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**Export Policies and the General Agreement on Trade in Services**

Rudolf Adlung

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# Export Policies and the General Agreement on Trade in Services

Rudolf Adlung\*

*“Export plays an important role in trade. Export means that we expect others to buy things we can't afford; and it is unpatriotic to buy foreign products ...”*  
Kurt Tucholsky (German satirist), 1931, ‘Kurzer Abriss über die Nationalökonomie’

## **ABSTRACT:**

Compared to its counterpart in merchandise trade, the General Agreement on Tariffs and Trade (GATT) of 1947, the General Agreement on Trade in Services (GATS) contains a variety of conceptual innovations. In addition to cross-border supply, the Agreement covers three additional types of transactions, i.e. the supply of services via consumer movements abroad as well as the presence of foreign firms and foreign service professionals in the respective markets. At the same time, the GATS accommodates a range of measures, including the use of quantitative restrictions and discriminatory taxes or subsidies, which are clearly constrained under the GATT. Most notably in the current context, the Agreement offers particularly broad scope for various types of export-related interventions, regardless of ensuing market distortions. The social and economic relevance of such measures, not only in sectors such as education or health, but also in producer-oriented services, including transport, telecommunications or finance, is immediately evident. This paper seeks to provide an overview and assessment in the light of relevant GATS provisions and WTO dispute rulings.

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\* Contact: [rudolf.adlung@gmail.com](mailto:rudolf.adlung@gmail.com).

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## 1. BACKGROUND

To his contemporaries, Tucholsky's quote might have appeared misplaced in connection with services trade. Indeed, the meaning of 'trade' has long been equated mainly with international exchanges of *things*, i.e. tangibles. For a variety of reasons (existence of public monopolies in key sectors, the perceived need for direct interaction between supplier and consumer, etc.) the role of services trade, i.e. exchanges of intangibles, has generally been ignored. However, this has changed dramatically over the past two or three decades. Technical and regulatory innovations, reflected *inter alia* in rapid digitalization of services production and trade, have blurred traditional policy perceptions. Recent estimates even suggest that, in value-added terms, thus excluding imported inputs, the share of services in total world trade meanwhile exceeds that of manufactures.<sup>1</sup> As has been discussed elsewhere, services not only ensure the smooth operation of global value chains, but are also key defining elements of many related production and sales processes.<sup>2</sup>

Regardless of the (possibly outdated) definitional distinctions between goods and services trade, governments are tempted to intervene in both spheres for similar, more or less well-conceived reasons. The perceived need for regulatory intervention may be even more pronounced in services, in particular those with strong infrastructural, distributional or cultural connotations, than in goods-producing sectors. Yet the question looms in either context whether the measures concerned (a) effectively serve their proclaimed purposes, (b) contribute to enhancing social and economic welfare, and (c) are compatible with the country's international obligations. Patriotism alone does not certainly provide sufficient grounds for action. Though it might be tempting for governments to interfere, *inter alia*, in order to promote exports and make others buy products "we can't afford", their ability to do so is certainly more constrained today than at Tucholsky's time.

While the status of export-related policies under the General Agreement on Tariffs and Trade (GATT) has been explored quite comprehensively<sup>3</sup>, the author is not aware of any comparable attempts from a services perspective. Yet, the status of such policies under the General Agreement on Trade in Services (GATS) deserves as much attention as interventions in merchandise trade; and this is for various reasons.

A quick reading already suggests that, overall, the GATS provides for significantly more leeway concerning governments' use of export-related measures than the GATT. However, there are conspicuous variations in treatment depending on the nature of the measures taken, trade promoting or restricting, and the origin/nationality of the services and service suppliers involved as well as their territorial presence. These variations certainly require further analysis, not least against the backdrop of two WTO/GATS dispute rulings which essentially confirm, in certain circumstances, the Agreement's applicability to *export restrictions*.

Concerning the extension of *export subsidies*, the GATS currently contains no policy-specific constraints in addition to the general obligations of Most-Favoured-Nation (MFN) treatment and, in selected areas (sectors and types of transactions), national treatment. Though there is a negotiating mandate, in Article XV, calling for the development of disciplines necessary to avoid subsidy-related trade distortions, these negotiations, like those in other rule-making areas (domestic regulation, emergency safeguards, and government procurement of services), have made virtually no headway since their start in the mid-1990s. Given the apparent stalemate, the question arises whether important interests might remain unheeded, and what could or should be done about this.

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<sup>1</sup> UNCTAD (2013), *Global Value Chains and Development*, Geneva, p. 18.

<sup>2</sup> Various relevant contributions are contained in Elms, Deborah K. and Patrick Low (2013, eds), *Global value chains in a changing world*, WTO Publications: Geneva.

<sup>3</sup> See, for example, Laird, Sam (1999), 'Export Policy and the WTO', *The Journal of International Trade and Development*, 8(1): 73-88. The article focuses on trade in agricultural and manufacturing products under the GATT, services-related issues under the GATS are not addressed.

Before discussing these issues in more detail, it may be helpful, first, to briefly describe the definitional scope of the GATS and its application to trade flows in either direction. This is followed, in the third section, by concrete examples of export-related trade interventions in services that governments may want to take for various policy reasons. In turn, this sets the stage for the discussion, in the fourth section, of the applicability of current GATS disciplines under various scenarios and the flexibilities involved. On this basis, the concluding section briefly comments on the need for, and the prospects of achieving, stricter constraints on the use of export policies under the GATS.

## 2. GATS: SCOPE AND COVERAGE

Pursuant to its Article I:1, the GATS applies to “to measures by Members affecting trade in services”.<sup>4</sup> For the purposes of the Agreement, *trade in services* is further defined to embrace four types of transactions or modes of supply, depending on the territorial presence and/or nationality of the parties involved. Accordingly, the GATS covers the supply of a service:

- (a) from the territory of one Member into the territory of any other Member (cross-border supply or mode 1);
- (b) in the territory of one Member to the service consumer of any other Member (consumption abroad or mode 2);
- (c) by a service supplier of one Member, through commercial presence in the territory of any other Member (commercial presence or mode 3)<sup>5</sup>;
- (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member (presence of natural persons or mode 4).

The modal extension of the GATS, as compared to the GATT’s exclusive focus on cross-border trade, is reflected in an extension of the Agreement’s coverage from the treatment of products (services) to include that of producers (service suppliers) as well.

