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“The GATS Regulatory Challenges and the New Governance Approaches”

By

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ABSTRACT

This thesis recommends a shift in the regulatory paradigm of the General Agreement on Trade in Services (GATS). GATS relies on binding legal disciplines for governing the multilateral services trade. The thesis argues that this is not an entirely appropriate approach in view of the peculiar nature of the services trade, and may have been the cause of the negligible services trade gains to date. The services trade rule-making in GATS is currently guided by the view that its legal disciplines need to be further strengthened. These disciplines mainly pertain to domestic regulatory measures which affect the services trade. The thesis however supports the argument that more flexible regulatory approaches are better suited to the governance of the multilateral services trade.

Drawing some lessons for improving the GATS framework in these terms, the thesis carries out a case study of the financial services trade liberalization in the EU. This case study reveals the use of regulatory innovations in EU governance to make it more effective. Such regulatory innovations are sometimes termed as 'New Governance' approaches. They are flexible, deliberative and participatory in nature, and do not rely on binding legal mechanisms. Thus they offer greater potential for protecting EU Members' regulatory autonomy, whilst executing its trade liberalization agenda. The thesis explores the possibility of utilizing similar approaches in GATS governance. It makes recommendations for improving GATS effectiveness through balancing its trade liberalization objectives with the WTO Members' domestic regulatory autonomy. A change in the GATS regulatory outlook is seen as a tool to achieve this purpose, with more flexible approaches to governance being a step towards this goal.

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Author's Declaration

I, Samina Taslim Zehra

declare that this thesis and the work presented in it are my own and has been generated by me as the result of my own original research.

“The GATS Regulatory Challenges and the New Governance Approaches”

I confirm that:

1. This work was done wholly or mainly while in candidature for a research degree at this University;
2. Where any part of this thesis has previously been submitted for a degree or any other qualification at this University or any other institution, this has been clearly stated;
3. Where I have consulted the published work of others, this is always clearly attributed;
4. Where I have quoted from the work of others, the source is always given. With the exception of such quotations, this thesis is entirely my own work;
5. I have acknowledged all main sources of help;
6. Where the thesis is based on work done by myself jointly with others, I have made clear exactly what was done by others and what I have contributed myself;
7. Either none of this work has been published before submission, or parts of this work have been published as: [please list references below]:

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Date:

Acknowledgement

I am immensely grateful to Almighty Allah who gave me the capacity and the strength to complete this work. Alhamdulillah!

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Abbreviations

ASEAN	Association of Southeast Asian Nations
DSB	Dispute Settlement Body
DSU	WTO Understanding on Rules and Procedures Governing the Settlement of Dispute
EC	Europeans Communities
ECJ	European Court of Justice
EU	Europeans Union
FDI	Foreign Direct Investment
G10	Group of 10
G20	Group of 20
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
HS	Harmonized Commodity Description and Coding System (HS Nomenclature)
ICJ	International Court of Justice
IMF	International Monetary Fund
ITO	International Trade Organization
LDCs	Least Development Countries
MFN	Most-Favoured Nation
NAFTA	North American Free Trade Agreement
NGO	Non-Governmental Organization
OECD	Organization for Economic Co-operation and Development
PTA	Preferential Trade Agreement
RTA	Regional Trade Agreement
SME	Small and Medium-sized Enterprise
SPS	WTO Agreement on the Application of Sanitary and Phytosanitary Agreement Measures
SPS	State-Owned Enterprise

TBT	Technical Barriers to Trade
TBT	WTO Agreement on Technical Barriers to Trade Agreement
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TPRM	Trade Policy Review Mechanism
TRIMs	Agreement on Trade-Related Investment Measures
TRIPs	Agreement on the Trade-Related Aspects of Intellectual Property Right
UNCTAD	United Nations Conference on Trade and Development
VCLT	Vienna Convention on the Law of Treaties
WPDR	Working Party on Domestic Regulations
WPDR	Working Party on Domestic Regulations
WTO	Working Party on Professional Services
WTO	World Trade Organization

Introduction

This study explores the possibility of regulatory innovations in the governance of multilateral services trade under the General Agreement on Trade in Services (GATS). The need for this study arises since GATS has failed to generate any significant services trade despite being in the field for almost two decades.¹ Repeated trade negotiation rounds of the World Trade Organization (WTO) have added little to the levels of service trade liberalization commitments shown at the time of the establishment of GATS.² This calls into question the efficacy of its existing regulatory structure and governance approaches. Accordingly, the study focuses upon identifying alternate regulatory mechanisms which could help to achieve the GATS objective of progressive trade liberalization, whilst recognizing each country's prerogative in regulating service trade according to its own domestic policies.

The study argues that the GATS ability to achieve its purpose of promoting trade in services is closely linked with whether the national regulatory autonomy of countries is sufficiently protected. This is because service trade is mainly governed by domestic regulations representing important policy considerations.³ For example, a country may not like to open up its financial markets to foreign service providers due to fears relating to stability and security. Countries may also wish to protect their health and education service markets, maintaining certain minimum standards as a domestic policy choice.⁴ In fact, the very feasibility of trade in services may depend upon the

¹ The GATS came into effect with the foundation of the WTO in 1998. There is near consensus among the researchers and the WTO sources that progress in multilateral services trade has been negligible under the GATS administration. See various reports by the Chairman of the Council for Trade in Services available at the WTO website. Also Marion Panizzon and Nicolle Pohl, 'Testing regulatory autonomy, disciplining trade relief and regulating variable peripheries: Can a cosmopolitan GATS do it all?' in Marion Panizzon, Nicole Pohl and Pierre Sauve (eds), *GATS and the Regulation of International Trade in Services* (Cambridge 2008) 4, 31; Hamid Mamdouh, 'Services liberalisation, negotiations and regulation: some lessons from the GATS experience' in Aik Hoe Lim and Bart De Meester (eds); *WTO Domestic Regulation in Services Trade: Putting Principles into Practice* (Cambridge 2014).

² Batshur Gootiiz and Aaditya Mattoo, 'Services in Doha: What's on the Table?' (2009) 43 *Journal of World Trade* 1013; Jara Alejandro and M. del Carmen Domínguez, 'Liberalisation of Trade in Services and Trade Negotiations' (2006) 40 (1) *Journal of World Trade*.

³ See *inter alia* Aik Hoe Lim and Bart De Meester, 'An introduction to domestic regulation and GATS' in Aik Hoe Lim and Bart De Meester (eds), *WTO Domestic Regulation and Services Trade: Putting Principles into Practice* (Cambridge 2014); Aaditya Mattoo and Pierre Sauve, 'Domestic Regulation and Trade in Services: Key Issues' in Mattoo and Sauve (eds), *Domestic Regulation and Services Trade Liberalization* (World Bank and Oxford Co-publication 2003); Panagiotis Delimatsis, 'Towards a horizontal necessity test for services: Completing the GATS Article VI:4 mandate' in Panizzon, Pohl and Sauve (eds), *GATS and the Regulation of International Trade in Services* (Cambridge, 2008).

⁴ This becomes clearer as the thesis proceeds. The concerns for domestic regulatory space started being displayed when GATS was being negotiated, and continued to be manifested in the current regulatory challenges discussed in Ch 2 dealing with the case law, and Ch 3 dealing with the current rule-making in the services trade.

state's ability to make regulatory intervention whenever the need arises.⁵ The peculiar nature of the services trade means that governments have to rely on domestic regulatory interventions, instead of border measures such as the tariffs used by the goods trade, in order to regulate the trade and achieve policy objectives.⁶ Therefore, when a country resorts to these measures, they often represent important policy considerations concerning the preservation of regulatory autonomy.⁷ Hence the GATS effectiveness as a liberalising instrument is contingent upon its ability to accommodate WTO Members' regulatory choices in addressing their concerns associated with the services trade.

It is therefore not difficult to imagine the significance WTO Members attach to regulating service trade, in view of its peculiar nature. For the GATS purposes, services trade consists of four types of transactions according to their modes of supply. These are: supply of a service from the territory of one Member into that of another (cross-border); consumption of a service by consumers of one Member who have moved into the territory of another Member (consumption abroad); services provided by foreign suppliers who are commercially established in the territory of another Member (commercial presence); and services provided by natural persons who have moved to the territory of another member (presence of natural persons).⁸ The GATS obligations apply to measures affecting trade through all of these modes, and to almost all service sectors.⁹

The mode-based definition of services means that GATS has a very broad scope. Its regulatory outreach extends far beyond the traditional concept of trade barriers at borders. Instead, it deals with domestic laws relating to the movement of humans and capital, and the rights of establishment. The services trade is therefore a source of major regulatory concern for national governments, when trying to achieve various public policy goals. Although GATS acknowledges in its preamble WTO Members' right to 'regulate' in order to achieve domestic policy objectives, its legal obligations and

⁵ For detailed reasons for regulatory intervention, see Heremans Tinne, 'Why regulate? An overview of rationale and purpose behind regulation' in Lim and Meester (eds), *WTO Domestic Regulation and Services Trade* (Cambridge 2014).

⁶ Services trade involves the movement of factors such as capital and personnel. The movement of factors is internally regulated by countries to achieve various policy objectives. Guarding the domestic regulatory space is therefore a strong consideration. For more on how the services trade is different from the goods trade and for the special nature of services, see Bernard Hoekman and Michel Kosteci, *The Political Economy of the World Trading System* (3rd edn, Oxford 2010); Aik Hoe Lim and Bart De Meester, 'An introduction to domestic regulation and GATS' in Aik Hoe Lim and Bart De Meester (eds), *WTO Domestic Regulation and Services Trade: Putting Principles into Practice* (Cambridge 2014).

⁷ Ibid.

⁸ Article 1.2 of the GATS.

⁹ There are about 150 sub-sectors of the services covered by GATS. The only exceptions are services supplied under 'governmental authority', e. g. social security services and measures affecting air traffic rights. There are also some general exceptions, based on the protection of plant and animal health, public morals and security concerns. (See GATS Articles XIII, XIV and XIV *ibid*).

the regulatory approaches adopted to meet these obligations do not always allow this. The core research question for this thesis, therefore, is whether the current governance structure of GATS can achieve progressive liberalization of multilateral services trade, while concurrently protecting WTO Members' regulatory autonomy. The GATS governance structure has three pillars: its legal framework and rule-making, interpretation of its legal obligations by WTO dispute settlement bodies, and its negotiation approaches. These three pillars of the GATS governance structure have been systematically examined to answer the research question.

However, if the current governance structure of GATS is unable to do so, can any alternative governance mechanisms accommodate the dual objectives of services trade liberalization and protection of domestic regulatory autonomy?

In examining these questions, this study engages with the GATS conceptual foundation, its core principles and the current regulatory approaches being used for its implementation. GATS relies upon the General Agreement on Tariffs and Trade (GATT), the multilateral agreement governing the trade in goods¹⁰ for its liberalization tools. The principles of Most-Favoured Nation (MFN) and National Treatment employed by GATS to liberalize the services trade have been borrowed from the GATT framework. The main objective of these two principles in both regimes is to ensure non-discriminatory market access for multilateral trade. The study argues that there is a considerable difference between the function of 'non-discrimination' in the GATT and GATS which remains under-emphasised. Since market access to goods is defined by tariffs, the 'non-discrimination' under the GATT relates to goods only. Market access to services, however, is defined by a 'positive' granting of non-discriminatory treatment through the schedules of specific commitments and non-discrimination, covering both services and service suppliers.¹¹ The study therefore examines, through GATS case law, whether or not these principles are being interpreted in a services specific context. It also observes that, although both the regimes struggle to create a balance between trade liberalization objectives and leaving a policy space to accommodate goals other than trade liberalization,¹² this challenge is particularly acute for the services trade.

¹⁰ See among others Bernard M Hoekman and Michael M Kostecki, *The Political Economy of the World Trading System: The WTO and Beyond* (3rd edn, Oxford 2008); D Barth, 'Liberalising International Trade in Services: The European Perspective' in K Deutch and B Speyers (eds), *The WTO Millenium Round – Free Trade in the 21st Century* (Routledge 2001) 86; Mattoo Rahindran and Arvind Subramaniam, 'Measuring Services Trade Liberalisation and its Impact on Economic Growth: An Illustration' (2006) 21 *Journal of Economic Integration* 64.

¹¹ Article XVI and XVII of the GATS.

¹² Thomas Cottier and Mathias Oesch, 'Direct and Indirect Discrimination in WTO Law and EU Law' (2011) NCCR Working Paper 2011/16.

At the heart of the study lies the question of whether domestic regulatory measures should be perceived as trade barriers without understanding their policy context. Existing approaches governing GATS focus upon finding legal tools to remove the barriers represented by domestic regulations. One such tool is the concept of necessity, as embedded in Article VI of the GATS. This concept stipulates that an otherwise non-discriminatory domestic regulation should not be more trade-restrictive than 'necessary'. Accordingly, a horizontal necessity test is being developed in the ongoing services negotiations on domestic regulations.¹³ This study however supports the argument that a more flexible approach, one example of which is an 'aims and effects' approach, towards dealing with domestic regulations would be helpful in establishing Members' confidence in the GATS framework, instead of the intrusive general disciplines currently being considered.

The existing academic research to find reasons for the lack of progress in multilateral services trade has mainly focused upon the inherent complexity and vagueness of the GATS legal text.¹⁴ The ineffectiveness of existing governance approaches, which rely on legislative compliance, has received little attention.¹⁵ This area therefore represents a relative research gap and the study derives its rationale from the same. It identifies the binding nature of WTO obligations and possible narrowing of the regulatory space to be the main reasons for poor liberalization gains.¹⁶ What needs to be explored is whether less intrusive modes of governing international trade in services could provide a middle ground for meeting the GATS dual objectives of trade liberalization and protecting domestic regulatory autonomy of WTO Members, and whether they can make GATS a more effective platform for the multilateral liberalization of services.

¹³ The Working Party on Domestic Regulations (WPDR) has been established for the purpose of developing domestic regulatory disciplines. See WTO document S/L/70 regarding decision on domestic regulation adopted by the Council for Trade in Service in April, 1999.

¹⁴ Juan Marchetti and Petros Mavroidis, 'What Are the Main Challenges for the GATS Framework? Don't Talk About Revolution' (2004) 3 *European Business Organization Law Review*; Pierre Sauve, 'Assessing The General Agreement on Trade in Services-Half Full or Half empty?' in R Howse (ed), *The World Trading System –Critical Perspective on World Economy* (Routledge,1998); Panagiotis Delimatsis, 'Article III GATS' in Wolfrun P T Stoll and Fenaugle (eds), *Max-Plank Commentaries on World Trade Law* (WTO-Brill Publishing 2008) 8; Aaditya Mattoo, 'National Treatment in the GATS: Corner Stone or Pandora's Box?' (1997) 31 (1) *JWT* 107; Aaditya Mattoo, 'MFN and the GATS' in Cottier and Mavroidis (eds), *Most Favoured Nation Treatment: Past and Present* (Michigan University Press 2000).

¹⁵ Commentators have rather suggested further strengthening these disciplines, see for example Panagiotis Delimatsis, 'Towards a horizontal necessity test for services: Completing the GATS Article VI:4 mandate' in Panizzon, Pohl and Sauve (eds), *GATS and the Regulation of International Trade in Services* (Cambridge 2008).

¹⁶ This view is supported by an analysis of the GATS legal obligations in Ch 1, a study of the GATS case law in Ch 2 and the current rule-making in multilateral services trade in Ch 3.

Methodology

The research methodology pursued for this thesis is a combination of doctrinal and comparative methods of research. It involves a deep analysis of the GATS legal framework and how it has been developed and applied. Since the EU offers greater progress in services liberalization than the WTO,¹⁷ it is worth exploring what lessons can be learnt from the EU governance of services trade. It may be added that the EU framework has not been used as a blueprint for the services liberalization in the WTO context. Nevertheless, both EU and WTO aim to promote trade between member states,¹⁸ and therefore EU legal framework and governance approaches can provide some insights for multilateral services trade liberalization. Financial services trade liberalization in the EU has accordingly been used as a case study to draw some lessons for the governance of multilateral liberalization of services under the GATS.

The research has relied on both primary and secondary sources and documentation. These include relevant legal treaty texts, case law judgements and documents, negotiation communiques, books, legal journals and research papers.

Structure

The thesis has been divided into three parts to address questions regarding the GATS regulatory challenges. Part 1 consists of three chapters, and discusses how the GATS framework fits within the WTO and the extent to which the goods trade framework, i.e. GATT, has influenced the governance of GATS. This part of the thesis also deals with the GATS regulatory challenges which stem from its current governance approaches. A discussion on GATS case law and the current state of services rule-making helps to understand these challenges, and evaluates various approaches under consideration for making GATS work more effectively for multilateral services trade. This section provides support for the argument that the current regulatory approaches being utilized for administering GATS do not strike a balance between its liberalizing objectives and WTO Members' regulatory autonomy. It also brings home the need to look for some alternative regulatory mechanisms. Part 2 is accordingly aimed at identifying alternative regulatory approaches for governing multilateral services trade, in order to increase the likelihood of GATS being able to achieve its services trade liberalizing objectives, whilst giving due consideration to WTO Members' regulatory autonomy. Part 2 of the thesis consists of two chapters. Chapters 4 and 5 focus on the

¹⁷ Ionnis Lianos and Okeoghene Odudu (eds), *Regulating Trade in Services in the EU and the WTO* (Cambridge 2012); Patrick Meserlin, 'The Influence of the EU in the World Trading System' in Daunton, Narlikar and Sterne (eds), *The Oxford Handbook on World Trade Organization* (Oxford 2012).

¹⁸ Grainne de Burca and Joanne Scott, 'The Impact of the WTO on EU Decision-making' in Scott and de Burca (eds), *The EU and the WTO: Legal and Constitutional Issues* (Hart Publishing, 2001)1-3,

shifting nature of EU regulatory approaches in general, and its impact upon one specific service sector, i.e. financial services. The EU case study is aimed at deriving some useful lessons for the governance of multilateral services trade. Part 3 of the thesis ties together various themes and findings of the research, and offers recommendations for changing the GATS regulatory paradigm. It suggests ways to improve GATS' effectiveness in terms of balancing its trade liberalization objectives with WTO Members' regulatory autonomy by employing regulatory innovations, and using more flexible approaches to the GATS governance.

Part 1: The GATS Framework

The General Agreement on Trade in Services broke new ground in putting down disciplines that now regulate trade in services.¹⁹ According to its preamble, GATS is intended to contribute to trade expansion 'under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries'. The preamble clearly sets 'progressive liberalization' as the GATS objective, while recognising a country's right to regulate for domestic policy purposes. Moreover, creating a reliable system of international trade in services which will ensure a fair and equitable playground for Members has also been envisaged as a GATS objective. This relies on principles such as Most Favoured Nation (MFN) and National Treatment.²⁰

Part 1 of the thesis provides the research context by examining whether the GATS framework and specific provisions align with the broader policy objectives pertaining to progressive trade liberalization and accommodating Member countries' regulatory concerns. It consists of three chapters. Chapter 1 explores the economic context of the international trade disciplines leading to the framing of the General Agreement on Trade in Services (GATS). This economic context is significant in understanding the governance philosophy of GATS, which revolves around the removal of services trade barriers and creating obstruction-free markets. Chapter 1 also traces the conceptual foundation of the multilateral services trade and the GATS negotiating history. Before dealing with its regulatory structure, the GATS theoretical premise is reviewed, demonstrating that the limitations of the current regulatory approaches are rooted in the GATS conceptual foundation, which rests on the goods trade experience.

¹⁹ Bethlehem, McRae, Neufeld and Van Damme (eds), *The Oxford Handbook of International Trade* (Oxford 2009); Barnard Hoekman and Pierre Sauve, 'Liberalizing Trade in Services', (1994) World Bank Discussion Paper 243; Pierre Sauve, 'Assessing The General Agreement on Trade in Services - Half Full or Half empty?' in Robert Howse (ed), *The World Trading System – Critical Perspective on World Economy* (Routledge, 1998); Panagiotis Delimatsis *International Trade in Services and Domestic Regulations* (Oxford, 2007)¹⁰; Eric Leroux, 'Eleven Years of GATS Case Law: What Have We Learned' (2007) 10 J.I.E.L. 749.

²⁰ Both these principles are meant to ensure non-discriminatory treatment of the services trade by a country in comparison to other trading partners and local suppliers of such services.

Next the chapter analyses the GATS framework and the nature of its legal obligations, with a view to evaluating their impact upon the WTO Members' regulatory space. It is important to see if the GATS legal obligations leave sufficient room for domestic regulatory autonomy, whilst advancing GATS' trade liberalization objectives. Accordingly, the chapter analyses the main GATS treaty provisions to highlight the regulatory challenges associated with their administration. It reviews in detail how services trade has been defined by GATS, and the implications of this definition for services trade governance. The domestic regulatory implications of GATS are focused on since, due to the peculiar nature of the services trade, it is domestic regulations which are predominantly perceived as trade barriers.²¹ Various treaty provisions of the GATS framework are systematically analysed to examine how the 'liberalization' objectives of GATS are balanced against the possible 'regulatory' concerns of WTO Members.²² In its conclusion, Chapter 1 flags up the GATS regulatory challenges, which mainly pertain to balancing the dual objectives of trade liberalization and protecting WTO Members' regulatory autonomy. It also highlights why the theoretical foundations of the goods and services trade should not be blurred, and why service trade related 'barriers' need to be viewed differently from goods trade barriers.²³

Chapter 2 examines how the GATS related obligations are interpreted by the WTO dispute resolution bodies, and what role has been played by these bodies in advancing the dual GATS objectives of trade liberalizing and protecting Members' rights to regulate. This chapter explores the WTO adjudicating bodies' interpretation of the GATS obligations and its effects on the Members' regulatory architecture. Drawing from the research in Chapter 1, which reveals that the conceptual basis for the GATS framework has been largely drawn from the goods trade experience, it is important to examine if the WTO dispute settlement bodies give sufficient consideration to services specific regulatory concerns. The likelihood of domestic regulations being perceived as 'trade barriers', even when they may represent genuine policy concerns, is a major challenge for GATS. In this scenario, the role of the dispute settlement bodies becomes crucial in interpreting GATS obligations. They can either help in developing multilateral services trade related jurisprudence to inform and direct GATS implementation in a way that Members' regulatory

²¹ Aaditya Mattoo and Pierre Sauve, 'Domestic Regulation and Trade in Services: Key Issues' in Mattoo and Sauve (eds), *Domestic Regulation and Services Trade Liberalization* (World Bank and Oxford Co-publication 2003); Panagiotis Delimatsis, 'Towards a horizontal necessity test for services: Completing the GATS Article VI: 4 mandate' in Panizzon, Pohl and Sauve (eds), *GATS and the Regulation of International Trade in Services* (Cambridge 2008).

²² As per the GATS preamble, the main purpose of the GATS is 'progressive liberalization' of the multilateral services trade while recognizing the Members' right to 'regulate' to meet national policy objectives.

²³ As has been pointed out earlier (see fn 3), the services trade related barriers are mostly domestic regulatory measures and hence different from border or tariff measures in the goods trade.

concerns are addressed, or exacerbate their fears regarding the loss of regulatory autonomy. This chapter examines the GATS case law from this perspective.

After examining the GATS framework and its obligations in Chapter 1, and how these are being interpreted and developed through case law in Chapter 2, it is important to examine the policy space within which the multilateral liberalization of services trade is pursued through GATS. This policy space is defined by the ongoing negotiations being conducted under the umbrella of WTO, which are discussed in Chapter 3. The latest round of WTO negotiations is the Doha Round, more commonly known as Doha Development Agenda (DDA), which is now into its fifteenth year. This chapter examines the services-related component of this Round in the wider context of overall WTO negotiations.

Chapter 3 highlights the scant progress that has been made in the GATS services trade liberalization and rule-making agenda. It explores the reasons for this deadlock from a negotiating perspective. The economic, legal and constitutional diversity of WTO Members²⁴ demands that the negotiating agenda is tailored to accommodate varying regulatory concerns. However, insistence on an 'all or nothing' approach has paralyzed the negotiating process. The Doha Ministerial Declaration, adopted on November 14, 2001, listed 21 subjects in its 'work programme', including Agriculture, Non-Agriculture Market Access, Services, and Intellectual Property Trade and WTO rules. The Declaration included a statement that 'the conduct, conclusion and entry into force of the outcomes of the negotiations shall be treated as part of a single undertaking'.²⁵ The chapter examines the effects of this approach on the multilateral services trade as governed by GATS.

Chapter 3 further explores the progress in the rule-making agenda of the WTO for services trade, and examines the extent to which such rule-making is tailored to the GATS specific regulatory challenges.²⁶ These challenges mainly pertain to a balancing of the dual objectives of GATS, i. e. progressive liberalization of the services trade, whilst protecting the regulatory autonomy of WTO Members to safeguard their genuine regulatory concerns. In order to see how these regulatory challenges manifest themselves in the actual liberalization agenda of GATS, this thesis engages with the services component in the current round of WTO negotiations. This part of the study helps to

²⁴ As of July, 2016, WTO membership consists of 164 members. At: https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm accessed 30 July 2016.

²⁵ Doha Ministerial Declaration, WT/MIN (01)/DEC/ 01, Para 47. At: http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm accessed 15 June 2016.

²⁶ The Council for Trade in Services has a negotiating mandate provided in Article VI: 4 which allows the Council to develop disciplines to prevent domestic regulations from becoming potential trade barriers. The Working Party on Domestic Regulations (WPDR) has been established for the purpose of developing domestic regulatory disciplines. (See WTO document S/L/70 regarding the decision on domestic regulation adopted by the Council for Trade in Service, in April, 1999).

identify the extent to which issues raised in the two earlier chapters are addressed by the services related rule-making agenda of the WTO, and considers whether GATS has evolved as a regulatory mechanism over the 15-year period it has been in the field.

WTO member countries have displayed a growing preference for regional and bilateral arrangements to advance their services trade.²⁷ In fact, the level of service market openings goes further than they are willing to commit to, or even negotiate under GATS.²⁸ This is an indicator of the fact that GATS has not been able to keep pace with the regulatory requirements of multilateral services trade. It might actually be facing an existential crisis as the only multilateral services trade agreement, if its regulatory direction is not realigned soon. This creates the need to explore other regulatory architectures and draw some lessons to improve GATS governance.

Part 2: The EU Financial Services Trade Case Study

The lack of progress in the liberalization commitments and rule-making agenda of GATS²⁹ calls into question the effectiveness of its existing framework, and highlights the need to revisit its regulatory approaches. Since the EU offers more progress in services liberalization than the WTO,³⁰ a case study of the regulatory approaches adopted by the EU for financial services trade liberalization has been carried out with a view to gain some insight. One question that might be asked is, why financial services? This is because financial services represent an area of high regulatory concern.³¹

²⁷All major regional trade agreements now have a services trade component. A few examples are ASEAN-China Agreement on Services, Chili-US FTA, and Hong Kong Closer Partnership with Australia-Thailand FTA. See the official WTO website link for services RTAs at: https://www.wto.org/english/tratop_e/serv_e/dataset_e/dataset_e.htm accessed 30 June 2016.

The Trade in Services Agreement (TiSA) is a trade agreement currently being negotiated by 23 members of the World Trade Organisation (WTO), including the EU. Together, the participating countries account for 70% of world trade in services.

Also see Markus Krajewski, 'Services Liberalisation in Regional Trade Agreements: Lessons for GATS 'Unfinished Business'' in L Bartel and F Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford 2006).

²⁸ Markus Krajewski, 'Services Liberalisation in Regional Trade Agreements: Lessons for GATS 'Unfinished Business'' in L Bartel and F Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford 2006); Martin Roy, Juan Marchetti and Aik Hoe Lim, 'The race towards preferential trade agreements in services: How much market access is really achieved?' in Panizzon, Pohl and Sauve (eds), *GATS and the Regulation of International Trade in Services* (Cambridge 2008).

²⁹ The fact that there has been little progress is evident from the services related negotiations in the Doha Round, discussed in Ch 3. It is also the WTO's admitted position on the GATS progress and frequently highlighted by commentators on the subject.

³⁰ Ionnis Lianos and Okeoghene Odudu (eds), *Regulating Trade in Services in the EU and the WTO* (Cambridge 2012); Patrick Meserlin, 'The Influence of the EU in the World Trading System' in Daunton, Narlikar and Sterne (eds), *The Oxford Handbook on World Trade Organization* (Oxford 2012).

³¹ Juan Marchetti, 'Financial Services Liberalisation in the WTO and PTAs' in Marchetti and Roy (eds), *Opening Markets for Trade in Services: Countries and Sectors in Bilateral and WTO Negotiation* (Cambridge 2008) 323.

The integrity and stability of financial markets is always a huge concern for countries.³² How the EU has dealt with the liberalization in this area in view of individual members' regulatory concerns may therefore offer some useful lessons for the international community and the GATS. The financial services trade framework in the EU has also gone through substantial regulatory changes, making it a good subject for study.

Chapter 4 critically analyzes the regulatory innovations, termed 'New Governance', that have emerged in EU governance³³. Financial services trade, telecommunication, health care, environmental protection, food safety and data protection are some of the areas where these regulatory innovations are being effectively used by the EU.³⁴ A focused appreciation of these approaches can inform the discussion on how to address the GATS regulatory challenges, which mainly stem from the need to balance its trade liberalization objectives and Members' regulatory autonomy in view of their concerns about liberalizing services trade. This expectation is supported by recent academic studies, which assert that there are reasons to view the EU not as a '*sui generis* outlier' but as a 'forerunner of new forms of governance especially suited to the tempers of our times at both national and international levels.'³⁵ This study further develops this observation by examining the possibility of employing EU regulatory innovations in the GATS specific setting, making it a more effective instrument for multilateral services trade.

Chapter 4 accordingly examines the 'New Governance' regulatory approaches in greater depth, and highlights their characteristics to determine whether they could be useful for the GATS framework. Identifying the overlapping boundaries between the traditional governance and 'New Governance' approaches is important for this study, since any observations regarding improving the GATS regulatory architecture cannot be made in a vacuum. They have to draw from the existing framework of GATS, which is tilted towards being more 'legal' as is demonstrated in Chapters 1 and 2 of the study, which deal with the GATS legal obligations.³⁶ Law is perceived as an instrument for a top-down approach towards regulation intended to deliver mandatory goals. New Governance,

³² Ibid.

³³ European Mission's White Paper on governance defines governance as 'rules, processes and behaviour that effect the way in which powers are exercised at European level' COM (2001) 428 final, European Governance – A White Paper, p. 8. fn 1.

³⁴ Charles Sabel and Jonathan Zeitlin, Learning from Difference: The New Architecture of Experimentalist Governance in the EU Towards A New Architecture' in Sabel and Zeitlin (eds), *Experimentalist Governance in the European Union: Towards A New Architecture* (OUP 2013) 3.

³⁵ Ibid.

³⁶ This observation is based on the study of the GATS obligations outlined in Chs 1 and 2 of the thesis, which contain a detailed account of how these obligations are designed and governed by a mandatory dispute resolution system.

on the other hand, is considered a more flexible way of regulating with pragmatic adjustments.³⁷ Nevertheless, despite being distinct concepts, law and New Governance have overlapping boundaries.³⁸ It is in this overlapping area that the potential for utilizing 'New Governance' regulatory approaches can be found for GATS.

Chapter 4 underlines that regulatory approaches categorized under the 'New Governance' are not homogenous. They can come into play in the form of networking of local regulatory authorities or Open Methods of Coordination (OMC).³⁹ For example, data privacy in the EU is overseen by a network of national regulatory authorities; the Lamfalussy framework for the financial services trade is a procedural framework involving national regulators; and the Open Method of Coordination is being used for European Employment Strategy.⁴⁰ The common themes running through all of these approaches are flexibility and a greater involvement of all stakeholders in the regulatory mechanism.⁴¹ These features display a greater potential for preserving the individual member countries' regulatory autonomy, and are hence considered relevant for improving the multilateral services trade governance under the GATS.

Accordingly, Chapter 5 focuses on financial services trade liberalization in the EU and examines the practical manifestations of the new governance regulatory approaches. The EU framework is not seen as a blueprint for services liberalization in the WTO context, since there are crucial points of divergence between the two settings. While the EU is a geographically limited entity, the WTO is a much broader, multilateral organization with over 160 members. However, despite having different objectives, political institutions and instruments, promotion of trade between states is their shared goal.⁴² Parallels can be drawn between the two in their rules governing other areas,

³⁷ Neil de Walker and Grainne Burca, 'Reconceiving Law and New Governance', (2006-7) *Columbia Journal of European Law* 521.

³⁸ *Ibid.*

³⁹ The OMC provides a new framework for cooperation between the EU Member states, whose national policies can be directed towards certain common objectives. Under this intergovernmental method, the Member states are evaluated by one another (peer pressure), with the Commission's role being limited to surveillance. The European Parliament and the Court of Justice play no part in the OMC process. <http://europa.eu/legislation_summaries/glossary/open_method_coordination_en.htm> accessed 15 June 2015.

⁴⁰ Tanja Borze, 'The European Union-A Unique Governance Mix?' in David Levi-Faur (ed), *The Oxford Handbook of Governance* (OUP 2012).

⁴¹ Anne Peters, 'Soft law as a new mode of governance' in Diedrichs, Reiners and Wessels (eds), *The Dynamics of Change in EU Governance* (Edward Elgar 2011); Adrienne Heretie and Martin Rhodes, 'Conclusion New Modes of Governance: Emergence, Execution, Evolution and Evaluation' in Adrienne Heritier and Martin Rhodes (eds), *New Modes of Governance in Europe: Governing in the Shadow of Hierarchy* (Basingstoke, Palgrave Macmillan 2011), 163-171; David Trubek and Joanne Scott, 'Mind the Gap: Law and New Governances Approaches in European Union' (2002) 8 *European Law Journal* 1.

⁴² Grainne de Burca and Joanne Scott, 'The Impact of the WTO on EU Decision-making' in Scott and Burca (eds), *The EU and the WTO: Legal and Constitutional Issues* (Hart Publishing 2001) 1-3.

such as discriminatory and non-discriminatory trade restrictions.⁴³ It is therefore relevant for this thesis to draw some lessons from the EU governance of its financial services trade for multilateral services trade liberalization.

The EU framework for financial services liberalization is a complex mix of regulatory approaches.⁴⁴ Chapter 5 traces the history of these approaches and evaluates their effectiveness versus their objectives. It identifies three distinct, but overlapping governance approaches in the EU regulatory framework. These are: liberalization through regulation, mutual recognition and the more recent 'New Governance' regulatory techniques. The regulatory approaches, comprising the 'New Governance' techniques, are found to be significantly relevant to this study. Among other areas of EU governance, they were introduced for the implementation of The Financial Services Action Plan of 1999-2005. The procedural framework for delivering the objectives of the Financial Services Action Plan was the Lamfalussy Framework⁴⁵ which introduced a four-stage process for the implementation of EU legislation. Level 2 of the Lamfalussy Framework was a major regulatory departure from the traditional modes of governance.⁴⁶ An enhanced role for the individual member states, delegation of rule-making authority and accommodating of diverse regulatory scenarios were major points of departure from the traditional legislative methods of governance in the EU.⁴⁷

This framework offered the potential to balance centralized integration objectives of the EU against a regard for the regulatory autonomy of its Member states.⁴⁸ This is an important balance to be achieved by the WTO, if it is to move ahead with its services liberalization agenda. The Lamfalussy Framework for the Financial Services Action Plan's implementation has been described as 'reflexive harmonization', whereby rule-making powers are conferred upon the self-regulatory

⁴³ J H H Weiler, 'The Constitution of the Common Market' in P Craig and G de Burca (eds), *The Evolution of EU Law* (Oxford 2011).

⁴⁴ Paul Craig and Grainne Burca, *EU Law: Text, Cases and Material* (Oxford 2011, 5th edition); Amy Verdun and Alfred Tovas (eds), *Mapping Europe's Economic Integration* (Palgrave Macmillan 2013).

⁴⁵ The framework was devised by a Committee of Wise Men chaired by Baron Alexander Lamfalussy. At: http://europa.eu/legislation_summaries/internal_market/single_market_services/financial_services_generalframework/l32056_en.htm accessed 15 June 2015.

⁴⁶ Elliot Posner, 'The Lamfalussy Process: The Polyarchic Origins of Networked Financial Rule-Making in the EU' in Sabel Charles and Zeitlin Jonathan (eds), *Experimentalist Governance in the EU: Towards A New Architecture* (Oxford 2010); Catharine Barnard, *The substantive Law of the EU: The Four Freedoms* (4th edn, OUP 2013) 644-645.

⁴⁷ Ibid.

⁴⁸ Catherine Barnard and Simon Deakin, 'Market Access and Regulatory Competition' in Catherine Barnard and Joanne Scott (eds), *The Law of the Single European Market: Unpacking the Premises* (Hart Publishing 2002). How the Lamfalussy Framework manages to do this has been discussed in detail in Chapter 4.

processes.⁴⁹ This process is an example of the ‘New Governance’ techniques being adopted for EU integration in many areas.⁵⁰ It is unique in having two distinct layers of governance, i.e. legislative and enforcement, which is a regulatory innovation, and a departure from the traditional modes of EU governance.⁵¹

Part 2 of the study gives impetus to the hypothesis that GATS governance can be aligned with services trade specific challenges, if suitable innovations are made in its regulatory philosophy and approaches. The EU transition from hierarchical regulatory approaches to the adoption of ‘New Governance’ techniques for regulating the financial services trade provides some pertinent lessons to improve GATS governance and overcome its regulatory challenges.

Part 3: The Need for a Regulatory Paradigm Shift

Part 3 of the study consists of Chapter 6, which brings together the research findings from the previous sections and offers recommendations for improving the GATS regulatory architecture in terms of achieving its objectives. It presents an alternative view for governing the international trade in services. This is the concluding chapter of the study, and suggests the need for a ‘paradigm shift’ in dealing with multilateral services trade. It emphasises that the most recommended approach of dismantling regulatory barriers for services trade through horizontal disciplines⁵² is influenced by the multilateral goods trade experience. However, these barriers are different in the context of services trade, as demonstrated in Chapter 1. The suitability of the current ‘necessity’ based approach in analysing the domestic regulations for their GATS compliance is also questioned in this chapter. Instead, an ‘Aims and Effects’ approach is found to be more appropriate for bringing out the regulatory context of the domestic regulatory measures.⁵³ The study demonstrates that this approach has the capacity to preserve the Members’ regulatory sovereignty, while the GATS liberalisation objectives are being pursued. Various negotiation approaches recommended for the multilateral services trade are also explored in Chapter 6, with the finding that ‘sectoral approaches’ offer the best potential for gaining progress in the multilateral services trade.

⁴⁹ Catherine Barnard, *The substantive Law of the EU: The Four Freedoms* (4th edn, OUP 2013) 644-645.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² By horizontal disciplines, it is meant that the disciplines will apply to all service sectors. It also means that all measures can come under scrutiny for their potential ‘trade hindrance effect’. The decision to develop such disciplines for ensuring that domestic regulations do not become unnecessary trade barriers is contained in the WTO document S/L/70 dt April, 1999. This document refers to them as ‘generally applicable’ disciplines at:

<http://www.wto.org/english/tratop_e/serv_e/dom_reg_negs_e.htm> accessed 15 June 2016.

⁵³ Further explained in Ch 3 dealing with the GATS case law and then in Ch 6.

The concluding chapter of the thesis examines the findings of the EU case study in juxtaposition with the GATS provisions to highlight areas of multilateral services trade governance that could benefit from the EU experience. Some features of the 'New Governance' regulatory approaches, such as broadening of the policy-making base, emphasis on coordination and deliberative consultation and an acceptance of diversity are considered useful for addressing the GATS regulatory challenges. Chapter 6 concludes with recommendations for specific areas of GATS which could benefit from the use of similar regulatory approaches. It also proposes an altered role for the WTO dispute settlement bodies in the GATS context. A shift in their role from striving to clear maximum trade barriers in the form of domestic regulations to understanding and exposing the underlying context of those regulations is recommended.

The conclusion to the study argues that GATS is in need of re-balancing and realigning to start moving towards its objectives. This re-balancing and realigning is with reference to the governance approaches being adopted towards multilateral services trade liberalization. Based on the research, it is viewed that GATS would benefit from adopting more flexible and accommodative regulatory approaches which could protect WTO Members' regulatory autonomy, whilst pursuing its liberalization agenda. Some assistance in this process may be drawn from the regulatory innovations employed in the EU governance aimed at balancing market integration objectives with the Member Countries' regulatory autonomy. It is expected that this shift in the governance strategy could help GATS, which is the only multilateral services trade liberalizing instrument, in remaining a relevant and robust framework for multilateral services trade.

Chapter 1

The Legal Framework for Multilateral Services Trade

A. Introduction

WTO's General Agreement on Trade in Services (GATS) is the first multilateral and legally enforceable agreement dealing with the services trade.⁵⁴ It is a result of policy makers' growing appreciation of the importance of services trade in the global economy.⁵⁵ Multilateral trade disciplines, which initially covered just the goods trade through the GATT, were extended to services and investment after the creation of the WTO.⁵⁶ The WTO, an elaborate structure of multilateral trade disciplines, emerged as a result of the Uruguay trade Round (1986-1994).⁵⁷ It brought many new areas, including services trade, intellectual property rights and government procurement under the umbrella of multilateral trade disciplines.⁵⁸ All of these disciplines were also subjected to a binding dispute settlement system, thus reinforcing the architecture of multilateral trade.⁵⁹

⁵⁴ WTO, *A Handbook on the GATS Agreement* (Cambridge 2005); Barnard Hoekman and Peter Sauve, 'Liberalising Trade in Services', World Bank Discussion Paper 243, 1994, 30; A Sapir, 'The General Agreement on Trade in Services: From 1994 to the Year 2000' (1999) 33 (1) *JWT* 51; Michael Trebilcock, Robert Howse and Antonia Eliason, *The Regulation of International Trade* (4th edn, Routledge 2013); John Jackson, 'The Evolution of the World Trading System - The Legal and Institutional Context' in Bethlehem, McRae, Neufeld and Van Damme (eds), *The Oxford Handbook of International Trade Law* (Oxford, 2009).

⁵⁵ Services trade has continued to grow rapidly and according to some studies, it constitutes one fifth of the global trade today. See Aik Hoe Lim and Bart De Meester, 'An Introduction to Domestic Regulation and GATS' in Aik Hoe Lim and Bart De Meester (eds), *WTO Domestic Regulation and Services Trade: Putting Principles into Practice* (Cambridge 2014); Joseph F Francois and Kenneth A Reinert (1996), 'The Role of Services in the Structure of Production and Trade: Stylized Facts from a Cross-Country Analysis' in Bernard Hoekman (ed), *The WTO and Trade in Services* (Edward Elgar 2012).

⁵⁶ John Croome, *Reshaping the World Trading System: A History of the Uruguay Round* (A World Trade Organization Publication 1995); John Jackson, William Davey and Alan Sykes, *Legal Problems of International Economic Relations: Cases, Materials and Text* (5th edn, West Group 2008).

General Agreement on Tariffs and Trade (GATT) covered multilateral goods trade from 1948 until the advent of the WTO in 1995. The WTO became the umbrella organisation for multiple agreements including on services (GATS), intellectual property rights (TRIPS), government procurement and investment.

⁵⁷ J Whalley, 'Developing Countries and System Strengthening in the Uruguay Round' in A Martin and L A Winters (eds), *The Uruguay Round and the Developing Economies*, World Bank Discussion Paper 307, 1995, 317; Robert Hudec, 'International Economic Law: The Political Theatre Dimension' (1996) 17 (9) *University of Pennsylvania Journal of International Economic Law* 12.

⁵⁸ Graham Dunkley, *The Free Trade Adventure: The Uruguay Round and Globalism - A Critique* (Zed books 1997) More detail and the legal text of WTO Agreements is available at the official WTO website at: https://www.wto.org/english/docs_e/legal_e/final_e.htm accessed 15 June 2015.

⁵⁹ John Jackson, 'International Economic Law in Times that are Interesting' (2000) 1 *J.I.E.L.* 7; Robert Howse, 'The Most Dangerous Branch? WTO Appellate Body Jurisprudence on the Nature and Limits of the Judicial

The main objective of the WTO is an opening up of the national markets for international trade under non-discriminatory conditions.⁶⁰ The founding principles for achieving this objective were stipulated by the WTO, and mainly include Most Favoured Nation (MFN) and National Treatment.⁶¹ These two principles are aimed at achieving non-discriminatory market access for all trading partners.⁶² WTO claims that it 'is not just about opening markets' without any regard for Members' domestic regulatory concerns.⁶³ Since services trade is principally governed by regulatory measures, and not by border measures such as the tariffs on goods trade,⁶⁴ the need for a balance between trade liberalization and domestic regulatory autonomy acquires greater significance in the services trade context. The services trade liberalizing objectives of GATS accordingly need to be carefully balanced against the domestic regulatory considerations of WTO Members in order for it to be an effective agreement.⁶⁵ This was acknowledged in the GATS preamble, its purpose being to

Power' in Cottier and Mavroidis (eds), *The Role of the Judge in International Trade Regulation: Experience and Lessons from the WTO* (Michigan University Press 2003).

⁶⁰ According to official WTO website, 'The WTO's founding and guiding principles remain the pursuit of open borders, the guarantee of most-favoured-nation principle and non-discriminatory treatment by and among members, and a commitment to transparency in the conduct of its activities' at:
<https://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm> accessed 15 June 2015.

⁶¹ According to the WTO official website, Most Favoured Nation (MFN) principle stipulates that 'Under the WTO agreements, countries cannot normally discriminate between their trading partners. Grant someone a special favour (such as a lower customs duty rate for one of their products) and you have to do the same for all other WTO members.' Similarly National Treatment implies that 'imported and locally-produced goods should be treated equally'.
<https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm> accessed 15 June 2015.

It should be mentioned that these principles have been laid down in Articles I and III of the GATT and Articles II and XVII of the GATS respectively.

⁶² Panagiotis Delimatsis, 'Article III GATS' in Wolfrun P T Stoll and Fenaugle (eds), *Max-Planck Commentaries on World Trade Law* (WTO-Brill Publishing 2008, 8); Aaditya Mattoo, 'National Treatment in the GATS: Corner Stone or Pandora's Box?' (1997) 31(1) *JWT* 107; Aaditya Mattoo, 'MFN and the GATS' in Cottier and Mavroidis (eds), *Most Favoured Nation Treatment: Past and Present* (Michigan University Press 2000).

⁶³ See how the WTO describes itself at:
<http://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm> accessed 15 June 2015.

⁶⁴ For more on how the services trade is different from the goods trade and for services' special nature, see Bernard Hoekman and Michel Kostecki, *The Political Economy of the World Trading System* (3rd edn, Oxford 2010); Aik Hoe Lim and Bart De Meester, 'An introduction to domestic regulation and GATS' in Aik Hoe Lim and Bart De Meester (eds), *WTO Domestic Regulation and Services Trade: Putting Principles into Practice* (Cambridge 2014).

⁶⁵ This area of the GATS governance has attracted some, but limited, scholarly attention. Some of the studies that have focused on this aspect of the GATS and proposed solutions for any possible tension between these two objectives of the GATS include Panagiotis Delimatsis, *International Trade in Services and Domestic Regulations* (Oxford 2007); Aaditya Mattoo and Pierre Sauve (eds), *Domestic Regulation and Services Trade Liberalisation* (World Bank and OUP 2003); Aik Hoe Lim and Bart De Meester (eds), *WTO Domestic Regulation and Services Trade: Putting Principles into Practice* (Cambridge 2014).

enable 'progressive liberalisation' while 'recognising the rights of Members to regulate in order to achieve national regulatory objectives'.⁶⁶

However, in view of the influence of 'Neo-liberal'⁶⁷ economic philosophy on the international economic order, the objectives of the multilateral trade regime came to be associated with the creation of an obstacle-free 'global market', not just discrimination-free treatment of the trading partners.⁶⁸ Consequently, many areas of economic activity and public power were brought under the jurisdiction of WTO rule-making and enforcement mechanisms.⁶⁹ These include disciplines on the domestic regulations pertaining to various WTO treaties on the enforcement of intellectual property rights, investment rights and the services trade.⁷⁰ These areas traditionally fell under the domestic regulatory jurisdiction of the WTO Members, e.g. investment related measures or product standards and licensing mechanisms.⁷¹ Multilateral legal obligations for these agreements were also often designed and interpreted in a way that raised questions as to what was the real

⁶⁶ See the GATS text available at:

<https://www.wto.org/english/docs_e/legal_e/final_e.htm> accessed 15 June 2015.

⁶⁷ The generalised principles of neo-liberal economic philosophy include a dependence on market forces for economic management and minimal state intervention, preservation of individual liberties and enterprise and a strong system of private ownership. See Rachael Turner, *Neo-Liberal Philosophy: History, Concepts and Policies* (Edinburgh University Press 2008); Andrew Lang, *World Trade Law after Neo-Liberalism* (Cambridge 2011). Hence the idea of an 'unfettered market' can be traced back to minimum state control in the affairs of the market envisaged in this philosophy. For the services trade, as highlighted in fn 11, the main regulatory mechanism is through domestic regulatory measures which will come under scrutiny for its trade restrictive effect as a result of the GATS/WTO obligations.

⁶⁸ This has been explored in more detail in the subsequent section which discusses the GATS economic context. Also see Andrew Lang, *World Trade Law after Neoliberalism: Re-imagining the Global Economic Order* (Oxford 2011).

⁶⁹ The Marrakesh agreement establishing the WTO provided an elaborate institutional arrangement for multilateral trade among WTO members. There are four Annexes that lay down the details of the members' rights and obligations. Annex I has three parts dealing with goods trade (GATT), services trade (GATS) and Intellectual Property rights (TRIPS). Annex II contains the Understanding on Rules and Procedure Governing the Settlement of Disputes (DSU). Annex III contains the Trade Policy Review Mechanism (TPRM) which is a surveillance mechanism for the members' trade policies, whether they are WTO rules compliant or not. Annex IV consists of plurilateral agreements which were not multilateralised. Apart from the areas mentioned above, there are committees working to produce disciplines on subsidies, anti-dumping and countervailing measures, technical barriers to trade, import licensing, customs valuation, market access, agricultural market access, trade-related investment measures, rules of origin and many more. This gives an ample idea of how broad the scope of the WTO is. This information has been taken from the official WTO website.

⁷⁰ Most of the WTO agreements are the result of the 1986–94 Uruguay Round negotiations, signed at the Marrakesh ministerial meeting in April 1994. There are about 60 agreements and decisions totalling 550 pages.

Negotiations since then have produced additional legal texts such as the Information Technology Agreement, services and accession protocols.

<https://www.wto.org/english/thewto_e/thewto_e.htm> accessed 15 June 2015.

⁷¹ Jagdish Bhagwait and Robert Hudec (eds), *Harmonisation and Fair Trade: Prerequisites for Free Trade* (Cambridge MIT Press 1996); Gary Burtless, *Globophobia* (Washington DC: Brookings 1998).

objective of the multilateral trade regime.⁷² Was it non-discrimination or un-fettered market access? Also, to what limit should the disciplines of multilateral trade regime legitimately extend *vis-à-vis* domestic regulatory autonomy?

As mentioned earlier, WTO's core principles are non-discrimination, predictability, transparency, competitiveness, protection of the environment and better consideration of the developing countries' needs.⁷³ Non-discrimination in the goods and services trade may be achieved with the help of two principles, i.e. Most Favoured Nation (MFN) and National Treatment. These two principles are designed to prohibit the discriminatory treatment of foreign and domestic products.⁷⁴ The GATS legal obligations regarding MFN and National Treatment are accordingly aimed at ensuring non-discriminatory market access to the trading partners.⁷⁵

However, whether the scope of GATS has been extended beyond providing a non-discriminatory multilateral services trade regime, to the dismantling of all potential barriers existing in the form of domestic regulation is the core question for this chapter.⁷⁶ In order to address this question, the chapter first examines the evolution of multilateral trade disciplines from the GATT to the WTO.⁷⁷ This will help in understanding how GATS fits into the WTO structure. Next it discusses why the need arose for multilateral services trade disciplines, and the relevance of Neo-liberal economic philosophy to the GATS. The third section gives an account of GATS evolution in terms of its conceptual foundation and negotiation history, before turning to its specific legal obligations. Various treaty provisions of the GATS framework are systematically analysed to examine how its 'liberalization' objectives are balanced against the possible 'regulatory' concerns of WTO Members. In the last section, regulatory challenges stemming from possible tension between the national regulatory autonomy of WTO Members and their legal obligations under GATS are flagged.

⁷² While the design and extent of the GATS legal obligations have been analyzed in this chapter, a study of the GATS case law has been conducted in the next chapter to examine the interpretation given by the WTO dispute settlement bodies to these obligations.

⁷³ These have been stated as core WTO values at:
<http://www.wto.org/english/thewto_e/whatis_e/what_stand_for_e.htm> accessed 15 June 2015.

⁷⁴ The MFN provisions are contained in Article II of the GATS and the National Treatment provisions in Article XVII.

⁷⁵ These obligations are contained in Articles II and XVII of the GATS.

⁷⁶ The GATS, while emphasising non-discriminatory treatment of trading partners, also has elaborate disciplines for domestic regulatory regimes in Article VI. These are meant to ensure that the domestic regulatory policy measures are not unduly trade restrictive. An in-depth discussion regarding these is contained in the subsequent section dealing with the GATS framework and its specific provisions.

⁷⁷ GATT 1947 dealt with the goods trade while the WTO became an elaborate institutional framework dealing with a number of other areas pertaining to economic activity. See fn 16 above.

B. WTO – A Rule Based System for World Trade

Since economic policy failure after World War I was considered a significant cause of World War II, the international community set out on the task of overhauling the world economy,⁷⁸ through institutional arrangements.⁷⁹ The Bretton Woods Conference, held in the US in 1944,⁸⁰ led to the creation of the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development, now known as the World Bank, for multilateral financial cooperation.⁸¹ The trade related agreement created the International Trade Organisation (ITO).⁸² The United States wanted quicker and more open access to international markets while the negotiations were still going on for the establishment of ITO.⁸³ Hence the US and its major trading partners created the General Agreement on Tariffs and Trade (GATT) with a view to promote free and fair trade in goods.⁸⁴ According to the GATT preamble, its purpose was ‘substantial reduction of tariffs and other trade barriers and the elimination of preferences, on a reciprocal and mutually advantageous basis.’⁸⁵

The original idea was that ITO would be the parent organisation, and GATT a purpose-designed agreement for the multilateral goods trade liberalization.⁸⁶ GATT was to depend upon ITO for the institutional support required for its implementation.⁸⁷ Its main purpose was to establish a legal mechanism for tariff-reducing negotiations.⁸⁸ The US government’s failure to rectify the ITO

⁷⁸ Douglas Irwin, Petros Mavroidis and Alan Sykes, *The Genesis of the GATT* (Cambridge 2009); John Jackson, ‘The Evolution of the World Trading System - The Legal and Institutional Context’ in Bethlehem and others (eds), *The Oxford Handbook of International Trade Law* (Oxford 2009) 32.

⁷⁹ For historical background to the GATT, see Douglas Irwin, ‘Multilateral and Bilateral Trade Policies the World Trading System’ in De Melo and Panagariya (eds), *New Dimensions in Regional Integration*; William Diebold, *The End of the ITO* (Princeton University Press 1952); Douglas Irwin, Petros Mavroidis and Alan Sykes, *The Genesis of the GATT* (Cambridge 2009).

⁸⁰ See a brief history of the Conference by the Times October, 2008 at: <http://content.time.com/time/business/article/0,8599,1852254,00.html> accessed June 2015.

⁸¹ John Barton and others, *The Evolution of the Trade Regime* (Princeton University Press 2008).

⁸² Ibid.

⁸³ Robert Gilpin, *Global Political Economy: Understanding the International Economic Order* (Princeton University Press 2001) 218.

⁸⁴ Robert Gilpin, *Global Political Economy: Understanding the International Economic Order* (Princeton University Press 2001) 217-220.

⁸⁵ For the original text of the Agreement, see www.wto.org/english/docs_e/legal_e/gatt47_e.pdf accessed 15 June 2015.

⁸⁶ Gilbert Winham, ‘The Evolution of the World Trading System -The Economic and Policy Context’ in Bethlehem and others, (eds), *The Oxford Handbook of International Trade Law* (Oxford 2009)14.

⁸⁷ John Jackson, ‘The Evolution of the World Trading System-The Legal and Institutional Context’ in Bethlehem and others (eds), *The Oxford Handbook of International Trade Law* (Oxford 2009) 35-41.

⁸⁸ Ibid.

eventually led to its demise.⁸⁹ However, GATT 1947 and some of its tariff related obligations had already been finalised before the close of the Bretton Woods Conference.⁹⁰ Many negotiators therefore wanted to bring it into force even if the ITO could not be established.⁹¹ A provisional application of the GATT from January 1948 was therefore pushed by adopting the Protocol of Provisional Application (PPA).⁹² The PPA laid down guidelines for the implementation of GATT 1947. Parts I and III of the GATT were fully implemented without any exceptions.⁹³ Part I contained the Most Favoured Nation (MFN) provisions and obligations relating to tariff concessions, and Part III was procedural in nature.⁹⁴

Part II (Articles III to XIII) contained substantive obligations regarding customs procedures, quotas, subsidies, anti-dumping duties, etc. falling mostly in the domestic regulatory regime of a country.⁹⁵ It should be highlighted that the Protocol adopted a different approach towards Part II, and only envisaged its implementation 'to the fullest extent not inconsistent with existing legislation' rather than full implementation.⁹⁶ This provided 'grandfathering rights' to the GATT contracting parties to continue with any legal provisions which existed in these areas before they became a signatory to the GATT.⁹⁷ Due to this flexible approach, most governments were able to approve the PPA without the need to go to their respective legislature for approval.⁹⁸

⁸⁹ William Diebold, *The End of the ITO* (Princeton University Press 1952); Robert Gilpin, *Global Political Economy: Understanding the International Economic Order* (Princeton University Press 2001) 218.

⁹⁰ John Barton and others, *The Evolution of the Trade Regime* (Princeton University Press 2008).

⁹¹ John Jackson, 'The Evolution of the World Trading System -The Legal and Institutional Context' in Bethlehem, McRae, Neufeld and Van Damme (eds), *The Oxford Handbook of International Trade Law* (Oxford 2009) 34.

⁹² Protocol of Provisional Application of the General Agreement on Tariffs and Trade, 55UNTS 308 (1947). Available at: http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CCwQFjAA&url=http%3A%2F%2Fwww.wto.org%2Fenglish%2Fres_e%2Fbooksp_e%2Fgatt_ai_e%2Fprov_appl_gen_agree_e.pdf&ei=Vh0LU_XAoO07QbC44HACQ&usg=AFQjCNFPfCILKRG_ySrLt2dAyjWrexzX6A&bvm=bv.61725948,d.ZGU accessed 15 June 2015.

⁹³ John Jackson 'The Evolution of the World Trading System - The Legal and Institutional Context' in Bethlehem and others (eds), *The Oxford Handbook of International Trade Law* (Oxford 2009).

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ See the text of the PPO at fn 93.

⁹⁷ Marc Hansen and Edwin Vermulst, 'The GATT Protocol of Provisional Application: A Dying Grandfather?' (1987) 27 *Columbia Journal of Transnational Law* 263.

⁹⁸ John Jackson 'The Evolution of the World Trading System-The Legal and Institutional Context' in Bethlehem, McRae, Neufeld and Van Damme (eds), *The Oxford Handbook of International Trade Law* (Oxford 2009).

This qualitative shift which emerged in the management of the international economy after World War II has been termed by Ruggie as a shift towards 'embedded liberalism'.⁹⁹ Ruggie describes embedded liberalism as the compromise struck by governments after World War II to balance domestic economic goals with the commitment to economic openness.¹⁰⁰ The commitment to economic openness was 'embedded' in an understanding that governments could temporarily opt out of their international commitments if these threatened to undermine their domestic economic objectives. There was thus an acknowledgement that pursuing domestic economic objectives and political consensus had to be balanced against international economic co-operation.¹⁰¹ However, international governance of the world economy started to have a more direct impact upon the domestic regulatory regimes of countries.¹⁰² The discussion below on the developments in multilateral trade rules further demonstrates this.

1. From GATT to WTO

The Uruguay Round of GATT negotiations held from 1986 to 1994 led to the formation of the WTO and adoption of a new set of agreements.¹⁰³ The Uruguay Round was launched at a GATT ministerial meeting in Punta del Este, Uruguay in September, 1986.¹⁰⁴ It had a very broad trade agenda and was called 'the largest trade negotiation' round ever.¹⁰⁵ The talks on the trading system covered many new areas including services trade, investment and intellectual property rights.¹⁰⁶ The Round also aimed to 'streamline' the dispute settlement system.¹⁰⁷ It launched the Trade Policy Review Mechanism, which provided for a regular review of the national trade policies and

⁹⁹ John Ruggie, 'International Regimes, Transactions and Change: Embedded liberalism in the Postwar Economic Order' (1982) 36 *International Organization* 379.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² John Croome, *Reshaping the World Trading System* (Kluwer 1999); Alan Deardorff, 'An Economist's Overview of the World Trade Organisation' in Flake and Low-Lee (eds), *The Emerging WTO and Perspectives from East Asia* (Korea Economic Institute of America 1996). They provide an account of the WTO, emphasising its institutional aspect.

¹⁰³ John Croome, *Reshaping the World Trading System* (Kluwer 1999) contains detailed negotiating history of the Uruguay Round. For details of the Round also see: http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm accessed 15 June 2015.

¹⁰⁴ *Ibid.*

¹⁰⁵ Fifteen original subjects covered included tariffs, non-tariff barriers, intellectual property rights, dispute settlement, services trade, investment-related measures, agriculture, subsidies, etc. at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm accessed 15 June 2015.

¹⁰⁶ John Jackson, *The World Trading System: Law and Policy in International Relations* (2nd edn, Cambridge MIT Press 1997).

¹⁰⁷ *Ibid.*

practices of GATT members.¹⁰⁸ The WTO¹⁰⁹ became an umbrella organisation, with GATT being the relevant treaty for the goods trade.¹¹⁰ A number of other agreements, including GATS for services trade, and TRIPS¹¹¹ for intellectual property rights, were also adopted.¹¹²

The shift from the GATT to the WTO brought many substantial changes in the governance of the international trade and its related areas.¹¹³ While GATT can be termed a model of negative integration,¹¹⁴ i.e. laying down what governments must not do, the WTO in many ways becomes a model of positive integration, with recommendations for what governments must do on the domestic policy front to fulfill their international obligations.¹¹⁵ Quoting an example from GATS, Article I of the Agreement requires that to fulfil its obligations and commitments under the Agreement, 'each Member shall take such measures as may be necessary'. Similarly, Article VI of the Agreement lays down the disciplines for domestic regulations to ensure that they do not become unnecessarily trade restrictive.¹¹⁶ The structure of the international trade governance also became more hierarchical.¹¹⁷ There was a top-down approach to policy making, the rules being prescriptive in nature, and subject to enforcement by a binding dispute settlement system.¹¹⁸

The question for the GATS which this thesis explores is therefore: how much room is left for domestic political choice, or situational exigency as a result of the legal obligation for disciplined domestic regulations?

¹⁰⁸ Alan Deardorff, 'An Economist's Overview of the World Trade Organisation' in Flake and Low-Lee (eds), *The Emerging WTO and Perspectives from East Asia* (Korea Economic Institute of America 1996).

¹⁰⁹ The deal was signed by ministers from most of the 123 participating governments at a meeting in Marrakesh, Morocco on 15th of April, 1994 taking effect from January 1995, for the formation of the World Trade Organisation (WTO). Further details at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm accessed 27 December 2014.

¹¹⁰ See above note 16 for details of the areas of economic activity covered under the WTO.

¹¹¹ Trade Related Aspects of Intellectual Property rights at: http://www.wto.org/english/tratop_e/trips_e/trips_e.htm accessed 15 June 2015.

¹¹² John Croome, *Reshaping the World Trading System: A History of the Uruguay Round* (A World Trade Organization Publication 1995).

¹¹³ John Jackson, *The World Trading System: Law and Policy in International Relations* (2nd edn, Cambridge MIT Press 1997).

¹¹⁴ Petros Mavroidis, *Trade in Goods* (Oxford 2012).

¹¹⁵ Ernst-Ulrich Petersmann, 'From Negative to Positive Integration in the WTO: The TRIPS Agreement and the WTO Constitution' in Cottier and Mavroidis (eds), *Intellectual Property: Trade, Competition and Sustainable Development* (University of Michigan Press 2003) 22.

¹¹⁶ The domestic regulatory implications have been discussed in more detail in the subsequent part of the chapter that deals with the GATS framework and its specific provisions.

¹¹⁷ John Jackson, *The World Trading System: Law and Policy in International Relations* (2nd edn, Cambridge MIT Press 1997).

¹¹⁸ Ibid.

The WTO derives its strength from claiming to be a 'rule-based'¹¹⁹ and 'multilateral'¹²⁰ organisation.¹²¹ Multilateralism, according to Ruggie, is the coordination of international relations on 'the basis of "generalised" principles of conduct - that is, principles which specify appropriate conduct for a class of actions, without regard to the particularistic interests of the parties or the strategic exigencies that may exist in any specific occurrence'.¹²² In the context of GATS, the concepts of Most Favoured Nation¹²³ (MFN) and National Treatment¹²⁴ are manifestations of this principle-based collaboration among states. These principles are an integral part of the GATS legal framework and duly enforceable through WTO's binding dispute settlement system.¹²⁵

The WTO Members relinquished some of their 'particularistic interest'¹²⁶ to be a part of a broader multilateral regime. But the question of whether the post-war global regime was actually 'multilateral' needs to be raised at this point. It has been shown empirically that multilateral institutions did not always work on the basis of egalitarian rules.¹²⁷ Rather, they were governed by 'minilateralist' groupings, or sub-sets of countries working within them.¹²⁸ The application of disciplines designed by such groups, however, is 'multilateral' by virtue of principles like MFN and National Treatment.

The same is the case with GATS legal obligations. These are multilateral in application by virtue of principles such as MFN and GATS article VI, which lays down disciplines for domestic regulations, enforceable by a binding dispute settlement system. However they were not always conceived in a multilateral setting.¹²⁹ This becomes evident when we study the GATS negotiating process in the subsequent section of the chapter, which traces GATS negotiation history. This disconnect

¹¹⁹ Petros Mavroidis, *Trade in Goods* (Oxford 2012).

¹²⁰ John Ruggie, 'Multilateralism: The Anatomy of an Institution' (Summer 1992) 46 (3) International Organization.

¹²¹ See also how the WTO describes itself at:

http://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm accessed 15 June 2015.

¹²² John Ruggie, 'Multilateralism: The Anatomy of an Institution' (Summer 1992) 46 (3) International Organization 571.

¹²³ MFN principle implies that products originating from all trading partners must be treated in the same manner.

¹²⁴ National Treatment implies that products originating from trading partners must not be discriminated against in comparison to local products.

¹²⁵ Article XXIII of the GATS

¹²⁶ As per Ruggie's definition of multilateralism given above at fn 72.

¹²⁷ Miles Kahler, 'Multilateralism with Small and Large Numbers' (1992) 46 International Organisation 681.

¹²⁸ This has been demonstrated while discussing the negotiations that led to the framing of the GATS. Also see Miles Kahler, 'Multilateralism with Small and Large Numbers' (1992) 46 International Organisation 681.

¹²⁹ See the section on the GATS negotiations in the text accompanying fns 248-284.

manifests itself in the practical implementation of GATS and what it has been able to achieve to date as a multilateral services trade framework.¹³⁰

2. The WTO Dispute Settlement Mechanism¹³¹

The Uruguay Round of trade negotiations not only produced agreements on a large scale; it also integrated them under a common legal system.¹³² The WTO Agreement created the Dispute Settlement Understanding (DSU) which was a binding dispute settlement system.¹³³ This implied that none of the Members could veto the adoption of a decision against it, unlike during the GATT period.¹³⁴

The dispute settlement system extended to all WTO agreements, covering areas such as agriculture, safeguards, trade in intellectual property, services and technical barriers to trade. It can be observed that trade disciplines have not only been substantially 'widened' by their application to new areas, but also 'deepened' by a mandatory dispute settlement mechanism.¹³⁵ So while new areas of regulation are brought under multilateral disciplines like the domestic regulations dealing with intellectual property rights or investment laws, these disciplines are now enforceable through binding dispute settlement procedures, and can lead to consequences in cases of non-compliance with.¹³⁶ The binding dispute settlement system of the WTO thus has authority to impact the national laws of its Members.¹³⁷

¹³⁰ The fact that there has been little progress in liberalization objectives and the rule-making agenda of the GATS is evident from the services related negotiations in the current round of WTO negotiations which I discuss in more detail in Ch 3. It is also WTO's admitted position on the GATS progress and frequently highlighted by commentators on the subject.

¹³¹ A detailed analysis of the interface between the WTO dispute settlement system and the GATS is carried out in the next chapter.

¹³² Weiler John, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the International and External Legitimacy of WTO Dispute Settlement System' 35 (2) (2001) JWT 197; John Jackson, 'Dispute Settlement in the WTO: Policy and Jurisprudential Considerations', Research Seminar in International Economics, Discussion Paper 419, 19998, 22.

¹³³ See Annex II of the Agreement establishing the WTO.

¹³⁴ John Jackson, *The World Trading System: Law and Policy in International Relations* (2nd edn, Cambridge MIT Press 1997).

¹³⁵ For the difference between the WTO and the GATT dispute settlement system, see Robert Hudec, *Enforcing International Trade Law and Practice* (New York Butterworth 1993); John Jackson, 'The Evolution of the World Trading System -The Legal and Institutional Context' in Bethlehem and others (eds), *The Oxford Handbook of International Trade Law* (Oxford,2009).

¹³⁶ David Palmeter and Petros Mavroidis, *Dispute Settlement in the World Trade Organisation: Practice and Procedure* (The Hague: Kluwer Law International 1999).

¹³⁷ Mitsuo Matsushita, Petros Mavroidis and Thomas Shoenbaum, *The WTO Law and Practice* (Oxford 2001).

There are umbrella treaty provisions in the WTO agreement for the compliance of domestic regulations. Article XVI: 4 of the agreement creating the WTO states:

‘Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements’.¹³⁸

By virtue of the binding dispute settlement mechanism, domestic regulations deemed not to be in conformity with WTO legal obligations can therefore become a subject of scrutiny and sanction.

So in many ways, the WTO does not merely provide the framework for an international regime relating to goods and services trade; it also creates obligations for nearly all related areas, e. g. intellectual property rights and domestic regulatory procedures.¹³⁹ It also goes further by subjecting these obligations to a binding dispute settlement system, unlike the GATT days of consensus based on acceptance of dispute decisions.¹⁴⁰ Any breach of an obligation has consequences in the case of WTO governed agreements.¹⁴¹ As indicated by the WTO, no one goes to jail but:

‘If a country has done something wrong, it should swiftly correct its fault. And if it continues to break an agreement, it should offer compensation or suffer a suitable penalty that has some bite.’¹⁴²

In Jackson’s words, the WTO, unlike its predecessor (GATT), has the mandate of ‘disciplining constraints on national behaviour’.¹⁴³ The GATS framework disciplines mainly engage with domestic regulatory regimes, of which Article VI is an example. Article VI lays down disciplines for national regulatory regimes so that they do not become unnecessarily restrictive to trade. As will be observed in the next chapter dealing with the GATS case law, a substantial number of services disputes have arisen from one or another of the domestic regulatory measures alleged to have violated complainants’ rights to market access.

¹³⁸ See the text of the Agreement at:

<http://www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_04_e.htm#articleXVI> accessed 15 June 2015.

¹³⁹ Ibid.

¹⁴⁰ William Davey, *Enforcing World Trade Rules: Essays on WTO Dispute Settlement and GATT Globalisation* (Cameron May 2006).

¹⁴¹ A detailed discussion on the implications of the WTO dispute settlement mechanism has been carried out in Ch 2 from a services’ perspective. However, generally speaking consequences can be in the form of the compensation that a ‘losing’ country has to pay or in the form of trade sanctions being imposed. <http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm> accessed 15 June 2015.

¹⁴² See the relevant section of the WTO website on dispute settlement at:

<http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm> accessed 15 June 2015.

¹⁴³ John Jackson, ‘The Evolution of the World Trading System - The Legal and Institutional Context’ in Bethlehem and others (eds), *The Oxford Handbook of International Trade Law* (Oxford 2009).

C. Creating Disciplines for Multilateral Services Trade Disciplines

1. Background

One of the reasons for developing multilateral disciplines for the services trade was the need to pre-empt a new wave of protectionism¹⁴⁴ in the 1980s.¹⁴⁵ Technology had made it possible to circumvent traditional barriers¹⁴⁶ to trade, and therefore countries started to impose new regulatory ‘barriers’ to protect the strategic sectors of their services economy.¹⁴⁷ While the GATT sponsored tariff cuts were taking place for the goods trade, an increase in ‘non-tariff trade-distorting measures’ was being witnessed.¹⁴⁸ This was termed as ‘new protectionism’ and was considered threatening to the multilateral trade liberalization regime set up after World War II.¹⁴⁹ The US Trade Representative in the early eighties observed:¹⁵⁰

‘Restrictive measures under consideration in a number of countries in telecommunications, data processing and information services have already created much uncertainty in the business community about the future ability of firms to utilize communication and data processing facilities; it has hurt investment and reduced trade opportunities. If the trend of increasing barriers to trade in services continues unchecked, trade opportunities could be markedly reduced and the international trading system could be seriously harmed’.

