

ARTICLES

Bryan Mercurio & Dianna Shao, *A Precautionary Approach to Decision Making: The Evolving Jurisprudence on Article 5.7 of the SPS Agreement*

Rafael Leal-Arcas, *European Union–China Trade Relations*

Petra L. Emerson, *An Economic Integration Agreement on Services: A Possible Solution to the Doha Development Round Impasse*

NOTES AND
COMMENTS

Andrea L. Stephenson, *Germany's Ban of Monsanto's Modified Maize (MON810): A Violation of International Law*

Emily C. Kendall, *The United States Guards the Guards Themselves: The International Law Implication of the Swiss Bank and IRS Controversy*

TL
&D

Trade, Law *and* Development

Vol. 2, No. 2

2010

PATRON

Justice N. N. Mathur

FACULTY-IN-CHARGE

Yogesh Pai

EDITORS-IN-CHIEF

Manu Sanan

Meghana Sharafudeen

EDITORS

(MANAGING)

Prateek Bhattacharya

(CONTENT)

Aditi Patanjali

(CONTENT)

Gopalakrishnan R.

ASSOCIATE EDITORS

Aman Bhattacharya

Ambika Gupta

Jayant Raghu Ram

PROOFREADERS

Lakshmi Neelakantan

Meghana S. Chandra

Abhipsit Mishra

Shreya Munoth

CONSULTING EDITOR

Shashank P. Kumar

BOARD OF ADVISORS

Raj Bhala

Glenn Wiser

Jagdish Bhagwati

Daniel Magraw

B. S. Chimni

M. Sornarajah

Ricardo Ramírez Hernández

Vaughan Lowe

Published by

The Registrar, National Law University, Jodhpur

ISSN : 0976-2329 | eISSN : 0975-3346

Petra L. Emerson, *An Economic Integration Agreement on Services: A Possible Solution to the Doha Development Round Impasse*
2(2) TRADE L. & DEV. 252 (2010)

AN ECONOMIC INTEGRATION AGREEMENT ON SERVICES:
A POSSIBLE SOLUTION TO THE DOHA DEVELOPMENT
ROUND IMPASSE

PETRA L. EMERSON*

The World Trade Organization's (WTO) Doha Development Round of negotiations has not yet produced the desired greater liberalization of trade in services. Considering the importance of further liberalization, at least among the willing WTO Members, this article proposes the establishment of a preferential agreement outside the Doha Round; an Economic Integration Agreement (EIA). If successfully negotiated, such an agreement could attract other Members to join, and have the potential of becoming a multilateral agreement such as the WTO agreements on telecommunications and financial services, or a plurilateral agreement such as the Information Technology Agreement.

Currently, EIAs are effectively the only exception to the Most-Favored-Nation (MFN) treatment principle practicable for broader agreements, in addition to the generally available exceptions. EIAs may not only revive negotiations among interested countries, but also offer a sensible way to account for different levels of Members' technological and infrastructural development. For example, India may find an EIA with the U.S., EU, or OECD, whether concluded cumulatively or individually, accelerating its development. The same could be said in the case of Brazil. As a method of distancing service negotiations from negotiations on agriculture and non-agriculture market access, an EIA could enable closer cooperation between the U.S and EU. An EIA could also induce trade among

* Attorney at Law, Arizona, USA; Research Assistant to David A. Gantz, Samuel M. Feghtly Professor of Law and the Director of the International Trade Law Program, University of Arizona James E. Rogers College of Law, USA. E-mail: petra.emerson[at]alum.law.arizona.edu. The author wishes to thank Professor David A. Gantz for his engaged attention, invaluable comments on earlier drafts and encouragement, and is grateful to Eric Emerson for his support and to the editorial team at *Trade, Law & Development* for their contribution. The usual disclaimer applies.

the members of the Organization for Economic Co-operation and Development.

As an exception to the MFN principle susceptible to abuse on one hand, and as an opportunity to expand liberalization, Article V of the General Agreement on Trade in Services (Economic Integration), as interpreted, balances two main requirements for a valid ELA. This article analyzes the scope and interaction of the two main conditions for ELA's creation: "substantial sectoral coverage" and "elimination of substantially all discrimination". By exploring the meaning of Article V, its negotiating history, the relevant WTO Panel decisions, and practical application of ELAs, this article assesses the minimal requirements a valid ELA should satisfy.

In the past, ELAs have been concluded within a Free Trade Agreement (FTA) framework, but nothing prevents an ELA from being concluded as a stand-alone agreement, without relation to trade in goods or other trade. Once ELA partners agree on terms of their ELA or an enlargement of existing FTA, they should notify the agreement to the Council for Trade in Services. The Council will determine the ELA's consistency with Article V. The ELA will likely satisfy those requirements if it covers most of each party's major service sectors.