Interestingly, the above definitions do not specify the direction of the trade flows covered by the respective modes. Thus, from the perspective of a Member A, cross-border transactions falling under mode 1, frequently conducted via the Internet, may consist of services arriving from abroad as well as services dispatched from A’s territory to a foreign-based recipient. In turn, the definition of mode 2 obviously covers services supplied within a third country to nationals/residents of A who have moved abroad (tourists, students, patients, etc.) as well as services supplied to foreign consumers within A’s territory.<sup>6</sup> Likewise, transactions under mode 3 could consist of supplies of foreign firms (hotels, banks, hospitals, etc.) that are commercially established within A as well as supplies of their counterparts from A that are established abroad. Finally, mode 4 covers, *inter alia*, the supplies within the territory of A of foreign service firms that employ foreign nationals for that purpose (managers,

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<sup>4</sup> The Appellate Body later posited that “the use of the term ‘affecting’ reflects the intent of the drafters to give a broad reach to the GATS”. It is deemed to be wider in scope than such terms as “regulating” or “governing”. See WTO Appellate Body Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas (EC - Bananas)*, WT/DS27/AB/R, adopted 25 September 1997, para 220.

<sup>5</sup> In turn, “commercial presence” is defined in Article XXVIII(d) to mean “any type of business or commercial establishment, including through

(i) the constitution, acquisition or maintenance of a juridical person, or

(ii) the creation or maintenance of a branch or representative office,

within the territory of a Member for the purpose of supplying a service”.

<sup>6</sup> Note that, pursuant to Article XVIII(i), (j) and (m), the definition of ‘service consumer’ of another Member also covers foreign-owned or -controlled juridical persons established within the respective jurisdictions.

teachers, doctors, etc.) as well as the supplies abroad of A-owned or A-controlled firms that involve foreign employees (i.e., non-nationals of the host country).<sup>7</sup>

### 3. GOVERNMENT MEASURES IMPINGING ON SERVICES EXPORTS: OVERVIEW

Reflecting its particularly broad definitional scope, in terms of modes of supply, the GATS covers a wide range of measures with which governments might want to control trade and investment in services. And there are only few sectors or activities which are excluded *per se* from the Agreement: measures affecting air traffic rights and directly related services as well as services provided in the exercise of governmental authority (Annex Table). The following Table provides examples, with a certain focus on public or social services, of export-related measures under individual modes, and the underlying motives.

**Table 1. Examples of measures restricting/promoting services 'exports'**<sup>1</sup>

Type of transaction	Restriction	Promotion <sup>2</sup>
Cross-border exports from a Member's territory	Restrictions on cross-border provision of laboratory services and tele-medical services <sup>S</sup>	Subsidies supporting exports of audiovisual products <sup>C</sup> Subsidies for transport operators (road, maritime, etc.) engaged in international trade <sup>A,E</sup> Tax exemptions for service exporters (call centres, participants in international fairs, etc.) <sup>E</sup>
Supplies to foreign recipients within a Member's territory	Limitations on number of foreign consumers (students, patients, etc.) that may be admitted to domestic facilities (universities, hospitals, etc.) <sup>S</sup>	Tax privileges for foreign tourists <sup>E</sup> Investments into the public infrastructure of domestic holiday resorts <sup>E</sup> Subsidized repairs of foreign ships, aircraft etc. in domestic facilities <sup>A,E</sup>
Commercial activities in another Member's territory	Controls on outward FDI in technologically advanced service sectors <sup>A</sup>	Subsidy or guarantee schemes promoting investments and other commercial activities abroad <sup>D</sup> Tax preferences on foreign investment income <sup>D</sup>
Outward movements of service professionals	Regulations preventing young graduates from immediately leaving the country ('brain drain') <sup>S</sup>	Publicly supported training to help professionals meet standards in potential host markets <sup>E</sup>
Underlying motives (hypothetical): A Economic autonomy (e.g., protect erosion of domestic capacity and/or avert technology transfer). C Cultural policy objectives. D Development assistance (objective: favouring engagements in low-income countries). E Export promotion as part of a national growth and employment strategy. S Promotion of domestic user industries, supply security (domestic availability of essential services).		

1 Not all scenarios appear equally likely. For example, governments are generally more inclined to promote inward FDI, for obvious reasons, than to encourage investments abroad.

2 For concrete examples of export subsidies in several countries see Abugattas, Luis (2005), 'State Support Measures for Services: An Exploratory Assessment with Scanty Data', UNCTAD (Document for Discussion, dated 25 February), Geneva; and Geloso Grosso, Massimo (2008), 'Analysis of Subsidies in Services - The Case of Export Subsidies', *OECD Trade Policy Papers No. 66*, Paris.

In gathering information on actually applied measures, the notifications to be submitted by WTO Members under relevant GATS provisions are a potentially relevant source. In sectors on which access commitments have been undertaken, Article III:3 requires all Members to notify at least annually the introduction of any new or changes to existing laws and regulations which "significantly affect" their trade in these services. However, the Article has been widely ignored to date. By end 2013, a total of some 500 notifications had been received since the Agreement's entry into force in January 1995, with close to one-half originating from three Members only (Albania, China, and

<sup>7</sup> For a discussion of the scope of mode 4, see Carzaniga, Antonia (2003), 'The GATS, Mode 4, and Pattern of Commitments', in Mattoo, Aaditya and Antonia Carzaniga (eds), *Moving People to Deliver Services*, Washington DC: The World Bank, 21-26.

Switzerland).<sup>8</sup> Moreover, the exact focus of the measures concerned is generally difficult to assess. It was thus not possible in the context of this paper to identify any notifications clearly dealing with export-related interventions. One might wonder whether this reflects governments' view that exports are not covered by specific commitments or, rather, that they are possibly covered, but that it would be unwise to draw other Members' attention to policy schemes that might be of questionable legal standing.<sup>9</sup> Or is it simply due to complacency, lack of government-internal coordination or sheer ignorance of existing obligations?

Another potentially relevant source of information are the Trade Policy Reviews of individual Members that the WTO Secretariat is mandated to conduct in regular intervals. Yet, the focus of these Reviews is too broad in order to serve as a reasonably comprehensive source of information in the current context.<sup>10</sup>

#### 4. STATUS OF EXPORT-RELATED POLICIES UNDER GATS PROVISIONS

While Article I specifies the definitional scope of the Agreement, Members' trade obligations are essentially defined in Parts II (Articles II to XV) and III (Articles XVI to XVIII). Part II sets out commonly applicable rules which have to be respected by all Members without modification, and Part III establishes the framework conditions governing the scheduling of the commitments each Member is required to submit under the GATS.

The obligations contained in Part II essentially fall into two groups, depending on whether they apply horizontally across all services covered by the Agreement or whether they are confined to sectors subjected to specific commitments. The former obligations include in particular the MFN requirement which, comparable to other WTO Agreements, plays a central role in the GATS as well. Permissible departures from MFN treatment, apart from certain exception clauses, are limited mainly to preferences granted under Economic Integration Agreements as specified in Article V of the GATS, and to recognition measures, on an autonomous or contractual basis, concerning the acceptance of foreign licences, certificates etc. pursuant to Article VII. In addition, there was a one-off possibility for Members, at the time they accepted the Agreement, to list and, thus, seek cover for existing MFN-inconsistent measures.<sup>11</sup>

The second type of obligations, conditional on the existence of specific commitments, include the notification requirement under Article III:3 mentioned before, a range of regulatory disciplines, such as the obligation to administer all measures of general application in a reasonable, objective and impartial manner (Article VI:1), as well as a prohibition on restricting international payments and

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<sup>8</sup> In addition, Article III:5 provides for the possibility to submit counter-notifications of measures taken by other Members that are considered to affect the operation of the Agreement. However, this provision has been invoked only once to date, by Norway, concerning perceived restrictions on foreign equity participation in Thailand's telecom sector. WTO document S/C/N/653 of 26 September 2012.

