions contains nine horizontal exemptions. Only three of these exemptions apply to all EU Member States. These exemptions address the progressive liberalisation between the EU and Switzerland, San Marino, Monaco, Andorra, and Vatican City State and work permits for seasonal workers from states in Central Eastern and South-Eastern Europe and in the Mediterranean Basin.

A.2. Transparency

Transparency increases the predictability of trade barriers which in turn reduces transaction costs for traders and decreases the likeliness of WTO non-compliant regulations. It can therefore be considered a cornerstone of WTO law.¹³⁵ However, perhaps mainly due to judicial economy concerns, there is little interpretational help from WTO dispute settlement organs regarding these provisions.¹³⁶ Nonetheless, the judicial bodies have confirmed what is stated in

¹³³ ICTSD, 'Members Looking at Potential Compromises on Services' (2007) 11 Bridges Weekly Trade News Digest. See, in this regard, European Parliament Resolution on the General Agreement on Trade in Services (GATS) within the WTO, including cultural diversity §12-14, where it is stated *inter alia* that 'each Member State should have the legal flexibility to take all necessary measures in the areas of cultural and audiovisual policy so as to preserve and promote cultural diversity' and that the EP 'takes the view that the GATS rules on cultural services, in particular in the audiovisual sector, should not jeopardise the cultural diversity and autonomy of the WTO contracting parties'.

¹³⁴ See Nordisk Film & TV Fond's list of support projects at www.nordiskfilmogtvfond.com/about_projects.php?sid=20&ptid=18.

¹³⁵ Krajewski, *National Regulation and Trade Liberalization in Services* 124; Panagiotis Delimatsis, 'Article III GATS' in Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle (eds), *Max Planck Commentaries on World Trade Law: WTO - Trade in Services*, vol 6 (Martinus Nijhoff 2008) 94.

¹³⁶ Delimatsis, 'Article III GATS' 95.

the GATS preamble, i.e. that transparency is part of the object and purpose of GATS.¹³⁷ However, these provisions have little or no impact on domestic regulatory autonomy.¹³⁸

Two GATS provisions cover transparency provisions that contain an unconditional obligation.¹³⁹ First, Article III:1-2 GATS requires each Member to publish or make publicly available all relevant measures of general application and any international agreements to which the Member is a party and that pertain to or affect the operation of GATS. This must be done promptly or at the latest by the time of their entry into force.¹⁴⁰ However, publication can occur after the entry into force of the measure in case of emergency situations. The scope of these provisions is wide as they address legislative, administrative and judicial decisions if they are generally applicable – hence not solely between parties.¹⁴¹ Administrative decisions which apply to a specific situation are thus not covered in principle unless they establish or modify conditions or terms which are also applicable to future cases.¹⁴² Moreover, this obligation might also apply to measures regulating other sectors, such as goods, if the relevant measures affect GATS.¹⁴³ Paragraph 4 of Article III GATS adds that a Member must respond promptly to requests on any covered measure by other Members. Moreover, there should be an enquiry point to provide information to other Members upon the latter's request.

Second, according to Article VII:4 GATS, Members (i) should have published a list of their existing recognition measures, (ii) shall inform the WTO's Council for Trade in Services of any negotiations on recognition so that other Members can indicate their interest in participating, and (iii) shall inform the Council for Trade in Services of any new measures or significant changes to existing measures.

A.3. Availability of legal remedies

Article VI:2 (a) GATS requires Members to maintain or institute judicial, arbitral, or administrative tribunals or procedures which provide for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services as soon as practicable. It is stated that the term 'administrative decision' refers to a legally binding act which regulates an individual situation, usually by applying a generally applicable measure to a particular case.¹⁴⁴ The obligation is limited by subparagraph (b) if it turns out to be inconsistent with the Member's constitutional structure or the nature of its legal system. The review is to be initiated by an affected service supplier and may even be carried out by the decision-making

¹³⁷ *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services* WT/DS285/AB/R, AB report adopted 20 April 2005 FN271 at §235.

¹³⁸ Krajewski, *National Regulation and Trade Liberalization in Services* 126.

¹³⁹ Adlung, 'Public Services and the GATS' 459. Krajewski treats Article VI:1-3 and VI:6 as transparency provisions, too. Here, they are discussed in the section on domestic regulation.

¹⁴⁰ The last part of this provision, 'affecting the operation of this Agreement', in practice means the same as 'affecting trade in services' in Article I:1 GATS. Delimatsis, 'Article III GATS' 96.

¹⁴¹ Krajewski, *National Regulation and Trade Liberalization in Services* 125-126.

¹⁴² Delimatsis, 'Article III GATS' 97. This argument is made by analogy with jurisprudence on Article X:3 (a) GATT.