TABLE OF CONTENTS

- I. INTRODUCTION
- II. THE GENERAL AGREEMENT ON TRADE IN SERVICES
 - A. Overview
 - B. Achievements and Problems of the GATS
 - C. The Doha Round
- III. A COMPARISON OF ECONOMIC INTEGRATION AGREEMENTS WITH PLURILATERAL AGREEMENTS
 - A. Reasons for ELAs to be an Effective Solution to the Stalled Doha Round
 - 1. Transitional Solution
 - 2. Single Undertaking is Not Flexible Enough to Embrace Geopolitical Changes
 - 3. Plurilateral Agreements are Difficult to Add to Annex 4 & Plurilateral Negotiations Failed
 - 4. EIAs Can Reconcile Different Needs of Developed and Developing Countries
 - 5. A Way to Deepen Cooperation Between the U.S. and the EU
 - B. Shortcomings of ELAs
- IV. GATS ARTICLE II (MFN TREATMENT) AND RELATED EXCEPTIONS
 - A. Most-Favoured-Nation ("MFN") Treatment
 - 1. 'Measure Covered' by the GATS
 - 2. 'Like' Services or Service Suppliers
 - 3. No 'Less Favourable Treatment' 'Of Any Other Country'
 - B. Three Specific Exemptions to MFN – ELAs, MRAs and the One-Time Exemption

V. GATS ARTICLE V (ECONOMIC INTEGRATION)

A. *Article V:1(a) – “Substantial Sectoral Coverage”*

1. Textual Interpretation
2. Interpretation in the Light of ‘Wider Process of Economic Integration’
3. Interpretation of V:1(a) by WTO Panels
4. In Practice: Article V:1(a) Defined by Specific Interests

B. *Article V:1(b) – “Elimination of Substantially All Discrimination”*

1. Textual Interpretation and Scope
2. Interpretation of V:1(b) by WTO Panels
3. Article V:4: Discrimination Against Non-Members
4. Article V:2: ‘Wider Process of Economic Integration’

VI. CONCLUSION

I. INTRODUCTION

The potential for growth of international trade in services is tremendous.¹ A broad range of economic studies inform that gains from opening up international trade in services would far exceed benefits gained from opening up international trade in goods.² A 2002 World Trade Organization (WTO) study estimates that liberalization of international trade in services could yield a welfare gain of U.S \$6 trillion for developing countries (for the period 2005-16); four times more than the yield from liberalization of international trade in goods.³ Another study points out that a 25 percent cut in the barriers to international trade in services could bring more gain to both developing and developed countries than a 70 percent tariff cut in barriers to international trade in agriculture in the North, and a 50 percent cut in the same barriers in the South.⁴ In the USA, the world’s most competitive supplier of services,⁵ services account for nearly 70 percent⁶ of U.S. Gross Domestic

¹ Pascal Lamy, Director-General, World Trade Organization, Speech delivered to the Global Services Summit: Continued policy and regulatory reform in favor of services trade will be vital to supporting economic recovery, ¶ 15, (Oct. 14, 2009) WTO NEWS, *available at*: http://www.wto.org/english/news_e/spp1_e/spp1138_e.htm (last visited Apr. 25, 2010).

² *Id.* ¶ 16. Pascal Lamy cited recent research by the World Economic Group (Groupe d’Economie Mondiale) at Sciences Po, Paris showing that, “even if there are no tariffs on services, the costs of trading services internationally are at least twice as high as for goods”.

³ Press Release, WTO, Services Negotiations Offer Real Opportunities for all WTO Members and More so for Developing Countries, ¶ 4 (Press Release 300, Jun. 28, 2002), WTO NEWS, *available at*: http://www.wto.org/english/news_e/pres02_e/pr300_e.htm (last visited Oct. 1, 2010).

⁴ Yvan Decreux & Lionel Fontagné, *A Quantitative Assessment of the Outcome of the Doha Development Agenda* (Centre d’Etudes Prospectives et d’Informations Internationales, Working Paper No.10, 2006).

⁵ Hon. Charlene Barshefsky, *Ways to Advance the Services Trade Agenda*, ¶ 7, Panel Discussion at the Global Services Summit (Oct. 13, 2009), *available at*:

Product (GDP).⁷ According to a 2009 report by the Coalition of Service Industries, the vast majority of the workforce in each of the 435 U.S. Congressional Districts is employed in the service sector.⁸ Similarly, in the European Union (EU), trade in services accounts for almost two-thirds of the GDP and employment.⁹ Further, the service sector provides jobs with wages significantly higher than in other sectors.¹⁰

Despite the enormous potential for growth and gains from further liberalization of international trade in services, the WTO's General Agreement on Trade in Services (GATS)¹¹ is incomplete,¹² static¹³ and has not facilitated much progress toward greater liberalization of trade in services.¹⁴ Also, the latest WTO round of trade negotiations, the Doha Development Round (Doha Round),¹⁵ has not produced the desired results.¹⁶ Even after incorporating a plurilateral process¹⁷ into the negotiations, almost no new or revised services offers¹⁸ have been

<http://www.uscsi.org/Summit2009/RRWaystoAdvance.pdf> (last visited Apr. 29, 2010) (hereinafter Barshefsky).