<sup>9</sup> Members' hesitation to provide intelligence is also discernible in other areas. For example, for the purpose of the mandated negotiations on subsidies (section 4.2.2(a)), launched after the Uruguay Round, Article XV:1 obliges Members "to exchange information concerning all subsidies related to trade in services" that are provided to domestic service suppliers. However, less than 20 relevant submissions had been made by end 2013 (including one for the EU), and the level of detail varies greatly (WTO document S/WPGR/21, 14 April 2011). See also Geloso Grosso (note 2 to above Table 1).

<sup>10</sup> As background for the negotiations on services subsidies, the WTO Secretariat repeatedly produced overviews of subsidy-related information contained in these reviews. The latest update was circulated as WTO document S/WPGR/W/25 Add. 7 of 17 April 2014.

<sup>11</sup> By end 2013, some 110 Economic Integration Agreements (excluding the EC Treaty, agreements with future EU member States, and subsequent EU enlargements) and 50-odd recognition measures had been notified under relevant provisions. In addition, a total of over 500 measures had been listed as MFN exemptions by about 100 Members (counting EU member States individually). For a more detailed discussion of the relevant provisions see Adlung, Rudolf and Antonia Carzaniga (2009), 'MFN Exemptions under the General Agreement on Trade in Services: Grandfathers Striving for Immortality?', *Journal of International Economic Law*, 12(2): 357-392.

transfers for current transactions (Article XI:1).<sup>12</sup> There are no provisions in this Part which would require Members *per se* to permit any specified level of trade, in whatever direction, or to abstain from any particular type of interventions as long as these conform with the MFN principle. Most notably, there is no services equivalent to Article XI of the GATT which would prohibit Members from operating restrictions on imports or exports other than duties, taxes or other charges.<sup>13</sup> Rather, in the absence of specific commitments for a particular service sector and mode of supply, a government would even be free to ban all trade.

Trade disciplines under the GATS concerning market access and national treatment are assumed only in the form of specific commitments as defined in Part III. The Agreement requires all Members to submit a schedule of commitments, but does not prescribe its (sectoral) scope or (liberalizing) substance.

#### 4.1 *Most-Favoured-Nation Treatment*

While the MFN clause under GATT Article I:1 applies to customs duties and charges “imposed on or in connection with importation or exportation” and to “all rules and formalities in connection with importation and exportation”, its services counterpart refers to the treatment of *foreign* services and service suppliers only. GATS Article II:1 requires each Member to accord “immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services or service suppliers of any other country”. In other words, government measures affecting exports or exporters of services are disciplined only should they discriminate between domestically established foreign-owned or -controlled suppliers of different nationality or their supplies.<sup>14</sup> While these must be treated on a par, measures that discriminate between potential target markets or recipients, i.e. services users of different nationality, are not disciplined *per se*.

#### 4.2 *Specific Commitments (Part III)*

As mentioned before, in sectors not subject to specific commitments, the GATS does not essentially limit Members' ability to operate trade measures, including quantitative restrictions, under any of the four modes of supply. In turn, this already implies a lot of leeway, taking into account that, on average, Members have scheduled commitments on no more than one-third of the 160-odd service sectors covered by the classification system generally used for scheduling purposes (the averages for developed countries and recently acceded WTO Members are in the order of two-thirds).<sup>15</sup>

In order to assess access conditions in committed sectors, it is important to look at both sets of obligations, market access (Article XVI) and national treatment (Article XVII), that are covered by a Member's services schedule. For any of the four modes of supply, the Member needs to specify the policy bindings it is ready to accept under either Article, implying that there are at least eight entries per scheduled sector. These may vary between so-called full commitments that are without any limitation; commitments subject to specified limitations ('partial commitments'); or they may provide

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<sup>12</sup> See Annex Table for a full overview.

<sup>13</sup> GATT Article XI:2 allows for certain departures in cases where (a) export restrictions are maintained to prevent critical shortages of essential products, (b) import or export restrictions are necessary to regulate the classification, grading or marketing of commodities in international trade, or (c) import restrictions on agricultural or fisheries products are necessary to the enforcement of governmental measures in specified circumstances.

<sup>14</sup> Note, however, that the distinction in Article II:1 between “any other Member” and “any other country” would allow governments to discriminate against and among suppliers/supplies from non-WTO Members.

<sup>15</sup> See Adlung, Rudolf and Martin Roy (2005), ‘Turning Hills into Mountains? Current Commitments under the General Agreement on Trade in Services and Prospects for Change’, *Journal of World Trade*, 36(6): 1161-1194, p. 1170.

for unfettered policy discretion (subject, of course, to the MFN clause).<sup>16</sup> The ability to operate quantitative restrictions is determined by entries in the market-access column of a schedule, while monetary and other measures affecting the competitive conditions between foreign and domestic services or service suppliers are subject to the Agreement's national-treatment disciplines.

Finally, Article XVIII of the Agreement provides for the possibility to undertake additional commitments “with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII”. Members may use these provisions to address perceived trade problems that elude the disciplines of the two former Articles provided the transactions concerned fall within the definitional scope of the Agreement (section 2). The most prominent case so far is the so-called Reference Paper in telecommunications, mainly consisting of competition disciplines and transparency obligations, which has been adopted by over 100 Members.<sup>17</sup>

#### 4.2.1 Market Access

##### (a) A closer look at GATS Article XVI

Comparable to the MFN clause, the scope of GATS Article XVI is confined to the treatment of foreign services/service suppliers. It does not constrain the use of restrictions on domestically-owned or -controlled suppliers and their produce.

Pursuant to Article XVI:1 “each Member shall accord to services and service suppliers of any other Member treatment no less favourable than that that provided for under the terms, limitations and conditions agreed and specified in its schedule”. In turn, Article XVI:2 then lists six categories of measures which Members must not maintain or adopt unless inscribed in their respective schedules of commitments. According to the Scheduling Guidelines, adopted by the Council for Trade in Services, this list is exhaustive; all measures falling under the six categories must be scheduled, whether or not they are discriminatory according to the national treatment standard of Article XVII (see below).<sup>18</sup> The measures consist of:

- (i) limitations on the number of service suppliers whether in the form of numerical quotas ... or the requirement of an economic needs test;
- (ii) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
- (iii) limitations on the total value of services operations or on the total quantity of service output expressed in terms of designated numerical units or the requirement of an economic needs test;

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<sup>16</sup> In the case of full commitments, the relevant entry reads ‘none’. In contrast, ‘unbound’ signals the absence of any policy bindings as defined in Articles XVI and XVII; trade under the mode concerned can thus be treated as if the sector had not been scheduled at all.