This statement reveals that domestic regulations were now being perceived as potential ‘barriers’ to trade.¹⁵¹ The drive to introduce multilateral trade disciplines for services trade was aimed at

¹⁴⁴ Protectionism here refers to economic policies of the governments which are aimed at protecting local industries and markets from foreign competition. They can use measures like high tariff rates, quotas, tax regimes and domestic regulatory measures to do so.

¹⁴⁵ Douglas Irwin, ‘New Protectionism in Industrial Countries: Beyond Uruguay Round’ (1994) IMF Policy Research Paper; Cline William (ed), *Trade Policy in the 1980s* (Institute for International Economics 1983); Robert Baldwin, ‘The New Protectionism: A Response to Shift in National Economic Power’ (1986) National Bureau of Economic Research, Working Paper 1823.

¹⁴⁶ Traditional barriers most commonly relate to tariffs and may include import restrictions, quotas etc. Technical regulations and product standards, on the other hand are examples of ‘technical’ or non-tariff barriers. See the WTO link for more detail on the trade barriers at: http://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm accessed 15 June 2015.

¹⁴⁷ Grilli Enzo and Sasoon Enrico (eds), *The New Protectionist Wave* (Palgrave UK 1990).

¹⁴⁸ Robert Baldwin, ‘The New Protectionism: A Response to Shift in National Economic Power’ (1986) National Bureau of Economic Research, Working Paper 1823.

¹⁴⁹ Ibid.

¹⁵⁰ Henry Eason, ‘America’s “Invisible” Trade Surplus-Exporting of Services’, *Nation’s Business* (1984), available at: <http://digital.hagley.org/cdm/landingpage/collection/p16038coll3> accessed 15 June 2015.

¹⁵¹ Lazar Fred, *The New Protectionism* (The Canadian Institute for Economic Policy Series 1981).

countering these barriers.¹⁵² It may be added that domestic regulations were also considered potential barriers to goods trade, and were placed under the category of ‘non-tariff barriers’.¹⁵³ Different agreements, e.g. Agreements on Import Licensing, Pre-shipment Inspection, Valuation and Rules of Origin were signed by WTO Members to ensure that domestic regulations were non-discriminatory and least burdensome for the multilateral goods trade.¹⁵⁴

A distinction however needs to be drawn between domestic regulations when they are seen as trade barriers for the goods, or for the services trade.¹⁵⁵ For the services trade, the whole thrust of multilateral disciplines falls on the domestic regulatory regimes exclusively, in the absence of tariffs such as border control mechanisms in the goods trade.¹⁵⁶ This is due to the very nature of the services trade. Services are intangible and non-storable.¹⁵⁷ Unlike goods, quality or standards are not linked to any physical characteristics, but to the performance or competence of the service supplier.¹⁵⁸ This implies that GATS related trade disciplines have to extend to areas of internal regulation dealing not only with the products (services), but also the producers (service suppliers). This clearly extends the mandate of GATS to potentially sensitive areas of domestic policy making. It also means that construing all domestic regulatory measures as services ‘trade barriers’ without examining their context can lead to serious concerns regarding the regulatory autonomy of the Member states.¹⁵⁹ The question to be examined is whether the GATS regulatory framework makes a distinction between goods and services trade barriers in its engagement with the domestic regulatory architecture.¹⁶⁰

¹⁵² Henry Eason, ‘America’s “Invisible” Trade Surplus-Exporting of Services’, *Nation’s Business* (1984) as above.

¹⁵³ More details on them and the WTO prescribed disciplines available at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm9_e.htm accessed 15 June 2015.

¹⁵⁴ Richard Baldwin and Patrick Lowe, *Multilateralising Regionalism: Challenges for Global Trade* (Cambridge 2008). Also see WTO website for more details on the nature of non-tariff barriers at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm9_e.htm accessed 15 June 2015.

¹⁵⁵ This has been discussed in more detail in the last section of this chapter which takes up a substantive discussion on the trade barriers in the services trade context.

¹⁵⁶ For the peculiar nature of services trade, see Bernard Hoekman and Michel Kostecki, *The Political Economy of the World Trading System* (3rd edn, Oxford 2010); Aik Hoe Lim and Bart De Meester, ‘An introduction to domestic regulation and GATS’ in Aik Hoe Lim and Bart De Meester (eds), *WTO Domestic Regulation and Services Trade: Putting Principles into Practice* (Cambridge 2014).

¹⁵⁷ Aik Hoe Lim and Bart De Meester, ‘An Introduction to domestic regulation and GATS’ in Aik Hoe Lim and Bart De Meester (eds), *WTO Domestic Regulation and Services Trade* (Cambridge 2016).

¹⁵⁸ *Ibid.*

¹⁵⁹ This becomes evident when we examine the GATS related disputes and the WTO dispute settlement bodies’ decisions regarding them (see Ch 2).

¹⁶⁰ This has been examined in depth in the next section which analyses the GATS specific provisions, and in Ch 2 which deals with the GATS case law.

In addition to countering the ‘new protectionism’ as discussed above, the seeking of new market openings by the US financial services sector is also considered a reason for the emergence of multilateral services trade disciplines.¹⁶¹ The US Coalition of Services Industries (USCSI), led by groups such as American International Group (AIG), American Express and Citicorp, worked closely with negotiators of the Uruguay Round from 1984 to 1986 in developing multilateral services trade disciplines.¹⁶² Former USCSI Chief, Harry Freeman remarked in retrospect:

‘At the close of the Uruguay Round, we lobbied and lobbied. We had about 400 people from the U.S. private sector. There were perhaps four Canadians and nobody from any other private sector. The private sector advocacy operations in the U.S. Government are radically different from those in every other government in the world.’¹⁶³

There is a sense, which can be derived from this statement, that at the time of the GATS negotiations, the process was dominated by US interest groups, with little participation by stake holders or business interest groups from other parts of the world.¹⁶⁴ In this scenario, how far the GATS framework is able to take into account the diverse regulatory considerations of the WTO Membership¹⁶⁵ is a pertinent question. The answer to this question lies in finding out how flexible GATS existing regulatory approaches are, and to what extent they balance WTO Members’ regulatory autonomy in addressing their legitimate policy concerns versus the GATS liberalization objectives.¹⁶⁶

This discussion provides an insight into the way the GATS obligations were subsequently framed. In view of the primary need for removing ‘trade barriers’, GATS has adopted all-encompassing disciplines for domestic regulations, as will be discussed in the later part of the chapter. Similarly, the role of special interest groups in designing a multilateral services trade framework for opening new markets leads to the question as to whether the GATS purpose is to ensure a non-discriminatory market access, or to create obstacle free markets.

¹⁶¹ Geza Feketekuty, *International Trade in Services: an Overview and Blueprint for Negotiations* (Ballinger Publishing Cambridge 1988).

¹⁶² As quoted by Erik Wesselius, ‘Driving the GATS Juggernaut’ (2003) Red Pepper, available at: <http://www.globalpolicy.org/component/content/article/209/43694.html> accessed 15 June 2015.

¹⁶³ Ibid.

¹⁶⁴ Julian Arkell, ‘Lobbying for Market Access for Professional Services’ in Michael Kostecki (ed), *Marketing Strategies for Services* (Oxford : Pergamon Press 1994); Bernard Hoekman and Michael Kostecki, *The Political Economy of the World Trading System* (3rd edn, Oxford 2010).

¹⁶⁵ As of June, 2016 the WTO membership stands at 164 countries according to WTO official website.

¹⁶⁶ This can be explored by analysing the GATS legal provisions in this chapter and by examining the WTO dispute settlement bodies’ interpretation of these provisions in Ch 2; also by analysing the capacity of the current rule-making in the services’ trade agenda of the WTO in Ch 3.

2. Genesis of the GATS

A brief background to the emergence of services trade in the multilateral trade liberalization agenda has been discussed in the preceding section. The need to counter the ‘new-protectionism’ of the 1980s, and the US services industry’s desire to find new markets for their services provided the background for the emergence of GATS.¹⁶⁷ However, examining the role of ‘ideas’ and ‘discourse’ in developing disciplines for the services trade will further help in understanding the GATS framework and its legal obligations.¹⁶⁸ For this purpose, the work of an ‘epistemic community’¹⁶⁹ of scholars and officials from the early 1970s, and leading up to the conclusion of GATS in the 1990s, needs to be highlighted.¹⁷⁰ In a way, Neo-liberal economic philosophy was translated into a tangible legal regime represented by WTO (and GATS), with the help of ideas and discourses pushed by the technocracy of institutions like GATS, the UNCTAD and the World Bank.¹⁷¹ The significance of the GATT/WTO technocrats in pushing forward the Neo-liberal framing and interpretation of the agreements has been examined in detail by Howse, who calls into question its legitimacy on the grounds that such rule-making procedure is often detached from real politics, since it is in the hands of a small number of people.¹⁷² So is GATS, then, also a product of the internal dominant ideological perspective of a select few, and ultimately contestable? It may also be asked whether this perspective provides a sufficiently solid theoretical foundation for regulating multilateral services trade. This will become clear in the following section, which examines the GATS conceptual foundation.

2.1. Creating a Conceptual Foundation for the GATS

The governance of the global services economy took centre stage in the 1980s, as has been discussed already.¹⁷³ A debate on whether the general rules governing the trade in goods adopted by the GATT should also apply to services trade initiated during this period, coinciding with the

¹⁶⁷ See above fns 94 and 107

¹⁶⁸ William Drake and Kalypto Nicolaidis, ‘Ideas, Interests and Institutionalization: “Trade in Services” and the Uruguay Round’ (1992) 46 *International Organization* 345.

¹⁶⁹ The term used by William Drake and Kalypto Nicolaidis *Ibid.*

¹⁷⁰ Andrew Lang, *World Trade Law after Neo-Liberalism: Re-imagining the Global Economic Order* (Oxford 2011).

¹⁷¹ Robert Howse, *The WTO System: Law, Politics and Legitimacy* (Cambridge 2007).

¹⁷² Robert Howse Robert, *The WTO System: Law, Politics and Legitimacy* (Cambridge 2007); Robert Howse, ‘From Politics to Technocracy – and Back again: the Fate of the Multilateral Trading Regime (2002) *The American Journal of International Law* 96.

¹⁷³ Juan Marchetti and Petros Mavroidis, ‘The Genesis of the GATS (General Agreement on Trade in Service)’ (2011) 22 *The European Journal of International Law* 689.

Uruguay Round of GATT negotiations.¹⁷⁴ This was not, however, an automatic outcome of trade interests emanating from the US as one of the causal explanations for the emergence of GATS, discussed in the previous section.¹⁷⁵ Although these interests had been pursued since the 1970s, particularly in the financial services industry, no significant results were achieved in the Tokyo Round of the GATT negotiations in 1979.¹⁷⁶ This was because the services had traditionally been heavily 'regulated'¹⁷⁷ by state institutions, and the idea of opening up services markets to international competition did not find prompt political acceptance.¹⁷⁸ It required a quantum shift in the 'mind-set' of the international community 'to believe that the long-term benefits of trade liberalisation could outweigh the substantial adjustment costs and risks involved.'¹⁷⁹

This process was described by Drake and Nicolaidis as 'institutionalisation of trade in services', and happened in three stages.¹⁸⁰ The term 'trade in services' was originally coined by OECD experts in 1972.¹⁸¹ During this stage, a lot of conceptual work, e. g. defining services trade, identifying barriers to services trade, examining whether domestic regulations were trade distortions or genuine regulatory measures, also took place.¹⁸² This stage ended with the services trade finally reaching the GATT forum during a 1982 ministerial meeting¹⁸³. An agreement was reached at this stage that the countries interested in the multilateral services trade would undertake studies of their own services sectors, and provide feedback.¹⁸⁴

¹⁷⁴ Andrew Lang, 'GATS' in Bethlehem and others (eds), *The Oxford Handbook of International Trade Law* (Oxford 2009) 160-165.

¹⁷⁵ Erik Wesselius, 'Driving the GATS Juggernaut' (2003) Red Pepper, available at: <http://www.globalpolicy.org/component/content/article/209/43694.html> accessed 15 June 2015.

¹⁷⁶ Wendy Dobson and Pierre Jacquet, *Financial Services Liberalisation in the WTO* (Washington DC Institute of International Economics 1997); Patrick Love and Ralph Lattimore (2009), 'Trade Rounds and the World Trade Organization' in *International Trade: Free, Fair and Open?* (OECD Publishing).

¹⁷⁷ There could be a number of considerations for regulating the services markets by the national governments, e.g. protection of environment, public health or integrity of financial markets.

¹⁷⁸ Julian Arkell, 'Lobbying for Market Access for Professional Services' in Michael Kostecky (ed), *Marketing Strategies for Services* (Oxford: Pergamon Press 1994); Bernard Hoekman and Michael Kostecky, *The Political Economy of the World Trading System* (3rd edn, Oxford 2010).

¹⁷⁹ Andrew Lang, 'GATS' in Bethlehem and others (eds), *The Oxford Handbook of International Trade Law* (Oxford 2009).

¹⁸⁰ William Drake and Kalypto Nicolaidis, 'Ideas, Interests and Institutionalization: "Trade in Services" and the Uruguay Round' (1992) 46 International Organization.

¹⁸¹ Ibid.

¹⁸² Andrew Lang, *World Trade Law after Neoliberalism: Re-imagining the Global Economic Order* (Oxford 2011).

¹⁸³ See the services component of 1982 ministerial declaration of the GATT at: https://www.wto.org/gatt_docs/English/SULPDF/91000208.pdf accessed 15 June 2015.

¹⁸⁴ William Drake and Kalypto Nicolaidis, 'Ideas, Interests and Institutionalization: "Trade in Services" and the Uruguay Round' (1992) 46 International Organization 345.

This is where the second stage began, which focused upon convincing the international community that the services trade was beneficial to them.¹⁸⁵ Positioning themselves with regards to the services trade, developing countries initiated a work programme with UNCTAD,¹⁸⁶ whose research showed that developing countries might have comparative advantage in some services, if not in all.¹⁸⁷ Simultaneously, OECD¹⁸⁸ also produced a ‘bombardment of studies’¹⁸⁹ to show the importance of the services trade to developed countries other than the US.¹⁹⁰ This stage was completed when resistance to the liberalization of the services trade had generally faded, and it landed squarely in the Uruguay Round Agenda in 1986 in Punta del Este.¹⁹¹ The Ministerial Declaration of Punta del Este read:

‘Negotiations in this area shall aim to establish a multilateral framework of principles and rules for trade in services, including elaboration of possible disciplines for individual sectors, with a view to expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting economic growth of all trading partners and the development of developing countries’.¹⁹²

¹⁸⁵ Patrick Messerlin and Carl Sauvant, *The Uruguay Round: Services in the World Economy* (Washington DC: The World Bank 1990).

¹⁸⁶ United Nations Conference on Trade and Development. Some of its services related studies are available at:
<<http://unctad.org/en/Pages/Home.aspx>> accessed 15 June 2015.

¹⁸⁷ See UNCTAD Trade and Development Reports from 1981 to 1987 at:
<<http://unctad.org/en/Pages/Publications/TradeandDevelopmentReport.aspx>> accessed 15 June 2015.

¹⁸⁸ The Organization for Economic Co-operation and Development. See for member countries and studies at:
<<http://www.oecd.org/about/>> accessed 15 June 2015.

¹⁸⁹ UNCTAD, ‘Services and the Development Process’ (1985) TD/B/1008/Rev.1; UNCTAD yearly investment reports ; UNCTAD Trade and Development Reports from 1981 to 1987 at:
<<http://unctad.org/en/Pages/Publications/TradeandDevelopmentReport.aspx>> accessed 15 June 2015.

OECD studies at:
<<http://www.oecd.org/about/>> accessed 15 June 2015.

¹⁹⁰ Patrick Moray Weller and Chong Xu Yi, *The Governance of World Trade: International Civil Servants and the GATT/WTO* (Edward Elgar 2004)139.

¹⁹¹ See the details of the Round at:
<http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm> accessed 15 June 2015.

¹⁹² Original text available at:
<http://www.sice.oas.org/trade/Punta_e.asp> accessed 15 June 2015.

The third stage, which began in 1986 ended in 1994¹⁹³ with the conclusion of the General Agreement on Trade in Services (GATS), established a new legal regime for the multilateral services trade.¹⁹⁴ Key difficulties in the drafting of GATS at this negotiation stage pertained to the definition of services, the extent of the coverage of the agreement, and the nature of the rules and mechanisms to distinguish between genuine regulatory concerns and services trade barriers.¹⁹⁵

From a regulatory perspective, which is the main focus of this thesis, the most challenging of these was to distinguish between genuine domestic regulatory concerns and potential trade ‘barriers’.¹⁹⁶ However, not enough attention was paid to this particular area in the drafting of GATS, making it the strongest challenge for the GATS regulatory framework in subsequent stages.¹⁹⁷ This view is supported by the fact that an EC proposal for the creation of an expert ‘regulation committee’ to design a mechanism for distinguishing genuine regulatory concerns from services trade barriers was not followed enthusiastically.¹⁹⁸ In the absence of such a mechanism, the GATS framework only provides a reference in its preamble to the Members’ ‘right to regulate’ and Articles XIV and XIV, which lay down exceptions from GATS obligations on the basis of health, morals and security reasons. These provisions, however, are quite narrow and not sufficient to strike a balance between the GATS liberalization objectives and the Members’ regulatory autonomy.¹⁹⁹ The result is

¹⁹³ Agreement for the creation of the WTO was signed in Marrakesh in April 1994 and the GATS was one of the Agreements under the WTO umbrella. See the WTO website at: < http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm> accessed 15 June 2015.

¹⁹⁴ Bernard Hoekman, ‘Assessing the General Agreement on Trade in Services’ in Will Martin and Alan Winters (eds), *The Uruguay Round and the Developing Economies* (Cambridge 1996) for a detailed account of the GATs and services trade liberalization commitment made by different countries.

¹⁹⁵ Geza Feketekuty, *International Trade in Services: An Overview and Blueprint for Negotiations* (Cambridge Ballinger 1998); Andrew Lang, *World Trade Law after Neoliberalism: Reimagining the Global Economic Order* (Oxford 2011).

¹⁹⁶ T Warren and C Findlay, ‘How significant are the Barriers? Measuring Impediments to Trade in Services’ in Sauve and Stern (eds), *Services 2000: New Directions in Services Trade Liberalisation* (Washington DC Brookings Institute 2000); Robert Stern, ‘Labour Standards and Trade’ in Marco Bronckers and Reinhard Quick (eds), *World Trade Law: Essays in Honour of John Jackson* (Kluwer Law 2000).

¹⁹⁷ As has been pointed out in the previous section, during the foundation years of the GATS, neo-liberal thought dominated the process which focused more on designing the mechanisms for prying open the services markets rather than creating a balance between the domestic regulatory concerns and the liberalizing objectives of the GATS.

¹⁹⁸ GATT Doc. MTN.GNS/W/65 of 20 July 1989. Mario Marconini, ‘The Uruguay Round Negotiations on Services’ in P A Messerlin and K Sauvart (eds), *The Uruguay Round: Services in the World Economy* (The World Bank, Washington, 1990)19-25. Also see Drake and Nicolaidis above.

¹⁹⁹ As a result, domestic regulatory provisions are often caught on the radar for being unduly trade restrictive as will be discussed in Ch 2 which deals with the GATS case law.

a deadlock situation in the services negotiations and liberalization gains²⁰⁰, to be discussed in more detail in Chapter 3, which deals with the current round of WTO negotiations.

The three institutions consulted most frequently to address conceptual difficulties with regards to the four broad issues mentioned above were the GATT secretariat, the OECD and the UNCTAD.²⁰¹

These three institutions not only made direct intellectual contributions based on their own expertise and studies, but were also the central points for collecting and disseminating relevant information produced by a broader range of scholars, think-tanks, government officials and business lobby groups.²⁰² This is what Drake and Nicolaidis termed the 'epistemic community' of services trade.²⁰³ The background conceptual work done by this community provided the basic ideas, concepts and rules which found their place in various drafts of the GATS.²⁰⁴

The point is that all these studies²⁰⁵ focused upon demonstrating to the international community that free services trade had great economic advantage, without much reflection on the GATS regulatory implications.²⁰⁶ The 'epistemic community' described above, while having the advantage

²⁰⁰ There are very limited trade gains so far from the GATS although it has been in field for almost two decades. The services rule-making agenda of the WTO is also facing bottlenecks. See various reports by the Chairman of the Council for Trade in Services available at the WTO website. Also Marion Panizzon and Nicole Pohl, 'Testing regulatory autonomy, disciplining trade relief and regulating variable peripheries: Can a cosmopolitan GATS do it all?' in Marion Pannizon, Nicole Pohl and Pierre Sauve (eds), *GATS and the Regulation of International Trade in Service* (Cambridge 2008) 4, 31; Hamid Mamdouh, 'Services liberalisation, negotiations and regulation: some lessons from the GATS experience' in Aik Hoe Lim and Bart De Meester (eds), *WTO Domestic Regulation in Services Trade: Putting Principles into Practice* (Cambridge 2014); Batshur Gootiiz and Aaditya Matoo, 'Services in Doha: What's on the Table?' (2009) 43 *Journal of World Trade* 1013; Jara Alejandro and M del Carmen Dominguez, 'Liberalisation of Trade in Services and Trade Negotiations' (2006) 40 (1) *Journal of World Trade*.

²⁰¹ See a number of publications by the institutions and their staff. UNCTAD and The World Bank, *Liberalising International Transactions in Services: A Handbook* (Geneva UN 1994); Jagdish Bhagwati, 'Trade in Services and Multilateral Trade Negotiations' (1987) 1 *World Bank Economic Review*; UNCTAD, 'Services and the Development Process' (1985) TD/B/1008/Rev.1; UNCTAD among yearly investment reports issued by the UNTAD.

²⁰² William Drake and Kalypso Nicolaidis, 'Ideas, Interests and Institutionalization: "Trade in Services" and the Uruguay Round' (1992) 46 *International Organization* 345.

²⁰³ Ibid.

²⁰⁴ This becomes evident when we study the GATS provisions in the next section. Most of the GATS provisions have their roots in the already existing experience in the goods trade in the form of GATT agreement.

²⁰⁵ UNCTAD, 'Services and the Development Process' (1985) TD/B/1008/Rev.1; UNCTAD yearly investment reports; UNCTAD Trade and Development Reports from 1981 to 1987 at: <http://unctad.org/en/Pages/Publications/TradeandDevelopmentReport.aspx> accessed 15 June 2015.

OECD studies at:

<http://www.oecd.org/about/> accessed 15 June 2015.

²⁰⁶ These implications mainly pertain to the WTO members' regulatory autonomy due to the peculiar nature of services trade as discussed earlier. These have been highlighted while analysing the specific obligations under the GATS in the next section dealing with the GATS framework and then flagged up in the concluding section of the chapter.

of 'experience' in multilateral trade rule-making,²⁰⁷ also had strong limitations. This community's experience was limited to the goods trade and did not bring in any services specific knowledge. The main principles of GATS have therefore been taken from GATT, e.g. the principles of Most Favoured Nation and National Treatment.²⁰⁸ In fact, in some places the entire text of a legal provision has been picked up from the GATT agreement and placed into GATS with slight modifications. One example of this is the domestic regulatory disciplines laid down in both treaties. In the absence of much thought on what could be the regulatory implications of GATS obligations, the MFN and national treatment principles for the services are also interpreted on the basis of goods related jurisprudence.²⁰⁹ This has extended the scope of the GATS legal obligations beyond its regulatory mandate which envisages 'progressive liberalization' of the services trade, while recognising the Members' right to regulate. Chapter 2 of this thesis, which deals with GATS case law, further demonstrates this.

More intriguing is the similar conceptualization of barriers to trade in services, although these so-called barriers are almost exclusively domestic regulatory measures.²¹⁰ This makes it clear that when creating the conceptual foundation of GATS, not enough attention was paid as to how the services trade liberalization objectives were to be balanced against WTO Members' regulatory autonomy, and the peculiar challenges involved in regulating the services trade.²¹¹

Various studies convinced the international community of the economic benefits of liberalizing services trade.²¹² The conceptual foundation for a legal framework for the services trade was drawn from GATT.²¹³ Accordingly, 'one could say that GATS is the child of GATT and economic research on services.'²¹⁴

²⁰⁷ The GATT secretariat had been dealing with the goods trade related rule-making since the coming into force of the GATT in 1948.

²⁰⁸ Articles II and XVII of the GATS.

²⁰⁹ See Ch 2 on the GATS case law.

²¹⁰ Michael Trebilcock, Robert Howse and Antonia Eliason, *The Regulation of International Trade* (4th edn, Routledge 2013); John Jackson, 'The Evolution of the World Trading System-The Legal and Institutional Context' in Bethlehem and others (eds), *The Oxford Handbook of International Trade Law* (Oxford 2009).

²¹¹ These challenges continue to manifest themselves in the form of very limited progress in terms of liberalization gains in the services trade, discussed in more detail in Ch 3 which deals with the current round of trade negotiations.

²¹² Refer to the UNCTAD, OECD and the World Bank Studies referred above.

²¹³ See the role of the GATT secretariat in framing services related disciplines and a remarkable similarity between the provisions of both the agreements. Further established in the next section dealing with the GATS framework.

²¹⁴ Piet Eeckhout, 'Constitutional Concepts for Free Trade in Services' in Grainne de Burca and Joanne Scott (eds), *The EU and the WTO: Legal and Constitutional Issues* (Hart Publishing 2001) 217.

This reaffirms that not much regulatory work was done to balance the domestic regulatory considerations of the Member countries against the GATS liberalization objectives; nor were any lessons drawn from existing regulatory frameworks for the services trade, for instance, from the EU.²¹⁵ Instead, the economic benefits from liberalization of the services trade, and the regulatory principles used for the goods trade became the foundation for GATS.

One might argue that since there had been no experience of multilateral services trade liberalization before GATS, reliance could only be placed on the conceptual foundation available for the goods trade. However, some regulatory input from the EU, which had longer experience in regulating services trade plurilaterally, may have provided useful insight.²¹⁶ The EU definitely had a substantial body of case law in the services trade,²¹⁷ and principles stemming from this case law might have served as the GATS conceptual foundation better than mere economic theory.²¹⁸ Later on, this study will be looking at the EU to gain some insights into multilateral services trade governance.²¹⁹ However, one specific point which is worth highlighting here is the EU Court ruling regarding the sharing of competencies in GATS related matters between its central jurisdiction and its Member states.²²⁰

When multiple trade related agreements involving goods, services, intellectual property rights, etc. were brought under the umbrella of the WTO in 1994,²²¹ a question arose as to the respective competences of the European Community (EC) and its Member states. The European Commission considered that the EC had sole powers in concluding various agreements under the WTO, while

²¹⁵ See the recent work of Marcus Klamert, *Services Liberalisation in the EU and the WTO: Concepts, Standards and Regulatory Approaches* (Cambridge 2014) which suggests that some of the regulatory approaches in the EU can be used in the multilateral setting. Similarly comparisons have been drawn between the WTO and the EU settings by other authors including Grainne de Burca and Joanne Scott (eds), *The EU and the WTO: Legal and Constitutional Issues* (Hart Publishing 2001).

²¹⁶ This is one of the reasons for using the EU experience in financial services trade liberalization as a case study for drawing some lessons for this thesis.

²¹⁷ Piet Eeckhout, 'Constitutional Concepts for Free Trade in Services' in Grainne de Burca and Joanne Scott (eds), *The EU and the WTO: Legal and Constitutional Issues* (Hart Publishing 2001) 217.

²¹⁸ Marcus Klamert, *Services Liberalisation in the EU and the WTO: Concepts, Standards and Regulatory Approaches* (Cambridge 2014); Sanford Gaines, Brigitte Oslen and Engsig Sorensen (eds), *Liberalising Trade in the EU and the WTO: A Legal Comparison* (Cambridge 2012).

²¹⁹ Ch 4 of the thesis looks at the financial services trade liberalization in the EU as a case study for drawing some lessons for the GATS.

²²⁰ Art. 228(6) ECT: 'The Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty. Where the opinion of the Court of Justice is adverse, the agreement may enter into force only in accordance with Article N of the Treaty on European Union'.

²²¹ Marrakesh Agreement constituting the WTO was signed in 1994 at:
<http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm> accessed 15 June 2015.

the Member states did not want to completely relinquish their powers.²²² Accordingly, the ECJ was asked for its opinion.²²³ The Court ruled that while the Community had sole competency to conclude agreements on the goods trade, this competency was 'shared' between the Member states and the Community for the purposes of agreements relating to the services trade and intellectual property rights.²²⁴

This opinion is indicative of the fact that the need to balance between the liberalization objectives and the Members' regulatory autonomy was duly acknowledged by the ECJ. However, those responsible for drafting GATS seem to have ignored any lessons that might have been learnt from the governance of services trade in the EU during the same period. Since then, the EU governance has further refined the question of competence and the mechanisms to balance its Member states' regulatory autonomy with its integration objectives.²²⁵ In fact, this is one area that has driven reform in EU governance, as will become evident from the EU study carried out in the next section. On the contrary, GATS rule-making has mainly focused on creating horizontal disciplines for domestic regulations, so that they do not become unnecessary trade restrictions.²²⁶

Needless to say, exclusive reliance on the goods trade experience when drafting a legal framework for the multilateral services trade led to an agreement that was not nuanced enough for the services trade. Some commentators see the 'premium on objectivity' in this arrangement, by which independent experts, instead of political representatives, undertook to draft the GATS.²²⁷ In their view, the negotiators had a better chance of reaching an agreement on general principles and rules if the proposals were coming from an independent group of experts, rather than the negotiators themselves.²²⁸ While the objectivity of independent experts may have helped in adopting GATS at

²²² Paul Craig and Grainne de Burca, *EU Law: Text, Cases and Material* (5th edn, Oxford 2011) 314.

²²³ Juka Snell, *Goods and Services in EC Law: A Study of the Relationship between the Freedoms* (Oxford 2002).

²²⁴ Ibid; Alan Dashwood and others (eds), *The Cambridge Yearbook of European Legal Studies: 2001* (Hart 2002).

Bello Hippler, 'Opinion 1/94, Community Competence to Conclude Certain International Agreements' (1995) 89 *The American Journal of International Law* 772; Meinhard Helif, 'The ECJ's Opinion 1/94 on the WTO No Surprise, but Wise?' (1995) 6 *EJIL* 245.

²²⁵ This has been discussed at some length in Ch 4 dealing with the EU governance model.

²²⁶ More detail of the GATS rule-making agenda is contained in Ch 3.

²²⁷ Andrew Lang, 'GATS' in Bethlehem and others (eds), *The Oxford Handbook of International Trade Law* (Oxford 2009) 160-165.

²²⁸ Ibid.

the time of the Uruguay Round conclusion,²²⁹ what effect it had on the practical application of GATS in subsequent years remains an open question.

One aspect of the GATS practical application relates to its treatment of regulatory diversity amongst WTO Members. The epistemic community was responsible for developing an intellectual consensus that ‘services transactions had common trade properties, faced common trade barriers, and could be governed according to common trade principles’.²³⁰ The diversity of various services sectors and WTO Members is far from this assumption regarding the regulatory homogeneity which inspired the drafting of GATS. This is evident from the following account, which contains a brief negotiating history of GATS.

2.2. Negotiating the GATS

The Punta del Este Ministerial Declaration of the Uruguay Round of the GATT negotiations had an agenda to establish a framework of rules and principles for multilateral services trade, and to elaborate possible disciplines for individual services sectors.²³¹ There was a broad understanding that the general framework for the services trade would rely on the relevant GATT principles.²³² Negotiating the GATS was an uphill task,²³³ the reasons for which were wide ranging. The primary reason, however, was the diversity of the negotiators’ views on the nature of a multilateral framework for the services trade.²³⁴ After all, this was not the group of like-minded countries who gathered to negotiate and create the GATT in 1947.²³⁵ The position of different players in relation to the services trade during the Uruguay Round is summed up below, and exposes the vast differences between their positions at the time of the GATS negotiations, despite the role of the

²²⁹ Agreement for the creation of the WTO was signed in Marrakesh in April 1994 and the GATS was one of the Agreements under the WTO umbrella. See the WTO website at: http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm accessed 15 June 2015.

²³⁰ William Drake and Kalypso Nicolaidis, ‘Ideas, Interests and Institutionalization: “Trade in Services” and the Uruguay Round’ (1992) 46 *International Organization* 345.

²³¹ Rachael McCulloch, ‘Services and the Uruguay Round’ (1990) 13 *The World Economy* 329; Graham Dunkley, *The Free Trade Adventure: The Uruguay Round and Globalism- A Critique* (Zed books 1997).

²³² Mario Marconini, ‘The Uruguay Round Negotiations on Services’ in P A Messerlin and K Sauvart (eds), *The Uruguay Round: Services in the World Economy* (The World Bank, Washington 1990) 19-25.

²³³ Geza Feketekey, ‘Assessing and Improving the Architecture of GATS’ in Pierre Sauve and R M Stern (eds), *GATS 2000, New Directions in Services Trade Liberalization* (The Brookings Institute 2000) 85-111.

²³⁴ Geza Feketekey, *International Trade in Services: An Overview and Blueprint for Negotiations* (Cambridge Ballinger 1998); Gary Hufbauer and Erika Wada, *Unfinished Business: Telecommunications of After the Uruguay Round* (Washington DC Institute of International Economics 1997).

²³⁵ Robert Gilpin, *Global Political Economy: Understanding the International Economic Order* (Princeton University Press 2001).

'epistemic community' in bridging the gaps, as discussed above.²³⁶ This diversity of views further strengthens the need for flexibility in the multilateral disciplines, a fact which seems to have been ignored by the GATS regulators in subsequent years.²³⁷

The US wanted a comprehensive agreement that would have the greatest participation by countries, and would cover maximum services sectors.²³⁸ According to the US, all countries except for the least developed countries (LDCs) needed to make reasonable liberalization efforts so that a truly multilateral framework could come into force.²³⁹ It was ready to make concessions to LDCs to enable them to participate.²⁴⁰ The EU adopted a similar position, providing its overriding concerns for the preservation of its Common Agriculture Policy (CAP) were addressed.²⁴¹ Most of the other OECD countries, including the UK, Australia, Canada, Japan, Sweden and Switzerland, while approving the overall services negotiations, were more interested in some services sectors than others.²⁴² Opinions varied on which sectors should be included, and which excluded from the ambit of the MFN provisions of GATS, making negotiations difficult.²⁴³ This is because different countries had different regulatory concerns,²⁴⁴ and can be understood in terms of the regulatory control in different sectors depending on a country's specific policy objectives.²⁴⁵ In fact during the Uruguay Round, vast differences remained in the position of different countries regarding a number of services sectors, including financial services, maritime transport, movement of naturalized persons

²³⁶ Juan Marchetti and Petros Mavroidis, 'The Genesis of the GATS (General Agreement on Trade in Service)' (2011) 22 *The European Journal of International Law* 689.

²³⁷ The approaches being adopted or recommended for the GATS regulation have been discussed in Chs 2 and 3 respectively which are inclined towards subjecting domestic regulations to universal disciplines, not a very flexible strategy. See Ch 2 on the interpretation of GATS treaty by the WTO dispute settlement bodies and Ch 3 on the current rule-making agenda of the WTO.

²³⁸ See United States Trade Representatives Annual Report to the President.

'The United States on the Trade Agreements Program', 1984-85, Appendix M: U.S. Goals for Trade in Services, 153.

²³⁹ *Ibid.*

²⁴⁰ Terrence Berg, 'Trade in Services: Toward a "Development Round" of GATT Negotiations Benefiting Both Developing and Industrialized States' (1987) 28 *Harvard International Law Journal* 1.

²⁴¹ CAP was a system of agricultural subsidies launched in 1962 and was a politically sensitive subject: <http://ec.europa.eu/agriculture/cap-for-our-roots/index_en.htm> accessed 15 June 2015.

²⁴² Geza Feketeaky, *International Trade in Services: An Overview and Blueprint for Negotiations* (Cambridge Ballinger 1998).

²⁴³ Juan Marchetti and Petros Mavroidis, 'The Genesis of the GATS (General Agreement on Trade in Service)' (2011) 22 *The European Journal of International Law* 689.

²⁴⁴ *Ibid.*

²⁴⁵ Mario Marconini, 'The Uruguay Round Negotiations on Services' in P A Messerlin and K Sauvart (eds), *The Uruguay Round : Services in the World Economy* (The World Bank, Washington 1990).

and basic telecommunication.²⁴⁶ For instance, in network-based services like telecommunication and transport, governments wanted to be able to control the infrastructure to prevent anti-competitive behaviour. On the other hand, for the professional services, they wanted the necessary regulations put in place to maintain particular standards of competence.²⁴⁷

Developing countries were also divided on the subject of services trade disciplines during the negotiations.²⁴⁸ G-10²⁴⁹ was a partnership of developing countries, including Brazil and India, which were firmly opposed to the inclusion of services in the Round.²⁵⁰ However, the then Indian Ambassador Shukla explained that, parallel to the Punta del Este negotiations, secret negotiations were being held in Geneva between the EU, India and Brazil.²⁵¹ A ‘common working platform’ emerged out of these negotiations, which consisted of three elements.²⁵² This platform reached an understanding that the services and the goods negotiations should have separate legal tracks, that the services negotiations should have development orientation and that national regulations should be respected.²⁵³

Some of the developing countries were in favour of the services component of the Uruguay Round from the outset.²⁵⁴ They joined other developed countries in what came to be known as the *Café*

²⁴⁶ Ibid.

²⁴⁷ Sauv , ‘Regional Versus Multilateral Approaches to Services and Investment Liberalization: Anything to Worry About?’ in P D maret, J F Bellis and G Garcia-Jimenez (eds), *Regionalism and Multilateralism* (Brussels: European Interuniversity Press 1997).

²⁴⁸ Rachael McCulloch, ‘Services and the Uruguay Round’ (1990) 13 *The World Economy* 329.

²⁴⁹ G 10 included Argentina, Brazil, Egypt, India, Yugoslavia, Cuba, Nigeria, Nicaragua, Peru and Tanzania.

²⁵⁰ Hoekman, Mattoo and English (eds), *Development, Trade, and the WTO: A Handbook*, (The World Bank 2002 1).

²⁵¹ Shukla, ‘From GATT to WTO and Beyond’, (2000) The United Nations University, World Institute for development Economic Research Working Paper 195. Available at: http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=OCCwQFjAA&url=http://www.wider.unu.edu/publications/working-papers/previous/Fen_GB/Fwp-195/files/F82530864827082831/default/Fwp195.pdf&ei=cVYXU56WJ-b_ygPhugl&usg=AFQjCNH8W4sNCecq6LETi_z7pQyD6ztFfQ&bvm=bv.62286460,d.bGQ accessed 15 June 2015.

²⁵² See Shukla ‘From GATT to WTO and Beyond’, The United Nations University, World Institute for development Economic Research Working Paper 195, August 2000 as above.

²⁵³ Ibid.

²⁵⁴ See fn 263.

au Lait group.²⁵⁵ This group served as a bridge between the two extreme positions taken by the US and the G10 for the services trade negotiations, and helped to overcome the 'North-South divide'.

²⁵⁶ Two distinct positions can be seen existing in the Round on the question of multilateral services trade. The US and some other developed countries were of the view that there should be a comprehensive framework in place for multilateral services trade, covering all services sectors.²⁵⁷ The developing countries, according to the lead of India and Brazil, asserted that negotiations should take place in service sectors of specific interest to them, and that their regulatory autonomy should be respected.²⁵⁸

Although the negotiations continued, and the delegates kept struggling to overcome their differences, after the Brussels Ministerial Conference in 1990,²⁵⁹ the negotiations predominantly remained with the representatives of the US, the EU and India.²⁶⁰ They had frequent meetings amongst themselves and the GATT secretariat.²⁶¹ These meetings produced a lot of material on the services trade for the then DG of GATT, who put together a draft known as Dunkel Draft.²⁶² This draft became the basis for the final agreement on services trade, the GATS.²⁶³

The overall results from the Uruguay Round were concluded in the form of a package, of which the GATS was a part.²⁶⁴ Many questions regarding services trade were left unanswered in this draft, the

²⁵⁵ Café au Lait included over 48 countries, and the draft proposal by this group provided the basis for the Punta del Este declaration that launched the Uruguay Round and services within it. See Carolyn Deere- Birkbeck (ed), *Making Global Trade Governance Work for Development* (Cambridge 2011); Juan Marchetti and Petros Mavroidis, 'The genesis of the GATS' (2011) 22 (3) EJIL 689-721.

Cornelia Woll, 'Strategies of the Emerging Countries in the World Trade Organization' in Christophe Jaffrelot (ed), *Emerging States: The Wellspring of a New World Order* (Paris: Presses de Sciences Po 2008).

²⁵⁶ North South divide refers to the variance in positions of developed countries led by the US and developing countries led by India. Diana Tussi and Miguel Lengyel, 'Developing Countries: Turning Participation into Influence' in Hoekman, Mattoo and English (eds), *Development Trade and the WTO: A Handbook* (The World Bank 2002) 490.

²⁵⁷ Mario Marconini, 'The Uruguay Round Negotiations on Services' in P A Messerlin and K Sauvart (eds), *The Uruguay Round: Services in the World Economy* (The World Bank, Washington 1990).

²⁵⁸ Jane Kelsey, *Serving Whose Interests? The Political Economy of Trade in Services Agreements* (Routledge Cavendish 2008).

²⁵⁹ GATT Doc.MTN.TNC/W/35/Rev.1,Annex II of Dec.1990.

²⁶⁰ Diana Tussi and Miguel Lengyel, 'Developing Countries: Turning Participation into Influence' in Hoekman, Mattoo and English (eds), *Development Trade and the WTO: A Handbook* (The World Bank 2002).

²⁶¹ William Drake and Kalypto Nicolaidis, 'Ideas, Interests and Institutionalization: "Trade in Services" and the Uruguay Round' (1992) 46 International Organization 345.

²⁶² GATT Doc.MTN.TNC/W/FA of 20 Dec.1991.

²⁶³ GATT Doc.MTN.TNC/25 of 5 Feb.1992.

²⁶⁴ The Marrakesh agreement establishing the WTO provided an elaborate institutional arrangement for multilateral trade among WTO members. There are four Annexes that lay down the details of the members'

most prominent of which was how to identify a services trade barrier from the genuine regulatory concerns of WTO Members.²⁶⁵ Although there is a reference in the GATS preamble to the Members' right to regulate to protect domestic regulatory concerns, no clear cut mechanism has been provided to practically enable this.²⁶⁶ Exceptions to the GATS legal obligations available in Articles XIV and XIV are limited in nature, and relate to moral, health or security reasons. In the presence of the otherwise overarching disciplines on domestic regulations, as will be shown in the discussion on the GATS framework in the next section, these exceptions hardly provide sufficient cover for WTO Members to open up their services markets, a fact substantiated by the scant progress in multilateral trade under GATS.

The GATS preamble states progressive liberalization of the services trade as one of its objectives, with the acknowledgment that Members have a right to regulate or to introduce new regulation in order to meet national policy objectives. However, in the absence of a clear mechanism to draw the distinction between genuine regulatory concerns and a services trade 'barrier', the core GATS objective remains elusive, as has already been pointed out.

The GATS negotiating history traced above points to the tension between the services trade liberalization goals of the world community and the fears of individual countries concerning the loss of their regulatory autonomy. Discussing the GATS conceptual foundation shows that little has been done to address this tension, since reliance was placed on goods trade related regulatory approaches, without giving sufficient attention to the peculiarities of the services trade.

After tracing the GATS conceptual foundation and its negotiating history, the next section carries out a study of the GATS framework and its legal obligations. This is done with a view to highlighting how the GATS legal obligations affect WTO Members' domestic regulatory space, and considering whether the apprehension expressed by countries during the negotiation of GATS regarding loss of regulatory autonomy was well founded.

rights and obligation. Annex I has three parts dealing with goods trade (GATT), services trade (GATS) and Intellectual Property rights (TRIPS). See the official WTO website.

²⁶⁵ This is substantiated by the fact that before or during the Uruguay round, no exercise was conducted to assess what constituted trade barriers for different sectors or different countries. The first such attempt was made by Hoekman and Francois in 'Services Trade and the Policy' (2000) Working Paper 60 of The Vienna Institute for International Economic Study. It has already been discussed that due to the peculiar nature of services, barriers to trade are not tariff measures as in the goods trade, but regulatory measures. In the absence of sector specific data on services trade barriers, only generalised (and very broad) disciplines were laid down in the GATS framework.

²⁶⁶ As becomes clear from the analysis of the GATS framework in the next section.

D. The GATS Framework

Most of the research on services trade liberalization under GATS has focused on the modest trade liberalization gains and the reasons for this.²⁶⁷ Various reasons have been attributed, including ambiguities in the text,²⁶⁸ the vast regulatory diversity of the WTO Membership²⁶⁹ and a lack of trust on the part of many WTO Members regarding the comparative gains from services trade liberalization.²⁷⁰ There has been substantial critique of the GATS text and its inherent ambiguities and complexities, together with discussion on improving GATS related liberalization commitments.²⁷¹

However, it could be said that the overall GATS governance, which includes not only its framework, but also its regulatory approaches, the interpretation of its legal obligations by the WTO dispute settlement bodies, and other informal ways of creating norms such as multilateral negotiations, have not been addressed holistically. GATS governance and analysis of the GATS framework for its regulatory implications and ability to accommodate the services trade related regulatory concerns of WTO Members are important components of this study.²⁷² Since the study aims to find ways to balance the GATS liberalization objectives and individual countries' regulatory autonomy, an analysis of the GATS framework, focusing on its implications for WTO Member countries' regulatory autonomy is usefully carried out.

The predominant elements of the GATS structure are a general set of rules which apply to all services trade related measures, schedules of specific commitments and a set of annexes which

²⁶⁷ See *inter alia* Andre Sapir, 'The General Agreement on Trade in Services: From 1994 to the year 2000' (1999) 33 *Journal of World Trade* 51; Panagiotis Delimatsis, *International Trade in Services and Domestic Regulations* (Oxford 2007).

²⁶⁸ See John Jackson's editorial note in *International Trade in Services and Domestic Regulations* (Oxford 2007).

²⁶⁹ Panagiotis Delimatsis and others, 'Developing Trade Rules for Services: a case of fragmented coherence?' in Cottier and Delimatsis (eds), *The Prospects of International Trade Regulation: From Fragmentation to Coherence* (Cambridge 2011).

²⁷⁰ Barnard Hoekman, 'Liberalizing Trade in Services: A Survey' World Bank Policy Research Working Paper 4030, October 2006.

²⁷¹ See *inter alia* Juan Marchetti and Petros Mavroidis, 'What Are the Main Challenges for the GATS Framework? Don't Talk About Revolution' (2004) 3 *European Business Organization Law Review*; Pierre Sauve, 'Assessing The General Agreement on Trade in Services - Half Full or Half empty?' in R Howse (ed), *The World Trading System –Critical Perspective on World Economy* (Routledge 1998); Panagiotis Delimatsis *International Trade in Services and Domestic Regulations* (Oxford 2007)10; Leroux, 'Eleven Years of GATS Case Law: What Have We Learned' (2007) JIEL.

²⁷² The few studies which do touch on this include Marion Panizzon, Nicole Pohl and Pierre Sauve, *GATS and the Regulation of International Trade in Services* (Cambridge 2008); Panagiotis Delimatsis, *International Trade in Services and Domestic Regulations* (Oxford 2007); Aaditya Mattoo and Pierre Sauve (eds), *Domestic Regulation and Services Trade Liberalisation* (World Bank and OUP 2003); Aik Hoe Lim and Bart De Meester Bart (eds), *WTO Domestic Regulation and Services Trade: Putting Principles into Practice* (Cambridge 2014).

relate to implementation modalities.²⁷³ This structure has at its foundation an understanding that periodic negotiations will be initiated by Members to gradually liberalize trade in services.²⁷⁴

An analysis of the GATS layout reveals that Articles I to XXIX can be broadly placed in six parts. Part I consists of Article I, which defines services and lays out the extent of the sectoral coverage and general scope of the Agreement. Part II consists of Articles II-XV, and sets out Members' general obligations which apply unconditionally to all sectors, or conditionally to a specific commitment. Part III from Articles XVI-XVIII defines the scope of specific commitments which a Member might have undertaken in scheduled sectors or through market access and national treatment. Part IV consists of Articles XIX to XXI, and explains various procedures regarding the modification or withdrawal of commitments, structure of schedules and the framework for gradual liberalization through future negotiations. Part V, which consists of Articles XXII-XVI, elaborates on the procedural and institutional issues, including dispute settlement. Part VI covers Articles XXVII-XXIX, and contains general provisions and definitions.

1. The GATS Definition of the Services and its Regulatory Implications

Instead of a definition, GATS provides broad guidelines as to what type of 'transactions' fall under the purview of GATS. Article 1.2 stipulates that services consist of four types of transactions according to their modes of supply, i.e. supply of a service from the territory of one Member into another (cross-border), consumption of a service by consumers of one Member who have moved into the territory of another Member (consumption abroad), services being provided by foreign suppliers which are commercially established in the territory of another Member (commercial presence) and services provided by naturalized persons who have moved to the territory of another Member (presence of naturalized persons). GATS applies to all measures affecting trade in all of these modes, and all service sectors, with the exception of services supplied under 'governmental authority', e. g. social security services, or measures affecting air traffic rights.²⁷⁵ Apart from these two sectors there are other general exceptions, related to public morals, plants, animal health, etc.²⁷⁶

²⁷³ Andrew Lang, 'GATS' in Bethlehem and others (eds), *The Oxford Handbook of International Trade Law* (2009 Oxford University Press).

²⁷⁴ GATS Text Available at: http://www.wto.org/english/docs_e/legal_e/legal_e.htm#services accessed 15 June 2015.

²⁷⁵ Article XIII

²⁷⁶ Article XIV

The four modes of supply can be explained by the following examples from the perspective of 'importing' country A:²⁷⁷

Mode 1: cross-border

A user in country A receives services from abroad through its telecommunications or postal infrastructure. Such supplies may include consultancy or research reports, medical advice, distance learning or architectural designs.

Mode 2: consumption abroad

Nationals of country A have moved abroad as tourists, students or patients to consume the respective services.

Mode 3: commercial presence

The service is provided within Country A by a locally established affiliate, subsidiary or representative office of a foreign-owned and controlled company. Examples could be banks, hotel groups, construction companies, etc.

Mode 4: movement of naturalized persons

A foreign national provides a service within country A as an independent supplier, e. g. as a consultant or health worker, or by being an employee of a service supplier, such as a firm or a hospital.

The mode-based definition of services demonstrates that GATS has a very broad scope.²⁷⁸ It is evident that services trade extends beyond the traditional concept of trade flow across borders.²⁷⁹ This raises the level of complexity and regularity diversity manifested, since it involves laws relating to the movement of human and capital, and rights of establishment.²⁸⁰ Read in conjunction with the definition of supply under Article XXVIII: a), the complexity of a services trade transaction increases manifold. The supply of service under the GATS definition includes 'the production, distribution, marketing, sale and delivery of a service'.

²⁷⁷ A Handbook on the GATS Agreement, WTO Publication (Cambridge 2005).

²⁷⁸ Nellie Munin, *Legal Guide to GATS* (Kluwer 2010); Marion Panizzon, Nicole Pohl and Pierre Sauve, *GATS and the Regulation of International Trade in Services* (Cambridge 2008); Panagiotis Delimatsis, *International Trade in Services and Domestic Regulations* (Oxford 2007).

²⁷⁹ Border measures like tariffs are therefore generally associated with the goods trade that takes place when the goods move physically between the borders. For more on how the services trade is different from the goods trade and for services special nature, see Bernard Hoekman and Michael Kostecki, *The Political Economy of the World Trading System* (3rd edn, Oxford 2010).

²⁸⁰ Markus Krawjeski, *National Regulation and Trade Liberalisation in Services: The Legal Impact of General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* (Kluwer Law International 2005).

It may therefore be a challenge to determine which mode of supply is involved in a particular transaction.²⁸¹ For example, in the case of electronic transmissions, it may not be clear whether the service has been provided to the consumer in Country A, or whether the consumer has moved abroad to avail itself of the service.²⁸² Moreover, the definition of the supply of service includes production, distribution, sale and delivery of a service. These stages of services provision may not all fall under the same mode, giving rise to further interpretative issues.²⁸³ Commercial linkages may exist among all four modes of supply. For example, a foreign company established under Mode 3 in Country A may employ nationals from Country B (Mode 4) to export cross-border services into Countries B, C etc. Similarly, business visits into A (Mode 4) may be necessary to complement cross-border supplies into that country (Mode 1), or to upgrade the capacity of a locally established office (Mode 3).²⁸⁴

This discussion indicates that governing services trade is a rather complex phenomenon, and may pose different and more acute regulatory challenges than the goods trade.²⁸⁵

The issue that needs highlighting, however, is broader than the implementation of related hurdles. It can be seen from this definition that it extends the scope of GATS provisions deep into the regulatory architecture of the Member country.²⁸⁶ The GATS specific modal definition of services involves laws relating to the movement of humans and capital, and to rights of establishment which fall almost exclusively in the area of domestic policy-making.²⁸⁷ Similarly, a measure affecting trade in service is:

‘any measure by a Member, whether in the form of law, regulation, rule, procedure, decision, administrative action, or any other form’.²⁸⁸

²⁸¹ Rudolf Adlung and Aaditya Mattoo, ‘The GATS’ in Mattoo, Stern and Zanini (eds), *A Handbook of International Trade in Services* (Oxford 2008) 50.

²⁸² Ibid.

²⁸³ Ibid.

²⁸⁴ This scenario has been taken from an interactive GATS course available at: http://www.wto.org/english/tratop_e/serv_e/cbt_course_e/signin_e.htm accessed 15 June 2015.

²⁸⁵ As pointed out very early on by Bernard Hoekman, ‘Assessing the General Agreement on Trade in Services’ in W Martin and L A Winters (eds), *The Uruguay Round and the Developing Countries*, (Cambridge University Press 1996).

²⁸⁶ See Robert Howse and Elisabeth Turk, ‘The WTO Negotiations on Services: The Regulatory State up for Grabs’ (2002) 9 (1-2) *Canada Watch* 3; Markus Krawjewski, ‘Public Services and Trade Liberalisation: Mapping the Legal Framework’ (2003) 2 *JIEL* 344.

²⁸⁷ A K Abu Akeel, ‘Definition of Trade in Services under the GATS: Legal Implications’ (1999) 32(1) *George Washington Journal of International Law and Economics* 189.

²⁸⁸ GATS Article XVIII (a).

In addition to the definition of 'measure', is the definition of 'measure by Member'²⁸⁹ which states:

'Measure by Member' means measures taken by:

- (i) Central, regional or local governments and authorities; and
- (ii) Non-governmental bodies in the exercise of power delegated by central, regional or local governments or authorities.

This means that all regulatory layers of a Member country, including central, provincial, local, or even private acts become a subject of scrutiny for GATS. The scope of GATS becomes all-encompassing when we study the four modes of services supply in conjunction with the definitions of 'measure', 'measure by Member' and 'supply of service' in the GATS.²⁹⁰

This discussion flags up two issues. Firstly, how does the GATS framework balance its liberalization objectives with consideration for Member countries' regulatory autonomy?²⁹¹ Secondly, the regulatory diversity relating to multilateral services trade governance is extraordinary.²⁹² Hence the likelihood of domestic regulations becoming potential trade barriers is also greater. So how does the GATS framework distinguish between genuine regulatory concerns and trade barriers to the services trade? Also, do its existing regulatory approaches have the required flexibility to accommodate this diversity? These questions are further explored by looking at the GATS related legal obligations in the next section.

2. The GATS Legal Obligations

Broadly speaking, there are two types of obligations under the GATS framework for WTO Members.²⁹³ General obligations apply to all service sectors and Member countries, and specific obligations apply to designated sectors. General obligations are based on the concepts of MFN treatment and transparency. According to Article II (MFN) of the GATS, Members are bound to extend a 'treatment no less favourable' than that accorded to equivalent services and service suppliers of any other Member country. Members were, however, allowed to seek exemptions

²⁸⁹ Article I.3 of the GATS.

²⁹⁰ W Goode, 'Services' in Kym Anderson (ed), *Strengthening the Global Trading System from GATT to WTO* (Centre for International Economic Studies, Univ. of Adelaide 1996).

²⁹¹ It may be recalled that this was a contested issue during the negotiations leading to the adoption of the GATS.

²⁹² This is both in terms of sectors and varying regulatory concerns of different WTO members. See Markus Krajewski, *National Regulation and Trade Liberalisation in Services: The Legal Impact of General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* (Kluwer Law 2003).

²⁹³ As discussed earlier, obligations under the WTO treaties including the GATS are subject to a binding dispute settlement system. A GATS specific analysis of disputes in the next chapter will further explain the nature of obligations being discussed here.

before the Agreement's date of enforcement in terms of the Article II exemptions.²⁹⁴ New exemptions can only be granted by way of a waiver of Article IX: 3 of the WTO Agreement. All exemptions are subject to review and should, in principle, not last for more than 10 years.²⁹⁵ Transparency obligations of the GATS are contained in its Article III. Specific obligations are contained in Article XVI (Market Access) and Article XVII (National Treatment). All of these obligations are discussed in more detail in the following paragraphs.

i. The MFN Obligations

The MFN provision has been considered a powerful tool to level economic and political imbalances.²⁹⁶ However, Members have continued to opt out of this obligation through a wide use of Article II and Article XIV Exemptions²⁹⁷ and by entering into regional trade agreements.²⁹⁸ Although Members have adopted a mechanism for reduction in MFN exemptions, there has been no progress in this regard.²⁹⁹ This brings home the WTO Member countries' apprehensions about opening up their services trade markets indiscriminately. According to the annex to Article II exemptions, all exemptions granted for more than five years need to be reviewed periodically. However, during the post GATS services negotiations, no meaningful reviews have been undertaken by the Council for Trade in Services.³⁰⁰ It will thus be of critical importance to see how negotiations conducted under the Doha Round have approached MFN exemptions. A more detailed discussion in this regard is carried out in Chapter 3, which examines the progress of the GATS negotiations in the current round of WTO negotiations.³⁰¹

²⁹⁴ GATS Annex on Article II Exemptions para 6 and OECD, 'Trade in Services: A Roadmap to GATS MFN Exemptions', TD/TC/WP(2001)/25/Final, 2001.4.

²⁹⁵ See the services related exemptions information at: http://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm accessed 15 June 2015.

²⁹⁶ MFN principle is the cornerstone of international trade regime, represented previously by the GATT and later by the WTO. See the Introduction to the chapter and also Aaditya Matoo, 'MFN and the GATS' in Cottier and Mavroidis (eds), *Most Favoured Nation Treatment: Past and Present* (Michigan University Press 2000).

²⁹⁷ Rudolf Adlung and Aaditya Mattoo, 'The GATS' in *A Handbook of International Trade in Services* (OUP 2008); Rudolf Adlung and Antonia Carzaniga, 'MFN Exemptions Under the General Agreement on Trade in Services: Grandfathers Striving for Immortality?' (2009) 12 JIEL 357.

²⁹⁸ Martin Roy, Juan Marchetti and Aik Hoe Lim, 'The race towards preferential trade agreements in services: How much market access is really achieved?' in Pannizon, Pohl and Sauve (eds), *GATS and the Regulation of International Trade in Services* (Cambridge 2008).

²⁹⁹ This fact was highlighted by Adlung and Carzaniga in their article 'MFN exemptions under GATS: grandfathers striving for immortality' (2009) JIEL. However, the current data of the WTO shows that these exemptions are still under review and a part of the ongoing services negotiations. See the following link at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm#exemptions accessed 15 June 2015.

³⁰⁰ Ibid.

³⁰¹ Doha Round is the current round of WTO negotiations which is dealt with in Ch 3 of the thesis.

It should be added here that MFN exemptions have sectoral undercurrents, which have been used to protect those sectors that are considered to be of high regulatory concern for WTO Members.

³⁰² This highlights the fact that countries' regulatory concerns vary from sector to sector.³⁰³ This observation raises the point that the GATS rule-making agenda and its legal interpretation by the WTO dispute settlement bodies may need to look for more flexible regulatory approaches to make GATS a more effective instrument.³⁰⁴ Whether this is actually being done, and to what degree, is explored further in Chapter 2, which deals with the services related case law, and Chapter 3, which discusses the current services related rule-making agenda of the WTO.

ii. Transparency Obligations

The next main obligation of the GATS framework from WTO Members is the need for transparency regarding their regulatory architecture.³⁰⁵ Transparency provisions pertain to the publishing of measures affecting services trade. They include ready availability of information regarding relevant laws, regulations and procedures. This obligation is deemed to be the 'second most important obligation after MFN' for the purpose of GATS.³⁰⁶ GATS transparency obligations are considered to have an even greater importance for the service trade, since it is marked with a higher degree of regulatory control than, for example, the financial services trade, which is highly regulated by the individual countries to ensure the security of their financial markets.³⁰⁷

³⁰² Services data base at:

http://www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm accessed 15 June 2015.

³⁰³ This has been acknowledged by a few commentators. See for example Markus Krajewski, *National Regulation and Trade Liberalisation in Services: The Legal Impact of General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* (Kluwer Law 2003). However, the predominant view remains to have 'horizontal disciplines' for all services sectors. See for example Panagiotis Delimatsis, *International Trade in Services and Domestic Regulations* (Oxford 2007). Pros and cons of both these approaches are further discussed in Ch 6.

³⁰⁴ GATS has generated limited progress in term of services trade liberalization, as pointed out by various commentators and admitted by the WTO. See various reports by the Chairman of the Council for Trade in Services available at the WTO website. Also Marion Panizzon and Nicole Pohl, 'Testing regulatory autonomy, disciplining trade relief and regulating variable peripheries: Can a cosmopolitan GATS do it all?' in Marion Pannizon, Nicole Pohl and Pierre Sauve (eds), *GATS and the Regulation of International Trade in Service* (Cambridge 2008) 4, 31; Hamid Mamdouh, 'Services liberalisation, negotiations and regulation: some lessons from the GATS experience' in Aik Hoe Lim and Bart De Meester (eds), *WTO Domestic Regulation in Services Trade: Putting Principles into Practice* (Cambridge 2014); Batshur Gootiiz and Aaditya Matoo, 'Services in Doha: What's on the Table?' (2009) 43 *Journal of World Trade* 1013; Jara Alejandro and M. del Carmen Dominiguez, 'Liberalisation of Trade in Services and Trade Negotiations' (2006) 40 (1) *Journal of World Trade*.

³⁰⁵ Article III of the GATS.

³⁰⁶ Panagiotis Delimatsis, *International Trade in Services and Domestic Regulations* (OUP 2007) 265.

³⁰⁷ Marion Pannizon and Nicole Pohl, 'Testing regulatory autonomy, disciplining trade relief and regulating variable peripheries: Can a cosmopolitan GATS do it all?' in Panizzon, Pohl and Sauve (eds), *GATS and the Regulation of International Trade in Services* (Cambridge 2008); Peter Czaga, 'Regulatory Reform and Market Openness: Understanding the Links to Enhance Economic Performance', OECD Trade Policy Working Paper 9, TD/TC/WP(2004)10/FINAL, 15 December 2004, OECD Publishing available in online OECD library at:

It is worth mentioning that OECD has stipulated transparency in its research on regulatory reform as the first of six principles to judge whether or not domestic regulations are trade-friendly.³⁰⁸ However what needs to be highlighted in any transparency mechanism for GATS related domestic regulatory obligations is the context of these regulations, in order to distinguish between genuine regulatory concerns and protectionist intents.³⁰⁹

iii. Market Access Obligations

In addition to the above general obligations, there are two other specific GATS obligations. They relate to market access and national treatment (Article XVI and XVII respectively) and apply only to those services sectors for which market opening commitments have been made.³¹⁰ Market access related commitments may be made in relation to specific sectors, and are subject to certain conditions and qualifications. Individual countries' commitments to open markets in specific sectors are the outcome of services negotiations.³¹¹ The commitments appear in 'schedules' that list the sectors being opened and the extent of market access given to those sectors, e. g. whether there are any restrictions on foreign ownership if a company is being opened to provide a certain service.³¹² For example, if a government commits itself to allowing foreign banks to operate in its domestic market, this will be termed as a market-access commitment. Similarly, if the government limits the number of licences it will issue for this purpose, that will be market-access limitation. Market access for GATS purposes applies to both domestic and foreign services, as well as the services suppliers.³¹³ This gives the market access obligations of GATS a very broad scope.³¹⁴ What needs highlighting is that this obligation applies to both discriminatory and non-discriminatory

http://www.oecd-ilibrary.org/trade/regulatory-reform-and-market-openness_315070506641 accessed 15 June 2015.

³⁰⁸ P Czaga, 'Regulatory Reform and Market Openness: Understanding the Links to Enhance Economic Performance' as above.

³⁰⁹ The significance of the 'regulatory context' of a services related regulatory measure is discussed in more detail in the concluding chapter of the research, i.e. Ch 6.

³¹⁰ The market opening commitments are made in the form of a schedule of specific commitments. Unlike GATT tariff structure however, which is relatively straightforward, the scheduling mechanism of GATS is very complex. A schedule of commitment contains a minimum of eight entries per sector which pertain to market access and national treatment with regards to four modes of supply. See Juan Marchetti and Petros Mavroidis, 'What are the Main challenges for GATS Framework? Don't talk about Revolution' (2004) 3 European Business Organization Law Review 511-562.

³¹¹ Ibid.

³¹² Rudolf Adlung and Martin Roy, 'Turning Hills into Mountains? Current Commitments under the GATS and Prospects for Change', WTO Staff Working Paper ERSD-2005-01 Dt 23rd March 2005.

³¹³ Article XVI: I talks about both the service and the services supplier.

³¹⁴ Delimatsis and Molinuevo, 'Article XVI GATS' in Stoll and Feinaugle, *Max-Planck Commentarie on World Trade Law, Volume 6, WTO Trade in Services, 2008*.

measures, and can categorize any domestic regulatory measure as a trade ‘barrier’.³¹⁵ This implies that any measure which hampers access to markets can be termed as trade restrictive, even when it treats domestic and foreign services on an equal footing, without favouring the domestic service.

The market access obligations of GATS can thus have substantial implications for domestic regulatory autonomy.³¹⁶ Some of the GATS case law, discussed in more detail in the next chapter, further demonstrates this. It also brings us back to the questions regarding the purpose and scope of GATS. Does it want to create an obstruction-free services trade market, or create a discrimination-free environment for the international community to advance its services trade interests? And accordingly, what are the implications of such approaches for the domestic regulatory autonomy of WTO Members?

iv. National Treatment Obligations

The National Treatment provisions of GATS are meant to ensure that no discrimination exists between the domestic providers of services and the international entrants to the market.³¹⁷ Exceptions to these obligations are available for certain over-riding policy concerns, including the protection of human, animal or plant life, and the health and protection of public morals.³¹⁸ Article XII provides for the introduction of temporary restrictions to safeguard the balance of payment. The ‘prudential carve out’ in the financial services trade allows the Members to take measures to ensure the stability and integrity of their financial systems.³¹⁹ However, whether these exceptions serve as a safety valve for the protection of national regulatory autonomy, and to what extent, are relevant questions for this study. These will be further explored by a discussion on the GATS case law in Chapter 2 of the thesis.

E. The Boundaries between the Goods and the Services Trade

At the outset, it needs highlighting that in order to make rules for multilateral services trade that work, it is important to underscore the conceptual difference between the goods and the services trades. To use the definition provided by The Economist, services are the products of economic

³¹⁵ Emily Reid, ‘Regulatory Autonomy in the EU and the WTO: Defining and Defending its Limits’ (2010) 44 *Journal of World Trade* 877-901.

³¹⁶ This has blurred the lines between trade liberalization and aiming towards internal de-regulation as pointed out and criticized by P Raworth, *International Regulation of Trade in Services*, Vol 1, Section II: Basic International Regulation of Services, 2003.

³¹⁷ A Mattoo, ‘National Treatment in the GATS: Cornerstone or Pandora’s Box?’ (1997) 31 (1) *JWT*; Cottier and Mavroidis, (eds), *Regulatory Barriers and the Principle of Non-discrimination in the World Trade Law* (Michigan University Press 2000).

³¹⁸ General exceptions under Article XIV of the GATS.

³¹⁹ See the GATS annex on financial services.

activity which you cannot drop on your foot.³²⁰ This seemingly straightforward definition has important consequences for establishing rules and disciplines for international services trade. What distinguishes services from goods is primarily their intangible nature.³²¹ This implies that the quality of a service cannot be judged until it has been consumed, and raises the question of how to judge or control quality. For this purpose, governments resort to regulatory interventions so that information asymmetries in the services market may not be exploited by services suppliers.³²² Some examples in this regard can be licensing requirements to ensure that the supplier is competent enough to supply the services, or qualification requirements for professional service providers. Similarly, governments may put restrictions on suppliers to provide prior information about their services for effective monitoring of market imbalances. Unlike the goods trade therefore, there is emphasis on regulating the quality of services through qualification requirements of service suppliers, and it is the competence and conduct of the service supplier that is under scrutiny.³²³ Goods are tangible products with physical characteristics which can be physically judged, but it is difficult, if not impossible to do the same for services.

Services are much more heterogeneous than goods, since most of the time they are highly tailored to the customer's needs.³²⁴ Goods have a 'universal economic language' in the form of codes developed by the World Customs Organisation. The Harmonized Commodity Description and Coding System for goods is a multi-purpose international product nomenclature, developed by the World Customs Organization (WCO). It comprises approximately 5,000 commodity groups, each identified by a six digit code, arranged in a legal and logical structure. This structure is also supported by well-defined rules to achieve uniform classification.³²⁵ No such classification exists for services. For the purpose of Uruguay Round³²⁶ negotiations which led to the development of the

³²⁰ See link at:

<<http://www.economist.com/economics-a-to-z/s#node-21529672>> accessed 15 June 2015.

³²¹ Fuchs was the pioneer author in introducing this idea. Victor R Fuchs, *The Service Economy* (National Bureau of Economic Research, New York, and Columbia University Press 1968). However many authors have since referred to services in the same vein. See for example Patrick Messerlin and Karl Sauvant, 'The Uruguay Round: Services in the World Economy' (The World Bank 1990).

³²² Aik Hoe Lim and Bart DeMeester, 'An introduction to domestic regulation and GATS' in Lim and Meester (eds), *WTO Domestic Regulation and GATS* (Cambridge 2014).

³²³ See *Technical Standards in Services: Note by the Secretariat*, WTO doc.S/WPDR/W49, 3 September 2012.

³²⁴ For example the education, consultancy, tourism and health services.

³²⁵ See WCO website at:

<<http://www.wcoomd.org/en/topics/nomenclature/overview/what-is-the-harmonized-system.aspx>> accessed 15 June 2015.

³²⁶ For details on the Round, see the WTO website at:

<http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm> accessed 15 June 2015.

GATS framework, the WTO Secretariat developed an indicative services sector classification, known as the W/120 document, which contained 120 sub-sectors and was based on the United Nations Central Product Classification.³²⁷ The CPC classification is not supported by any explanatory notes or a legal framework, unlike the goods classification. It came into question for a dispute settlement in the GATS *US Gambling* case.³²⁸

Even if we accept the sectoral context provided by this list, it remains difficult to measure and track services transactions. Unlike trading in goods, there is no physical package crossing international boundaries. There are no accompanying documents which show the internationally recognised commodity code, description, quantity, origin, or destination.³²⁹ Then there is the added complexity associated with the specific modal definition of GATS which involves laws relating to the movement of human and capital, and rights of establishment.³³⁰ How far these services specific peculiarities were taken into account when designing a framework for the multilateral services trade governance remains an open question. Rather, the discussion so far reveals that GATS draws largely on the goods trade conceptual foundation and experience, rather than looking for a services specific governance model. This has made GATS administration a complex task. Its biggest challenge is to distinguish between legitimate domestic regulatory objectives and deliberate barriers to services trade. GATS has strived to address this challenge by focusing on non-discrimination, which is its primary discipline.

MFN and national treatment are the two tools used to enforce this discipline. For GATS purposes, MFN and national treatment principles have been borrowed from the multilateral goods trade governance existing in the form of GATT, as has been pointed out earlier. However, it needs highlighting that the application of non-discrimination obligations gives rise to a wider range of questions and uncertainties for services trade under GATS than for the goods trade under GATT. For one, it is difficult to determine the attributes of a service through *ex ante* physical testing. Thus it is often the conduct and competence of the service supplier that becomes a subject of regulation.³³¹ Moreover, for the goods trade, border measures such as quotas or tariffs are

³²⁷ See link at:

<http://unstats.un.org/unsd/tradekb/Knowledgebase/Sectoral-Classification-List-W120> accessed 15 June 2015.

³²⁸ WTO documents WT/DS285/R of November 14, 2004 and WT/DS285/AB/R of April 7, 2005 (Report of the Panel and Appellate Body: United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services).

³²⁹ M Krawjewski, *National Regulation and Trade Liberalisation in Services -The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* (Kluwer Law 2003).

³³⁰ Article I of the GATS which was discussed in more detail in the previous section dealing with the GATS framework.