⁶ The 70 percent of U.S. GDP gained from service sectors account for 80 percent of U.S. private sector GDP. *Id.*

⁷ *Id.*

⁸ *New Data Shows Service Sector As the Largest Employer in all U.S. Congressional Districts*, ¶ 3, GLOBAL SERVICES NETWORK, Dec. 3, 2009, available at: http://www.globalservicesnetwork.com/gsnalert_12309.html (last visited Apr. 29, 2010).

⁹ Barshefsky, *supra* note 5, ¶ 7.

¹⁰ *Id.*

¹¹ General Agreement on Trade in Services, Jan. 1, 1995, Marrakesh Agreement Establishing the World Trade Organization, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT Doc. MTN/FA, Annex 1B, available at: http://www.wto.org/english/docs_e/legal_e/26-gats.pdf (hereinafter GATS).

¹² RAJ BHALA, INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE 1539-41 (3d ed., 2008) (hereinafter BHALA) (discussing problems with the GATS).

¹³ Gary Hufbauer & Sherry Stephenson, *Services Trade: Past Liberalization and Future Challenges*, 10 J. INT'L ECON. L. 605, 630 (2007) (hereinafter Hufbauer & Stephenson).

¹⁴ RUDOLF ADLUNG, WORLD TRADE ORGANIZATION - ECONOMIC RESEARCH AND STATISTICS DIVISION, SERVICES LIBERALIZATION FROM A WTO/GATS PERSPECTIVE: IN SEARCH OF VOLUNTEERS 4 (2009) (hereinafter ADLUNG).

¹⁵ Launched at the Fourth WTO Ministerial Conference in Doha, Qatar, in November 2001. See generally http://www.wto.org/english/tratop_e/dda_e/dda_e.htm (last visited Oct. 01, 2010).

¹⁶ See Part II.C.

¹⁷ See Part III.A.3.

¹⁸ Members submit proposals of specific commitments of liberalization in a wide range of sectors and in movement of natural persons. The negotiation process is governed by Guidelines and Procedures for the Negotiations, first adopted by the Council for Trade in

submitted.¹⁹ Considering this development and the importance of continued liberalization of international trade in services, at least among the willing WTO Members, this article analyses the role of Economic Integration Agreements (EIAs),²⁰ an exception to the Most-Favored-Nation (MFN) treatment principle of the GATS,²¹ as a possible solution to the Doha Round impasse.

EIAs may not only revive negotiations among interested Members, but also offer a sensible way to account for different levels of Members' technological and infrastructural development, while enabling further services trade liberalization.²² For example, India may find an EIA with the U.S, EU, or Organization for Economic Co-operation and Development (OECD) accelerating its development.²³ The same could be said in the case of Brazil.²⁴ As a method of distancing service negotiations from negotiations on agriculture and non-agriculture market access (NAMA), an EIA could enable closer cooperation between the U.S and EU.²⁵ Similarly, the OECD too could induce greater economic activity among its members vide an EIA.²⁶ Moreover, EIAs may become an effective vehicle for greater liberalization of trade in services at the multilateral level.

In the light of these potential benefits, this article summarizes the current interpretation and use of the EIA exception to Article V of GATS by analyzing the text of GATS, its negotiating history, the WTO Panel decisions in this regard, as well as the current practical use of EIAs. Part II describes germane principles of the GATS. Along with discussing GATS' contributions to international trade, Part II outlines GATS' development through the Doha Round and related problems. Part III, on the other hand, while considering the role of preferential trade agreements (PTAs),²⁷ both EIAs and Plurilateral Agreements,²⁸ as a temporary

Services on March 28, 2001. Initially, participants were to submit requests for and offers of specific commitments by 2003, a deadline repeatedly extended. See WTO, Ministerial Declaration of 14 November 2001, ¶ 15, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) (hereinafter Doha Declaration), available at: http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#services (last visited Dec. 4, 2010).

¹⁹ Rudolf Adlung & Antonia Carzaniga, *MFN Exemptions under the General Agreement on Trade in Services: Grandfathers Striving for Immortality?*, 12 J. INT'L ECON. L. 357, 383 (2009) (hereinafter Adlung & Carzaniga).

²⁰ GATS, *supra* note 11, art. V.

²¹ GATS, *supra* note 11, art. V. See also Adlung & Carzaniga, *supra* note 19, at 357-8.

²² See Part III.A.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Preferential Trade Agreements (PTAs) enable its signatories, whether they are WTO Members or not, to give preferential access to each other's markets. Both Plurilateral

solution to the Doha Round impasse, essentially, compares EIAs to Plurilateral Agreements and explores several reasons for the former's superior utility and effectiveness.

Part IV describes the MFN treatment principle of the GATS and its related exceptions. It also explains the rise of EIAs in comparison to the other MFN exceptions. Part V focuses on the GATS Article V exception in detail, by analyzing the two main requirements for establishing a successful EIA: the first being "substantial sectoral coverage",²⁹ and the second being "elimination of substantially all discrimination".³⁰ In addition, Part V also explains the limits of these requirements on EIAs' scope and their role in preventing abuse of the EIA exception to MFN while encouraging liberalization among Members.