<sup>17</sup> As of end 2013, 104 Members had adopted the Reference Paper in full, while an additional seven Members had committed with variations (counting EU member States individually). For a broader overview of the use of additional commitments, see WTO Secretariat (2002), *Additional Commitments under Article XVIII of the GATS*, WTO document S/CSC/W/34. Individual Reference-Paper provisions are discussed, *inter alia*, by Bronkers, Marco and Pierre Larouche (2008), ‘A Review of the WTO Regime for Telecommunications Services’, in Alexander, Kern and Mads Andenas (eds), *The World Trade Organization and Trade in Services*, Leiden and Boston: Martinus Nijhoff, 319-379.

<sup>18</sup> In other words, further measures that may be deemed to affect ‘market access’, such as minimum capital requirements and other regulatory constraints, are not covered. See WTO document S/L/92 of 28 March 2001, para 8. Concerning the legal status of the Guidelines, in US - Gambling, the Appellate Body stipulated that they constituted supplementary means of interpretation according to Article 32 of the Vienna Convention. Appellate Body Report, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US - Gambling)*, WTO document WT/DS285/AB/R, adopted 20 April 2005.

- (iv) limitations on the total number of natural persons that may be employed in a particular service sector ... who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;
- (v) measures which restrict or require specific types of legal entity or joint venture through which a services supplier may supply a service; and
- (vi) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign share-holding or the total value of individual or aggregate foreign investment.

Mirroring the modal definition of services trade under the Agreement which, as noted before, does not imply any direction of the flows covered, at least the limitations falling under (a) to (d) appear equally applicable to import- as well as export-related transactions. (See, however, below section 4.2.1(b).)

A potentially relevant question in the current context revolves around the use of the term ‘total’ in Articles XVI:2(b) to (d): “limitations on the *total* value of service transactions”, “*total* number of service operations”, etc. Could it be credibly argued in these cases that exclusively export-related restrictions are not covered since they limit only supplies in a particular market segment, but not overall? Possibly not. Indeed, the panel report in *US-Gambling* refers to the 1993 Scheduling Guidelines which state that “the quantitative restrictions specified in subparagraphs (a) to (d) refer to maximum limitations”.<sup>19</sup> The report then infers that the use of the word ‘total’ under Article XVI:2(c) “serves the purpose of indicating that limitations covered by Article XVI:2(c) must impose maximum limits on services operation and/or service output”.<sup>20</sup> In turn, this seems to reflect the view that any type of upper limit is covered, even if it applies to individual market segments only. The imposition of ceilings on the supplies originating from domestically established foreign suppliers that are destined for users abroad and/or for foreign users within the Member's own territory would thus indeed constitute limitations within the meaning of Article XVI. What might be excluded, however, are firm-related size limitations which might be maintained, e.g. under competition or zoning laws, and do not affect the total amounts that could be supplied within any market segment.<sup>21</sup>

- (b) Export-related disciplines: Relevance of mode 3

### Scheduling Guidelines

The Scheduling Guidelines, adopted by the Council for Trade in Services in March 2001, i.e. at an early stage of the Doha Round negotiations, were intended “to assist in the preparation of offers, requests and national schedules of specific commitments”. The underlying objective was “to explain, in a concise manner, how specific commitments should be set out in schedules in order to achieve precision and clarity”.<sup>22</sup> However, one might wonder whether this objective has been fully met.

With a view to explaining the scope of mode 1 (cross-border supply), the Guidelines (para 28) refer to services supplied via telecommunications or mail and, somewhat disturbingly, to “services embodied in *exported* goods”. Yet, the latter term is obviously meant to refer to ‘traded goods’. An explanatory table further specifies that the respective services are delivered “*within* the territory of the Member, from the territory of another Member” (emphasis in the original). In turn, this indicates that mode 1 commitments, from the perspective of a scheduling Member, refer only to services imported

<sup>19</sup> Document MTN.GNS/W/164 of 1 September 1993, p. 2. This document is the predecessor of document S/L/92 referred to in above note 18, and provided guidance for Members as they prepared their services schedules during the Uruguay Round. The parts referred to above have remained unchanged.

<sup>20</sup> Panel Report, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US - Gambling)*, WTO document WT/DS285/R, para 6.345. The subsequent Appellate Body report, referred to in above note 18, does not pronounce on this issue.

<sup>21</sup> This interpretation could also explain why the term ‘total’ would serve no purpose in the context of Article XVI:2(a) - “limitations on the number of service suppliers” - and, thus, has been omitted.

<sup>22</sup> WTO document S/L/92 (see above note 19), para 1.

into that Member's territory. The Guidelines do not further pronounce, however, on whether commitments concerning cross-border services exports would be covered by another mode.

Similarly, as regards mode 2 (consumption abroad), the same table provides an import-focussed interpretation as well. Accordingly, the respective supplies consist of services "delivered *outside* the territory of the Member, in the territory of another Member, to a service consumer of the Member". The Guidelines further explain that limitations inscribed under mode 2 "should only relate to measures affecting the consumers of that Member, and not to measures affecting consumers of another Member, in the territory of that Member" (para 31). Again, the potential relevance of other modes is left open. In this case, what would be the status of services that are provided to foreigners who stay within the scheduling Member's territory?

Contrasting from both modes 1 and 2, one defining feature of modes 3 and 4 is the supplier's presence in the respective Member's territory. In case of mode 3, the explanatory table closely follows the wording of GATS Article I:2(c), reproduced in above section 2, while mode 4 is considered to cover situations where the supplier is "present as a natural person". The latter interpretation certainly oversimplifies the broader definition of mode 4 in Article I:2(d), which also covers situations in which the supplier is a foreign-owned juridical person which employs foreigners, of whatever nationality, to provide the service in a host country.<sup>23</sup>

### Dispute Rulings

Two WTO panel decisions explicitly recognize the application of market access commitments under mode 3 to export flows that seem to fall within the definitional scope of modes 1 and 2 (section 2).<sup>24</sup>

First, in discussing the geographic scope of a commitment undertaken by Mexico on telecommunication services under mode 3, the panel in *Mexico - Telecoms* observed that the definition of services supplied through commercial presence is "silent with respect to any other territorial requirement (as in cross-border supply under mode 1) or nationality of the service consumer (as in consumption abroad under mode 2). Supply of a service through commercial presence would therefore not exclude a service that originates in the territory in which a commercial presence is established (such as Mexico), but is delivered into the territory of any other Member (such as the United States)".<sup>25</sup>

Second, the panel in *China - Electronic Payment Services*, explicitly endorsing the former panel's reasoning, opined that "[n]othing in the GATS suggests that the supply of a service through commercial presence in the territory of a Member does not extend to the 'export' of services from that Member's territory to a recipient in the territory of another Member or to a foreign recipient located in the 'exporting' Member's territory. A foreign service supplier may therefore, subject to any limitations set out in the Member's schedule, supply a committed service to a foreign recipient wherever located, and of whatever nationality or origin."<sup>26</sup> A related footnote explains that a mode 3 commitment on data processing services would allow a foreign company established in the territory of a Member to supply such services to a consumer located abroad, while a commitment on hotel services would allow a foreign-owned hotel established in that Member's territory to supply its services to foreign tourists. A following footnote further adds that the supply of electronic payment services from China into the

<sup>23</sup> See, for instance, Carzaniga in above note 7.