³³¹ See *Technical Standards in Services: Note by the Secretariat*, WTO doc.S/WPDR/W/49, 3 September 2012.

subjected to discipline, and ‘behind the border’ or ‘non-tariff’ measures only come into play at a subsequent stage. It may be added that WTO has also expanded the goods trade disciplines to regulatory measures through agreements like the Agreement on Technical Barriers to Trade (TBT Agreement), and Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). However, for the services trade, the starting point for enforcing disciplines has always been ‘behind the border’ measures.³³² Thus, unlike the goods trade, the barriers to services trade are not explicit and quantifiable. The challenge for the services trade, therefore, is to identify trade restrictive internal regulations from genuine regulatory pursuits. These regulatory pursuits include achieving public policy objectives such as equitable access to services, consumer protection, macroeconomic stability and environmental considerations.³³³ Thus GATS disciplines venture into areas of internal policy making hitherto unknown to multilateral disciplines.³³⁴ This makes the relationship between the trade liberalization objectives of GATS and domestic regulatory autonomy very complex.

The GATS framework tries to provide a solution to this problem by distinguishing between three types of measures. These are quantitative restrictions on entry/establishment, whether discriminatory or non-discriminatory, measures modifying the conditions of competition in favour of national services and services suppliers, and domestic regulations that are neither discriminatory nor quantitative in nature. The first two categories are subject to the disciplines of GATS Articles XVI (Market Access) and XVII (National Treatment). The third category may be termed as ‘domestic regulations’ not considered trade restrictive, and hence in no need of disciplining. However GATS has mandated the creating of disciplines for this category of internal regulations as well through its Article VI: 4.³³⁵

GATS Article XVII (National Treatment) also permits regulatory distinctions when they are applied in an ‘origin-neutral’ manner (see sub-section 2 below):

1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.

³³² Aik Hoe Lim and Bart De Meester, *An Introduction to Domestic Regulation and GATS* in Lim and Meester (eds), *WTO Domestic Regulation and Services Trade: Putting Principles into Practice* (Cambridge 2014).

³³³ Ibid.

³³⁴ Ibid.

³³⁵ The current approaches to developing disciplines under Article VI:4 are further discussed in Ch 3 dealing with the current state of play in GATS rule-making.

2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.
3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

As can be observed, sub-section 3 opens the door for alleging *de-facto*³³⁶ discrimination by stating that regulation may be considered to provide 'less favourable treatment' if it modifies the condition of competition in favour of services or services suppliers of the Member compared to domestic services or services suppliers. This may give rise to a situation where unintended regulations, meant to achieve domestic regulatory objectives, may become an object of scrutiny for violating GATS obligations. The *EC-Banana III*³³⁷ case is one such example, whereby the WTO panel had to develop a three-prong test to determine if there was a breach of national treatment obligation.³³⁸ The three elements of this test are: (i) the Member has made a commitment in the sector and mode of supply under issue; (ii) the measure adopted by the Member affects the relevant sector and/or mode of supply; and (iii) the measure accords to the service or service supplier of any other Member treatment less favourable than it does to the *like* service or service supplier.³³⁹ The establishment of *likeness* between the services or services suppliers, which is the third element of this test, is a challenging task.³⁴⁰ According to Cossy:³⁴¹

'The intangibility of services, the difficulty to draw a line between product and production, the existence of four modes of supply, the combined reference to services and service suppliers, but also the lack of a detailed nomenclature and the "customized" nature of many transactions are some of the factors which complicate the task of establishing likeness in services trade.'

The appropriateness of this approach is therefore further challenged in Chapter 2 dealing with case law, and in the concluding chapter of the thesis, which presents alternative approaches to regulating the services trade under GATS.

³³⁶ De facto discrimination applies to any variation in the conditions for competition which is not ordained by any law but exist as a matter of circumstantial reality.

³³⁷ Panel Report *EC-Banana III (US)*, discussed in more detail in Ch 2 dealing with the GATS case law.

³³⁸ *Ibid.*

³³⁹ Panel Report *EC-Banana III (US)* para 7.314.

³⁴⁰ Mirielle Cossy, 'Determining the "likeness" in GATS: Squaring the Circle', WTO Staff Working Paper ERSD 2006-08, 2006.

³⁴¹ *Ibid.*

The discussion in this chapter brings home two main conceptual difficulties with the way that multilateral services trade is being regulated by GATS. Firstly, although GATS is believed to be an agreement quite unique and purpose-built for the multilateral services trade, it relies heavily on the theoretical premises designed for the goods trade. Almost every aspect of services trade, ranging from the economic benefits of the trade³⁴² to how the principles of Most Favoured Nation and National Treatment are interpreted, derives its inspiration from these concepts in the goods trade context. Secondly, a very essential difference in what constitutes a barrier to trade, or a genuine regulatory concern, and how it should be weighed against the trade gains, has not received sufficient regulatory attention.

Essentially, the chapter has highlighted the tension between the GATS dual objective of progressive liberalization and protecting WTO Members' regulatory concerns. It has demonstrated that the GATS conceptual foundation and legal framework draws heavily on the goods trade experience available in the form of the GATT agreement. The discussion in the chapter further revealed that this may not be an ideal approach for balancing the trade liberalizing objectives of GATS against individual countries' regulatory autonomy. This hypothesis is tested further by looking at the GATS case law in the next chapter, which focuses on exposing the practical implications of the GATS obligations for WTO Members' regulatory autonomy.

³⁴² Explored in more detail in Ch 6 with reference to Ricardo's theory of comparative advantage for free trade.

Chapter 2

The GATS Governance and the WTO Dispute Settlement Bodies

Introductory remarks

WTO Members' apprehensions regarding loss of regulatory autonomy, and the potential of GATS obligations to encroach upon their regulatory space have been highlighted in Chapter 1. Chapter 1 also demonstrates that the conceptual foundation for the GATS framework has largely been drawn from the goods trade experience.³⁴³ However, multilateral services trade demands a different governance paradigm in view of its potential domestic regulatory impact, as discussed in the previous chapter. The current chapter is aimed at exposing whether the WTO dispute settlement bodies have also relied on goods related jurisprudence for resolving services trade disputes, or developed approaches uniquely suited to the governance of GATS. The main challenge in administering GATS is the likelihood of internal regulations being perceived as 'trade barriers', even when they may represent genuine policy concerns. In this scenario, the role of the dispute settlement bodies becomes crucial in interpreting the GATS obligations. They can either help in developing a multilateral services trade jurisprudence which protects Members' regulatory autonomy relating to genuine policy concerns, or further exacerbate their fears regarding the narrowing of their domestic regulatory space.³⁴⁴

How the services disputes are approached by the WTO dispute settlement bodies reflects on the GATS governance. Accordingly, the chapter has been divided into two sections. It first presents a synthesised account of the GATS regulatory challenges stemming from the background discussion carried out in Chapter 1, and then analyses GATS case law to examine how these challenges are addressed by the WTO jurisprudence.

³⁴³ See the section on the genesis of the GATS framework.

³⁴⁴ The impact of WTO dispute settlement system on members' regulatory autonomy has been commented upon many authors. See *inter alia* Abraham Chayes and Antonia Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Boston Harvard University Press 1995), who view that coercive enforcement of such agreements is not appropriate. Mitsuo Matsushita, Petros Mavroidis and Thomas Schoenbaum discuss the role of WTO in the context of international economic law in *The WTO Law and Practice* (Oxford 2001). See also Michael J Trebilcock and Robert Howse, *The Regulation of International Trade* (4th edn, Routledge 2012).

For a counter view that the WTO dispute settlement system does provide sufficient 'policy space' to the members, see Olivier Cattaneo, 'Has the WTO Gone Too Far or Not Far Enough? Some Reflections on the Concept of Policy Space' in Andrew Mitchell, *Challenges and Prospects for the WTO* (Cameron May Ltd 2005).

A. What are the GATS Regulatory Challenges?

1. Liberalizing and Regulating Services Trade

The two seemingly contradictory concepts of ‘liberalization’ and ‘regulation’ dominate the GATS framework. Although the main purpose of GATS remains progressive *liberalization* of the services trade³⁴⁵, it simultaneously recognises each country’s individual jurisdiction in *regulating*³⁴⁶ services trade. The GATS preamble states:

‘[To] establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization [and] the achievement of progressively higher levels of liberalization of trade in services through successive rounds of multilateral negotiations [while] recognising the right of Members to regulate and to introduce new regulations, on the supply of services within their territories in order to achieve national policy objectives.’

The preamble very much sets the tone for the legal framework of the GATS, and is an attempt to cater to these two objectives. For the purpose of finding liberalization tools, inspiration for the GATS came from the General Agreement on Tariffs and Trade (GATT), the multilateral agreement governing the trade in goods.³⁴⁷ The main principles utilized by GATS as trade liberalization instruments are most-favoured-nation (MFN) and national treatment. They have also been borrowed from the GATT framework. Under GATT, the MFN treatment obliges a Member not to discriminate between the WTO Members with regards to any tariff concessions.³⁴⁸ The GATS equivalent for this is Article II, which applies to all measures affecting trade in services in any sector falling under the Agreement, whether specific commitments for the liberalization of that sector have been made or not.³⁴⁹ The difference in wording between Article I of the GATT and Article II of the GATS emphasises the ‘regulatory’ aspect of liberalizing the services trade. The wording used in Article I of the GATT is ‘advantage, favour, privilege or immunity’, while the GATS refers to

³⁴⁵ It may be added that the multilateral trading system in general exists to promote progressive trade expansion. The mission statement of the WTO reads: ‘The World Trade Organization — the WTO — is the international organization whose primary purpose is to open trade for the benefit of all,’ available at: http://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm accessed 15 June 2015.

³⁴⁶ An acknowledgement of the right to regulate is abundantly available in the GATS preamble and more specifically in Article VI of the GATS which lays down the disciplines for domestic regulations.

³⁴⁷ B Hoekman and M Kostecki, *The Political Economy of the World Trading System: WTO and Beyond* (3rd edn Oxford 2009); Panagiotis Delimatsis, *International Trade in Services and Domestic Regulations: Necessity, Transparency and Regulatory Diversity* (OUP 2007) 31.

³⁴⁸ Article I of the GATT.

³⁴⁹ Exemptions to this can only be obtained when accepting the entry into the Agreement and for a limited time of ten years in principle. See Article II of the GATS.

‘measures affecting trade in services’. The matter becomes clearer when we look at the definition of the ‘measures’ provided in GATS Article XXVIII:

‘Measure means any measure by a Member, whether in the form of law, regulation, rule, procedure, decision, administrative action, or any other form.’

Looking at the GATS MFN clause in conjunction with the definition of ‘measure’, it becomes clear that the MFN in GATS is not only very broad, but it also has a more direct link with the Member countries’ domestic regulations. Accordingly, Mattoo and Adlung advise the Member countries to use a very ‘broad interpretation’ when assessing the relevance of GATS for a particular policy or policy proposal.³⁵⁰ This is not to say that there are no exceptions to this rule.³⁵¹ The point of the discussion is that the extension of the GATS MFN clause into the regulatory architecture of a country sets it apart from the GATT MFN clause. Whether the interpretation given by the WTO dispute settlement bodies to the provision of both agreements makes this distinction is further explored by analyzing the GATS case law.

National treatment provisions are meant to preempt any discriminatory measures which might lead to unfavourable conditions for the foreign services, or service suppliers competing in the local market of a country. These provisions are, however, only applicable to the sectors listed by the member countries in their schedules for specific commitments, unlike MFN provisions which have a universal application. Despite existing commitments, flexibility is allowed under certain circumstances. For example, in addition to general exceptions pertaining to public morals, plant and animal health, and security exceptions under Article XIV, Article XII allows for the introduction of temporary restrictions to safeguard the balance of payment, and to ensure the stability of financial systems.³⁵² As for the GATT, the main objective of these principles in the GATS remains a non-discriminatory market access. However, how far the present interpretation by the WTO dispute settlement bodies is relevant to the services context is a question explored in this chapter.

It is worthwhile here to refer to the European Court of Justice’s opinion 1/94 to bring home how the GATS definition of services can infringe upon domestic sovereignty.³⁵³ When multiple trade related agreements involving goods, services, intellectual property rights, etc. were brought under

³⁵⁰ Rudolf Adlung and Aaditya Mattoo, ‘The GATS’ in Aaditya Mattoo, Robert M Stern and Gianni Zanini (eds), *A Handbook of International Trade in Service* (OUP 2008).

³⁵¹ Exceptions to this principle include services purchased for government procurement and some general exceptions pertaining to public morals, health etc. (Article XII and XIV of the GATS).

³⁵² Articles XIII, XIV, and XIV and Annex on Financial Services.

³⁵³ A summary of the ECJ decision is available at: http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapcelexplus!prod!CELEXnumdoc&numdoc=61994V0001&lg=en accessed 15 June 2015.

the umbrella of the WTO in 1994,³⁵⁴ a question arose as to the respective competencies of the European Community and its Member states. The European Commission considered that the EC had sole powers for concluding various agreements under the WTO, while the Member states did not want to completely give up their powers.³⁵⁵ Accordingly, the ECJ was asked for its opinion. The Court ruled that while the Community had sole competence to conclude agreement on the goods trade, this competence was 'shared' between the Member states and the Community for the purposes of agreement relating to the services trade and the intellectual property rights.³⁵⁶ According to Craig and Burca:

'Opinion 1/94 was an important opinion which marked the end of the expansion of EC competence under the CCP, as well as the end of the period of judicial activism with regard to the EC's exclusive competence. Recent cases have confirmed this and indicated that trade measures will not necessarily be perceived as trade or commercial policy measures if they pursue other objectives such as environmental policy.'³⁵⁷

It is precisely this possibility of domestic regulatory choices being perceived as trade barriers, in view of the four-mode based definition in GATS, that the ECJ preempted it by retaining individual Members' competence in negotiating GATS commitments. The question therefore is whether the current approaches adopted by the WTO dispute resolution bodies to resolve multilateral services trade related disputes take into account this aspect of the services trade or not.

Although it has been observed that the negotiators in the Uruguay Round, when designing multilateral disciplines for the services trade, took a different approach to that for the goods trade,³⁵⁸ a discussion on the borrowing of core concepts of MFN and National Treatment from the GATT in the preceding chapter shows that this may not be the case. In fact whatever adaptations have been made to these two core principles for the purposes of market access in the services trade was a result of political expediency,³⁵⁹ rather than a well-deliberated policy choice aimed at

³⁵⁴ The Marrakesh Agreement constituting the WTO was signed in 1994. See link at: http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm accessed 15 June 2015.

³⁵⁵ Paul P Craig and Grainne de Burca, *EU Law: Text, Cases and Material* (5th edn, Oxford 2011).

³⁵⁶ Judith Hippler Bello, 'Opinion 1/94, Community Competence to Conclude Certain International Agreements' (1995) 89 (4) *The American Journal of International Law* 772-788.

³⁵⁷ *Supra* note 675.

³⁵⁸ Jagdish Bhagwati, 'Splintering and Disembodiment of Services and Developing Nations' (1984) 7 *The World Economy* 133-144.

³⁵⁹ It is a matter of historical record that the negotiations on services suffered many impasses. In Trebilcock and Howse's words, an agreement on services negotiations was a result of "carefully-negotiated compromises". There are many accounts which refer to these compromises and the tensions between the developing and the developed countries on services negotiations. For this particular point see Michael J Trebilcock and Robert Howse, *The Regulation of International Trade* (4th edn, Routledge 2012).

countering particular regulatory challenges for the liberalization of services trade. The matter will become more complicated if, in case of a dispute, the WTO adjudicating bodies also rely on GATT jurisprudence, instead of trying to interpret GATS provisions in line with the specific dynamics of the services trade.

2. GATS and Domestic Regulatory Autonomy

The significance Members attach to the need for regulating trade in services has been duly reflected in the GATS preamble.³⁶⁰ The latest WTO Round's Doha Ministerial Declaration reiterated this right of WTO Members to undertake services trade liberalisation under GATS.³⁶¹

'We reaffirm the right of members under the General Agreement on Trade in Services to regulate, and to introduce new regulations on the supply of services.'

The same stance has been repeated in subsequent rounds of WTO negotiations.³⁶² The Ministerial Conference of Hong Kong emphasised that the services negotiations should advance in a way that has 'due respect for the right of Members to regulate'.³⁶³

As emphasised earlier, GATS has two objectives, i.e. enabling progressive trade liberalization and protecting WTO Members' right to regulate for domestic policy considerations. These two objectives, however, are to some extent in constant tension.³⁶⁴ GATS recognises the need for domestic regulations designed by the Members to achieve policy objectives,³⁶⁵ and simultaneously promotes the liberalization of services trade through the introduction of new regulatory disciplines and removal of obstructive regulations. Article I. 3, for example assigns a regulatory role to the government regarding non-governmental bodies.³⁶⁶ Similarly, Article VI of the GATS contains wide-

³⁶⁰ which states that the GATS objective is to achieve 'progressive liberalization' while acknowledging the Members' right to 'regulate' to achieve domestic policy objectives.

³⁶¹ *WTO Doha Ministerial Declaration*, adopted on 14 November 2001, WT/MIN (01)/DEC/W/1 para 7.

³⁶² *Hong Kong Ministerial Declaration*, adopted on 18 December 2005, WT/MIN (05)/.

³⁶³ *Hong Kong Ministerial Declaration*, adopted on 18 December 2005, WT/MIN (05)/Dec para 25.

³⁶⁴ Some studies that have focused on this aspect of the GATS, and proposed solutions for any possible tension between these two objectives of GATS include Markus Krajewski, *National Regulation and Trade Liberalisation in Services: The Legal Impact of General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* (Kluwer Law 2003); Panagiotis Delimatsis, *International Trade in Services and Domestic Regulations* (Oxford 2007); Aaditya Mattoo and Pierre Sauve (eds), *Domestic Regulation and Services Trade Liberalisation* (World Bank and OUP 2003), and most recently Aik Hoe Lim and Bart De Meester (eds), *WTO Domestic Regulation and Services Trade: Putting Principles into Practice* (Cambridge 2014).

³⁶⁵ In its preamble and then in various exceptions provided under Article XIV (General Exceptions), Article XIV (Security Exceptions). Article VI also acknowledges the need to have domestic regulations but with certain disciplines.

³⁶⁶ See Article I.3 above.

reaching disciplines to ensure that domestic regulations do not become unnecessary trade barriers to the services trade of the sectors which have been committed for opening up.

Parallels can be drawn between the GATT and GATS provisions regarding domestic regulatory disciplines. Article VI: 1 of the GATS states:

‘In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.’

These provisions correspond with GATT Article X: 3 (a) which states:³⁶⁷

‘Each Member shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in Paragraph 1 of this Article.’³⁶⁸

If we read the two in conjunction, we can see that the GATT provision is qualified by making reference to Paragraph 1 of the Article, which mainly pertains to the classification or valuation of products for customs purposes, rates of duty and taxes and any other measures. However, in the absence of any such qualifying provisions, the scope of Article VI of the GATS becomes very broad. This is particularly so because the provision does not only cover the measures which directly ‘govern’ services trade, but also those which might indirectly ‘affect’ it. The key question, then, is how to distinguish between a genuine regulatory concern and the measures that become a potential trade barrier without intending to do so? The later part of the chapter examines this question through case law.

The Council for Trade in Services³⁶⁹ has a negotiating mandate provided in Article VI: 4 which allows the Council to develop disciplines to prevent domestic regulations from becoming potential trade barriers. However, if we link the implications of the modal definition of services discussed in the earlier section with the GATS mandate to develop disciplines for domestic regulatory regimes, it can be seen that domestic regulations are very easily perceived as trade barriers. One of the main regulatory challenges for the GATS, therefore, is to safeguard genuine regulatory concerns, while ensuring non-discriminatory treatment for the multilateral services trade, which is a prime

³⁶⁷ Andrew Mitchell and Tania Voon, ‘Reasonableness, Impartiality and Objectivity’ in Lim and Meester (eds), *WTO Domestic Regulation and Services Trade: Putting Principles into Practice* (Cambridge 2014).

³⁶⁸ Paragraph 1 refers to: ‘Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefore, or affecting their sale, distribution.....’

³⁶⁹ The Council for Trade in Services is a body that operates under the guidance of the General Council of the WTO and is responsible for overseeing the functioning of the General Agreement on Trade in Services (GATS). It is open to all WTO members, and can create subsidiary bodies as required.

obligation of the WTO Members. Exceptions from the GATS obligations stipulated in Articles XIV and XIV are not sufficient alone to provide the requisite regulatory flexibility, since they are limited in scope and application.³⁷⁰ Moreover, their application is necessity based, and in cases of dispute, the country applying them has to display sufficient 'necessity' for using them. This brings us to another regulatory approach adopted from GATT jurisprudence for evaluating the legality of domestic provision under GATS. The approach is the application of a necessity test³⁷¹ which is arguably unsuitable for the services trade governance in this thesis.³⁷²

The Working Party on Domestic Regulations (WPDR) was established for the purpose of developing domestic regulatory disciplines.³⁷³ This committee has so far developed the Disciplines on Domestic Regulation in the Accountancy Sector.³⁷⁴ The Accountancy Disciplines carry detailed provisions on licensing requirements, qualifications, procedures and technical standards.³⁷⁵ This is an effort to 'harmonise' diverse regulatory regimes.³⁷⁶ Is, then, the WTO 'seeking to eradicate heterogeneity of regulation'³⁷⁷ through GATS, and does it have the mandate to do so? Is this even envisaged as one of its objectives? These are some of the questions worth raising.

³⁷⁰ These exceptions relate to public morals, health and security reasons.

³⁷¹ Necessity test is a device used to manage overlapping regulatory regimes. Its purpose is to subject the exercise of regulatory powers to certain conditions, thus limiting its scope. This definition has been taken from Fontanelli Filippo, 'Necessity Killed the GATT- Article XX GATT and 'Misleading Rhetoric about Weighing and Balancing' (Autumn/Winter 2012/13) 5 (2) European Journal of Legal Studies.

The necessity requirement is used to discipline domestic regulations in several WTO agreements. In addition to GATS, necessity test is used in Articles 2.2 and 5.6 SPS; Articles 2.2 and 2.5 TBT; Article 8.1 of the TRIPS and Articles XI: 2(b) and (c) and XX of the GATT.

³⁷² A detailed discussion on how this approach has played out in the GATS practical implementation is contained in Part 2 of this chapter which deals with GATS case law. However an alternative view to the GATS governance is contained in the concluding chapter of the thesis, i.e. Ch 6, which argues that instead of a 'necessity' based approach, an 'aims and effects' approach is better suited to overcome the GATS regulatory challenges.

³⁷³ See the WTO document S/L/70 regarding decisions on domestic regulation adopted by the Council for Trade in Service in April, 1999 available at: <http://www.wto.org/english/tratop_e/serv_e/dom_reg_negs_e.htm> accessed 15 June 2015.

³⁷⁴ WTO Council for Trade in Services: Disciplines on Domestic Regulation for the Accountancy Sector (March 1999) 38 (2) International Legal Materials 499-501, Published by: American Society of International Law URL: <http://www.jstor.org/stable/20698897>.

³⁷⁵ WTO, Trade in Services, 'Disciplines on Domestic Regulation in the Accountancy Sector' S/L/64 17 December 1998.

³⁷⁶ Panagiotis Delimatsis, *International Trade in Services and Domestic Regulations: Necessity, Transparency and Regulatory Diversity* (Oxford 2007) 171-175.

³⁷⁷ Emily Reid, 'Regulatory Autonomy in the EU and the WTO: Defining and Defending its Limits' (2010) 44 Journal of World Trade 877.

The Accountancy Disciplines introduced under GATS created a necessity test. Article III of the Disciplines instructs the Members to ensure that:³⁷⁸

‘[L]icensing requirements and procedures, technical standards and qualification requirements and procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary barriers to trade in accountancy services. For this purpose, Members shall ensure that such measures are not more trade-restrictive than necessary to fulfill a legitimate objective.’³⁷⁹

This test is a powerful tool to allow WTO Members to challenge other Members on the ‘necessity’ of a measure to achieve a ‘legitimate regulatory objective’. This essentially means that all regulatory measures become open to scrutiny and challenge. The question therefore arises of whether the GATS framework, through such approaches borrowed from other WTO jurisprudence, may be aiming to create a barrier-free trade market, and whether such approaches undermine its capacity to protect Members’ regulatory concerns.

Another significant development is that since the conclusion of the Accountancy Disciplines,³⁸⁰ the approach towards creating domestic regulation disciplines has become ‘horizontal’.³⁸¹ A horizontal approach implies that a set of general disciplines will be developed for all services sectors, rather than trying to negotiate separate disciplines for different sectors, which all have varying regulatory implications. This approach rests on the understanding in the WTO quarters that although their characteristics might differ, ‘there was a considerable similarity in the underlying economic and social reasons for regulatory intervention’.³⁸² In reality, nothing could be further away from this than the actual regulatory diversity of the services trade. This diversity is not only represented by all the modes through which the services trade can take place, but also all the underlying considerations for which its flow needs to be regularized.³⁸³ There follows some of the policy objectives that are pursued by countries through their domestic regulatory policies.³⁸⁴

³⁷⁸ See WTO document S/L/70 referred to in fn 209.

³⁷⁹ Note that this resonates with Article 2.2 of the Agreement on Technical Barriers to Trade (TBT) which states that ‘technical regulations shall not be more trade restrictive than necessary to fulfill a legitimate objective...’

³⁸⁰ These disciplines were adopted in 1998. WTO, Trade in Services, ‘Disciplines on Domestic Regulation in the Accountancy Sector’ S/L/64 17 December 1998.

³⁸¹ Aik Hoe Lim and Bart De Meester, ‘An introduction to domestic regulation and GATS’ in Lim and Meester (eds), *WTO Domestic Regulation and Services Trade: Putting Principles into Practice* (Cambridge 2014) 11.

³⁸² Ibid.

³⁸³ Markus Krajewski, *National Regulation and Trade Liberalisation in Services: The Legal Impact of General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* (Kluwer Law 2003); Panagiotis Delimatsis, *International Trade in Services and Domestic Regulations* (Oxford 2007).

³⁸⁴ Ibid

2.1. Health and Stability of Financial Markets

Financial institutions may resort to risky or imprudent lending or borrowing activities to enhance their profits. They may devise complex instruments, which are little understood by the consumers, to advance their business interests. The 2008 financial meltdown of the international markets was a manifestation of this phenomenon.³⁸⁵ Accordingly, requirements such as minimum capital, asset diversification and monitoring of new financial instruments have been put in place by governments. This is to ensure that consumer interests are protected, and the overall market stability of a country remains intact.

2.2. Inclusive and Sustainable Development

This is an important consideration, particularly for the developing countries, and has also been acknowledged by the WTO.³⁸⁶ Governments often intervene to ensure that services are available to all citizens, irrespective of their income levels, on equitable terms. An example is the universal health or immunization programmes being run by central or provincial governments in some countries.³⁸⁷ For transport or other infrastructure services, governments may have to expand their services to remote areas at an affordable price, and thus open market competition in such services may impact adversely their developmental consideration. Another important consideration is the environment, where, for example, tourism services may produce negative environment impact, and thus governments have to regulate this market. They do so by designing policies like special tax structures and subsidies.

2.3. Consumer Protection

As mentioned previously, for certain services it is very difficult to judge the quality, safety standard or desirability of the service, unless it has been consumed. Professional services, health and education services and financial services are some examples in this regard.³⁸⁸ Countries accordingly resort to prudential measures and set up technical standards for the provision of these services. In order to help consumers to make informed decisions, they lay down requirements such as publication of costs, risks and side-effects.

³⁸⁵ Also discussed in the EU case study on financial trade liberalization in Ch 5.

³⁸⁶ Services, Development and Trade: The Regulatory and Institutional Dimension, Note by the Secretariat, UN doc.TD/B/CI/MEM.3/11, 15th December 2011, p.7.

³⁸⁷ Pakistan is one such country where polio immunization campaign is centrally controlled by the government. <<http://www.endpolio.com.pk/>>

³⁸⁸ *Technical Standards in Services: Note by the Secretariat*. WTO doc.S/WPDR/W/49, 3 September 2012.

2.4. Accessibility of Services

There are certain services which countries want to extend to all areas and all income groups of society, even at the expense of profitability. Services like health, education, access to transport and communication are considered important for citizens, and governments strive to make them accessible to everyone. Accordingly, tax income and profit from other areas may be diverted to such services. Actions such as compelling commercial health service providers to ensure that a certain percentage of patients are treated free of charge may be imposed by governments through domestic regulatory measures.

2.5. Monopolies and Anti-Competitive Approaches

There are certain services which are prone to monopolistic tendencies, e.g. telecommunication, courier services, etc.³⁸⁹ This can result in consumers being unduly exploited due to scarcity of choice among service providers. Accordingly, national regulators can set limitations on market shares or put capping on the prices. They can also give incentives for the provision of services in certain far-flung areas.

All these examples point not only to the reasons for which countries may regulate, but also to the need to understand the context of a regulation. The current WTO approach, however, focuses on subjecting all domestic regulations to horizontal disciplines.³⁹⁰ There is thus a need for GATS policy makers to bring a shift in their paradigm towards the domestic regulatory choices of countries in order to make the GATS more effective.

3. Barriers to Trade in Services

Services have been defined according to the GATS modes of supply. Article 1.2 of the GATS stipulates that services consist of four types of transactions according to their modes of supply, i.e. supply of a service from the territory of one Member into another (cross-border), consumption of a service by consumers of one Member who have moved into the territory of another Member (consumption abroad), services being provided by foreign suppliers who are commercially established in the territory of another Member (commercial presence) and services provided by naturalized persons who have moved to the territory of another member (presence of naturalized persons).³⁹¹ Careful scrutiny of each mode reveals that there may be innumerable aspects of a transaction in the supply of services which might constitute a barrier to trade. For example,

³⁸⁹ Aik Hoe Lim and Bart De Meester, 'An introduction to domestic regulation and GATS' in Lim and Meester (eds), *WTO Domestic Regulation and Services Trade: Putting Principles into Practice* (Cambridge 2014).

³⁹⁰ The current approaches in services trade rule-making are further explored in Ch 3 which deals with the current round of services trade negotiations under the WTO.

³⁹¹ Discussed in more detail in the previous section dealing with the GATS framework

immigration restrictions may constitute a barrier to the provision of a service to be provided by the movement of naturalized persons. The same transaction may have licensing or qualification requirements for the service providers which could be termed a barrier to the trade in service provision. Strict exchange controls may discourage temporary movement of workers and constitute an indirect barrier to the services trade. This simple example shows that the barriers to services trade are multifaceted. They are difficult to quantify, and even more difficult to discipline through a homogenous set of rules. Trebilcock and Howse hinted at this difficulty: 'The very fact that barriers to trade in services are so heterogeneous and difficult to quantify makes a comprehensive approach to their discipline extremely difficult to conceptualise'.³⁹²

The complexity of services trade barriers becomes abundantly clear if we examine them on a much smaller scale in the context of EU integration. Article 56 of TFEU³⁹³ provides:

'Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member states who are established in a Member State other than that of the person for whom the services are intended.'

Accordingly, a breach of Article 56 of the TFEU is only possible if one of the listed situations in Article 52 TFEU³⁹⁴ arises (subject to the proportionality test).

'The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.'

If we examine the EU case law dealing with the treatment of domestic regulatory measures, it can be seen that more than one judgement has been considered to undermine national regulatory autonomy.³⁹⁵

See for example the Court's judgement in *Sager* where the Court held that Article 56 TFEU requires that:

'not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member states, when it is liable to prohibit or

³⁹² Trebilcock and Howse, *The Regulation of International Trade* above.

³⁹³ Ex Article 49 TEC.

³⁹⁴ Ex Article 46 TEC.

³⁹⁵ Emily Reid, 'Regulatory Autonomy in the EU and WTO: Defining and Defending its Limits'. (2010) 44 (4) *Journal of World Trade* 877-901.

otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.³⁹⁶

Reid observes that judgement in this case, along with Court's approach in other cases, e.g. *Craus*³⁹⁷ and *Gebhard*³⁹⁸, has focused on the regulatory measures' impact upon 'market access' instead of examining its possible discriminatory nature. She accordingly raised questions on the justification of this approach, keeping in view the purpose of the original treaty.³⁹⁹ This is despite the fact that the EU mandate for economic integration in terms of four freedoms is much broader than the WTO, when we compare the relevant provisions.⁴⁰⁰ Similar questions can therefore be validly raised in the GATS context, and are discussed in more detail in the study of the GATS case law.⁴⁰¹

Thus even in a small regulatory environment like the EU, it would not be entirely appropriate to suggest that a level playing field for the services trade can only be achieved if all so-called trade barriers are removed in one go, or if minimum regulatory standards are agreed upon in a club-like environment. Quite the contrary, it can only be achieved by accommodating regulatory diversity and assigning value to regulatory choices. What appears like a barrier to trade in one country might actually be the safety valve which makes pursuing trade in services a worthwhile objective for another. How, then, can one regulatory perspective take precedence over another until there is a shared understanding regarding this difference? Since the WTO represents a much more diverse setting, unless the GATS framework takes into account the diversity in domestic regulatory philosophy and interest, it will continue to imply that certain regulatory measures are barriers to trade in services, the violation of which can invoke punitive action.⁴⁰² A study of the GATS case law in the next section will reveal how the domestic regulatory measures have been interpreted by the WTO dispute settlement bodies.

The purpose of this brief recap of the GATS regulatory challenges was to identify the areas where the WTO dispute settlement bodies can shape GATS governance so that it becomes more capable of dealing with services trade related challenges. Whether they have been able to do so or not will

³⁹⁶ Case C-76/90 *Saenger v. Dennemeyer & Co. Ltd* [1991] ECR I-4221 para 12.

³⁹⁷ Case C-19/92 *Kraus v. Land Baden-Wurtemberg* [1993] ECR I-1663.

³⁹⁸ Case C-55/94 *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165.

³⁹⁹ See fn 401.

⁴⁰⁰ Thomas Cottier and Mathias Oesch, 'Direct and Indirect Discrimination in WTO Law and EU Law', NCCR Working Paper No 2011/16, April, 2011. Available at: <www.wti.org/fileadmin/user.../nccr.../CottierOeschNCCRWP16.pdf> accessed 15 June 2015.

⁴⁰¹ Ch 3 of the thesis.

⁴⁰² It may be added that the GATS violations are cognizable under a binding dispute settlement system of the WTO.

become clearer as the chapter proceeds. All the aforesaid challenges point to one central theme, which is that GATS liberalizing goals can often come into conflict with domestic regulatory policies. The role of the WTO dispute settlement bodies in reconciling this regulatory tension has been further examined through case law.

B. WTO Dispute Settlement and the GATS

The WTO Dispute Settlement Understanding (DSU)⁴⁰³ subjects GATS obligations to a binding dispute settlement system with consequences in cases of non-compliance.⁴⁰⁴ As previously highlighted, the services trade-related regulatory concerns of WTO Members demand that the GATS regulatory approaches are flexible and accommodative. The interpretation given by the WTO dispute settlement bodies to the GATS related obligations is one yardstick to measure the extent of flexibility in GATS regulatory approaches. These bodies can play an effective role in advancing the dual GATS objective of trade liberalization while protecting Members' right to regulate to achieve domestic policy goals, provided they take into account the peculiarities of the services trade.⁴⁰⁵

Although the dynamics of dispute resolution in the context of GATS have not been fully exposed, due to a rather infrequent use of the system under this particular agreement, there are important insights to be gained from the study of the cases decided to date. WTO's official records suggest that a total number of 23 cases cited GATS in their requests for consultation on a potential dispute.⁴⁰⁶ This chapter examines all of these cases to get a comprehensive view of the GATS related disputes. However, cases which led to panel/appellate body rulings are discussed in more detail, with particular reference to the GATS provisions involved. What follows is a brief analysis of the cases which did not reach the panel stage and were resolved through mutual consultations. In the second half of the chapter, the panel and appellate body cases are taken up for a substantive discussion.⁴⁰⁷

⁴⁰³ Annex 2 of the WTO agreement contains rules and procedures governing the settlement of disputes. This is available at:

<https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm> accessed 8 June 2012.

⁴⁰⁴ WTO's dispute settlement system has been briefly discussed in Ch 1. This chapter carries a more specific discussion on the GATS disputes. The consequences can be in the form of the compensation that a 'losing' country has to pay, or in the form of trade sanctions being imposed. See details at:

<http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm> accessed 27 December 2014.

⁴⁰⁵ See the services trade definition and various other aspects of the services trade discussed in Ch 1.

⁴⁰⁶ The relevant date for this record is 15th September, 2014.

⁴⁰⁷ Services disputes gateway of WTO website at:

<http://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A8> accessed 27 December 2014.

1. What do the GATS Related Complaints Indicate about the GATS Governance?

Before discussing in detail the judgments provided by WTO dispute settlement bodies in various GATS disputes, a brief comment needs to be made on the complaints that were initiated, but were resolved through the process of mutual consultation by the members. This will provide important insights into GATS governance and its related regulatory challenges.

Three of the cases which remained at the level of mutual consultations were identical, i.e. *China-Measures Affecting Financial Information Services and Foreign Financial Information Suppliers* (DS 372, DS 373 and DS 378) pertained to China as a respondent, with US, Canada and EU being the complainants. GATS Articles XV,⁴⁰⁸ XVI⁴⁰⁹ and XVII⁴¹⁰ were invoked by all three complainants in their requests for consultations. The EU, the United States and Canada claimed that a number of Chinese measures were adversely affecting foreign financial service suppliers in China. Such measures included various legal and administrative instruments which empowered the state news agency to act as a regulatory authority for foreign news agencies and financial information suppliers. The complainants further contested that foreign firms were not allowed to solicit subscriptions directly for their services in China, which was in violation of China's commitments, *inter alia*, under the above quoted provisions of the GATS. As a consequence of consultation, China signed identical memorandums of understanding with the three complainants and undertook to authorize a new regulator of financial information services, which was to be a governmental entity separate from, and not accountable to, any supplier of financial information services. China also introduced a new and a more 'GATS compatible', licensing system for the purpose of the provision of subject service. Note that the point of contention was the internal regulatory mechanisms, and China ended up amending the same to comply with its obligations under GATS.

Another case, *China-Value-Added Tax on Integrated Circuits* (DS 309) involving China and the United States pertained to China's alleged preferential regime for domestically produced and designed integrated circuits. The US claimed that China was subjecting imported integrated circuits at a higher tax rate than the local ones. China's tax policies were considered by the US to be a violation of various GATT provisions, China's Protocol of Accession and Article XVII⁴¹¹ of GATS. China agreed to amend or revoke the measures at issue, to eliminate the availability of VAT refunds on integrated circuits produced and sold in China and on those designed in China. Consequently, a

⁴⁰⁸ Subsidies.

⁴⁰⁹ Market Access as regards specific commitments.

⁴¹⁰ National Treatment.

⁴¹¹ National Treatment provisions.

mutually agreed solution was notified to DSB.⁴¹² Again, this case brings out the regulatory impact that GATS legal obligations can have on the national policies of a Member country.

Ecuador requested consultations with Turkey concerning certain import procedures for fresh fruits, in particular, bananas in *Turkey-Certain Import Procedures for Fresh Fruit* (DS 237) on 31 August 2001. Turkey required issuance by the Turkish Ministry of Agriculture of a certain document from foreign suppliers. Ecuador alleged that this procedure as applied by the Turkish authorities was a barrier to trade, which was inconsistent with the obligations of Turkey *inter alia* under GATT 1994, and the GATS. GATS provisions invoked included Article VI⁴¹³ and Article XVII⁴¹⁴. The matter was mutually settled after Turkey agreed to issue the relevant document for the quantities requested by Ecuador: notice the internal regulatory procedure being considered a barrier to services trade.

Two similar cases, *Nicaragua-Measures Affecting Imports from Honduras and Colombia* (DS 201 and DS 188) wherein the consultations did not reach their logical conclusion, were brought by Colombia and Honduras in respect of certain Nicaraguan measures which taxed goods originating from Colombia and Honduras. Among certain GATT provisions, Articles II⁴¹⁵ and XVI⁴¹⁶ of the GATS were also alleged to have been violated.⁴¹⁷

Another case was brought by the EC in January, 1998, i.e. *Canada-Measures Affecting Film Distribution Services* (DS 117). It was alleged that Canada's policies on film distribution contravened Articles II⁴¹⁸ and III⁴¹⁹ of the GATS.⁴²⁰

On 2 May, 1997, the US requested consultations with Belgium in respect of certain measures of the Kingdom of Belgium governing the provision of commercial telephone directory services in *Belgium -Measures Affecting Commercial Telephone Directory Services* (DS80). These measures included the imposition of conditions for obtaining a licence to publish commercial directories, and the

⁴¹² Satisfactory implementation of the settlement was noted in WT/DS309/8 (6 October 2005).

⁴¹³ Domestic Regulations.

⁴¹⁴ Market Access.

⁴¹⁵ MFN.

⁴¹⁶ National Treatment.

⁴¹⁷ The case apparently pertained to a territorial dispute, now pending before the International Court of Justice William J Davey, 'Specificities of WTO Dispute Settlement in Services Cases' in *GATS and the International Regulation of Trade in Services* (Cambridge 2008) 276.

⁴¹⁸ MFN.

⁴¹⁹ Transparency.

⁴²⁰ Although no settlement was notified in the case, it was reported that the complaining company had been bought by a Canadian company and the grievance was accordingly addressed. Gregory C Shaffer, *Defending Interests: Public Private Partnership in WTO Litigation* (The Brookings Institute 2003) 196.

regulation of acts, policies and practices with respect to telephone directory services. The US alleged violations of Articles II,⁴²¹ VI,⁴²² VIII⁴²³ and XVII⁴²⁴ of GATS, as well as nullification and impairment of benefits accruing to it under the specific GATS commitments made by the EC on behalf of Belgium.⁴²⁵

On 13 June, 1996, the US requested consultations with Japan concerning Japan's measures affecting distribution services through the operation of the Large-Scale Retail Store Law, which regulates the floor space, business hours and holidays of supermarkets and department stores, i.e. *Japan-Measures Affecting Distribution Services* (DS 45). Violations of the GATS Articles III⁴²⁶ and Article XVI⁴²⁷ were alleged. The US also alleged that these measures nullified or impaired benefits accruing to the US under the GATS. The US apparently did not pursue the case for two reasons. First, Japan's Large Retail Stores Act was replaced in 1998, and consequently distribution service policies stopped being a cause of concern for the US. Secondly, since the US had lost a similar case for GATT, it did not consider it worthwhile to pursue the subject case.⁴²⁸

The European Community requested consultations with the United States concerning the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 and other legislation enacted by the US Congress regarding trade sanctions against Cuba *vide United States-the Cuban Liberty and Democratic Solidarity Act* (DS38) on 3 May, 1996. The EC claimed that US trade restrictions on goods of Cuban origin, as well as the possible refusal of visas and the exclusion of non-US nationals from US territory, were inconsistent with US obligations under the WTO Agreement. Violations of GATT Articles I, III, V, XI and XIII, and GATS Articles I,⁴²⁹ III,⁴³⁰ VI,⁴³¹ XVI⁴³² and XVII⁴³³ were alleged.

⁴²¹ Most Favoured Nation Treatment.

⁴²² Domestic Regulations.

⁴²³ Monopolies and Exclusive Services Suppliers.

⁴²⁴ National Treatment.

⁴²⁵ No settlement has been reported in the matter and the case has not been pursued due to lack of commercial interest. William J Davey, 'Specificities of WTO Dispute Settlement in Services Cases' in *GATS and the International Regulation of Trade in Services* (Cambridge 2008) 276.

⁴²⁶ Transparency.

⁴²⁷ Market Access.

⁴²⁸ William J Davey as above fn 253.

⁴²⁹ Scope and Definitions.

⁴³⁰ Transparency.

⁴³¹ Domestic Regulations.

⁴³² Market Access.

⁴³³ National Treatment.

The European Community requested the establishment of a panel on 3 October, 1996. The DSB established a panel at its meeting on 20 November, 1996. At the request of the EC, dated 21 April, 1997, the Panel suspended its work. The Panel's authority lapsed on 22 April, 1998, pursuant to Article 12.12 of the DSU. Although DSB was not notified of a mutually agreed solution, according to press reports, one was reached in April 1997.⁴³⁴

While it has been suggested by some commentators that cases which did not make it to the panel stage were 'mundane' and insignificant,⁴³⁵ they do provide important insights about the GATS regulatory architecture. Firstly, they highlight the areas found by the Member states to be most challenging for the GATS administration. An overwhelming number of cases have quoted Article XVI (Market Access) and Article XVII (National Treatment) as alleged to have been violated. This suggests a pattern in the way obligations under these Articles are interpreted by the Member states. It may also be noted that while the obligations regarding MFN (Article II) and transparency (Article III) apply across the board, no obligations exist regarding market access and national treatment, unless specific scheduling commitments have been made by the Members regarding a particular service. Thus the scope of obligations under these two provisions is very much linked to the commitments undertaken in the Schedule.⁴³⁶

A logical outcome of this arrangement is that the rights and obligations are very clear to both the service provider and the service receiving Members, since they have entered into commitments as a consequence of the 'request and offer' mechanism of the GATS.⁴³⁷ The 'request and offer' mechanism entails that a conscious policy decision has been made to open up the market for a specific sector. However, these complaints reveal that ambiguity remains regarding the nature and extent of the obligations in the sectors committed through this process. This is mainly due to the fact that the complaining Members have found one or other domestic regulation to be a services trade barrier, and hence a violation of the rights to market access. This reinforces one of the issues raised in the first part of this chapter that, in the practical implementation of GATS, domestic regulations are often likely to be perceived as trade barriers. One of the main regulatory challenges for the GATS therefore is to further refine the concept of a services trade barrier. Only then can a

⁴³⁴ William J Davey as above.

⁴³⁵ William J Davey as above.

⁴³⁶ Panagiotis Delimatsis, *International Trade in Services and Domestic Regulations. Necessity, Transparency and Regulatory Diversity* (Oxford 2007) 130.

⁴³⁷ Request and offer mechanism is the prevalent mode of services negotiations in GATS. See Ch 3 for advantages and disadvantages of different modes of services negotiations.

balance be struck between genuine regulatory concerns of the Members and their trading rights under GATS.

A second issue which transpires from the study of these cases is that Member states have addressed the grievances of complaining partners by changing their domestic regulatory architecture to bring it in line with their international obligations under GATS. Although it has been suggested that the intent of GATS is to encourage a 'not-more-trade-distortive-than-necessary' approach towards regulation, instead of harmonization of domestic regulation,⁴³⁸ it can be observed that GATS disciplines have actually influenced domestic regulatory architecture substantially. The study of all these cases also suggests that the outcome of consultations leads to changes in the domestic regulations more often than not, e.g. in at least four cases mentioned above involving China against various developed countries, China had to introduce new regulations, or suitably amend the existing ones to meet its international obligations under GATS. This reinforces the apprehension expressed by the developing countries regarding loss of regulatory autonomy at the time the GATS framework was being negotiated.⁴³⁹

These cases highlight that domestic regulations may be perceived as 'trade barriers' due to the way the GATS obligations have been designed and the lack of clarity on what constitutes a barrier to services trade.⁴⁴⁰ The responding countries altered their regulatory choices voluntarily, instead of fighting to preserve them through the dispute settlement process. This is probably an indication of their understanding that the GATS framework was not designed to accommodate domestic regulatory considerations. It could also be indicative of the fact that the dispute settlement bodies' interpretation of GATS legal obligations is not always favourable towards the Members' regulatory concerns.⁴⁴¹ All these observations point to the need for more clarity on what is a genuine regulatory concern and what constitutes a 'barrier to trade' in the services context, and how to protect the former. The WTO dispute settlement bodies' role in providing this clarity will be discussed in the next section, which looks at the decisions made in GATS related disputes.

⁴³⁸ Panagioti Delimatsis, *International Trade in Services and Domestic Regulations. Necessity, Transparency and Regulatory Diversity* (Oxford 2007) 165.

⁴³⁹ See the section on the GATS negotiations in Ch 1.

⁴⁴⁰ Recall that in Ch 1 it was demonstrated that the GATS conceptual foundation has been inspired by the goods trade experience leading to a similar approach towards trade barriers in both the regimes. What is required is a services specific regulatory approach towards dealing with the rights and obligations of the WTO members under the GATS, and this study is an attempt to explore such approaches.

⁴⁴¹ This is shown in the discussion that follows regarding the WTO panel and Appellate Body decisions in the GATS related disputes.

2. The GATS Case Law

While we observed in the section dealing with cases which did not reach the adjudication stage that Member countries felt obliged to suitably align their domestic regulatory regimes with their obligations under GATS, in cases which reached the adjudication stage, this role was assumed by the dispute resolution bodies. WTO adjudicating bodies have relied heavily on the conceptual basis for the goods trade and the jurisprudence developed in the GATT (goods related) cases. In so doing, WTO adjudicatory bodies have heightened the GATS regulatory challenges, instead of mitigating them. The following discussion on the WTO dispute settlement bodies' decisions regarding GATS disputes will substantiate this viewpoint.

Three cases, i.e. *Canada-Periodicals*, *EC-Banana* and *Canada-Autos* illustrate the relationship between GATS and GATT to varying degrees. It may be appreciated that the line between goods and services is further blurred due to rapid technological advances,⁴⁴² which means that the jurisdiction of both these agreements continues to overlap. It therefore becomes imperative for the adjudicating bodies to carefully weigh Members' legal obligations during each agreement. Not doing so will create unforeseen regulatory burdens for the WTO Members. This however does not seem to be the approach taken by the WTO adjudicating bodies under existing case law. In the *Canada - Periodical* case for example, Canada took a stance that its regulatory measures only affected trade in services, and thus should only be examined under GATS discipline and not GATS. The service was 'advertising' for which no commitments had been undertaken by Canada. However, both the Panel and the Appellate Body held that the obligations under both Agreements were 'cumulative' rather than one having an overriding effect on the other.⁴⁴³ This lay the foundation for a broadening of the scope of GATS obligations to those areas for which no market opening commitments had been undertaken by the Members. It essentially means that a 'measure primarily relating to trade in goods can be reviewed under, and found inconsistent with, the GATS'.

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Interpreting on the same premises, the WTO adjudicating bodies further enhanced the scope of the GATS provisions by relying on the term 'affecting' in Article I:1 of the GAT while giving its ruling in

⁴⁴² Brian Coopeland and Aaditya Mattoo, 'The Basic Economics of Services Trade' in Mattoo, Stern and Zanini (eds), *A Handbook of International Trade in Services* (Oxford 2008); Panagiotis Delimatsis, *International Trade in Services and Domestic Regulations: Necessity, Transparency and Regulatory Diversity* (Oxford 2007) 16.

⁴⁴³ *Canada-Periodicals, Canada-Certain Measures Concerning Periodicals*, Appellate Body Report, WT/DS31/AB/R, 30 June 1997, 17-22.

⁴⁴⁴ Eric H Leroux, 'From Periodicals to Gambling: A review of systemic issues addressed by WTO adjudicatory bodies under the GATS' in *GATS and the Regulation of International Trade in Services* (Cambridge 2008) 237.

the subsequent *EC - Banana* case. In so doing, reliance was again placed on GATT jurisprudence. The Appellate Body stated as follows:

In addressing this issue, we note that Article I:1 of the GATS provides that "[t]his Agreement applies to measures by Members affecting trade in services". In our view, the use of the term "affecting" reflects the intent of the drafters to give a broad reach to the GATS. The ordinary meaning of the word "affecting" implies a measure that has "an effect on", which indicates a broad scope of application. This interpretation is further reinforced by the conclusions of previous panels that the term "affecting" in the context of Article III of the GATT is wider in scope than such terms as "regulating" or "governing". We also note that Article I:3(b) of the GATS provides that "'services' includes any service in any sector except services supplied in the exercise of governmental authority" (emphasis added), and that Article XXVIII(b) of the GATS provides that the "'supply of a service' includes the production, distribution, marketing, sale and delivery of a service". There is nothing at all in these provisions to suggest a limited scope of application for the GATS. We also agree that Article XXVIII(c) of the GATS does not narrow 'the meaning of the term 'affecting' to 'in respect of'.⁴⁴⁵

However, the question remains of whether this was an appropriate approach in the absence of a criterion that could be used to distinguish between genuine regulatory concerns and discriminatory measures aimed at stifling foreign service providers. A better approach probably could have been to examine the 'context' of the regulation before defining the scope of 'affecting'. The Appellate Body has extended the scope of 'affecting' beyond regulations which 'govern' or 'regulate' services on the basis of existing GATT case law. However if the regulatory concerns of the Members are to be taken into account and it is acknowledged that 'trade barriers' in services trade are almost exclusively domestic regulations, the application of 'affecting' has to be restricted to the regulations directly 'governing' the services sectors committed for opening up.

Similarly, in the *EC-Banana* case the argument of the complainant was that the method of distribution of import licences for bananas violated the GATS, since these licences were largely allocated to EU based entities. The EC's defence was that since many non-EC distributors were also allocated these quotas, there was no violation. The panel however focused on the outcomes in the form of market share instead of discrimination on the basis of nationality.⁴⁴⁶ The Panel thus clearly stepped beyond the GATS objectives of protecting Members' right to non-discriminative market

⁴⁴⁵ *EC-Bananas, European Communities – Regime for the Importation, Sale and distribution of Bananas*, Appellate Body Report, WT/DS27/AB/R, 9 September 1997 para 220.

⁴⁴⁶ Bernard Hoekman and Michel Kostecki, *The Political Economy of the World Trading System* (3rd edn, Oxford University Press 2010).

access and undermined their right to regulate. It could be said that it attempted to create an unfettered market for services trade.

The Appellate Body reiterated the wide scope of GATS by stating that the same measure could be scrutinized under both agreements. Thus, since the importers of bananas were also engaged in distribution services, their activities could fall within the ambit of GATS.⁴⁴⁷ The Appellate Body identified three types of measure, i.e. measures falling within the scope of GATT, those falling within the scope of GATS and those measures falling within the scope of both agreements. However, it did not suggest a method of identification for the last category. This was left to be decided on case by case basis.⁴⁴⁸ The adjudicating bodies, while giving a vast scope to the GATS provisions through their interpretation of the word 'affecting' in Article I: 1 of the GATS, needed to provide criteria that could be used to distinguish between 'discriminatory' trade restrictions and genuine regulatory concerns of Member states, which they did not.

The issue of the overlapping jurisdictions of GATS and GATT was again taken up in *Canada-Autos* case, and this time, while agreeing on the relevance of both GATS and GATT to certain measures simultaneously, the Panel and Appellate Body came up with different findings on the application of GATS. The Panel's decision that import duty exemption constituted a measure affecting trade in services in terms of Article I: 1 of the GATS agreement was held presumptive.⁴⁴⁹ The Appellate Body, reversing the findings of the Panel on the application of GATS held that:

'[T]he focus of the enquiry, and the specific aspects of the measure to be scrutinized, under each agreement will be different because the subjects of the two agreements are different'.⁴⁵⁰

Thus it had to be demonstrated that a certain measure had actually 'affected' the supply of services under one of the four modes of supply. Here again although the interpretation of the Appellate body was more reasonable, it fell short of further refining the concept of 'affecting' and developing a regulatory approach, which could be used to support GATS substantive obligations, whilst safeguarding Members' regulatory concerns. Instead, a criterion for the assessment of the 'necessity' of a certain regulatory measure was developed which was not suitable for the services trade for the reasons explained below.

⁴⁴⁷ *EC-Banana* Appellate Body Report paras 223-228.

⁴⁴⁸ *EC-Banana* Appellate Body Report para 221.

⁴⁴⁹ Eric H Leroux, *Eleven Years of GATS Case Law: What have we Learned?* (2007) J.I.E.L. 754.

⁴⁵⁰ Appellate Body Report *Canada-Autos* para 160.

The panel designed a four-pronged test to determine the consistency of a particular measure with Article XVII of GATS.⁴⁵¹ The four elements of the test were:

- Specific GATS commitments must have been undertaken
- Measures affecting trade in services
- Like services or service suppliers
- Treatment no less favourable

While the determination of the first aspect of a case is relatively straightforward, the remaining three points cannot be determined without looking at the wider context and objectives associated with the measures under consideration. GATS does not provide an inherent mechanism to determine the likeness of services, or the extent of favourable/unfavourable treatment.⁴⁵² The only possible way of determining the appropriateness of a regulatory measure is thus by an examination of its context, i.e. its objectives and the kind of effects it has on the domestic and foreign service suppliers. The European Community's appeal to apply an 'aim and effects' approach, which could have helped in bringing these out was rejected, while again relying on GATT related jurisprudence, i. e. *Japan-Alcoholic Beverages* case. The decision read:

'We see no specific authority either in Article II or in Article XVII of the GATS for the proposition that the "aims and effects" of a measure are in any way relevant in determining whether that measure is inconsistent with those provisions. In the GATT context, the "aims and effects" theory had its origins in the principle of Article III:1 that internal taxes or charges or other regulations "should not be applied to imported or domestic products so as to afford protection to domestic production". There is no comparable provision in the GATS. Furthermore, in our Report in *Japan – Alcoholic Beverages*, the Appellate Body rejected the "aims and effect" theory with respect to Article III:2 of the GATT 1994. The European Communities cite an unadopted panel report dealing with Article III of the GATT 1947, *United States - Taxes on Automobiles* 152, as authority for its proposition, despite our recent ruling.'⁴⁵³

It is evident from the Appellate Body's decision to disregard the request for an 'aim and effect' approach that it relied on a strict 'textual' interpretation of GATS Article XVII: 2 and 3. Hudec called this a 'head counting' approach which ignored the 'evident purpose' and the 'economic

⁴⁵¹ WT/DS 27/R.

⁴⁵² Mireille Cossy, 'Determining "likeness" under the GATS: Squaring the circle?' WTO Staff Working Paper ERSD-2006-08 September 2006.

⁴⁵³ WT/DS 27/R para 241.

consequences' of the regulations involved.⁴⁵⁴ In the absence of criteria to determine 'likeness' in services in the same way as goods, the 'aims and effects' test can provide the necessary flexibility, a fact which seems to have been ignored by the WTO adjudicating bodies.⁴⁵⁵

But more puzzling is the WTO dispute settlement bodies' almost exclusive reliance on goods related jurisprudence. This certainly poses a limitation for the implementation of the GATS framework by the Member countries, and is a cause for further entrenchment of its regulatory challenges. It seems that the possibility of developing a purely services related jurisprudence will be almost non-existent until the WTO adjudicatory bodies start to appreciate the unique challenges faced by the multilateral services trade.

Turning now to the interpretation of specific commitments in Members' schedules and the relevance of the scheduling guidelines to this interpretation, it can be observed that the WTO adjudicating bodies have equated the services schedules of specific commitments with the GATT tariff structure. The extent to which this approach is helpful, and what regulatory implications it has for the WTO members is discussed below. The decision to adopt 2001 Scheduling Guidelines reads:⁴⁵⁶

1. To adopt the Guidelines for Scheduling of Specific Commitments under the General Agreement on Trade in Services contained in document S/CSC/W/30 as a non-binding set of guidelines.
2. Members are invited to follow these guidelines on a voluntary basis in the future scheduling of their specific commitments, in order to promote their precision and clarity.
3. These guidelines shall not modify any rights or obligations of the Members under the GATS.

The scheduling guidelines were thus not to affect the balance of Members rights and obligations, as is evident from the above, and this is the key point.

Two cases, i. e. *US-Gambling* and *Mexico-Telecom* dealt with the legal relevance of the 2001 Scheduling Guidelines. The report on *Mexico-Telecom*⁴⁵⁷ held a view that the scheduling guidelines had relevance to the interpretation of GATS. The panel in *US-Gambling* further enhanced the significance of the scheduling guidelines by stating that they formed the 'context' in terms of Article 31 of the VCLT under which to examine a Member's GATS related obligations. Later

⁴⁵⁴ Robert E Hudec, 'GATT/WTO Constraints on National Regulation: Requiem for an "Aims and Effects" Test', 32 *International Lawyer* (1998). Reprinted in R E Hudec, *Essays on the Nature of International Trade Law* (London Cameron May 1999). Also available at: www.worldtradelaw.net/articles/hudecrequiem.pdf accessed 15 June 2015.

⁴⁵⁵ A more detailed discussion on the suitability of the 'aims and effects' approach has been carried out in Ch 6 of the thesis.

⁴⁵⁶ WTO DocS/L/91.

⁴⁵⁷ WT/DS/204/R 2 April 2004.

on, the Appellate Body held that the scheduling guidelines should be taken as a 'supplementary means of interpretation' instead of the 'context' in terms of Article 32 of VCLT.⁴⁵⁸ In so doing, reliance was placed on the GATT Appellate body Report in the *EC – Computer Equipment*⁴⁵⁹ case. It was held that:

'In the context of the GATT 1994, the Appellate Body has observed that, although each Member's Schedule represents the tariff commitments that bind one Member, Schedules also represent a common agreement among all Members. Accordingly, the task of ascertaining the meaning of a concession in a Schedule, like the task of interpreting any other treaty text, involves identifying the common intention of Members, and is to be achieved by following the customary rules of interpretation of public international law, codified in Articles 31 and 32 of the Vienna Convention.'

⁴⁶⁰

This methodology, based on the rules of treaty interpretation contained in the Vienna Convention, led to the conclusion that the US had made market opening commitments for gambling services vide its general commitment under 'recreational, cultural and sporting services'. It may be recalled that the question under consideration was whether or not the US had made a commitment to allow market access to international gambling services suppliers, and whether its law regarding a ban on gambling was correctly interpreted to enable the US to avail itself of Article XIV (a) exception. It is surprising that in the presence of a 'specific' non-commitment, a legal analysis was carried out on the premises of 'general' rules of treaty interpretation in the Vienna Convention, termed an 'activist interpretation' by Munin.⁴⁶¹ This view holds ground for the reasons explained below.

The US contested that 'the remote supply of gambling poses threats related to organized crime, money laundering, fraud and other criminal activities; risks to children given the availability of remote supplied gambling and betting services to children; and particular health risks'.⁴⁶² If we now look at the Panel decision, it acknowledged the importance of domestic interests being defended by the US using the following words:

⁴⁵⁸ Vienna Convention on the law of treaties of 23rd May 1969, 1155 U. N. T. S331; 8 ILM 679. Articles 31 and 32.

⁴⁵⁹ Appellate body Report European Communities – Customs Classification of Certain Computer Equipment WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (5/6/1998)

⁴⁶⁰ *US-Gambling* Appellate Body Report para 159.

⁴⁶¹ Nellie Munin, 'The GATS: a legal perspective on crossroad of conflicting interests', (2011) 10 (3) World Trade Review 325-342.

⁴⁶² Panel Report *US-Gambling* para 6 479.

'We are well aware that there may be sensitivities associated with the interpretation of the terms "public morals" and "public order" in the context of Article XIV. In the Panel's view, the content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values. Further, the Appellate Body has stated on several occasions that Members, in applying similar societal concepts, have the right to determine the level of protection that they consider appropriate.'⁴⁶³

It is somewhat surprising, then, that the Panel and the Appellate Body dismissed the US defence, and chose to construct an interpretation from the ground favouring trade liberalization. However, in doing so, they failed to apply the rules of interpretation contained in the Vienna Convention in a GATS specific manner. It was determined that since the US had reasonably available alternatives to the existing practice, its claim for availing the exceptions defence could not hold.⁴⁶⁴ If the scheduling guidelines were, however, truly taken as the 'context' in terms of Article 31(1) of the Vienna Convention, the same had very clear provisions regarding modifying the balance of rights and obligations.⁴⁶⁵ In a way this was to be the 'objective' of these guidelines. Article 31 (1) of the Vienna Convention, on the other hand, reads:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its **object and purpose**.

Now if we read the scheduling guidelines and the above Treaty rule in juxtaposition, it can be clearly seen that the decision to disregard the US defence for imposing a restriction on Internet betting services was not only based on an extraordinarily stretched meaning of the treaty, but was also at loggerheads with its very objective.

The US-Gambling case was the first case to interpret public moral exception in GATS.⁴⁶⁶ It was essentially ruled that a Member cannot maintain any of the measures listed in Article XVI: 2 if a full market access commitment has been undertaken under Article XVI. Full market access is represented by the entry 'none' in the Schedule, which means that there is no restriction on market access.⁴⁶⁷ In Delimatsis' view, interpreting full market access commitment in a specific sector as total market openness would not be in complete agreement with GATS textual

⁴⁶³ Panel Report *US-Gambling* para 6 461.

⁴⁶⁴ Panel Report *US-Gambling* para 6 529-6, 531.

⁴⁶⁵ Refer to the 2001 decision to adopt the scheduling guidelines WTO DocS/L/91, March, 2001 available at: <https://docs.wto.org/dol2fe/Pages/FE.../DDFDocuments/.../L/91.pdf> accessed 15 June 2015.

⁴⁶⁶ William J Davey, 'Specificities of WTO Dispute Settlement in Services Cases' in *GATS and the International Regulation of Trade in Services* (Cambridge 2008) 295.

⁴⁶⁷ Panel Report *US - Gambling* para 6 318 and Appellate Body Report para 215.

elements.⁴⁶⁸ This view holds ground since, as discussed earlier, the purpose of GATS is non-discriminatory market access, and not an obstruction free market.

The next GATS case under discussion, i.e. *China-Audiovisual Services*, touches upon almost all the areas covered in previous disputes. The adjudicating bodies reiterated in the *China Audiovisual* case that a product can have both goods and services components, and accordingly be subjected to the provisions of GATS or GATT. It is interesting to note that China's 'right to regulate' what can be traded and who can trade was duly acknowledged by the Appellate Body.⁴⁶⁹ However, this right will remain elusive until a mechanism or clear regulatory guidelines are provided by the WTO dispute settlement bodies, which they have not done to date.

The delicate balance between domestic policy objectives and trade liberalization considerations has become a subject of scrutiny by the adjudicating bodies. An analysis of the WTO dispute settlement bodies' approach towards the handling of GATS disputes in this chapter demonstrates that, more often than not, a legal interpretation of GATS has been chosen which has favoured trade liberalization objectives over domestic policy goals.⁴⁷⁰ It may also be added that the WTO dispute settlement bodies' engagement with the GATS framework has done little to develop a mechanism for maintaining a balance between various policy considerations of the Members and multilateral trade liberalization agenda of the GATS. In fact, the Appellate Body's reading of Article XVI of GATS in *US-Gambling* has been compared to a landmark decision of the European Court of Justice in the *Dassonville*⁴⁷¹ case, which expanded the scope of the prohibition under Article 28 of the Treaty of Rome to 'all trading rules enacted by Member states which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade'.⁴⁷²

Belgian law stipulates that goods bearing a designation of origin can only be imported if they are accompanied by a certificate from the government of the exporting country certifying the right to export. *Dassonville* imported Scotch whisky into Belgium from France without having the requisite certificate from the British authorities. Consequently, *Dassonville* was prosecuted in Belgium, and argued by way of defence that the Belgian ruling constituted a measure that had an equivalent effect to the quantitative restriction on trade. In the seminal decision of *Dassonville*, the scope of Article

⁴⁶⁸ Panagiotis Delimatsis, 'Don't Gamble with GATS - the Interaction between Articles VI, XVI, XVII and XVIII of GATS in the Light of the US Gambling Case' (2006) 40 (6) JWT 1064.

⁴⁶⁹ Paola Conconi and Joost Pauwelyn, 'Trading Culture: Appellate Body Report on China-Audiovisuals' (2011) 10 (1) World T. R. 100.

⁴⁷⁰ Nellie Munin, 'The GATS: A Legal Perspective on Crossroads of Conflicting Interests', (2011)10 (3) World T. R. 338.

⁴⁷¹ Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837.

⁴⁷² Federico Ortino, 'United States: Measure Affecting the Cross border Supply of Gambling and Betting Services.' (2008) 7 (1) World T. R. 115.

34 TFEU was interpreted very widely. The Court held that ‘any measure capable of hindering, directly or indirectly, actually or potentially, intra-Community trade’ would fall within the scope of Article 34, and thus be prohibited. This meant that any measure that could potentially interfere with intra-Community trade, even indirectly, could fall within the scope of Article 34. Evidently this was a step too far, particularly as the case was decided before completion of the EC internal market. Taken to extremes, *Dassonville* could be used to challenge a plethora of national rules. For this very reason, the WTO dispute settlement bodies’ treatment of *US-Gambling* has been compared with the *Dassonville* case. It has already been highlighted that free movement of services is much more complex than free movement of goods, due to the human element. This freedom affects not only the provision of services, but also those who deliver them. Consequently, there is a need to carefully weigh the implications of interpreting trade disciplines too broadly for the WTO member countries’ regulatory architecture.

The questions to raise are: Does GATS have a mandate for ‘internationalizing’ the issues which the Members want to keep in their domestic jurisdiction?⁴⁷³ Does it need to override all other regulatory objectives to advance trade liberalization? Is there a need for the WTO adjudicatory bodies to realign their interpretation of GATS provisions with its dual objective of ‘progressive liberalization’ and recognition of the Members’ right to ‘regulate’, as stated in its preamble?

A Discussion on *Mexico-Telecom*, *US-Gambling* and *China-Audiovisual* Cases

In the concluding section of this chapter, it is important to draw on three cases that deal more specifically with GATS regulatory issues. These cases are also important to understand the potential impact of the GATS obligations and their interpretation by the WTO dispute settlement bodies for WTO members’ domestic policies and regulatory architecture.

Mexico-Telecom was the first case dealing purely with trade in services under the GATS. The US alleged that Mexico had failed to open its cross-border telecommunications as required under its GATS obligations, on the following grounds:

- Mexico had failed to ensure that Telmex (its major telecommunications supplier) provided interconnection between US cross-border suppliers of these services on reasonable terms, conditions and cost-oriented rates, in accordance with Section 2 of its Reference Paper commitments.
- It had failed to maintain appropriate measures to prevent Telmex from engaging in ‘anticompetitive practices’, since regulations empowered Telmex to fix rates for

⁴⁷³ Petros Mavroidis, ‘Highway XVI revisited: The Road from Non-Discrimination to Market Access in GATS’ (2007) 6 (1) World T. R. 1.

international interconnection on behalf of all suppliers in the market, resulting in a cartel, contrary to Section 1 of its Reference Paper commitments.

- It had failed to ensure access by US suppliers to public telecommunications networks in Mexico, thus preventing them from providing non-facilities based services within Mexico (through commercial agencies) and international simple resale. This was inconsistent with Articles 5(a) and 5(b) of the GATS Annex on Telecommunications.

In deciding the case, one of the key issues addressed by the Panel was what constituted cross-border supply. Mexico argued that its GATS schedule did not contain specific commitments that would attract Reference Paper obligations. According to Mexico, the reference paper obligations did not extend to services that originated abroad, or were subject to international accounting rates.⁴⁷⁴ It made the plea that the services in question were not supplied cross-border, because the data was not transmitted by the supplier itself. The Panel concluded that a telephone call originating from the US and terminating in Mexico was indeed a cross-border service, even if the US firm did not use its own facilities in Mexico, but instead used Mexican firms to carry the call from its border to the final destination. In other words, for a service to be cross-border it was not necessary for the service to be provided by the US supplier itself within Mexican territory. In other words, commercial arrangements made by the supplier for providing the service were irrelevant, and what mattered was the commitment to deliver the service to customers.

The Panel also found that uniform settlement rates and proportional returns were so designed that Mexican operators worked like a cartel, and thus engaged in anti-competitive practices. The Panel noted that Mexico had not taken adequate steps to check these practices. It was clarified by the Panel that the anti-competitive practices fell within the scope of the Telecom Reference Paper, even when they were mandated by domestic law. While giving an overriding importance to the commitments made by the WTO members in the Telecom Reference Paper, the Panel stated that:

‘International commitments made by under the GATS “for the purpose of preventing suppliers...from engaging in or continuing ant-competitive practices” are ...**designed to limit the regulatory powers of WTO members.**⁴⁷⁵

The panel thus interpreted the terms of the Reference Paper as binding obligations to be undertaken by Mexico. This was notwithstanding the chapeau of the Reference Paper that provided ‘[t]he following are principles and definitions on the regulatory framework for the basic telecommunication services.’

⁴⁷⁴ Mexico-Telecom para 7.18.

⁴⁷⁵ Mexico-Telecom para 7.244.

The US also claimed that Mexico did not meet its obligations under Section 5 of the GATS Annex on Telecommunications, by not ensuring that US suppliers had access to its public telecommunication transport network. Mexico's stance was that the access and use of its public telecommunication network was not a part of its commitments under the Annex. The Panel noted that Section 5(a) of the Annex obliged Mexico to provide access to its public telecommunication network to any other WTO member for the supply of a 'service included in its Schedule'.

From the above discussed points, it becomes evident that the scope of the WTO disciplines on regulation of the international trade in services is very broad. Similarly, the power of the WTO dispute settlement bodies in giving interpretation to the Members' legal obligations under GATS is equally extensive.

The next major case that focused on the balance between trade obstructions and domestic regulatory autonomy in the services trade was the *US-Gambling* case, which was discussed at some length in the previous section. However, the regulatory impact of this case needs emphasizing in this concluding section of the chapter. It may be recalled that three federal and four state laws were found to violate GATS commitments made by the US, so in order to comply with the dispute settlement bodies' rulings, the US government had to not only change its own law, but also override the state authority to regulate gambling at a domestic level. The Panel also observed that if there was a more flexible regime for similar services in one area, a stricter regime in another area served as a trade barrier, and could not be justified. This could essentially mean setting up a 'lowest common denominator' requirement at the sub-federal level⁴⁷⁶, way beyond the mandate available to the GATS regarding influencing domestic regulatory regimes.

China-Audiovisual case represents the fundamental tension between market access rights of the WTO members (US in this case) and their domestic policy considerations (in this case China). It also brings home the need to factor in non-trade considerations into the multilateral services trade disciplines. China was found to violate GATT, GATS and China's Accession Protocol for certain cultural products or 'content' related goods. This finding of the Panel and Appellate Body supports the view that the WTO dispute settlement bodies adopt a least trade-restrictive approach to apply and interpret the multilateral trade disciplines, even when they are addressing those aspects of domestic policy which have a close relation to WTO members' cultural policy. It should be acknowledged that the cultural policy of a country is often closely linked with its political and social identity, and requires ample regulatory autonomy.