¹⁴³ *Ibid.*

¹⁴⁴ Markus Krajewski, 'Article VI GATS' in Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle (eds), *Max Planck Commentaries on World Trade Law: WTO - Trade in Services*, vol 6 (Martinus Nijhoff 2008) 173.

authority,¹⁴⁵ however, in that case the Member must ensure that the procedures provide for an objective and impartial review. Moreover, Members have considerable leeway when regulating the review. For example, this can be done by requiring the affected service supplier to show he is affected and to identify the grounds on which he will challenge the administrative decision or by choosing appropriate remedies.¹⁴⁶ In the case of Members who already comply with this obligation as a result of national law, the provision will have little impact. However, in Members where no such procedures are in place, quite far-reaching adaptations could possibly be required to conform with Article VI:2 GATS. Nonetheless, considering that other trade agreements contain similar or more stringent provisions, it might be argued that these provisions are a prerequisite to enter into the multilateral trading system. The impact of these provisions on domestic regulatory autonomy is thus limited.¹⁴⁷

A.4. Monopolies and restrictive business practices

As discussed *supra*, monopolies are in principle subject to GATS if the governmental authority exception does not apply. Article VIII GATS contains some obligations for a certain type of monopolies. The agreement distinguishes between governmental or public monopolies and purely private monopolies, as Article XXVIII (h) GATS defines ‘monopoly supplier of a service’ as ‘any person, public or private, which in the relevant market of the territory of a Member is authorized or established formally or in effect by that Member as the sole supplier of that service’. Thus, private monopolies not created by government intervention do not come within the scope of this provision but are nonetheless subject to other GATS obligations.¹⁴⁸ Although GATS does not oppose public monopolies but rather attempts to control their consequences,¹⁴⁹ the agreement does ‘contain a dynamic towards the abolishment’ of such monopolies as demonstrated by liberalisation practice.¹⁵⁰

Article VIII:1 GATS obliges a Member to ensure that any monopoly service supplier in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that Member's MFN obligations and its specific commitments. The scope of the provision is limited to the supply of the monopoly service and therefore the monopolists’ purchases, and whether they are for input or their own consumption, is not covered.¹⁵¹ The other provisions of Article VIII GATS only apply with respect to sectors in which specific commitments have been made and will thus be addressed in the following section.

Concerning restrictive business practices,¹⁵² Article IX:2 GATS obliges Members to enter into consultations at the request of another Member in order to eliminate restrictive business

¹⁴⁵ Krajewski, *National Regulation and Trade Liberalization in Services* 127.

¹⁴⁶ Krajewski, ‘Article VI GATS’ 174.

¹⁴⁷ Krajewski, *National Regulation and Trade Liberalization in Services* 128-129.

¹⁴⁸ Adlung, ‘Public Services and the GATS’ 473.

¹⁴⁹ Sadeq Bigdeli and Stefan Rechsteiner, ‘Article VIII GATS’ in Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle (eds), *Max Planck Commentaries on World Trade Law: WTO - Trade in Services*, vol 6 (Martinus Nijhoff 2008) 206.

¹⁵⁰ Türk and Krajewski 8.

¹⁵¹ Bigdeli and Rechsteiner 210.

¹⁵² For a typology of such practices, see Bigdeli and Burri Nenova, ‘Article IX GATS’ 223-230.

practices other than those covered by Article VIII GATS. A Member must 'accord full and sympathetic consideration' to the elimination request, and cooperate through the supply of relevant information. Although the scope of this provision is very wide, it is negatively defined as all business practices except those falling within the ambit of Article VIII GATS. The provision contains only limited substantive obligations: a duty to consult, good faith in those consultations and providing information (including a confidentiality safeguard).¹⁵³

Sectoral limitations for monopolies

Aside from the horizontal limitation discussed *supra*, the EU schedule of specific commitments contains some explicit limitations to sectoral commitments in order to allow monopolies. This is, for example in Belgium, the case for pharmacists who have a monopoly to supply pharmaceuticals to the general public – this limits market access in Mode 3. A second Belgian example concerns a state monopoly for placement services, thereby limiting market access for Mode 3 service suppliers.

A.5. Subsidies

A subsidy is not defined in GATS as it is in for example the WTO Agreement on Subsidies and Countervailing Measures. More generally, 'subsidy' encompasses *inter alia* direct grants and tax incentives. Hence, such measures are a powerful policy tool used frequently by domestic regulators, especially in sectors such as tourism, transport, audio-visual, and financial services.¹⁵⁴ Article XV GATS recognises that subsidies may have distortive effects on trade in services but does not contain disciplines for subsidies. However, this does not exclude subsidies from GATS. Rather, they are assessed like any other measure and all GATS obligations apply to subsidies as they would to any other measure.¹⁵⁵ Additionally, Article XV:2 GATS states that when a Member's subsidies cause adverse effects, consultations between both Members may be initiated. The consultations are to be afforded sympathetic consideration.

Considering the importance of subsidies as a policy tool, many members have scheduled subsidies limitations regarding, for example, their national treatment obligation.¹⁵⁶ Importantly, paragraph 10 of a WTO explanatory note on scheduling states that GATS does not contain obligations outside a Member's territorial jurisdiction, implying that the national treatment obligation does not extend to a service supplier located in the territory of another Member.¹⁵⁷

¹⁵³ Ibid 230-232.

¹⁵⁴ Poretti 353.

¹⁵⁵ Krajewski, 'Public Services and Trade Liberalization: Mapping the Legal Framework' 361; 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) 177.

¹⁵⁶ Pierre Sauvé, 'Completing the GATS Framework: Addressing Uruguay Round Leftovers' (2002) 57 *Aussenwirtschaft* 301, 326.

¹⁵⁷ World Trade Organization, *MTN.GNS/W/164, Scheduling of Initial Commitments in Trade in Services: Explanatory Note* (3 September 1993) (1993).