<sup>24</sup> For an overview and assessment of these decisions see Sherman, Laura B. (2005), 'Clarifying the meaning of WTO telecommunications obligations: Mexico - measures affecting telecommunications services', *info*, 7(6): 16-32, and Hoekman, Bernard and Niall Meagher (2014), 'China - Electronic Payment Services: discrimination, economic development and the GATS', *World Trade Review*, 13(2): 409-442.

<sup>25</sup> Panel Report, *Mexico - Measures Affecting Telecommunications Services (Mexico - Telecoms)*, WT/DS204/R, adopted 1 June 2004, para 7.375.

<sup>26</sup> Panel Report, *China - Certain Measures Affecting Electronic Payment Services (China - Electronic Payment Services)*, WT/DS413/R, adopted 31 August 2012, para 7.618.

territory of any other Member could be limited by market access commitments of China under mode 3.

In both panels' view, a full commitment on market access (Article XVI) under mode 3 would thus prevent a Member from imposing, within its territory, limitations on the number of suppliers that are permitted to conduct exports and/or on the value of the services they are providing either cross-border to foreign-based recipients or domestically to foreign users present within the territory concerned (e.g., tourists, students, patients). Obviously, the panels' focus was on the foreign suppliers impacted by a measure, rather than on the underlying trade flows, and this impact obviously occurs under mode 3. While the trade flows flatly fall within the definitional scope of modes 1 and 2, respectively (section 2), the right to generate such flows is contingent on the existence of commitments under mode 3. Comparable to the MFN requirement in Article II, the reach of Article XVI is confined to a Member's treatment of services and service suppliers of other Members.

Two further elements are worth noting. Both panel decisions confirm, explicitly or otherwise, that Members remain free to impose export restrictions (a) on their *own* services or service suppliers - even in the event of full commitments under Article XVI - as well as (b) on any services or service suppliers, whether foreign or national, in sectors not subject to specific commitments. As noted before, the Article covers six categories of limitations, whether or not these are applied on a discriminatory basis according to the national treatment standard of Article XVII, but does not, of course, prevent Members from operating restrictions that affect only domestic suppliers and their services. Nor does it discipline the use of restrictions on foreign suppliers in non-committed sectors or modes.

The two quoted decisions essentially concern measures maintained in sectors - telecommunication and financial services - in which commercial policy interests tend to prevail and which are also key to the operation of international supply chains. However, the findings might prove equally relevant for measures/sectors with a strong social- or public-policy background. Two examples: In order to protect the interests of domestic users of hospital or laboratory services, a government may want to prevent domestic providers from using more than x % of their capacity for foreign-based clients (Table 1). For similar reasons, the government may consider limiting the number of foreign students enrolled in its universities or of visiting foreign patients ('health tourists') treated in its hospitals. Applying the above panels' reasoning to Members that have undertaken commitments on market access under mode 3, in order to remain free to impose such restrictions not only on domestic firms, but on their on foreign-owned or -controlled counterparts as well, the measures concerned would need to be covered by limitations.

(c) Does the modal context really matter?

Possibly yes.

Even after careful review of all potentially relevant entries in schedules, it was impossible in the context of this study to find any limitations through which a Member would specifically have reserved the right to restrict *exports*. This does not necessarily imply that no relevant schemes are in place or under consideration, but simply that nobody apparently anticipated the need for targeted limitations. Relevant 'policy space' might exist nevertheless: those Members that, for whatever reasons, had not undertaken any bindings on market access also remained entitled to operate export restrictions. Yet, the shares of non-bindings differ significantly between modes. On average across a selection of sectors deemed representative of current scheduling patterns, relevant entries ('unbound') were found to be in the order of one-third for mode 1, less than one-tenth for mode 2 and close to nil for mode 3.<sup>27</sup> In other words, there are certainly cases where the association of an export restriction with a particular sector/mode ultimately determines its legal status under existing commitments.

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<sup>27</sup> See Adlung and Roy, above note 15, p. 1173. In addition, of course, it needs to be borne in mind that the sector coverage of current schedules varies widely. There are a few LDCs that have inscribed just one single sector out of the 160-odd sectors contained in the generally used classification list, while some recently acceded Members, including Moldova, Kyrgyz Republic and Georgia, committed 120 and more sectors.

What about the relevance of mode 4? In order to limit ‘brain drain’, would Members be free, for example, to curtail departures of young service professionals, including doctors and nurses, who may feel attracted by more generous employment conditions abroad? Again, there is nothing in the definition of mode 4 that would imply that outflows of natural persons, and related measures, are excluded *per se*. However, as noted before, what is ultimately disciplined under Article XVI of the Agreement is a Member’s ability to restrict suppliers of other Members, and the services concerned, but not the use of measures impinging on its own suppliers and their services. (Article XVI:1: “With respect to market access through the modes of supply identified in Article I [see section 2], each Member shall accord services and service suppliers of *any other Member* treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its schedule” (emphasis added).) It is thus quite difficult to think of restrictions on outbound movements of natural persons that might be inconsistent with full commitments under mode 4. A highly hypothetical case: a Member government seeks to prevent *foreign-owned* firms that are established within its territory from sending their (national or foreign) employees abroad to conduct a services transaction. But who would want to do this, and for what purpose?

Finally, it may be worth recalling that the scope of the MFN clause is equally limited to the treatment of foreign services and service suppliers. Article II:1 would not prevent Members from operating export-related restrictions of varying intensity across different destinations or recipients of different nationality. While the absence of relevant constraints might be viewed as a gap in the Agreement, the author is not aware of any discussions in WTO fora or other circles that would point to related trade frictions.