⁴⁷⁶ Ellen Gould, 'The GATS US Gambling Decision: A Wake up Call to WTO Members' Briefing Paper, (December 2004) 5 (4) Canadian Centre for Policy Alternatives.

C. Concluding remarks

The main regulatory questions which came under the WTO dispute settlement bodies' consideration resonate with the issues flagged up in the first part of this chapter. These questions mainly relate to defining the scope of services related market access commitments and domestic regulations being perceived as 'trade barriers'. They also relate to the interpretation of 'necessity' in finding the justification for a regulatory measure and market access exception. In trying to address all these questions, the adjudicating bodies have somewhat blurred the lines between the GATT and the GATS, not only in terms of conceptualizing the goods and the services trades, but also in interpreting the provision in both the agreements and in the application of case law.

There is a pattern emerging in WTO jurisdiction where the legal approaches developed in the goods trade are being followed for decisions taken in services related cases. This is tilting the balance of outcomes towards one of these two objectives, i.e. services trade liberalization as against the Members' right to regulate. The question is whether this is an entirely appropriate trend, and whether the adjudicating bodies have exceeded the mandate available to them under the GATS treaty? Articles II (Most Favoured Nation Treatment), VI (Domestic Regulation), XVI (Market access) and Article XVII (National Treatment) of the GATS concern themselves with 'non-discrimination' in the treatment extended to services and services suppliers from different sources in comparison with domestic services.⁴⁷⁷ Should they, then, be interpreted to mean more than that? The above discussion indicates an interpretation of the GATS provisions which favours 'unhindered market access' while an interpretation barring any discrimination on the basis of nationality will also suffice.

Another key point which needs emphasizing here is that the WTO adjudicating bodies seem to be overly reliant on the conceptual basis for the goods trade in their interpretation of services trade disputes. They have gone as far as drawing direct comparison between the GATT (goods related) jurisprudence and the GATS.⁴⁷⁸ This is not necessarily the best approach for the governance of multilateral services trade. This approach on the one hand adds to the apprehension expressed by WTO Members regarding loss of their regulatory autonomy at the time the GATS was being drafted,⁴⁷⁹ and, on the other, serves as a roadblock in the development of GATS as a regulatory framework. This chapter also points out that the 'aims and effects' approach, instead of the current 'necessity' based approach for determining the extent of GATS obligations is more suitable for the GATS administration. Although most commentators on GATS favour the 'necessity' based

⁴⁷⁷ Discussed at some length in the introduction to Ch 1.

⁴⁷⁸ As indicated in the above discussion on individual case rulings.

⁴⁷⁹ Refer to Ch 1 of the thesis.

approach rather than the 'aims and effects' approach in solving disputes, the latter is more suited to services related regulatory challenges, as will be demonstrated in the concluding part of the study.

After examining the GATS regulatory framework in Chapter 1 and the GATS governance through case law in Chapter 2, it is important to examine the policy space within which any progress in multilateral liberalization of services trade can occur. This policy space is defined by the ongoing negotiations being conducted under the umbrella of WTO. The latest round of WTO negotiations is the Doha Round, which is now in its 15th year.⁴⁸⁰ The next chapter is accordingly devoted to this study and to see how the services rule-making agenda is attempting to deal with GATS regulatory challenges.

⁴⁸⁰More details available at:

< http://www.wto.org/english/tratop_e/dda_e/dda_e.htm > accessed 15 June 2015.

CHAPTER 3

WTO's Doha Round of Negotiations and the Services Trade

A. Introductory remarks

The latest round of WTO negotiations is the Doha Round, more commonly known as Doha Development Agenda (DDA), which is now into its fifteenth year.⁴⁸¹ The extent of progress in the services related component of this Round will reveal whether the GATS objectives of progressive trade liberalization have been achieved or not. The relevant context in this regard is provided by overall multilateral trade negotiations.⁴⁸² Although the Doha Round of negotiations has posted very little overall progress, services trade has been a particularly problematic area. This holds true for both services trade market openings and the rule-making agenda of GATS.⁴⁸³ The Doha Ministerial Declaration which was adopted on November 14, 2001 listed 21 subjects in its 'work programme' which included Agriculture, Non-agriculture Market Access, Services, and Intellectual Property Trade and WTO rules.⁴⁸⁴ The Declaration included a statement that 'the conduct, conclusion and entry into force of the outcomes of the negotiations shall be treated as part of a 'single undertaking'.⁴⁸⁵ This approach has not been very effective for achieving GATS related services trade progress.⁴⁸⁶ This strengthens the view that the GATS governance paradigm is in need of revisiting.

A review of the WTO Round's rule-making agenda for services trade will reveal as to what extent such rule-making is tailored to the GATS specific regulatory challenges highlighted in the first two

For a general overview of the Doha Round see Donna Lee, *The WTO after Hong Kong: progress in, and prospects for, the Doha Development Agenda* (Routledge 2007); For a more specific services trade review of the round see part IV of Ernst-Ulrich Petersmann (ed), *Reforming the world trading system: legitimacy, efficiency, and democratic governance* (Oxford 2005) and Simon Evenett, *Next Steps: Getting Past the Doha Round Crisis* (Centre for Economic Policy Research 2011).

⁴⁸² The subjects covered in the Doha Round negotiations include agricultural and non-agricultural market access, services, trade-related intellectual property rights, trade facilitation, trade and investment and rules on subsidies, etc. The full list of subjects can be seen at: https://www.wto.org/english/tratop_e/dda_e/dohasubjects_e.htm accessed 15 June 2015.

⁴⁸³ This is the WTO's admitted position and becomes clearer as the chapter proceeds. Also see Harald Hohmann (ed), *Agreeing and Implementing the Doha Round of WTO* (Cambridge 2008) and Bernard Hoekman, 'The Doha Development Agenda 10 Years on: What Next?' in Rorden Wilkinson and James Scott (eds), *Trade, Poverty, Development: Getting Beyond the WTO's Doha Deadlock* (Routledge 2013).

⁴⁸⁴ Doha Ministerial Declaration, WT/MIN (01)/DEC/ 01.

⁴⁸⁵ Doha Ministerial Declaration, WT/MIN (01)/DEC/ 01 Para 47. This approach means that all of the agenda items have to be taken up simultaneously and 'nothing is agreed unless everything is agreed', Matthew Kennedy, 'Two Single Undertakings - Can the WTO Implement the Results of a Round?' (2011) 14 J.I.E.L. 79.

⁴⁸⁶ See Kennedy above.

chapters. These challenges mainly pertain to a balancing of the dual objectives of the GATS, i.e. progressive liberalization of the services trade, while protecting the WTO Members' regulatory space for meeting genuine policy concerns. A very ambitious Doha Development Agenda is, however, hampering the progress in the services trade, and therefore the question needs to be asked as to whether a change in the negotiating strategy is required to focus on smaller projects to enable the GATS related progress. It is worth examining whether the services negotiation approaches currently used by the WTO take into account the peculiarities associated with the multilateral services trade.⁴⁸⁷ Some of the services specific regulatory challenges manifested in the GATS implementation have been highlighted earlier.⁴⁸⁸ Whether the GATS related negotiations and rule-making agenda take into account these challenges is a crucial question, which is focused upon in this chapter.

B. Background to the Doha Round

The idea of the launch of a fresh round of WTO negotiations dates back to the WTO's First and Second Ministerial conferences held in Singapore and Geneva in 1996 and 1998 respectively.⁴⁸⁹ Certain circles of the WTO Membership had begun promoting the idea of a comprehensive 'Millennium Round' at that time.⁴⁹⁰ This round was meant to include negotiations on agriculture and services trade.⁴⁹¹ Many developed nations, including the EU had high stakes in these areas, particularly in agriculture.⁴⁹² Consequently, informal meetings of the Members, who called themselves 'The Friends of a New Round', including both developing and developed countries, were held in 1998 and 1999.⁴⁹³ Thus the launch of a new round of negotiations became an agenda

⁴⁸⁷ The 'multilateral services trade' implies the mode-based definition of services trade provided in the GATS, and the peculiar challenges of governing services trade on the basis of this definition have already been highlighted in Ch 1.

⁴⁸⁸ In Ch 1, while discussing the nature of GATS' obligations, and in Ch 2, which deals with GATS related disputes.

⁴⁸⁹ Sungjoon Cho, 'The Demise of Development in Doha Round Negotiations', (2010) 45 Texas International Law Journal.

⁴⁹⁰ William Lovett, 'Bargaining Challenges and Conflicting Interests: Implementing the Doha Round' (2002) 17 AM. U. INT'L L. REV. 951, 958.

⁴⁹¹ David Christy, 'Round and Round We Go . . .' (Summer 2008) WORLD POL'Y J; Simon Evenett, 'What Can Researchers Learn from the Suspension of the Doha Round Negotiations in 2006?' (2007) Univ. of St. Gallen Discussion Paper No. 2007-17.

⁴⁹² Ibid.

⁴⁹³ Ian Fergusson, 'World Trade Organisation Negotiations: The Doha Development Agenda', Congressional Research Service Report for Congress, December 12, 2011. Available at: <http://fas.org/sgp/crs/misc/RL32060.pdf> accessed 15 June 2015.

item by the time the Third Ministerial Conference of the WTO was held in Seattle from 30th November to 3rd December, 1999. According to the then Director General, WTO Mike Moore:

“All of us recognize, deep down, that a broad and balanced new trade remit is in our shared interest...”⁴⁹⁴

WTO’s Seattle Ministerial Conference was marred by irreconcilable differences on the agenda items and was a diplomatic failure.⁴⁹⁵ The post Seattle period was accordingly dubbed as a ‘confidence building’ period, and various steps were taken to bridge the gap between the positions of the WTO Members.⁴⁹⁶ This was proposed through technical co-operation and capacity building to bridge the implementation gaps.⁴⁹⁷ Preparatory work for a new round accordingly began with informal meetings in April, 2001, and in July, 2001 a report was circulated concluding that:

“For many delegations, it is clear that the launch of a wider negotiation programme is effectively the working hypothesis.”⁴⁹⁸

Speaking at a meeting on 30th July 2001, Director General Moore observed:

“The question facing the Ministers will be the same as at Seattle: are they ready to launch a wider process of negotiations – a new round in fact – and if so what should its content be? I have made no secret of my conviction that a new round is necessary.....The arguments in favor of launching a new round have been recognized by an increasing number of international institutions, notably by the Secretary General of the UN himself and by a succession of ministerial and leaders’ summits”.⁴⁹⁹

A mini-ministerial meeting was held in Mexico City on 1 September, 2001 which reached a near consensus on the launch of the Doha Round, but differences remained in areas such as agriculture and the so-called ‘Singapore issues’.⁵⁰⁰ Accordingly, two draft texts were released on September

⁴⁹⁴ Opening Address to the Third Ministerial Conference, 30 November 1999 available at: http://www.wto.org/english/news_e/pres99_e/pr156_e.htm accessed 15 June 2015.

⁴⁹⁵ Raghwan Chakrawarthy, ‘Seattle WTO Ministerial ends in failure’ for the Third World Network available at: <http://www.twinside.org.sg/title/deb2-cn.htm> accessed 15 June 2015.

⁴⁹⁶ Oren Peres, *Ecological Sensitivity and Global Legal Pluralism: Rethinking the Trade and Environment Conflict* (Hart Publishing 2004).

⁴⁹⁷ Stuart Harbinson, ‘The Doha Round: “Death-Defying Agenda” or “Don’t Do it Again”?’ ECIPE working paper NO 10/2009 available at ECIPE website.

⁴⁹⁸ Report by the Chairman of the General Council in co-operation with the Director-General on the Current State of Preparatory Work, Job (01)/118, 24 July 2001 (informal document).

⁴⁹⁹ Statement by the Director General in informal General Council Meeting, 30 July, 2001 as quoted by Stuart Harbinson, ‘The Doha Round: “Death-Defying Agenda” or “Don’t Do it Again”?’ ECIPE working paper No 10/2009 available at ECIPE website.

⁵⁰⁰ Singapore issues refer to the relationship between trade and investment, trade and competition policy, trade facilitation and transparency in government procurement. See the following WTO link at:

2001, i.e. a draft ministerial declaration⁵⁰¹ and a draft decision on implementation related issues.⁵⁰² A revised version was issued on 27th October, 2001 which was forwarded to ministers as the basis on which to build the new Doha Round.⁵⁰³

This long chain of preparatory work which led to the Doha Round shows that it had a 'respectable parentage'.⁵⁰⁴ It is therefore intriguing that the negotiations in the round have failed to reach a conclusion to date.⁵⁰⁵ However, more intriguing is the fact that no effort has been made to change the current strategy, despite its ineffectiveness in reconciling the differences between WTO Members. What can be the possible alternatives in this regard has been explored further in the chapter. However first a brief account is given of the various stages of negotiations in the Doha Round and their services trade component, to bring home the actual state of play in GATS related liberalization gains and rule-making.

C. The Chronology and the Scope of Doha Round⁵⁰⁶

The Doha Round of negotiations was launched in Doha, Qatar in November, 2001 at the Fourth Ministerial Conference of the WTO Members.⁵⁰⁷ The Doha Ministerial Declaration was adopted on November 14, 2001. It listed 21 subjects in its 'work programme', including Agriculture, Non-agriculture Market Access, Services, Intellectual Property Trade and WTO rules.⁵⁰⁸ It was envisaged that the negotiations would be concluded by 1 January, 2005.⁵⁰⁹ The Declaration also included a statement that 'the conduct, conclusion and entry into force of the outcomes of the negotiations shall be treated as part of a single undertaking'.⁵¹⁰ Single undertaking has been summed up in the

http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey3_e.htm accessed 15 June 2015.

⁵⁰¹ Draft Ministerial Declaration, JOB (01)/140, 26th September 2001 (informal document).

⁵⁰² Draft Decision on Implementation Related Issues and Concerns, JOB (01)/139, 26th September 2001, informal document.

⁵⁰³ Letter from Chairman of the General Council and the Director General to H. E Mr. Yousaf Hussain Kamal, Minister of Finance, Economy and Commerce of Qatar, dt 5th November 2001 available at: <http://www.thunderlake.com/ministerials.html> accessed 15 June 2015.

⁵⁰⁴ Stuart Harbinson, 'The Doha Round: "Death-Defying Agenda" or "Don't Do it Again"?' ECIPE working paper NO 10/2009 available at ECIPE website.

⁵⁰⁵ Rorden Wilkinson and James Scott (eds), *Trade, Poverty, Development: Getting Beyond the WTO's Doha Deadlock* (Routledge 2013).

⁵⁰⁶ The chronology of events has been mainly drawn from the official WTO website at: http://www.wto.org/english/tratop_e/dda_e/dda_e.htm accessed 15 June 2015.

⁵⁰⁷ See for details of the Round the following official WTO website at: https://www.wto.org/english/tratop_e/dda_e/dda_e.htm accessed 15 June 2015.

⁵⁰⁸ The full list of the subjects can be seen at the following official WTO website link at: https://www.wto.org/english/tratop_e/dda_e/dohasubjects_e.htm accessed 14 June 2015.

⁵⁰⁹ Doha Ministerial Declaration, WT/MIN (01)/DEC/ 01 Para 45.

⁵¹⁰ Doha Ministerial Declaration, WT/MIN (01)/DEC/ 01 Para 47.

maxim that ‘nothing is agreed unless everything is agreed’.⁵¹¹ This approach has been the biggest bottleneck in the Round’s progress in general, and for services trade in particular, since the fate of the services trade agenda has remained tied to other areas of negotiations.⁵¹²

The Doha Development Agenda has been termed ‘the most ambitious attempt at international co-operation over the past decade’.⁵¹³ Since ‘development’ through trade gains to the developing countries, particularly the least developed ones, was placed at the heart of the negotiation agenda, it came to be known as the ‘Doha Development Agenda’ (DDA).⁵¹⁴ WTO has assigned a dual significance to the word ‘development’. On the one hand, it emphasizes that development is a main objective of the negotiations, and on the other, it highlights the problems likely to be faced by the developing countries when implementing various agreements. When they launched the Doha Round, ministers placed development at its centre. “We seek to place developing countries’ needs and interests at the heart of the Work Programme adopted in this Declaration,” they said. “... We shall continue to make positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth of world trade commensurate with the needs of their economic development. In this context, enhanced market access, balanced rules, and well-targeted, sustainably financed technical assistance and capacity-building programmes have important roles to play.”⁵¹⁵

What still needs to be seen is whether the resolve to develop ‘balanced rules’ translates into actual work. Since the focus of the thesis is on the services trade, this chapter looks at the services trade related rule-making from the perspective of the regulatory challenges for services trade, raised earlier. A brief overview of the broader Doha negotiations is provided below as a contextual background before discussing the service-specific elements.

⁵¹¹ Matthew Kennedy, ‘Two Single Undertakings - Can the WTO Implement the Results of a Round?’ (2011) 14 J.I.E.L. 79.

⁵¹² Ibid.

⁵¹³ Please see the foreword to Will Martin and Aadytia Matoo (eds), *Unfinished Business? The WTO’s Doha Agenda* (World Bank 2011).

⁵¹⁴ The title ‘Doha development Agenda’ was proposed in closing remarks at Doha Ministerial Conference: WT/Min(01)/SR/9, p. 4.

⁵¹⁵ See paragraph 2 of DOHA WTO MINISTERIAL 2001: MINISTERIAL DECLARATION WT/MIN(01)/DEC/1,20 November 2001, adopted on 14 November 2001. It may be recalled that in Ch 1, a discussion was carried out on how ‘development’ related gains were used as an attractive package for the multilateral trade disciplines which affected the domestic regulatory autonomy of the WTO members.

1. The Doha Chronology

A flurry of negotiation activities followed the Doha Round of WTO.⁵¹⁶ The Cancun Mid-Term Ministerial Review, held in September, 2003, failed to bridge the communication gap on agriculture negotiations and other areas.⁵¹⁷ A crucial development came through the General Council's decision of August, 2004 on the Doha Agenda Work Programme, which came to be known as the 'July Package'.⁵¹⁸ This package contained a framework each for Agriculture and Non-Agriculture Market Access, modalities for Trade Facilitation and recommendations for Services negotiations, including a target date for revised offers.⁵¹⁹ The deadlock surrounding the 'Singapore issues' was also finally addressed when negotiations were launched in trade facilitation and the remaining three issues were dropped from the work programme.⁵²⁰

Numerous mini-ministerial meetings were held at Davos, Paris and Dalian from January, 2005 onwards to prepare the groundwork for the Hong Kong Ministerial Conference, to be held in Hong Kong in December, 2005.⁵²¹ However, Director General Supachi Panitchpakdi could only paint a rather dismal picture at the stock-taking meeting of the negotiation committee in July, 2005 in the following words:

"My warning in February and my subsequent warning about the slow pace of negotiations do not seem to have been well heeded..... . I regret that the negative side of the ledger outweighs the positive".⁵²²

Modest results from the Sixth Session of the Ministerial Conference in Hong Kong were adopted through a Ministerial Declaration on 14th December, 2005.⁵²³ This round of negotiations had little to offer in terms of concrete progress.⁵²⁴ The Declaration from the conference only reaffirmed the

⁵¹⁶ Hohmann Harald (ed), *Agreeing and Implementing the Doha Round of WTO* (Cambridge 2008); Bernard Hoekman, 'The Doha Development Agenda 10 Years on: What Next?' in Rorden Wilkinson and James Scott (eds), *Trade, Poverty, Development: Getting Beyond the WTO's Doha Deadlock* (Routledge 2013).

⁵¹⁷ Ibid.

⁵¹⁸ WT/L/579 available at:

http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm accessed 15 June 2015.

⁵¹⁹ See the text of July Package, WT/L/579, August 2004.

⁵²⁰ Nitya Nanda, *Expanding Frontiers of Global Trade Rules* (Routledge 2008).

⁵²¹ Ian Fergusson, 'World Trade Organisation Negotiations: The Doha Development Agenda' Congressional Research Service Report for Congress, December 12, 2011.

⁵²² Report by the Chairman of the Trade Negotiations Committee to the General Council, TN/C/5 dt 28th July 2005 which contains an overview of the situation in each of the negotiations group available at:

http://www.wto.org/english/tratop_e/agric_e/negoti_tnc_july05_e.htm accessed 15 June 2015.

⁵²³ Ministerial Declaration of December 2005, WT/MIN(05)/DEC available at:

http://www.wto.org/english/thewto_e/minist_e/min05_e/final_text_e.htm accessed 15 June, 2015.

⁵²⁴ Ibid.

commitment to conclude the Doha Round within yet another ambitious deadline, i.e. the year 2006.⁵²⁵

The Hong Kong Ministerial Declaration holds some significance for services negotiations, since its Annex C put in place a structure for the negotiating objectives through various modes of supply.⁵²⁶ It also opened up the ground for negotiations on services trade through a ‘plurilateral’ in addition to ‘bilateral’ process.⁵²⁷ Its content, dealing with specific and concrete negotiating objectives, however, could be seen as too flexible and open-ended, which is evident from vague and unsure statements like these: ‘Members should be guided, to the maximum extent possible, by the following objectives....’.⁵²⁸

Full services trade modalities were targeted for achievement by 30th April, 2006, and a draft schedule of commitments by 31st July, 2006.⁵²⁹ However, once again a deadlock in other areas obstructed positive developments in the services negotiations.⁵³⁰ Despite intense consultations between Director General Pascal Lamy and the ‘G6’ which included US, EU, Brazil, India, Japan and Australia, on market access for agriculture and non-agriculture sectors and agriculture subsidies, no headway was made in the negotiations.⁵³¹ The Director General accordingly reported to the Trade Negotiation Committee that:

“[T]he gap in level of ambition between market access and domestic support remained too wide to bridge.... . Faced with this persistent impasse, I believe that the only course of action I can recommend is to suspend the negotiations across the Round as a whole to enable the serious reflection by participants which is clearly necessary”.⁵³²

Talks which were suspended in July, 2006 resumed in January, 2007. A G4 (US, EU, Brazil and India) summit aimed at finding common ground for the negotiations was held in Potsdam, Germany in

⁵²⁵ Ibid.

⁵²⁶ See Annex C ‘Recommendations of the Special Session of the Council for Trade in Services’ at: https://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm#annexc accessed 15 June 2015.

⁵²⁷ Rudolf Adlung, ‘Services Negotiations in the Doha Round: Lost in Flexibility?’ (2006) 9 J.I.E.L. 865.

⁵²⁸ Annexure C to the Hong Kong Ministerial Declaration available at: http://www.wto.org/english/thewto_e/minist_e/min05_e/final_text_e.htm accessed 15 June 2015.

⁵²⁹ Ibid.

⁵³⁰ Rudolf Adlung as above.

⁵³¹ The talks were officially suspended in July 2006.

⁵³² Chairman’s Introductory Remarks, Informal Trade Negotiations Committee meeting at the level of Heads of Delegation, 24 July 2006, informal document reference JOB(06)231.

June, 2007.⁵³³ This attempt also failed, due to demands for cuts in agricultural subsidies by the developing countries, and in industrial tariffs by the developed countries.⁵³⁴ Revised modalities for Agricultural and Non-Agricultural Market Access were yet again circulated and a services signaling conference was held in July, 2008.⁵³⁵ Ministers exchanged signals regarding expected improvements in the services commitments. During this stage of negotiations, the talks collapsed once again over the issue of a special safeguard mechanism, which was envisaged to protect farmers in the developing countries against sudden increases in imports or decreases in prices.⁵³⁶ Although the 2008 financial crisis had infused new energy into the Doha Round as a possible stabilizer for the global economic system,⁵³⁷ the political will remained short of the level required for a meaningful conclusion of the Round. The G 20 Washington Summit held in November, 2008 had the following statement as part of its declaration:

“[W]e shall strive to reach agreement this year on modalities that leads to a successful conclusion to the WTO's Doha Development Agenda with an ambitious and balanced outcome. We instruct our Trade Ministers to achieve this objective and stand ready to assist directly, as necessary. We also agree that our countries have the largest stake in the global trading system and therefore each must make the positive contributions necessary to achieve such an outcome”.⁵³⁸

Despite the international community's strong realization of the need to conclude Doha, as reflected above, the year 2009 passed without a major breakthrough. The Seventh Session of the WTO Ministerial Conference in Geneva, Switzerland, took place from 30 November to 2 December 2009.⁵³⁹ However this session had no negotiating agenda and the general theme was “The WTO, the Multilateral Trading System and the Current Global Economic Environment”.⁵⁴⁰

⁵³³ ‘G-4 Talks In Potsdam Break Down, Doha Round's Fate In The Balance Once Again’ (27 June 2007) [11 \(23\) BRIDGES](#).

⁵³⁴ Ian F Fergusson, *World Trade Organization Negotiations: The Doha Development Agenda* CRS Report for Congress Dt December 12, 2011 available at: <http://fpc.state.gov/documents/organization/69477.pdf> accessed 15 June 2015.

⁵³⁵ Ibid.

⁵³⁶ Stuart Harbinson, ‘The Doha Round: “Death-Defying Agenda” or “Don’t Do it Again?”’ ECIPE working paper NO 10/2009 available at ECIPE website.

⁵³⁷ B Hoekman, W Martin and A Mattoo, *Conclude Doha: It Matters!* Washington DC: World Bank (mimeo) 2009; World Trade Organization, *Report to the TPRB from the Director-General on the Financial and Economic Crisis and Trade Related Developments* (Geneva WT 2009).

⁵³⁸ G 20 full declaration text available at: <http://news.bbc.co.uk/1/hi/business/7731741.stm> accessed 15 June 2015.

⁵³⁹ For the conference details, see the following WTO link at: https://www.wto.org/english/thewto_e/minist_e/min09_e/min09_e.htm accessed 15 June, 2015

⁵⁴⁰ Ibid.

In the absence of any substantial progress in the talks, a stock-taking exercise was conducted in March, 2010 which took account of the ‘gaps’ more than anything else.⁵⁴¹ By this time, the diplomats and political commentators alike had started giving up on Doha. The former US trade representative Susan Schwab wrote:

“It is time for the international community to recognize that the Doha Round is doomed”.⁵⁴²

She further suggested that prolonging the Round would jeopardize the multilateral trading system and that the international community should, instead, try to salvage smaller agreements.⁵⁴³ While projecting a rather optimistic account of potential gains from Doha, Bhagwati and Sutherland in their report on the Round, the Interim Report of the High Level Trade Experts Group (January, 2011) had set a ‘final-push’ deadline of December, 2011 for the conclusion of the Round.⁵⁴⁴ The same was missed, along with numerous others before that.

The resumed consultations which led to the Ministerial Conference in December, 2011 did not result in any improvement in the Doha Development Agenda.⁵⁴⁵ It had become clear by now that the continued process of WTO negotiations in their existing form was incapable of bearing any fruit.⁵⁴⁶ However the most recent WTO Ministerial Conference held in Bali in December, 2013 stuck to the old way of doing things, and set a deadline for the end of 2014 for accomplishing the Doha Agenda work programme. The most recent services related meeting of the WTO members was held in April, 2014 in which it was observed that:

‘[T]he three market access areas — services, agriculture and non-agricultural market access (NAMA) - should be addressed in parallel....’⁵⁴⁷

⁵⁴¹ See DG’s remarks on 22 March 2010 TRADE NEGOTIATIONS COMMITTEE ‘Lamy opens stocktaking week with hope for strong signal on concluding the Round’ at:
<http://www.wto.org/english/news_e/news10_e/tnc_dg_stat_22mar10_e.htm> accessed 14 June 2015.

⁵⁴² Susan C Schwab, ‘After Doha: Why the Negotiations are Doomed and What Should We Do About It’ (May/June 2011) Foreign Affairs
<http://pagines.uab.cat/jbacaria/sites/pagines.uab.cat/jbacaria/files/16_Schwab_pp104_117_Blues.pdf> accessed 15 June 2015.

⁵⁴³ Ibid.

⁵⁴⁴ Bhagwati and Sutherland, ‘The Doha Round: Setting a Deadline Defining a Final Deal, January 2011. Available at:
<<http://www.number10.gov.uk/wp-content/uploads/doha-round-jan-2011.pdf>> accessed 15 June 2015.

⁵⁴⁵ See the comments of the DG from the closing session at:
<https://www.wto.org/english/thewto_e/minist_e/min11_e/min11_closing_e.htm> accessed 15 June 2015.

⁵⁴⁶ Cover note by TNC chair, TN/C/13, 21st April, 2011.

⁵⁴⁷ See the WTO link at:
<http://www.wto.org/english/news_e/news14_e/serv_01apr14_e.htm> accessed 15 June 2015.

Some Members even suggested that the level of ambition in services should be commensurate with those in agricultural and non-agricultural market access.⁵⁴⁸ These approaches are in clear negation of the ground realities of the Doha Round negotiations, and there are few prospects of concrete results. It has to be acknowledged that talks on the Doha Round have remained marred by the irreconcilable differences to date.⁵⁴⁹ A 'political guidance' document issued by the General Council in December, 2011 noted that 'significantly different' perspectives over various elements of the single undertaking make it 'unlikely that all the elements of Doha Development Round could be concluded simultaneously in the near future'.⁵⁵⁰

A most recent and significant shift in the approach towards Doha Round negotiations, emphasizing 'small steps' strategy might therefore prove to be the only hope for progress in the talks. This approach, needed to guide the future course of negotiations of WTO governed areas, including services, in the former Director General WTO, Pascal Lamy's words is as follows:

"[T]he current political environment dictates that the most realistic and practical way forward is to move in small steps, gradually moving forward the parts of the Doha Round which are mature and re-thinking those where differences remain".⁵⁵¹

2. Doha Development Agenda and the Services Trade

The Doha Round has a very broad spectrum, as can be judged from the subjects covered in the negotiating agenda.⁵⁵² Apart from separate and specific negotiating agendas for agricultural trade, non-agricultural market access, services, transparency in government procurement, trade facilitation and trade related intellectual property rights, it also has an ambitious rule-making agenda.⁵⁵³ This includes rules anti-dumping and subsidies, trade and environment and regional trade agreements.⁵⁵⁴

However, to narrow it down in terms of benefits for the multilateral trading system, the Doha Agenda has three key benefits to offer, i.e. increased market access security for goods and services, better market access for agricultural and manufactured goods and improvement in trading

⁵⁴⁸ Rudolf Adlung, 'Services Negotiations in the Doha Round: Lost in Flexibility?' (2006) 9 J. I. E. L.

⁵⁴⁹ A Bouët and D Laborde, 'The Potential Cost of a Failed Doha Round' (2009) IFPRI.

⁵⁵⁰ 'Elements for Political Guidance' WT/Min(11)/W/2, December 1, 2011 .

⁵⁵¹ DG in his report to the General Council on 14th February, 2012 available at: http://www.wto.org/english/news_e/news12_e/gc_rpt_14feb12_e.htm accessed 15 June 2015.

⁵⁵² The full list of the subjects can be seen at the following official WTO website link at: https://www.wto.org/english/tratop_e/dda_e/dohasubjects_e.htm accessed 15 June 2015.

⁵⁵³ Ibid.

⁵⁵⁴ Ibid.

prospects of the least developed countries.⁵⁵⁵ It is envisaged to curtail tariff protection in the goods trade and completely ban agricultural export subsidies in industrialized countries.⁵⁵⁶ The Doha Agenda for services liberalization is less ambitious, and offers substantially lower terms than actual prevalent policies.⁵⁵⁷ At best, Doha offers to lock in the existing levels of liberalization in the services trade.⁵⁵⁸

Negotiations on agriculture and manufactured goods have taken the centre stage in Doha, while services have only been mentioned on the sidelines.⁵⁵⁹ Studies suggest that Doha offers no new market openings for services trade, but only somewhat greater security of existing market access.⁵⁶⁰ This is despite the fact that negotiations on services were already into their second year by the time their incorporation into the Doha Agenda took place.⁵⁶¹ Since Article XIX of the GATS requires WTO Members to undertake successive rounds of negotiations to progressively liberalize services trade, the first official services negotiations started in early 2000 under the Council for Trade in Services.⁵⁶² During this period, the WTO Secretariat prepared a series of background papers on major services sectors to promote policy discussion,⁵⁶³ and the Council for Trade in services was able to issue negotiating guidelines and principles in March, 2001.⁵⁶⁴ However, this valuable body of work, which could have become a foundation stone for a more meaningful Doha agenda for services, failed to do so and targets set for services liberalization by Doha remained modest.⁵⁶⁵

⁵⁵⁵ Will Martin, Aaditya Mattoo, in 'The Doha Development Agenda: What's on the Table?' World Bank Policy Research Working Paper 4672, July, 2008 available at the World Bank Website.

⁵⁵⁶ M Adler and others, (2009) 'What's on the Table? The Doha Round as of August 2009', Peterson Institute for International Economics Working Paper 09-6, August; B Hoekman, W Martin and A Mattoo (2009) *Conclude Doha: It Matters!* (Washington DC: World Bank).

⁵⁵⁷ Will Martin and Aaditya Mattoo at 73 above.

⁵⁵⁸ Ibid.

⁵⁵⁹ Pierre Sauve, 'Been there, not yet done that: Lessons and challenges in services trade' in Pannizon, Pohl and Sauve (eds), *GATS and the Regulation of International Trade in Services* (Cambridge 2008).

⁵⁶⁰ Batshur Gootiiz and Aaditya Mattoo, 'Services in Doha: What's on the Table?' (2009) 43 *Journal of World Trade* 1013.

⁵⁶¹ Ibid.

⁵⁶² Ibid.

⁵⁶³ These studies available at:

<http://www.wto.org/english/tratop_e/serv_e/sanally_e.htm> accessed 15 June 2015.

⁵⁶⁴ See the guideline document S/L/93 at:

<https://www.wto.org/english/tratop_e/serv_e/nego_mandates_e.htm> accessed 15 June 2015.

⁵⁶⁵ Aik Hoe Lim and Bart De Meester (eds), *WTO Domestic Regulation and Services Trade: Putting Principles into Practice* (Cambridge 2014); Joseph F Francois and Kenneth A Reinert (1996), 'The Role of Services in the Structure of Production and Trade: Stylized Facts from a Cross-Country Analysis' in Bernard Hoekman (ed), *The WTO and Trade in Services* (Edward Elgar 2012).

The original text of the Doha Declaration only reaffirms the 2001 negotiating guidelines and sets deadlines for 'requests' and 'offers' for specific commitments.⁵⁶⁶ No policy references have been made to the potential role of services in achieving the development related objectives of the round,⁵⁶⁷ nor have future directions for the negotiations been pointed out. A lack of structure to the negotiating process, and the reliance on a request- and- offer procedure⁵⁶⁸ has left Doha Services negotiations without a clear benchmark against which to evaluate any progress.⁵⁶⁹ The request and offer procedure which was laid down through the Negotiating Guidelines and Procedures in 2001, perhaps with a view to shield vulnerable economies from drastic liberalization, has failed to deliver.⁵⁷⁰ It is surprising that the process itself has not been called into question in any of the negotiating meetings.⁵⁷¹

It is important to mention that quantifying what Doha has to offer in services is difficult, since, unlike goods, there are no tariff-based formulae for assessing the level of protection.⁵⁷² The process of liberalization depends on each member making individual market access and national treatment offers.⁵⁷³ Gootiz and Matoo tried to map the Doha offers in various services sectors and modes of supply against existing GATS commitments.⁵⁷⁴ They used an index of trade restrictiveness in five important sectors, i.e. financial services, telecommunications, retail distribution, transportation and professional services. For each service sector, the most appropriate mode of supply was chosen, and the openness of policy towards foreign service suppliers was rated on a

⁵⁶⁶ See the Services' component of Doha Ministerial Declaration WT/MIN(01)/DEC/1 November,2001 available at: http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm accessed 15 June 2015.

⁵⁶⁷ As mentioned in the GATS preamble.

⁵⁶⁸ Discussed in more detail in Ch1.

⁵⁶⁹ Rudolf Adlung and Roy Martin, 'Turning Hills into Mountains? Current Commitments under the GATS and Prospects for Change', WTO Staff Working Paper ERSD-2005-01 Dt 23rd March 2005 available at WTO website.

⁵⁷⁰ Rudolf Adlung, 'Services Negotiations in the Doha Round: Lost in Flexibility?' (2006) 9 J.I.E.L. 865.

⁵⁷¹ For recent views on alternate approaches see, Elisabeth Turk, 'Services post Hong Kong:-initial experiences with plurilaterals'; Kelly Clare, 'Negotiating approaches from a Member's Perspective'; Gao Henry, 'Evaluating alternative approaches to GATS negotiations: Sectoral formulae and others' in Pannizon, Pohl and Sauve (eds), *GATS and the Regulation of International Trade in Services* (Cambridge 2008). However in view of the focus of this thesis on the GATS regulatory challenges in balancing the dual objectives of trade liberalization and national regulatory autonomy, recommendations regarding the negotiatory approaches more suitable for GATS administration are contained in the concluding chapter of the thesis.

⁵⁷² Bernard Hoekman and Michel Kosteki, *The Political Economy of the World Trading System* (3rd edn, Oxford 2010).

⁵⁷³ Batshur Gootiiz and Aaditya Matoo, 'Services in Doha: What's on the Table?' (2009) 43 Journal of World Trade 1013.

⁵⁷⁴ Ibid.

scale from 1 to 5.⁵⁷⁵ The sector results were then aggregated across modes of supply, and the results of the survey summarized in an index of services trade restrictiveness (STRI). The study concludes that, in all regions of the world, actual policy is substantially more liberal than the original GATS commitments.⁵⁷⁶ Since the services liberalization offers made in Doha only slightly improve upon the original level of commitments, offer gaps still remain substantially large.⁵⁷⁷ Thus even the best Doha offers do not reflect the unilateral liberalization already undertaken by most of the Member countries.⁵⁷⁸ The study observes that financial services and telecommunication are the only two services for which Doha offers have improved reasonably on the initial commitments made in Uruguay, but even these do not reflect the actual policy.⁵⁷⁹

This implies that the WTO Member countries are liberalizing certain services sectors voluntarily, but are reluctant to bring them under the umbrella of the GATS regulations.⁵⁸⁰ Researchers have even hinted at the prospect of increasing regionalism in view of the slow progress in the WTO Doha Round of trade negotiations. If indeed the countries were to start looking at regional or bilateral levels for their services trade liberalization objectives, the GATS may soon become an irrelevant multilateral treaty. This could, however, be avoided by altering the GATS regulatory approaches and making them more attractive for the world's trading community.

To re-enforce the observation in earlier research regarding the varying regulatory concerns of the Members in different services sectors, it may be added that some services sectors, e.g. transport, professional services and maritime transport, are not being discussed for liberalization at all.⁵⁸¹ The US, for example, has not made any offers or commitments for maritime transport services.⁵⁸² This brings home the need for regulatory flexibility in dealing with various services sectors, since the WTO Members' regulatory concerns or policy considerations also vary from sector to sector. The GATS objective of 'progressive liberalization' can therefore only be achieved if other components regarding space for domestic regulatory autonomy is also given due consideration.

⁵⁷⁵ Ibid.

⁵⁷⁶ Ibid.

⁵⁷⁷ Ibid.

⁵⁷⁸ Ibid.

⁵⁷⁹ Gootiiz and Matoo above.

⁵⁸⁰ See Richard Baldwin and Theresa Carpenter, 'Regionalism: moving from fragmentation towards coherence' in Cottier and Delimatsis (eds), *The Prospects of International Trade Regulation* (Cambridge 2011).

⁵⁸¹ Rudolf Adlung and Martin Roy, 'Turning Hills into Mountains? Current Commitments under the GATS and Prospects for Change', WTO Staff Working Paper ERSD-2005-01 Dt 23rd March 2005.

⁵⁸² WTO Database available at:

<http://www.wto.org/english/tratop_e/serv_e/s_propnewnegs_e.htm#transport> accessed 15 June 2015.

There are few milestones regarding services trade in the Doha Round of negotiations. In fact, Annex C of the 2005, Hong Kong Ministerial Declaration is the only concrete document produced since the 2001 Negotiating Guidelines. Although there is a realization in WTO quarters that services should receive the same amount of political drive as that used for agricultural and NAMA negotiations, the reality is far from this. A draft services negotiating text which was released prior to the July, 2008 mini-ministerial read:

“Negotiations must be driven by the same level of ambition and political will as reflected in the agriculture and NAMA modalities. While respecting the existing structured principles of the GATS, Members shall respond to bilateral and plurilateral requests by offering commitments that substantially reflect current levels of market access and national treatment and provide new market access and national treatment in cases where significant trade impediments exist.”⁵⁸³

Much of the negotiating impetus remained focused on agriculture and non-agriculture market access during the mini-ministerial held in Geneva from July 21-29, 2008. However, a ‘signaling’ services’ conference was held on July 26th to gauge the level of additional offers of services liberalization, in case a deal was struck in the agriculture and NAMA talks.⁵⁸⁴ However this was not to be and the conference remained more of a symbolic exercise. In March, 2010, a stocktaking exercise was undertaken by the Trade Negotiation Committee, and the state of negotiations was summarized by the Chairman in the following words:

“[I]t is clear that there has been little or no significant progress in the market access negotiations since July, 2008. Gaps in sectoral coverage and levels of commitment need to be filled in order for Members to be satisfied with the outcome of the services negotiations . In filling these gaps, rule-making in the services negotiations will need to move in tandem with market access. Members can make progress in services once the political will has been summoned to resolve problems in other areas of the Round”.⁵⁸⁵

A more recent report, while discussing the state of play for specific sectors and modes of supply notes the ‘gaps’ in the desired and achieved levels of progress in services liberalization.⁵⁸⁶ The report also mentions various proposals made by countries including Australia, Mexico and

⁵⁸³ ‘Elements required for the Completion of the Services Negotiations: Note by the Chairman,’ TN/S/33 Dt 26th May, 2008 available at: http://www.wto.org/english/news_e/news08_e/serv_may08_e.htm accessed 15 June 2015.

⁵⁸⁴ See report of the Chairman JOB(08)/93, Dt 30-07-2008.

⁵⁸⁵ Council for Trade in Services Special Session, Report by the Chairman to the Trade Negotiating Committee for the purpose of the TNC stocktaking exercise. Document reference TN/S/35 Dt 22nd March 2010 available at the WTO website.

⁵⁸⁶ Ibid.

Switzerland as a way forward in the market access negotiations. However, a more ambitious proposal by Australia for a 'core group' of Members embarking on a more aggressive negotiation process, was termed by certain other Members as 'going beyond the level of ambition established in Annex C of the Hong Kong Ministerial Declarations'.⁵⁸⁷ This may be true to a certain extent,⁵⁸⁸ but the need remains for exploring alternative negotiating approaches.

This brief account highlights that there has been negligible progress to date in terms of services trade market openings. The negotiators have even found it difficult to 'lock-in' the existing levels of services trade liberalization for multilateral purpose.⁵⁸⁹ It should be pointed out that Member countries' reluctance to bind themselves to market openings multilaterally, even when they are willing to do so on a regional or bilateral level, is an indicator of the basic regulatory challenges faced by the GATS. Are these challenges related to the 'intrusiveness' of GATS disciplines, as pointed out in Chapter 1, and to the fear of being tied down to unforeseen obligations, as pointed out in Chapter 2? Answers to these questions are further explored in the next section, by examining how the rule-making under GATS is executed.

D. The GATS Related Rule-making

It is evident from the preceding discussion that the fate of services negotiations has remained tied to the rest of the Doha agenda, and that not much concrete progress in terms of actual liberalization has been achieved to date. In fact it has been feared that, in the absence of any progress towards liberalization, Members might deem the rule-making to be unnecessary.⁵⁹⁰ This casts doubts upon the relevance of GATS as a framework for multilateral services trade liberalization, and since it is the only such framework, upon the future of multilateral services trade.⁵⁹¹ The GATS provides an opportunity for the diverse community of the WTO to advance their services trade interests when they want to, at equitable terms. It should not, however, turn into an instrument obliging them to do so at the expense of all other regulatory considerations.

⁵⁸⁷ Council of Trade in Services Special Session, Report by the Chairman. Document Reference TN/S/36 Dt 21st April, 2011 available at WTO website.

⁵⁸⁸ This might actually aggravate the WTO's members fears regarding the unforeseen GATS obligations highlighted in Ch1 and also discussed in Ch 2.

⁵⁸⁹ B Hoekman, W Martin and A Mattoo, *Conclude Doha: It Matters!* (Washington, DC: World Bank 2009).

⁵⁹⁰ Rudolf Adlung, 'Services Negotiations in the Doha Round: Lost in Flexibility?' (2006) 9 J.I.E.L. 865.

⁵⁹¹ There is a substantial body of work which highlights the economic benefits of multilateral services trade. See for example, Brian Coopeland and Aaditya Mattoo, 'The Basic Economics of Services Trade' in Mattoo, Stern and Zanini (eds), *A Handbook of International Trade in Services* (Oxford 2008); Panagiotis Delimatsis, *International Trade in Services and Domestic Regulations: Necessity, Transparency and Regulatory Diversity* (Oxford 2007); Hildegunn Kyvik Nordas, 'Domestic Regulation: what are the costs and benefits of international trade in services?' in Lim and Meester (eds), *WTO Domestic Regulation and Services Trade: Putting Principles into Practice* (Cambridge 2014).

Accordingly, having a multilateral platform in the form of GATS is better than having none at all. Its absence may lead to regional or 'club like' associations, excluding many Members of the WTO from the potential benefits of having equitable opportunities in the services trade. However the rules by which it operates need to accommodate the diverse regulatory objectives each country wishes to pursue. Only this can make the GATS an attractive multilateral services trade liberalization platform for WTO Members.

Rule-making in four critically important areas of the services trade was embedded during the drafting of the GATS text for completion through recurring negotiations.⁵⁹² The relevant mandate for 'domestic regulation' is contained in Article VI: 4, for 'emergency safeguard measures' in Article X, for 'government procurement' in Article XIII and for 'subsidies' in Article XV. While the negotiations have not been entirely abandoned as comprehended above, according to the most recent report by the Trade Negotiation committee on the state of play in the services negotiations, it was stated by the Chairman in respect of the three areas other than domestic regulations that:

"[T]he proponents had found it difficult to convince the Membership of the need for new disciplines in any of the three areas. Given the fundamental divergences over the objectives and expected outcome of these negotiations, discussions in the WPRG have not been able to achieve progress."⁵⁹³

It can thus be seen that difference of views regarding the objectives and outcomes of the negotiations remains a challenge to any progress in the rule-making. However, this lack of common ground between the negotiators is linked to the need for balancing GATS related obligations with Members' need for domestic regulatory autonomy, as highlighted in Chapters 1 and 2. The negotiators' lack of understanding is symptomatic of a deeper apprehension by Members regarding loss of their 'regulatory space', which has been heightened by the WTO dispute settlement bodies.

Development of disciplines for domestic regulations is the only area in which some progress has been reported among the four areas mentioned above.⁵⁹⁴ The following section contains more details regarding this area, and an analysis of whether the direction of rule-making is aligned with the services trade-related regulatory challenges.

⁵⁹² See Articles VI, X, XIII and XV of the GATS.

⁵⁹³ Council of Trade in Services Special Session, Report by the Chairman. Document Reference TN/S/36 Dt 21st April, 2011 available at WTO website.

⁵⁹⁴ See WTO, Trade in Services, 'Decision on Domestic Regulation', S/L/70, 28th April, 1999.

1. Disciplining Domestic Regulations through a Necessity Test

The Council of Trade in Services states, regarding its mandate under Article VI: 4 of the GATS:

With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, *inter alia*:

- (a) based on objective and transparent criteria, such as competence and the ability to supply the service;
- (b) not more burdensome than necessary to ensure the quality of the service;
- (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

The Council for Trade in Services has established a subsidiary body responsible for accomplishing the mandate of Article VI: 4, i.e. a Working Party on Domestic Regulation (henceforth to be referred to as WPDR).⁵⁹⁵ It should be stated at the outset that there has been little progress in the work of WPDR, due to of lack of consensus among Members, this fact having been well documented in various reports issued by the body.⁵⁹⁶ It is therefore unnecessary to trace the chronological history of WPDR's consultative work. Instead, more emphasis is placed on the principles being followed and approaches taken in designing a necessity test for the purpose of Article VI: 4 of the GATS.⁵⁹⁷ General guidance has been sought from the Secretariat's note, which identifies necessity, transparency, equivalence and international standards as guiding principles for developing domestic regulation disciplines.⁵⁹⁸

Out of these four concepts, necessity and transparency have been accorded priority in WPDR discussions.⁵⁹⁹ For further analysis, the concept is, of necessity, taken up, since it finds its equivalent in many other WTO Agreements, including GATT and has been accordingly used for the GATS case law. Article XI :2(b) and (c) and Article XX of the GATT which deal with exceptions from

⁵⁹⁵ See WTO, Trade in Services, 'Decision on Domestic Regulation', S/L/70, 28th April, 1999, para 2.

⁵⁹⁶ Hong Kong Ministerial Declaration was probably the closest Members came to adopting a text on the domestic regulatory reform. WT/MIN/(05)/Dec, para 5. Adopted on 18th Dec, 2005.

⁵⁹⁷ The concept of necessity test has been discussed in two earlier chapters. It is an instrument to pre-empt that none of the domestic regulations are more trade-restrictive than necessary.

⁵⁹⁸ WTO, CTS, 'Article VI:4 of the GATS: Disciplines on Domestic Regulation Applicable to All Services', S/C/W/96, 1 March 1999.

⁵⁹⁹ WTO, WPDR, 'Report on the Meeting Held on 11 May 2001', S/WPDR/M/11, 7 June, 2001, para 8.

certain obligations are such comparable provisions. We compare the text of Article VI:4 in the preceding paragraph with Article XX of the GATT text, relevant parts of which are reproduced below:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;
- (c)
- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices.

A clear difference between the two provisions is that while GATS Article VI:4 represents the test for 'necessity' as a 'positive obligation', the necessity requirement of Article XX of the GATT is part of a general exception. Article XX of the GATT is specific in objectives, and clearly identifies the situations in which invoking a necessity test may become necessary. By contrast, Article VI: 4 requires a broader check on domestic regulations from becoming 'unnecessary barriers to trade in services'. Delimatsis' observation that, 'the necessity test in provisions that provide for an exception (be it particular or general) are for the most part associated with an exhaustive set of policy objectives that are of a more limited and fundamental nature' becomes very significant.⁶⁰⁰ He further observes that obligation provisions which entail necessity test can have 'an open-ended list of objectives'.⁶⁰¹ Having made these observations, however, Delimatsis' conclusion that the jurisprudence on Article XX of the GATT can apply '*mutatis mutandis*' to the GATS for the purpose of developing a necessity test does not fit so well with the regulatory dynamics of the services trade.

⁶⁰⁰ Panagiotis Delimatsis, *International Trade in Services and Domestic Regulations: Necessity, Transparency and Regulatory Diversity* (Oxford 2007) 211.

⁶⁰¹ Delimatsis as above.

It should be noted that despite the lack of definition or a shared script regarding its elements, a total of 253 economic needs tests⁶⁰² have been listed in the schedules of 90 WTO Members, as of 2001, as justification for their market limitations in different services sectors.⁶⁰³ This data hints at Members' apprehension regarding giving up their regulatory space in order to accommodate GATS obligations. Given this backdrop, if a horizontal necessity test is developed for the GATS with open-ended objectives, it will further encroach upon the regulatory space available to Members. It is also tantamount to expecting a harmonisation of the domestic regulatory regimes of the Members, since Article VI: 4 entails positive obligations regarding adopting certain disciplines, which is clearly not the GATS objective.⁶⁰⁴

It is therefore imperative that the negotiators engaged in rule-making in the four mandated areas, particularly domestic regulations, are guided by the peculiarities of the services trade, instead of finding parallels in the goods trade experience. This study proposes the 'aims and effects' as an alternative approach.⁶⁰⁵ This approach may be considered more appropriate for bringing out the regulatory context of a domestic measure. This proposal will be discussed in more detail in Chapter 6, which is the concluding chapter of the study, and contains recommendations for improving GATS governance in terms of its objectives.

E. Current Services Negotiation Approaches

A study of the EU governance model in the latter part of the research reveals the significance of informal tools of governance in obtaining policy objectives.⁶⁰⁶ Multilateral services trade negotiations at the WTO forum are one such tool which can be used to achieve convergences in the diverse policy objectives and strategies. Accordingly a brief introduction to the currently utilized negotiation approaches is given here.⁶⁰⁷ The core negotiating approach for the GATS

⁶⁰² A test that conditions market access upon the fulfilment of certain economic criteria.

⁶⁰³ See WTO's Council for Trade in Services document S/CSS/W/118 30 November 2001.

⁶⁰⁴ I discuss this in more detail in the concluding chapter of the research and also propose some alternatives. However, for a further account of how a necessity test can have negative effects on Members' policy space and regulatory flexibility, see Institute for Agriculture and Trade Policy and Polaris Institute, 'Five Danger Signs-The GATS Assault on Sovereignty and Democracy', 2006 available at:

http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=3&ved=0CDcQFjAC&url=http%3A%2F%2Fwww.aeworldtwin.net%2Fdocuments%2FGATS_5_Danger_Signs.pdf&ei=A_XsUrSwH5Cg7AaDroDgAw&usg=AFQjCNFFYNnwsFmjSBvD5idvWdU_I7ro9g&bvm=bv.60444564,d.ZGU accessed 15 June 2015.

⁶⁰⁵ Discussed in Chapter 2 which deals with the case law and then in Chapter 6 which is the concluding chapter of the study.

⁶⁰⁶ See Chs 4 and 5.

⁶⁰⁷ Alternate negotiations approaches currently recommended by various commentators are discussed in more detail in the concluding part of the study, i.e. Ch 6.

negotiations has been the bilateral request and offer approach.⁶⁰⁸ This approach has its foundation in the method of negotiating tariffs for trade in goods,⁶⁰⁹ and was the main method for services negotiations in the Uruguay Round and Doha Work Programme. While negotiations are carried out on a bilateral basis, the outcomes of such negotiations are multilateralised. This is due to the MFN clause of the GATS, under which any trade concessions are to be extended to all WTO Members. The Council for Trade in services issued negotiating guidelines and principles in March, 2001 reiterating this approach for negotiations.⁶¹⁰

The original text of the Doha Declaration reaffirms the 2001 negotiating guidelines and sets deadlines for 'requests' and 'offers' for specific commitments.⁶¹¹ The request and offer procedure, which was presumably laid down to shield vulnerable economies from drastic liberalization, has led to fragmentation and little real progress in terms of services liberalization.⁶¹² In a bilateral bargaining process, requests for market access in services tend to be highly ambitious,⁶¹³ often seeking a complete removal of restrictions to free trade.⁶¹⁴ The requests are often not aligned with the target country market.⁶¹⁵ Response in the form of offers, on the other hand, is minimalistic and falls far below the expected levels of market opening.⁶¹⁶ This mode of negotiations is also resource intensive.⁶¹⁷ The ineffectiveness of the existing negotiating process has thus led to a 'low level equilibrium trap, where little is expected and less is offered'.⁶¹⁸

⁶⁰⁸ Clare Kelly, 'Negotiating approaches from a Member's perspective' in Marion Panizzon, Nicole Pohl and Pierre Sauve (eds), *GATS and the Regulation of International Trade in Services* (Cambridge 2008) 174.

⁶⁰⁹ The fact that the GATS conceptual foundation has been drawn from the GATT (WTO agreement dealing with the goods trade) has been highlighted in Ch 1.

⁶¹⁰ See the following link at:

http://www.wto.org/english/tratop_e/serv_e/s_negs_e.htm accessed 15 June 2015.

⁶¹¹ See the Services' component of Doha Ministerial Declaration WT/MIN(01)/DEC/1 November, 2001 available at:

http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm accessed 15 June 2015.

⁶¹² Rudolf Adlung and Martin Roy, 'Turning Hills into Mountains? Current Commitments under the GATS and Prospects for Change', WTO Staff Working Paper ERSD-2005-01 Dt 23rd March 2005 available at WTO website.

⁶¹³ Ibid.

⁶¹⁴ Ibid.

⁶¹⁵ Elisabeth Turk, 'Services post-Hong Kong-initial experiences with plurilaterals' in Marion Panizzon, Nicole Pohl and Pierre Sauve (eds), *GATS and the Regulation of International Trade in Services* (Cambridge 2008).

⁶¹⁶ Ibid.

⁶¹⁷ Ibid.

⁶¹⁸ Aaditya Mattoo, 'Regulatory Authorities and WTO Negotiations on Services' Trade Policy Analyses, Cordell Hull Institute 8 (9)(April 2006). Available at:

[http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=8&ved=0CFwQFjAH&url=http%3A%2F%2Fwww.cordellhullinstitute.org%2Ftpa%2Fvolume%25208%2520\(2006\)%2Fvol.%25208%2C%2520No.](http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=8&ved=0CFwQFjAH&url=http%3A%2F%2Fwww.cordellhullinstitute.org%2Ftpa%2Fvolume%25208%2520(2006)%2Fvol.%25208%2C%2520No.)

Accordingly, the stage has been set for experimenting with alternative negotiatory approaches. A shift from bilateral request offer to a plurilateral approach was suggested vide Annex C of Hong Kong Ministerial Declaration in December, 2005.⁶¹⁹ However this initiative has not been actively pursued. It is evident from the rather low liberalization gains and dismal progress in the rule-making agenda of the GATS that the existing policy perspective has lost its value. Many countries globally are accordingly turning to bilateral or regional arrangements for their services liberalization needs. WTO data lists 67 Regional Trade Agreements (RTAs) for 53 countries (counting the EU as one), only few of them predating the creation of WTO in 1994.⁶²⁰ In most of these agreements, countries are willing to offer greater market opening commitments than they are willing to negotiate for the GATS.⁶²¹ The wave of preferential trade agreements shows that countries are turning to smaller arrangements for their services trade requirements.⁶²² These preferential trade agreements do not necessarily become a 'stumbling block' for multilateralism; rather some commentators see them as 'building blocks'.⁶²³ It remains a fact however that these agreements represent preferential regulatory co-operation between some countries, while leaving out others.⁶²⁴ Thus they undermine the basic premises of non-discrimination on which the international trading system has been built. The time has therefore come to change the

[%25209%2520Mattoo.pdf&ei=vZXuUpfkCsKy7AaMoIEg&usg=AFQjCNFpj6VuxRa7pKrvKqGy9-D6QzmqeA&bvm=bv.60444564,d.ZGU> accessed 15 June 2015.](#)

⁶¹⁹ See Annex C of the Hong Kong Ministerial at:

http://www.wto.org/english/thewto_e/minist_e/min05_e/final_annex_e.htm#annexc accessed 15 June 2015.

⁶²⁰ All major regional trade agreements now have a services trade component. However to quote a few examples there are ASEAN-China Agreement on Services, Chili-US FTA, Hong Kong Closer Partnership with Australia-Thailand FTA. See the official WTO website link at:

https://www.wto.org/english/tratop_e/serv_e/dataset_e/dataset_e.htm accessed 30 June 2016.

The Trade in Services Agreement (TiSA) is a trade agreement currently being negotiated by 23 members of the World Trade Organisation (WTO), including the EU. Together, the participating countries account for 70% of world trade in services.

⁶²¹ Martin Roy, Juan Marchetti and Aik Hoe Lim, 'The race towards preferential trade agreements in service: How much market access is really achieved?' in Marion Panizon, Nicole Pohl and Pierre Sauve (eds), *GATS and the Regulation of International Trade in Services* (Oxford 2008).

⁶²² Ibid.

⁶²³ Carsten Fink and Marion Jansen, 'Services provisions in regional trade agreements: stumbling or building blocks for multilateral liberalization? Paper presented at the Conference on Multilateralising Regionalism Sponsored and organized by WTO - HEI Co-organized by the Centre for Economic Policy Research (CEPR).

10-12 September 2007 Geneva, Switzerland; Richard Baldwin and Theresa Carpenter, 'Regionalism: moving from fragmentation towards coherence' in Cottier and Delimatsis (eds), *The Prospects of International Trade Regulation: From Fragmentation to Coherence* (Cambridge 2011).

⁶²⁴ Martin Roy, Juan Marchetti and Aik Hoe Lim Aik, 'The race towards preferential trade agreements in service: How much market access is really achieved?' in Marion Panizon, Nicole Pohl and Pierre Sauve (eds), *GATS and the Regulation of International Trade in Services* (Oxford 2008).

governance modes of GATS so that it remains a relevant means of agreement for the purposes of multilateral services trade.

F. Concluding remarks

The WTO and the international community have realized the need to re-visit the negotiation approaches in the Doha Round and salvage whatever work has been done so far in view of the failure of existing strategies. A relatively recent G 20⁶²⁵ statement emphasizes:

“...it is clear that we will not complete the DDA if we continue to conduct negotiations as we have in the past...we need to pursue in 2012 fresh, credible approaches to furthering negotiations, including the issues of concern for Least Developed Countries and, where they can bear fruit, the remaining elements of the DDA mandate.”⁶²⁶

The Financial Times urged on 18th April, 2011 that:

“In order for the World Trade Organization to remain as more than just a dispute-settlement process, its members should show that the rule-making system can adapt and renew itself. This means putting more effort into narrower projects, as opposed to the large-scale ‘single undertaking’ talks of the past”.⁶²⁷

This observation of the Financial Times highlights the significance of modifying the direction of rule-making in the WTO so that it caters to the changing requirements of the multilateral trading system. In no other area of the multilateral trade governance is this need more pressing than in the GATS, where practically no regulatory work has been done since its inception, as demonstrated above. It is also evident that the ambitious and rigid negotiating agenda of the WTO represented by the DOHA Round has become a roadblock in the progress of almost all areas of multilateral trade, including services. Resting on this broader premise, it can also be observed that the current approaches have not helped GATS in evolving as a regulatory mechanism either. The rule-making process in the GATS has been put on the back burner. In the absence of a services specific supporting framework for GATS in the form of rules, reliance has increased on the goods- related conceptual basis and implementation strategies, leading to a further exacerbation of the GATS regulatory challenges. This was evidenced when discussing how the GATS conceptual foundation

⁶²⁵ G 20 is a group of developed countries who undertake economic co-operation. For the Members list see the following link at:

<https://g20.org/about-g20/> accessed 15 June 2015.

⁶²⁶ G20 Cannes Summit Communiqué: Paragraph on Global Trade held on 3-4, 2011 in Cannes, France.

⁶²⁷ The Financial Times at:

<http://www.ft.com/cms/s/0/f759d08a-69ee-11e0-89db-00144feab49a.html#axzz1yStYzH9G> accessed 15 June 2015.

was drawn from the goods trade experience in Chapter 1. This included the construction, and subsequent interpretation by the WTO dispute settlement bodies, of 'trade barriers' and other legal obligations stipulated in the GATS framework.⁶²⁸ As indicated previously, trade barriers for goods mainly pertain to tariffs, while for services, they are purported to be domestic regulatory measures. By their very nature, the trade barriers for the goods and the services trade cannot be compared or executed through similar governance strategies. However, this is exactly what the GATS policymakers have been trying to do to date. The GATS drafters, interpreters (in the GATS disputes) and rule-makers have all worked around one philosophy, which is the creation of an obstruction-free market for the services trade. We observe this in the GATS framework which, *inter alia*, prescribes disciplines for domestic regulations. We also observe this in the interpretation given by the WTO dispute settlement bodies to the GATS obligations, i.e. in the *US-Gambling* case wherein market access rights took precedence over domestic regulatory considerations. Finally, we observe this in the services trade related rule-making agenda discussed in the current chapter, The creation of a horizontal necessity test for disciplining the domestic regulatory architecture, as discussed above, is closer in philosophy and application to the disciplines for goods trade, which are mainly governed through straightforward tariff structures. This also proves that there is lack of flexibility and creative thinking in designing services trade-related governance approaches. If the rule-making for the GATS becomes more geared towards particular services trade challenges, instead of finding easy solutions to the already existing goods trade rule-making experience, the current stalled state of progress in services trade market openings could improve.

On a broader level, there is also a need to look beyond the straightjacket of single undertaking, and to re-visit the prevalent negotiatory approaches of the WTO. Instead of an 'all or nothing approach', WTO needs to focus on smaller projects which take into account the specific regulatory considerations of the Members in a particular area. This approach is especially needed for the GATS, in view of the nature of the multilateral services trade and its practical implications for Members' regulatory autonomy, as discussed in previous chapters.

This shift in gear is necessary to enable the negotiators to overcome the 'single undertaking' roadblock and evaluate the reasons for the rather slow progress in the liberalization of services trade and deficient rule-making. This chapter clearly shows that the negotiating pattern of the WTO needs to be re-visited if any headway is to be made with the services liberalization agenda. It also shows that even when Member states are willing to make bilateral or regional services liberalization openings, they are not willing to bind themselves multilaterally with the GATS commitments. This suggests the need to review the regulatory approaches adopted by the GATS

⁶²⁸ This has been shown with practical examples in Chs 1 and 2 of this thesis.

framework. WTO negotiation agenda should address the complexities associated with the GATS framework. Instead of looking at the GATT for inspiration in rule-making, negotiators should take into account the unique regulatory concerns associated with the multilateral services trade.

The lack of progress in the liberalization commitments and rule-making agenda of the GATS calls into question the effectiveness of the existing framework, and highlights the need to re-visit its regulatory approaches. Since the EU offers the most developed model of economic integration, a case study of the regulatory approaches adopted by the EU for financial services trade liberalization has been carried out with a view to gain some insight. The choice of the financial services for the case study stems from the fact that they represent an area of high regulatory control in view of the concerns for financial market stability.⁶²⁹ Since the main objective of this thesis is to identify regulatory approaches that balance 'liberalization' with 'regulatory concerns', financial services was an apt choice. The next chapters accordingly carry out this case study with a view to gaining some insight into the GATS regulatory challenges. Chapter 4 gives an overview of the EU governance approaches, with greater emphasis on the regulatory innovations that have been adopted to better cope with EU policy objectives, while Chapter 5 focuses on financial services trade liberalization in the EU to gain some relevant lessons for the multilateral setting of the services trade, represented by the GATS.

⁶²⁹ Ernst Baltensperge and Nils Herger, 'Development and stability in the nexus between trade and finance' in C Thomas Cottier and Panagiotis Delimatsis (eds), *The Prospects of International Trade Regulation: From Fragmentation to Coherence* (Cambridge 2011) 394.

Chapter 4

EU Modes of Governance

A. Introduction

The lack of progress in the liberalization commitments and rule-making agenda of the GATS⁶³⁰ brings home the need to re-visit the regulatory approaches used for its governance. Since the EU offers a more developed integration model in general, and much greater progress in services liberalization than the WTO,⁶³¹ it is worth exploring what regulatory techniques have contributed towards achieving this progress. The EU framework is not seen as a blueprint for services liberalization in the WTO context, since there are some crucial points of divergence between the two settings. While the EU is a geographically limited entity, the WTO is a much broader multilateral organization with over 160 members.⁶³² Each has different objectives, political institutions and instruments.⁶³³ Nevertheless, both aim to promote trade between Member states.⁶³⁴ Parallels can also be drawn between the two in their respective rules governing areas like discriminatory and non-discriminatory trade restrictions.⁶³⁵ It is therefore relevant for this thesis to draw some lessons from the EU legal framework and its governance approaches for the multilateral services trade liberalization.

According to Ruggie, governance “refers to the workings of the system of authoritative rules, norms, institutions and practices by means of which any collectivity manages its common affairs”.

⁶³⁶ Accordingly the first part of the thesis (Chapter 1-3) carried out a study of the governance of

⁶³⁰ See Chs 1 - 3. The fact that there has been little progress is evident from the services related negotiations in the Doha Round and the research carried out in the previous chapter. It is also the WTO's admitted position on the GATS progress and frequently highlighted by commentators on the subject.

⁶³¹ Ionnis Lianos and Okeoghene Odudu (eds), *Regulating Trade in Services in the EU and the WTO* (Cambridge 2012); Patrick Meserlin, ‘The Influence of the EU in the World Trading System’ in Daunton, Narlikar and Sterne (eds), *The Oxford Handbook on World Trade Organization* (Oxford 2012).

⁶³² For a legal comparison between the two regimes see the introduction to Sanford E Gaines, Birgitte Oslen and Karsten Sorenson (eds), *Liberalising Trade in the EU and the WTO* (Cambridge 2012).

⁶³³ Ibid.

⁶³⁴ Grainne de Burca and Joanne Scott, ‘The Impact of the WTO on EU Decision-making’ in Scott and Bura (eds), *The EU and the WTO: Legal and Constitutional Issues* (Hart Publishing 2001)1-3.

⁶³⁵ Thomas Cottier and Matthias Oesch, ‘Direct and indirect discrimination in WTO and EU law’ in Sanford E Gaines, Birgitte Oslen and Karsten Sorenson (eds), *Liberalising Trade in the EU and the WTO* (Cambridge 2012); J H H Weiler, ‘the Constitution of the Common Market’ in P Craig and G de Burca (eds), *The Evolution of EU Law* (Oxford 2011).

⁶³⁶ John Ruggie, Foreword in T G Weiss and R Thakur, *Global Governance and the United Nations: An Unfinished Journey* (Bloomington Indiana University Press 2010).

international trade law at different times. It also highlighted the shifting nature of the governance of international trade when a transition from the GATT to WTO took place. The shift from the GATT to the WTO brought many substantial changes in the governance of international trade and its related areas.⁶³⁷ While GATT has been termed a model of negative integration,⁶³⁸ i.e. laying down what governments must not do, WTO in many ways has become a model of positive integration, with recommendations for what governments must do on the domestic policy front to fulfil their international obligations.⁶³⁹ GATT decision-making was consensus-based while WTO became a rule-based system where Members had to follow the rules laid down.⁶⁴⁰ GATS, being a WTO agreement, manifested all the essential elements of the changed governance architecture of the international trade framework, with binding obligations, domestic policy outreach and dispute settlement mechanisms. It is therefore with reference to the 'governance' of GATS that the novelties of the governance in the EU are being explored for their relevance to the former. The results expected from governing the international trade in services through GATS are 'progressive liberalization' of the services trade while preserving countries' genuine regulatory concerns.⁶⁴¹ However, in view of the scant progress in terms of actual trade liberalization, the existing governance model of the GATS is seemingly not very effective.⁶⁴² This chapter accordingly analyzes EU regulatory approaches to examine if they can provide some answers to the GATS governance challenges.

According to the United Nations Commission on Global Governance (UNCGS):

'Governance is the sum of many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and co-operative action taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interest.'⁶⁴³

⁶³⁷ This has been discussed in more detail in Chapter 1.

Also see John Jackson, *The World Trading System: Law and Policy in International Relations* (2nd edn, Cambridge MIT Press 1997).

⁶³⁸ Petros Mavroidis, *Trade in Goods* (Oxford 2012).

⁶³⁹ Ernst-Ulrich Petersmann, 'From Negative to Positive Integration in the WTO: The TRIPS Agreement and the WTO Constitution' in Cottier and Mavroidis (eds), *Intellectual Property: Trade, Competition and Sustainable Development* (University of Michigan Press 2003) 22.

⁶⁴⁰ Ibid.

⁶⁴¹ See the GATS preamble.

⁶⁴² This has been discussed at some length in Chapters 1 - 3.

⁶⁴³ The Commission on Global Governance, *Our Global Neighbourhood* (Oxford University Press 1995) 4.

It is in emphasizing that governance is a ‘continuing process’ that a study of the EU governance model becomes particularly relevant to this thesis. As shown earlier, one of the failings of the GATS framework has been that it has not grown and evolved to accommodate services trade regulatory challenges during the two decades it has been in the field. The EU governance, on the other hand, has continued to develop and evolve, resulting in a more effective framework for integration.⁶⁴⁴

Accordingly, the second part of this research carries out a case study of the EU regulatory approaches. It consists of two chapters. Chapter 4 is devoted to a general study of the EU governance model and how it has evolved over a time period, and Chapter 5 conducts a more focused study of financial services trade liberalization in the backdrop provided by Chapter 4.

The current chapter traces the evolution of EU governance to highlight how changing requirements have affected its approaches. This chapter is also aimed at critically analyzing regulatory innovations that have emerged in EU governance.⁶⁴⁵ Financial services trade liberalization, telecommunication, health care, environmental protection, food safety and data protection are some of the areas where these regulatory innovations are being effectively used by the EU.⁶⁴⁶ It is expected that a focused appreciation of these regulatory approaches can inform the discussion on how to address the GATS regulatory challenges, which are mainly concerned with balancing its dual objectives of trade liberalization and accommodating Members’ regulatory concerns, in view of the particular nature of the services trade. This expectation is also supported by some earlier academic studies. Sabel and Zeitlin, for example, asserted that there are reasons to view the EU not as a ‘*sui generis* outlier’ but as a ‘forerunner of new forms of governance especially suited to the tempers of our times at both national and international levels.’⁶⁴⁷

The chapter is divided into two parts. The first part discusses EU governance broadly by examining various instruments being used to achieve Union objectives. It explores the hierarchy between these instruments, and how it affects EU governance. It also discusses briefly the balance of

⁶⁴⁴ Neil Nugentl, *The Government and Politics of European Union* (7th edn, Palgrave Macmillan); Charles Sabel and Jonathan Zeitlin, ‘Learning From Difference: The New Architecture of Experimentalist Governance in the EU Towards A New Architecture’ in Sabel and Zeitlin (eds), *Experimentalist Governance in the European Union: Towards A New Architecture* (OUP 2013). This has been demonstrated through a brief study of the EU governance evolution.