Part VI concludes that Members willing to continue liberalizing trade in services could eliminate some or all existing service trade barriers among each other by executing an EIA outside the Doha Round. Moreover, such an EIA could serve as a transitional stage toward liberalizing trade in services multilaterally, as new Members could join a working EIA and avail themselves of its benefits. As long as each signatory of an EIA increases liberalization at least in sectors in which it already affords National Treatment in its Schedule of Commitments, and as long as it decreases trade barriers in its "essential" service sector(s) and, probably, does not exclude any mode of supply, such EIA would likely prevail, if challenged. It should be noted, though, that this article analyzes three interpretations of a service "sector" definition at the heart of any EIA, and that the WTO Panel evaluates EIA's conformity with WTO rules on case-by-case basis. Additionally, EIA signatories should eliminate "substantially all discrimination", which effectively imposes an obligation to ensure internal MFN treatment among all signatories of an EIA. Last but not least, special consideration would likely apply for an EIA among the least developed countries, or if enabling a "wider process of economic integration", which may include trade in goods.

Agreements and EIAs are in their nature PTAs. But Plurilateral Agreements are agreements and associated legal instruments specified in Annex 4 to the WTO Agreement. They are binding on WTO Members that accepted them. *See infra* note 68. EIAs stem from the WTO as well. For more discussion about EIAs, see Part III and Part V of this article.

²⁸ *Id.*

²⁹ GATS, *supra* note 11, art. V:1(a).

³⁰ *Id.* art. V:1(b).

II. THE GENERAL AGREEMENT ON TRADE IN SERVICES

A. Overview

International trade in services is currently being negotiated within the multilateral GATS³¹ framework under the WTO umbrella.³² Nevertheless, individual Members also negotiate PTAs bilaterally or as regional trade agreements (RTAs), despite PTAs being only the second-best solution to a multilateral agreement,³³ as the main economic advantages of participating in bilateral or regional agreements are best realized on a wider, multilateral scale.³⁴ Thus, on the basis of this theory, it has been concluded that “...there is a big incentive to form and enlarge a customs union until the world is one big customs union, that is, until free trade prevails”.³⁵ By analogy and by sharing similar goals with trade in goods, the same dynamic applies to trade in services.

The GATS (which is the focus of this paper) applies to “any service in any sector except services supplied in the exercise of governmental authority”.³⁶ The definition of services trade under the GATS is four-pronged and dependent upon the territorial presence of the supplier and the consumer at the time of the transaction.³⁷ Pursuant to GATS Article I:2, the GATS covers the following: cross-border supplies into a Member’s territory (mode 1), consumption of services by Member’s nationals abroad (mode 2) and the presence of foreign-owned or -

³¹ The GATS consists of three components: (1) a general framework agreement for all WTO Members which lays out the general rules and obligations for trade and investment in services; (2) several important annexes (sometimes called protocols) on specific service sectors; and (3) national schedules of specific commitments concerning market access for each WTO signatory government, listing the specific service sectors that each nation has committed to the agreement. See Rafael Leal-Arcas, *The Resumption of the Doha Round and the Future of Services Trade*, 29 LOY. L.A. INT’L & COMP. L. REV. 339, 350 (2007) (hereinafter Leal-Arcas).

³² Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 187, 33 I.L.M. 1125 (hereinafter WTO Agreement).

³³ Murray Kemp & Henry Wan, *An Elementary Proposition Concerning the Formation of Customs Unions*, 6 J. INT’L ECON., 95-98 (1976).

³⁴ *Id.*

³⁵ *Id.*

³⁶ GATS, *supra* note 11, art. I:3(b). GATS art I:3(c) defines “a service supplied in the exercise of governmental authority” and it means “any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers”. Services requested by a governmental authority are governed by the Agreement on Government Procurement, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 4(b), 33 I.L.M. 1125, available at: http://www.wto.org/english/docs_e/legal_e/gpr-94_01_e.htm (hereinafter GPA).

³⁷ GATS, *supra* note 11, art. I:2.

controlled companies (mode 3) and of foreign natural persons (mode 4) within the Member's jurisdiction.³⁸

In contrast to the parallel General Agreement on Tariffs and Trade (GATT),³⁹ Members can negotiate and limit the degree of National Treatment and market access under the GATS.⁴⁰ The principles of non-discrimination, MFN and National Treatment, will then apply only to service sectors that Members have "listed in their schedules of commitments and only to the extent that no limitations have been attached".⁴¹ Members commit in their individual schedules via either a "positive list"⁴² approach or "negative list" approach.⁴³ However, regardless of their Specific Commitments under Part III of the GATS, Members are still bound by the General Obligations and Disciplines under Part II of the GATS. Nevertheless, Members are permitted to derogate from the MFN principle under GATS⁴⁴ by making certain exceptions which will be discussed in part IV of this paper.