#### 4.2.2 National Treatment

##### (a) Scope of current disciplines (Article XVII)

Pursuant to Article XX:2 of the GATS, measures inconsistent with both the market access and national treatment provisions of the Agreement are to be scheduled under market access only. Relevant inscriptions are considered to provide a condition or limitation on national treatment as well. To avoid unnecessary complications, the focus of the following observations is on export-related measures that fall under national treatment only. Among these, discriminatory monetary incentives (subsidies and similar support measures) or disincentives (fees and charges) are certainly the most economically significant types of intervention that might affect exporters or exports of services.<sup>28</sup>

Unlike Article XVI, which contains an exhaustive list of measures considered to constitute limitations on market access, the national treatment provisions of Article XVII are openly defined to cover any measure that modifies the “conditions of competition” to the disadvantage of foreign like services or service suppliers. However, an attachment to the Scheduling Guidelines provides, based on existing scheduling patterns, an illustrative list of frequently occurring types of limitations, including subsidies and taxes, residency requirements, and licensing and qualification requirements. Moreover, the Guidelines themselves confirm that “Article XVII applies to subsidies in the same way that it applies to all other measures” and that subsidies are “also not excluded from the scope of Article II (MFN)”.<sup>29</sup>

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<sup>28</sup> For a broader discussion concerning the status of subsidies under the GATS, see for example Ahuja, Rajeev (2005), ‘Towards Developing Subsidy Disciplines Under GATS’, Indian Council for Research on International Economic Relations (ICRIER), Working Paper No. 174, New Delhi; Adlung, Rudolf (2007), ‘Negotiations on Safeguards and Subsidies in Services: A Never-Ending Story?’, *Journal of International Economic Law*, 10(2): 235-265, and Poretti, Pietro (2008), ‘Waiting for Godot: Subsidy disciplines in services trade’, in Panizzon, Marion, Nicole Pohl and Pierre Sauvé (eds), *GATS and the Regulation of International Trade in Services*, Cambridge UK: Cambridge University Press, 466-488.

<sup>29</sup> WTO document S/L/92, above note 18, para 16. A recent assessment of the relevant literature is provided by De Meester, Bart and Dominic Coppens (2013), ‘Mode 3 of the GATS: A Model for Disciplining Measures Affecting Investment Flows?’, in Drabek, Zdenec and Petros C. Mavroidis (eds), *Regulation of*

Claims that subsidies in services are not currently subject to disciplines thus definitely go too far.<sup>30</sup> It is true, however, that Article XV:1 of the Agreement contains a mandate could provide the basis for negotiating potentially more biting disciplines. The Article recognizes that “in certain circumstances subsidies may have distortive effects on trade in services” and mandates negotiations “with a view to developing the necessary multilateral disciplines to prevent such effects”. Yet, which trade distortive effects could not currently be addressed under Articles II and XVII of the Agreement?

While export subsidies and import-displacing subsidies are possibly the most obvious cases, monetary disincentives in the form of special taxes, fees or charges might matter as well. As long as the respective policy schemes do not modify the competitive conditions to the detriment of foreign established suppliers or their services, nor among them, both obligations (MFN and national treatment) are met - irrespective of the impact on other Members' trade interests. For example, fees or charges intended to deter foreign students or patients, i.e. foreign service consumers, could be maintained despite full commitments under the GATS as long as no discriminatory elements in the sense of Article XVII are involved. Moreover, for understandable reasons, given wide variations of trading conditions across countries, the Scheduling Guidelines explicitly exempt Members from national treatment obligations *vis-à-vis* service suppliers located abroad.<sup>31</sup> Again, this is regardless of any adverse effects that the respective subsidy programmes may have on foreign suppliers that intend to compete under modes 1 and 2 (cross-border supply and consumption abroad).<sup>32</sup>

In WTO fora, mostly the Working Party on GATS Rules, problems potentially associated with export subsidies have been raised on a number of occasions, mainly with a focus on mode 1.<sup>33</sup> However, the issue has not gained much traction. In turn, this may have been due to three factors in particular.

First, despite repeated calls from hesitant Members, not to base rule-making attempts on abstract claims, but on concrete cases of distortion, not a single such case has yet been submitted for discussion. Second, Members' perception concerning the desirability of subsidy disciplines seems to have changed since the Agreement's entry into force and the submission of the original GATS schedules. Indeed, out of a dataset of 66 regional trade agreements (RTAs) in services, some 70 per cent were found to contain subsidy-related entries, in terms of national treatment limitations, that provided more leeway than those featuring in the respective parties' GATS schedules dating mostly from the Uruguay Round (1992/93).<sup>34</sup> Third, while the concept of export subsidies is still easy to explain in the context of mode 1, it could prove more difficult to substantiate in a different modal setting. For instance, what about publicly funded infrastructural projects (car parks etc.) in holiday resorts that are used mainly by foreign tourists? (If such schemes were to be disciplined as export subsidies, the actual impact would vary widely between countries of different size and, thus, different shares of *foreign* tourists.) And what about the publicly funded education of nurses, medical doctors and other professionals that move abroad? Could the funds used be considered to constitute, and be constrained as, export subsidies under mode 4? There may be many more cases in services than in goods-producing sectors where subsidies are extended for what appear to be completely legitimate

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*Foreign Investment - Challenges to International Harmonization*, World Scientific Publishing: Singapore, 99-151.

<sup>30</sup> Even WTO panels were not immune from misinterpretations: The panel report in *US - Large Civil Aircraft* posits, without qualification, that the GATS negotiators were unable to agree on disciplines governing the provision of subsidies to service suppliers. (*United States - Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*), WT/DS353/R, 31 March 2011.)

<sup>31</sup> WTO document S/L/92, above note 18, para 16.

<sup>32</sup> See also the discussion in Poretti in above note 28, p. 469.

<sup>33</sup> The most recent initiative in this regard was a submission from the Swiss delegation in 2010. See WTO documents S/WPGR/M/67 and 69 of 23 April and 15 September 2010. A balanced presentation of the role of export subsidies in services, their status under the GATS and various negotiating efforts, in different contexts, towards tighter disciplines is provided by Geloso Grosso (note 2 to above Table 1).

<sup>34</sup> Adlung, Rudolf and Sébastien Miroudot (2012), 'Poison in the Wine? Tracing GATS-Minus Commitments in Regional Trade Agreements', *Journal of World Trade*, 46(5): 1045-1082, p. 1062f.

public policy objectives; and the dividing line between different types of support may prove difficult to draw.

Tellingly, Members have not even been able, despite various attempts, to come up with an agreed definition of subsidies in services trade. There is thus no equivalent, whatsoever, to the rather sophisticated delineation provided for merchandise trade in Article 1 of the Agreement on Subsidies and Countervailing Measures (ASCM, see following section). In the end, it might be a dispute surrounding the national treatment limitations for subsidies, inscribed in quite a number of schedules, that might prompt a panel or the Appellate Body to look into this matter.