⁶⁴⁵ European Mission’s White Paper on governance defines governance as ‘rules, processes and behavior that effect the way in which powers are exercised at European level’ COM (2001) 428 final, European Governance – A White Paper, p. 8. fn 1.

⁶⁴⁶ Charles Sabel and Jonathan Zeitlin, ‘Learning From Difference: The New Architecture of Experimentalist Governance in the EU Towards A New Architecture’ in Sabel and Zeitlin (eds), *Experimentalist Governance in the European Union: Towards A New Architecture* (OUP 2013) 3.

⁶⁴⁷ Charles Sabel and Jonathan Zeitlin, ‘Learning From Difference: The New Architecture of Experimentalist Governance in the EU Towards A New Architecture’ in Sabel and Zeitlin (eds), *Experimentalist Governance in the European Union: Towards A New Architecture* (OUP 2013) 8.

competences between the EU and its Member states. The second part of the chapter focuses on the study of the regulatory innovations adopted in the EU governance to achieve Union objectives in various areas. These are often termed as 'New Governance' approaches, and widely regarded as a departure from conventional approaches to governance.⁶⁴⁸

B. The EU Governance

1. Competences

The EU's power to act has been assigned certain limits, so that it might be said that any competence assigned to the EU is an 'attributed' competence.⁶⁴⁹ This principle was previously embodied in Articles 5(1) and 7 (1) of the EC. However, prior to the Lisbon Treaty, it was difficult to decide the balance of competence between the EU and its Member states, since there was no categorization.⁶⁵⁰ There were often questions pertaining to competence, for example if the competence was exclusive or shared in a certain area.⁶⁵¹ Some treaty Articles such as Articles 95 and Article 308EC, were very broadly framed, compounding the problem.⁶⁵² There are two points on which the reform agenda in the EU governance was hence focused. One is bringing more clarity in the scope of EU competence, and the second is containing its power.⁶⁵³ This reform agenda transpired in many aspects of the Lisbon Treaty as will become evident from the discussion that follows.

The aforesaid EC provisions have now been stipulated in Article 5 of the TEU of the Lisbon Treaty, but with a difference. Article 5 of the TEU states:

1. *The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.*
2. *Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member states in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member states.*
3. *Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member states, either at central level or at regional and local level,*

⁶⁴⁸ Ibid.

⁶⁴⁹ A Dashwood, 'The Limits of European Community Powers' (1996) 21 ELRev 113.

⁶⁵⁰ Paul Craig and Grainne de Burca, *EU Law: Text Cases and Material* (6th edn, OUP 2015).

⁶⁵¹ Ibid.

⁶⁵² Both the Articles pertain to competition provisions and a link to their text can be found at: <http://ec.europa.eu/competition/information/treaty.html> accessed 31 July 2016.

⁶⁵³ Paul Craig, *The Lisbon Treaty, Law, Politics and Treaty Reform* (OUP 2010).

but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

4. *Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.*

The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

We can see that a clear demarcation of areas of competence has been made in the Treaty in following three classes:

- Areas of exclusive EU competence.
- Areas where competences are shared between the EU and the Member states.
- Areas where EU supports, co-ordinates and supplements Member states' actions.

The first category is a comparatively narrow one.⁶⁵⁴ Article 3 TFEU of the Lisbon Treaty defines the following areas as exclusive EU competences: the competition rules within the internal market, the customs union, the common commercial policy, monetary policy for the Euro countries, the conservation of marine biological resources under the common fishing policy and the conclusion of international agreements as exclusive competences if the EU has a corresponding internal competence.

Most of the areas are, however, covered in the second category, which is the 'default' position for EU functioning.⁶⁵⁵ Shared competence between the Union and the Member states applies in the following principal areas:

Internal market; social policy, for the aspects defined in this Treaty; economic, social and territorial cohesion; agriculture and fisheries, excluding the conservation of marine biological resources; environment; consumer protection; transport; trans-European networks; energy; areas of freedom, security and justice; and common safety concerns in public health matters, for the aspects defined in this Treaty.

⁶⁵⁴ Stephen Weatherhill, 'Better Competence Monitoring' (2005) 30 EL Rev 23.

⁶⁵⁵ Paul Craig and Grainne de Burca, *EU Law: Text Cases and Material* (6th edn, OUP 2015.)

The third category is where the EU has been barred from harmonization through regulation, and can only impart a supportive role.⁶⁵⁶ The Lisbon Treaty provides for this new competence category, called ‘supportive, coordinating or complementary action’ in Art. 6 TFEU. Under this competence category, the EU can adopt binding laws, but not standardize across the EU national laws. This implies that the ‘harmonization’ powers of the EU have been curtailed.

Article 6 TFEU states:

The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be:

- (a) Protection and improvement of human health;*
- (b) Industry;*
- (c) Culture;*
- (d) Tourism;*
- (e) Education, youth, sport and vocational training;*
- (f) Civil protection;*
- (g) Administrative cooperation.*

As regards the issue of containing the EU power, Article 352 of TFEU provides a mechanism which requires unanimity in the Council, consent from the European Parliament and alerting the national parliament based on the subsidiary principle, before an action deemed to be necessary is initiated by the EU. The strengthening of the role of the national Parliament is a significant step towards balancing the integration objectives of the EU with national political exigencies.⁶⁵⁷ Article 5 (3) of the Treaty on European Union (TEU) and Protocol (No 2) deals with the application of the principles of subsidiarity and proportionality. The principles of subsidiarity and proportionality govern the exercise of EU competences in the areas where it does not have exclusive competence. The principle of subsidiarity is meant to protect the capacity of the Member states to take decisions and initiate action.⁶⁵⁸ It authorizes intervention by the Union only when the objectives of an action cannot be sufficiently achieved by the Member states, and can be better achieved at Union level, ‘by reason of the scale and effects of the proposed action’.⁶⁵⁹ The purpose of the principle in the European Treaties is, on one hand, to create balance between the powers of the Union and the States, and also to ensure that powers are exercised as close to the political choices of the citizen

⁶⁵⁶ Robert Schutze, *From Dual to Co-Operative Federalism, the Changing Structure of European Law* (OUP 2009).

⁶⁵⁷ Paul Craig, *The Lisbon Treaty, Law, Politics and Treaty Reform* (OUP 2010).

⁶⁵⁸ Takis Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2007).

⁶⁵⁹ Article 5 (3) of TFEU.

as possible.⁶⁶⁰ This is a desirable feature in any governance model but as observed in the first part of the study, not necessarily a forte of the WTO or GATS governance. While acknowledging the institutional and framework divergences between the two models of integration, it can still be explored how the GATS governance can be improved learning from the EU reform agenda as described above.

2. Institutions and Decision-Making

Article 13 of the TFEU lists the institutions that carry out the functions of the Union. They are: the European Parliament, the European Council, the Council, the Commission, the Court of Justice of the European Union, the European Central Bank and the Court of Auditors. The powers of all these institutions are governed by the Treaty provisions. These institutions have a complex structure and their interrelationship is also a dynamic and complex phenomenon,⁶⁶¹ the study of which is beyond the scope of this research. However to demonstrate the tension between the centralized integration objectives of the Union and Member states' national regulatory interests, a theme relevant to this research, a brief mention of the Commission and the Council is necessary. While the European Commission is often considered to have a federal pro-integration approach, the Council has a more cautious inter-governmental bent.⁶⁶² The Commission consists of bureaucrats representing the EU's collective interests, while the Council is comprised of politicians from Member states, and thus represents the national interests of the States individually.⁶⁶³ Over a period of time, the Council has acquired a greater role in EU decision-making. The following examples indicate the extent of the Council's powers.

The Council votes its approval to all legislative initiatives of the Commission before they actually become law.⁶⁶⁴ The Council's legislative powers have been enhanced by Article 241 of TFEU which empowers it to ask the Commission to initiate study in a particular area and submit proposals. The Council can make this request by simple majority for any area that it deems is important for achieving common objectives. It can also delegate powers to the Commission to make regulations

⁶⁶⁰ Robert Schutze, *From Dual to Co-Operative Federalism, the Changing Structure of European Law* (OUP 2009).

⁶⁶¹ Paul Craig, 'Institutions, Power and Institutional Balance' in Paul Craig and Grainne de Burca (eds), *The Evolution of EU Law* (2nd edn, OUP 2010) Ch 3.

⁶⁶² Deidre , *Executive Power in the European Union, Law, Practices and the Living Constitution* (OUP 2009); Andy Smith (ed), *Politics and the European Commission: Actors, Independence, Legitimacy* (Routledge 2004); Dionyssi Dimitrakopoulous (ed), *The Changing European Commission* (Manchester University Press 2004).

⁶⁶³ Deidre Curtin, *Executive Power in the European Union, Law, Practices and the Living Constitution* (OUP 2009).

⁶⁶⁴ Paul Craig, 'Institutions, Power and Institutional Balance' in Paul Craig and Grainne de Burca (eds), *The Evolution of EU Law* (2nd edn, OUP 2010).

in a specific area. The Council concludes agreements with the international institutions and other states on behalf of the EU. In addition to this; the Council enjoys significant powers with regard to Common Security and Foreign Policy.⁶⁶⁵ Hayes-Ranshaw accordingly terms the Council's as 'intergovernmental institution *par excellence*'.⁶⁶⁶ They further acknowledge how the EU Member States have enhanced their decision making powers through the Council in the following words:⁶⁶⁷

'The Council remains the fulcrum of the decision making and legislative process of the EU. This reflects the stubborn determination of member governments in the EU to maximize their involvement in framing the decisions and shaping the legislation that would have a bearing on their politics.....The Commission has lost ground in what used to be the classic council-commission tandem, and the Council has gained a good deal more direct executive power in in new areas of EU collective policy making.'

The framework of EU governance is thus evolving in such a way as to balance EU integration objectives with Members' national interests. The WTO architecture is such that its basic framework does not accommodate an EU type of arrangement in the form of the Council. However, this brief discussion brings home the need to create flexible governance mechanisms which can accommodate national regulatory considerations, while pursuing integration objectives, be it for the EU or the WTO. If not in institutional set up, parallels can be drawn between the two settings for regulatory approaches and instruments of policymaking, as will be demonstrated in the discussion that follows.

Without going into further detail about the workings of individual European institutions, it should be emphasized that decision-making in the EU is shaped by the balance of power among its various institutions such as the Commission, the Council and the European Parliament. This is a dynamic process, and as the institutions have evolved, so has the decision-making process. In its existing form, the EU rests on the Council, which represents the interests of its Member states and the European Parliament. This, in turn, represents the interests of the people of Europe for the legitimacy of its decision-making (Article 10 of the TEU), while the Commission acts as the main tool for achieving EU treaty objectives. It may be concluded that the current EU governance model strives to share legislative and executive powers in its institutions, which has been a continuing theme in the history of its integration.

⁶⁶⁵ Paul Craig, Grainne de Burca, *EU Law: Text Cases and Material* (6th edn, OUP 2015).

⁶⁶⁶ F Hayes-Renshaw and H Wallace, *The Council of Ministers* (2nd edn, Palgrave 2006).

⁶⁶⁷ *Ibid.* 321.

3. Instruments and Hierarchies

Article 288 of the TFEU lays down the foundation for the instruments that are used for EU governance:

To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

Recommendations and opinions shall have no binding force.

According to the Article, the three kinds of instruments, i.e. regulations, directives and decisions, are binding, but with a certain degree of difference. While regulations are binding in their 'entirety' to all Member states and are 'directly applicable', a directive is only binding concerning the result to be achieved, leaving the 'form' and 'method' to achieve that result with the national authorities. For regulations, the ECJ has interpreted 'directly applicable' to mean that individuals have rights that can be defended in the national courts.⁶⁶⁸ Another interpretation of this terminology is that incorporating each regulation into the national legal system through national legal acts would be extremely cumbersome. This term makes them a part of the national system without the need to transpose or adopt them.⁶⁶⁹ It also implies that the regulations have an independent legal effect in each Member State, which should not pass any law that obstructs or conceals the nature of the regulation.⁶⁷⁰

Directives differ from regulations in two ways. They do not have to be addressed to all Member states, and are binding only to the extent of the results to be achieved, leaving the form and the method to achieve those results to the individual Member states. This provides a certain level of

⁶⁶⁸ J Steiner, 'Direct Applicability in EEC Law - A Chameleon Concept' (1982) 98 LQR 229 while quoting Case 34/73 *Variola vs Amministrazione delle Finanze* [1973] ECR 981.

⁶⁶⁹ Robert Schütze, 'The Morphology of Legislative Power in the European Community: Legal Instruments and Federal Division of Powers' [2006] 25 YEL 91.

⁶⁷⁰ *Ibid.*

flexibility for the Member states in implementing complex legislative measures.⁶⁷¹ A certain amount of discretion means that Member states can adjust the implementation strategies to the variations in their national legal, political and social systems. As has been observed earlier, flexibility is an important element in making GATS governance more effective. EU instruments of policymaking present a better example of flexible governance than the GATS, as will become clearer through further discussion.

According to Article 228 of TFEU, a decision is applicable in its entirety, and if it specifies to whom it is applicable, it is binding only to those bodies. In most cases, decisions are used as legal acts in specific situations, and are applicable to addressees only.⁶⁷² However there are also decisions of a generic nature, which cover general inter-institutional relations in the Union and procedures such as Comitology.⁶⁷³

Recommendations and opinions are mentioned as non-binding in Article 228 of TFEU, and have been termed as 'soft law' by commentators.⁶⁷⁴ In addition to these forms of soft law, there are many other EU initiatives, such as Open Method of Co-Ordination,⁶⁷⁵ policy guidelines and non-legal measures which are used to achieve EU objectives. For example, the Commission has issued policy guidelines in the area of state aid to explain how it will exercise its discretion regarding this aid.⁶⁷⁶ In its review of the Internal Market Strategy in 2000, the Commission included legal and non-legal measures that it wanted to take in order to achieve the Single Market.⁶⁷⁷ For the implementation of EU Social Agenda, 'all existing Community instruments bar none must be used: the open method of co-ordination, legislation, the social dialogue, the Structural Funds, the Support Programmes, the integrated policy approach, analysis and research.'⁶⁷⁸ In fact this mixture of formal and informal law has become an EU peculiarity, and a recurring feature of the yearly

⁶⁷¹ A von Bogdandy, J Bast and F Arndt, 'Legal Instruments in European Union Law and their Reform: A Systematic Approach on an Empirical Basis.' (2004) YEL 91.

⁶⁷² Takis Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2007).

⁶⁷³ B de Witte, 'Legal Instruments and Law Making in the Lisbon Treaty' in S Griller and J Ziller (eds), *The Lisbon Treaty, EU Constitutionalism without a Constitutional Treaty* (Springer 2008).

⁶⁷⁴ Linda Sanden, *Soft Law in European Community Law* (Hart 2004); Jan Klabbbers, 'Informal Instruments before the European Court of Justice' (1994) 31 CML Rev 999.

⁶⁷⁵ Dealt with in more detail in the next part of the chapter under the heading 'New Modes of Governance'.

⁶⁷⁶ State Aid Manual of Procedures Internal DG Competition working documents on procedures for the application of Articles 107 and 108 TFEU.

⁶⁷⁷ Com (2000)257 final.

⁶⁷⁸ Nice European Council, 7-9 December 2000, Annex 1, [28].

work programmes of the Commission⁶⁷⁹ for achieving Union objectives.⁶⁸⁰ This observation will be further tested through a specific study of the financial services trade liberalization in the next chapter.

Prior to the Lisbon Treaty, there were primary regulations, directives, or decisions, supported by secondary regulations, directives, or decisions which dealt with the subject matter in greater detail.⁶⁸¹ Post Lisbon however, there is a more defined hierarchy of EU governance instruments.⁶⁸² There are five main tiers, i.e. constitutional treaty, charter of rights, general principles of law, legislative acts and implementing acts. The constituent treaties of the EU, i.e. TEU and TFEU, hold the top position in the EU hierarchy of norms.⁶⁸³ Any legislation is accordingly made in the pursuit of some Treaty Article. EU courts set the scope of the Treaty articles and define their interpretations.⁶⁸⁴ Similarly, the Charter of Rights has the same status as the Treaties, since according to Article 6 (1) TEU, the Charter has the same legal value as the Treaties. The scope and interpretation of the Charter is also determined by the EU courts.⁶⁸⁵

The second tier in the hierarchy is represented by the general principles of law which have been shaped by the EU courts over a period of time.⁶⁸⁶ Article 263 (2) of TFEU states that judicial review can be executed on the questions of competence, infringement of treaties, misuse of power, etc. Thus it provides the EU courts with a broad mandate to design the principles for review in the situations stated above. According to Craig and Burca, in developing legal principles, European courts have drawn on the administrative law of Member states.⁶⁸⁷ The principles in the major legal systems of the Member states have been developed to cater to EU specific needs. This is evidence that the EU, instead of imposing legal principles and interpretations upon the Member states, has exercised flexibility in adopting legal principles from the national laws. For example, German law has been used to develop the principles of proportionality and legitimate expectation in the EU

⁶⁷⁹ Paul Craig, *The Lisbon Treaty, Law, Politics and Treaty Reform* (OUP 2010).

⁶⁸⁰ Ibid.

⁶⁸¹ A von Bogdandy, J Bast and F Arndt, 'Legal Instruments in European Union Law and their Reform: A Systematic Approach on an Empirical Basis' (2004) YEL 91; Bogdandy, Bast and Arndt, 'The Hierarchy of Norms' in Tridimas and Nebbia (eds,) *European Union Law for the Twenty First Century, Re-thinking the New Legal Order* (Hart 2004).

⁶⁸² Paul Craig, *The Lisbon Treaty, Law, Politics and Treaty Reform* (OUP 2010).

⁶⁸³ Deidre Curtin and Tatevik Manucharyan, *Legal Acts and Hierarchy of Norms in EU Law* (OUP 2015).

⁶⁸⁴ J Peterson and M Shackleton, (eds), *The Institutions of the European Union* (2nd edn, OUP 2006).

⁶⁸⁵ Ibid.

⁶⁸⁶ Paul Craig, *The Lisbon Treaty, Law, Politics and Treaty Reform* (OUP 2010).

⁶⁸⁷ Ibid.

law.⁶⁸⁸ This is a desirable aspect of EU governance, and if the WTO dispute settlement bodies similarly co-opted such norms this could make it a more dynamic instrument of the multilateral services trade.

Legislative acts, which are third in the hierarchy of norms in the EU, are the legal acts adopted through ordinary legislative procedure.⁶⁸⁹ They are governed by Article 298 of TFEU:

1. *The ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission. This procedure is defined in Article 294.*
2. *In the specific cases provided for by the Treaties, the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament, shall constitute a special legislative procedure.*
3. *Legal acts adopted by legislative procedure shall constitute legislative acts.*
4. *In the specific cases provided for by the Treaties, legislative acts may be adopted on the initiative of a group of Member States or of the European Parliament, on a recommendation from the European Central Bank or at the request of the Court of Justice or the European Investment Bank.*

Thus legislative acts can be regulations, directives or decisions, and in addition to the ordinary legislative procedure, a special legislative procedure has also been made mandatory for their formulation in certain specific situations. The Lisbon Treaty has placed two further categories under the legislative acts, which are delegated and implementing acts. Delegated acts are covered by Article 290 of the TFEU:

1. *A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act.*
The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power.
2. *Legislative acts shall explicitly lay down the conditions to which the delegation is subject; these conditions may be as follows:*
(a) the European Parliament or the Council may decide to revoke the delegation;

⁶⁸⁸ Paul Craig and Grainne de Burca, *EU Law: Text Cases and Material* (6th edn, OUP 2015).

⁶⁸⁹ The codecision procedure was introduced by the Maastricht Treaty on European Union (1992), and extended and made more effective by the Amsterdam Treaty (1999). With the Lisbon Treaty that took effect on 1 December 2009, the renamed ordinary legislative procedure became the main legislative procedure of the EU's decision-making system.

(b) the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act.

For the purposes of (a) and (b), the European Parliament shall act by a majority of its component members, and the Council by a qualified majority.

3. *The adjective 'delegated' shall be inserted in the title of delegated acts.*

As discussed earlier, the standard pattern before Lisbon was primary legislative measures, complemented by secondary legislative measures. Since there was a realization that not everything could be done through primary legislation, and there was a need for delegation of power, the Commission was given the power to make secondary norms. To give a regulatory role to the national regulators in contentious issues, the process of comitology was introduced, which meant that the Commission and the national regulators jointly made secondary legislation.⁶⁹⁰ The European Parliament considered this to be an obstruction to the Union objectives, since the process was always dominated by the Member states.⁶⁹¹ This tension between the centralized integration objectives and national regulatory objectives is reminiscent of the discussion carried out regarding GATS governance in the earlier chapters.

Post Lisbon, the comitology process for delegated acts has undergone some change and the committees have become more advisory in nature.⁶⁹²

As regards the implementing acts, procedure has been laid down in Article 291 of the TFEU:

1. *Member States shall adopt all measures of national law necessary to implement legally binding Union acts.*
2. *Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council.*
3. *For the purposes of paragraph 2, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.*
4. *The word 'implementing' shall be inserted in the title of implementing acts.*

In the pre-Lisbon period, Article 202 of the EC allowed delegation of powers to the Commission for implementing rules laid down by Council subject to comitology. Post Lisbon however, a clear

⁶⁹⁰ Paul Craig, 'Delegated Acts, Implementing Acts and the New Comitology Regulation' (2011)36 ELRev.

⁶⁹¹ Andenas and Turk (eds), *Delegated Legislation and the Role of Committees in the EC* (Kluwer 2000).

⁶⁹² Paul Craig, 'Delegated Acts, Implementing Acts and the New Comitology Regulation' (2011)36 ELRev.

distinction between delegated and implementing acts emerged. While delegated acts are meant to supplement legislative acts, implementing acts are meant to execute the legislative acts, without amending or supplementing them. The idea is to distinguish between secondary measures that are legislative in nature and those that are purely executive. Craig and Burca have identified certain difficulties in distinguishing between the two kinds of acts.⁶⁹³ However for the purpose of flagging up the regulatory techniques used for EU integration, it can be said that the categorization between legal, delegated and implementing acts provides more room for national regulators to have a role in the EU regulatory architecture, a factor missing for WTO Members in the GATS governance.

C. New Modes of Governance in the EU

The previous section has introduced the main instruments used by the EU for law-making and achieving policy objectives. It is evident that there is a wide variety of instruments and procedures at play in the EU governance model, which make it a very complex regulatory structure. The question, then, is what is meant by 'new governance', when there is already such a multiplicity of formal and informal approaches to managing EU affairs. A substantial body of academic literature has attempted to differentiate between the old and new forms of governance and their characteristics.⁶⁹⁴ There are definitions of new governance which deal with it from various angles and perspectives, including different actors, instruments and modes.⁶⁹⁵

The following are different ways in which new governance approaches have been identified in the existing academic literature:⁶⁹⁶

- Public policy-making with the inclusion of private actors.
- Public policy-making outside the traditional arena.
- Decision-making through non-hierarchical modes.
- Greater emphasis on negotiation and co-operation in the decision-making.
- Soft policy instrument replace the hard instruments.
- Delegation of regulatory tasks.

⁶⁹³ Paul Craig and Grainne de Burca, *EU Law: Text Cases and Material* (6th edn, OUP 2015).

⁶⁹⁴ O de Schutter and J Lenoble (eds), *Reflexive Governance-Redefining the Public Interests in a Pluralistic World* (Hart 2010); G van Calster, 'An overview of Regulatory Innovations in the European Union' (2009) 11 *CYELS* 289; Heritier and Rhodes (eds), *New Modes of Governance in Europe: Governing in the Shadow of Hierarchy* (Palgrave 2011); Charles Sabel and Jonathan Zeitlin, 'Learning From Difference: The New Architecture of Experimentalist Governance in the EU' in Sabel and Zeitlin (eds), *Experimentalist Governance in the European Union: Towards A New Architecture* (Oxford 2010).

⁶⁹⁵ *Ibid.*

⁶⁹⁶ Adrienne Heritier and Martin Rhodes, 'Conclusion New Modes of Governance: Emergence, Execution, Evolution and Evaluation' Adrienne Heritier and Martin Rhodes (eds), *New Modes of Governance in Europe: Governing in the Shadow of Hierarchy* as above.

It is evident that fully grasping all the different ways in which new governance has been described and discussed is a daunting task. It can also lead to considerable confusion, and hence some simplification of this concept is warranted. Craig and de Burca, while acknowledging the same difficulty, have found 'shifting away from hierarchical governance' to be a unifying theme for their study of the new governance.⁶⁹⁷

If the same theme is considered relevant for the present study, then first hierarchical governance needs to be defined. Broadly speaking, hierarchical governance implies that policies flow from the centre or the top, are prescriptive in nature, without leaving much regulatory space for whom they are intended, and are obligatory, which means that they can be legally enforced.⁶⁹⁸

In the EU context, the classic 'Community Method'⁶⁹⁹ had been used historically as the baseline from which to draw a distinction between old and new forms of governance.⁷⁰⁰ According to the European Mission's White Paper on Governance issued in 2001 'Community Method' is defined as having a three stage process:⁷⁰¹

1. The European Commission makes legislative and policy proposals.
2. These are adopted in the form of law by the Council of Ministers and the European Parliament through the use of qualified majority.
3. The European Court of Justice ensures that the rule of law holds.

All three elements of the hierarchical governance can be traced back to the classic community method, i.e. centralized exercise of power by the EU through the Commission, leading to binding rules which are subject to the jurisdiction of the Court of Justice.

⁶⁹⁷ Paul Craig Paul and Grainne de Burca, *EU Law: Text Cases and Material* (6th edn, OUP 2015).

⁶⁹⁸ *Ibid.*

⁶⁹⁹ The Treaty of Maastricht (1992) introduced an institutional structure composed of three pillars, and also the distinction between the Community and intergovernmental methods. This institutional architecture and its methods prevailed up until the Treaty of Lisbon came into force.

The Community method denoted the institutional functioning of the first pillar of the European Union. It was based on a premise of integration, and was characterised by the following main features:

- Commission monopoly of the right of initiative;
- widespread use of qualified majority voting in the Council;
- an active role for the European Parliament (opinions, proposals for amendments);
- uniform interpretation of Community law by the Court of Justice.

⁷⁰⁰ See for example Trubek and Scott, *'Mind the Gap: Law and New Governances Approaches in European Union'* as above and Burkard Eberlein and Dieter Kerwer, 'New Governance in the European Union: A Theoretical Perspective, (2004) 42 *Journal of common Market Studies* 121.

⁷⁰¹ COM (2001) 428 final, *European Governance – A White Paper*, p. 8.

After Lisbon, ordinary legislative method has replaced the classic community method, as previously discussed. However, the ordinary legislative procedure has similar structural elements to the classic community method. There are, after all, binding rules flowing from the central authority, which are detailed and prescriptive most of the time, and which are subject to the jurisdiction of the EU courts.

This chapter however argues that there has been a significant ‘shift’ in EU governance from the hierarchical governance as described above, without implying that the new governance has replaced the conventional modes of governance. Indeed, ordinary legislative process is to date the main instrument of law-making in the EU. The move away does not mean that the EU relied exclusively on hierarchical modes of governance in the past, as will be demonstrated in the discussion that follows on the emergence of the new governance modes in the EU. The point to be underscored is, however, that a shift in preference has taken place, which is evident from the various EU policy initiatives.

The emergence of new modes of governance has been linked to the evolution of the EU institutional architecture.⁷⁰² As the economy, society and polity of the EU changed, the problems associated with their management also became more complex.⁷⁰³ The legislators therefore started considering it appropriate to lay down broad frameworks, while leaving room for stakeholders to fill in the regulatory space details through revisable rules.⁷⁰⁴

The political enlargement and economic liberalization of the EU provided a broader context in which the new modes of governance emerged.⁷⁰⁵ The economic liberalization agenda of the EU aimed to make room for new market entrants. For this purpose, the Commission has pursued a policy of harmonization and de-regulation.⁷⁰⁶ On the other hand, Europe also wanted to safeguard

⁷⁰² See *inter alia*, Udo Diedrichs, Wulf Reiners and Wolfgang Wessels, ‘New Modes of Governance: Policy Developments and the Hidden Steps of EU Integration’ in Heritier and Rhodes (eds), *New Modes of Governance in Europe: Governing in the Shadow of Hierarchy* (Palgrave 2011); Charles Sabel and Jonathan Zeitlin, ‘Learning From Difference: The New Architecture of Experimentalist Governance in the EU’ in Sabel and Zeitlin (eds), *Experimentalist Governance in the European Union: Towards A New Architecture* (Oxford 2010).

⁷⁰³ *Ibid.*

⁷⁰⁴ See Orly Lobel, (2004) ‘The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought’ 89 *Minn. L. Rev.* 342; Joanne Scott and David M Trubeck, (2002) ‘Mind the Gap: Law and New Approaches to Governance in the European Union’ 8 *Eur. L. Rev.* 1; David M Trubeck and Louise G Trubeck, ‘Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Co-ordination’ (2005) 11 *Eur. L. J.* 343.

⁷⁰⁵ Adrienne Heritier and Dirk Lehmkuhl, ‘Governing in the Shadow of Hierarchy: New Modes of Governance in Regulation’ in Adrienne Heritier and Martin Rhodes (eds), *New Modes of Governance in Europe: Governing in the Shadow of Hierarchy* (Palgrave 2011).

⁷⁰⁶ For more detail on EU’s economic integration, see Ch 5 of the thesis.

its non-economic interests, e. g. the stability of its financial markets, environment and public health, through regulatory control.⁷⁰⁷ EU governance has become more complex, due to the political enlargement of the EU, with the number of Member countries reaching 28, and more applications for accession in the pipeline.⁷⁰⁸ Growing regulatory diversity has demanded that the EU integration process is made more accommodating and flexible wherever possible.⁷⁰⁹ Tulmets has accordingly traced a direct link between the methods used by the EU for its enlargement and the emergence of the new governance techniques in its internal policies.⁷¹⁰

In 1994-5, the European Commission issued a White Paper on the Internal Market to ensure that the candidate countries for the EU would adopt '*community acquis*'.⁷¹¹ The *community acquis* is a term used for the collective rights and obligations of the members which bind them to the EU. The Commission initially employed a traditional approach guided by the Community Method⁷¹² for achieving the *acquis*. In this approach the countries were required to transpose the Community law to their national regulatory architecture. Subsequently however, the Commission realized the inability of this method to achieve the integration objectives. Some of the shortcomings of the Community method which led to this realization were:⁷¹³

- The candidate countries were transposing the law, but rarely implementing it.

⁷⁰⁷ Neil Nugent, *The Government and Politics of European Union* (7th edn, Palgrave Macmillan)

⁷⁰⁸ See the following link for EU members and the countries in waiting at:
<http://europa.eu/about-eu/countries/index_en.htm> accessed 15 June 2016.

⁷⁰⁹ Elsa Tulmets, 'Experimentalist Governance in EU External Relations: Enlargement and the European Neighbourhood Policy' in Sabel and Zeitlin (eds), *Experimentalist Governance in the European Union: Towards A New Architecture* (OUP 2010).

⁷¹⁰ Elsa Tulmets, *Experimentalist Governance in EU External Relations: Enlargement and the European Neighbourhood Policy* as above at 299.

⁷¹¹ See the following link at:
<http://europa.eu/legislation_summaries/glossary/community_acquis_en.htm> accessed 20 June 2015.

⁷¹² The Treaty of Maastricht (1992) introduced an institutional structure composed of three pillars, and also the distinction between the Community and intergovernmental methods. This institutional architecture and its methods prevailed up until the Treaty of Lisbon came into force.

The Community method denoted the institutional functioning of the first pillar of the European Union. It was based on a premise of integration and was characterised by the following main features:

- Commission monopoly of the right of initiative;
- widespread use of qualified majority voting in the Council;
- an active role for the European Parliament (opinions, proposals for amendments);
- uniform interpretation of Community law by the Court of Justice.

⁷¹³ Christopher Preston Christopher (1995) 'Obstacles to EU Enlargement: The Classical Community Method and the Prospects for a Wider Europe' 33 *Journal Common Market Studies* 451.

- The Commission had no legal control over the countries, since they were not yet members of the EU.
- The countries lacked the institutional capacity to deal with regulatory changes. This became more apparent when the Washington Consensus⁷¹⁴ strategy for economic revival with its emphasis on privatization and deregulation did not help the Eastern European countries in resolving their economic crisis.

The Commission therefore proposed a flexible, coordination-based model, which would bridge the policy gaps among the countries and help in institution building. This was done through the policy guidelines issued via its 'Agenda 2000'.⁷¹⁵ This method was similar to the Open Method of Coordination with its emphasis on coordination, delegation and freedom of implementation.⁷¹⁶ This approach improved the effectiveness of integration policies and coherence in EU external relations.⁷¹⁷ In fact, closer cooperation and understanding of the unique regulatory perspectives was to be the cornerstone of EU enlargement.⁷¹⁸

This discussion reveals that regulatory approaches similar to the new modes of governance became effective tools for achieving convergence in policy matters for the countries which did not fall within the EU supranational structure in the initial phase of EU integration. Before joining, these countries' relationship with the EU depended on diplomacy and negotiations.⁷¹⁹ The EU law had no direct effect on their domestic policy making until accession.⁷²⁰ The '*acquis*' therefore could not be imposed hierarchically upon these countries.⁷²¹ To this was added the issue of lack of institutional

⁷¹⁴ This is the set of 10 policies that the US government and the international financial institutions based in the US capital believed were necessary elements of 'first stage policy reform' that all countries should adopt to increase economic growth. At its heart is an emphasis on the importance of macroeconomic stability and integration into the international economy - in other words a neo-liberal view of globalization.

⁷¹⁵ 'Agenda 2000: For a Stronger and Wider Union' European Commission document COM (97), July, 1997 available at: www.ab.gov.tr/files/ardb/evt/2.../gundem_2000_eng.pdf accessed 20 June 2015.

⁷¹⁶ Elsa Tulmets, 'Experimentalist Governance in EU External Relations: Enlargement and the European Neighbourhood Policy' in Sabel and Zeitlin (eds), *Experimentalist Governance in the European Union: Towards A New Architecture* (OUP 2010).

⁷¹⁷ Ibid.

⁷¹⁸ J Zielonka, *Europe as Empire: The Nature of the Enlarged European Union* (2nd edn, Oxford 2007).

⁷¹⁹ J Zielonka, *Europe as Empire: The Nature of the Enlarged European Union* (2nd edn, Oxford 2007), see the discussion on Eastern Europe enlargement.

⁷²⁰ Ibid.

⁷²¹ Tanja A Borzel, 'Drawing Closer to Europe New Modes of Governance and Accession' in Heritie and Rhodes (eds), *New Modes of Governance in Europe: Governing in the Shadow of Hierarchy* (Palgrave 2011).

capacity.⁷²² The new modes of governance helped countries come up to the level required for European accession.⁷²³

Two aspects of the more recent history of EU integration, however, point more significantly towards the 'shift' mentioned earlier and the role of 'new governance' regulatory approaches in overall EU governance. One of these aspects is an early realization of the limitations of conventional modes of governance in achieving common European market goals. Accordingly in the 1980s, the Commission resorted to a new approach to harmonization, based on the use of standards to remove 'technical barriers to trade'. The main elements of this approach were set out in an annex to the Council resolution adopted in 1985, as follows:⁷²⁴

1. Legislative harmonization is limited to the adoption, by means of Directives based on Article 100 of the EEC Treaty (Article 115 TFEU, ex Article 94 TEC), of the essential safety requirements (or other requirements in the general interest) with which products put on the market must conform, and which should therefore enjoy free movement throughout the European Community/Union;
2. The task of drawing up the technical specifications needed for the production and placing on the market of products conforming to the essential requirements established by the Directives is entrusted to organizations competent in the standardization area;
3. These technical specifications are not mandatory and maintain their status of voluntary standards. (This implies that the producer has the choice of not manufacturing in conformity to the standards, but that in this event he has an obligation to prove that his products conform to the essential requirements of the Directive);
4. At the same time, national authorities are obliged to recognize that products manufactured in conformity with harmonized standards (or, provisionally, with national standards) are presumed to conform to the 'essential requirements' established by the Directive.

This approach has some significant features which need highlighting. First the directives only set basic or essential requirements for ensuring public safety and other general interests. This means that the directives become less detailed and consequently less prescriptive. Another regulatory

⁷²² J Zielonka, *Europe as Empire: The Nature of the Enlarged European Union* (2nd edn, Oxford 2007).

⁷²³ Tanja A Borzel, 'Drawing Closer to Europe New Modes of Governance and Accession' in Heritier and Rhodes (eds), *New Modes of Governance in Europe: Governing in the Shadow of Hierarchy* (Palgrave 2011).

⁷²⁴ See the link to the resolution at:

[<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31985Y0604\(01\)>](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31985Y0604(01)) accessed 30 July 2016.

departure is that the setting of standards is not to be done by the EU legislative bodies, but by independent bodies known as CEN⁷²⁵ and CENELEC⁷²⁶ in agreement with the Commission. These bodies are comprised of members from the national standard setting bodies, and therefore are more likely to represent the interests of national governments and industries. Thirdly and most importantly, the standards set by these bodies remain voluntary. Thus this new approach to harmonization represents a shift away from hierarchical governance, which represents a monopoly of regulation by central institutions, and the compulsory and prescriptive nature of norms.

While acknowledging the deficiencies, the new approaches to governance were declared 'highly efficient and successful' by the Commission.⁷²⁷ This proved a good example of a move away from a hierarchical to a more experimental form of governance, and has been built upon ever since.⁷²⁸

The second significant policy development was brought in by EU governance when it adopted the Lisbon Agenda in 2000.⁷²⁹ A new policy instrument known as the Open Method of Co-Ordination (OMC) was introduced in the Lisbon Agenda, and the European Council Conclusions at Lisbon described it in the following words:

1. Implementing a new open method of coordination

37. Implementation of the strategic goal will be facilitated by applying a new open method of coordination as the means of spreading best practice and achieving greater convergence towards the main EU goals. This method, which is designed to help Member States to progressively develop their own policies, involves:

- *Fixing guidelines for the Union combined with specific timetables for achieving the goals which they set in the short, medium and long terms;*
- *Establishing, where appropriate, quantitative and qualitative indicators and benchmarks against the best in the world and tailored to the needs of different Member States and sectors as a means of comparing best practice;*
- *Translating these European guidelines into national and regional policies by setting specific targets and adopting measures, taking into account national and regional differences;*
- *Periodic monitoring, evaluation and peer review organised as mutual learning processes.*

⁷²⁵ The European Committee for Standardization.

⁷²⁶ European Committee for Electro technical Standardization.

⁷²⁷ Enhancing the implementation of the new approach directive. com (2003)240.

⁷²⁸ Paul Craig and Grainne de Burca, *EU Law: Text Cases and Material* (6th edn, OUP 2015).

⁷²⁹ Conclusions of the Lisbon European Council Presidency, Mar 2000; The Community Lisbon Programme, Com (2000) 330.

38. A fully decentralised approach will be applied in line with the principle of subsidiarity in which the Union, the Member States, the regional and local levels, as well as the social partners and civil society, will be actively involved, using variable forms of partnership. A method of benchmarking best practices on managing change will be devised by the European Commission networking with different providers and users, namely the social partners, companies and NGOs.

As can be seen from the above description, OMC in itself is quite a broad and flexible procedure. It does, however, display all the elements identified earlier for the EU's move away from hierarchical to new modes of governance. The first aspect of the OMC to demonstrate this move is a fully decentralized approach, as against a centralized or top-down approach. The Union, the States, the regional actors and even the civil society and NGOs come together in partnership of varying forms. The second aspect that sets OMC apart from traditional modes of governance is the absence of prescriptive policymaking. OMC sets general guidelines or goals instead, which are to be executed by the state or national actors. This means that they have considerable regulatory space available to them. Obviously the flexibility of the approach will depend upon how broad the participatory base is but, at least by design, OMC provides room for flexibility. The third aspect is a substantially reduced, if not entirely absent, legal enforcement. It needs mentioning that in some areas, binding rules do play a role, one example of which is economic governance in the EU.⁷³⁰

It is also worth mentioning that there has been a general emphasis on reforming EU governance through regulatory innovations that are a departure from traditional and hierarchical forms of law and policymaking. Regulatory initiatives like OMC introduced through Lisbon, the implementation of the principles of subsidiarity and proportionality, and stressing the need for better regulation strategy are indicators of this emphasis.

It may be recalled that with the Lisbon Treaty, the EU has further refined the decision-making process.⁷³¹ The Lisbon Treaty distinguishes between legislative acts and delegated acts and sets out separate procedures for them. Under the delegated acts, the Commission is empowered to adopt measures supplementing or amending certain elements of the legislation.⁷³² Special Committees of national regulators implement the relevant legislation by 'filling in the details' when necessary.⁷³³

⁷³⁰ W Bechelkille, 'Hard Law in the Shadow of Soft Law in the Eu Economic Governance' (2007)13 CJEL 705.

⁷³¹ Edward Best, 'The Lisbon Treaty: A Qualified Advance for EU Decision-Making and Governance' (2008) available at: http://www.eipa.eu/files/repository/eipascope/20080509183728_SCOPE2008-1-2_EdwardBest.pdf accessed 20 June 2015.

⁷³² Adrienne Heritier and Catherin Moury, 'Institutional Changes in European Governance: The Commission's Implementing Powers and the European Parliament' in Levi-Faur David (ed), *The Oxford Handbook of Governance* (OUP 2012) 650.

⁷³³ The Lamfalussy Report available at:

Sabel and Zeitlin term this phenomenon 'experimental governance'.⁷³⁴ By this they imply that specific regulatory needs lead to identifying new ways of governance. Level 2 of the Lamfalussy framework for financial services trade liberalization, which will be discussed in further detail in the next chapter, is an example in case.

The inefficiency and ineffectiveness of the prevailing regulatory mechanisms also seem to have played a role in the emergence of regulatory innovations in the EU.⁷³⁵ This will be demonstrated in the study of financial services liberalization more specifically. But some examples can be quoted here wherein new governance regulatory approaches proved to be more effective than the hierarchical modes in achieving policy objectives. One successful example in this regard is when the EU adopted the new governance regulatory techniques in its environmental policy to make it more effective.⁷³⁶ Early European water legislation began with compulsory standards for rivers and lakes used for drinking water during the 1970s and 1980s in setting binding quality targets. It also included quality objective legislation on fish waters, shellfish waters, bathing water and groundwater. However the ineffectiveness of this approach led to a re-thinking of community water policy in mid-1995. The Commission accepted a request from the European Parliament's Environment Committee and from the Council of Environment ministers, and the new European Water Policy was developed in an open consultation process involving all interested parties. A Commission Communication was formally addressed to the Council and the European Parliament, but at the same time comments were invited from all interested parties such as local and regional authorities, water users and non-governmental organizations. A two-day Water Conference was also hosted in May 1996. This Conference was attended by some 250 delegates including representatives of Member states, regional and local authorities, enforcement agencies, water providers, industry, agriculture and consumers and environmentalists.⁷³⁷

The outcome of this consultation process developed a consensus that although considerable progress had been made in tackling individual issues, the current water policy was fragmented, in terms of both objectives and of means. All parties agreed on the need for a single piece of

<http://ec.europa.eu/internal_market/securities/lamfalussy/report/index_en.htm> accessed 20 June 2015.

⁷³⁴ Charles F Sabel and Jonathan Zeitlin, 'Learning From Difference: The New Architecture of Experimentalist Governance in the EU Towards A New Architecture' in Sabel and Zeitlin (eds), *Experimentalist Governance in the European Union: Towards A New Architecture* (OUP 2010) 3.

⁷³⁵ Adrienne Heritier and Catherine, 'Institutional Change in European Governance: The Commission's Implementing Powers and the European Parliament' in Levi-Faur David (ed), *The Oxford Handbook of Governance*, (Oxford 2012).

⁷³⁶ J Timmerman and S Langass (eds), *Environmental Information in European Transboundary Water Management* (London: IWA Publishing 2003).

⁷³⁷ For a background on this by the Commission, see the following link at:

<http://ec.europa.eu/environment/water/water-framework/info/intro_en.htm> accessed 30 June 2016.

framework legislation to resolve these problems. In response to this, the Commission presented a Proposal for a Water Framework Directive with the following key aims:

- Expanding the scope of water protection to all waters, surface waters and groundwater
- Achieving 'good status' for all waters by a set deadline
- Water management based on river basins
- 'Combined approach' of emission limit values and quality standards
- Getting the prices right
- Getting the citizens involved more closely
- Streamlining legislation

The result was the Water Framework Directive (WFD), which provides general guidelines and is fairly open-ended in its implementation strategies. The directive states that the Member States must achieve 'good water status' by 2020, with the definition of 'good water' being left to the implementers.⁷³⁸ This is a good illustration of replacing the hierarchical models of governance which have failed to generate desired policy results with more flexible and innovative approaches. Similarly, policy gaps in other areas of EU governance also led to the emergence of non-hierarchical regulatory approaches, one example of which was the financial services trade, explored in more detail in the next chapter.⁷³⁹

It can be observed that regulatory innovations, which are a departure from conventional approaches, have become a conscious policy choice in EU governance in many areas. The main reasons for their emergence have been a realization that the hierarchical modes are not working as effectively to achieve EU policy goals as is desirable.⁷⁴⁰ The need for flexibility and a capacity to accommodate the diverse regulatory concerns of the EU Members while pursuing its integration objectives has driven this paradigm shift in EU governance. These are also the main areas of concern in GATS governance, as discussed in the previous chapters.

There is also empirical evidence that the EU Member countries have tried to retain competencies in sensitive sectors by resorting to innovative regulatory methods.⁷⁴¹ This has not been with a view to block further integration, but to gain expertise and retain partial control over the policy areas

⁷³⁸ Ingmar Von Homeyer, 'Emerging Experimentalism in EU Environmental Governance' in Sabel and Zeitlin (eds), *Experimentalist Governance in the European Union: Towards A New Architecture* (OUP 2010) 122-150.

⁷³⁹ U Diedrichs, W Reiners and W Wessels, *The Dynamics of Change in EU Governance, Studies in EU Reform and Enlargement* (Edward Elgar 2011).

⁷⁴⁰ Sabel and Zeitlin (eds), *Experimentalist Governance in the European Union: Towards A New Architecture* (OUP 2010); David Levi-Faur (ed), *The Oxford Handbook of Governance* (OUP 2012) 650.

⁷⁴¹ Sabel and Zeitlin, 'Learning From Difference: The New Architecture of Experimentalist Governance in the EU Towards A New Architecture' above.

concerned.⁷⁴² Hence the areas of greater regulatory concern are actually the nurseries for developing new modes of governance.⁷⁴³ This empirical evidence is relevant for studying the possibility of using new governance regulatory approaches for GATS, since liberalization of services is considered an area of high regulatory concern.⁷⁴⁴

The final question for this study is, do the new governance regulatory approaches provide a 'window of opportunity' for addressing GATS regulatory concerns? This question is addressed from a practical angle in the next chapter, which examines more specifically how financial services trade liberalization has been affected by the use of 'new governance' methods. This will help in understanding what can actually be learnt from the EU regulatory innovations in the services trade for GATS governance. However first, a brief study of the characteristics of the new governance regulatory approaches is made below to provide the rationale for their preferred use in GATS governance.

D. Characteristics of the New Regulatory Approaches

Apart from the broad differences between the hierarchical and new modes of governance highlighted above, there are other characteristics which make them more suitable for governing a multilateral setting like the one represented by GATS. Most of the new governance approaches involve a broadening of the policymaking base.⁷⁴⁵ This has been demonstrated in financial services, European energy and environment governance, EU food safety regulations, and GMO governance in the EU, among other areas.⁷⁴⁶ This has been done by involving stakeholders from different tiers of government, private sectors or individual country regulators.⁷⁴⁷ There is a lot of emphasis on coordination and deliberative consultation between various actors, e. g. local, regional, national and European.⁷⁴⁸ Some aspects of policy implementation are delegated to the local authorities

⁷⁴² Ibid.

⁷⁴³ Ibid.

⁷⁴⁴ This has reference to the discussion in Chs 1-2 regarding the GATS existing regulatory structure and the implementation of its legal obligations.

⁷⁴⁵ See Eberlein Burkard, 'Experimentalist Governance in the EU Energy Sector', Ingmar Homeyer, 'Emerging Experimentalism in EU Environmental Governance', Ellen Vos, 'Responding to Catastrophe: Towards a New Architecture for EU Food Safety Regulation?' and Patrycja Dabrowska, 'EU Governance of GMO: Political Struggles and Experimentalist Solutions' in Charles Sabel and Jonathan Zeitlin (eds), *Experimentalist Governance in the European Union: Towards A New Architecture* (OUP 2010).

⁷⁴⁶ Ibid.

⁷⁴⁷ Ibid.

⁷⁴⁸ See for specific examples apart from the Lamfalussy Framework for the financial services, European energy and environment governance, EU food safety regulation, GMO governance in the EU, among other areas. See Eberlein Burkard, 'Experimentalist Governance in the EU Energy Sector'; Ingmar Homeyer, 'Emerging Experimentalism in EU Environmental Governance'; Ellen Vos, 'Responding to Catastrophe: Towards a New Architecture for EU Food Safety Regulation?'; Dabrowska Patrycja, 'EU Governance of GMO:

through the Lamfalussy framework for the financial services trade in the EU.⁷⁴⁹ The European Commission's policy for consultation manifests many features of the new governance regulatory approaches, summed up in its 2002 document, 'General Principles and Minimum Standards for Consultation of Interested Parties by the Commission'.⁷⁵⁰ It reads:

"By fulfilling its duty to consult, the Commission ensures that its proposals are technically viable, practically workable and based on a bottom-up approach. In other words good consultation serves a dual purpose by helping improve the quality of the policy outcomes and at the same time enhancing the involvement of interested parties and the public at large."

Here the policymaking has been seen as a collective problem-solving process among all the stakeholders, instead of a regulator's job exclusively.⁷⁵¹ Since solutions to the problem at hand may have been shared informally beforehand, they have become more acceptable.⁷⁵²

Another important feature of the new governance approach to regulation is its acceptance of diversity.⁷⁵³ Instead of imposing or expecting uniformity in the policies, it accepts different approaches for handling the same situation. One example of this is Level 2 of the Lamfalussy mechanism for the financial services trade, which accommodates different implementation strategies for the same policy outcome. These approaches rely more on softer instruments, e. g. flexible guidelines, revisable strategies and amendable targets. Reliance on hard law mandating certain policy outcomes is comparatively less.⁷⁵⁴ The new governance approaches are conducive to experimentation and creation of new knowledge.⁷⁵⁵ Pooling of a variety of experiences and sharing

Political Struggles and Experimentalist Solutions' in Charles Sabel and Jonathan Zeitlin (eds), *Experimentalist Governance in the European Union: Towards A New Architecture* (OUP 2010).

⁷⁴⁹ Level 2 of the Lamfalussy Framework.

⁷⁵⁰ COM 2002:704.

⁷⁵¹ This has been observed by de Burca while commenting on experimentalism in the EU anti-discrimination regime. See below.

⁷⁵² Grainne de Burca, 'Stumbling into Experimentalism: The EU Anti-Discrimination Regime' in Charles Sabel and Jonathan Zeitlin (eds), *Experimentalist Governance in the European Union: Towards a New Architecture* (Oxford 2010).

⁷⁵³ Ellen Vos, 'Responding to Catastrophe: Towards a New Architecture for EU Food Safety Regulation' in Charles Sabel and Jonathan Zeitlin (eds), *Experimentalist Governance in the European Union: Towards a New Architecture* (Oxford 2010).

⁷⁵⁴ Vos, 'Responding to Catastrophe: Towards a New Architecture for EU Food Safety Regulation' as above.

⁷⁵⁵ Elsa Tulmets, 'Experimentalist governance in EU External Relations: Enlargement and the European Neighbourhood Policy' in Regulation' in Charles Sabel and Jonathan Zeitlin (eds), *Experimentalist Governance in the European Union: Towards a New Architecture* as above.

of best practices may give birth to new knowledge.⁷⁵⁶ The policy objectives can be adjusted on the basis of evaluation, and this has been observed in the EU integration process.⁷⁵⁷

It has also been observed in the EU context that, due to a continuous exchange of ideas and arguments, the new governance regulatory approaches can change the Member states' policy preferences and make them more community compatible.⁷⁵⁸ The comitology consultations, for example, can make the actors involved realize the external effects of their policy preferences and modify them if necessary.⁷⁵⁹ This process has been termed 'feedback spiral' by Diedrichs, Reiners and Wessels.⁷⁶⁰ A 'feedback spiral' can start when the need to solve a problem is combined with the urge to preserve sovereignty.⁷⁶¹ As a consequence, informal and softer policy instruments are preferred over classic community procedure, so that individual states can have their say in the decision-making process.⁷⁶² This leads to adjustments in the expected policy outcomes and re-defining of the goals.⁷⁶³

To sum up, it can be said that the 'new governance' regulatory approaches are distinct from traditional modes of governance in many significant ways. They are more flexible in their execution methods, as well as expected outcomes.⁷⁶⁴ They rely more on networking and a broader policy base rather than a hierarchical command and control method of governance.⁷⁶⁵ Deliberative consultations play a significant role in these methods, and the policymaking or implementation can be delegated to local agents from the centralized authority.⁷⁶⁶ They are more accommodative of

⁷⁵⁶ Ibid.

⁷⁵⁷ Tulmets, 'Experimentalist governance in EU External Relations: Enlargement and the European Neighbourhood Policy in Regulation' as above.

⁷⁵⁸ Eberlein Burkard and Dieter Kerwer, 'New Governance in the European Union: A Theoretical Perspective' (2004) 42 *JCMS* 121-142.

⁷⁵⁹ Ibid.

⁷⁶⁰ Diedrichs, Reiners and Wessels, 'New Modes of Governance: Policy Development and the Hidden Steps of the EU Integration' in Adrienne Heritier and Martin Rhodes (eds), *New Modes of Governance in Europe: Governing in the Shadow of Hierarchy* as above.

⁷⁶¹ Ibid.

⁷⁶² Ibid.

⁷⁶³ Ibid.

⁷⁶⁴ Neil Walker and Grainne de Burca, 'Reconceiving Law and New Governance' (2006-7) *Columbia Journal of European Law* 521.

⁷⁶⁵ See note 987.

⁷⁶⁶ See for example the execution of the Lamfalussy framework.

regulatory autonomy, since they do not rely on imposing uniform solutions for achieving policy objectives.⁷⁶⁷

Although the specific set of new governance regulatory approaches used in the EU cannot be prescribed for the GATS as such, some key elements associated with these approaches are worth highlighting. These can be adopted through the GATS specific, tailor-made regulatory techniques.⁷⁶⁸ GATS can adopt more flexible, participatory and accommodative governance approaches that are more accommodative of WTO Members' regulatory autonomy. This might hold the answer to some of the regulatory challenges of GATS, which are mainly concerned with balancing the trade liberalization objectives of the treaty, and the WTO Members' regulatory concerns. However, since GATS is presently governed by a 'legal' framework⁷⁶⁹ and relies more on traditional forms of governance, it is important to examine the relationship between 'law' and 'new governance' to see if the GATS framework can accommodate some regulatory innovations on the aforesaid lines. This relationship has been examined in the following section.

E. Can Law and the New Approaches to Governance CoExist?

The question that this section intends to explore is whether Law and New Governance are the antithesis of each other or whether they can coexist? There is a wide gap between the 'premises' and 'values' of the new governance and the law.⁷⁷⁰ The latter depends on hierarchies, clear rules and their implementation, while the former relies on power-sharing and flexibility.⁷⁷¹ In Walker and de Burca's words:⁷⁷²

'Law is perceived as a tool of the top-down approach to regulation, an instrument for stabilizing expectations, improving clarity by articulating and mandating specific goals, and delivering predictable outcomes. New governance, on the other hand, is seen as a highly pragmatic and flexible approach to and modality of regulation, a method for ensuring maximum responsiveness and adaptability, with an emphasis on open-ended and provisional goals and ensuring revisability and corrigibility.'

⁷⁶⁷ Grainne de Burca, 'Stumbling into Experimentalism: The EU Anti-Discrimination Regime' in Charles Sabel and Jonathan Zeitlin (eds), *Experimentalist Governance in the European Union: Towards a New Architecture* (Oxford 2010).

⁷⁶⁸ This is done in the concluding chapter of the thesis, i.e. Ch 6.

⁷⁶⁹ See the GATS legal obligations as set out in Ch 1 and the way they are governed by a mandatory dispute settlement process in Ch 2.

⁷⁷⁰ Trubek and Scott, 'Mind the Gap: Law and New Governance Approaches in European Union' as above.

⁷⁷¹ Ibid.

⁷⁷² Neil Walker and Grainne de Burca, 'Reconceiving Law and New Governance' (2006 -7) *Columbia Journal of European Law* 521.

The question, then, is how to make a governance system embedded in law work with the new governance approaches in the presence of this 'gap'?

Let us begin by examining them on a conceptual level. Generally speaking, law is considered a tool for 'regularizing' a social formation or a political community.⁷⁷³ It is meant to ensure fairness and uniformity.⁷⁷⁴ It guarantees the settling of conflicts in a reliable manner, while ensuring that rights and obligations are clearly defined.⁷⁷⁵ New governance, on the other hand, allows adjustments, participation and negotiation in response to the diversity of regulatory contexts.⁷⁷⁶

While recognizing the risk of over-generalization, Walker and de Burca associate law with the meta-value of 'social regularity', and new governance with the meta-value of 'social responsiveness'.⁷⁷⁷ By this they imply that 'law' promises an equitable representation of varying interests in society through a concrete legal framework. For the purpose of conflict resolution, reliance is placed on such regulatory means which have been settled by a political community through legislation. Now if we try to examine 'law' in the context of the GATS, in the earlier part of the study, it was demonstrated that the WTO was substantially ahead of the GATT 1947 in creating multilateral trade disciplines and in the ability to enforce them. It provided a legal framework for an international regime relating to goods and services trade and created obligations for almost all related areas, including domestic regulatory procedures. It went even further by subjecting these obligations to a binding dispute settlement system with consequences in case of non-compliance.⁷⁷⁸ So in this way, the GATS framework, which is a part of the broader WTO regime, is an example of the meta value of 'social regularity', since the WTO provides a legal and institutional framework for the implementation and monitoring of its Members' rights as well as for settling disputes arising from their interpretation and application.

Walker and de Burca associate the new governance with the meta-value of 'social responsiveness' as indicated above. They explain it by the 'shifting' or 'adjustment' of the objectives of a regulatory framework according to the particular interests of the actors.⁷⁷⁹ In other words, it is a scenario

⁷⁷³ Ibid.

⁷⁷⁴ Walker and de Burca, 'Reconceiving Law and New Governance' as above.

⁷⁷⁵ Ibid.

⁷⁷⁶ Ibid.

⁷⁷⁷ Walker and de Burca, 'Reconceiving Law and New Governance' as above.

⁷⁷⁸ The consequences can be in the form of the compensation that a 'losing' country has to pay or in the form of trade sanctions being imposed. See for details the following link at:
<http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm> accessed 20 June 2015.

⁷⁷⁹ Walker and de Burca, 'Reconceiving Law and New Governance' above.

which makes it possible for diverse regulatory frameworks to coexist.⁷⁸⁰ It ensures participation leading to negotiated outcomes,⁷⁸¹ and it relies on continued evolution through best practice and mutual learning.⁷⁸² These have been highlighted when discussing the essential characteristics of the new governance regulatory approaches in the previous section.

The conceptual framework was developed by the above authors for an understanding of any governance-related normative order, recognizing the influence of these over-arching values on each other and their imperative nature for the success of any governance system.⁷⁸³ This section examines this framework to identify an area where the boundaries of 'law' and 'new governance' overlap. As can be seen from the above conceptual framework and values associated with both 'law' and 'new governance' are of substantial practical relevance in any system of governance.⁷⁸⁴ This is particularly true for the GATS framework, which has to grapple with its dual objectives of progressive trade liberalization through predictable rules, and accommodating of the regulatory autonomy of the WTO Members through a certain amount of regulatory flexibility. However the question is whether the GATS framework has the regulatory capacity to accommodate the two governance modes simultaneously? This thesis makes specific recommendations on this subject in the next chapter, which sums up the research findings. However, the broad premises for suggesting ways to improve GATS 'effectiveness' is that it can develop more flexible regulatory approaches, while remaining within its broad legal framework.

This is further supported by the above authors in the following words:

'[W]e want to demonstrate that law and NG (New Governance) have more in common than is often appreciated, that their relationship around the area of overlap and shifting boundaries is one of mutual influence and penetration rather than one-sided conceptual empire-consolidation or empire-building, and that their optimal combination has to be thought of in positive sum terms even if difficult choices and trade-offs remain.'⁷⁸⁵

This view is supported by the 'sociological' definition of law developed by Dworkin, in which law does not have very well-defined boundaries.⁷⁸⁶ According to him, a very rigid interpretation of law

⁷⁸⁰ This has been practically demonstrated in various areas of EU governance. See fn 40 for specific examples.

⁷⁸¹ Ibid.

⁷⁸² Martin Heidenreich and Gabriele Bischoff, 'The Open Method of Co-ordination: A Way to the Europeanization of Social and Employment Policies' (3 June 2008) 46 (3) *Journal of Common Market Studies*.

⁷⁸³ See Walker and Burca above.

⁷⁸⁴ Hence even within EU, they are used alongside more traditional methods of governance. For example levels 1, 3 and 4 of the Lamfalussy framework.

⁷⁸⁵ Walker and de Burca, 'Reconceiving Law and New Governance' above.

⁷⁸⁶ Ronald Dworkin, *Justice in Robes* (Harvard University Press 2006) 2-5.

and legal rules risks ignoring the pluralistic values of the society it is meant to regulate.⁷⁸⁷ This apprehension is of particular relevance to the governance of the services trade by the WTO, as has been previously emphasized.⁷⁸⁸ The diverse regulatory concerns of WTO Members over the services trade demand greater regulatory flexibility than has been demonstrated by the existing approaches towards the GATS governance.⁷⁸⁹

After examining the possibility of the co-existence of 'law' and 'new governance' on a conceptual level, the next step is to examine their practical engagement with each other. While looking at the new modes of governance in the EU context, researchers have found them to be more effective when they co-exist with the traditional processes of governance.⁷⁹⁰ There are different forms of coexistence of the legal approaches (law) and the new governance approaches. There are situations when the systems coexist to complement each other. For example, the EU attempt to fight discrimination against women consists of binding treaty articles on the one hand, and the European Employment Strategy (EES) on the other, which are non-binding guidelines and can be considered new governance techniques.⁷⁹¹ There can be a situation where the new governance approaches are introduced as a complete alternative to the existing legal ones, without actually replacing the latter. The EU's Social Dialogue introduced via the Amsterdam Treaty is one such example, where representatives of workers and employers can negotiate rules which are adopted as directives.⁷⁹² The third form of coexistence is when the law itself is transformed in its interaction with the new governance procedures. The Lamfalussy Framework for the financial services trade liberalization is one such example. Another example is the EU's Water Framework Directive. It provides broad guidelines but leaves it to the individual Member states to implement those guidelines through tailor-made modalities of their own.⁷⁹³

⁷⁸⁷ Ibid

⁷⁸⁸ See Chs1-3.

⁷⁸⁹ See in particular Ch 3, which deals with the WTO dispute settlement interpretation of the WTO members' legal obligations and unpacks the existing rule-making approaches for the services trade.

⁷⁹⁰ Diedrichs, Reiners and Wessels, 'New Modes of Governance: Policy Developments and the Hidden Steps of EU Integration' in Adrienne Heritie and Martin Rhodes (eds), *New Modes of Governance in Europe: Governing in the Shadow of Hierarchy* above.

⁷⁹¹ Grainne de Burca, 'Stumbling into Experimentalism: The EU Anti-Discrimination Regime' in Charles Sabel and Jonathan Zeitlin (eds), *Experimentalist Governance in the European Union* (Oxford 2010).

⁷⁹² Social dialogue refers to discussions, consultations, negotiations and joint actions involving organisations representing the two sides of industry, i.e. the employee and the employer. See in more detail at: <http://ec.europa.eu/social/main.jsp?catId=329&langId=en> accessed 20 June 2015.

⁷⁹³ David M Trubeck and Louise G Trubeck, 'New Governance and Legal Regulation: Complementarity, Rivalry and Transformation' in Adrienne Heritie and Martin Rhodes (eds), *New Modes of Governance in Europe: Governing in the Shadow of Hierarchy* (Palgrave 2011).

This discussion reveals that both on conceptual and practical levels, the law and the new governance can not only coexist, but also complement each other. It would hence be completely inaccurate to think that one can only exist in the absence of the other. The answer to effective governance may actually lie in the balancing of the two values, i.e. ‘social regularity’ and ‘social responsiveness’, which are represented by law and new governance, respectively, as discussed above.⁷⁹⁴ The EU regulatory architecture in certain areas represents a practical manifestation of this balance. This is a significant finding since, as mentioned earlier, GATS has a distinctly ‘legal’ framework. The possibility of overlapping boundaries of law and the ‘new governance’ offer potential for developing similar regulatory innovations in multilateral services trade governance, which could provide the much needed impetus for GATS.

F. Concluding Remarks

The EU established the principle of non-discrimination and the free movement of goods, services and people through the Treaty of Rome at an early stage of its integration. However, national rules which addressed policy objectives were not always swept aside. Secondary legislation was used as a tool to allow for a certain amount of regulatory flexibility. The European Court of Justice (ECJ) was charged with the role of judging whether the national rules remained within the limits set by the Treaties when they interfered with the four freedoms. The acceptance of adverse judgments depends upon the legitimacy of the ECJ. ECJ derives its legitimacy from the ‘political context’ that has been developed around it. There is a long history of institutional effort to strike a balance between inter-governmentalism, supra-nationalism and judicial activism.⁷⁹⁵ This is not the case with WTO, which lacks a political mechanism and has moved sharply away from the GATT practice of settling disputes through diplomacy and consensus.⁷⁹⁶ The WTO dispute settlement bodies arrive directly at a binding interpretation, even when the WTO members are not sure if they have entrusted such powers to these bodies.⁷⁹⁷

Petersmann criticized the phenomenon of using foreign policy powers to effect citizens’ rights domestically in the following words:

“In globally integrated economies, ‘domestic’ and ‘foreign’ policies are often no longer separable, and citizens value the ‘transnational’ exercise of their liberties no less than purely domestic activities.

⁷⁹⁴ Walker and de Burca, ‘Reconceiving Law and New Governance’ *Columbia Journal of European Law* above.

⁷⁹⁵ Peter Holmes, ‘The WTO and the EU: Some Constitutional Comparisons’ in Burca and Scott (eds), *The EU and the WTO* (Hart 2001).

⁷⁹⁶ See the evolution of the WTO discussed in Ch 1.

⁷⁹⁷ Peter Holmes, ‘The WTO and the EU: Some Constitutional Comparisons’ in Burca and Scott (eds), *The EU and the WTO* (Hart 2001).

National Constitutions remain therefore incomplete without effective constitutional constraints on foreign policy powers.⁷⁹⁸

In this regard, both EU and WTO Member countries' governments use the executive powers of the states for making foreign policy to enter into trade deals.⁷⁹⁹ Such deals often entail arrangements that impinge upon domestic regulatory freedom.⁸⁰⁰ However, due to the political context available in the EU and absent from the WTO, the crisis of legitimacy is more apparent in the WTO. As has been discussed at some length in the negotiation process for the GATS agreement, WTO treaty law is negotiated by diplomats. It is not just the political actors who are excluded from the decision-making process, but sometimes the smaller countries are not involved until the very last stage of negotiations.⁸⁰¹

If the approach towards trade liberalization in the EU and the WTO is compared, it can be seen that harmonization efforts without consideration for governance implications can create problems of legitimacy.⁸⁰² A study of the governance structure of the WTO and the EU in previous chapters demonstrates that the 'legitimacy' issue is common to both WTO and the EU. In Petersmann's words: "Separation and limitation of power and other constitutional restraints on decision-making process are no less needed at the level of international organizations than at the state level."⁸⁰³

While it is valid to question whether these conditions are met completely at the EU level, they are met to a much lesser degree at the WTO.

The chapter provides a background to the emergence of new governance approaches in the EU, and examines their efficacy in different policy areas. The concepts of law and new governance are examined with the observation that the two can coexist. In fact, as observed in the EU context, their coexistence can add to the efficiency and performance of a governance system. The main findings of the chapter are that the EU has been pursuing a conscious policy of evolving new modes of governance better suited to the EU integration objectives. It has successfully used regulatory innovations in the areas where existing regulatory mechanisms have failed, or where there were regulatory gaps. The new governance regulatory approaches have even helped the EU in achieving

⁷⁹⁸ E U Petersmann, 'The Transformation of the World Trading System through the 1994 Agreement Establishing the World Trade Organisation' (1995) 6 *European Journal of International Law*.

⁷⁹⁹ L Siedentop, *Law Democracy in Europe* (London Penguin 2000) 117.

⁸⁰⁰ *Ibid.* Also discussed in the case law chapter, i.e. Ch 2.

⁸⁰¹ See the discussion on GATS negotiation process discussed in Ch 1.

⁸⁰² Peter Holmes, 'The WTO and the EU: Some Constitutional Comparisons' in Burca and Scott (eds), *The EU and the WTO* (Hart 2001).

⁸⁰³ Petersmann *supra* note 798

'policy convergences' with the non-member states during the enlargement process.⁸⁰⁴ The main characteristics of the new governance regulatory approaches are their non-hierarchical nature and flexibility. They accommodate broader participation and power sharing, accept regulatory diversity and make possible the revisability of regulatory objectives⁸⁰⁵.

Another important finding of the research for the chapter is that the concepts of law and new governance are not always at cross-purposes. In fact, their coexistence can add to the effectiveness of a governance structure. The chapter shows that areas of higher regulatory concern have been conducive to the emergence of the new governance regulatory approaches in the EU. It can therefore be concluded that their potential for use in the GATS should be further examined. The findings point to the possibility of exploring the question of whether the new governance regulatory approaches can be used in the GATS context, and if they can, in what ways? The next chapter is accordingly devoted to a study of the use of new governance regulatory approaches in the specific setting of financial services trade liberalization in the EU. It explores in detail the framework for the financial services trade liberalization to observe the new governance techniques at play. This will help in shaping the final recommendations of the study, which aim to provide more specific and practical ways of improving GATS governance by adopting some regulatory innovations.

⁸⁰⁴ Jan Zielonka, *Europe as Empire: The Nature of the Enlarged European Union* (2nd edn, Oxford 2007).

⁸⁰⁵ Stefano Bartolini, 'New modes of governance: An introduction' in Heritier and Rhodes (eds), *New Modes of Governance in Europe: Governing in the Shadow of Hierarchy* (Palgrave 2011); Charles Sabel and Jonathan Zeitlin, 'Learning From Difference: The New Architecture of Experimentalist Governance in the EU Towards A New Architecture' in Sabel and Zeitlin (eds), *Experimentalist Governance in the European Union: Towards A New Architecture* (OUP 2010); Ingmar Von Homeyer, 'Emerging Experimentalism in EU Environmental Governance' in Sabel and Zeitlin (eds), *Experimentalist Governance in the European Union: Towards A New Architecture* (OUP 2010); U Diederichs, W Reiners and W Wessels, *The Dynamics of Change in EU Governance, Studies in EU Reform and Enlargement* (Edward Elgar 2011).

Chapter 5

Financial Services Trade Liberalization in the EU

While the previous chapter examined the EU governance model generally, with some specific comments on how the new governance regulatory approaches are affecting it, the current chapter focuses on the use of 'new governance' regulatory approaches in a particular area, i.e. financial services trade. This will enable a more relevant analysis of how the new governance regulatory approaches can be used for GATS governance. The chapter first provides a brief backdrop by discussing EU economic integration, and then takes up a focused study of financial services trade governance in the EU. It also briefly discusses the externalities which have affected the financial services trade governance in the EU, by looking at the financial crisis of 2008, and how international arrangements for financial services monitoring represented by BASLE affect the new governance approaches, which differ considerably from conventional hierarchical approaches of governance. It has been observed that they are non-prescriptive and provide considerable flexibility to Member states in accommodating their regulatory objectives while pursuing the integration goals of the EU. They have also become a conscious regulatory choice and a part of the EU agenda for reform in its governance.

The first part of this study demonstrated the lack of progress in the multilateral services trade liberalization under Gats. It also asserted that the biggest regulatory challenge for GATS is to balance its liberalization agenda with WTO Members' acute regulatory concerns, owing to the peculiar nature of the services trade, which is mainly governed by domestic regulatory measures. The existing rule-making strategies and directions which rely on prescriptive and binding rules have been found unsuitable for meeting GATS regulatory challenges. All these factors point to the benefit of using more flexible governance modes to make GATS a more effective instrument of multilateral services trade. A study of how the EU has utilized these approaches in the financial services trade can therefore be used to draw some relevant lessons.

One question that may be asked is why the financial services? This is because financial services represent an area of high regulatory concern.⁸⁰⁶ The integrity and stability of their financial markets is always a huge concern for countries.⁸⁰⁷ How the EU has dealt with the liberalization in this area in view of the individual Member's regulatory concerns might therefore offer some useful lessons for

⁸⁰⁶ Juan Marchetti, 'Financial Services Liberalisation in the WTO and PTAs' in Marchetti and Roy (eds), *Opening Markets for Trade in Services: Countries and Sectors in Bilateral and WTO Negotiation* (Cambridge 2008) 323.