B. *Achievements and Problems of the GATS*

Since its inception, besides increasing the importance of trading in services internationally, the GATS has provided a successful dispute resolution process, and inspired negotiators to improve liberalizing mechanisms at the regional level.⁴⁵ However, in spite of GATS's successes, many barriers remain.⁴⁶ While international trade in services has progressed tremendously, both technologically and in volume, the GATS has been static for the past ten years; reflected by the fact that the depth and breadth of service commitments remain almost unchanged

³⁸ GATS, *supra* note 11, art. I:2(a)–(d).

³⁹ General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 33 I.L.M. 1125 (1994) (hereinafter GATT).

⁴⁰ Amar Gupta, David A. Gantz, Devin Sreecharana & Jeremy Kreyling, *Evolving Relationship Between Law, Offshoring of Professional Services, Intellectual Property, and International Organizations*, 21 INFO. RESOURCES MGMT. J. 103, 111 (2008).

⁴¹ Adlung & Carzaniga, *supra* note 19, at 358.

⁴² Nothing is bound that is not included.

⁴³ See Sherry M. Stephenson, *Regional versus Multilateral Liberalization of Services*, 1(2) WORLD TRADE REV. 187 (2002) (According to Stephenson, the negative list approach promises to incite more commitments than the positive-list approach. Within the Western Hemisphere no fewer than 12 RTAs have adopted a "negative list" approach for carrying out services trade liberalization and these RTAs are much more transparent instruments for service providers than agreements that follow a positive list approach).

⁴⁴ GATS, *supra* note 11, art. II:1.

⁴⁵ Hufbauer & Stephenson, *supra* note 13, at 612-3.

⁴⁶ *Id.* at 630.

since 1997, especially in the case of most developing Members.⁴⁷

Stemming from the Uruguay Round negotiations (1986-93), the GATS contains many political compromises, partial commitments and ambiguities.⁴⁸ The central problem in services liberalization is to define commitments that are “viewed as both beneficial to the countries that undertake them and significant to their negotiating partners”.⁴⁹ The Doha Round has so far produced only a “separate set of rules for nearly every WTO Member or grouping thereof”.⁵⁰

C. *The Doha Round*

The Doha Round, which aims to reduce trade barriers and expand global economic growth, development and opportunities,⁵¹ currently focuses on the liberalization in service trade as one of its three main goals.⁵² For trade in services, the Doha Development Agenda⁵³ outlined Members’ agreement to “negotiate on (1) market access for financial, telecommunications, and transport services, and (2) easing of immigration rules for employing workers on temporary contracts”.⁵⁴

However, the offers of service trade liberalization submitted till 2009 in the Doha Round have provided “few, if any, new business opportunities, foreshadowing no new liberalization in this area as a result of the Round”.⁵⁵ As Members emphasize on the negotiation process to decrease agricultural barriers, they implicitly assign a secondary priority to barriers that hamper negotiations in services sectors.⁵⁶ Since offers may be balanced across fields of trade as well, agriculture negotiations complicate service trade negotiations.⁵⁷

Other impediments to greater liberalization in services include the lack of political momentum, insignificant public support for market-oriented reforms and

⁴⁷ *Id.* at 630.

⁴⁸ BHALA, *supra* note 12, at 1539.

⁴⁹ Hufbauer & Stephenson, *supra* note 13, at 612.

⁵⁰ Raj Bhala, *Resurrecting The Doha Round: Devilish Details, Grand Themes, And China Too*, 45 *TEX. INT’L L. J.* 1, 125 (2009).

⁵¹ See Doha Declaration, *supra* note 18, ¶ 1-2.

⁵² The Doha Round has three pillars: (1) the opening of trade in agriculture, (2) manufactured goods, and (3) services. See Doha Declaration, *supra* note 18, ¶ 13-16 (memorializing the agreement made between the 142 nations that attended the talks at Doha).

⁵³ Outlined in the Doha Declaration, *supra* note 18. See also BHALA, *supra* note 12, at 62.

⁵⁴ BHALA, *supra* note 12, at 63.

⁵⁵ ADLUNG, *supra* note 14, at 4.

⁵⁶ Hufbauer & Stephenson, *supra* note 13, at 621.

⁵⁷ BHALA, *supra* note 12, at 66-7.

the high cost of such reforms constrain negotiators' maneuvering.⁵⁸ Furthermore, policy competencies segmented across ministries, agencies and government levels clutter communication.⁵⁹ A mere agreement about underlying definitions is difficult to arrive at given the complexity of sectors, modes and measures covered by services agreements.⁶⁰

III. A COMPARISON OF ECONOMIC INTEGRATION AGREEMENTS WITH PLURILATERAL AGREEMENTS

A. Reasons for EIAs to be an Effective Solution to the Stalled Doha Round

1. Transitional Solution

The GATS has played "little or no role"⁶¹ in the process of services liberalization while significant unilateral reforms have occurred in the last decade.⁶² Moreover, the "traditional mercantilist paradigm of reciprocal exchanges of concessions seems to be less effective than in the goods area",⁶³ because services negotiations tend to be more complicated, time-consuming and resource-intensive due to additional technical, economic and political frictions.⁶⁴ Additionally, the novelty of the GATS may add legal uncertainty for negotiators to cope with.⁶⁵ Perhaps then, it is not surprising that no multilateral agreements have been concluded under the GATS framework in more than a decade since the adoption of the WTO agreements on telecommunications (February 1997) and financial services (December 1997).⁶⁶

A solution to the current impasse can be achieved by arranging for an EIA outside of the Doha Round or by a WTO plurilateral agreement.⁶⁷ Both EIAs and

⁵⁸ ADLUNG, *supra* note 14, at 7.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Most existing commitments prevail from the mid-1990s and are related only to a limited number of sectors. *See* ADLUNG, *supra* note 14, at 1.