Therefore, in the case of committed sectors without scheduled limitations concerning subsidies, national treatment must still only be accorded to foreign service suppliers located within the Member's territory.¹⁵⁸

National treatment and subsidies

In the case of subsidies, the EU has not listed MFN exemptions and, not surprisingly, no relevant entries were scheduled with regard to market access. However, as concerns national treatment, two horizontal limitations– which apply to all scheduled sectors – regarding subsidies were included in the EU schedule of specific commitments. They relate to Modes 3 and 4. First, applying to most EU Member States, in the case of Mode 3 the eligibility for subsidies (from the EU or Member States) may be limited to juridical persons established in the territory (or a sub-division) of a Member. Some Members, including Belgium, are not bound by this commitment for branches established in a Member State by a non-EU company. Furthermore, research and development subsidies are exempted from this commitment. Lastly, this limitation states that the supply of a service or its subsidisation within the public sector is not in breach of Mode 3 national treatment commitments. Second, in the case of Mode 4 and again applicable to most EU Member States, subsidies to natural persons may be limited to nationals of a Member State.

In addition to the two horizontal commitments, there are some sectoral commitments in entertainment services, including theatre, live bands and circus services. For instance, France and Italy are unbound for Mode 3 national treatment as concerns subsidies and any other forms of direct and indirect investment, thereby explicitly reserving the right to grant subsidies in such cases.

B. OBLIGATIONS APPLYING TO SECTORS SUBJECT TO SCHEDULED SPECIFIC COMMITMENTS

B.1. Transparency

In addition to the unconditional transparency obligation discussed *supra*, Article III:3 GATS obliges Members to promptly and at least annually inform the WTO's Council for Trade in Services of the introduction or modification of laws, regulations or administrative guidelines which significantly affect trade in services covered by the Member's specific commitments. Many Members have not conformed to this obligation.¹⁵⁹ Aside from the fact that, as stated, this obligation only applies to sectors for which specific commitments have been scheduled, the scope of the provision is more narrow than that of Article III:1 GATS. This is because not all measures of general application are targeted. Nonetheless, it is unclear how this difference is to

¹⁵⁸ Poretti 361-362.

¹⁵⁹ Delimatsis, 'Article III GATS' 101-102.

be given shape.¹⁶⁰ Moreover, measures in sectors for which no commitments have been scheduled, even regarding for example goods, may impact upon sectors that are scheduled and could thus need to be notified.¹⁶¹ The enquiry point mentioned under the unconditional transparency obligation which provides information to other Members upon the latter's request should also do so regarding the measures covered by Article III:3 GATS. As noted with regard to the unconditional transparency obligations, these provisions should have little or no impact on domestic regulatory autonomy.¹⁶²

B.2. Domestic regulation

One of the most contentious provisions of GATS is Article VI on domestic regulation, which addresses the relationship between national regulators and individual service suppliers in six paragraphs. Paragraphs 1, 2, 3 and 6 contain procedural requirements.¹⁶³ Paragraphs 4 and 5, however, encompass potential and currently applicable substantive obligations, respectively.

First, the procedural provisions of Article VI GATS: paragraph 2, which obliges Members to make available legal remedies, applies as an unconditional obligation and has already been discussed *supra*. The scope of the other provisions is addressed here. Article VI:1 GATS is very much linked to Article III:1 GATS, although the latter is an unconditional obligation whilst the former only applies to sectors in which specific commitments have been scheduled. The provision obliges Members to ensure that all measures of general application affecting trade in services are administered in a reasonable, objective, and impartial manner. It does not discipline the content of the measure but the way in which it is administered.¹⁶⁴ The 'reasonable' standard differs from necessity or proportionality tests as it only requires a rational reason for the behaviour. Objectiveness implies a rational process, without emotional or personal intentions; and the condition of impartiality means that no special consideration or privileged treatment can be granted to one party and not the other.¹⁶⁵ These obligations can be seen as an obligation of either consistency and predictability¹⁶⁶ or one prohibiting discriminatory or arbitrary decisions.¹⁶⁷ The scope of Article VI:1 GATS is limited to measures which affect trade in services, to be understood broadly as in Article I GATS, and which are of general application. Aside from typical measures of general application such as regulations, individual decisions establishing or abandoning a principle of general application fall within the scope of the provision as well.¹⁶⁸ Although this provision does not address a measure's substance, its impact on domestic regulatory autonomy may be substantial. However, it seems that national legislation would already cover at least some of the obligations arising from Article VI:1 GATS.

¹⁶⁰ Krajewski, *National Regulation and Trade Liberalization in Services* 126.

¹⁶¹ Delimatsis, 'Article III GATS' 99-100.

¹⁶² Krajewski, *National Regulation and Trade Liberalization in Services* 126.

¹⁶³ As concerns paragraphs 1 and 3, see *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services* WT/DS285/R, Panel report adopted 10 November 2004 §6.432.

¹⁶⁴ *Ibid.*

¹⁶⁵ Krajewski, 'Article VI GATS' 171.

¹⁶⁶ Delimatsis, 'Article III GATS' 104.

¹⁶⁷ Krajewski, *National Regulation and Trade Liberalization in Services* 128.

¹⁶⁸ Krajewski, 'Article VI GATS' 170.