⁸⁰⁷ Ibid.

the international community and the GATS. Secondly, there has been considerable evolution of financial services trade governance in the EU, one manifestation of which is a tailor-made framework for the trade. Some aspects of this framework align with the movement from hierarchical to new governance regulatory approaches in the EU. These factors make it an apt choice for the present study. Financial services trade has been conducted in the EU as a part of broader economic agenda, and the chapter begins by providing a background to this. It then discusses the financial services trade liberalization framework in the EU generally, before turning to an analysis of the Financial Services Action Plan, a tailor-made framework for financial services trade in the EU. The last part of the chapter examines the Financial Services Action Plan as a model of new governance, and provides some conclusions which become the basis for the study findings in the sixth and final chapter of the thesis.

A. Background to EU Economic Integration

Europe's economic integration is a multifaceted and complex phenomenon.⁸⁰⁸ EU policy aims, policies, institutional structure and membership have all undergone a dynamic process of development and expansion for many decades.⁸⁰⁹ This case study aims to depict some dimensions of this dynamic process, with a focus on financial services trade liberalization. However it is important to situate this study in its historical and political context. According to most accounts on the history of EU integration, the foundation of economic cooperation in Europe was laid down as a reconstruction effort in the wake of the enormous physical and economic destruction caused by the Second World War.⁸¹⁰ US aid, which came in the form of the Marshall Plan, had cooperation by European governments and progressive trade liberalization at its heart.⁸¹¹ According to George Marshall, the author of the plan:

“In considering the requirements for the rehabilitation of Europe, the physical loss of life, the visible destruction of cities, factories, mines and railroads was correctly estimated but it has become obvious during recent months that this visible destruction was probably less serious than the dislocation of the entire fabric of European economy. For the past 10 years conditions have

⁸⁰⁸ See among others Kenneth Armstrong and Simon Bulmer, *The Governance of the Single European Market* (Manchester University Press 1998); David Howarth and Tal Sadeh (eds), *The Political Economy of Europe's Incomplete Single Market* (Routledge 2012); George Vassiliou (ed), *The accession story: the EU from fifteen to twenty-five countries* (Oxford 2007).

⁸⁰⁹ De Burca and Craig, *EU Law: Text, Cases and Material* (OUP 2014).

⁸¹⁰ D Urwin, *The Community of Europe: A History of European Integration* (2nd edn, Longman 1995); Michael J Trebilcock, Robert Howse and Antonia Eliason, *The Regulation of International Trade* (4th edn, Routledge 2013) 98.

⁸¹¹ Robert J Donovan, *The second victory: the Marshall Plan and the postwar revival of Europe* (New York Madison Books 1987).

been highly abnormal. The feverish preparation for war and the more feverish maintenance of the war effort engulfed all aspects of national economies. Machinery has fallen into disrepair or is entirely obsolete. Under the arbitrary and destructive Nazi rule, virtually every possible enterprise was geared into the German war machine. Long-standing commercial ties, private institutions, banks, insurance companies, and shipping companies disappeared, through loss of capital, absorption through nationalization, or by simple destruction.⁸¹²

The post-war European economic recovery in this statement has been linked to the recovery of the 'commercial ties' and a rehabilitation of institutions like banks and insurance companies. The next major step towards economic integration was the Schuman Plan of 1950, which established the European Coal and Steel Company (ECSC) through the Treaty of Paris.⁸¹³ This can be termed a major step towards 'Franco-German' reconciliation, which became the cornerstone for the region's closer economic integration in future.⁸¹⁴ However, in addition to its trade liberalization agenda for the coal and steel sectors, the High Authority (which was the supranational executive body of the ECSC), was also given extensive decision-making powers to deal with 'imminent' and 'manifest' crisis.⁸¹⁵ This included the right to levy taxes, fix quotas and influence investment decisions.⁸¹⁶ In this way the ECSC became the first supranational European institute with regulatory powers.⁸¹⁷

The signing of the Treaty of Rome in 1957 and the establishment of the European Economic Community with the idea of a 'common market' at its heart gave further impetus to EU economic integration.⁸¹⁸ While the initial focus remained on the removal of tariff and quota barriers to trade, over a period, deeper economic ties were sought through free movement of goods, services, capital and people within the community.⁸¹⁹ The Treaty of Rome accommodated services trade

⁸¹² Text from the speech he gave at Harvard University on 5 June 1947 available at: <http://www.oecd.org/general/themarshallplanspeechatharvarduniversity5june1947.htm> accessed 15 June 2015.

⁸¹³ The ECSC (founding members: France, West Germany, Italy, the Netherlands, Belgium and Luxembourg) was the first of a series of supranational European institutions that would ultimately become today's European Union. See the following link at: http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/index_en.htm accessed 15 June 2015.

⁸¹⁴ Loukas Tsoukalis, *The New European Economy Re-Visited* (Oxford 1997) 11.

⁸¹⁵ Ibid.

⁸¹⁶ For details see the Treaty establishing the European Coal and Steel Community at: http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_ecsc_en.htm accessed 15 June 2015.

⁸¹⁷ Henry L Mason, *The European Coal and Steel Community: Experiment in Supranationalism* (Springer 1995).

⁸¹⁸ Paul Craig, 'Institutions, Power and Institutional Balance' in Craig and de Burca (eds), *The Evolution of EU Law* (2nd edition, Oxford 2011) 42-50.

⁸¹⁹ See Article 3 of the Treaty, original text available at:

liberalization almost on the pattern of the goods trade, but financial services were excluded from general freedom of services provision.⁸²⁰ They were linked instead to the liberalization of capital.⁸²¹

The decades of the 1950s and 1960s are termed the 'Golden Age' of economic growth in Europe.⁸²² However, the increasing economic openness of European markets was being constantly regulated domestically to adjust to increased competition abroad through the monetary and fiscal policies of the states.⁸²³ Until this time, European economic integration remained confined to trade in goods in the form of an effective customs union.⁸²⁴ It may therefore be said that the regulatory policy of a delicately maintained 'equilibrium' between external liberalization and states' domestic regulatory role was pursued.⁸²⁵

The changing international economic scene in the wake of the demise of the Bretton Woods⁸²⁶ system and the major oil crisis of the 1970s⁸²⁷ halted any further integration of macro-economic policies, and brought about a wave of protectionism, which persisted for almost a decade.⁸²⁸ The momentum of economic and political integration picked up in the 1980s.⁸²⁹ This was due to the growing fear that the non-tariff barriers and policy of 'national champions'⁸³⁰ pursued by many

www.gleichstellung.uni-freiburg.de/dokumente/treaty-of-rome accessed 15 June 2015.

⁸²⁰ Ibid.

⁸²¹ Ibid.

⁸²² Nicholas Crafts and Gianni Toniolo, 'European Economic Growth: An Overview', 1950-2005, Centre for Economic Policy Research discussion paper No:6863, June, 2008 available at: http://wrap.warwick.ac.uk/1671/1/WRAP_Crafts_CEPR-DP6863%5B1%5D.pdf accessed 15 June 2015.

⁸²³ fn 29

⁸²⁴ Willem Molle, *The Economics of European Integration: Theory, Practice, Policy* (5th edn, Ashgate 2006).

⁸²⁵ Loukas Tsoukalis, *The New European Economy Re-Visited* (Oxford 1997) 22.

⁸²⁶ This was a rules-based system of international finance negotiated after the World War II. Two institutions i.e. the World Bank and the International Monetary Fund were created to administer the system. For more details see the following BBC report available at:

<http://news.bbc.co.uk/1/hi/business/7725157.stm> accessed 15 June 2015.

⁸²⁷ There were a series of energy crises between 1967 and 1979 caused by problems in the Middle East which led to stock market crash, soaring inflation and high unemployment. For more details see Peter R Odell, 'The Nature of Oil crisis and its Implications for the Developing Countries', Erasmus Universiteit Rotterdam, International Centre for Energy Studies, 1983.

⁸²⁸ M Albert and R J Ball (1983) 'Towards European Economic Recovery in the 1980s' European Parliament, Working Document 183-84 available at: <http://aei.pitt.edu/5539/1/5539.pdf> accessed 15 June 2015.

⁸²⁹ Antonio Pinto and Nuno Teixeira (eds), *Southern Europe and the Making of the European Union, 1945-1980s* (East European Monographs 2002).

⁸³⁰ This policy refers to a promotion of national sectors instead of allowing free competition for efficiency and profit. See the following OECD paper on a general discussion on the policy of national champions at: <http://www.oecd.org/daf/competition/44548025.pdf> accessed 15 June 2015.

The reader may recall that apprehension regarding non-tariff barriers was discussed while tracing the development of multilateral trade disciplines in Ch1.

countries had led to the loss of European markets' competitiveness.⁸³¹ The European Commission accordingly presented a White Paper entitled 'Completing the Internal Market' in June, 1985, spelling out around 300 measures along with a time-table for completion of the internal market.⁸³² This paper also brought in a new regulatory approach in the form of a mutual recognition principle for European integration.⁸³³ The principle of 'mutual recognition'⁸³⁴ was introduced for the first time in this paper.⁸³⁵

An ambitious agenda of creating a single European market by the year 1992 was set out in the Single European Act, adopted in 1986, and the internal market was defined as 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured'.⁸³⁶ The momentum of further European economic and political integration continued and the new Treaty on European Integration was signed in Maastricht in 1992.⁸³⁷ The signing of the Amsterdam Treaty in 1997 marked a shift from an internal market as the sole objective of European integration to creating an area of *freedom, security and justice* which was considered complementary to economic integration.⁸³⁸ This was a departure from the Neo-liberal agenda for economic integration, which has been discussed at some length in a multilateral context in Chapter 1. This view is supported by Barnard, who asserts that while the Treaty of Rome emphasized deregulation and economic efficiency goals associated with Neo-liberal economic philosophy, the Amsterdam Treaty recognized other regulatory objectives of the EU Member states.⁸³⁹

⁸³¹ Albert and Ball (1983) above at fn 427.

⁸³² Text available at:

http://europa.eu/documents/comm/white_papers/pdf/com1985_0310_f_en.pdf accessed 15 June 2015.

⁸³³ Ibid see section 77 onwards in Part 2.

⁸³⁴ According to the European Commission's definition 'Mutual recognition ensures market access for products that are not subject to EU harmonisation. It guarantees that any product lawfully sold in one EU country can be sold in another. This is possible even if the product does not fully comply with the technical rules of the other country.'

It in its present form stems from Regulation (EC) No 764/2008.

See the link at:

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32008R0764>

⁸³⁵ Ibid

⁸³⁶ Text of the Act available at:

http://ec.europa.eu/economy_finance/emu_history/documents/treaties/singleeuropeanact.pdf accessed 15 June 2015.

⁸³⁷ Mark Gilbert, *European Integration: A Concise History* (Rowman and Littlefield Publishers 2012) 143-155.

⁸³⁸ See the amendments contained in Article I (5) in the original Text of the Treaty available at:

www.eurotreaties.com/amsterdamtreaty.pdf accessed 15 June 2015.

⁸³⁹ Catherine Barnard, *The substantive Law of the EU: The Four Freedoms* (4th edn, OUP 2013).

The Lisbon Treaty⁸⁴⁰ articulated the change brought in with the Amsterdam Treaty by referring to ‘a highly competitive social market economy’ as an objective of the treaty.⁸⁴¹ The more significant shift however was in the decision-making process.⁸⁴² The Lisbon Treaty introduced a new system of instruments and procedures in addition to the ordinary legislative process of co-decision.⁸⁴³ It created the distinction of ‘implementing acts’ or ‘delegated acts’ for the non-legislative acts, making them easier to implement by the Member states.⁸⁴⁴ The Lisbon Treaty also clarified the distribution of competences between the EU and the Member states.⁸⁴⁵ It lay down the areas for which the EU was solely responsible, in which competences were shared with Member states.⁸⁴⁶ Competences that were not explicitly given to the EU remained with the Member states.⁸⁴⁷

On close examination, different phases in the European integration, like the international economic integration, can be linked with the political and economic philosophies prevalent in the international polity. European integration, which lasted roughly from the Treaty of Paris (1950), the Treaty of Rome (1956) and the coming into force of the Single European Act (1986), corresponds with the philosophy of embedded liberalism. Any steps towards integration were embedded in the understanding that the liberalization goals were to be balanced against domestic regulatory considerations.⁸⁴⁸ European domestic markets were also constantly regulated in the initial phase of

⁸⁴⁰ Full text available at:

<http://ec.europa.eu/archives/lisbon_treaty/full_text/index_en.htm> accessed 15 June 2015.

⁸⁴¹ Christian Joergesand and Florian Rodi, ‘The “Social Market Economy” as Europe’s Social Model’ EUI Working Paper available at the SSRN link at:

<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=635362> accessed 15 June 2015.

⁸⁴² This has been dealt with at some length in the previous chapter.

⁸⁴³ Following the coming into force of the Treaty of Lisbon, the co-decision procedure becomes the ordinary legislative procedure of the European Union (EU) (Article 294 of the Treaty on the Functioning of the EU).

This procedure gives the European Parliament, representing the Union’s citizens, the power to adopt instruments jointly with the Council of the European Union. It becomes co-legislator, on an equal footing with the Council, except in the cases provided for in the Treaties where the procedures regarding consultation and approval apply. See for more detail, Christophe Crombez, *The Treaty of Amsterdam and the Codecision Procedure* (Katholieke Universiteit Leuven, Departement Toegepaste Economische Wetenschappen 1998).

⁸⁴⁴ Edward Best, ‘The Lisbon Treaty: A Qualified Advance for EU Decision-Making and Governance’ (2008) available at:

<http://www.eipa.eu/files/repository/eipascope/20080509183728_SCOPE2008-1-2_EdwardBest.pdf> accessed 15 June 2015.

⁸⁴⁵ Catherine Barnard, *The substantive Law of the EU: The Four Freedoms* (4th edn, OUP 2013).

⁸⁴⁶ Ibid.

⁸⁴⁷ Ibid.

⁸⁴⁸ Gilbert Mark, *European Integration: A Concise History* (Rowman and Littlefield Publishers 2012); Antonio Pinto and Nuno Teixeira (eds), *Southern Europe and the Making of the European Union, 1945-1980s* (East European Monographs 2002).

integration.⁸⁴⁹ On an international level, this stage corresponds with the pre-WTO arrangement for trade liberalization, the main instrument of which was the GATT.⁸⁵⁰

The second phase began with the Single European Act (1986) and lasted until the Treaty of Amsterdam (1997). A very ambitious agenda of creating a single European market by the year 1992 was set out in the Single European Act, the internal market being defined as ‘an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured’.⁸⁵¹ This period was marked by intense regulatory activity.⁸⁵² The European Commission presented a White Paper entitled ‘Completing the Internal Market’ in June, 1985, spelling out approximately 300 measures, along with a time-table for the completion of the internal market before the Single European Act.⁸⁵³ This approach relied on removing the ‘trade barriers’ for a free market.⁸⁵⁴ It resonates with the economic philosophy represented by the Neo-liberal approach towards economy.⁸⁵⁵ On an international level, the WTO was a manifestation of this philosophy, as demonstrated in the earlier part of the thesis.⁸⁵⁶

The third phase in European integration was set in motion by the signing of the Amsterdam Treaty in 1997. This marked a significant shift from an internal market as the sole objective of European integration to creating an area of *freedom, security and justice*, which was considered complementary to economic integration.⁸⁵⁷ From a regulatory perspective, this shift brought changes to the decision-making processes.⁸⁵⁸ This phase also saw the emergence of innovations in the regulatory techniques.⁸⁵⁹ These were wide-ranging regulatory innovations used in various areas

⁸⁴⁹ Ibid.

⁸⁵⁰ Also see Ch 1 of the thesis.

⁸⁵¹ Text of the Act available at:

<http://ec.europa.eu/economy_finance/emu_history/documents/treaties/singleeuropeanact.pdf> accessed 15 June 2015.

⁸⁵² George Mckenzie, *The Economics of the Single European Act* (Palgrave 1991); Maria Cowels, ‘The Single European Act’ in Erik Jones, Anand Menon and Stephen Weatherhill (eds), *The Oxford Handbook of European Union* (Oxford 2012).

⁸⁵³ See the complete text of the White Paper at:

<http://europa.eu/documents/comm/white_papers/pdf/com1985_0310_f_en.pdf> accessed 15 June 2015.

⁸⁵⁴ See Sections 1, 2 and 3 which deal with removal of physical, technical and fiscal barriers.

⁸⁵⁵ See the components of this philosophy discussed in Ch 1.

⁸⁵⁶ For more detail see the evolution of the WTO in Ch 1.

⁸⁵⁷ See the amendments contained in Article I (5) in the original Text of the Treaty available at:

<www.eurotreaties.com/amsterdamtreaty.pdf> accessed 15 June 2015.

⁸⁵⁸ Neil Nugent, *The Government and Politics of European Union* (7th edn, Palgrave Macmillan 2010).

⁸⁵⁹ Discussed in more detail in Ch 4. Also see Charles Sabel and Jonathan Zeitlin (eds), *Experimentalist Governance in the European Union* (Oxford 2010).

of EU integration,⁸⁶⁰ and have been discussed at some length in the previous chapter. The regulatory innovations in the EU highlight that the GATS framework has lagged behind in developing its own regulatory approaches suited to the changing times.

B. Financial Services Trade Liberalization in the EU

Services in the EU are generally governed by Articles 49-54 of TFEU⁸⁶¹ (Ex Articles 43-48 of EC), which require the removal of restrictions on the right of individuals and companies to establish business in a Member state. Establishment has been defined as ‘the actual pursuit of an economic activity through a fixed establishment in another Member state for an indefinite period’.⁸⁶² Similarly, Articles 56-62 of TFEU (ex Article 49-55 EC) on the free movement of services require the removal of restrictions on the cross-border provision of services, i.e. when the provider is not established in the state where services are provided. Two significant pieces of secondary legislation are the 2005 directive on the recognition of professional qualifications,⁸⁶³ and a general directive on services in the internal market, which was adopted in 2006.⁸⁶⁴

The central principles for free movement of services within the EU have been laid down in TFEU in its chapters on freedom of establishment and freedom to provide services. However, important secondary legislation has also been used in areas like insurance, electronic commerce and financial services, to further define the scope of freedom to trade in these services.⁸⁶⁵ Part of the reason for choosing a financial services case study stems from the fact that financial services trade liberalization is mainly governed by the secondary legislation and tailor-made framework. Financial

⁸⁶⁰ Some of the areas for which these regulatory innovations have been used include financial services trade liberalization, European energy sector, environment governance and food safety. See Elliot Posner, ‘The Lamfalussy Process: Polyarchic Origins of Networked Financial Rule-Making in the EU’; Eberlein Burkard, ‘Experimentalist Governance in the European Energy Sector’; Ingmar Homeyer, ‘Emerging Experimentalism in EU Environmental Governance’; Ellen Vos, ‘Responding to Catastrophe: Towards a New Architecture for EU Food Safety Regulation?’ in Charles Sabel and Jonathan Zeitlin (eds), *Experimentalist Governance in the European Union: Towards A New Architecture* (Oxford 2010).

⁸⁶¹ The European Community refers to three communities originally established in the 1950s, i.e. the European Coal and Steel Community, the Economic Community and the Atomic Energy Community. After the Maastricht Treaty, the EEC was re-named the European Community. The constituent parts of the Lisbon Treaty which came into force on September 1st, 2009 are the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).

See Finn Laursen (ed), *Designing the European Union: From Paris to Lisbon* (Palgrave Macmillan November 2012); George Vassiliou, *The Accession Story* (OUP 2007).

⁸⁶² Case C-221/89 R v Secretary of State for Transport, *exp Factortame* [1991]ECRI-3905,[20].

⁸⁶³ Directive 2005/36/EC of the European Parliament and of Council of 7 September 2005 on the recognition of professional qualifications [2005] OJL 255/22.

⁸⁶⁴ Directive 2006/123/EC of the European Parliament and of Council of 12 December 2006 on services in internal market [2006] OJL 376/36.

⁸⁶⁵ See various directives at:

http://ec.europa.eu/finance/insurance/legislation/index_en.htm accessed 30 July 2016.

services were also specifically excluded from the 2006 directive on services in the internal market, and are dealt with through a sector specific regulatory framework instead. This holds relevance for the GATS, since its primary legal framework suffers from some inherent weaknesses, which make it a rather non-conducive liberalizing instrument for multilateral services trade, as explored earlier at some length.⁸⁶⁶ This necessitates that rule-making is geared to meet the particular challenges associated with the services trade to meet GATS objectives. It is through the flexibility and purpose-designed nature of the secondary legislation that GATS stands any chance of remaining a relevant multilateral agreement.⁸⁶⁷

Moreover, the dynamic and evolutionary nature of the EU regulatory approaches is nowhere more prominent than in its administration of financial services trade liberalization. This is unlike the static nature of the GATS law, which has not evolved much over a period of two decades, and is accordingly unable to cope with services trade-related challenges. What GATS needs is not a grand re-engineering of its framework, which would be a political impossibility, but a repository of supportive rules which could cater to services trade peculiarities in a multilateral setting. This has so far been a neglected area, as is evident from the deficient rule-making efforts discussed in Chapter 3, in dealing with the services trade agenda of the current round of WTO negotiations.

The greater level of economic integration in general, and evolved nature of financial services framework in particular make the EU an apt choice for drawing some useful lessons for turning GATS into a more effective regulatory framework for the multilateral services trade.

1. Financial Services in the EU: Legislation, Mutual Recognition and Regulatory Innovations

The process of financial services trade liberalization in the EU has been incremental.⁸⁶⁸ There are a few principal regulatory approaches that can be identified during the course of EU economic integration. Prior to 1986, market integration was sought through legislation, and what has been identified in the previous chapter as 'hierarchical' regulatory approaches. The 'First Directive' on the liberalizing of direct investment, lending services and purchase of securities was issued in May, 1961, followed by another in 1963.⁸⁶⁹ These directives divided capital movement into four

⁸⁶⁶ See Chs 1 and 2

⁸⁶⁷ The deficient rule-making of the GATS and the inappropriateness of its current regulatory direction has been discussed in Ch 3.

⁸⁶⁸ Lucia Quaglia, *Governing Financial Services in the European Union: Banking, Securities and Post-trading* (Routledge 2010).

⁸⁶⁹ Ibid.

categories, which qualified for unconditional or conditional liberalization.⁸⁷⁰ No liberalization was sought in the physical import and export of financial assets, e. g. bank notes.⁸⁷¹ The 1970's economic crisis led to a tightening of controls by the Member states, using the safeguarding clauses provided in these directives.⁸⁷² Accordingly Snell observes that the framework of capital movement differed significantly from the framework for the other freedoms that form the basis for the internal market.⁸⁷³ He further points out that for freedom of capital movement, 'instead of a determined Court and an enlightened Commission providing leadership for the reluctant Member states, in the early period, the Member states were very much in the driving seat, with the Court silent and the Commission at times even an outright opponent of liberalization.'⁸⁷⁴ This observation seems to hold true if we read it in conjunction with Court's judgement in 1981 in the *Casati* case, when the Court held that complete freedom of movement of capital could undermine the economic policy of one of the Member states or create an imbalance in its balance of payment.⁸⁷⁵

While the regulatory approaches for the integration of the financial markets and capital movement remained guarded, the banking sector was liberalized more quickly.⁸⁷⁶ The First Banking Directive was issued in 1977,⁸⁷⁷ aimed at creating an internal EC banking market and strengthening supervision of credit institutions.⁸⁷⁸ This was followed by the 1983 Directive on Consolidated Supervision of financial institutions.⁸⁷⁹ However it was not until the late 1980s, when the external conditions, i.e. balance of payment conditions, improved for the European countries, that they

⁸⁷⁰ Ibid.

⁸⁷¹ P Oliver and J P Bache, 'Free movement of capital between the Member States: Recent developments' (1989) 26 CML Rev.

⁸⁷² Eilis Ferran, 'Crisis-driven regulatory reform: where in the world is the EU going?' in Ferran and others, *The Regulatory Aftermath of the Global Financial Crisis* (Cambridge 2012).

⁸⁷³ The four freedoms constitute the free movement of goods, people, services and capital. See for more detail the following page on the European Commission website at: http://ec.europa.eu/internal_market/top_layer/index_en.htm accessed 20 June 2015.

Also Jukka Snell, *Goods and services in EC law: a study of the relationship between the freedoms* (OUP 2002).

⁸⁷⁴ Ibid.

⁸⁷⁵ Case 203/80 *Casati* [1981] ECR 2595 para 9. Judgement available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61980CJ0203:EN:PDF> accessed 20 June 2015.

⁸⁷⁶ Bart De Meester, *Liberalisation of Trade in Banking Services: An International and European Perspective* (Cambridge 2014).

⁸⁷⁷ Ibid.

⁸⁷⁸ Suzette Rodriguez, 'Are Banks Within the European Community Adequately Supervised?', (1994) 17 B. C. Int'l & Comp. L. Rev. 213, available at: <http://lawdigitalcommons.bc.edu/iclr/vol17/iss1/13> accessed 20 June 2015.

⁸⁷⁹ Ibid.

started easing down on the capital controls.⁸⁸⁰ The continuing internationalization of trade, communication revolution and an increasing competition in the financial sector in the 1980s⁸⁸¹ soon led the policy makers overseeing European integration to try and make their financial services policy framework more attractive for their competitors.⁸⁸² Thus the first exclusive strategy for the liberalization of financial services was laid down in the White Paper of 1985.⁸⁸³

The strategy put forward in the White Paper was two-pronged, involving minimum harmonization with a regulatory framework based on the principle of ‘lowest common denominator’,⁸⁸⁴ and mutual recognition modeled on the decision of the Court in the famous *Cassis de Dijon*.⁸⁸⁵ Mutual recognition is meant to ensure market access for services that are not subject to EU harmonization. It guarantees that any service lawfully provided in one EU country can be provided in another. This is possible even if the service does not fully comply with the technical rules of the other country. Mutual recognition is considered a more ‘sovereignty-friendly’ strategy than legislative harmonization.⁸⁸⁶ So while the White Paper was structured around 300 legislative measures to achieve a more integrated Europe, a new regulatory strategy in the form of ‘mutual recognition’ was emerging, which was considered less intrusive.⁸⁸⁷

For the banking sector in Europe, another peculiarity was the provision for ‘home country control’, which meant that the responsibility for prudential control on all domestic and foreign banks remained with the country of origin.⁸⁸⁸ This shift in strategy was an acknowledgement of the fact that financial integration through the harmonization of ‘all’ national regulations was not workable.⁸⁸⁹ This new strategy proved quite effective in terms of capital mobility and liberalization of the banking sector.⁸⁹⁰ Two more directives were adopted in 1986 and 1988 to further reduce controls on the movement of capital. Similarly, three new banking directives were adopted in 1989,

⁸⁸⁰ Willem Molle, *The Economics of European Integration: Theory, Practice, Policy* (5th edn, Ashgate 2006).

⁸⁸¹ Ethan Kapstein, *Governing the Global Economy: International Finance and the State* (Harvard University Press 1994) 129.

⁸⁸² Above fn 90.

⁸⁸³ Ibid.

⁸⁸⁴ This term refers to the lowest regulatory standards on which the European states could converge.

⁸⁸⁵ Emily Reid, ‘Regulatory Autonomy in the EU and WTO: Defining and Defending its Limits’ (2010) 44 *Journal of World Trade* 877.

⁸⁸⁶ Armstrong and Bulmer, ‘The Governance of the Single European Market’ as above fn 107.

⁸⁸⁷ Ibid.

⁸⁸⁸ Jean Dermine, ‘European Banking: Past, Present and Future’, Conference Paper Second ECB Central Banking Conference Frankfurt am Main 24 and 25 October 2002 available at: https://www.ecb.europa.eu/events/pdf/.../dermine_comp.pdf accessed 20 June 2015.

⁸⁸⁹ Lucia Quaglia, *The European Union and Global Financial Regulation* (Oxford 2014).

⁸⁹⁰ Lucia Quaglia, *The European Union and Global Financial Regulation* (Oxford 2014) 26.

including the significant Second Banking Directive with its provision for a single banking licence, recognized throughout the EC.⁸⁹¹ This marked the way for a true internal market for the banking sector,⁸⁹² and has been termed the '*magna carta*' of European regulation in the banking sector.⁸⁹³ Its main principles were:

- Minimum harmonization of prudential regulation standards
- Single community wide recognized banking licence (European passport)
- An institutionalized principle of home country control

This reveals that a somewhat different regulatory strategy was being adopted for the banking sector to the one for capital movement, as discussed above. While the controls for the movement of capital were more stringent, the banking sector was treated more liberally, with Member countries recognizing each others' regulatory structure for the purposes of liberalization.

The insurance sector remained in the background during this period due to the 'clash of two cultures', i.e. the 'maritime insurance' tradition of countries such as the UK and Netherlands, with lower state regulation, and the 'alpine insurance' tradition of countries such as France and Germany, with stringent state control.⁸⁹⁴ The first piece of notable legislation in this field was adopted in 1973 in the form of the First Non-Life Directive.⁸⁹⁵ It was not until the late 1980s and 1990s that insurance law started to develop.⁸⁹⁶

As can be seen from the above discussion, European integration in the 1980s had started moving from attempting to remove trade barriers to a regulatory harmonization of macro-economic policies.⁸⁹⁷ The White Paper of 1985 linked the creation of an integrated European financial market

⁸⁹¹ Bonn, 'Regulation of Insurance Services: The European Perspective' in J Basedow and others (eds), *Economic Regulation and Competition: Regulation of Services in the EU, Germany and Japan* (Kluwer 2002).

⁸⁹² First Council Directive 77/780 on the Coordination of Laws, Regulations and Administrative Provisions Relating to the Taking Up and Pursuit of the Business of Credit Institutions, 1977, i. e. First Banking Directive; Directive 83/350 on the Supervision of Credit Institutions on a Consolidated Basis, 1983 ; Second Council Directive 89/646 on the Coordination of Laws, Regulations and Administrative Provisions Relating to the Taking-Up and Pursuit of the Business of Credit Institutions 1989, i. e. Second Banking Directive; Council Directive 92/30 on the Supervision of Credit Institutions on a Consolidated Basis, 1992.

⁸⁹³ Bonn, 'Regulation of Insurance Services: The European Perspective' in J Basedow and others (eds), *Economic Regulation and Competition: Regulation of Services in the EU, Germany and Japan* (Kluwer 2002) 41.

⁸⁹⁴ Bonn, 'Regulation of Insurance Services: The European Perspective' as above.

⁸⁹⁵ Directive 73/239/EEC(1973) Available at: http://eurlex.europa.eu/Result.do?T1=V3&T2=1973&T3=239&RechType=RECH_naturel&Submit=Search accessed 20 June 2015.

⁸⁹⁶ Above fn 804.

⁸⁹⁷ The White Paper of 1985 was an example of this strategy.

with the complete liberalization of capital movement.⁸⁹⁸ Hence Directive 88/361 of 1988⁸⁹⁹ was a significant step towards this goal.⁹⁰⁰ It carried a decision to completely liberalize capital movement in countries known for their extensive capital controls, including France and Italy.⁹⁰¹ This directive was an indicator of the increasing influence of the Community over national 'policies' and 'attitudes'.⁹⁰² It was also a significant pointer towards how the EC had started gradually influencing, and sometimes even replacing, national competencies in certain areas.⁹⁰³

The liberalization of the financial services continued to be done through Directives, some of which have been mentioned above, until around 1998.⁹⁰⁴ This period is indicative of the reliance on hierarchical modes of governance, as discussed in the previous chapter. The rules flowing from the centre were detailed and prescriptive in nature, and the EU Court could exercise their jurisdiction in determining the outcome of these rules. However it can also be seen that this was not a very successful period for the integration objectives of the EU in the financial services trade.⁹⁰⁵ Hence the realization that more needed to be done to achieve the desired level of integration of financial services in the EU, and to improve the relevant regulatory approaches. This was acknowledged by the Commission in the following words:⁹⁰⁶

'The Commission concludes that the basic EU framework of prudential rules is generally satisfactory but that legislative techniques need to be more streamlined, flexible and faster. This is necessary to allow supervisory rules to be rapidly adapted to evolving market conditions. The Communication therefore calls upon the EU's Council of Ministers and the European Parliament to explore new pragmatic approaches to amending prudential rules.'

⁸⁹⁸ Kenneth Armstrong and Simon Bulmer, *The Governance of the Single European Market* (Manchester University Press 1998).

⁸⁹⁹ To be effective from July, 1990.

⁹⁰⁰ Loukas Tsoukalis, *The New European Economy Re-Visited* (OUP 1997).

⁹⁰¹ Text available at:

<<http://www.scribd.com/doc/62753074/Council-Directive-88-361-EEC-1988-Implementing-Freedom-of-Resources-Movement>> accessed 20 June 2015.

⁹⁰² Loukas Tsoukalis, *The New European Economy Re-Visited* (OUP 1997).

⁹⁰³ Gilbert M, *European Integration: A Concise History* (Rowman and Littlefield Publishers 2012).

⁹⁰⁴ Gabriel Hawawini, *The transformation of the European financial services industry: From fragmentation to integration* (Salomon Brothers Centre for the Study of Financial Institutions, Leonard N. Stern School of Business, New York University 1990).

⁹⁰⁵ Martijn Empel, 'Financial Services in the EU: Harmonization and Liberalization' in Martijn Empel (ed), *Financial Services in Europe: An Introductory Overview* (Kluwer 2008).

⁹⁰⁶ Extract from the Communication text available from the Europa server at: <http://europa.eu/rapid/press-release_IP-98-941_en.htm?locale=en> accessed 20 June 2016.

Accordingly, a consensus-based request was made by the European Council to the Commission for an action plan.⁹⁰⁷ The communication was entitled, 'Financial Services: Building a Framework for Action', and was based on the discussions held within the Financial Services Policy Group (FSPG), composed of personal representatives of the finance ministers and the European Central Bank (ECB).⁹⁰⁸ A brief discussion on the outcome of this initiative, i.e. the Financial Services Action Plan is contained in the next section. However, it needs highlighting that in addition to the liberalization objectives sought through these initiatives, there was also a realization that the regulatory policies had to be more inclusive and less prescriptive. The regulatory policies of governments towards these services were also gradually changing.⁹⁰⁹ Countries like France, Germany and the UK created sector-wise, independent regulatory authorities with clear mandate and regulatory powers to make procedures.⁹¹⁰ These were signs that in the 1990s, a clear shift from an 'outcome-oriented regulation' to 'process-oriented regulation' was taking place,⁹¹¹ and that the EU needed to quickly adjust to these changes.

The Financial Services Action Plan of 1999 can be seen as the first step towards adapting to these changes in EU financial services trade governance.⁹¹²

2. Financial Services Action Plan (FSAP)

Three distinct phases in the development of the framework for the liberalization of financial services can be traced in the above account. The first phase, spanning the period until the issuance of the White Paper of 1985, made slow progress and was a patchwork of Directives. This slow progress can be explained by the overarching requirement of unanimity in the Council decision-making and Member countries' hesitation in opening up their financial markets, due to regulatory concerns.⁹¹³ The second phase began with the issuance of the Commission's White Paper on the Completion of the Internal Market, with the focus shifting from legislative harmonization to the

⁹⁰⁷ The full text of the Communication is available from the Europa server at: http://europa.eu/rapid/press-release_IP-98-941_en.htm?locale=en accessed 20 June 2016.

⁹⁰⁸ Copy available at: http://ec.europa.eu/internal_market/finances/docs/actionplan/index/fs_en.pdf accessed 27 December 2014.

⁹⁰⁹ Loukas Tsoukalis, *The New European Economy Re-Visited* (OUP 1997).

⁹¹⁰ *Ibid.*

⁹¹¹ Catherine Barnard, *The substantive Law of the EU: The Four Freedoms* (4th edn, Oxford 2013).

⁹¹² *Ibid.*

⁹¹³ Tridimas Takis, 'EU: Financial Regulation: Federalization, Crisis Management and Law Reform' in Craig and de Burca (eds), *The Evolution of EU Law* (2nd edn, Oxford 2011) 784.

principles of ‘mutual recognition’ and ‘home country control’.⁹¹⁴ Based on these principles, a reasonable level of progress was achieved in the liberalization of financial services, particularly the banking services, through a ‘second generation’⁹¹⁵ of Directives. The third phase started with the introduction of the Financial Services Action Plan (FSAP) in 1999, which was accompanied by a new and innovative law-making framework in the form of the Lamfalussy process.⁹¹⁶

If we now compare the GATS framework⁹¹⁷ with the financial services liberalization framework of the EU, it becomes amply clear that the former has lagged far behind in developing dynamic regulatory approaches. There has been substantial experimentation and innovation in the EU framework to cope with the regulatory challenges posed by the financial services trade liberalization, but practically none in the GATS. Another important strategy by the EU has been to develop separate approaches for various sub-sectors of the financial services, e. g. banking, securities and insurance, in view of very specific regulatory concerns of the Members. In GATS, however, we have noted a tendency to adopt generalized principles of regulation, one example of which is the horizontal necessity test, discussed in more detail in the previous chapters.⁹¹⁸

Apart from these broader areas of comparison, this study is aimed at identifying specific regulatory approaches that can be used for GATS governance. For this purpose, a more detailed analysis is carried out below of the Financial Services Action Plan 1999-2005, which is the first tailor-made framework for the liberalization of financial services in the EU.⁹¹⁹

3. The Financial Services Action Plan: A Regulatory Departure

The Financial Services Action Plan (FSAP) set up an agenda for designing a regulatory framework for financial services liberalization in Europe.⁹²⁰ The Plan achieved this by establishing a purpose-designed mechanism for the financial services trade. The Introduction to the Plan states:

⁹¹⁴ Kenneth Armstrong and Simon Bulmer, *The Governance of the Single European Market* (Manchester University Press 1998). Also refer to above fns 130 to 133.

⁹¹⁵ Tridimas, ‘EU: Financial Regulation: Federalization, Crisis Management and Law Reform’ as above.

⁹¹⁶ Catherine Barnard, *The substantive Law of the EU: The Four Freedoms* (4th edn, Oxford 2013).

⁹¹⁷ Refer to Chs 1, 2 and 3.

⁹¹⁸ Horizontal necessity test entails an approach to check the need for having a regulation in place which allegedly curtails a member’s right to services market access. This test could to be applied to all services sectors committed for market opening. This test was discussed in Ch 1 while analysing the GATS framework, in Ch 2 while discussing GATS case law and in Ch 3 which deals with current services-related rule-making. Final recommendations regarding alternative approaches appear in Ch 6 of the thesis.

⁹¹⁹ Barnard at fn 842

⁹²⁰ See the Introduction to the Financial Services Action Plan. Text available at : http://ec.europa.eu/internal_market/finances/docs/actionplan/index/action_en.pdf accessed 20 June 2015.

“Important strides have been made towards providing a secure prudential environment in which financial institutions can trade in other Member States. Yet, the Union’s financial markets remain segmented and business and consumers continue to be deprived of direct access to cross-border financial institutions. Now, the tempo has changed. With the introduction of the euro, there is a unique window of opportunity to equip the EU with a **modern financial apparatus** in which the cost of capital and financial intermediation are kept to a minimum. Corporate and household users of financial services will benefit significantly, and investment and employment across the Union will be stimulated.”⁹²¹

The broad objective of the FSAP was to create a single European Market for the financial services. However it is worthwhile to look at some of the specific objectives of the Plan which were:⁹²²

- Establishing a single wholesale market for the financial services which would enable investors and intermediaries to have access to all European markets from a single point of entry without unnecessary barriers. Such a market was to also have an integrated and sound prudential framework which would provide a safety net for securities trade against counter-party risk;
- Making retail markets more open and secure by providing enabling information to the consumers so that they could participate in the single financial market. Unjustified and unnecessary barriers to cross-border provision of retail financial services were to be removed by taking steps such as facilitating electronic commerce and making smaller value transactions across the border more economical;
- Strengthening the rules on prudential supervision by taking necessary steps to bring banking, insurance and securities prudential legislation up to the highest standards, and aligning them with the work of existing bodies, such as the Basle Committee. Better prudential supervision of financial conglomerates by drafting a proposal for a Directive, in view of the evolving nature of these entities, offering a range of financial services in areas such as banking, insurance and securities, and operating on a cross-border basis was also one of the priorities, since the traditional approach whereby financial operators were distinguished by sector was felt to have become redundant.

⁹²¹ Text available at :

<http://ec.europa.eu/internal_market/finances/docs/actionplan/index/action_en.pdf> accessed 20 June 2015.

⁹²² Summary provided at:

<http://europa.eu/legislation_summaries/internal_market/single_market_services/financial_services_general_framework/l24210_en.htm> accessed 20 June 2015.

Achievement of these objectives was sought through a comprehensive set of around 42 measures, with their own operational objectives.⁹²³ Many of the FSAP measures were meant to impact a specific branch of the financial services industry, i.e. broadly speaking, banking, insurance and securities.⁹²⁴ Some FSAP measures took the form of EC Regulations which applied directly to Member states. However the majority were Directives which needed to be transposed into the law of each Member state.⁹²⁵ Directives and regulations are normally proposed by the Commission and adopted by 'co-decision' after joint consideration by the Council of Ministers of the Member states and the European Parliament.⁹²⁶

A major procedural framework for delivering the objectives of the Financial Services Action Plan was to be the Lamfalussy Framework, which was devised by a Committee of Wise Men chaired by Baron Alexandre Lamfalussy.⁹²⁷ The committee proposed a new decision-making process for the implementation of EU legislation regarding the securities market, which was endorsed by the Stockholm European Council in March, 2001.⁹²⁸ The report observed that the current regulatory system was slow and ambiguous, and since the Directives contained too many details, their implementation did not keep pace with the fast-changing financial markets. A four-level approach was accordingly proposed⁹²⁹ which is summarized as follows:⁹³⁰

Level 1: Framework principles to be decided by normal EU legislative procedures (i. e. proposal by the Commission to the Council of Ministers/European Parliament for co-decision).

Level 2: Establishment of two new committees – an EU Securities Committee and an EU Securities Regulators Committee to assist the European Commission in determining how to implement the details of the Level 1 framework.

⁹²³ *The Europa World Year Book* (44th edn, Europa Publications first published in 1926).

⁹²⁴ *The EU Financial Services Action Plan: A Guide* (Great Britain Treasury 2003).

⁹²⁵ Ibid.

⁹²⁶ The EU Financial Services Action Plan: A guide, Prepared by HM Treasury, the Financial Service Authority and the Bank of England, 31 July 2003. Available at:
<http://www.fsa.gov.uk/pubs/other/fsap_guide.pdf> accessed 20 June 2015.

⁹²⁷ Initial report of the committee available at:
<http://ec.europa.eu/internal_market/securities/docs/lamfalussy/wisemen/2000-11-09-ip_en.pdf> accessed 20 June 2015.

⁹²⁸ Text of the final report available at:
<http://ec.europa.eu/finance/securities/lamfalussy/report/index_en.htm> accessed 20 June 2015.

⁹²⁹ pp 14-19 of the above report.

⁹³⁰ From different sources but mainly from Review of the Lamfalussy Process...Communication from the Commission (com 2007), 20 November 2007 available at :
<http://ec.europa.eu/internal_market/finances/docs/committees/071120_final_report_en.pdf> accessed 20 June 2015.

Level 3: Enhanced cooperation and networking among EU securities regulators to ensure consistent and equivalent transposition of Levels 1 and 2 legislation (common implementing standards).

Level 4: Strengthened enforcement, notably with more vigorous action by the European Commission to enforce Community law, underpinned by enhanced cooperation between the Member states, their regulators and the private sector.

More specifically, the FSAP measures concerning securities trading were translated into four so-called ‘Lamfalussy Directives’. They were the Prospectus Directive (2003), the Market Abuse Directive (2003), the Transparency Directive (2004) and the Market in Financial Instruments Directive (MiFID) (2004).⁹³¹ The Lamfalussy process was initially meant to address securities regulations, but was subsequently extended to the banking and insurance sectors in 2003.⁹³²

The Financial Services Action Plan was an example of the shift towards a more ‘procedural’ approach to harmonization.⁹³³ The Lamfalussy Framework for the Plan’s implementation has been further qualified by Barnard as a ‘reflexive harmonization’ whereby rule-making powers are conferred upon the self-regulatory processes.⁹³⁴ She called the process an example of the ‘new governance’ techniques being adopted for EU integration. According to Barnard, two distinct layers, i.e. legislative and enforcement are evident in the Lamfalussy process.⁹³⁵ The Plan and its procedural framework are indicative of the fact that integration of the European financial market has come a long way. A more detailed discussion on the Plan as a model of new governance takes place later in the chapter. However, at this point it is pertinent to evaluate its practical outcome and study the degree of its impact upon financial markets integration in Europe.⁹³⁶ A report entitled ‘Evaluation of the Economic Impact of the Financial Services Action Plan’ was prepared by an international consultancy firm (CRA International) for the European Commission in March, 2009.⁹³⁷ The analysis in this report was sector based and covered the ‘market impact’ of the FSAP,

⁹³¹ Transposition of Lamfalussy Directives procedure at:

<http://ec.europa.eu/internal_market/securities/transposition/index_en.htm> accessed 20 June 2015.

⁹³² Financial Services: The Lamfalussy Process and the Development of European Supervisory Authorities at: <http://www.europarl.europa.eu/ftu/pdf/en/FTU_3.4.4.pdf> accessed 20 June 2015.

⁹³³ Catherine Barnard, *The substantive Law of the EU: The Four Freedoms* (4th edn, OUP 2013).

⁹³⁴ Ibid.

⁹³⁵ Barnard, *The substantive Law of the EU: The Four Freedoms* as above.

⁹³⁶ We observed in Ch 3 that progress in terms of trade liberalization through GATS is minimal. It is therefore relevant to evaluate the EU regulatory approaches for their success in achieving liberalization gains in order for it to be of a meaningful relevance.

⁹³⁷ Text of the report available at:

<http://ec.europa.eu/internal_market/finances/docs/actionplan/index/090707_economic_impact_en.pdf> accessed 20 June 2015.

as well as the level of achievement in ‘strategic objectives’.⁹³⁸ The report acknowledged noticeable market impact in all three sectors, i.e. banking, securities and insurance. Insurance was considered to be the least affected sector, followed by banking, with the greatest impact being felt in the securities sector.⁹³⁹ The report concluded that the most significant FSAP measures for the banking sector were Directive 2006/48/EC, relating to the take-up and pursuit of the business of credit institutions, and Directive 2006/49/EC on the capital adequacy of investment firms.⁹⁴⁰ The report was critical of the Capital Requirement Directive (CRD), which had proved to be insufficient as a framework for pre-empting the 2008 credit crisis.⁹⁴¹

Since CRD is a Basel⁹⁴² inspired regulation, it provides an important insight into another less highlighted aspect of the EU rule-making in financial services, which will be discussed briefly in the next section.

It can be seen from the above discussion that there has been considerable progress in terms of financial services integration in the EU. However, the regulatory mechanisms adopted for the implementation of the Financial Services Action Plan need to be analysed from a different angle, to draw out its relevance to the present study. As has been pointed out in the earlier part of the research, the ‘effectiveness’ of the GATS framework for the purposes of this study is linked to its ability to accommodate the regulatory autonomy of the WTO Members, while providing a platform for progressive trade liberalization. Similarly, the purpose of the EU case study is to evaluate this aspect of financial services trade governance within the EU. However, before the Financial Services Action Plan is discussed as a model of new governance approach, there are two aspects of the international financial architecture that need a mention. These are the 2008 financial crisis, and the international institutional set-up for the management of the world’s financial markets, represented by the Basel Accords.⁹⁴³ These are briefly discussed below for their influence on the EU framework for financial services trade liberalization, before an analysis of the Financial Services Action Plan as a model of the shifting nature of EU integration approaches.

⁹³⁸ Ibid.

⁹³⁹ Ibid.

⁹⁴⁰ Ibid

⁹⁴¹ Ibid

⁹⁴² The Basel Accords refer to the banking supervision Accords Basel I, Basel II and Basel III—issued by the Basel Committee on Banking Supervision (BCBS). The Basel Accords is a set of recommendations for regulations in the banking industry. See for more detail the following link at: <http://www.bis.org/bcbs/history.htm> accessed 20 June 2015.

⁹⁴³ Ibid.

C. Post 2008 Financial Crisis and the governance of Financial Services in the EU

While elaborating upon EU response to the 2008 financial crisis in a workshop held under the auspices of WTO in June, 2012 entitled, 'Financial services and Development', Olivier Salles, Head of Unit, International Affairs, Directorate General Internal Market and Services, European Commission, described EU response to the crisis as 'most comprehensive' with the '**right balance between regulating and allowing financial actors to play their role.**'⁹⁴⁴ According to him, Europe did regulate rather extensively, but while doing so, tried not to hamper the liberal workings of the financial markets.⁹⁴⁵ Some of the more significant conceptual undertakings pertained to transparency, responsibility, supervision and crisis prevention and management, as highlighted in a 2010 brochure issued by the DG Market and Services entitled 'The European Union's Roadmap for Financial Reform'.⁹⁴⁶ All adopted or proposed measures were to fit in with these broader agenda objectives. Accordingly, the then DG Market linked the EU's action against 'lack of transparency' to avoiding future financial crisis, as well as maintaining Europe's competitiveness in financial services in the following words:

"Changes are needed. We cannot exit the crisis the same way as we entered it. I am certain that we are in a critical period — one in which history will tip one way or the other. One in which we decide whether or not to learn the lessons of the past and choose what kind of financial stability we want to build. Europe must take action to end the lack of transparency and misjudgment of risks, to avert future crises, and remain a world leader in financial services. This is a moment of truth."⁹⁴⁷

On a more practical level however, the most noticeable feature of the strategies adopted by the EU to cope with the 2008 financial crisis was to use public resources to rescue failing banks and credit institutions in the form of subsidies, as acknowledged by the European Commissioner for Competition in a speech in the 9th Global Forum on Competition in Paris on 18th February, 2010.⁹⁴⁸

⁹⁴⁴ Presentation made in the workshop available at:

<http://www.wto.org/english/tratop_e/serv_e/wkshop_june12_e/salles_e.pdf> accessed 20 June 2015.

⁹⁴⁵ Ibid.

⁹⁴⁶ Available at:

<http://ec.europa.eu/internal_market/finances/docs/roadmap/financial_reform_en.pdf> accessed 20 June 2015.

⁹⁴⁷ Introductory remarks to the brochure available at the above link.

⁹⁴⁸ Text of the speech available at:

<http://ec.europa.eu/commission_2010-2014/almunia/headlines/speeches/index_en.htm> accessed 20 June 2015.

See also a report prepared for the Congress on the subject available at:

<<http://fpc.state.gov/documents/organization/127015.pdf>> accessed 20 June 2015.

“It is widely acknowledged that the money governments poured or committed in support of financial institutions prevented a catastrophic collapse of the global banking system.”

No studies are available to evaluate the impact of these subsidies on the competitiveness of market conditions and how the institutions deemed to be ‘too big to fail’⁹⁴⁹ may eventually affect the liberalization of financial services. However, it may be asserted that this approach could facilitate a trend towards ‘socialization’ of risks and ‘privatization’ of profits.⁹⁵⁰ This implies that the impact of a financial catastrophe is likely to be felt more strongly by the general public, who lose their savings or have to pay more taxes to save the system, while the great profits from large institutions may end up in the pockets of the select few, without sharing the burden of loss proportionately. This brings home the need, highlighted earlier,⁹⁵¹ for the liberalization objectives of a trade regime to be carefully weighed against its regulatory burdens.

Another prominent aspect of the EU regulatory response to the financial crisis has been an almost exclusive dependence upon G20.⁹⁵² Global governance of the world’s financial systems seems to be run almost entirely by the G20⁹⁵³ with the help of IMF, the World Bank and more recently, FSB⁹⁵⁴ (Financial Stability Board). This approach runs the risk of leaving out some crucial factors from the equation, e. g. the potential and the risks emanating from other parts of the world which do not necessarily get represented by the aforementioned bodies.⁹⁵⁵

This observation raises two important questions, which are equally relevant to the multilateral setting of the services trade liberalization. What is the right balance between the liberalization and

⁹⁴⁹ The term is widely used since the 1980s but for the purpose of reference here has been taken from The Economist Dec 1 2012. Available at: <http://www.economist.com/news/books-and-arts/21567323-main-problem-about-financial-crises-getting-grip> accessed 20 June 2015.

⁹⁵⁰ Term used by Tsoukalis, ‘*The New European Economy Re-Visited*’ as above at fn 101 earlier but more relevant in the present scenario.

⁹⁵¹ More specifically in Ch which discusses the theoretical premises of goods and services trades.

⁹⁵² The Group of Twenty (G20) is the premier forum for its members’ international economic cooperation and decision-making. Its membership comprises 19 countries plus the European Union. The [members of the G20](#) are Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Republic of Korea, Mexico, Russia, Saudi Arabia, South Africa, Turkey, the United Kingdom, the United States and the European Union.

⁹⁵³ See para 21 of the Los Cabos G20 Declaration of June 2001 available at: <http://www.g20.utoronto.ca/2012/2012-0619-loscabos.pdf> accessed 10 July, 2015.

⁹⁵⁴ While the World Bank and the IMF are products of the Washington Consensus representing neo-liberal economic agenda, as discussed previously, FSB is an international body formed to coordinate at an international level the work of national financial authorities and international standard setting bodies, and to develop and promote the implementation of effective regulatory, supervisory and other financial sector policies. It has a very select membership. See the following link at: http://www.financialstabilityboard.org/about/fsb-members/?page_moved=1 accessed 20 June 2015.

⁹⁵⁵ For example, smaller African or Asian countries.

regulatory considerations, and how to achieve that balance? Can an exclusive and club-like approach of governance be considered effective when the impact of decisions made in such an environment is much wider?

The following section discusses another external factor which has the potential to influence the EU and the multilateral governance of financial services, i.e. the Basle Convention.

D. Basle Convention and the EU Regulatory Framework

By the mid-1980s, regulators of the financial sector, whose primary objective was to protect it from systemic failures, started feeling the pressure of watching over the sector's business interests.⁹⁵⁶ Thus G10⁹⁵⁷ central bankers came together in Basle to discuss possible convergence of capital adequacy standards in 1984.⁹⁵⁸ After several years of discussions, it was finally announced on July 15, 1988 that they had reached an agreement which would lead to 'international convergence of supervisory regulations governing the capital adequacy of international banks.'⁹⁵⁹ The intentions were noble or at least so the Accord claimed.⁹⁶⁰ It was meant to 'level' the playing field for international banks.⁹⁶¹ But there was some criticism levelled against the Basle Accord, since it provided commercial bankers with the incentive to re-direct assets within bank portfolios.⁹⁶² This meant that the consumer-oriented businesses of the banks, such as lending, took a backstage, and profit-making became their primary objective. This phenomenon is alleged to have fuelled the credit crunch of 1991-1992 in the US.⁹⁶³ In plain words, it implied that the service-providing function of the banks was taken over by the profit-making function.

⁹⁵⁶ Ethan Kapstein, *Governing the Global Economy: International Finance and the State* (Harvard 1996)

⁹⁵⁷ Wealthiest 11 member nations of the International Monetary Fund (Belgium, Canada, France, Germany, Italy, Japan, Netherlands, Sweden, Switzerland, UK, and USA). These countries 'stand ready to lend their currencies to the IMF up to specified amounts when supplementary resources are needed' under the 'General Arrangements to Borrow.' Although Switzerland became the 11th member in 1994, the original name persists. Also called the Paris Club. Read more at:

<<http://www.businessdictionary.com/definition/group-of-ten-G-10.html#ixzz3eXH5P2YG>> accessed 15 June 2015.

⁹⁵⁸ Above fn 885.

⁹⁵⁹ Basle Committee report available at:

<<http://www.bis.org/publ/bcbs04a.pdf>> accessed 15 June 2015.

⁹⁶⁰ Benton E Gup, *The New Basel Capital Accord* (Mason, Ohio; London, Thomson 2004).

⁹⁶¹ Ibid.

⁹⁶² Bhalla and Kapstein, 'The Basle Accord and Financial Competition' (1990)90 Harvard Business Review 90,158.

⁹⁶³ Bhalla and Kapstein, above.

The Basle Accord also raised doubts regarding the ‘democratic deficit’⁹⁶⁴ in the regulatory process, due to lack of participation by the stakeholders.⁹⁶⁵ This approach towards regulation where selective people got together for negotiations continued for the two subsequent Accords, i.e. Basle II and Basle III.⁹⁶⁶ The complexity of these Accords also made it very difficult for the ‘regulators’ and the ‘regulated’ to ‘stay at arm’s length’,⁹⁶⁷ thus casting legitimacy doubts on two different accounts, i.e. the phenomenon of ‘regulatory capture’ and the ‘democratic deficit’.⁹⁶⁸ As far as the phenomenon of ‘regulatory capture’ is concerned, the same has been summed up by Schmidt in the following words:

‘It is a common phenomenon in all areas of regulation that regulators become “captured” by the industry they regulate, meaning that they take on the objectives of management in the firms they regulate. They may thereby lose sight of the ultimate objectives of regulation. Regulatory capture is particularly serious in industries such as banking where there is conflict of interest between the firms’ objectives (to maximize profits) and the objectives of the regulation (to provide consumer protection and maintain systemic stability).’⁹⁶⁹

What needs emphasizing, therefore, is that a balance needs to be sought between various regulatory objectives through a broader representation of actors. It has been shown in the preceding sections that the financial sector has always been pro-active in policy making and regulatory processes, and sometimes the industry and its consumers have benefited from this approach.⁹⁷⁰ However, the future challenge for EU policy makers is to balance the conflicting interests and considerations, while addressing the legitimacy apprehensions. For this it needs to look beyond the existing ‘clubs’ and to adopt more inclusive governance approaches.

⁹⁶⁴ This concept denotes a lack of democratic participation in the decision-making processes. For a European take on the concept see the link at:

<http://europa.eu/legislation_summaries/glossary/democratic_deficit_en.htm> accessed 15 June 2015.

⁹⁶⁵ Benton E Gup, *The New Basel Capital Accord* (Mason, Ohio; London, Thomson 2004).

⁹⁶⁶ Ibid.

⁹⁶⁷ Kevin Dowd and others, ‘Capital Inadequacies The Dismal Failure of the Basel Regime of Bank Capital Regulation’ *Policy Analysis No 681* (CATO Institute 2011).

⁹⁶⁸ H Benink and R Schmidt, ‘Europe’s Single Market for financial services by European Shadow Financial Regularity Committee’ (2004) *Journal of Financial Stability*; Kevin Dowd Kevin and others, as above.

⁹⁶⁹ H Benink and R Schmidt, ‘Europe’s Single Market for financial services by European Shadow Financial Regularity Committee’ (2004) *Journal of Financial Stability* 186. Available at: <http://ces.univ-paris1.fr/membre/capelle/Cours/Ecofi/S4_fichiers/Europe's%20single%20market%20for%20financial%20services.pdf> accessed 15 June 2015.

⁹⁷⁰ The role of the financial services industry has also been discussed in the GATS negotiations in Ch 1.

This discussion was intended to highlight some of the potential stumbling blocks in the EU regime for the financial services trade. A more specific discussion on the Financial Services Action Plan as a regulatory innovation, and whether it can hold some lessons for a multilateral regime for the services trade represented by GATS is contained in the next section.

E. Financial Services Action Plan as a Model of New Governance

A brief evaluation of the liberalization outcomes of the Financial Services Action Plan has taken place earlier. More important for this study is an analysis of the regulatory approaches adopted for the financial services integration in the EU. This section deals exclusively with the regulatory aspect of the Financial Services Action Plan.

In its final report, the Committee of Wise Men, appointed for accelerating the pace of financial integration within EU, identified the 'legislative process' as the main hurdle in the integration of financial services in the EU.⁹⁷¹ The Committee noted that the existing co-decision procedure⁹⁷² for enacting legislation was too slow, and that it generally took two years to pass internal market legislation. A four-level approach regarding financial services law-making was accordingly recommended. Level 1 of the Lamfalussy Framework refers to the adoption of directives and regulations using a co-decision procedure at the EU level. It reflects the core principles and choices made by the broader, mandate holding bodies of the EU, including the European Parliament, the European Commission and the Council of Ministers. In order to accelerate the pace of legislation at Level 1, it was also recommended by the committee that consultations with stakeholders are carried out prior to the introduction of a directive or regulation, and that the technical implementation details should be left to the Level 2 drafters.⁹⁷³

Level 2 is the implementation of law by 'filling in the details'. This should be done by creating a special committee of national supervisory officers to 'ensure consistent implementation and enforcement'.⁹⁷⁴ The Wise Men recommended creating two committees, i.e. the European Securities Committee, with a regulatory function, and the Committee of European Securities

⁹⁷¹ Lamfalussy Report available at:

<http://ec.europa.eu/internal_market/securities/docs/lamfalussy/wisemen/final-report-wise-men_en.pdf> accessed 27 December 2014.

⁹⁷² It may be recalled that this has now been replaced with the ordinary legislative procedure, but in the study both are used as examples of hierarchical forms of governance.

⁹⁷³ A directive is an EU legislation which sets out the objectives of the law but requires national legislation by the Member states for implementation. See Klaus Dieter Borchardt, *The ABC of Community Law 63-71(2000)* available at:

<http://europa.eu/documentation/legislation/pdf/oa8107147_en.pdf> accessed 15 June 2015.

⁹⁷⁴ Lamfalussy Report available at :

<http://ec.europa.eu/internal_market/securities/docs/lamfalussy/wisemen/final-report-wise-men_en.pdf> accessed 15 June 2015.

Regulator, with an advisory function.⁹⁷⁵ The European Securities Committee could act alone, but within the delegation limits set out in the relevant Level 1 Directive. It was believed that this committee should consist of ministerial or state secretary level nominees of the Member states.⁹⁷⁶ Addressing the European Parliament's apprehensions regarding the loss of their co-decision power, the Wise Men emphasized that the Parliament should be kept well informed of all the developments, and that the Level 2 committee should be mindful of not over-stepping the limits set out by Level 1.⁹⁷⁷

Level 3 is intended to ensure uniform implementation of the EU financial law.⁹⁷⁸ For this purpose, implementation guidelines and joint interpretations are expected from the committee concerned, along with peer reviews of regulatory practice.⁹⁷⁹ The members of this committee are expected to have expert knowledge of the relevant regulation. Level 4 deals with the enforcement of EU law, for which the main responsibility, according to EC Treaty Article 226-228, lies with the European Commission. The Wise Men recommended 'bolder' action by the Commission in enforcement, and urged industry participants to highlight inconsistent implementation.⁹⁸⁰

It should be noted that there is a clear emphasis on the involvement of all the stakeholders in each of the four regulatory levels. However, while Levels 1, 3 and 4 more or less streamline the existing methods of legislation and implementation framework, Level 2 of the Lamfalussy Framework is a major regulatory departure from the existing method of law-making in the EU.⁹⁸¹ The enhanced role of individual Member states, delegation of rule-making authority and accommodating of diverse regulatory scenarios are major points of departure from the traditional legislative methods in the EU.⁹⁸² It is no surprise, then, that most of the resistance or criticism was directed at Level 2 of the Lamfalussy Framework. The European Parliament raised serious objections to this procedure.⁹⁸³ Accordingly the following conditions, *inter alia*, were agreed by the European Commission for the Level 2 legislation:

⁹⁷⁵ Ibid.

⁹⁷⁶ Ibid.

⁹⁷⁷ Report paras 32-35.

⁹⁷⁸ Ibid.

⁹⁷⁹ Report para 37.

⁹⁸⁰ Lamfalussy Report.

⁹⁸¹ Ibid.

⁹⁸² See the discussion on hierarchical modes of governance in Ch 4.

⁹⁸³ Above report para 49. See Annex 3: Analysis of the Comments on the Initial Report.

- Insertion of a sunset clause in the Financial Services Action Plan limiting the duration of the delegation of power for Level 2 legislation to four years from the effective date of the legislation.
- A delay in the effective date of three months for Level 2 legislation to allow a review period for the European Parliament.
- Wide consultation on Level 2 legislation, including with the Economic and Monetary Affairs Committee of the European Parliament.⁹⁸⁴

These conditions could undermine the objective of the Framework, which was to achieve an accelerated pace of legislation through delegation.⁹⁸⁵ Despite these modifications however, the Framework has continued to play an important role in financial services integration in the EU. The changes brought about in the regulatory architecture have since been built upon.⁹⁸⁶ Two new institutions, i.e. the European Systemic Risk Board and European Supervisory Authorities, and numerous specialist committees, including those for the banking, insurance and securities sectors, comprised of members of the national regulatory authorities, have been made a part of the Framework procedure.⁹⁸⁷ The delegation provisions of the framework have been further streamlined in light of the post-Lisbon amendments to the previous Treaty provisions under Articles 290 and 291.⁹⁸⁸ Article 290 delegations are termed ‘delegated acts’, which are meant to supplement or amend only non-essential elements of the directive or regulation.⁹⁸⁹ Article 291 delegations, or ‘implementing acts’ trigger the mechanism for uniform application of EU law as and when required.⁹⁹⁰ Specialist committees for Level 2 advise the Commission on policy areas pertaining to banking, securities, insurance, etc. and the Commission may also consult them when drafting legislative proposals, which are otherwise dealt with at Level 1.⁹⁹¹ Thus the comitology

⁹⁸⁴ Duncan Alford, ‘The Lamfalussy Process and EU Bank Regulation: Another Step on the Road to Pan European Regulation available at: http://www.wiwi.uni-muenster.de/iw/downloads/web/ss09/WEB-11%20Alford_LamfalussyProcessandEUBanking_Final.pdf accessed 15 June 2015.

⁹⁸⁵ Lotte Frach, ‘Evaluating the Efficiency of Lamfalussy Process: the Prospectuses Directive, Takeover Directive and MFID as Case Studies’ (REGEM Analysis No 16, 2008, Trier University).

⁹⁸⁶ Elliot Posner, ‘The Lamfalussy Process: Polyarchic Origins of Networked Financial Rulemaking in the EU’ in Sabel and Zeitlin (eds), *Experimentalist Governance in the European Union: Towards a New Architecture* (Oxford 2008).

⁹⁸⁷ Ibid.

⁹⁸⁸ See Ch 4 for Lisbon changes.

⁹⁸⁹ Ibid.

⁹⁹⁰ Text of Article 290 and 291 of the Treaty of The Functioning of the European Union available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0150:FIN:EN:HTML> accessed 15 June 2015.

⁹⁹¹ See the report at fn 906.

procedure, which deals mostly with non-legislative measures falling under Level 2, also has some influence over the legislative acts covered in Level 1.⁹⁹² Another significant task at Level 2 is the implementation of technical standards which have been drafted at Level 1.⁹⁹³

Level 2 of the framework is an example of what has been termed as ‘deliberative supranationalism’ by Jeorges and Neyer, when referring to the comitology regime of the EU in general.⁹⁹⁴ The crux of their argument is that the representatives of national governments working in a team are more likely to transcend their national perspectives and try to reach a consensual solution to a transnational problem.⁹⁹⁵ This observation holds ground for the framework under discussion, since the regulatory architecture of financial services integration in the EU has continued to expand under the Lamfalussy Framework. The framework has been extended to more financial services sectors than it was originally intended for, which points towards its effectiveness in terms of the aforesaid assertion.⁹⁹⁶

Barnard and Deakin termed the Lamfalussy Framework an example of ‘reflexive harmonization’ which, instead of suppressing the possibility of regulatory innovation by imposing external standards, allows multiple implementation methods, including the acceptance of existing or self-regulatory mechanisms.⁹⁹⁷ This is also seen by them as a way of balancing the market integration objectives with national regulatory diversity:

“The essence of reflexive law is the acknowledgement that regulatory interventions are most likely to be successful when they seek to achieve their ends not by direct prescription, but by inducing ‘second-order effects’ on the part of social actors. In other words, this approach aims to ‘couple’ external regulation with self-regulatory processes.”⁹⁹⁸

This observation regarding the capacity of such ‘regulatory structures’ to cope better with market failures does not *prima facie* fit so well with the EU’s financial services regulatory structure, in view

⁹⁹² Ibid.

⁹⁹³ Most of this information has been derived from official EU legislation sites at: <http://www.fca.org.uk/static/fca/documents/european-union-legislative-process.pdf> accessed 15 June 2015.

⁹⁹⁴ C Jeorges and J Neyer, ‘From Intergovernmental Bargaining to Deliberative Political Process: The Constitutionalisation of Comitology’ (1997) 3 *ELJ* 273.

⁹⁹⁵ Ibid.

⁹⁹⁶ Initially meant for banking, it now covers the insurance sector also.

⁹⁹⁷ Barnard and Deakin, ‘Market Access and Regulatory Competition’, Jean Monnet Working Paper 9/01 available at: <http://centers.law.nyu.edu/jeanmonnet/archive/papers/01/012701.html> accessed 15 June 2015.

⁹⁹⁸ Catherine Barnard and Simon Deakin, ‘Market Access and Regulatory Competition’ in Barnard Catherine and Scott Joanne (eds), *The Law of the Single European Market: Unpacking the Premises* (Hart Publishing 2002).

of the 2008 financial crisis. However, it can be asserted on the basis of earlier discussion that the financial crisis may have been more to do with the club-like and non-inclusive international arrangements for the regulation of financial markets, e. g. Basle Accords, rather than the reflexive governance modes. The crisis was more a product of international financial institutions' prescriptive and straightjacket approach and lack of transparency in corporate governance, rather than the EU's regulatory mechanism for financial services integration.⁹⁹⁹ That apart, Barnard and Deakin observations regarding the 'reflexive law' model of governance to be better able to cope with market failures may actually hold true.

Taking the discussion further, it can be said that the Lamfalussy Framework creates a 'regulatory space' within which experimental rule-making can occur.¹⁰⁰⁰ This 'regulatory space' however is perpetually prone to encroachment by international institutions entrusted with the task of managing international financial markets, and working in rather opaque conditions. The Basle Accord is one such example.

Another important aspect which needs to be highlighted is that the harmonization programme put in place through the Financial Services Action Plan has created relatively limited litigation when compared with other areas of EU governance like consumer or employment law.¹⁰⁰¹ There have been very few references regarding the interpretation of the Directives issued under the Plan.¹⁰⁰² Could this be because of the freedom of governance enjoyed by the national regulators in the implementation of the Plan? If this is the case, similar methods of governance for GATS could save it from frequent disputes. Some contentious judgements issued by the WTO dispute settlement bodies in GATS litigation, which have been discussed at some length in Chapter 2 of this study, have set a direction for GATS governance which is not helping it to overcome its challenges. Therefore if deliberative, non-prescriptive and flexible regulatory approaches were adopted, they may create a relatively dispute-free administration for GATS.

⁹⁹⁹ See a series of *The Economist* articles, 'The Origins of the Financial Crisis: Crash Course (September 2013) 7.. Also see Jonathan Swift's report in the *Forbes* magazine of 22-11-2011, 'Lest We Forget Why We had a Financial Crisis' at: <http://www.forbes.com/sites/stevedenning/2011/11/22/5086/> accessed 15 June 2015.

¹⁰⁰⁰ Recall that the current rule-making in the GATS adopts a horizontal approach with universal disciplines for all services sectors with no room for such experimentation.

¹⁰⁰¹ Tridimas, 'EU: Financial Regulation: Federalization, Crisis Management and Law Reform' in Craig and de Burca (eds), *The Evolution of EU Law* as above.

¹⁰⁰² Tridimas above.

F. Concluding Remarks

The EU has come a long way in developing a complex and detailed framework for the liberalization of financial services. This framework is a criss-cross of varying approaches towards liberalization.¹⁰⁰³ The current mechanism for financial services trade put in place through the Financial Services Action Plan has achieved significant progress in the liberalization goals and development of regulatory approaches, as demonstrated in the preceding section. More importantly, however, the EU framework for liberalization of the services trade has continued to evolve, unlike the GATS, which has stood still since birth, not only in terms of liberalization objectives, but also in rule-making.

Since this chapter consists of a case study of the European framework for financial services liberalization, it also needs to indicate the gaps observed. The framework has not proved to be an effective safety valve against financial meltdown, as witnessed in the post-2008 developments. However as discussed above, the reasons for this meltdown have more to do with the EU externalities rather than the framework itself. The positive effects of financial integration do not seem to have fully translated into welfare gains for the EU.¹⁰⁰⁴ One indication for the same is that public funds are being spent to bail out big financial institutions.¹⁰⁰⁵ These can be termed as state subsidies.¹⁰⁰⁶ The European decision-making process has also been alleged to be suffering from a lack of democracy and accountability.¹⁰⁰⁷ An increasing reliance on the 'club like' international institutions for policy cues is an area of concern.¹⁰⁰⁸ It may offset the effects of 'regulatory flexibility' likely to be achieved through the new governance regulatory approaches.¹⁰⁰⁹ These important caveats should be kept in mind before any parallels are drawn between the EU

¹⁰⁰³ As indicated earlier, these approaches range from regulatory harmonisation through Directives, etc. to mutual recognition and recent new governance approaches.

¹⁰⁰⁴ It is evident from the provision of subsidies to banks to save them from a meltdown in 2008 crisis that there is a tendency of burdening the consumers with the costs.

¹⁰⁰⁵ See Forbes report of 13/10/2008, 'Its Raining Bailouts in Europe' at: http://www.forbes.com/2008/10/13/europe-bailouts-update-markets-econ-cx_II_po_1013markets14.html accessed 20 June 2015.

¹⁰⁰⁶ European Commissioner for Competition in a speech in 9th Global Forum on Competition in Paris on 18th February, 2010. See fn 201.