(b) Absence of trade-defence instruments

The impact of export subsidies might appear particularly virulent in services trade given that the GATS does not provide for any trade-defence instruments, whether in the form of safeguard actions, countervailing measures, or anti-dumping duties. Within the existing legal framework, the latter two types of intervention, if technically feasible at all, could easily be challenged under the MFN clause. While there is evidence of at least one anti-dumping case in services, it dates from the late 1980s, i.e. prior to the entry force of the GATS. Under a Regulation on unfair pricing practices in maritime transport (EEC, No. 15/89 of 4 January 1989), the EC imposed ‘redressive duties’ on cargo transported by a Korean shipping company, Hyundai. The company allegedly benefitted from a cargo reservation scheme in favour of Korean companies and various support measures, including tax benefits, under an industry rationalisation programme.<sup>35</sup>

Article X:1 of the Agreement provides for negotiations on “the question emergency safeguard measures based on the principle of non-discrimination”, while the negotiating mandate on subsidies, in Article XV:1, requires Members also to address “the appropriateness of countervailing procedures”. However, the former negotiations have made virtually no progress in over 19 years, and the issue of countervailing action has not been addressed in any depth either. Where the ASCM distinguishes, in merchandise trade, between prohibited subsidies (export promotion), actionable subsidies (e.g., support that causes injury or serious prejudice), and non-actionable subsidies (e.g., non-specific support), the GATS remains essentially silent.<sup>36</sup> In any event, if a comparable effort were to be launched for services, it is most likely that, given the absence of tangible borders, the concept of actionable subsidies, which may draw countervailing duties, would not be further pursued.<sup>37</sup> The same is true for anti-dumping measures which are not even mentioned, in whatever context, in the GATS.

Governments’ reticence to deal with trade-defence instruments in services is understandable, nevertheless, given *inter alia* the methodological and technical problems involved (no border protection, difficulties to properly define the scope and content of a service transaction, etc.) and the scheduling flexibility afforded under the GATS, including the possibility to exclude particularly vulnerable sectors/modes from commitments or to reserve the right to operate economic needs tests. Moreover, as indicated before, adversely affected Members would be free to ‘fight fire by fire’ and introduce compensatory subsidy schemes. Further, Article XV:2 also provides for the possibility to

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<sup>35</sup> For more details, see Vermulst, Edwin (1990), ‘Commercial Defense Actions and Other International Trade Developments in The European Communities: 1 July 1988 - 30 June 1989’, *European Journal of International Law*, 1(1): 337-364, p. 353. Such action would still be permissible for those WTO Members that, like the EU, have not scheduled commitments on maritime transport. The MFN obligation in this particular sector was suspended for the non-scheduling Members after the relevant negotiations, extended beyond the timeframe of the Uruguay Round, remained unsuccessful and were carried over into the current round. See, for example, WTO Secretariat (2001), *Guide to the GATS - An Overview of Issues for Further Liberalization of Trade in Services*, Kluwer Law International and WTO Secretariat: The Hague, 429-462.

<sup>36</sup> For an overview of the status of different types of subsidies under the GATT, see Laird in above note 3. A more detailed analysis of export subsidies is contained in Green, Andrew and Michael Trebilcock (2007), ‘Enforcing WTO Obligations: What Can We Learn from Export Subsidies?’, *Journal of International Economic Law*, 10(3): 633-683.

<sup>37</sup> See also Ahuja in above note 28, p. 40.

request consultations should a Member consider to be adversely affected by another Member's subsidies. However, there are no indications that this provision has ever been invoked.

It is thus fair to conclude that, concerning export subsidies, the gap between GATS and GATT disciplines is at least as wide as it is in the case of export restrictions. Currently applicable disciplines, MFN and national treatment, may serve to ensure foreign established suppliers' equal access to any existing support programmes, rather than protecting potentially affected Members from whatever type of trade distortion. And this situation is unlikely to change any time soon.<sup>38</sup>

#### 4.2.3 Additional Commitments

The lack of negotiating momentum concerning the creation of export-related policy disciplines, whether due to perceived technical/interpretational difficulties, the absence of acute problems or negotiating fatigue, may also explain while a relatively light-handed approach to this issue has been rarely used to date: additional commitments pursuant to Article XVIII.<sup>39</sup> These could be scheduled by any interested Members, possibly after prior coordination, and would not require an amendment to the Agreement.

As mentioned before, Article XVIII allows for commitments on measures covered by the Agreement, i.e. affecting trade flows under any of the four modes of supply (section 2), but *not* falling under Articles XVI or XVII.<sup>40</sup> Potential targets in the current context thus include, first, export restrictions that escape the disciplines of Article XVI, including quotas or bans operating on a Member's own services and service suppliers. (As noted before, restrictions constraining the service exports of foreign suppliers would be within the ambit of Article XVI.) A second target could be financial measures, i.e. subsidies or taxes, promoting/discouraging exports under one or more modes. Concerning subsidies, the focus would naturally be on non-discriminatory measures that do not differentiate between beneficiaries on the basis of nationality and/or on subsidies that are extended only or predominantly to foreign-owned or -controlled suppliers and their produce. While there are cases that might call for targeted initiatives - with a view, for example, to forestalling subsidy-fuelled capacity expansions in sectors such as tourism (hotels, etc.), ship or aircraft repair, call-centre and various types of back-office services (Table I) - the fact remains that they have drawn only limited, if any, attention in the WTO so far.<sup>41</sup>

Nevertheless, there are two instances - interestingly in supply chain-related sectors: maritime transport and telecommunications - where additional commitments have been negotiated that would constrain, *inter alia*, the use of export restrictions in services. (In this case, 'exports' are meant to consist of supplies of services within a Members' territory to foreign-based users.) And these obligations apply regardless of the ownership structure, foreign or domestic, of the suppliers concerned.

In maritime transport, a scheduling template, the so-called maritime model schedule, was developed during the Uruguay Round negotiations in this sector. The fourth column of this schedule (Additional Commitments), which exists in various versions, relates to "access to/use of" a specified range of port services, including towing, pilotage, provisioning, fuelling and watering. These services must be made available to international maritime transport suppliers on "reasonable and non-discriminatory" terms and conditions. The same treatment is to be extended to multi-modal transport

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<sup>38</sup> With hindsight, the title of Poretti's paper on this issue - 'Waiting for Godot: Subsidy disciplines in services trade' (see above note 28) - thus appears very well chosen.

<sup>39</sup> See also above note 17.

<sup>40</sup> A description of the negotiating history of Article XVIII and existing commitments under this Article is provided in the WTO Secretariat Note quoted in above n 17.