⁶² Hufbauer & Stephenson, *supra* note 13, at 611.

⁶³ ADLUNG, *supra* note 14, at 1.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Hufbauer & Stephenson, *supra* note 13, at 612. Decision on Negotiations on Basic Telecommunications, Uruguay Round Ministerial Decisions and Declarations, *available at*: http://www.wto.org/english/docs_e/legal_e/50-dstel.pdf; Decision on Financial Services, Uruguay Round Ministerial Decisions and Declarations, *available at*: http://www.wto.org/english/docs_e/legal_e/48-dsfin.pdf (hereinafter Decision on Financial Services).

⁶⁷ WTO Agreement, *supra* note 32, art. II:3 states that "Plurilateral Trade Agreements", the agreements and associated legal instruments included in Annex 4, "are also part of [the

plurilateral agreements are in their nature PTAs, because they do not apply to all WTO Members. In comparison to the GATS schedules or the GATS offers in the Doha Round, it has been the PTAs, including EIAs, that have provided important trade liberalization advances.⁶⁸

An empirical study about the influence of PTAs on multilateral liberalization of international trade in services offers several explanations as to why Members undertook more extensive commitments in PTAs and not under the GATS.⁶⁹ First, political support may have helped to overcome important impediments to multilateral services liberalization.⁷⁰ These impediments include institutional resistance, disengagement of non-trade ministries cooperating on trade policy-making or lack of resources for complex and far-reaching service negotiations (four different modes, many different types of trade barriers, etc.).⁷¹ Second, relatively more simple deals via PTAs involving limited service sectors or number of parties may project commercial gains more clearly, thereby attracting more attention of service exporters as well as political representatives.⁷² Third, Members disappointed with the Doha Round and concerned about free-riding may prefer to use PTAs to bind an applied regime of openness or encourage further reforms.⁷³

For these reasons, PTAs could serve as a detour to a multilateral agreement where multilateral negotiations have failed. According to the domino theory,⁷⁴ the

WTO] Agreement for those Members that have accepted them, and are binding on those Members. The Plurilateral Trade Agreements do not create either obligations or rights for Members that have not accepted them". Thus, signatories are not required to apply them on an MFN basis. See also Bernard Hoekman, *Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment*, 8 J. INT'L ECON. L. 405, 418 (2005).

⁶⁸ MARTIN ROY, JUAN MARCHETTI & HOE LIM, WORLD TRADE ORGANIZATION - ECONOMIC RESEARCH AND STATISTICS DIVISION, SERVICES LIBERALIZATION IN THE NEW GENERATION OF PREFERENTIAL TRADE AGREEMENTS (PTAs): HOW MUCH FURTHER THAN THE GATS? 50-53 (2006) (hereinafter ROY, MARCHETTI & LIM). Such agreements include many U.S. FTAs as well as agreements between China and Hong Kong, Australia and Singapore, EC and Chile, or Singapore and Korea.

⁶⁹ In PTAs with U.S. and Singapore, Australia allows life insurers from both countries to operate branches in Australia, in addition to its commitments under the GATS. In another PTA, China permits wholly owned operations from Hong Kong and Macao to provide architectural, engineering, integrated engineering, and urban planning and landscape architectural services via a PTA. For more examples see ROY, MARCHETTI & LIM, *supra* note 68, at 50-52.

⁷⁰ ROY, MARCHETTI & LIM, *supra* note 68, at 56.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ The domino theory posits that "signing one FTA induces outside nations to sign new FTAs that they previously shunned since the trade diversion effect of the first FTA

conclusion of FTAs prompts the execution of new FTAs. Potentially, free-trade in PTAs would “eventually lead to further liberalization at the multilateral level”.⁷⁵ Precedents to this route exist. For example, plurilateral codes⁷⁶ negotiated in the Tokyo Round, such as the agreements on technical barriers to trade, import licensing, customs valuation, subsidies, and antidumping, have all been ‘multilateralized’.⁷⁷ Although these instances did not include trade in services, they demonstrate that increasing number of Members may elect to join working plurilateral agreements to avail themselves of visible benefits.