¹⁰⁰⁷ 'Financial Regulation in the European Union: Mapping the Decision Making Structure on Financial Regulation and Supervision'. SOMO Report, December, 2008. Available at: http://www.eurodad.org/uploadedfiles/whats_new/reports/eumapping_financial_regulation_final.pdf accessed 20 June 2015.

¹⁰⁰⁸ See the above section on the Basel Accords.

¹⁰⁰⁹ This is because of the dynamics of the decision making in a club-like environment. For example, G 20 makes decisions which are relevant to many other non-member countries, as has been previously highlighted.

framework for the liberalization of financial services and improving the effectiveness of GATS, even though these areas of concern are also relevant for the multilateral setting represented by the GATS.

The main purpose of this chapter was to signpost certain approaches, strategies or modalities which could be picked up as tools for improving the effectiveness of GATS in terms of achieving its dual objective of progressive trade liberalization, while protecting the WTO Members' regulatory autonomy.¹⁰¹⁰ It is accordingly concluded that the changing nature of EU regulatory approaches towards financial services liberalization has the potential for providing useful hints for GATS governance. As discussed above, this framework manages to strike the balance between the centralized integration objectives of the EU and the regulatory autonomy of its Member states to some extent.¹⁰¹¹ This is an important balance for the WHO to strive for, if it is to move ahead with its services liberalization agenda in a widely diverse setting. The GATS framework also needs to grow and develop new approaches of governance in order to become a dynamic multilateral treaty, instead of a redundant one. Studying the EU framework could help the WHO negotiators and the policy makers in achieving this objective.

For the reasons discussed above, whether the regulatory approaches identified in the EU case study can work in a multilateral setting becomes a pertinent question. The answer to this question could provide a window of opportunity for improving the effectiveness of GATS as an instrument of multilateral services trade liberalization. The next and final chapter of the study makes recommendations in this regard, while bringing the research findings together.

¹⁰¹⁰ This is the GATS dual objective as highlighted in its preamble and also its main regulatory challenge. See Chs 1-3.

¹⁰¹¹ See the section on the Lamfalussy Framework.

Chapter 6

New Governance Regulatory Approaches and the GATS Regulatory Challenges

A. Introduction

This thesis has so far engaged with the conceptual basis, legal framework and regulatory approaches being employed and recommended for the governance of multilateral services trade under the GATS.¹⁰¹² It has been demonstrated that the economic rationale that has inspired the liberalization of the goods trade under the umbrella of GATT,¹⁰¹³ has been considered equally compelling for the services trade by the GATS drafters, researchers and the policy makers.¹⁰¹⁴ However, it has also been highlighted that, in view of elements specific to the services trade, such as factor mobility and intangibility,¹⁰¹⁵ this might lead to practical challenges.¹⁰¹⁶ It has been demonstrated that the GATS objective of progressive trade liberalization, while protecting WTO Members' regulatory autonomy, remains elusive due to the current regulatory approaches being employed for its governance.¹⁰¹⁷ The interpretation given to its obligations by the WTO dispute settlement bodies, and the implementation strategies being recommended in its current rule-making, point towards a further shrinking of the regulatory space of WTO Members.¹⁰¹⁸ Moreover, the services-related rule-making is also geared towards developing universal disciplines on

¹⁰¹² See Chs 1-3.

¹⁰¹³ GATT stands for General Agreement on Tariffs and Trade and is the WTO administered agreement for the multilateral goods trade.

¹⁰¹⁴ In addition to the evolution of the GATS and its conceptual foundation discussed at more length in Ch 1, see *Inter alia*, Brian Hindley and Alasdair Smith, 'Comparative Advantage and Trade in Services (1984) 7 (1)The World Economy 369; Brian Coopeland and Aaditya Mattoo, 'The Basic Economics of Services Trade' in Mattoo, Stern and Zanini (eds), *A Handbook of International Trade in Services* (Oxford 2008); Panagiotis Delimatsis, *International Trade in Services and Domestic Regulations: Necessity, Transparency and Regulatory Diversity* (Oxford 2007) 8.

¹⁰¹⁵ Mirelle Cossy, 'Some thoughts on the concept of 'likeness' in the GATS' in Marion Pannizon, Nicole Pohle and Pierre Sauve (eds), *GATS and the Regulation of International Trade in Services* (Cambridge 2008).

¹⁰¹⁶ These challenges manifest themselves in very little progress being achieved in liberalization gains and the rule-making under the GATS as highlighted in Ch 3.

¹⁰¹⁷ See the GATS preamble and discussion in Chs 1-3 which highlights how the current GATS approaches deal with the GATS treaty objectives.

¹⁰¹⁸ See Ch 1 that unpacks the GATS legal obligations and Ch 2 which discusses the WTO dispute settlement bodies' rulings in GATS related disputes.

domestic regulations, so that they do not become unnecessarily trade restrictive.¹⁰¹⁹ Such disciplines could lead to all domestic regulatory policies being perceived as potential services ‘trade barriers’.¹⁰²⁰ This issue is contested in the thesis on the grounds that none of the domestic regulations should be considered trade barriers unless their regulatory context is fully exposed and understood.¹⁰²¹ Only then can the GATS effectively balance its trade liberalization objectives with the WTO Members’ regulatory concerns for the services trade.

The thesis asserts that there is a need for a ‘paradigm shift’ in dealing with the multilateral services trade under the GATS umbrella. The conceptual and legal boundaries of ‘trade barriers’ in both the goods and services trade context have been explored previously.¹⁰²² Based on the same, the study argues that the most recommended approach of dismantling regulatory barriers for services trade by applying horizontal disciplines¹⁰²³ is influenced by the multilateral goods trade experience. These barriers in the context of services trade are, however, different.¹⁰²⁴ They are not the border or tariff measures predominant in the goods trade, but are mostly ‘behind the border regulatory measures’.¹⁰²⁵ They often represent genuine regulatory concerns and policy considerations.¹⁰²⁶ They are also exceedingly diversified, and a universal approach to their removal is not viable.¹⁰²⁷ This is not to suggest that ‘behind the border regulatory measures’ cannot be seen as barriers to

¹⁰¹⁹ The proposal for developing a horizontal necessity test is one such example, discussed in more detail in Ch 3 dealing with the GATS rule-making.

¹⁰²⁰ See the discussion in Ch 3 on the development of horizontal disciplines for judging the domestic regulations. Also see the conceptualization of trade barriers in the GATS discussed in Ch 1 and the dispute settlement bodies’ approach towards domestic regulations in Ch 2 which deals with services trade disputes. Ch 2 demonstrates that most of the disputes arise out of domestic regulatory policies being perceived as market access barriers.

¹⁰²¹ An aims and effects approach is proposed in the thesis as an alternative to the necessity based approach.

¹⁰²² See Ch 1 of the thesis.

¹⁰²³ By horizontal disciplines, it is meant that the disciplines will apply to all services sectors. It also means that all measures come under scrutiny for their potential ‘trade hindrance effect’. The decision to develop such disciplines for ensuring that domestic regulations do not become unnecessary trade barriers is contained in the WTO document S/L/70 dt April,1999. This document refers to them as ‘generally applicable’ disciplines and is available at: http://www.wto.org/english/tratop_e/serv_e/dom_reg_negs_e.htm accessed 20 June 2015.

¹⁰²⁴ Bernard Hoekman and Kostecki Michel, *The Political Economy of the World Trading System* (3rd edn, Oxford 2010); Aik Hoe Lim and Bart De Meester, ‘An introduction to domestic regulation and GATS’ in Aik Hoe Lim and Bart De Meester (eds), *WTO Domestic Regulation and Services Trade: Putting Principles into Practice* (Cambridge 2014).

¹⁰²⁵ Ibid.

¹⁰²⁶ It should be added that the barriers to services trade are not border/tariff measures, but ‘behind the border’ domestic regulations which often reflect domestic policy considerations. See Article VI of the GATS. They can range from capital controls to protect financial markets to immigration controls for the labour market.

¹⁰²⁷ See Ch 1 for a more substantive discussion on services trade barriers.

goods trade, or that their perception, as such is confined to the services trade.¹⁰²⁸ What needs emphasizing is that the GATS provisions apply ‘almost exclusively’ to domestic regulations because of the peculiar nature of services trade,¹⁰²⁹ which depends on factor mobility instead of the physical border-crossing of the goods trade.¹⁰³⁰ Also, more specific disciplines for domestic regulations have been introduced over time, such as those applying to technical barriers to trade (TBT) or sanitary and phytosanitary (SPS) measures (i.e. food safety and animal and plant health measures) in the goods context.¹⁰³¹ However no such auxiliary agreements exist for the GATS.¹⁰³² The GATS disciplines are contained in the general obligations without specific guidance as to which measures are to be ‘prohibited’ and which are to be ‘permitted’.¹⁰³³ This enhances the scope of domestic measures seen as barriers to trade for services, and accordingly the need to look for more flexible regulatory approaches to accommodate WTO Members’ genuine regulatory concerns.

One question to ask is does GATS need to remove the majority of trade barriers in the services trade, or does it need to accommodate the regulatory diversity¹⁰³⁴ they represent by protecting Members’ regulatory autonomy? Apart from sectoral or country specific diversity, another unique feature of the GATS is its outreach into the multiple layers of a country’s regulatory architecture.¹⁰³⁵ This becomes clearer by referring to the definition and scope of ‘measures by Members’ in Article 1:3 of the GATS. Measures for the purpose of GATS according to this definition include those taken by (a) central, regional or local governments and authorities, (b) non-governmental bodies in the exercise of power delegated by central, regional or local governments

¹⁰²⁸ WTO has developed some disciplines for such barriers in the goods trade in the form of TBT and SPS Agreements.

¹⁰²⁹ This becomes abundantly clear when we look at the four mode-based services definition in the GATS discussed in Ch 1.

¹⁰³⁰ Andrew Lang, *World Trade Law after Neoliberalism: Re-imagining the Global Economic Order* (Oxford 2011).

¹⁰³¹ The TBT Agreement sets out the disciplines that govern trading practices at the international level for all consumer type products. It sets out the rights and obligations of WTO Members when applying technical regulations and standards and conformity assessment procedures for traded goods. See the WTO’s ‘World Trade Report 2012: Trade and public policies: A closer look at non-tariff measures in the 21st century’, 2012. Available at: www.wto.org/english/res_e/booksp_e/...e/world_trade_report12_e.pdf accessed 20 June 2015.

¹⁰³² See the GATS text and various annexes.

¹⁰³³ See Article VI of the GATS, for example, which lays down disciplines for domestic regulations.

¹⁰³⁴ I refer to regulatory diversity in terms of various service sectors, the diversity in the WTO membership and, in view of the definition of ‘measure’ extending to sub-regulatory bodies within a country, to the regulatory diversity within WTO members’ regulatory architecture. This is a situation peculiar to the GATS with no parallels in the GATT, which deals with the multilateral trade of goods.

¹⁰³⁵ Aaditya Mattoo and Pierre Sauve (eds), *Domestic Regulation and Services Trade Liberalisation* (World Bank and OUP 2003).

and authorities.¹⁰³⁶ Given this wide scope, the idea of developing any form of standard regulatory disciplines for GATS is bound to raise constitutional and legitimacy related questions.¹⁰³⁷ It might also not be very practical.¹⁰³⁸ Hence the emphasis on finding ways to accommodate the WTO Member countries' regulatory autonomy, while governing the multilateral services trade through GATS.

A major theme of the study is the potential relevance of 'new governance' regulatory approaches to GATS governance.¹⁰³⁹ Certain characteristics of these approaches which set them apart from the traditional hierarchical modes of governance are that they help in broadening of the policy making base through an emphasis on coordination and deliberative consultation. They are flexible, and therefore better equipped to deal with the diversity of multilateral services trade. Since they have been used successfully as a conscious policy choice by the EU, they are also considered relevant for addressing the GATS regulatory challenges.

Various negotiation approaches being used or recommended for the multilateral services trade are also explored in this chapter, with the observation that 'sectoral approaches' are best suited to the multilateral services trade, since they offer the potential for accommodating the varying regulatory concerns of WTO Members.¹⁰⁴⁰ A brief mention of the limitations of the current 'request and offer' negotiation approaches was made in Chapter 1 of the thesis. However, the current chapter contains a detailed analysis of the pros and cons of various alternative negotiatory approaches, along with those considered best suited to GATS governance. At this point, it will be useful to present a brief recap of the discussion which took place in the previous chapters.

Firstly, while tracing the evolution of multilateral trade disciplines, which initially covered the goods trade and were later extended to the services trade, it can be seen that the concept of multilateral 'tradability' of the services trade was built almost from scratch through the work of an international 'epistemic community'.¹⁰⁴¹ Hence most of the concepts and legal principles were

¹⁰³⁶ Although this has been discussed at some length in Ch1, it is worth emphasising here to bring home the point.

¹⁰³⁷ It may be recalled that current rule-making under GATS is based on this approach and has been critically evaluated in Ch3 of the thesis.

¹⁰³⁸ Which is evident from the very small rule-making agenda of GATS, as discussed in Ch 3

¹⁰³⁹ The rationale for this has been provided through a case study of the EU financial services trade. See Chs 4 and 5.

¹⁰⁴⁰ It may be recalled that during the GATS negotiations discussed in Ch 1, there were sectoral undercurrents in the positions taken by the countries. This was due to the diversity of concerns among them regarding different services sectors. The current approaches were briefly discussed in Ch 3, and some of the proposed alternative approaches recommended in the current literature, in the subsequent section of this chapter.

¹⁰⁴¹ William J Drake and Kalypto Nicolaidis, 'Ideas, Interests and Institutionalisation: "Trade in Services" and the Uruguay Round' (1992) 46 (1) International Organisation 345.

borrowed from the goods trade experience.¹⁰⁴² The study argues that not enough attention was paid to the essential regulatory difference between the goods and services trades. This was demonstrated through a discussion on the conceptual foundation and negotiation process of framing the GATS before and during the Uruguay Round. It was also highlighted that a persistent point of contention throughout the negotiations for framing the GATS had been concerns for the integrity of domestic regulatory choices, since services trade governance fell almost entirely within the domestic policy domain.¹⁰⁴³

Next, the study has examined the GATS regulatory structure, and the extent of its legal obligations. It highlights the significant impact that the GATS legal obligations have for WTO Members' regulatory autonomy. The limited progress made in the liberalization of the services trade under GATS¹⁰⁴⁴ is often linked to the complexities of the GATS framework.¹⁰⁴⁵ However, this thesis engages with the regulatory approaches adopted for GATS implementation to discover reasons for GATS stalled progress. Although a brief discussion on the ambiguities and complexities associated with the GATS framework has been conducted in the study, the focus of the thesis remains upon GATS overall governance. This, *inter alia*, includes its regulatory strategies, approaches adopted by the WTO dispute settlement bodies in interpreting its obligations and the direction of current rule-making.¹⁰⁴⁶

A study of GATS case law exposes the legal difficulties in the interpretation of the GATS text.¹⁰⁴⁷ More importantly, it hints at the shrinking of the regulatory space available to WTO Member countries as a consequence of GATS obligations and the way the WTO dispute settlement bodies interpret them.¹⁰⁴⁸ This observation provides a link with earlier findings regarding the GATT Members fearing loss of domestic regulatory autonomy when the GATS framework was being negotiated.¹⁰⁴⁹ Inadequacy of the negotiation approaches adopted by the WTO membership for

¹⁰⁴² See the evolution of the GATS discussed in Ch 1.

¹⁰⁴³ See the GATS negotiation history detailed in Ch 1 of the thesis.

¹⁰⁴⁴ There is near consensus on this among the researchers and the WTO sources. See the report by the Chairman of the Council for Trade in Services in Special Session for the purpose of the stocktaking in 2010 available at the WTO website. Also see Juan A Marchetti and Petros C Mavroidis in 'What are the Main challenges for GATS Framework? Don't talk about Revolution' (2004) European Business Organization Law Review.

¹⁰⁴⁵ Rudolf Adlung and Aaditya Mattoo, 'The GATS' in Aaditya Mattoo, Robert Stern and Gianni Zanini (eds), *A Handbook of International Trade in Services* (OUP 2008).

¹⁰⁴⁶ These areas are covered in Chsr 1, 2 and 3 respectively.

¹⁰⁴⁷ See Ch 2

¹⁰⁴⁸ This has reference to Ch 2 of the thesis.

¹⁰⁴⁹ See the GATS negotiation history in Ch 1.

liberalization in the current round of WTO negotiations has also been highlighted in the study.¹⁰⁵⁰ Negligible services trade gains and the deficient rule-making agenda of the GATS suggest that it needs to re-visit its regulatory direction.

A case study of financial services trade liberalization in the EU has accordingly been conducted with a view to gain some relevant lessons from the EU governance model. The EU stands out for the dynamic and evolutionary nature of its regulatory mechanisms when compared with the GATS. EU regulatory reform has focused upon finding a balance between its centralized integration objectives and its Member states' regulatory autonomy. Accordingly, in many areas of its governance, it has broken away from traditional hierarchical approaches, and opted for more flexible modes of policy-making and implementation. Such regulatory innovations are often dubbed as 'new governance' approaches. The use of 'new governance' regulatory approaches by the EU, with their emphasis on 'participatory' and 'deliberative' processes, has been identified as having some potential for the multilateral services trade governance under GATS.¹⁰⁵¹

The current chapter brings these themes together to make some recommendations for overcoming the GATS specific regulatory challenges, in order for it to become a more effective instrument in terms of its objectives. It also brings out key observations made in the existing academic studies regarding improving the GATS framework, and situates the present study within them.

The chapter starts by highlighting why the GATS regulatory framework is in need of re-visiting on a conceptual level. This involves looking at the theoretical premises of the goods and services trades. It also involves a conceptualization of services trade barriers from a different angle to the goods trade. The appropriateness of existing approaches in dealing with services trade barriers is evaluated, and alternative views are presented. The second part of the chapter deals with the negotiation approaches, i.e. multilateral, plurilateral, sectoral, etc. being used or recommended for the services trade under the GATS umbrella, and discusses their merits or lack of merit. This section also offers conclusions regarding the approaches considered more suitable for services negotiations in view of the various aspects of GATS regulatory structure. The prospects of using new governance regulatory approaches in the GATS are discussed in the last section of the chapter. Whilst taking into account existing academic research, this chapter identifies areas within the institutional framework of GATS which could adopt and benefit from the new governance

¹⁰⁵⁰ Ch 3 of the thesis discusses the Doha Round of negotiations, which is the current round of WTO negotiations. It was launched in November, 2001. For more details refer to Ch 4 of the thesis and the following link at:
<http://www.wto.org/english/tratop_e/dda_e/dda_e.htm> accessed 20 June 2015.

¹⁰⁵¹ Refer to Chs 4 and 5 of the thesis.

regulatory approaches. It hints at the prospects of involving stakeholders in the decisions regarding multilateral services trade governance through the 'new governance' regulatory techniques.

The main finding of the research is that GATS needs to re-balance and realign its approach towards services trade liberalization by accommodating the regulatory autonomy of the WTO Members when pursuing its liberalization objectives. It is also asserted that the current regulatory approaches being used for GATS governance do not strike a balance between these two objectives - hence the stalled GATS progress. It is suggested that GATS could become a more effective platform for the multilateral services trade by adopting more flexible regulatory approaches. For this purpose, the regulatory innovations adopted in EU governance provide some useful lessons which could be applied to GATS governance.

B. Are the Theoretical Premises for the Services Trade the same as the Goods Trade?

It follows that relying on the same conceptual basis for the liberalization of the services trade and the goods trade, implies that the economic theoretical basis for the liberalization of the services trade is the same as the goods trade.¹⁰⁵² Take, for example, the theory of 'comparative advantage'¹⁰⁵³ used to advocate goods trade, which is considered sufficiently applicable to the services trade.¹⁰⁵⁴ The economic rationale that has inspired the liberalization of the goods trade under the umbrella of GATT is thus considered equally compelling for the services trade, and hence for GATS.¹⁰⁵⁵ The Theory of Comparative Advantage was first introduced by David Ricardo in his book, 'The Principles of Political Economy', published in 1817. In the international trade context, this theory implies that a country would benefit from producing and exporting those goods in which it has the greatest comparative advantage, and importing those in which it has the greatest comparative disadvantage. Giving an example, he explained that England produced a certain quantity of cloth using the labour of 120 men, and a certain quantity of wine using the labour of 120 men. Portugal produced the same quantity of cloth with the labour of 90 men, and the same

¹⁰⁵² This has been touched upon while discussing the conceptual foundation of the GATS.

¹⁰⁵³ David Ricardo, *On the principles of political economy, and taxation* (London: Murray, 1817).

¹⁰⁵⁴ Aaditya Mattoo Aaditya, 'The Basic Economics of Services Trade' in Mattoo, Stern and Zanini (eds), *A Handbook of International Trade in Services* (Oxford 2008).

¹⁰⁵⁵ *Inter alia*, B Hindley and A Smith, 'Comparative Advantage and Trade in Services (1984) 7 (1)The World Economy 369; Brian Coopeland and Aaditya Mattoo, 'The Basic Economics of Services Trade' in Mattoo, Stern and Zanini (eds), *A Handbook of International Trade in Services* (Oxford 2008); Panagiotis Delimatsis, *International Trade in Services and Domestic Regulations: Necessity, Transparency and Regulatory Diversity* (Oxford 2007).

quantity of wine with the labour of 80 men. Thus Portugal had an absolute advantage¹⁰⁵⁶ over England in the production of both commodities. Ricardo argued that both countries were still better off through trade with each other, and here is why: England imported wine produced by 80 Portuguese, which would have taken 120 English labourers to produce in exchange for cloth. Portugal gained by exporting the wine produced by its 80 labourers, and importing the cloth in exchange, which would have taken 90 of its men to produce.¹⁰⁵⁷

This approach, however does not seem to be nuanced enough for services, in view of the movement of factors involved in the services trade, for example labour and capital, and the general difficulty in drawing a line between the services and the service producer.¹⁰⁵⁸ The movement of factors is directly linked to the domestic policy priorities and regulatory concerns.¹⁰⁵⁹ For example, the movement of capital in financial services, or of personnel for providing consultancy services or labour can be of substantial regulatory concern for countries.¹⁰⁶⁰ The impact of services trade is also more direct and immediate on people, and domestic services policies are not always drawn for economic reasons, as might be the case in the goods trade for the majority of the time.¹⁰⁶¹ In general, the policy priorities and regulatory concerns of states are linked to domestic welfare,¹⁰⁶² and any regulatory changes aimed at liberalizing the trade in services might therefore lead to welfare losses. These welfare losses hence need to be evaluated against the gains from liberalizing services trade.¹⁰⁶³

It might also be true for the goods trade that certain domestic policy changes lead to welfare losses in terms of their trade, and they need to be accounted for.¹⁰⁶⁴ However there are significant

¹⁰⁵⁶ Adam Smith in his book, 'The Wealth of Nations' argued that specialisations in international trade were likely to generate mutual gains for nations, while attacking mercantile ideas of closely regulating international trade. His book was published in 1776, and his economic ideas came to be known as the Theory of Absolute Advantage.

¹⁰⁵⁷ Ibid.

¹⁰⁵⁸ Mirelle Cossy, 'Some thoughts on the concept of 'likeness' in the GATS' in Panizzon, Pohle and Sauve (eds), *GATS and the Regulation of International Trade in Services* (Cambridge 2008).

¹⁰⁵⁹ Ibid.

¹⁰⁶⁰ Michael Trebilcock, Robert Howse and Antonia Eliason, *The Regulation of International Trade* (4th edn, Routledge 2013).

¹⁰⁶¹ Joseph F Francois and Kenneth A Reinert, 'The Role of Services in the Structure of Production and Trade: Stylized Facts from a Cross-Country Analysis' in Bernard Hoekman (ed), *The WTO and Trade in Services* (Edward Elgar 2012).

¹⁰⁶² The assumption is based on the fact that in most of the politically representative societies, policy-making claims to represent people's welfare.

¹⁰⁶³ Which takes us back to balancing of the dual GATS objectives.

¹⁰⁶⁴ Graham Dunkley, *The Free Trade Adventure: The Uruguay Round and Globalism- A Critique* (Zed books 1997).

differences between the goods and the services trade when it comes to evaluating the comparative advantages from their trading.¹⁰⁶⁵ Firstly, domestic regulatory changes affect services more directly and more immediately than goods. There is no cushion of time during which the impact of this change becomes apparent for services, unlike goods. For example if there is a change in investment measures or labour standards, it becomes visible on the radar measuring the comparative advantage from trade in a certain commodity. In other words, it has the chance to be accounted for. Redding reveals that if the potential for productivity is not fully internalised, an economy loses its comparative advantage in a specialised area, leading to welfare losses from the free trade in goods.¹⁰⁶⁶ Similarly, uneven technology development and institutional progress can also lead to loss of comparative advantage, and thus to loss in welfare.¹⁰⁶⁷ For the services trade, the scenario is somewhat different. There are no terms available to develop an equation to account for the loss of comparative advantage,¹⁰⁶⁸ and even if there were, the impact of change in capital structure or labour policy would have already affected the people delivering or receiving the services before the calculation could be made.

Moreover there could be a scenario in the services trade where an individual's welfare gain may become a country's welfare loss, or vice versa. This becomes even more complicated when global gain becomes a country's welfare loss.¹⁰⁶⁹ It can be understood by an example given by Copeland and Mattoo, while discussing the factor mobility aspect of the services trade.¹⁰⁷⁰ They present a scenario in which a lawyer moves from his 'home' country to deliver legal services in another country. Since the return to him for his services is low in his home country, he moves to take advantage of higher returns for his services elsewhere. Although the movement of the lawyer

¹⁰⁶⁵ For more on how the services trade is different from the goods trade and for services' special nature, see Bernard Hoekman and Michel Kostecki, *The Political Economy of the World Trading System* (3rd edn, Oxford 2010); Aik Hoe Lim and Bart De Meester, 'An introduction to domestic regulation and GATS' in Aik Hoe Lim and Bart De Meester (eds), *WTO Domestic Regulation and Services Trade: Putting Principles into Practice* (Cambridge 2014).

¹⁰⁶⁶ Stephen Redding, *Dynamic Comparative advantage and welfare effects of trade* (Oxford Economic Paper 51OUP 1999).

¹⁰⁶⁷ Przemyslaw Kowalski, 'Comparative Advantage and Trade Performance: Policy Implications', 2011, OECD Trade Policy Working Paper 121 available at: www.oecd.org/trade accessed 20 June 2015.

and Jing Zhang and Andrei Levchenko, 'The Evolution of Comparative Advantage: Measurement and Welfare Implications' 2011, NATIONAL BUREAU OF ECONOMIC RESEARCH working paper 16806, Cambridge.

¹⁰⁶⁸ Unlike the goods trade, where such an advantage is quantifiable.

¹⁰⁶⁹ Again this might be true for the goods trade, and the advantages from free trade in goods also need to be weighed against other policy objectives. However, it is important to draw a distinction between the goods and services trade for a more direct impact upon societies and people.

¹⁰⁷⁰ Brian Copeland and Aaditya Mattoo, 'The Basic Economics of Services Trade' in Mattoo, Stern and Zanini (eds), *A Handbook of International Trade in Services* (Oxford 2008).

increases the global welfare, does it improve the welfare of his home country? Not necessarily. In fact, if the movement of the lawyer is a permanent migration, it actually leads to a decline in the welfare of his home country.¹⁰⁷¹ Fear of a 'brain drain' in many developing countries can be quoted in this context.¹⁰⁷² There is a very telling analysis by the Economist in this regard:

'When people in rich countries worry about migration, they tend to think of low-paid incomers who compete for jobs as construction workers, dishwashers or farmhands. When people in developing countries worry about migration, they are usually concerned at the prospect of their best and brightest decamping to Silicon Valley or to hospitals and universities in the developed world. These are the kind of workers that countries like Britain, Canada and Australia try to attract by using immigration rules that privilege college graduates.'¹⁰⁷³

To keep things in perspective, it might be added that there could be a scenario where migration may also result in welfare gains for the home country, e.g. if the remittances received from the income earned abroad are considered a part of the welfare of a country. The point which needs driving home, however is that any effort to fit services into a 'square' trade theory and design a regulatory framework for them is likely to suffer from a very basic conceptual deficiency, leading to practical problems in its application. The *locus classicus*¹⁰⁷⁴ supporting this observation is the Opinion of A G Jacobs in *Sager*:¹⁰⁷⁵

'The truth is that the provision of services covers a vast spectrum of different types of activity. At one extreme, it may be necessary for the provider of the service to spend a substantial period of the time in the Member State where the service is provided: for example an architect supervising the execution of a large building project. In that type of case, the border line between services and establishment may be a narrow one... At the other extreme, the person providing the service might transmit it in the form of a product: for example, he might provide an educational service by posting a series of books and video-cassettes: here there is an obvious analogy with the free movement of goods...'

¹⁰⁷¹ Ibid.

¹⁰⁷² Brain drain refers to large scale migration of educated people from the developing countries to the developed countries in search of brighter future.

¹⁰⁷³ The Economist, 'Drain or Gain', 26th May, 2011 at: <http://www.economist.com/node/18741763> accessed 20 June 2015.

¹⁰⁷⁴ The term used by Eekhout in Piet Eekhout, 'Constitutional Concepts for Free Trade in Services', in Grainne de Burca and Joanne Scott (eds), *The EU and the WTO: Legal and Constitutional Issues* (Hart Publishing 2001).

¹⁰⁷⁵ Case C-76/90, *Sager v. Dennemeyer* and C-268/91[1993] 1-6097, para 18.

It is not difficult to visualise the regulatory complexity associated with this kind of scenario and note that this opinion dates back to 1991. The technology since has progressed in leaps and bounds, adding another layer of complexity to the way services transactions are carried out.¹⁰⁷⁶ Whether the only multilateral framework for services trade is evolving at the same pace remains to be seen.¹⁰⁷⁷

Mattoo and Copeland conclude in their aforementioned study¹⁰⁷⁸ that insights from the theory of trade in goods can be applied to trade in services, provided the 'regulatory framework' is adequate. This however is a big proviso, and makes any assertions regarding the applicability of the theoretical basis for goods trade to services trade look simplistic. This observation is supported by economists like Daly, in whose opinion:

'Free capital mobility totally undercuts Ricardo's comparative advantage argument for free trade in goods, because that argument is explicitly and essentially premised on capital (and other factors) being immobile between nations. Under the new global economy, capital tends simply to flow to wherever costs are lowest—that is, to pursue absolute advantage.'¹⁰⁷⁹

The point, however, is not merely to undermine the theoretical perspective given to the need for a more liberal multilateral services trade, but to question the regulatory framework that derives its rationale solely from this perspective. The observation which merits identifying is that the purpose of rule-making for the services trade needs to be distinguished from the purpose of rule-making for the goods trade. Generally speaking, the purpose of rule-making for multilateral trade in goods is the reduction of trade barriers.¹⁰⁸⁰ However even in the context of goods, the question may be asked as to what end the reduction of trade barriers is intended? Is it to create a trade environment which does not discriminate on the basis of nationality, for which MFN and national treatment provisions related regulatory structure may suffice? Or is the end goal the creation of a market completely 'unfettered', and without any checks and balances? The latter is clearly not the

¹⁰⁷⁶ Krishna Oolun, 'Information communications technology: the Mauritian experience of regulation and reform' in Lim and Meester (eds), *WTO Domestic Regulation and Services Trade* (Cambridge 2014).

¹⁰⁷⁷ This has been more specifically explored in Ch 3 which deals with the current state of rule-making for multilateral services trade.

¹⁰⁷⁸ Brian Copeland and Aaditya Mattoo, 'The Basic Economics of Services Trade' in Mattoo, Stern and Zanini (eds), *A Handbook of International Trade in Services* (Oxford 2008).

¹⁰⁷⁹ Herman Daly, *Ecological Economics and Sustainable Development, Selected Essays of Herman Daly* (Northampton MA: Edward Elgar Publishing 2007).

¹⁰⁸⁰ Preamble to the General Agreement on Tariffs and Trade (GATT). Text available on the WTO

website at:

http://www.wto.org/english/docs_e/gattdocs_e.htm accessed 20 June 2015.

objective of the multilateral trading system, which focuses mainly on ‘non-discrimination’.¹⁰⁸¹ One of the main objectives in the creation of the WTO was an ‘elimination of discriminatory treatment in international trade relations’.¹⁰⁸² However, WTO hints at a number of other objectives in its own mission statement:

‘The WTO’s founding and guiding principles remain the pursuit of open borders, the guarantee of most-favoured-nation principle and non-discriminatory treatment by and among members, and a commitment to transparency in the conduct of its activities. The opening of national markets to international trade, with justifiable exceptions or with adequate flexibilities, will encourage and contribute to sustainable development, raise people’s welfare, reduce poverty, and foster peace and stability. At the same time, such market opening must be accompanied by sound domestic and international policies that contribute to economic growth and development according to each member’s needs and aspirations.’¹⁰⁸³

It can therefore be said with some confidence that compromising all other objectives for the purposes of ‘trade liberalization’ is not the intent of the multilateral trade regime. ‘Trade liberalization without discrimination’ may reasonably be the intention, for which no bulldozing of domestic regulatory choices is required.

The need to keep the focus on the scope and purpose of ‘liberalization’¹⁰⁸⁴ in the services trade is even more important than the goods trade, for multiple reasons.

First and foremost is the fact that the construction of multilateral services trade liberalization disciplines is a relatively new phenomenon.¹⁰⁸⁵ It was built on the ideas, concepts and legal principles borrowed from the GATT, rather than any real experience of multilateral trading in services, unlike goods.¹⁰⁸⁶ And, from the very outset, there was a huge gap between the expectations and apprehensions of the developed and developing countries from the GATS, since it

¹⁰⁸¹ As discussed in the earlier sections of the chapter dealing with the evolution of the multilateral trade regime.

¹⁰⁸² See the text of the Marrakesh Agreement creating the WTO at: http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm accessed 20 June 2015.

¹⁰⁸³ WTO Mission Statement at: http://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm accessed 20 June 2015.

¹⁰⁸⁴ Please see the introduction to this chapter.

¹⁰⁸⁵ GATS came into being in 1995 with the advent of the WTO.

¹⁰⁸⁶ Discussed in more detail earlier when I discussed the role of an ‘epistemic community’ in developing multilateral trade disciplines. But for further reference see Drake and Nicolaidis, ‘Ideas, Interests and Institutionalisation: “Trade in Services” and the Uruguay Round’ (1992) 46 (1) International Organisation 345.

was viewed as a US trade agenda.¹⁰⁸⁷ As further shown in Ch 3, this gap continues to exist, and manifests itself in very little progress in the services trade agenda of the WTO.¹⁰⁸⁸

Secondly, trade barriers in the services context directly reflect the political and social choices of a country, and not just its economic policies which are mostly reflected in the goods trade.¹⁰⁸⁹ While tariff reductions or increase in goods trade almost always have economic implications, there can be regulatory measures in services with no economic intention or impact whatsoever.¹⁰⁹⁰ The services trade barriers represent ‘behind the border’ regulatory measures aimed at achieving national policy objectives, e.g. capital controls introduced by a certain country to safeguard its financial markets. They might also represent important social considerations for a country, e.g. restrictive policy towards the import of betting or gambling services. Moreover, as per the definition of ‘measure’ in GATS, they might even be a matter of localised community choice, and constitutionally guaranteed by the state.¹⁰⁹¹ Krajewski therefore recommends the use of flexible approaches in dealing with domestic regulations.¹⁰⁹² He recommends the use of mutual recognition for achieving services trade liberalization under GATS. However, as discussed in the EU case study, this approach has its pitfalls in a diverse setting like the WTO.¹⁰⁹³ This study therefore recommends the use of new governance regulatory approaches, which offer greater potential for flexibility, and hence regulatory autonomy.¹⁰⁹⁴

A third reason for emphasizing them in the services context is from an implementation point of view. The preamble to the GATT agreement states as its purpose a ‘substantial reduction of *tariffs*

¹⁰⁸⁷ Michael Trebilcock, Robert Howse and Antonia Aliason, *The Regulation of International Trade* (4th edn, Routledge 2012).

¹⁰⁸⁸ Refer to Ch 3 on the Doha Round of WTO negotiations and low levels of services trade commitments as well as minimal progress in rule-making.

¹⁰⁸⁹ Tinne Heremans, ‘Why regulate? An overview of the rationale and purpose of regulation’ in Lim and Meester (eds), *WTO Domestic Regulation and Services Trade: Putting Principles into Practice* (Cambridge 2014).

¹⁰⁹⁰ Markus Krajewski, ‘Recognition, standardisation and harmonisation: Which rules for GATS in times of crisis?’ In Panizzon, Pohl and Sauve (eds), *GATS and the Regulation of International Trade in Services* (Cambridge 2008). He recommends the use of mutual recognition for this purpose. However as discussed in the EU case study, this approach has its pitfalls in a diverse setting like the WTO. This study therefore recommends the use of new governance regulatory approaches which offer greater potential for flexibility and hence the regulatory autonomy.

¹⁰⁹¹ In a federation for example, services like health and education are provincial subjects, and they are quite independent in making policies regarding them.

¹⁰⁹² Above fn 1171.

¹⁰⁹³ See Ch 4. The EU also used mutual recognition principle for achieving its integration objectives, but its governance has further evolved as can be seen from the innovative regulatory techniques being adopted in various areas, including financial services trade.

¹⁰⁹⁴ Specific recommendations in this regard are contained in the concluding section of the chapter.

and other barriers to trade'. While these barriers are easy to identify in the case of goods, they are not so easy to identify or quantify in the services trade on the same pattern as the tariffs for goods.¹⁰⁹⁵

It may be suggested from the aforesaid discussion that rule-making or interpreting in the services trade needs to take into consideration the regulatory context of a measure being examined for its potential 'trade-hindering' effect. The capacity to accommodate the regulatory autonomy of a country flows naturally from looking at services-related barriers from this angle, offering potential for GATS in terms of its dual objectives highlighted earlier.

One might argue that the GATS preamble and its various provisions sufficiently accommodate consideration for the regulatory autonomy of a country. However, the GATS dual objective of services trade liberalization and a regard for Members' regulatory concerns needs something more than just a symbolic mention in the preamble, or a few exceptions from its obligations.¹⁰⁹⁶

Article I.3 of the GATS assigns a regulatory role to the government regarding even non-governmental bodies. The Council for Trade in Services has a separate negotiating mandate provided in Article VI: 4 which allows the Council to develop disciplines to prevent domestic regulations from becoming potential trade barriers. The Working Party on Domestic Regulations (WPDR) was established for this purpose.¹⁰⁹⁷ Article VI.4 of the GATS requires WTO Members to develop any necessary disciplines to ensure that measures relating to qualification requirements and procedures, technical standards and licensing requirements and procedures do not constitute unnecessary barriers to trade in services. However, all this rule-making seems to be tilted towards one objective, and that is to achieve liberalization at the expense of undermining any other regulatory objective.¹⁰⁹⁸

1. Is there a Need for a Paradigm Shift?

The above discussion demonstrates the need to change the regulatory direction of the GATS. This need becomes even more pressing since there is increasing evidence that countries are resorting to

¹⁰⁹⁵ OECD, 'Assessing Barriers to Trade in Services: Revised Consolidated Lists of Cross-Sectoral Barriers', TD/TC/WP(99)58 Final, 2001.

¹⁰⁹⁶ See general exceptions in Article XIV and security exceptions in XIV *bis*.

¹⁰⁹⁷ See the WTO document S/L/70 regarding decision on domestic regulation adopted by the Council for Trade in Service in April, 1999 available at: http://www.wto.org/english/tratop_e/serv_e/dom_reg_negs_e.htm accessed 20 June 2015.

¹⁰⁹⁸ Ch 3 further explores the progress in services related rule-making and supports this contention.

bilateral, regional and plurilateral agreements for their services trade.¹⁰⁹⁹ The first question to be asked, therefore, is what can be done at a conceptual level to help GATS remain a relevant agreement for trade in services? Although this study emphasises the need for conceptual work on various aspects of the multilateral services trade, most of the existing academic work has remained confined to legal and technical aspects of GATS.¹¹⁰⁰ Adlung, in one of his papers prepared for the Economic Research and Statistics division in 2009, concluded that:

‘Conceptual work remains more important in services, given the novelty of many of the elements involved, than in other areas of the WTO.’¹¹⁰¹

However, not much research is available on refining the conceptual foundation of GATS which relies heavily on the GATT model.¹¹⁰² To see how refining the conceptual basis for GATS could improve its working, we need to dwell upon the genesis of the GATS framework. Although more of this is contained in Chapter 1, it merits adding here that the ‘epistemic community’¹¹⁰³ which provided the intellectual input for the GATS birth had certain limitations. This community’s experience was limited to the goods trade, and it did not bring in any services specific knowledge, or at least, not from a services regulation point of view. This can be seen from a plain reading of the GATT and the GATS. Most of the main principles of the GATS have been taken from the GATT,

¹⁰⁹⁹ All major regional trade agreements now have a services trade component. However to quote a few examples, there are: ASEAN-China Agreement on Services, Chili-US FTA, Hong Kong Closer Partnership with Australia-Thailand FTA. See the official WTO website link for services RTAs at: https://www.wto.org/english/tratop_e/serv_e/dataset_e/dataset_e.htm accessed 30 June 2016.

The Trade in Services Agreement (TiSA) is a trade agreement currently being negotiated by 23 members of the World Trade Organisation (WTO), including the EU. Together, the participating countries account for 70% of world trade in services.

See Juan Marchetti and Petros Mavroidis (2004), ‘What are the Main Challenges for the GATS Framework? Dont Talk about Revolution’ (2004) 5 *European Business Organisation Law Review* 511-562; Martin Roy, Juan Marchetti and Aik Hoe Lim, ‘The race towards preferential trade agreements in services: How much market access is really achieved?’ in Marion Panizzon, Nicole Pohle and Pierre Sauve (eds), *GATS and the Regulation of International Trade in Services* (Cambridge 2008).

¹¹⁰⁰ See for example, Marchetti and Mavroidis, ‘What are the main challenges for the GATS Framework? Dont talk about revolution’ (2004) 3 *European Business Organisation Law Review* 511-562; Marchetti and Roy, ‘Services liberalisation in the WTO and in PTAs’ in Marchetti and Roy (eds), *Opening Markets for Trade in Services: Countries and Sectors in Bilateral and WTO Negotiations* (Cambridge 2009).

¹¹⁰¹ Rudolf Adlung, ‘Services Liberalisation from a WTO/GATS Perspective: In Search of Volunteers’ Feb, 2009 Staff Working Paper ERSD-2009-05. World Trade Organisation Economic Research and Statistics Division. Available at: www.wto.org/english/res_e/reser_e/ersd200905_e.pdf accessed 20 June 2015.

¹¹⁰² This is both with reference to the design of its obligations as mentioned in Ch 1 and the interpretation of its obligations by dispute settlement bodies as evidenced in Ch 2.

¹¹⁰³ Drake and Nicolaidis, ‘Ideas, Interests and Institutionalisation: “Trade in Services” and the Uruguay Round’ (1992) 46 (1) *International Organisation* 345.

e.g. the principles of Most Favoured Nation and National Treatment, or the concept of barriers to trade.¹¹⁰⁴

We may also dwell upon the general debate on the benefits of services related economic integration embodied in the notion of progressive liberalization, and the doubts that loom over this idea. Recall Nobel Prize-winning economist, Paul Samuelson's views on outsourcing. He writes:

'High I.Q. secondary schools in South Dakota, who had been receiving from my New York Bank wages one-and-a-half times the US minimum wage for handling phone calls about my credit cards, have been laid off since 1990... [Offshoring erosion of] the comparative advantage that had belonged to the US can induce for the United States permanent *lost* per capita real income.'¹¹⁰⁵

Given this less than favourable statement in favour of 'outsourcing', which is particularly relevant to the services trade, the impression one gets is that lowering the barriers to trade indiscriminately can produce national welfare losses. Nevertheless the conclusion drawn by Samuelson at the end of his paper favours free trade over 'lobbyist induced quotas and tariffs'. And this is what he says:

'If past and the future bring both type A inventions that *hurt* your country and Type B inventions that help - and when both *add* to real world net national product welfare – then free trade may turn out still to be pragmatically best for each region in comparison with lobbyist-induced tariffs and quotas which involve both perversion of democracy and non-subtle deadweight distortion losses.'¹¹⁰⁶

It follows from Samuelson's observations, however, that lowering trade barriers without pragmatic evaluation can lead to national welfare losses, or at least losses to some actors. Of course this is not to imply that the WTO Members should resort to outright protectionism.¹¹⁰⁷ What is being suggested is that the institutional approach to the implementation of the GATS should be appropriately honed to the regulatory diversity represented among the GATS signatories. Allowing more flexibility in regulatory choice can become an instrument to overcome some of the conceptual and political obstacles in multilateral services trade mentioned in the discussion carried out in the earlier sections. This is not to suggest that such an approach is not relevant to the goods trade. The point in emphasizing the services trade, however is that protecting the national regulatory autonomy under the GATS obligations is more complex, because of the different nature

¹¹⁰⁴ This has been discussed at a greater length in Ch 1.

¹¹⁰⁵ Paul Samuelson, 'Where Ricardo and Mill Rebut and Confirm Arguments of Mainstream Supporting Globalisation' (2004) 18 *Journal of Economic Perspectives* 137.

¹¹⁰⁶ *Ibid.* 142-143

¹¹⁰⁷ Protectionism is the economic policy of restraining trade between states through methods such as tariffs on imported goods, restrictive quotas and a variety of other government regulations.

of services trade, as explained earlier, and due to certain treaty obligations of the GATS. One such obligation is Article VI pertaining to domestic regulations, with its 'non-exhaustive' approach¹¹⁰⁸ unlike the GATT.¹¹⁰⁹

In addition to the elements specific to the services trade, e.g. factor mobility, intangibility, etc. which have been discussed before, another point that needs to be highlighted is the communication between the services supplier and the services consumer. Although a degree of trust is also required for the goods trade, in receiving or providing any kind of services we are committing ourselves more to the other's judgement. In fact, we develop a 'shared meaning' instead of a concrete image, unlike the goods to be traded. Thus communication, emphasised as a general prerequisite for trade,¹¹¹⁰ has a greater significance for the services trade. Relying on similar ideas, Janda and Glynn observed that:

'Trade in services is [thus] a principal pathway of mutual learning and confidence building between people.'¹¹¹¹

This discussion indicates that a framework for the services trade has to provide a space where continued exchange of information can lead to regulatory learning. The case for abandoning prescriptive regulatory interventions in favour of self-regulatory processes which have evolved through mutual adjustments thus becomes strong. This is where the case study of the EU in the previous section proves relevant. It has been observed that in EU governance, the conscious departure from hierarchical modes of governance to more flexible ones has led to considerable policy gains. A practical example of this, as discussed at some length in Chapter 5, is the Lamfalussy Framework for financial services trade in the EU, which had shown little progress through previously implied hierarchical approaches. This approach has also been termed as 'reflexive harmonisation' by Barnard and Deakin, who have observed its successful working in many areas of

¹¹⁰⁸ Article VI requires that any measures should be 'reasonable, objective and impartial' without providing an exhaustive list.

¹¹⁰⁹ See Ch 1 where both these provisions have been compared.

¹¹¹⁰ David Harper, 'Trade, Language and Communication' (2004). Draft available online at: <http://www.google.co.uk/url?sa=t&rct=j&q=&escr=s&frm=1&source=web&cd=1&ved=0CDEQfjAA&url=http%3A%2F%2Fciteseerx.ist.psu.edu%2Fviewdoc%2Fdownload%3Fdoi%3D10.1.1.93.4633%26rep%3Drep1%26type%3Dpdf&ei=A8zjUvWDEY2v7AalyYcBg&usg=AFQjCNHUJsy9rIFVwIFQL1Er7EAPMX2Edw&bvm=bv.59930103,d.ZGU> accessed 20 June, 2015.

¹¹¹¹ Richard Janda and Mark Glynn, 'In pursuit of the cosmopolitan vocation for trade: GATS and aviation services' in Panizzon, Pohle and Sauve (eds), *GATS and the Regulation of International Trade in Services* (Cambridge 2008).

European governance as well.¹¹¹² According to Barnard, Deakin and Hobbs, ‘reflexive harmonisation’ in the context of economic regulation means that:

‘[T]he preferred mode of intervention is for the law to underpin and encourage autonomous processes of adjustment, in particular by supporting mechanisms of group representation and participation, rather than to intervene by imposing particular distributive outcomes.’¹¹¹³

The GATS rule-making accordingly needs to be guided by such flexible governance paradigm to achieve any real progress, since its existing emphasis on prescriptive rules, one example of which is the proposed horizontal disciplines for domestic regulations so that they do not become unnecessarily trade restrictive, has led to a blind alley.

Next, it needs to be asked if one can expect the regulatory premises developed for the goods trade to work effectively¹¹¹⁴ for the services trade. As has been shown earlier, not only the main principles, like the Most Favoured Nation (MFN) and National Treatment, but their interpretation for the purposes of the services trade has been inspired by the goods trade framework and jurisprudence.¹¹¹⁵ The problem is not necessarily with the principles themselves, but a lack of services specific development in their character. This is where there is a need for a paradigm shift on a conceptual level. The conceptual level paradigm shift can then be fed into devising a services specific regulatory mechanism, without requiring re-writing of the GATS.¹¹¹⁶

The proposed paradigm shift is aimed at changing the regulatory philosophy of GATS.¹¹¹⁷ The GATS needs a broadening of its policy making base. In order to demonstrate that its existing policy base is narrow, we need to revert back to the GATS drafting, discussed in more detail in Chapter 1, which demonstrated how a few institutions¹¹¹⁸ and their narrow regulatory paradigm that national markets needed to be opened up to services trade for economic gains, dominated the process. A further argument regarding the narrow, non-representative nature of the whole trading regime

¹¹¹² Catherine Barnard and Simon Deakin, ‘In Search of Coherence: Social Policy, the single market and fundamental rights’ *Industrial Relations Journal* (2000).

¹¹¹³ Catherine Barnard, Richard Hobbs and Simon Deakin, ‘Reflexive Law, Corporate Social Responsibility and the Evolution of Labour Standards: the Case of Working Time’ ESRC Centre for Business Research, University of Cambridge Working Paper No. 294, 2004.

¹¹¹⁴ Effectiveness here denotes the GATS ability to achieve trade liberalization while protecting the WTO members’ regulatory autonomy as envisaged in its preamble.

¹¹¹⁵ This refers to the discussion in Ch 3 which reveals that the WTO dispute settlement bodies rely heavily on the goods-related jurisprudence when deciding on services trade disputes.

¹¹¹⁶ which has little political feasibility.

¹¹¹⁷ This change in the regulatory philosophy has its roots in the essential characteristics of the new governance regulatory approaches in the EU, identified in Ch 5 of the thesis, and found relevant for improving the working of the GATS.

¹¹¹⁸ Like UNCTAD and the GATT secretariat.

represented by the WTO, of which GATS is a part, can also be made here. While there is no denying that the broad WTO framework is based on the rules mutually agreed by the international community, does this give an open-ended and unlimited mandate to the WTO to make policy prescriptions for its Member countries? After all, the politics, social structure and governance of a country are an ever-changing phenomenon, with shifting policy requirements. Therefore, should there not be enough flexibility within the multilateral trade governance to also accommodate Members' policy concerns? Howse, when tracing the evolution of the world trading system, accordingly hinted upon this issue in the following words:¹¹¹⁹

'Once the result is a set of rules approved by each member according to its internal political system, the problem of legitimacy largely disappears, or its political dimension disappears—the insiders are then authorized to take the rules and, on the basis of their expertise, apply them to the "management" of the trading regime. This is not to say that new rules may not be required in the future, which will then be subject to the full process of politics within each member country.'

The question of broader representation and legitimacy therefore becomes quite pertinent to GATS governance. This question can be addressed by involving stakeholders from different tiers of the Member governments and individual country regulators. Emphasis needs to be placed on co-ordination and deliberative consultation between various actors. Instead of imposing or expecting uniformity in policies, GATS needs to accommodate varying implementation strategies for similar policy outcomes. A successful display of this has already been witnessed in EU governance through regulatory innovations. This approach is even more important because mandating certain policy outcomes leads to complex legal disputes, and has a so-called 'chilling effect' on the Member countries that shy away from committing to services openings.¹¹²⁰

Since 'regulation' is almost as significant as 'liberalization' for the purposes of the GATS¹¹²¹, there needs to be broad-based agreement on the objectives of regulation. What is currently available in the GATS, however, is a general mechanism for disciplining domestic regulations, instead of specific guidance on why countries may find it necessary to regulate.¹¹²² Moreover, in view of the several

¹¹¹⁹ Robert Howse, 'From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trading Regime' (2002) 96 AJIL.

¹¹²⁰ Rudolf Adlung, 'Services Liberalisation from a WTO/GATS Perspective: In Search of Volunteers' World Trade Organisation, Economic Research and Statistics Division Staff Working Paper ERSD-2009-05.

¹¹²¹ The GATS preamble recognises the right of Members to regulate, and to introduce new regulations on the supply of services within their territories. It has been amply shown in the discussion so far that the regulatory aspect of GATS is almost as important as liberalizing. This aspect has policy implications. It also raises protectionist concerns when most trade barriers in the services trade are associated with domestic regulations.

¹¹²² There are exceptions to GATS obligations in Article IVX. However they are narrow in scope, as has been discussed in Ch 1.

modes through which services trade can take place under GATS, the barriers to trade become limitless, as has been emphasized earlier. More often than not, they represent ‘behind border regulatory measures’ aimed at domestic welfare objectives or policy considerations. This calls for careful evaluation of what constitutes a barrier to trade in services, and how the trade gains from liberalization are to be balanced against the domestic policy objectives sometimes protected by these so-called ‘trade barriers’.

Another angle to the trade barriers is the complexity of how domestic welfare losses or gains are to be calculated against the level of services trade liberalization achieved through their removal. The cost and benefit of a regulatory policy can only be evaluated by a country in its domestic political context. Only national governments can decide which risks they can take, and which they cannot in order to sustain services trade liberalization. Some of the policy goals for which countries regulate are to protect their financial markets, to make services universally accessible, to achieve environmental objectives and to reduce poverty.¹¹²³ It is only logical, then, that instead of superimposing disciplines upon these domestic regulatory considerations, a more inclusive approach to understanding their underlying objectives is adopted. Better still, the very conceptualization of these domestic regulatory measures is changed from being ‘regulatory barriers’.

In terms of liberalization gains globally, if these policy objectives are pursued by countries to optimize domestic welfare, they need to be weighed against any global gains from services trade liberalization.¹¹²⁴

2. What are some of the Legal and Structural Issues?

This section focuses on legal and structural issues within the GATS framework. The intention is to raise certain questions regarding the GATS existing framework and emphasize the need for a dynamic process of secondary norm making, which has been entirely absent from the GATS working, but has helped the EU in becoming a dynamic and effective model of governance, as demonstrated earlier.

i. The GATS Law: Legal Ambiguities, Uncertainties and Complexities

The following is an examination of some of the provisions which are noticeably unclear and give rise to interpretative uncertainty, in order to see which features in the above picture are more

¹¹²³ These have been discussed at some length in Ch 2.

¹¹²⁴ Michael Trebilcock, Robert Howse and Antonia Aliason, *The Regulation of International Trade* (4th edn, Routledge 2013).

blurred than others.¹¹²⁵ Starting with the definition of services, it is noted that instead of providing a clear definition of services, GATS Article I relies on a very broad view of the meaning of trade in services. Article I.2 states:

ii. For the purposes of this Agreement, trade in services is defined as the supply of a service:

- (a) From the territory of one Member into the territory of any other Member;
- (b) In the territory of one Member to the service consumer of any other Member;
- (c) By a service supplier of one Member, through commercial presence in the territory of any other Member;
- (d) By a service supplier of one Member, through the presence of naturalized persons of a Member in the territory of any other Member.

With the rapid expansion in e-commerce,¹¹²⁶ most of it affecting the services trade¹¹²⁷, classification of electronically traded services as Mode 1 or Mode 2 becomes relevant. Although the WTO Panel and Appellate Body rulings in *US-Gambling* implied that GATS Mode 1 commitments are relevant to the electronic delivery of services,¹¹²⁸ ambiguity remains as to whether such services are covered in Mode 1 or Mode 2. What's more, a decision has yet to be reached on whether digital products should be defined as 'goods' or 'services'.¹¹²⁹

Article I.3 sets out the categories of entities for GATS disciplines, through which the scope of GATS extends not only to the three tiers of governmental authority, i.e. central, regional or local, but also to the non-governmental authorities to which any powers may have been delegated. In the case of the services sector, which is not under direct control of any governmental authority, these provisions imply a 'regulatory' role for the Member government. Thus Members come under the obligation to 'regulate' while implementing GATS, as a liberalizing agreement. Trebilcock and Howse explained this dichotomy in the following words:

'One view of such an obligation, that would go hand in hand with the functional view of the delegated power, is that a positive obligation is imposed on governments to curb the practices of

¹¹²⁵ Although this area has already been discussed in Ch 1, it is presented here alongside the existing academic views to provide a context for the recommendations which are to follow.

¹¹²⁶ The term e-commerce has been seen by the WTO as the 'production, distribution, marketing, sale or delivery of goods and services by electronic means'. Reference taken from General Council Work Programme on Electronic Commerce, WT/L/274 (30 September 1990).

¹¹²⁷ Sacha Wunch-Vincent, 'Trade rules for the digital age' in Marion Panizzon, Nicole Pohle and Pierre Sauve (eds), *GATS and the Regulation of International Trade in Services* (Cambridge 2008).

¹¹²⁸ US-Gambling Panel Report para 3.29 and 215.

¹¹²⁹ Sacha Wunch-Vincent, *The WTO, the Internet and Digital Products: EC and US Perspectives* (Oxford: Hart Publishing 2006).

these entities that violate the GATS. The notion that the GATS - as a liberalising agreement - could involve an obligation to regulate may seem, [at first], odd.'

The scheduling mechanism of GATS is very complex.¹¹³⁰ A schedule of commitment contains a minimum of eight entries per sector, which pertain to market access and national treatment with regards to four modes of supply to varying levels. Schedules are normally divided into two parts: Part I which contains 'horizontal commitments', being limitations or additional commitments applying to all services committed for liberalization; and Part II which contains sector to sector commitments. WTO members can schedule quantitative restrictions either numerically, or in the form of 'an economic needs test', and the latter has not been defined anywhere in the GATS. It is surprising to note that, despite the lack of definition or a shared script, according to WTO working, a total number of 253 economic needs tests have been listed in the schedules of 90 WTO Members as of 2001. Out of these, 49 apply to all services sectors.¹¹³¹ Marchetti and Mavroidis suggest that this test may not even exist in the domestic legal framework, and may just serve the purpose of 'contingent protection'.¹¹³² What they do not comment upon, however, is why such an overwhelming need for 'contingent protection' is felt by the Members in the application of the GATS framework. The answer to this question lies in the reluctance of Members for their regulatory space to be constrained by a multilateral market access agreement.

The system used for scheduling commitments contains more ambiguities than clear referencing. Technical and scientific innovations in sectors such as telecommunication and banking have not been properly listed, and Members appear ready to risk the uncertainties of a future dispute ruling, rather than engaging in open debate'.¹¹³³ Jara and Dominguez also observe that the classification list used by Members for scheduling is 'incomplete and outdated'.¹¹³⁴ Apart from specific sector-related and technical issues, there is general difficulty regarding the scheduling of overlapping market access and national treatment commitments. For example, if a Member had left market

¹¹³⁰ Marchetti and Mavroidis, 'What are the Main Challenges for the GATS Framework? Don't Talk about Revolution', (2004) 5 *European Business Organisation Law Review* 511-562.

¹¹³¹ Economic Needs Tests, Note by the Secretariat. S/CSS/W/118 30 November 2001. Available on the WTO website.

¹¹³² Marchetti and Mavroidis, 'What are the Main Challenges for the GATS Framework? Don't Talk about Revolution', (2004) 5 *European Business Organisation Law Review* 511-562.

¹¹³³ Rudolf Adlung, 'Services Liberalization from a WTO/GATS Perspective: In Search of Volunteers' WTO Staff Working Paper ERSD-2009-05, 2009. Adlung has made some practical suggestions regarding improving the scheduling mechanism in this paper including clubbing together of economically linked services sectors.

¹¹³⁴ Alejandro Jara and M del Carmen Dominguez, 'Liberalisation of Trade in Services and Trade Negotiations' (2006) 40 (1) *Journal of World Trade*.

access unbound, but had undertaken full commitment on national treatment, the GATS scheduling mechanism does not provide cover for this situation.¹¹³⁵

Similarly, Article XX.2, which deals with the listing of restrictions affecting both Article XVI (market access) and Article XVII (national treatment), does not clarify the relationship between these two Articles. It states:

‘Measures inconsistent with both Articles XVI and XVII shall be inscribed in the column relating to Article XVI. In this case the inscription will be considered to provide a condition or qualification to Article XVII as well.’

Since Article XVI (market access) applies across all four modes of services supply, and Article XVII (national treatment) applies only to the sectors inscribed in the Members schedule of commitments, their interrelationship for the purpose of Article XX.2 becomes difficult to explain or interpret. Marchetti and Mavroidis pointed out the drafting deficiencies in Article V (economic integration), Article I.3(b) (services supplied in the exercise of governmental authority) and paragraph 2 of the Annex on financial services (scope of the prudential carve-out). According to them, it is not clear from the wording of Article V as to what would make an economic integration agreement GATS compatible. Article I.3(b) does not sufficiently clarify what services can be considered as supplied in the exercise of governmental authority. The difference between a ‘prudential’ and ‘protectionist’ measure does not come through in the wording of the Annex on financial services.¹¹³⁶

Some of these areas have been taken up by WTO quarters for review, e.g. Article V and Article XX.2, and the 2001 Doha Ministerial Declaration contained an agreement regarding this.¹¹³⁷

‘We also agree to negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements. The negotiations shall take into account the developmental aspects of regional trade agreements.’¹¹³⁸

¹¹³⁵ Adlung and Matoo 2008, ‘The GATS’ in Aaditya Mattoo, Robert Stern and Gianni Zainini (eds), *A Handbook of International Trade in Services* (Oxford 2000) 60 fn 17.

¹¹³⁶ Marchetti and Mavroidis, ‘What are the Main Challenges for the GATS Framework? Don’t Talk about Revolution’ (2004) 5 *European Business Organisation Law Review* 511-562.

¹¹³⁷ WTO (2001b), Ministerial Declaration, adopted on 14 November 2001, WT/MIN(01)/DEC/1 para 29 and WTO (2002). Additional Commitments under Article XVIII of the GATS, Informal Note by the Secretariat, S/CSC/W/34.

¹¹³⁸ See Doha Ministerial Declaration at: http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm accessed 20 June 2015.

However, a stalled services agenda for the Doha round of WTO negotiations¹¹³⁹ has led to very little real work on these legal ambiguities and gaps.

There are varied explanations in the existing research for why the GATS framework is the way it is. One view about the GATS textual ambiguities is that they are the result of ‘novelty’ and ‘innovation’ that had to be carried out in the drafting of the GATS.¹¹⁴⁰ Features such as the definition of trade in services, the concept of market access and the scheduling methodology are quoted as an example of GATS specific provisions with no parallels in the GATT. The question, however is whether these ‘innovations’ are well considered from a services trade perspective. One such departure which has been discussed in the previous paragraphs is Article I.3 of the GATS. Assigning a regulatory role to the government for non-governmental bodies is a departure from the GATT approach which only applies its disciplines to governmental entities. It appears that the consequences of such obligations on the Members’ approach towards GATS have not been weighed completely.

It may be recalled that the US had started its efforts to put services on the international trade agenda in the 1970s through the OECD Trade Committee. In 1982, the USA pressed for GATT-based negotiations on services in a GATT Ministerial Meeting.¹¹⁴¹ So it was largely due to the US that services appeared on the agenda during the Uruguay Round.¹¹⁴² This, however, led to much opposition from other WTO Members, particularly the developing countries, who considered it an attempt at violating domestic policy sovereignty.¹¹⁴³ This conflict of interests led to many impasses and compromises out of political expediency.

Another view is provided by Feketekuty who argued that:

‘[T]he agreement’s deficiencies are the result of the manner in which the underlying framework was implemented through the drafting of legal provisions in the GATS.... After correctly analysing the unique requirements of an effective GATS regime for services, the negotiations frequently fell back on GATT terminology and legal drafting, even when they did not provide the best fit.’¹¹⁴⁴

¹¹³⁹ Details of which have been covered in Ch 3 of the thesis.

¹¹⁴⁰ Delimatsis, *International Trade in Services and Domestic Regulations: Necessity, Transparency and Regulatory Diversity* as above.

¹¹⁴¹ Drake and Nicolaidis, ‘Ideas, Interests and Institutions: “Trade in Services” and the Uruguay Round’ (1992)46 *International Organisation* 45.

¹¹⁴² I discuss this in more detail in the introductory chapter dealing with the genesis of the GATS.

¹¹⁴³ This has been documented in detail in Ch 1. Also see Raghavan Chakravarthi, *Recolonization: GATT, the Uruguay round & the Third World* (London : Zed, 1990, Ch 5 on services).

¹¹⁴⁴ Geza Feketekuty, ‘Assessing and Improving the Architecture of GATS’ in Peter Sauve and Robert Stern (eds), *GATS 2000: New Directions in Services Liberalisation* (The Brooklyn Institute 2000).

This statement seems self-contradictory, although the latter part of it regarding negotiators' frequent reliance on GATT terminology and drafting is factually correct. If it is assumed that the GATS negotiators correctly analysed the 'unique requirements' of an effective regime for services, which is the aforesaid author's viewpoint, then it does not make for good legal judgement to rely on the GATT framework. Moreover, if they did rely on the GATT framework for the drafting of GATS, then evidently sufficient analysis of the requirements of an effective framework for the services trade was not carried out. This is supported by the fact that the three institutions which were consulted most frequently to address conceptual difficulties while framing the GATS were the GATT secretariat, the OECD and the UNCTAD. This community's 'experience' was limited to the goods trade and did not bring in any services specific knowledge or at least, not from a services regulation point of view.¹¹⁴⁵ This takes us back to the issue of the existing research gap regarding conceptual differences between the goods and services trade. Highlighting this difference could help in making a sound foundation for the GATS.

The themes under discussion in the preceding paragraphs converge on one point, that the liberalization of the services trade under GATS needs to be looked at, and interpreted from, an angle different from the goods trade. This observation is further strengthened by very little progress in terms of services trade liberalization commitments, as well as the services rule-making agenda in the past years.¹¹⁴⁶

At this point it is relevant to explore some of the approaches recommended in the current research for improving the GATS legal framework and structure.

B. Improving the GATS Framework: Current Recommended Approaches

The common themes that run through the existing body of research seeking to improve the performance of GATS, together with general agreement on its unfinished business in rule-making and liberalization commitments¹¹⁴⁷ are discussed in the following paragraphs.

¹¹⁴⁵ This has been discussed at considerable length in Ch 1.

¹¹⁴⁶ For a general overview of the services negotiations, see the following link at: http://www.wto.org/english/tratop_e/serv_e/s_negs_e.htm accessed 20 June 2015;

and for a more detailed discussion see Ch 4 of the thesis which deals with the Doha Round of services negotiations.

¹¹⁴⁷ See *inter alia* Marchetti and Mavroidis, 'What are the Main Challenges for the GATS Framework? Don't Talk about Revolution' (2004) 5 European Business Organisation Law Review 511-562; Geza Feketekuty, 'Assessing and Improving the Architecture of GATS' in Peter Sauve and Robert Stern (eds), *GATS 2000: New Directions in Services Liberalisation* (The Brooklyn Institute 2000); Delimatsis, *International Trade in Services and Domestic Regulations: Necessity, Transparency and Regulatory Diversity* (Oxford 2007); Patrick Low and Aaditya Mattoo, 'Alternative Approaches to Liberalisation under the GATS' in Peter Sauve and Robert Stern (eds), *GATS 2000: New Directions in Services Liberalisation* (The Brooklyn Institute 2000).

1. Dismantling Regulatory Barriers

An overwhelming majority of the available academic research in the area focuses upon the need to dismantle domestic regulatory barriers in services. Article XVI of the GATS, which covers 'Market Access' provisions for the services trade, will lose its significance unless there are strong disciplines pre-empting the domestic regulations from becoming barriers to trade. To quote a few examples, Delimatsis states:

'[T]he absence of a strong provision on domestic regulations can render Article XVI GATS without any real value.'¹¹⁴⁸

Mattoo and Low consider that:

'Trade in services, far more than trade in goods, is affected by a variety of domestic regulations. A central task in the coming GATS negotiations will be to develop disciplines which ensure that such regulations support rather than impede trade liberalization.'¹¹⁴⁹

And finally in Marchetti and Mavroidis's words:

'Regulations are pervasive in service activities. Before the Uruguay Round negotiations, economists and policy makers used to think about regulation of service activities as the impenetrable mass of restrictions and requirements that affected the production and supply of trade. Thus economists used to refer – and still do -to different types of regulation, such as economic regulation, health-and-safety, environmental or social regulation, and information regulation.'¹¹⁵⁰

As can be observed from the above, there seems to be a visible consensus among the GATS commentators regarding the need for deepening the disciplines on domestic regulations. Most of them agree that unduly burdensome regulatory barriers aimed at pre-empting market failure undermine the liberalization of services under the GATS. The basic argument for the need to regulate the services sector and counter-argument for domestic regulation to be non-restrictive is summed up in the following table:¹¹⁵¹

¹¹⁴⁸ Delimatsis, *International Trade in Services and Domestic Regulations: Necessity, Transparency and Regulatory Diversity* (Oxford 2007) 290.

¹¹⁴⁹ Patrick Low and Aaditya Mattoo, 'Alternative Approaches to Liberalisation under the GATS' in Peter Sauve Peter and Robert Stern (eds), *GATS 2000: New Directions in Services Liberalisation* (The Brooklyn Institute 2000).

¹¹⁵⁰ Marchetti and Mavroidis, 'What are the Main Challenges for the GATS Framework? Don't Talk about Revolution', (2004) 5 *European Business Organisation Law Review* 511-562.

¹¹⁵¹ Although this is a rather old study, it is being used since there has hardly been any change in the approaches towards disciplining domestic regulatory policies to date. The reader may also refer to the current rule-making in the GATS discussed in Ch 3 in this regard. Table 1 is taken from Mattoo's paper in *The WTO/World Bank Conference on Developing Countries' in a Millennium Round*, WTO Secretariat, 20-21 September 1999, available at:

Table: I

Dealing with domestic regulations at the multilateral and national level			
Market failures	Services sectors	Multilateral approach	Action required at national level
Monopoly/ oligopoly	Network services: transport (terminals and infrastructure), environmental services (sewage) and energy services (distribution networks).	Generalize key disciplines in telecom reference paper to ensure cost-based access to essential facilities, be they roads, rail tracks, terminals, sewers or pipelines.	Develop pro-competitive regulation to protect consumer interests where competitive market structures do not exist.
Asymmetric information	Intermediation and knowledge-based services: financial services, professional services, etc.	Non-discrimination and generalization of the 'necessity' test. Use the test to create a presumption in favour of economically efficient choice of policy in remedying market failure.	Strengthen domestic regulation to remedy market failure in an economically efficient manner.
Externalities	Transport, tourism, etc.		
Social objectives: Universal service	Transport, telecommunications, financial, education, health.		Devise economically efficient means of achieving social objectives in competitive markets.

Source: Matoo, fn 763

Note that in all four categories, the recommended approach to dealing with domestic regulations becoming an obstruction to free trade is to enhance the 'disciplines' on domestic regulations in various forms.

One suggested way of establishing these disciplines is by introducing a generalised 'necessity test'.¹¹⁵² Necessity tests typically require that covered measures which restrict trade do not go beyond what is 'necessary' to achieve a Member's policy objective. While Article XX of the GATT is rather specific in objectives, and clearly identifies situations in which invoking a necessity test may

http://www.iatp.org/files/Developing_Countries_in_the_New_Round_of_GATS_.htm accessed 20 June 2015.

¹¹⁵² Note that the need for such a test appears in Article VI on domestic regulations and Article XIV on general exceptions.

become necessary, Article VI: 4 in contrast, requires a broader check on domestic regulations from becoming 'unnecessary barriers to trade in services'. The necessity test is a tool to establish whether a domestic regulatory measure is necessary to achieve domestic policy goals. It is meant to strike a balance between WTO Members' regulatory autonomy and WTO's mandate to ensure that domestic regulations do not become unduly trade restrictive. However, it does imply that a Member can be questioned on the kind of regulatory measure being sought, if not on the objective being pursued. This is a regulatory burden in itself and restricts the Member countries' regulatory autonomy in excess of what a simple non-discrimination obligation would require.

In this regard, the reader may recall that a four-pronged test to determine the inconsistency of a particular measure with Article XVII of GATS was designed by the WTO dispute settlement bodies.

¹¹⁵³ The four elements of the test were:

- Specific GATS commitments must have been undertaken
- Measures affecting trade in services
- Like services or service suppliers
- Treatment no less favourable

While determination of the first aspect is relatively straightforward, the remaining three points cannot be determined without looking at the wider context and objectives associated with the measures under consideration. GATS does not provide an inherent mechanism to determine the likeness of services, or the extent of favourable/unfavourable treatment.¹¹⁵⁴ The only possible way of determining the appropriateness of a regulatory measure can thus be an examination of its context, i.e. its objectives and the kind of effect it has on domestic and foreign service suppliers. The European Community's appeal to apply an 'aim and effects' approach, which could have helped in bringing these out, was rejected, while again relying on GATT related jurisprudence instead, e.g.. *Japan-Alcoholic Beverages* case. It is worth reproducing the relevant part of the decision to understand the approach taken by the Appellate Body. The decision read:

'We see no specific authority either in Article II or in Article XVII of the GATS for the proposition that the "aims and effects" of a measure are in any way relevant in determining whether that measure is inconsistent with those provisions. In the GATT context, the "aims and effects" theory had its origins in the principle of Article III:1 that internal taxes or charges or other regulations "should not be applied to imported or domestic products so as to afford protection to domestic

¹¹⁵³ WT/DS 27/R.