The impact on domestic regulatory autonomy is this likely to be limited.¹⁶⁹ Next, Article VI:3 GATS addresses situations in which authorisation by national authorities is required to supply a service. In such cases, a Member must inform an applicant of the authorities' decision within a reasonable timeframe after the complete submission of the application. Moreover, at the request of the applicant and without undue delay, information concerning the application shall be provided by the Member. Lastly, Article VI:6 GATS refers to professional services sectors, in which Members must provide for adequate procedures to verify the competences of professionals of other Members. As argued with concern to Article VI:2 GATS, paragraphs 3 and 6 of Article VI GATS are unlikely to cause issues for Members.

Second, Article VI GATS contains substantive provisions in paragraphs 4 and 5, which are very much linked. Paragraph 4 contains the obligation to develop disciplines for measures relating to qualification requirements and procedures, technical standards and licensing requirements, while paragraph 5 contains some disciplines that apply pending the entry into force of such new disciplines. The negotiations on domestic regulation disciplines based on paragraph 4 are part of the Doha Round and have so far not led to an agreement. However, the outcome of these negotiations will be crucial in the balance between domestic regulatory autonomy and trade liberalisation as they directly limit the former. It must be considered that, although both provisions apply solely to measures relating to qualification requirements and procedures, technical standards and licensing requirements, such domestic regulatory measures, are commonly used to attain a wide variety of policy goals in any services sector.¹⁷⁰ Additionally, future disciplines potentially have an impact on the delicate regulatory autonomy balance between federal and sub-federal competences,¹⁷¹ as many domestic regulations are the result of regional authorities exercising their competences.¹⁷²

Pending an agreement on paragraph 4, Article VI:5 GATS obliges Members to refrain from applying licensing and requirements and technical standards that nullify or impair the specific commitments in a way that (i) is not based on objective and transparent criteria, such as competence and the ability to supply the service, (ii) is more burdensome than necessary to ensure the quality of the service, (iii) is, in the case of licensing procedures, in itself a restriction on the supply of the service, and (iv) could not have been expected of that Member at the time the specific commitments in those sectors were made. Moreover, international standards of relevant international organizations applied by that Member shall be taken into account to

¹⁶⁹ Krajewski, *National Regulation and Trade Liberalization in Services* 128.

¹⁷⁰ World Trade Organization, *Disciplines on Domestic Regulation Pursuant to GATS Article VI.4: Background and Current State of Play* (2011) 3. Many legal uncertainties and political sensitivities surround these negotiations. As addressing these goes beyond the scope of this contribution, see *inter alia* Aaditya Mattoo and Pierre Sauvé (eds), *Domestic Regulation & Service Trade Liberalization* (World Bank & Oxford University Press 2003); Joost Pauwelyn, 'Rien ne Va Plus? Distinguishing Domestic Regulation from Market Access in GATT and GATS' (2005) 4 *World Trade Review* 131; 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; 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) and Panagiotis Delimatsis, 'Determining the Necessity of Domestic Regulations in Services: The Best is Yet to Come' (2008) 19 *European Journal of International Law* 365.

¹⁷¹ Delimatsis, 'Due Process and 'Good' Regulation Embedded in the GATS – Disciplining Regulatory Behaviour in Services through Article VI of the GATS' 48

¹⁷² Wouters and Coppens 240.

assess the conformity with the four conditions set out. The importance of this last provision might be small if read as nothing more but an interpretative guideline for WTO dispute settlement organs, however, it could be equally substantial if understood as a presumption in favour of such international standards indicating that when a Member applies an international standard, deviating domestic regulation is an unnecessary restriction to trade.¹⁷³ The scope of the provision is substantially limited by the 'nullification and impairment' test it introduces: a Member claiming violation of Article VI:5 GATS must prove that another Member's specific commitment is nullified and impaired.¹⁷⁴ Moreover, any domestic regulation in force at the entry into force of GATS would not satisfy the fourth condition of Article VI:5 set out above on legitimate expectation, thereby limiting the scope to regulations introduced after scheduling.¹⁷⁵ Hence, Article VI:5 is to be interpreted as a standstill-clause.¹⁷⁶

B.3. Monopolies and exclusive service providers

In addition to Article VIII:1 GATS discussed *supra*, paragraph 2 of this provision states that a Member must ensure that a monopolist or an affiliated company does not abuse its position in the relevant market when supplying services in a sector outside its monopoly but for which specific commitments have been scheduled.¹⁷⁷ For example, the refusal to grant non-discriminatory access to a facility essential to other competitors, such as network cabling for telecommunications, could constitute an abuse of monopoly position.¹⁷⁸ Other examples include the misuse of information or anti-competitive cross-subsidisation in which monopoly profits are used to cross-subsidise activities in which the monopolist faces competition.¹⁷⁹ Cross-subsidisation might especially occur in sectors where former monopolies have been partially liberalised but certain core aspects of their activities remain monopolised. Examples include telecommunications networks and cables, water and drainage pipes or energy distribution.¹⁸⁰ It is to be noted that only markets in which the monopolist competes and therefore does not have monopoly rights are targeted. Moreover, as noted *supra*, according to the GATS definition of monopolies Article VIII GATS only applies to legal monopolies. It appears that since GATS does not put obligations on private actors but does on governments, the substantive part of these obligations and their impact on domestic regulatory autonomy is limited.