2. Single Undertaking Is Not Flexible Enough to Embrace Geopolitical Changes

The reality of minimal progress in the Doha Round of negotiations reflects a geopolitical transformation. The rise of the emerging economies such as China, India and Brazil as major economic powers begins to distribute economic influence from one hegemony among multiple poles.⁷⁸ Therefore, the paradigm of a ‘single undertaking’,⁷⁹ which prevails from the Uruguay Round,⁸⁰ may not provide enough flexibility in adding new plurilateral agreements to account for the geopolitical changes.⁸¹

creates new political economy forces in excluded nations. Specifically, excluded nations seek to sign FTAs as a means of redressing the new discrimination. The second-round FTAs in turn create their own trade diversion that may in turn lead to more FTAs” (Baldwin 1993), *available at*: <http://www.voxeu.org/index.php?q=node/5457> (last visited Dec. 4, 2010).

⁷⁵ ROY, MARCHETTI & LIM, *supra* note 68, at 58.

⁷⁶ Most agreements of the Tokyo Round (1973-79) were not signed by all GATT members. For this reason, they were informally called “codes”. During the Uruguay Round, several codes were amended and accepted by all WTO Members as multilateral commitments. For more information see http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (last visited Dec. 5, 2010)

⁷⁷ Ping Wang, *China’s Accession to the WTO Government Procurement Agreement – Challenges and the Way Forward*, 12 J. INT’L ECON. L. 663, 666 (2009).

⁷⁸ Debra P. Steger, *The Culture of the WTO: Why It needs to Change*, 10 J. INT’L ECON. L. 483, 493 (2007) (hereinafter Steger).

⁷⁹ Since the Uruguay Round (1986-1994), all WTO Members have to accept all the agreements without exception. The Uruguay Round agreements were negotiated, agreed and accepted as part of a ‘single undertaking’--an ‘all or nothing’ package. See http://www.wto.org/english/docs_e/legal_e/ursum_e.htm (last visited Dec. 5, 2010).

⁸⁰ The idea of the ‘single undertaking’ was developed in order to repair the serious fragmentation in the GATT 1947 system that resulted from the Tokyo Round of multilateral trade negotiations. In the old GATT system, there were different levels of obligations because of the Tokyo Round ‘Codes’ each of which had different Memberships. See Steger, *supra* note 78, at 488-9.

⁸¹ Steger, *supra* note 78, at 488-9 (A closer exploration of the idea of “variable

The WTO negotiations have since moved away from the “all or nothing” single undertaking in information technology and telecommunication understandings. These understandings were, in effect, plurilateral agreements implemented as commitments in certain Members’ Schedules.⁸² Many protocols of accession to the WTO approved since 1995 provide further examples of deviation from the single undertaking paradigm.⁸³ As plurilateral agreements, EIAs may serve as a transitional solution toward a greater liberalization of trade in services at the multilateral level before single undertaking becomes practicable in this area.

3. Plurilateral Agreements Are Difficult to Add to Annex 4 & Plurilateral Negotiations of the Doha Round Have Failed

Currently, incorporation of new plurilateral agreements to Annex 4 is difficult because Article X (9) of the WTO (Marrakesh) Agreement⁸⁴ requires a consensual decision of the General Council,⁸⁵ which is not easy to achieve.⁸⁶ Since an adoption of a formal amendment to the WTO (Marrakesh) Agreement is unlikely,⁸⁷ Plurilateral Agreements are not likely to become the tool for unblocking the current Doha Round impasse. An EIA, on the other hand, may revive negotiations among interested countries and become the viable alternative to Plurilateral Agreements where multilateral negotiations have failed.

More importantly, the plurilateral negotiation process has been attempted after the Hong Kong Ministerial Conference⁸⁸ as a way of providing renewed energy to

geometry” was recommended by both the Report of the Consultative Board to Director-General Supachai Panitchpakdi on ‘The Future of the WTO: Addressing Institutional Challenges in the New Millennium’ (the Sutherland Report), published in 2004, and the recent Report of the Atlantic Council, ‘Transatlantic Leadership for a New Global Economy’).

⁸² Steger, *supra* note 78, at 489.

⁸³ *Id.*

⁸⁴ WTO Agreement, *supra* note 32, art. X(9).

⁸⁵ Steger, *supra* note 78, at 489.

⁸⁶ “The predominant view is that the political organs are paralyzed due to the practice of consensus decision-making.” See Isabel Feichtner, *The Waiver Power of the WTO: Opening the WTO for Political Debate on the Reconciliation of Competing Interests*, 20 EUR. J. INT’L L. 615, 617 (2009).

⁸⁷ Colin B. Picker, *Regional Trade Agreements v. the WTO: A Proposal for Reform of Article XXIV to Counter This Institutional Threat*, 26 U. PA. J. INT’L ECON. L. 267, 318 (2005) (hereinafter Picker).