¹¹⁵⁴ Mireille Cossy, 'Determining "likeness" under the GATS: Squaring the circle?', WTO Staff Working Paper ERSD-2006-08, September 2006.

production". There is no comparable provision in the GATS. Furthermore, in our Report in *Japan – Alcoholic Beverages*, the Appellate Body rejected the "aims and effects" theory with respect to Article III:2 of the GATT 1994. The European Communities cites an unadopted panel report dealing with Article III of the GATT 1947, *United States - Taxes on Automobiles*¹¹⁵², as authority for its proposition, despite our recent ruling.¹¹⁵⁵

Perhaps guided by the WTO dispute settlement bodies' direction in the matter, the need for developing a horizontal¹¹⁵⁶ necessity test remains the most highly recommended approach for controlling the 'trade inhibiting' effects of domestic regulations.¹¹⁵⁷ It is even considered 'the key proxy for drawing a fine line between legitimate regulatory interference and protectionism'.¹¹⁵⁸ But let us first examine what has been the Council of Trade in Services approach towards the mandate it had under Article VI: 4 of the GATS, which states:

'With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, *inter alia*:

- (a) Based on objective and transparent criteria, such as competence and the ability to supply the service;
- (b) Not more burdensome than necessary to ensure the quality of the service;
- (c) In the case of licensing procedures, not in themselves a restriction on the supply of the service.'

The Council for Trade in Services established a subsidiary body responsible for accomplishing the mandate of Article VI: 4, i.e. a Working Party on Domestic Regulation (henceforth referred to as WPDR).¹¹⁵⁹ It should be stated at the outset that there has been little progress in the work within

¹¹⁵⁵ WT/DS 27/R para 241.

¹¹⁵⁶ Horizontal here implies covering all modes and sectors of services under the GATS and a screening of all regulatory measures for their potential for causing hindrance to trade.

¹¹⁵⁷ See *inter alia* Juan Marchetti and Petros Mavroidis, 'What are the Main Challenges for the GATS Framework? Don't Talk about Revolution', (2004) 5 European Business Organisation Law Review 511-562; Feketekuty, 'Assessing and Improving the Architecture of GATS' in Peter Sauve and Robert Stern (eds), *GATS 2000: New Directions in Services Liberalisation* (The Brooklyn Institute 2000); Delimatsis, '*International Trade in Services and Domestic Regulations: Necessity, Transparency and Regulatory Diversity* (Oxford 2007); Patrick Low and Aaditya Mattoo, 'Alternative Approaches to Liberalisation under the GATS' in Peter Sauve and Robert Stern (eds), *GATS 2000: New Directions in Services Liberalisation* (The Brooklyn Institute 2000).

¹¹⁵⁸ Delimatsis, '*International Trade in Services and Domestic Regulations: Necessity, Transparency and Regulatory Diversity* (Oxford 2007) 168.

¹¹⁵⁹ See WTO, Trade in Services, 'Decision on Domestic Regulation', S/L/70, 28th April, 1999, para 2.

the WPDR because of lack of consensus among Members, and this fact is well documented in various reports issued by the body.¹¹⁶⁰ It is therefore not considered necessary to trace the chronological history of consultative work on the WPDR in this study. Instead, more emphasis is placed on the principles being followed and approaches being taken in designing a necessity test for the purpose of Article VI: 4 of the GATS. General guidance for this purpose has been sought from the Secretariat's note which identifies necessity, transparency, equivalence and international standards as guiding principles for developing domestic regulation disciplines.¹¹⁶¹

The concept of necessity finds its equivalent in many other WTO Agreements, including GATT. Article XI :2(b) and (c) and Article XX of the GATT which deal with exceptions from certain obligations, offer such provisions.

The difference between the two provisions is that while GATS Article VI:4 represents the test for 'necessity' as a 'positive obligation', the necessity requirement in Article XX of the GATT is part of a general exception. While analysing the development of the necessity test in the GATT context through case law, Fontanelli observes that both the 'regulatory margin' and its 'predictable scope' for WTO Members might be shrinking. He goes on to further question:

'To put it bluntly, the de-regulatory inspiration of the GATT 1947 is maybe under the wearisome attack of the necessity test, as performed by the Panels and the AB. Could it be that **necessity has, to some extent, killed the GATT?**'¹¹⁶²

Note that this question was raised when the GATT necessity test had limited scope, being relevant to 'exceptions' only. It is not difficult to judge the consequences for the regulatory choices of the Members in case a horizontal necessity test is adopted for GATS with a greater outreach into domestic regulatory terrain. It may also be recalled that the necessity test analysis in the *US-Gambling* by the WTO adjudicating bodies was based on GATT case law.¹¹⁶³ The decision in the case was accordingly seen to expand the scope of GATS. It has been compared to the *Dassonville* case

¹¹⁶⁰ Hong Kong Ministerial Declaration was probably the closest Members came to adopting a text on the domestic regulatory reform. WT/MIN/(05)/Dec, para 5. Adopted on 18th Dec, 2005.

¹¹⁶¹ WTO, CTS, 'Article VI:4 of the GATS: Disciplines on Domestic Regulation Applicable to All Services', S/C/W/96, 1 March 1999.

¹¹⁶² Filippo Fontanelli, 'Necessity Killed the GATT - Art XX GATT and the Misleading Rhetoric about Weighing and Balancing' (Autumn/Winter 2012/13) 5 (2) European Journal of Legal Studies 36-56.

¹¹⁶³ Panel and Appellate Body Report *US-Gambling*.

by the ECJ with 'all trading rules enacted by Member states which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade', and becoming a subject of review.¹¹⁶⁴

The lessons from the interpretation of the necessity test in GATT, or proportionality test in EU case law are significant. If with specific and rather narrow objectives, the GATT necessity test and EU proportionality test are apprehended to encroach upon the Members' regulatory territory, what might be the impact of a horizontal necessity test on the GATS with greater regulatory concerns in the services trade?

From a trade policy perspective, the WPDR and academia seem stuck in a need for 'horizontal disciplines'¹¹⁶⁵ mantra. The reason for this is a presumption that regulatory interventions exist on a largely predictable spectrum of economic and social reasons, e.g. externalities, information asymmetries, etc.¹¹⁶⁶ See, for example, Mattoo's comment:

'[E]ven though services sectors differ greatly, the underlying economic and social reasons for regulatory interventions do not.'¹¹⁶⁷

This statement seems to rest on the assumption that the regulatory context for domestic policy-making is always the same. In practice, nothing could be further from truth. Among more than 160 members of WTO, the same regulatory measure could be applied, but with different objectives in mind. Taking one example, in Mode 4 supply of services,¹¹⁶⁸ one country could apply immigration restrictions for security reasons, while another may restrict labour movement to protect and implement certain labour standards. Indeed, there may be countless examples of varying regulatory responses by the Member countries in a given situation. Hence the regulatory context of a specific measure, which has some effect on the services trade, becomes important.

Accordingly one of the recommendations of the study is that in order to understand the regulatory context of a domestic policy measure, the aims and effect approach is more suitable than a broad, necessity-based approach.

¹¹⁶⁴ Frederico Ortino, 'United States: Measures Affecting the Cross-Border Supply of Gambling and Betting Services' (2008) 7 (1) World T.R. 115; Douglas Irwin and Joseph Weiler, 'Measures Affecting Cross-Border Supply of Gambling and Betting Services' (2008) 7 (1) World T.R. 100.

¹¹⁶⁵ Horizontal disciplines imply the disciplines which apply to all services sectors and service supply modes in the GATS across the board.

¹¹⁶⁶ See Table 1 above.

¹¹⁶⁷ Aaditya Mattoo, 'Developing Countries in the New Round of the GATS Negotiations: Towards a Pro-Active Role' in B Hoekman and W Martin (eds), *Developing Countries and the WTO: A Pro-active Agenda* (Oxford 2001) 88.

¹¹⁶⁸ Mode 4 refers to the movement of naturalized persons to supply the service.

2. Alternative Negotiation Approaches

A brief discussion on the prevalent negotiation approaches and their inadequacy in addressing the GATS governance challenges has been carried out in the first part of the study. While setting aside the broader dynamics of ‘single-undertaking’¹¹⁶⁹ which overshadowed the services negotiations, this section is aimed at critically evaluating various alternative negotiation approaches. EU case study demonstrates that the informal and soft policy instruments in its governance have made a considerable contribution to the achievement of its integration goals, striking a balance of power between the organisation and its members. In an otherwise hierarchical governance model of the GATS, the mandate for regular negotiations is a similar tool available to countries. A lot can be achieved, both in terms of liberalization gains and protecting domestic regulatory choices, if this tool is used effectively. This section accordingly discusses the pros and cons of some of the alternative negotiation approaches towards GATS. Negotiating modules which have been adopted by the WTO services negotiators, or recommended as alternatives, are summed up below:

- **Friends groups:** These are informal sectoral or modal groups of like-minded Members. In 2005/2006 approximately 14 groups were working together in sectors such as logistics, maritime, audio-visual, legal and mode 4 services.¹¹⁷⁰
- **Bilateral Request and Offer Negotiations:** This method has its foundation on the tariff-based GATT mode for negotiations. It is the main method of negotiation employed by GATS.¹¹⁷¹
- **Formula:** Such approaches are aimed at securing a core level of liberalization among a higher number of parties.¹¹⁷²
- **Plurilateral Negotiations:** Plurilateral negotiations include a set of WTO members, with the benefits resulting from negotiations which are to be generalised on an MFN basis.
- **Sectoral Negotiations:** Sectoral services negotiations were conducted after the Uruguay Round. This type of negotiation saw results both in market access and rule-making, e.g. Telecom Reference Paper and Understanding on Financial Services.¹¹⁷³

¹¹⁶⁹ Single-undertaking approach meant negotiating agriculture, NAMA and other issues collectively. It marred services negotiations and has already been dealt with in more detail in Ch 3 of the thesis.

¹¹⁷⁰ Alejandro Jara and Carmen M del Dominiguez, ‘Liberalisation of Trade in Services and Trade Negotiations’ (2006) 40 (1) *Journal of World Trade* 122.

¹¹⁷¹ Elisabeth Turk, ‘Post-Hong-Kong: Experiences With Plurilaterals’ in Marion Panizzon, Nicole Pohl and Pierre Sauve (eds), *GATS and the Regulation of International Trade in Services* (Cambridge 2008).

¹¹⁷² Rachael Thompson, ‘Formula Approaches to Improving GATS Commitments’, in Sauve and Stern (eds), *GATS 2000 - New Directions in Services Trade Liberalisation* (Oxford 2000).

¹¹⁷³ Lee Tuthill and Laura B Sherman, ‘Telecommunications: can trade agreements keep up with technology?’ in Juan Marchetti Juan and Martin Roy (eds), *Opening Markets for Trade in Services: Countries and Sectors in Bilateral and WTO Negotiations* (Cambridge 2008).

Three of the most frequently used or talked about approaches are taken up for further discussion, i.e. bilateral, plurilateral and sectoral approaches. In addition to these specific approaches for the services trade, a brief account of a 'club of clubs approach' is also given, which has been recommended by some quarters as a general solution to the problems of rule-making in the WTO, due to the wide diversity in its membership.

2.1. Bilateral Request and Offer Negotiations

The core negotiating approach for the GATS negotiations has been the bilateral request and offer approach.¹¹⁷⁴ This approach, again, had its foundation in the method of negotiating tariffs for trade in goods. 'Request-offer' was the main method for services negotiations in the Uruguay Round and Doha Work Programme. While negotiations are carried out on a bilateral basis, the outcomes of such negotiations are multilateralised. This is due to the MFN clause of the GATS under which any trade concessions are to be extended to all other WTO Members. The Council for Trade in services issued negotiating guidelines and principles in March, 2001, reiterating this approach for negotiations.¹¹⁷⁵ The Guidelines, in accordance with the objectives of GATS were:

'[T]he negotiations shall be conducted on the basis of progressive liberalization as a means of promoting the economic growth of all trading partners and the development of developing countries, and recognizing the right of Members to regulate, and to introduce new regulations, on the supply of services. The negotiations shall aim to achieve progressively higher levels of liberalization of trade in services through the reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access, and with a view to promoting the interests of all participants on a mutually advantageous basis and to securing an overall balance of rights and obligations.'

The original text of the Doha Declaration reaffirms the 2001 negotiating guidelines, and sets deadlines for 'requests' and 'offers' for specific commitments.¹¹⁷⁶ The request and offer procedure, which was presumably laid down to shield vulnerable economies from drastic liberalization, led to fragmentation and little real progress in terms of services liberalization.¹¹⁷⁷ In the bilateral bargaining process, requests for market access in services tended to be highly ambitious, seeking

¹¹⁷⁴ Clare Kelly, 'Negotiating approaches from a Member's perspective' in Marion Panizzon, Nicole Pohl and Pierre Sauve (eds), *GATS and the Regulation of International Trade in Services* (Cambridge 2008).

¹¹⁷⁵ See the link at:

<http://www.wto.org/english/tratop_e/serv_e/s_negs_e.htm> accessed 20 June 2015.

¹¹⁷⁶ See the Services component of the Doha Ministerial Declaration WT/MIN(01)/DEC/1 November, 2001 available at:

<http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm> accessed 20 June 2015.

¹¹⁷⁷ Adlung and Roy, 'Turning Hills into Mountains? Current Commitments under the GATS and Prospects for Change', WTO Staff Working Paper ERSD-2005-01 Dt 23rd March 2005 available at WTO website.

complete removal of restrictions to free trade. The requests were also often not aligned with the target country market. The response in the form of offers was, on the other hand, minimalistic and fell far below the expected levels of market opening. Such negotiations were resource intensive.¹¹⁷⁸ The ineffectiveness of the negotiating process has thus led to a 'low level equilibrium trap, where little is expected and less is offered'.¹¹⁷⁹

Accordingly, the need was felt to experiment with alternative negotiatory approaches, and a shift to plurilateral from bilateral request-offer approach was suggested, vide Annex C of the Hong Kong Ministerial Declaration in December, 2005.¹¹⁸⁰ The following is a brief account of the merits or demerits of the alternative negotiatory approaches recommended for services trade negotiations.

2.2. Plurilateral Negotiations

The relevant text for providing a mandate for plurilateral negotiations in Annex C of the Hong Kong Ministerial Declaration is contained in paragraph 7:

'In addition to bilateral negotiations, we agree that the request-offer negotiations should also be pursued on a plurilateral basis in accordance with the principles of the GATS and the Guidelines and Procedures for the Negotiations on Trade in Services. The results of such negotiations shall be extended on an MFN basis. These negotiations would be organized in the following manner:

- (a) Any Member or group of Members may present requests or collective requests to other Members in any specific sector or mode of supply, identifying their objectives for the negotiations in that sector or mode of supply.
- (b) Members to whom such requests have been made shall consider such requests in accordance with paragraphs 2 and 4 of Article XIX of the GATS and paragraph 11 of the Guidelines and Procedures for the Negotiations on Trade in Services.
- (c) Plurilateral negotiations should be organised with a view to facilitating the participation

¹¹⁷⁸ Elisabeth Turk, 'Services post-Hong Kong - initial experiences with plurilaterals' in Marion Panizzon, Nicole Pohl and Piere Sauve (eds), *GATS and the Regulation of International Trade in Services* (Cambridge 2008).

¹¹⁷⁹ Aaditya Mattoo, 'Regulatory Authorities and WTO Negotiations on Services' (April 2006) 8 (9) Trade Policy Analyses, Cordell Hull Institute. Available at: [http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=8&ved=OCFwQFjAH&url=http%3A%2F%2Fwww.cordellhullinstitute.org%2FPTPA%2FVolume%25208%2520\(2006\)%2FVol.%25208%2C%2520No.%25209%2520Mattoo.pdf&ei=vZXuUpfkCsKy7AaMolEg&usg=AFQjCNFpj6VuxRa7pKrvKqGy9-D6QzmqeA&bvm=bv.60444564,d.ZGU](http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=8&ved=OCFwQFjAH&url=http%3A%2F%2Fwww.cordellhullinstitute.org%2FPTPA%2FVolume%25208%2520(2006)%2FVol.%25208%2C%2520No.%25209%2520Mattoo.pdf&ei=vZXuUpfkCsKy7AaMolEg&usg=AFQjCNFpj6VuxRa7pKrvKqGy9-D6QzmqeA&bvm=bv.60444564,d.ZGU) accessed 20 June 2015.

¹¹⁸⁰ See Annex C of the Hong Kong Ministerial at: http://www.wto.org/english/thewto_e/minist_e/min05_e/final_annex_e.htm#annexc accessed 20 June 2015.

of all Members, taking into account the limited capacity of developing countries and smaller delegations to participate in such negotiations.’

In her account of the run-up to the Hong Kong Ministerial and adoption of Annex C, Turk observed numerous variations in the language of the plurilateral negotiations. She noted that it shifted from a legally binding and mandatory exercise to a ‘best endeavour’ formulation. Further flexibility was introduced by a reference to paragraphs 2 and 4 of the GATS Article IX which addressed the regulatory concerns and developmental needs of the developing countries.¹¹⁸¹ During 2006, Members held three rounds of plurilateral negotiations, in which a total number of 21 requests are said to have been circulated.¹¹⁸² Although the process was considered useful in terms of technical knowledge sharing and transparency, liberalization commitments remained modest.¹¹⁸³ Plurilateral talks were pursued between 30, mostly OECD countries, ¹¹⁸⁴ and some larger developing economies. The idea of accumulating a ‘critical mass’ for the negotiations was applied, and it was further supported by subsequent research that eight countries (EU, US, Brazil, Canada, China, India, Japan, Korea and Mexico) accounted for 80% of global production.¹¹⁸⁵

The question is how to decide what constitutes a ‘critical mass’ for the purpose of carrying out plurilateral negotiations for the services trade. What ought to sustain and justify the pursuit of liberalization of the services trade? Is it the production of services, as has been the yardstick for the plurilateral negotiations so far, or is it the breadth of participation by WTO Members? Do the countries with greater production carry more weight, or those who benefit more from the claimed

¹¹⁸¹ Elisabeth Turk, ‘Services post-Hong Kong-initial experiences with plurilaterals’ in Marion Panizzon, Nicole Pohl Nicole and Pierre Sauve (eds), *GATS and the Regulation of International Trade in Services* (Cambridge 2008).

¹¹⁸² Scott Sinclair, ‘Crunch Time in Geneva: Benchmarks, Plurilaterals, Domestic Regulation and Other Pressure Tactics in the GATS Negotiations’ (June 2006) Canadian Centre for Policy Alternatives.. Available at: http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CC8QFjAA&url=http%3A%2F%2Fwww.policyalternatives.ca%2Fsites%2Fdefault%2Ffiles%2Fuploads%2Fpublications%2FNational_Office_Pubs%2F2006%2FCrunch_Time_in_Geneva.pdf&ei=uqHuUrW8KogB7Qbww4G4Bw&usg=AFQjCNE8tFsPLNnoiWnSc5Wzh0cSk3Y0qw&bvm=bv.60444564,d.ZGU accessed 20 June 2015.

¹¹⁸³ See the services commitments schedule on the following link at: http://www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm accessed 20 June 2015.

¹¹⁸⁴ On 14 December 1960, 20 countries originally signed the Convention on the Organisation for Economic Co-operation and Development. Since then, 14 countries have become members of the Organisation which are mostly developed countries. A list is available at OECD website at: <http://www.oecd.org/about/membersandpartners/list-oecd-member-countries.htm> accessed 20 June 2015.

¹¹⁸⁵ Patrick Messerlin and Erik van der Marel, ‘“Leading with Services” the Dynamics of Transatlantic Negotiations in Services’, Groupe d’Economie Mondiale Policy Brief, 2009. Available at: http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CCwQFjAA&url=http%3A%2F%2Fgem.sciences-po.fr%2Fcontent%2Fpublications%2Fpdf%2FMesserlin-VanderMarel_services07062009.pdf&ei=W2fvJv-4KNLe7AbHqIC4DA&usg=AFQjCNEYKLPgKFiD9xu_FG-xPW8XZiEsOQ&bvm=bv.60444564,d.ZGU accessed 20 June 2015.

welfare gains¹¹⁸⁶ of services trade liberalization? The ‘production’ analogy for determining the multilateral services trade agenda is, once again, a goods trade inspired approach. It has been pointed out in the first section of this chapter that a regulatory framework for services trade which relies on the conceptual basis provided by the goods trade cannot be very effective. This observation is further supported by the doubts regarding the design of plurilateral approaches adopted for the GATS negotiations so far.

It is worth mentioning that a stand-alone plurilateral agreement has recently been proposed by the United States and Australia. This agreement is being negotiated between almost 20 countries, most of which fall in the category of developed nations.¹¹⁸⁷ The agreement is being envisaged to overcome the stalemate of the Doha negotiations. It derives its justification from the WTO Ministers’ acknowledgement in December, 2011 that:

‘In order to achieve this end and to facilitate swifter progress, Ministers recognize that Members need to more fully explore different negotiating approaches while respecting the principles of transparency and inclusiveness.

In this context, Ministers commit to advance negotiations, where progress can be achieved, including focusing on the elements of the Doha Declaration that allow Members to reach provisional or definitive agreements based on consensus earlier than the full conclusion of the single undertaking.’¹¹⁸⁸

Although there is a shared understanding that the agreement would be brought back to the GATS and WTO fold, no modalities have been decided regarding this. While the proposed agreement is in its infancy, it nevertheless raises the question about what should be the deciding factors for obtaining the ‘critical mass’. The current approach is that the participating countries generate 70% of the world services trade.¹¹⁸⁹ If this is to be the criteria for advancing services trade, then questions should be raised regarding the GATS objectives pertaining to the developing and least developed countries as stipulated in its preamble. Questions should also be raised regarding the

¹¹⁸⁶ Jan Francois, ‘Services Trade and Policy’ 48 (3) *Journal of Economic Literature* 642-92.

¹¹⁸⁷ Countries include the EU, Australia, Canada, Chile, Chinese Taipei, Colombia, Costa Rica, Hong Kong, China, Iceland, Israel, Japan, the Republic of Korea, Mexico, New Zealand, Norway, Panama, Paraguay, Pakistan, Peru, Switzerland, Turkey and the USA. See European Commission website at: http://trade.ec.europa.eu/consultations/index.cfm?consul_id=177 accessed 20 June 2015.

¹¹⁸⁸ Elements for political guidance in statement for the closing session of 8th Ministerial conference of the WTO. Dec. 2011. Available at: http://www.wto.org/english/thewto_e/minist_e/min11_e/min11_closing_e.htm accessed 20 June 2015.

¹¹⁸⁹ See the link at: <https://servicescoalition.org/negotiations/trade-in-services-agreement> accessed 20 June 2015.

very raison d'être of GATS, since it derives its main justification from providing a multilateral platform for the services trade.

2.3. Sectoral Negotiations

The WTO Members conducted sectorial discussions at the very start of the GATS negotiations,¹¹⁹⁰ involving sectors such as telecommunication, construction, transport and financial services.¹¹⁹¹ However, further discussion is merited on the telecommunication negotiations since they led to substantial progress in terms of market opening commitments, as well as setting rules for the sector trade.¹¹⁹² Before the conclusion of the Uruguay Round negotiations in 1994, negotiators drafted the Ministerial Declaration on Negotiations of Basic Telecommunications, which was adopted in April, 1994. The negotiations were extended to get more commitments from WTO Members in view of the regulatory reforms being carried out domestically by most of them in the sector. The negotiations resulted in the Fourth Protocol for GATS, outlining a schedule of basic commitments for the telecommunication sector¹¹⁹³.

This was a well-represented schedule and developed, developing and least developed countries from all regions of the world undertook commitments.¹¹⁹⁴ Participants also succeeded in framing a set of principles for competition safeguards, licensing processes and the role of independent regulators, among other areas, in the form of a telecommunication Reference Paper to be used as a guide by Members for designing regulatory disciplines. Disciplines so designed were then to be inscribed as additional commitments under Article XVII of the GATS which states:

'Members may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII, including those regarding qualifications, standards or licensing matters. Such commitments shall be inscribed in a Member's Schedule.'

Article XVIII accommodates additional commitments of the Members with respect to measures which do not fall under the market access and national treatment provisions of the Agreement. Such commitments may be in the form of standards, qualifications, licences, etc. What is unusual

¹¹⁹⁰ Terence P Stewart Terence, *The GATT-Uruguay Round: A Negotiating History* (Kluwer Law 1995) 2372.

¹¹⁹¹ Ibid. 2372-2373

¹¹⁹² This discussion relies mainly on Lee Tuthill, 'User's Rights: The Multilateral Rules on Access to Telecommunications', *Telecommunications Policy*, 199620 (2) 89-99 and 'The GATS and New Rules for Regulators', 1997 *Telecommunications Policy* 21 (9/10)783-98.

¹¹⁹³ See the following link at:

http://www.wto.org/english/tratop_e/serv_e/4prote_e.htm accessed 20 June 2015.

¹¹⁹⁴ Lee Tuthill and Laura Sherman, 'Telecommunications: can trade agreements keep up with technology?' in Marchetti and Roy (eds), *Opening Markets for Trade in Services: Countries and Sectors in Bilateral and WTO Negotiations* (Cambridge 2008).

about this provision is that it can accommodate regulatory self-disciplines, of which the telecommunication Reference Paper is an example.¹¹⁹⁵ In this sector, more than 80 Members have used Article XVIII for additional commitments.¹¹⁹⁶ The results of the telecommunication services have been deemed 'impressive',¹¹⁹⁷ which has to be seen as an exception in the general low level progress in services trade liberalization.

What is more significant is that, in addition to sector specific market openings, these negotiations also addressed issues of a general nature, such as transparency and technical co-operation.¹¹⁹⁸

Both the process of negotiations and their outcome in the form of additional commitments and the Reference Paper on telecommunication, have important insights for this study. Some of the features of the negotiations which set them apart from other negotiation methods are now highlighted, and then additional commitments entered into by the Members, using the telecommunication Reference Paper are discussed.

The Decision establishing the Negotiating Group on Basic Telecommunication stated that the group would be open to all with observer status, even if they did not want to become a part of the negotiations. The observers were entitled not only to attend the formal meetings of the negotiating group, but also to receive the relevant documents and give their feedback.¹¹⁹⁹ This was a good way of ensuring the widest possible participation, and some 19 countries which joined as observers later joined in the actual negotiations.¹²⁰⁰ A mechanism was devised to exchange information regarding the regulatory regimes of the participating countries through

¹¹⁹⁵ World Trade Organisation, *A Handbook on the GATS Agreement* (Cambridge 2005).

¹¹⁹⁶ See the relevant WTO website page for telecommunication services at: http://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_e.htm accessed 20 June 2015.

¹¹⁹⁷ Tuthill and Sherman, 'Telecommunications: can trade agreements keep up with technology?' in Juan Marchetti and Roy Martin (eds), *Opening Markets for Trade in Services: Countries and Sectors in Bilateral and WTO Negotiations* (Cambridge 2008).

¹¹⁹⁸ See the Annex to the GATS on Telecommunications available at: http://www.wto.org/english/tratop_e/serv_e/12-tel_e.htm accessed 20 June 2015.

¹¹⁹⁹ TS/NGBT/1 available at: [https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?MetaCollection=WTO&SymbolList="TS/NGBT/1"+OR+"TS/NGBT/1/*"&Serial=&IssuingDateFrom=&IssuingDateTo=&CATTITLE=&ConcernedCountryList=&OtherCountryList=&SubjectList=&TypeList=&AutoSummary=&FullText=&FullTextForm=&ProductList=&BodyList=&OrganizationList=&ArticleList=&Contents=&CollectionList=&RestrictionTypeName=&PostingDateFrom=&PostingDateTo=&DerestrictionDateFrom=&DerestrictionDateTo=&Referencelist=&Language=ENGLISH&SearchPage=FE_S_S001&ActiveTabIndex=0&&languageUIChanged=true#](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?MetaCollection=WTO&SymbolList=) accessed 20 June 2015.

¹²⁰⁰ Henry Gao, 'Alternative Approaches to GATS Negotiations' in Marion Panizzon, Nicole Pohl and Pierre Sauve (eds), *GATS and the Regulation of International Trade in Services* (Cambridge 2008).

questionnaires. Thus some very useful groundwork regarding the existing regulatory diversity in the sector was carried out.

Most governments actively participated in this exercise. The technical aspects of, and conceptual issues associated with the sector were also discussed concomitantly.¹²⁰¹ All of these aspects of the negotiations in the telecommunication sector set them apart from the other two negotiation approaches discussed previously. While bilateral negotiations almost completely failed to generate any results, due to the lack of a shared script among Members, plurilateral negotiations were carried out in a club-like environment. The successful sectoral negotiations in the telecommunication sector were a result of greater room for accommodating the regulatory diversity represented in the WTO Membership. These negotiations relied on broader participation and deliberative consultation which could be deemed necessary for improving the GATS framework.

The Reference Paper is a reflection of the common understanding between a large number of WTO Members on how they wanted to regulate the telecommunication sector. Instead of entering into an endless debate on the GATS obligations, they agreed to design a specific framework for telecommunication.¹²⁰² The principles in the Reference Paper were flexible and allowed diversity of rules and practice. The paper served as a guide for regulatory design by the Members, and since it was an outcome of the feedback received from participants regarding their respective regulatory regimes as discussed above, it was easier to adopt. Perhaps this is the reason that, at the end of the negotiations in 1997, all barring two Members adopted the Reference Paper.¹²⁰³

Technical progress in the telecommunication industry and the domestic need for adjustments through reform are sometimes considered the main reasons for the negotiation success in this sector. Adlung suggests that the 'circumstances' were such that services liberalization became 'irresistible'.¹²⁰⁴ This view, however, only partially explains the success of the telecommunication negotiations. In my view, the negotiation dynamics, which took on board the diversity of regulatory environment from the outset, played an equal, if not more important part in their success. If it was only for the technical developments and pressure on governments to keep up the pace through

¹²⁰¹ Ibid.

¹²⁰² Peter Cowhey and Jonathan Aronson, 'Trade in Services Telecommunications' in Mattoo, Stern and Zanini (eds), *A Handbook of International Trade in Services* (Oxford 2008).

¹²⁰³ Ekaterina Markova, *Liberalisation and Regulation of Telecommunication Sector in the Transition Economies* (Physica Verlag 2009).

¹²⁰⁴ Rudolf Adlung, 'The GATS Turns Ten: A Preliminary Stocktaking', World Trade Organisation Staff Working Paper ERSD-2004-05.

regulatory reform, most of the services sectors today would have taken centre stage in the GATS negotiations. After all, many services have experienced dramatic technical progress over the past decades, e.g. the audiovisual sector, but not many WTO Members have felt compelled to reform and adjust by seeking liberalization through GATS.

2.4. Club of Clubs Approach

WTO consists of 163 Members¹²⁰⁵ with distinct legal systems, political traditions and expectations from the multilateral system.¹²⁰⁶ The need to accommodate this diversity is therefore apparent. Although 'consistency' is considered to be a desirable objective for multilateral trading systems,¹²⁰⁷ it is highly unlikely that WTO Members would be willing to agree upon everything all the time. This has been sufficiently proved by the impasse in the Doha Round of negotiations.¹²⁰⁸ Lawrence has accordingly proposed a 'club- of -clubs' approach to reform the WTO and make headway in the delayed workings of the body.¹²⁰⁹ This approach proposes a framework within which willing and like-minded Members can opt for a more extensive set of commitments on lowering barriers to trade and reducing the discriminatory domestic policy measures.¹²¹⁰ The author believes that this approach could enhance the legitimacy of WTO by letting the Members avoid those obligations which are not in their best interest. This, however, is a self-defeating argument. As acknowledged by the author himself, this approach may create 'two classes' of WTO citizen, first class Members who are a part of the club, and second class members who are not. Part of the legitimacy crisis of the WTO stems from a general apprehension regarding the Neo-Liberal development theory.¹²¹¹ Harvey defines the core principles of neo-liberalism as follows:

'[H]uman wellbeing can best be advanced by liberating individual entrepreneurial freedom and skills within an institutional framework characterised by strong private property rights, free markets, and free trade'.¹²¹²

¹²⁰⁵ As of June, 2014, and according to WTO website at:

<http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm> accessed 20 June 2015.

¹²⁰⁶ Craig Van Grassek, 'The consistency of WTO Rules: Can the Single Undertaking be Squared with Variable Geometry?' (2006) 9 (4) *Journal of International Economic Law* 837.

¹²⁰⁷ *Ibid.*

¹²⁰⁸ For further detail, see Ch 3 of the thesis

¹²⁰⁹ Robert Lawrence, 'Rulemaking Amidst Growing Diversity: A Club-of-Clubs Approach to WTO Reform And New Issue Selection' (2006) 9 (4) *Journal of International Economic Law* 823.

¹²¹⁰ *Ibid.*

¹²¹¹ John Ravenhill, *Global Political Economy* (3rd edn, Oxford 2011).

¹²¹² David Harvy, *A Brief History of Neoliberalism* (Oxford 2007).

WTO was the main channel of the dissemination of neo-liberal ideas regarding free trade. It did not, however, generate enough common ground among the developing and developed country expectations regarding its role, and the stalemate in trade negotiations has persisted, despite the 'development' branding of the current negotiation round as Doha Development Agenda. In view of this discussion, it is concluded that the proposed 'club-of-club' approach is likely to exacerbate the WTO legitimacy crisis, instead of addressing it. This proposal is not appropriate for pursuing the services trade through GATS, due to the numerous regulatory challenges associated with the service trade, which have already been discussed at some length.

This study has already touched upon international decision-making in a club-like environment, i.e. the Basle Accords in Chapter 5. While not obligatory, the norm setting for financial services through the Basle Accords has substantial influence on the way international financial markets work. So while country A might not be a signatory to the Accord, firms in that country will still feel pressured into acquiring the requisite standards to compete for business in the international market.¹²¹³ My view, therefore, is that such an approach runs the risk of indirectly forcing non-members to follow the norms set in a club-like environment, of which they were not even a part. This puts them in a doubly disadvantageous position.

C. Recommendations

As discussed earlier,¹²¹⁴ a major plurilateral agreement is currently being developed outside the WTO multilateral trading system. There are 23 negotiating partners in this agreement, including the US and the EU, accounting for 70% of world trade in services. This agreement is called the Trade in Services Agreement (TiSA) and is aimed at integration with the GATS at a subsequent stage. Before any recommendations are made on how to improve GATS effectiveness in terms of achieving multilateral trade liberalization, a discussion to examine the implications of this agreement for the future of GATS is necessary.

Although the agreement is still at its negotiation stage, its proposed framework has some significant features that might have implications for GATS, and accordingly for WTO Members.¹²¹⁵ The proposed

¹²¹³ Reference case study of the financial services trade in the EU, Ch 3.

¹²¹⁴ Ibid.

¹²¹⁵ It may be added that the agreement has drawn some criticism for the secrecy surrounding it, since no negotiation details or documents have been made available officially. As a result, this discussion relies heavily on the information and documents made available by the EU on the European Commission website. See the following link at:

<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1133> accessed 10 January 2017.

agreement has four parts. Part I consists of 'General Provisions', incorporating all the relevant articles from the GATS. No change has been introduced to the GATS articles, except with regard to the replacement of 'Members by 'Parties', the numbering and cross-referencing, as well as the reference to institutions. Part II is 'Understanding on Specific Commitments', and contains additional liberalization commitments. Article II contains provisions for a horizontal national treatment, combined with standstill and ratchet. Part II also contains a placeholder for further horizontal commitments or standards that participants might agree upon. Part III, termed 'New and Enhanced Disciplines', is meant to contain future regulatory disciplines. Part IV is entitled 'Institutional Provisions', i.e. for functioning of the agreement.¹²¹⁶

Article V of the GATS provides for negotiating such preferential trade agreements. However, there are two major concerns that need to be raised here. The first is regarding the lack of inclusiveness in the agreement. Although the countries negotiating this agreement contribute a major share to the international trade in services, they still remain only 23 of more than a hundred WTO Members. If the agreement is concluded, what will be the incentive for carrying on multilateral services trade negotiations under the GATS umbrella? And would that not in turn leave out the majority of WTO Members from the benefits associated with an open and equitable services market? Accordingly, one of the commentators warns that this agreement will create 'two parallel global regimes for services trade and undermine the WTO system's political and judicial credibility'.¹²¹⁷ There is a need, therefore, for greater transparency and inclusiveness in the TiSA negotiations, and also for close monitoring by the WTO of what is being negotiated. This brings us to the second aspect of the agreement, which also needs close monitoring by the GATS negotiators and WTO Members.

The question that needs attention is whether this agreement is merely an enhanced market access agreement aimed at preserving autonomous levels of services liberalization, or is it a potential move towards achieving higher regulatory standards from all WTO Members participating in services commitments? Part III of the proposed draft intended for enhanced disciplines could be a potential step towards achieving and expecting higher regulatory standards from all WTO Members, if the agreement integrates with GATS in the future. This would lead to further narrowing of the regulatory space available to WTO Members to pursue their domestic policy objectives. Such regulatory standards would also mean that little room is left for adopting flexible regulatory approaches to rule-

¹²¹⁶ See Plurilateral Services Agreement Draft Text Provisions Proposal by the European Union available at: <http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152687.pdf>

¹²¹⁷ Pierre Sauve, 'The Trouble with TiSA' at : <<http://www.tradeforum.org/article/The-trouble-with-TiSA/>>

making and market openings, as recommended by this thesis. There is a need to acknowledge the diverse preferences, expectations and abilities of WTO Members, and GATS provides the best platform for this. Any diversions from this platform, if not crafted carefully enough to accommodate the broad majority of WTO Members' viewpoints, could therefore lead to marginalization of the greater number of developing countries. This scenario would make the future of GATS more uncertain.

The GATS framework is considered a milestone in the development of multilateral trade disciplines.¹²¹⁸ It has nonetheless achieved very little in terms of actual services trade liberalization.¹²¹⁹ It may be recalled that according to the second recital of the GATS preamble, progressive liberalization lies at the heart of the GATS framework. However GATS has fallen short of achieving this core objective in the two decades it has been in the field.¹²²⁰ This study has dealt with the conceptual and legal obstructions that have hindered the progress in multilateral services trade. The main assertion of this study is that GATS effectiveness as a multilateral services trade liberalization instrument is closely linked with its ability to accommodate WTO Members' regulatory concerns for the services trade. The study has explored various ways and means of fostering this ability. It has focused on the regulatory approaches best suited for this purpose and how to use them in a GATS specific context. The main recommendations of the study in this regard are contained below.

1. Horizontal Disciplines or an Aim and Effect Approach?

One of the key recommendations of the study is the use of an 'aims and effects' approach towards determining the trade hindrance effect of domestic regulations instead of the 'necessity' based approach currently under consideration. It is encouraging that two relatively recent WTO cases have witnessed a 'resurgence' in the aims and effects approach towards deciding whether a domestic measure is discriminatory or not.¹²²¹ In *Dominican Republic-Cigarettes*,¹²²² the Appellate Body went further than it had ever gone before when it ruled that even if a regulation had a

¹²¹⁸ Bernard Hoekman and Michel Kostecki, *The Political Economy of the World Trading System* (3rd edn, Oxford 2010); Michael Trebilcock, Robert Howse and Antonia Eliason, *The Regulation of International Trade* (4th edn, Routledge); John Jackson, 'The Evolution of the World Trading System -The Legal and Institutional Context' in Bethlehem and others (eds), *The Oxford Handbook of International Trade Law* (Oxford 2009).

¹²¹⁹ Rudolf Adlung and Roy Martin, 'Turning Hills into Mountains? Current Commitments under the GATS and Prospects for Change', WTO Staff Working Paper ERSD-2005-01 Dt 23rd March 2005 available at WTO website; Rudolf Adlung, (2006) 'Services Negotiations in the Doha Round: Lost in Flexibility?' 9 J.I.E.L 865. Also see the services component of the Doha Round discussed in Ch 3.

¹²²⁰ Ibid.

¹²²¹ Joost Pauwelyn, 'The Unbearable lightness of Likeness' WTO Staff Working Paper ERSD-2006-08, September, 2006.

¹²²² Appellate Body Report on Dominican Republic-Cigarettes, WT/DS302/AB/R, adopted on 19th May, 2005.

detrimental effect on imported goods in comparison to domestic products, that effect in itself may not be a sufficient proof of discrimination towards the imported goods. In this case, the domestic regulation being challenged was the condition to submit a bond for imported cigarettes, which was considered disadvantageous for the imported cigarettes in view of their smaller market share. The Appellate Body ruled:

'[T]he existence of a detrimental effect on a given imported product resulting from a measure does not necessarily imply that this measure accords less favourable treatment to imports if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product, such as the market share of the importer in this case. In this specific case, the mere demonstration that the per-unit cost of the bond requirement for imported cigarettes was higher than for some domestic cigarettes during a particular period is not, in our view, sufficient to establish "less favourable treatment" under Article III:4 of the GATT 1994.'¹²²³

In a way the Appellate body has identified a 'non-protectionist alternative purpose' in the regulation,¹²²⁴ which is akin to 'aims' in the 'aims and effects' approach.

A similar approach was reiterated in the panel report on *EC-Biotech*¹²²⁵ when it was observed by the panel that a demonstration by the complaining party that the measure is more burdensome towards the imported product is not sufficient in itself to show a protectionist purpose. The panel ruled:

'Argentina does not assert that domestic biotech products have not been less favourably treated in the same way as imported biotech products, or that the like domestic non-biotech varieties have been more favourably treated than the like imported non-biotech varieties. In other words, Argentina is not alleging that the treatment of products has differed depending on their origin. In these circumstances, it is not self-evident that the alleged less favourable treatment of imported biotech products is explained by the foreign origin of these products rather than, for instance, a perceived difference between biotech products and non-biotech products in terms of their safety, etc. In our view, Argentina has not adduced argument and evidence sufficient to raise a presumption that the alleged less favourable treatment is explained by the foreign origin of the relevant biotech products.'¹²²⁶

¹²²³ Ibid para 96.

¹²²⁴ *Supra* fn 1274.

¹²²⁵ Panel Report on EC-Biotech Products, WT/DS291/R, adopted on 21st November 2006.

¹²²⁶ Ibid para 7.2514.

In light of this trend in the GATT related judgements of the WTO adjudicating bodies, Pauwelyn sees the possibility of a ‘non-protectionist’ purpose, e.g. health, environment, consumer protection, etc. ‘justifying’ domestic regulation.¹²²⁷

The need for such a consideration is even greater in the context of the services trade, and it is hoped that the WTO dispute settlement bodies will consider these trends when deciding future GATS cases.

The question of how to distinguish between ‘discrimination’ and ‘genuine regulatory concern’ can also benefit from the work done by Hudec on the possibility of adopting an ‘aims and effects’ approach.¹²²⁸ Although his discussion is predominantly about the GATT provisions, it does offer some relevant input which can be further developed in the services context. Hudec concerns himself with the question of how to deal with the ‘*de facto* discrimination’ which is origin neutral.¹²²⁹ This is also a relevant question for GATS, and has been raised earlier with regard to the ‘purpose’ and ‘scope’ of services trade liberalization under the GATS treaty, the overarching objectives of the WTO and whether the direction of the rule-making agenda or the legal interpretations by the WTO dispute settlement bodies fit the same.¹²³⁰

Hudec’s approach towards an ‘aims and effects’ test is stated in the following words:¹²³¹

‘The policing activity of domestic regulatory measures is a delicate task, one that requires reaching an acceptable balance between the trade objectives of the regime and the legitimate regulatory claims of the member states.’

Hudec felt that the application of the ‘aims and effects test’ was a good approach to be adopted by the WTO dispute settlement bodies when dealing with the question of domestic regulations discriminatory effect. Broadly speaking, an ‘aims and effects’ approach towards the analysis of a regulatory measure can be described as an approach which takes into account the intention (aims) behind a regulatory measure and its results (effects). Hudec recognises two approaches in

¹²²⁷ *Supra* fn 1274.

¹²²⁸ Robert E Hudec, ‘GATT/WTO Constraints on National Regulation: Requiem for an “Aims and Effects” Test’ (1998) 32 *International Lawyer*. Reprinted in R.E.Hudec, *Essays on the Nature of International Trade Law* (London, Cameron May 1999). Also available at: www.worldtradelaw.net/articles/hudecrequiem.pdf accessed 20 June 2015.

¹²²⁹ *De facto* discrimination is essentially different from *de Jure* discrimination. While in the latter there is an explicit law which discriminates goods or services from a certain origin, in the *de facto* discrimination, a regulatory burden applies to goods or services from all origins, as well as to local goods or services. Hence the term ‘origin neutral’ is also used for such measures.

¹²³⁰ Refer to Ch 1 -4 of the thesis.

¹²³¹ Robert E Hudec, ‘GATT/WTO Constraints on National Regulation: Requiem for an “Aims and Effects” Test’ (1998) 32 *International Lawyer*. Reprinted in R.E.Hudec, *Essays on the Nature of International Trade Law* (London, Cameron May 1999).

determining 'likeness' in domestic and imported products, to see if a measure is affecting them in violation of Article III of the GATT.¹²³² The first approach is a kind of 'threshold test' which rests on factors (including physical features) determining the market competitiveness of the two products to determine their likeness. The other approach evaluates the 'regulations' to see if they render the two products 'alike' for the purpose of Article III of the GATT. Hudec suggests that :

'It is difficult to see why important issues of regulatory policy should turn on these sterile concepts of physical likenesses.'¹²³³

The first case to witness the development of an 'aims and effects' test was the GATT case on *US-Malt Beverage*. It involved the question of internal taxes and their *de facto* discriminatory effect on the imported goods¹²³⁴. Subsequently, this approach in its various forms came under discussion in cases including *Korea-Alcoholic Beverages*,¹²³⁵ *Korea-Beef*¹²³⁶ and *EC-Measures Concerning Meat and Meat Products (Hormones)*¹²³⁷¹²³⁸.

Rejection of an EC plea for applying an 'aims and effects' test in *EC-Bananas*¹²³⁹ case (which was a GATS case)¹²⁴⁰ caused disappointment to Hudec, who commented:

'The disappointment becomes even greater when it is recognised that the issues in these cases go to the very core of WTO's policing function over domestic regulatory policy - in some respect the most important element of its legal character'.¹²⁴¹

¹²³² Article III:4 of the GATT prohibits discrimination on the basis on nationality for like products. It states: The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

¹²³³ *Supra* fn 1250.

¹²³⁴ Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages*, adopted 19th June 1992, BISD 39S/206.

¹²³⁵ Appellate Body Report, *Korea-Taxes on Alcoholic Beverages*, WT/DS75/AB/R adopted February 1999.

¹²³⁶ Appellate Body Report *Korea-Measure Affecting Import of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R adopted January 2001.

¹²³⁷ *EC Measures Concerning Meat and Meat Products-Report of the Panel*, WT/DS26/R, August 1997 and Appellate Body Report WT/DS26/AB/R, January 1998,

¹²³⁸ It may be mentioned that this is not an exhaustive discussion on the GATT cases involving the application of 'aims and effects' test which would be beyond the scope of this research. The point is to examine if anything can be drawn for the GATS from this jurisprudence.

¹²³⁹ Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25th September 1999.

¹²⁴⁰ See Ch 3 on the case law for further detail.

¹²⁴¹ *Supra* fn 1250.

According to Porges and Trachtman, the Appellate Body seems to have given due consideration to Hudec's opinion when subsequently deciding the *EC-Asbestos*¹²⁴² case. It was recognised by the Appellate Body in this case that while looking at the legitimacy of the national regulatory measure, its 'purpose' needed to be taken into account.¹²⁴³

Hudec aptly pointed out that in the early days of WTO the policy motivations behind domestic regulatory architecture needed to be taken into account. This observation is valid even today, since none of the legal provisions are 'stand alone' entities. They are embedded in social realities and political discourses which need to be recognized by the rule-making and interpretative bodies.

As for the specific regulatory architecture of the GATS, the national treatment provisions contained in Article XVII do not prohibit different treatment of 'like' services, provided such treatment does not differentiate on the basis of nationality, or in other words is 'origin neutral'. Article XVII: 2 and 3 read:

2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.

3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

In this scenario, somewhat differently from the GATT, an issue can arise about whether the regulation is discriminatory in imposing certain conditions which become more burdensome for foreign service suppliers. This is exactly the question which arose in the *EC-Banana* case.¹²⁴⁴ The European Community's appeal to apply an 'aim and effects' approach was rejected in the following words:

'We see no specific authority either in Article II or in Article XVII of the GATS for the proposition that the "aims and effects" of a measure are in any way relevant in determining whether that measure is inconsistent with those provisions. In the GATT context, the "aims and effects" theory had its origins in the principle of Article III:1 that internal taxes or charges or other regulations "should not be applied to imported or domestic products so as to afford protection to domestic

¹²⁴² Appellate Body Report, *European Communities - Measures Affecting Asbestos and Asbestos Containing Products*, WT/DS135/AB/R, adopted April 9, 2001.

¹²⁴³ Amelia Porges and Joel P Trachtman, 'Robert Hudec and Domestic Regulation: The Resurrection of Aim and Effect' (2003) 37 (4) *Journal of World Trade* 783-799.

¹²⁴⁴ Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25th September 1999.

production". There is no comparable provision in the GATS. Furthermore, in our Report in Japan - Alcoholic Beverages, the Appellate Body rejected the "aims and effects" theory with respect to Article III:2 of the GATT 1994. The European Communities cites an unadopted panel report dealing with Article III of the GATT 1947, United States - Taxes on Automobiles¹²⁴⁵, as authority for its proposition, despite our recent ruling.¹²⁴⁵

It is evident from the Appellate Body's decision to disregard the request for an 'aim and effect' approach that it relied on a strict 'textual' interpretation of the GATS Article XVII: 2 and 3. This approach has been termed as the 'head counting' approach by Hudec, which ignored the 'evident purpose' and 'economic consequences' of the regulations involved.¹²⁴⁶ In the absence of criteria to determine 'likeness', which has been discussed at some length in Chapter 1 in services as in goods, the 'aims and effects' test could provide the necessary flexibility, a fact which seemed to have been ignored by the WTO adjudicating bodies.¹²⁴⁷

Some of the existing academic literature addresses the need to introduce the 'aims and effects' test in the GATS. Cossy, for example recommends introducing an 'improved' aims and effects test which 'would almost inevitably entail the introduction of some kind of proportionality or necessity test' within the definition of GATS national treatment.¹²⁴⁸ This proposal, however needs to be further refined. Since it is almost impossible to compare services or services suppliers, it is not the 'likeness' that essentially causes the discrimination, but it is the domestic regulation which may be discriminatory or not.¹²⁴⁹ Moreover visualising the 'necessity test' and the 'aims and effects test' simultaneously is impractical, since these approaches are quite different from one another. While the necessity test is universal, and even applies to measures which are not necessarily discriminatory, the 'aims and effects' test is intended for determining the *de facto* discrimination of a domestic regulation. In the goods context, SPS¹²⁵⁰ and TBT¹²⁵¹ agreements impose some kind of 'necessity test', leaving little room for the determination of *de facto* discrimination. However, the need for such an approach remains relevant in the GATS context. The possibility of having such a

¹²⁴⁵ Ibid para 241.

¹²⁴⁶ *Supra* fn 1250.

¹²⁴⁷ A more detailed discussion on the services case law has been carried out in Ch 3 of the research.

¹²⁴⁸ Mirielle Cossy, 'Some thoughts on the concept of 'likeness' in the GATS' in Marion Panizzon, Nicole Nicole and Pierre Sauve (eds), *GATS and the Regulation of International Trade in Services* (Cambridge 2008).

¹²⁴⁹ Joost Pauwelyn, 'The Unbearable lightness of Likeness' WTO Staff Working Paper ERSD-2006-08, September, 2006.

¹²⁵⁰ The WTO Agreement on the Application of Sanitary and Phytosanitary Measures. For more details see the following link at:

<http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm> accessed 20 June 2015.

¹²⁵¹ Agreement on Technical Barriers to Trade. For more details the following link at:

<http://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm> accessed 20 June 2015.

test in terms of GATS national treatment provisions and domestic regulations disciplines (Article VI), as opposed to the much recommended ‘necessity test’ can therefore be raised.

2. New Governance Regulatory Approaches and the GATS Framework

This study revolves around the need for a paradigm shift in the regulatory philosophy of the services trade. It emphasises that the current regulatory approaches of the GATS have not been very effective in addressing the regulatory concerns of WTO Members associated with the services trade, and hence the stalled services liberalization and rule-making agenda.¹²⁵² Similarly, the current negotiation approaches for the multilateral services trade have generated very few concrete results.¹²⁵³

Summing up the discussion around these themes, it can be said that the GATS conceptual basis for liberalizing the services trade is strongly influenced by the goods trade and the agreement governing the same, i.e. the GATT. This study asserts that this might not be an appropriate way of dealing with the services trade due to a variety of reasons which might compel WTO Members to regulate services trade.¹²⁵⁴ Secondly, the research points out that domestic regulatory choices are mostly seen as trade barriers. This has been demonstrated by a study of the GATS case law and the current consultations on rule-making. Predominant approaches for dealing with such trade barriers suggest their removal by applying horizontal disciplines.¹²⁵⁵ However, this study takes an exception to this view. It asserts that a generic approach is not suited to the services trade, since it does not take into account its sectoral and regulatory diversity, and is not very conducive to protecting WTO Members’ regulatory autonomy, one of the two stated objectives of the GATS. Thirdly, sectoral negotiation approaches, among the other approaches adopted or recommended so far, are more suitable for the services trade.

The main questions raised by the study are: does the GATS framework need to remove the majority of trade barriers, which are mostly domestic regulations in the services trade, or find a way to accommodate Members’ regulatory autonomy? Do the current regulatory approaches of the GATS need to be re-visited to make it more accommodating of the services trade related regulatory diversity and concerns?

¹²⁵² As highlighted in Ch 3 dealing with the current round of WTO negotiations.

¹²⁵³ The current negotiation approaches have been discussed in Ch 3.

¹²⁵⁴ Explained in more detail in the earlier sections.

¹²⁵⁵ This includes current academic studies, a detailed reference to which has been made in the earlier sections.

To answer these questions, we need to fall back upon the discussion carried out on the application of the new governance regulatory approaches by the EU. It was observed that the new governance regulatory approaches had helped the EU in achieving ‘policy convergences’ with the non-member states during the enlargement process.¹²⁵⁶ It was also seen that the EU had successfully used the new governance regulatory approaches in areas where the existing regulatory mechanisms had failed, or where there were ‘regulatory gaps’.¹²⁵⁷ Another relevant observation was that areas of high regulatory concern had been conducive to the emergence of the new governance regulatory approaches.¹²⁵⁸ Such areas, e.g. the financial services trade, which has high regulatory concerns, proved to be a ‘window of opportunity’ for the growth of the new governance approaches in the EU. These considerations had led to the observation that the use of new governance regulatory approaches in the EU can provide some lessons for GATS. Accordingly, instead of recommending them as a blueprint for GATS, some of their essential features have been identified. These are briefly reproduced below.

Most of the new governance approaches involve a broadening of the policy making base, as against the hierarchical approaches. Hierarchical approaches rely on top-down policy making, with detailed and prescriptive rules, liable to be legally enforced. The GATS regulatory approaches fit in very much with this norm. GATS prescribes certain rules for WTO Members, and violation of these rules is contestable by mandatory dispute settlement mechanisms. The existing direction of further rule-making under GATS is similar in nature, as has been discussed previously with reference to the proposed domestic disciplines.

While the EU case study reveals a conscious ‘shift’ towards the broadening of policy making by involving stakeholders from different tiers of government, private sectors or individual country regulators, there is a lot of emphasis on coordination and deliberative consultation between various actors, e.g. local, regional, national and European. An important feature of the new governance approach to regulation has been its acceptance of diversity. Instead of imposing or expecting uniformity in policies, it accepts different approaches to governance. One example of this is level 2 of the Lamfalussy mechanism for the financial services trade, which accommodates

¹²⁵⁶ See Ch 5.

¹²⁵⁷ See *inter alia* Stefano Bartolini, ‘New modes of governance: An introduction’ in Heritier and Rhodes (eds), *New Modes of Governance in Europe: Governing in the Shadow of Hierarchy* (Palgrave 2011); Charles Sabel and Jonathan Zeitlin, ‘Learning From Difference: The New Architecture of Experimentalist Governance in the EU Towards A New Architecture’ in Sabel and Zeitlin (eds), *Experimentalist Governance in the European Union: Towards A New Architecture* (OUP 2010); Ingmar Von Homeyer, ‘Emerging Experimentalism in EU Environmental Governance’ in Sabel and Zeitlin (eds), *Experimentalist Governance in the European Union: Towards A New Architecture* (OUP 2010); U Diedrichs, UW Reiners and W Wessels, *The Dynamics of Change in EU Governance, Studies in EU Reform and Enlargement* (Edward Elgar 2011).

¹²⁵⁸ *Ibid.*

different implementation strategies for the same policy outcome. These approaches rely more on softer instruments, e.g. flexible guidelines, revisable strategies and amendable targets.¹²⁵⁹ Reliance on hard law, mandating certain policy outcomes is accordingly less.¹²⁶⁰ The new governance approaches are conducive to experimentation and creation of new knowledge.¹²⁶¹ Pooling of a variety of experiences and sharing of best practices may give birth to new knowledge.¹²⁶² Policy objectives could be adjusted on the basis of evaluation, as in the EU integration process.¹²⁶³ It has also been observed in the EU context that due to a continuous exchange of ideas and arguments, the new governance regulatory approaches can change the Member States' policy preferences and make them more Community Compatible¹²⁶⁴. Comitology consultations, for example, can make the actors involved realize the external effects of their policy preferences and modify them if necessary. In such a scenario, policy making becomes a problem-solving process instead of a regulating job exclusively.¹²⁶⁵

These characteristics point to the possibility of using the new governance regulatory approaches in the GATS context. The following are some of the ways in which this could be done.

3. Re-Conceptualising the GATS

GATS has been in the field for more than fifteen years now, and many of its birth defects could have been addressed, had the time been used for meaningful reviewing of its framework. However this has not been the case. Part of the explanation may come from the general working of the WTO. This study demonstrates that the WTO negotiating process has not helped GATS in evolving as a regulatory mechanism.¹²⁶⁶ The rule-making process has been put on the back burner.¹²⁶⁷ The straightjacket of single undertaking with its insistence on an 'all or nothing approach' has left the

¹²⁵⁹ Ingmar Von Homeyer, 'Emerging Experimentalism in EU Environmental Governance' in Sabel and Zeitlin (eds), *Experimentalist Governance in the European Union: Towards A New Architecture* (OUP 2010).

¹²⁶⁰ U Diedrichs, W Reiners and W Wessels, *The Dynamics of Change in EU Governance, Studies in EU Reform and Enlargement* (Edward Elgar 2011).

¹²⁶¹ Ibid.

¹²⁶² Ibid.

¹²⁶³ U Diedrichs, W Reiners and W Wessels, *The Dynamics of Change in EU Governance, Studies in EU Reform and Enlargement* (Edward Elgar 2011).

¹²⁶⁴ Ibid.

¹²⁶⁵ Neil Walker and Grainne de Burca, 'Reconceiving Law and New Governance', (2006-7) *Columbia Journal of European Law* 521. Also see Ch 5 of the thesis.

¹²⁶⁶ Refer to Ch 3

¹²⁶⁷ Ibid.

whole WTO negotiating process paralysed, of which GATS is only one part.¹²⁶⁸ However this does not imply that the GATS framework in its own right is not in need of re-assessment.

Resting on this broader understanding, the thesis questions the relevance of existing studies/approaches to improve the working of the GATS framework, which pre-dominantly rely on the need to remove services trade barriers.¹²⁶⁹ An alternative view presented and question asked is: can accommodating the regulatory diversity represented by these trade barriers make the GATS framework more workable? The study has hinted at the need for a paradigm shift in viewing the services trade. There are two reasons for this. Firstly, the conceptual basis for GATS, as it stands today, is deeply entrenched in GATT and the goods trade. Secondly, its practical manifestations, e.g. interpretation of its obligations by the WTO dispute settlement bodies, are also influenced by GATT jurisprudence. It is further shown that the regulatory concerns associated with the services trade are not only exceedingly diversified, but can represent genuine policy considerations.¹²⁷⁰ It is therefore difficult to address them using a 'one size fits all' regulatory approach.¹²⁷¹ Additionally, it is important to accommodate genuine policy concerns,¹²⁷² e.g. environment, health, culture, etc. to address the regulatory precautions being exercised by WTO Members in their interaction with the GATS.

The research for earlier parts of the project reveals the potential of new governance regulatory approaches in accommodating the EU Members' regulatory autonomy. If we now refer back to the account of the telecommunication negotiations being conducted at the WTO forum, we might find at least a few common features between them and the new governance regulatory approaches. Of special note is the emphasis on deliberative consultations and broadening of the policy base. It is therefore worth exploring whether these approaches can be extended to other areas of the GATS regulatory architecture. Two options immediately spring to mind. One is the negotiations on a sectoral basis, and another is the additional commitments under Article XVIII of the GATS. Recall that Members are entitled to undertake additional commitments with respect to measures not

¹²⁶⁸ For a more detailed discussion, see Ch 3 of the thesis.

¹²⁶⁹ With services trade barriers mostly being the domestic regulatory measures.

¹²⁷⁰ Michael Trebilcock, Robert Howse and Antonia Eliason, *The Regulation of International Trade* (4th edn, Routledge 2013); Emily Reid, 'Regulatory Autonomy in the EU and WTO: Defining and Defending its Limits' (2010) 33 (4) *Journal of World Trade* 877-901.

¹²⁷¹ See Trebilcock and others, above, who view that 'The very fact that barriers to trade in services are so heterogeneous and difficult to quantify makes a comprehensive approach to their discipline extremely difficult to conceptualise'.

¹²⁷² And this might be equally true for the goods trade also, but dynamics of the services trade differ from the goods trade, as has been discussed.

falling under the market access and national treatment provisions of the Agreement: Article XVIII states:

Members may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII, including those regarding qualifications, standards or licensing matters. Such commitments shall be inscribed in a Member's Schedule.

Additional commitments are frequently used by Members in the telecommunications sector. Members have incorporated certain competition conditions and regulatory self-disciplines under Article XVIII of the GATS. These were developed during informal groupings of Members in the shape of a Reference Paper.¹²⁷³

Sectoral negotiations have been discussed previously with specific reference to the telecommunication sector. However, a more generalised discussion is warranted here in terms of their pros and cons, since they could be seen as a potential mechanism for adopting some of the relevant characteristics of the new governance approaches in GATS. The advantage of the sectoral approach is that it is broad enough to take into account the diversities associated with the individual sectors and the countries entering into negotiations. These diversities include 'differences in market structure and the scope for competition, differences in regulatory objectives and the nature of government regulation, and differences in the historical development of domestic and international institutions'.¹²⁷⁴ Simultaneously, sectoral approach is narrow enough to weigh the value of a specific sector's liberalization against potential regulatory concerns. Development of sector-specific emergency safeguard measures has also been found more feasible than the general over-arching disciplines.¹²⁷⁵ These approaches can prove conducive to the creation of new knowledge by the pooling of individual regulatory experiences, as was witnessed in the telecommunication sector, where a feedback system was developed to gain input from participating countries. In these respects, sectoral approaches are better aligned with the new governance regulatory techniques.

¹²⁷³ Refer to a more detailed discussion in the section on sectoral negotiations.

¹²⁷⁴ Geza Feketekuty, *International Trade in Services: An Overview and Blueprint for Negotiations* (Ballinger 1988) 241.

And Setting the Agenda for Next Round of Negotiations on Trade in Services 1998, available at: www.commercialpolicy.org/articles_news/trade_services.html accessed 20 June 2015.

¹²⁷⁵ Pierre Sauve, 'Been there, not yet done that: Lessons and challenges in services trade' in Marion Panizzon Marion, Nicole Pohl and Pierre Sauve (eds), *GATS and the Regulation of International Trade in Services* (Cambridge 2008).

Sectoral approaches, however do have their pitfalls.¹²⁷⁶ The biggest risk is of them being hijacked by special interest groups which might be protecting the interests of some monopolies. This trend has been seen as the possible cause of the failure of post-Uruguay negotiations in maritime services.¹²⁷⁷ This, however, is a common concern with participatory and deliberative processes in any regulatory setting, and the likely gains from adopting these approaches outweigh the possible pitfalls. Doubts have also been expressed that a purely sectoral approach would deprive negotiators of the 'policy space' to find trade-offs in one sector while giving concessions to another.¹²⁷⁸ In my view however, this is exactly the kind of 'trade-off' that does not occur between services sectors, since the regulatory concerns of one sector may not be comparable with another, even when the trade gains may be. Feketekuty observes that:

'Any purely sectoral discussion is likely to turn into an effort to justify and reinforce sectoral regulations that tend to be restrictive and interventionist'.¹²⁷⁹

But this is only valid when the countries work under the pressure of entering into irreversible commitments, which is not what is being visualised here by employing new modes of regulatory approaches. The sectoral approach to services trade negotiation with due flexibility in its disciplines, sharing of knowledge-base and revisability of regulatory objectives, is seen as one of the ways in which the questions pertaining to diversity within the GATS can be addressed. It is also recommended that the focus of future research needs to shift from 'liberalizing' to 'protecting the regulatory autonomy while liberalizing' to make GATS a useful multilateral services agreement. It has been discussed in detail in the earlier part of the thesis, but needs reiterating here, that the GATS' objective is trade liberalization on the basis of non-discrimination between its trading partners, and not unfettered market access.¹²⁸⁰ Therefore, when designing or interpreting its rules, this objective has to be kept in mind, along with the main provisions for which the rules are being designed or interpreted.

The question remains as to what should be the extent of faithfulness to commitments entered into by such negotiations. A very important feature of the new governance regulatory approaches is that they do not rely upon adjudication, but rather self-adjusting methods of compliance, while the

¹²⁷⁶ Henry Gao, 'Alternative Approaches to GATS Negotiations' in Marion Panizzon, Nicole Pohl and Pierre Sauve (eds), *GATS and the Regulation of International Trade in Services* (Cambridge 2008).

¹²⁷⁷ Carsten Fink, Aaditya Mattoo and Cristina Neagu Ileana, 'Trade in International Maritime Services: How Much Does Policy Matter?' (2002) 16 (1) World Bank Economic Review 81-108.

¹²⁷⁸ Henry Gao, 'Alternative Approaches to GATS Negotiations' as above.

¹²⁷⁹ Geza Feketekuty, 'Setting the Agenda for the Next Round of Negotiations on Trade in Services' 1998 available at commercial diplomacy website.

¹²⁸⁰ See Ch 1 which discussed the GATS legal obligations.

GATS obligations are governed by a binding dispute settlement system. If we were to re-imagine a role for the WTO dispute settlement system for GATS, it would only be that of a guest appearance, instead of a lead actor.

It may be mentioned that, on the basis of the European Court's engagement with the new governance regulatory approaches, Scott and Sturm presented a judicial model for the courts, where they could act as catalysts to the new governance institutions.¹²⁸¹ They outlined three aspects which could lend themselves to making the European Courts play a catalyzing role, i.e.

- The courts can play their role in ensuring full and fair participation of various actors in the new governance. These include those affected by, or responsible for the new governance regulatory approaches.
- The courts can monitor the adequacy of the information base on which the new governance decision-making rests.
- The courts can promote principled decision-making in new governance techniques by pre-requesting transparency and accountability.

While the ideology or relevance of this model cannot be undermined, one has to examine it in light of the author's own apprehensions about the fear of creating 'an empire of law'. This apprehension gains special significance for the role of the WTO judicial bodies in the context of GATS.

Observations presented earlier regarding the GATS regulatory 'outreach' and the WTO dispute settlement bodies' rather aggressive treatment of any violations, make it a slippery ground to tread. A preferable role for the WTO dispute settlement bodies, as seen by this author, is of lesser intervention rather than more, as against the role suggested above for the European Courts. This projection for a minimal role for the WTO bodies is reinforced by the assumption that any sectoral commitments entered into by the Members on the basis of new governance regulatory approaches would not be bound by the mandatory WTO obligations for market access. Moreover, if the commitments are arrived at by a deliberative process, the possibility of them becoming the subject of a dispute is minimized. Hence the chances of the WTO dispute settlement bodies' role in defining the limits of WTO Members' legal obligations also decreases. One proposal for them, when they do engage with GATS, is to consider the 'aim and effect' approach, as against a universal 'needs' approach, as already discussed.

Finally, some qualifications should be added to the potential use of the new governance regulatory approaches in the GATS.

¹²⁸¹ Joanne Scott and Susan Sturm, 'Courts as Catalysts: Re-Thinking the Judicial Role in New Governance' (2006-2007) 13 *Columbia Journal of European Law*.

In my case study of financial services trade liberalization in the EU, the roots of some of the new governance regulatory approaches were traced to a shift from ‘outcome-oriented regulation’ to ‘process-oriented regulation’ in the 1990s.¹²⁸² The Financial Services Action Plan of 1999 was the first step towards adopting a proactive approach towards harmonization, based on the aforesaid lines. The framework for financial services liberalization gradually became procedural, with a clear structure and legal code. There was a noticeable increase in the level of influence ‘interest groups’ exerted on the policy making. As noted by Mugge, the agenda for the Financial Services Action plan was set by the associated interest groups. Financial firms saw new business opportunities in the European integration of the financial markets.¹²⁸³ It was observed by Shirreff in the *Euromoney* magazine that firms like ABN Amro, Deutsche Bank, Citibank and Morgan Stanley had started lobbying in Brussels for maximum harmonization of rules.¹²⁸⁴ This implied that the institutional arrangements for the management of the liberalization process was also changing, and the private actors were now interacting with the ‘pan –European’ associations rather than their own governments. Regulation would be left to ‘depoliticized experts’ so that market forces would determine the running of the sector instead of political considerations.¹²⁸⁵ This is not necessarily a good scenario for GATS and may add to the apprehensions expressed in the previous section regarding the interest groups dominating services negotiations and agenda.¹²⁸⁶

A distinction also needs to be drawn between the ‘new governance’ regulatory approaches, which are mere technical procedures, and those which are participative and evolutionary in nature.¹²⁸⁷ It should be emphasized that it is the second category of ‘new governance’ techniques which has potential for GATS since, as discussed previously, appreciating the underlying objectives of domestic regulatory measures is an important part of services trade governance. Hence the recommendation above for an aims and effects approach to evaluate the domestic regulatory policies by the WTO dispute settlement bodies.

¹²⁸² Mugge, ‘Financial Liberalization and the European Integration of Financial Market Governance’. Available at: http://poloekdvpw.mpifg.de/e_documents/publikationen/Muegge%20%20Liberalization%20and%20Eu%20Integration.pdf accessed 20 June 2015.

¹²⁸³ Ibid.

¹²⁸⁴ D Shirreff, ‘Disgrace at the heart of Europe’ (October 1999) *Euromoney*.

¹²⁸⁵ *The Economist*, ‘No SEC’s, please, we’re European’, August 19th, 1999. Available at: <http://www.economist.com/node/233715> accessed 20 June 2015.

¹²⁸⁶ This apprehension has been discussed in detail while examining the sectoral negotiations in the previous section.

¹²⁸⁷ It may be added that the EU case study has provided evidence for both kinds of governance techniques being categorised as ‘new governance’ and employed in various areas, see Chs 5 and 6 of the thesis.

Furthermore, these approaches are not proposed as tailor-made alternatives to existing regulatory approaches, nor as mere tools for protecting domestic regulatory choices at all costs. Rather, they could be used to bring out the context that explains the regulatory choices of WTO Members, and in so doing, makes them more likely to be accommodated. This study does not strive to give complete answers to the GATS regulatory challenges, but rather to assert that GATS is in need of re-balancing and realigning in order to achieve its objectives. It recommends concrete ways in which a shift in its regulatory strategy could make it a more relevant trade liberalization instrument, and save it from the existential crisis it may soon face.

The study accordingly recommends that GATS regulatory philosophy needs to change from striving for legally binding disciplines to more flexible regulatory approaches. Some of the characteristics of the 'new governance' regulatory approaches identified in the EU case study could help achieve this flexibility in GATS governance. The GATS rule-making should be guided by services trade-related challenges, instead of the existing lessons from the goods trade. For this purpose, the researchers and policy makers need to undertake more conceptual work with regard to the services trade. One area of multilateral services trade governance which urgently needs re-conceptualizing is the notion of services trade barriers. The line between potential trade barriers and genuine domestic policy considerations remains blurred. GATS will continue to face tension between its trade-related objectives and protecting Members' regulatory autonomy unless these lines do not become clearer. This study recommends the use of an 'Aims and Effects' approach to gain this clarity. Sectoral negotiating approaches are recommended as being most suitable for pursuing the GATS services liberalization agenda, since they offer the potential for utilizing regulatory innovations which could improve GATS effectiveness in terms of its objectives.

These recommendations are nevertheless linked with an overall observation that the WTO needs to review its grand ambition, stipulated in the Doha negotiation agenda of multilateral trade. Instead, it needs to focus on smaller projects and incremental approaches to enable GATS related progress, which could be achieved through the recommendations offered above.

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