Article VIII:4-5 GATS regulates the granting, authorisation, or establishment of either monopoly rights or rights for exclusive service provision to a small number of service providers whilst substantially preventing competition between them, for example through regional monopolies,

¹⁷³ Krajewski, *National Regulation and Trade Liberalization in Services* 152-153. Also see interpretative footnote 3 at Article VI:5 (b) GATS.

¹⁷⁴ *Ibid* 153.

¹⁷⁵ *Ibid*; J Anthony VanDuzer, 'A Critical Look at the Prospects for Robust Rules for Services in Preferential Trading Agreements' (2012) 39 *Legal Issues of Economic Integration* 29, 33.

¹⁷⁶ Joel P Trachtman, 'Addressing Regulatory Divergence through International Standards: Financial Services' in Aaditya Mattoo and Pierre Sauvé (eds), *Domestic Regulation & Service Trade Liberalization* (World Bank & Oxford University Press 2003) 31; Krajewski, 'Article VI GATS' 194.

¹⁷⁷ The relevant market criterion is mentioned in Article XXVIII (h) GATS. See Bigdeli and Rechsteiner, 'Article VIII GATS' 213-214.

¹⁷⁸ The essential facilities doctrine originates in US antitrust law. *Ibid* 215-217.

¹⁷⁹ *Ibid* 217; Poretti 364.

¹⁸⁰ Poretti 364.

after the entry into force of GATS.¹⁸¹ In case a Member grants such rights in services sectors in which specific commitments have been scheduled, it must notify the WTO's Council for Trade in Services. Moreover, Article XXI:2-4 GATS concerning the modification of schedules of specific commitments applies. This states that another Member whose benefits from GATS may be affected by the introduction of the new monopoly is to be compensated either through negotiation or arbitration or by withdrawing substantially equivalent benefits with respect to the first Member only.

B.4. Payments and transfers

According to Article XI GATS, a Member shall not apply restrictions on international transfers and payments for current transactions relating to its specific commitments.¹⁸² International transfers and payments comprise inward and outbound cross-border transactions between residents and non-residents of a Member.¹⁸³ According to Article XXX (d) of the International Monetary Fund Agreement, current transactions are any payment for a purpose other than transferring capital. The importance of this provision is not to be underestimated, as the Panel stated:

‘Article XI plays a crucial role in securing the value of specific commitments undertaken by Members under the GATS. Indeed, the value of specific commitments on market access and national treatment would be seriously impaired if Members could restrict international transfers and payment for service transactions in scheduled sectors [...] Article XI is an indispensable complement to GATS disciplines on market access and national treatment.’¹⁸⁴

However, the Panel added in the same paragraph that ‘Article XI does not deprive Members from regulating the use of financial instruments [...] provided that these regulations are consistent with other relevant GATS provisions.’ Hence, it appears that the obligation of Article XI GATS is to be seen, as noted by the Panel, more as a corollary of other GATS obligations. It does not add an extra obligation but rather limits ways in which governments may attempt reducing the impact of their specific commitments.

B.5. Market access

The market access obligation of Article XVI GATS states that each Member shall accord services and service suppliers of another Member treatment no less favourable than that provided for under the terms, limitations, and conditions of the Member's schedule of specific commitments. Footnote 8 to Article XVI GATS explains that specific commitments in Mode 1 or Mode 3 for services for which the cross-border movement of capital is respectively an essential part or is related to it, that movement of capital is to be allowed. Article XVI:2 GATS only addresses six types of measures which a Member shall not maintain or adopt in sectors where specific commitments are scheduled unless the schedule contains a limitation to the

¹⁸¹ Bigdeli and Rechsteiner, ‘Article VIII GATS’ 219.

¹⁸² Additionally, see footnote 8 at Article XVI GATS and Christ and Panizzon 250-251.

¹⁸³ Ibid.

¹⁸⁴ *US - Gambling (Panel)* §6.442.

commitment. These six types are four origin-neutral types of quantitative restrictions,¹⁸⁵ limitations on the form of establishment, and limitations on the participation of foreign capital.¹⁸⁶ This list of measures is exhaustive.¹⁸⁷ Consequently, 'full market access' in the sense of Article XVI GATS is not identical to what this means in common terms, i.e. an undertaking's ability to execute its activities.¹⁸⁸ However, the scope of the quantitative restrictions on the list was extended by the Appellate Body's finding that a total ban may constitute an Article XVI quota.¹⁸⁹ Additionally, it has been stated that measures which do not fall under the list of prohibited measures may violate Article XXIII:3 GATS if they nullify and impair full market access commitments.¹⁹⁰

Measures are inconsistent with the market access obligation if they afford treatment less favourable than what the Member committed itself to, irrespective whether the treatment is discriminatory or not.¹⁹¹ Hence, as Article XVI GATS also prohibits certain non-discriminatory measures which affect foreign service suppliers, its scope is wider than a first reading may reveal. However, although certain market access measures listed in Article XVI:2 GATS are 'typical examples of quantitative entry controls' and thus have the potential to severely hamper domestic regulatory autonomy, the actual impact depends on the scheduled specific commitments.¹⁹²

Mode 4 market access limitations in the EU schedule

The EU has scheduled some important horizontal limitations to its market access commitments, such as the public utilities limitation mentioned *supra*. Most importantly, Mode 4 is substantially narrowed by an elaborate limitation on market access which is largely copied in the national treatment column of the schedule. This limitation states that all EU Member States are unbound except for measures concerning the entry into and temporary stay within a Member State which apply to listed categories of natural persons providing services. This list consists of intra-corporate transfers, business visitors and contractual service suppliers. In order to fall within these categories, a natural person must fulfil conditions set out in the schedule. These may vary from one Member State to another. It appears that, generally, highly educated natural persons are targeted by the Mode 4 commitments.