<sup>41</sup> Apart from their comprehensive treatment in the EC Treaty and the Agreement establishing the European Economic Area (EEA), there are some limited attempts at regional level to deal with export subsidies in services. A case in point is the Protocol on Trade in Services to the Australia - New Zealand Closer Economic Trade Relations Trade Agreement (ANZCERTA) which contains a prohibition on introducing new or expanding existing export incentives. See WTO document S/WPGR/W/46 of 12 November 2003.

operators which seek to rent, hire or charter trucks, railway carriages etc. for onward forwarding of international cargoes. However, since the negotiations in this particular sector had to be suspended in 1996, due to lack of engagement of some major players, there are only relatively few Members which ultimately undertook commitments on this sector. In this context, between 13 and 16 Members scheduled commitments in respect of access to and use of various port services, while no more than five Members assumed bindings concerning the provision of multi-modal transport services.<sup>42</sup>

The telecommunications Reference Paper was developed in the post-Uruguay Round Negotiating Group on Basic Telecommunications in order then to be scheduled, possibly with modifications, as additional commitment in this sector. The Paper requires the respective Member, *inter alia*, to ensure that any major supplier grants interconnection under non-discriminatory terms, conditions and rates.<sup>43</sup> Reflecting the successful conclusion of these negotiations in the wake of the Uruguay Round, a large number of Members, currently more than 100, undertook commitments and adopted the Reference Paper mostly without variations.<sup>44</sup> The scope of the Paper's interconnection guarantees was discussed *in extenso* by the panel in *Mexico - Telecoms*. The panel held the view that, in the absence of particular qualifications, the term 'interconnection' can be understood to cover all forms of interconnection, including the termination of incoming calls from abroad.<sup>45</sup> In turn, this is tantamount to an 'export' of services to foreign-based users.

## 5. CONCLUSIONS

The main focus of current GATS disciplines, to the extent they have been assumed by individual Members, is on protecting 'imports' under the four modes of supply from being undermined by various types of policy interventions. Yet, there are virtually no generally applicable rules aimed at ensuring the proper functioning of international service markets *per se*. Governments are largely free to employ export-related measures regardless of their impact on economic operators, whether clients or competitors, established abroad. Even complete trade bans are permissible in the absence of relevant commitments in a Member's schedule. And export subsidies could essentially be provided full blast, even if they were targeted at particular markets.

As has been argued elsewhere, the absence of GATT-type trade remedies in services could even create an incentive to (re-)organize certain manufacturing processes so as to qualify them as services productions.<sup>46</sup> Manufacturing operations on the basis of inputs owned by others ('contract manufacturing') are contained in the classification list generally used by Members for scheduling their GATS commitments. The respective investment and product flows may thus be associated with a services transaction.

Ignoring the possibility of Additional Commitments, the following Table seeks to classify export-related interventions according to their (current) status under the Agreement from the perspective of foreign established service suppliers. There is at least one advantage these may have over their domestically owned counterparts: the exclusion from the scope of export restrictions in sectors that have been scheduled without limitations for the sectors/modes concerned.

The absence of genuine disciplines on a range of export-related policies begs the question, of course, whether there are scenarios that would call for the creation of constraints similar to those under the GATT. At first glance, subsidies might appear as a prime candidate. However, definitional problems abound. For example, how should 'exports' under modes other than mode 1 (cross-border

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<sup>42</sup> Situation in mid-2010. WTO document S/C/W/315 of 7 June 2010.

<sup>43</sup> A major supplier is defined in the Paper as a supplier which "has the ability to materially affect the terms of participation ... in the relevant market for basic telecommunication services as a result of: (a) control over essential facilities; or (b) use of its position in the market".

<sup>44</sup> See above note 17.

<sup>45</sup> See Panel Report *Mexico - Telecoms*, above note 25, para 7.117, and the discussion in Sherman, above note 24, p. 20ff.

<sup>46</sup> Adlung, Rudolf and Weiwei Zhang (2013), 'Trade Disciplines with a Trapdoor: Contract Manufacturing', *Journal of International Economic Law*, 16(2): 493-506.

supply) be dealt with? And since WTO rules are not normally developed in the abstract: where have trade frictions actually been encountered in the past? Surprisingly, even the - relatively few - Members that have called in the relevant Working Party for disciplines to be developed, have failed so far to provide concrete evidence of distortions that need to be addressed, despite repeated requests.

**Table 2. Status of export policies under the GATS \***

	<b>No commitment under mode 3</b>	<b>Full commitment under mode 3</b>
<b>Export restrictions (incl. bans)</b>	No constraints, except MFN obligation	Not permissible
<b>Export subsidies/taxes</b>		MFN & National Treatment**

\* Concerning the treatment of *domestically established foreign suppliers and their services*.

\*\* With possibility of reverse discrimination (higher subsidies or lower taxes for foreign suppliers/services).

Export-inhibiting measures, whether in the form of quantitative ceilings or financial disincentives, might prove equally difficult to tackle. A cross-cutting ban on such measures would certainly prove politically unacceptable. For instance, a government that, in pursuit of social equity objectives, promotes private supplies of health, education or other public services, cannot reasonably be expected to sit tight if significant quantities are 'exported' to visiting foreign consumers (patients, students) or to recipients abroad. Members might thus want to retain the ability, for example, to prompt all domestically established private operators, regardless of their nationality, to prioritize domestic users/consumers of such services. From an overall economic perspective, it could also be argued that export restrictions in services are less externally disruptive than in merchandise trade, in particular in the case of electronic transactions, as affected customers/recipients might find it easier in many cases to identify and switch to alternative sources of supply.

Nevertheless, there is certainly scope for further reflection and, possibly, action. One issue that may warrant attention in this context is the association, in two panel rulings, of export restrictions affecting domestically established foreign suppliers with quantitative limitations under mode 3 (commercial presence) of the GATS. The competent authorities might thus be well advised, in undertaking commitments in 'vulnerable' sectors, and screening existing ones, to carefully consider the reach of the obligations involved. Of course, this is equally relevant for a variety of regional trade agreements (RTAs) in services, essentially adopting the same definitions and framework provisions as the GATS, which have mushroomed in recent years or are currently under negotiation. Another issue that definitely remains to be explored, in the current context and beyond, is the possibility of using Additional Commitments under Article XVIII whenever the trade flows concerned are covered by the Agreement. Inspired by the maritime model schedule or the Reference Paper in telecommunications, interested Members could develop templates in sensitive areas (sectors and modes) to address specific concerns about interventions, possibly including non-discriminatory export policies, which do not fall within the scope of Articles XVI or XVII.

However, where should the energy for such initiatives come from? One possible source is the successful conclusion of the WTO's ninth Ministerial Meeting in Bali, in December 2013. Should Members ultimately succeed, as envisaged, in re-launching market access negotiations in three main areas - agriculture, NAMA (non-agricultural market access) and services - after a six-year stalemate, one might hope that this would also inspire new conceptual thinking. Given the relative novelty of the GATS, the need for deeper reflection, beyond mere exchanges of 'concessions', is definitely more acute in services than in the two other areas. Indeed, it would be highly unfortunate if new access commitments were negotiated, whether in the Doha Round or in RTAs, without sufficient thought being given to potential legal traps that still need to be closed or, at least, consciously avoided.

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

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

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

<sup>b</sup> Purpose: Ensure compliance with MFN principle.

<sup>c</sup> More comprehensive transparency obligations, including notification requirements, than in sectors not subject to specific commitments.

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

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

<sup>f</sup> Market access and national treatment may be made subject to limitations.

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

Source: Adlung, Rudolf (2006), 'Public Services and the GATS', *Journal of International Economic Law*, Vol. 9(2): 455-485, p. 459.