¹⁸⁵ I.e. limitations on the number of service suppliers, on the total value of service transactions or assets, on the total number of service operations and on the total number of natural persons that may be employed in a particular service sector.

¹⁸⁶ See, extensively, Delimatsis and Molinuevo, 'Article XVI GATS' 375-390.

¹⁸⁷ *US - Gambling (Panel)* §6.298.

¹⁸⁸ Delimatsis and Molinuevo, 'Article XVI GATS' 377.

¹⁸⁹ *US - Gambling (AB)* §227, where it was stated that '[b]ecause zero is quantitative in nature, it can, in our view, be deemed to have the "characteristics of" a number—that is, to be "numerical"'. This finding has been criticised, see e.g. Donald H Regan, 'A Gambling Paradox: Why an Origin-Neutral "Zero-Quota" is Not a Quota Under GATS Article XVI' (2007) 41 *Journal of World Trade* 1297, who claims that an origin-neutral zero-quota is not an Article XVI quota.

¹⁹⁰ Krajewski, *National Regulation and Trade Liberalization in Services* 83-84.

¹⁹¹ *Ibid* 82.

¹⁹² *Ibid* 94.

B.6. National treatment

Article XVII:1 GATS requires Members to accord treatment no less favourable to services or service suppliers of any other Member than the treatment it accords to its own like services or service suppliers. The provision does not require formally identical or formally different treatment but entails that no less favourable treatment is rendered to foreign services or service suppliers. In the context of national treatment, the likeness test has been developed. If origin is the only basis for different treatment, service suppliers are considered like while if other factors play a role, a more detailed analysis is necessary.¹⁹³ Treatment is considered less favourable if it modifies the conditions of competition in favour of domestic services.¹⁹⁴ As noted concerning MFN, the interpretation of likeness and less favourable treatment is key to the scope of this obligation.¹⁹⁵ Additionally, as with MFN, both *de jure* and *de facto* discrimination is covered.¹⁹⁶ An important limiting factor to the scope of the national treatment obligation is explained in a WTO explanatory note on scheduling which states that GATS does not contain obligations outside a Member's territorial jurisdiction, hence national treatment obligations do not extend to a service supplier located in the territory of another Member.¹⁹⁷

It is to be noted that the scope of market access and national treatment obligations is not mutually exclusive: a measure may violate both. Moreover, in this regard Article XX:2 GATS complicates the reading of schedules of specific commitments. According to this provision, measures that are inconsistent with both market access and national treatment obligations shall be inscribed in the column relating to market access where they will be considered for providing a qualification or condition to national treatment as well. The Panel affirmed that this specific scheduling rule applies when a measure is inconsistent with both Articles XVI and XVII.¹⁹⁸ Thus, notes the Panel, an inscription of "Unbound" – i.e. no specific commitment – under Article XVI and a corresponding "None" – i.e. no limitations or full commitment – for Article XVII indicates that the Member remains free to maintain the full range of limitations expressed in the six categories of Article XVI:2 whether they are discriminatory, and possibly violating Article XVII GATS, or not.¹⁹⁹

Horizontal national treatment commitments of the European Union

As with market access, the EU has scheduled some important horizontal limitations to its national treatment commitments. Aside from the limitation on subsidies already addressed, four more limitations should be mentioned.

¹⁹³ *China - Publications and Audiovisual Products (Panel)* §7.975.

¹⁹⁴ *EC - Bananas III (Panel)* §7.299 §7.299-7.301; *China - Publications and Audiovisual Products (Panel)* §7.798; *China - Electronic Payment Services (Panel)* §7.687.

¹⁹⁵ Krajewski, *National Regulation and Trade Liberalization in Services* 96-97.

¹⁹⁶ *EC - Bananas III (AB)* §233.

¹⁹⁷ World Trade Organization, *MTN.GNS/W/164, Scheduling of Initial Commitments in Trade in Services: Explanatory Note (3 September 1993)* §10.

¹⁹⁸ *China - Electronic Payment Services (Panel)* §7.657.

¹⁹⁹ *Ibid* §7.661. If the Article XX:2 GATS rule would not exist, in such a case a measure inconsistent with Article XVI GATS could still violate Article XVII GATS commitments if it were discriminatory.

First, the EU scheduled a horizontal Mode 3 limitations on legal entities, which is divided into three categories: limitations on branches, agencies and representative offices; limitations on subsidiaries; and some additional limitations applying to specific EU Member States which are not addressed here. Concerning the first category, and applicable to all EU Member States, it is stated that, in principle, national treatment accorded to subsidiaries of foreign companies established in an EU Member State and formed in accordance with their law is not extended to branches or agencies of foreign companies. As concerns subsidiaries, again applicable to all EU Member States, less favourable treatment may be granted if a subsidiary only has its registered office in EU territory,. This is the case unless the subsidiary shows that it has an effective and continuous link with the economy of the Member States. For example, post-box companies can thus be treated differently under GATS national treatment for Mode 3 services supply.

Second, about ten EU Member States have added national treatment limitations concerning real estate purchases by foreigners or non-residents. Third, it is explicitly stated that EU Directives on mutual recognition of diplomas do not apply to nationals of third countries and that recognition of diplomas to practice regulated professions remain within the competence of the Member States unless EU law applies. Moreover, access to a regulated profession in one Member State does not grant the right to do so in another Member State. Fourth, the horizontal limitations limit the scope of Mode 4. All EU Member States are unbound except as indicated in the list discussed under the market access limitations.

B.7. Additional commitments

In addition to market access and national treatment commitments, Article XVIII GATS allows Members to schedule additional commitments. Additional commitments could be scheduled by only one Member or by many Members. The latter situation is exemplified by the Reference Paper on Basic Telecommunications. In principle the benefits from additional commitments apply to all WTO Members on an MFN basis.²⁰⁰ Most of the approximately eighty WTO Members that have scheduled additional commitments have done so in the telecommunications sector. About thirty Members have taken up such commitments in other sectors, namely financial, maritime transport, and professional services.²⁰¹

²⁰⁰ Markus Krajewski, 'Article XVIII GATS' in Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle (eds), *Max Planck Commentaries on World Trade Law: WTO - Trade in Services*, vol 6 (Martinus Nijhoff 2008) 422.

²⁰¹ Ibid 423.

The (EU's) most notable additional commitment: the Reference Paper on Basic Telecommunications Services

The EU's schedule contains very few additional commitments. Most notably, it includes a reference to the Reference Paper on Basic Telecommunications Services, which is attached to the schedule. In addition to the EU's already very liberal specific market access and national treatment telecommunications services commitments in Modes 1, 2 and 3, the Reference Paper contains a flexible set of obligations which apply to basic telecommunications. These obligations include preventing anti-competitive practices such as cross-subsidisation, misuse of information from competitors, and withholding of technical and commercial information; ensuring interconnection or linking to the networks of a major supplier providing public telecommunications transport networks; transparency obligations on the procedures for interconnection and interconnection arrangements; transparency obligations for licensing criteria and allocated frequency bands; having an independent and impartial regulatory body; and having objective, timely, transparent and non-discriminatory procedures for the allocation and use of scarce resources. Importantly, as mentioned *supra*, the Reference Paper includes the explicit right for Members to define, within limits, the universal service obligations it wishes to maintain.

C. COMMITMENTS IN ANNEXES TO GATS

Article XXIX GATS states that the Annexes to GATS are an integral part of the agreement. The Annexes on Article II Exemptions, Movement of Natural Persons Supplying Services under the Agreement and Air Transport Services do not contain obligations but primarily limit or clarify certain aspects of the scope of GATS. The other Annexes however do contain substantive obligations.

The first is the Annex on Financial Services. Its main substantive provision, Paragraph 2 (a) contains the so-called prudential carve-out, which is an exception to GATS obligations and commitments. However, concerning obligations, only Paragraph 3 (b) needs to be mentioned. This provision requires Members to give equal opportunity to third Members to negotiate accession to an agreement between the Member and any third country or a comparable agreement on the recognition of prudential measures.

The Understanding on Commitments in Financial Services

In the WTO context, trade in financial services is regulated in (i) GATS, (ii) the Annex on Financial Services,²⁰² (iii) the Second and Fifth Protocol to GATS,²⁰³ and (iv) the Understanding on Commitments in Financial Services. While Annexes are an integral part of GATS and Protocols are attached to it, the Understanding has a different legal position. It bears the most resemblance to the Reference Paper on Basic Telecommunications as it is optional and becomes legally binding only through inclusion in a Member's schedule of commitments.²⁰⁴

Eighteen EU Member States have committed to the obligations in the Understanding.²⁰⁵ First, a general standstill obligation binds current levels of commitments as a 'base level'. Second, as concerns market access, the Understanding includes (i) an obligation to list monopolies and an endeavour to reduce their scope; (ii) MFN and national treatment obligations for foreign service suppliers established in the Member as concerns government procurement by public entities; (iii) the obligation to allow foreign service suppliers to provide certain cross-border financial services and to allow residents to purchase most of these services in any other Member; and (iv) granting a right of establishment of commercial presence to another Member's financial service suppliers. Moreover, the understanding (v) supports financial innovations by including a right for an established service supplier to offer a financial service which is not being supplied in that Member.²⁰⁶ Additionally, (vi) some obligations concern the transfer and processing of information; the admittance of certain types of employees of an established financial services supplier into the territory of the Member; and the obligation to endeavour removing or limiting the adverse effects of non-discriminatory measures impeding trade in financial services. Third, national treatment must be accorded to foreign services and service suppliers concerning access to payment and clearing systems operated by public entities and access to official funding and refinancing facilities – excluding the lender of last resort. It must also concern membership of, participation in, or access to financial organisations or institutions for financial service suppliers resident in that Member. To add to the complexity of these far-reaching commitments, additional limitations have been scheduled in the EU's schedule of commitments.

Second, the Annex on Negotiations on Maritime Transport Services contains a suspension of MFN obligations in the maritime transport services sector. The suspension is currently linked to

²⁰² The Second Annex on Financial Services is no longer legally relevant.

²⁰³ S/L/11, Second protocol to the General Agreement on Trade in Services (24 July 1995); S/L/45, Fifth protocol to the General Agreement on Trade in Services (3 December 1997)

²⁰⁴ Armin von Bogdandy and Joseph Windsor, 'Understanding on Commitments in Financial Services' in Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle (eds), *Max Planck Commentaries on World Trade Law: WTO - Trade in Services*, vol 6 (Martinus Nijhoff 2008) 650-651.

²⁰⁵ I.e. all EU Members up until the 1995 enlargement, and Czech Republic, Hungary and Slovakia.

²⁰⁶ von Bogdandy and Windsor 657.

the conclusion of the Doha Round.²⁰⁷ Hence, until the conclusion of these negotiations, the general MFN obligation and the Annex on Article II Exemptions do not apply to maritime transport services. However, this suspension does not apply to specific commitments inscribed in the schedule of commitments. In the case of the EU, almost no such commitments are listed, with the exception of especially Estonia, Hungary, Latvia, Lithuania and Malta, which have made considerable commitments.

Third, GATS includes two annexes related to telecommunications: the Annex on Telecommunications and the Annex on Negotiations on Basic Telecommunications. The former contains a transparency obligation for information on conditions affecting access to and use of public telecommunications transport networks and services. Moreover, access to and use of such networks and services is guaranteed for foreign service providers, although subject to some limitations, on reasonable and non-discriminatory terms through a number of provisions for Members who have made specific commitments. Lastly, the Annex refers to an obligation to encourage and support cooperation. It must be noted that the Annex does not establish a right to provide services and only addresses the rights of foreign service suppliers using telecommunications services.²⁰⁸ The Annex on Negotiations on Basic Telecommunications is formally very alike the Annex on Negotiations on Maritime Transport Services. However, in this case negotiations were concluded and the suspension of MFN commitments ended in 1997. Finally, as already addressed telecommunications services are also regulated in the 1996 Reference Paper on Basic Telecommunications Services for Members who have taken up these commitments.

3. EXCEPTIONS TO GATS

Although the scope of the obligations arising out of GATS is also altered considerably by the scope of the possible exceptions to them, it goes beyond this contribution to address this complex subject. It suffices to highlight those exceptions not yet mentioned. GATS includes exceptions which apply to all obligations: (i) regional economic integration and labour market integration exceptions in Article V and V bis GATS, (ii) general exceptions in Article XIV and (iii) security exceptions in Article XIV bis GATS. Article VII GATS contains recognition measures as exceptions to the MFN obligation. Furthermore, provisional emergency safeguards in Article X:2 and restrictions to safeguard the balance of payments in Article XII exist for services sectors in which specific commitments have been scheduled.

Lastly, the prudential carve-out of Paragraph 2 of the Annex on Financial Services must be mentioned as well as it is a substantial exception to GATS rules for financial services covered

²⁰⁷ The Annex refers to a (1996) Decision on Negotiations on Maritime Transport Services, which made the end of the suspension dependent on the end of Article XIX:1 GATS negotiations, which were incorporated into the Doha Development Agenda in 2000. Benjamin Parameswaran, 'Annex on Maritime Transport Services' in Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle (eds), *Max Planck Commentaries on World Trade Law: WTO - Trade in Services*, vol 6 (Martinus Nijhoff 2008) 672-673.

²⁰⁸ Henry Gao, 'Annex on Telecommunications' in Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle (eds), *Max Planck Commentaries on World Trade Law: WTO - Trade in Services*, vol 6 (Martinus Nijhoff 2008) 710.

by the Annex. The exception applies to prudential reasons, such as the stability of the financial reasons, when used in good faith.

CONCLUDING REMARKS

This contribution highlights that many uncertainties exist regarding the scope of GATS and of some of its main obligations, which complicate the balancing of trade liberalisation with domestic regulatory autonomy. It remains unclear whether these goals should be balanced in the interpretation of each obligation separately or only considering the agreement as a whole. Moreover, the interpretative width is quite substantial in many key areas of GATS. These uncertainties have caused the EU to take a cautious approach, using the inherent GATS flexibility to gain some legal certainty. However, this has not solved all interpretative problems. It must be stressed that as the WTO is a Member-driven organisation, violation complaints must be brought before the dispute settlement organs by other Members. Thus,

‘policy makers must take into account not only what a panel or the Appellate Body might decide if a challenge were brought but also the risk that another WTO Member would initiate a challenge, a calculus that requires a careful assessment of the political and commercial interests at stake, both domestic and foreign.’²⁰⁹

From a policy perspective, this remark should not be underestimated.

Additionally, this contribution points out that although relatively few provisions are likely to impinge upon domestic regulatory autonomy, they may do so in a far-reaching manner. Aside from the scope of GATS, the most contentious provisions in this regard are Article VI:5 GATS, the market access and national treatment obligations and any obligations undertaken as additional commitments. The outcome of negotiations on other disciplines, such as on Article VI:4 GATS or subsidies may introduce further issues with respect to the impact of GATS on domestic regulatory autonomy.²¹⁰

²⁰⁹ VanDuzer, ‘Health, Education and Social Services in Canada: The Impact of the GATS’ 368.

²¹⁰ See in this regard Bregt Natens, *The Doha Round and the Future Architecture of the Multilateral Regulation of Trade in Services* (Leuven Centre for Global Governance Studies Working Paper 110, 2013).

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