⁸⁸ The goals of the sixth WTO Ministerial Conference in Hong Kong in December 2005 were to secure: (1) an agreement on the modalities (i.e., detailed negotiating parameters) for negotiations in agriculture and non-agricultural market access (NAMA); (2) an effective negotiating framework for a significant result in services; (3) directions to ensure that WTO rules remain effective and in some cases are strengthened; and (4) the

the services negotiations.⁸⁹ But no significant progress has been achieved so far. Over 20 informal plurilateral groups were initiated -mostly, but not exclusively- by sector-specific interests of developed countries to define and pursue common objectives.⁹⁰ Some groups also focused on individual modes and the issue of MFN exemptions.⁹¹ While the process “helped WTO Members to build upon their initial discussions, the plurilateral negotiations ended after several months with little to show in terms of concrete progress toward revised offers”.⁹² The Annex C⁹³ of the Draft Hong Kong Ministerial Declaration,⁹⁴ “failed to deliver any timelines for service negotiations, even in a preliminary sense”.⁹⁵ Since virtually no new or revised services offers have been submitted since February 2007, the progress that may have been achieved is impossible to trace.⁹⁶

Although the lack of progress could have been caused by temporary suspension of all Doha Development Agenda negotiations from July 2006 to February 2007 and could have been remedied by resuming negotiations, a generally prevailing lack of momentum spilled over from the negotiations on agriculture and NAMA.⁹⁷ The phenomenon may be remedied by distancing service negotiations from these other areas as much as possible, for which an EIA could be the appropriate and effective vehicle.

4. EIAs Can Reconcile Different Needs of Developed and Developing Countries

It seems that the Members’ interests are “far from uniform and are often

outline of an agreement on trade facilitation. WTO, Ministerial Declaration of 18 December 2005, WT/MIN(05)/ DEC (Dec. 22, 2005). *See generally* http://www.wto.org/english/thewto_e/minist_e/min05_e/final_text_e.htm (last visited Dec. 5, 2010) (hereinafter Doha Work Programme).

⁸⁹ Hufbauer & Stephenson, *supra* note 13, at 621.

⁹⁰ Adlung & Carzaniga, *supra* note 19, at 382.

⁹¹ *Id.* at 383.

⁹² Hufbauer & Stephenson, *supra* note 13, at 621.

⁹³ To intensify and expedite services negotiations, Annex C (dealing specifically with services) introduced plurilateral mode of negotiations (paragraph 7) which permits a group of Members to present collective requests to other Members in any sector or mode of supply, unlike bilateral negotiations. *See* Leal-Arcas, *supra* note 31, at 388 (“The plurilateral approach has solidified a platform for interested [WTO] Members to build upon initial, sector-specific discussions, either through an extended round of negotiations similar to what transpired after the Uruguay Round, or in the context of the next round of services negotiations mandated under GATS.”).

⁹⁴ Doha Work Programme, *supra* note 88.

⁹⁵ Leal-Arcas, *supra* note 31, at 388.

⁹⁶ Adlung & Carzaniga, *supra* note 19, at 383.

⁹⁷ *Id.*

mutually exclusive".⁹⁸ During the Doha Round, developed countries demanded faster liberalization as well as expansion of negotiations into new and related areas like competition law.⁹⁹ On the other hand, developing countries focused on agriculture policies, and other areas needing adjustment to their developmental realities like intellectual property protections.¹⁰⁰ Yet, despite the differences in the negotiation agenda with the developed countries, developing countries recognize the importance of liberalizing their trade in services.¹⁰¹ They desire to stimulate growth and the maturation of their own globally competitive service providers and to receive services in short-term.¹⁰² But they are reluctant to open their markets too much or too quickly, since that could destroy local providers who are not yet competitive with world-class companies.¹⁰³

To afford time for developing countries to undertake trade reforms in the services sector and protect their service providers on one side, and to encourage further liberalization of trade in services among the willing on the other side, preferential EIAs can reconcile these different interests and prove to be a win-win solution for all.¹⁰⁴ Having an opportunity to negotiate an EIA with smaller groups of countries, developing countries could more easily predict the effects of market liberalization, be more selective in deciding which sectors to open for market access, or they may be "able to extract concessions in non-service areas than with larger groups (e.g., Mexico and service negotiations under the North American Free Trade Agreement (NAFTA))."¹⁰⁵ Developing countries which are not interested in liberalizing their services sector via EIAs could still participate in services trade liberalization via mutual recognition agreements (MRAs)¹⁰⁶ pursuant to GATS Article VII.¹⁰⁷

5. A Way to Deepen Cooperation between the U.S. and the EU

While most of the large economies such as China, U.S., Japan, the European

⁹⁸ Picker, *supra* note 87, at 318.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ BHALA, *supra* note 12, at 101-2.

¹⁰² *Id.*

¹⁰³ BHALA, *supra* note 12, at 101-2.

¹⁰⁴ ROY, MARCHETTI & LIM, *supra* note 68, at 56.

¹⁰⁵ David A. Gantz (unpublished comment to an earlier draft, on file with author) (hereinafter Gantz).

¹⁰⁶ MRAs are further discussed in Part IV *infra*.

¹⁰⁷ GATS, *supra* note 11, art.VII. Article VII provides that the recognition of technical standards, licenses and the like may be extended at any time, autonomously or based on mutual agreement, for an unlimited period. Moreover, recognition must not be used as a means of discrimination or a disguised restriction on trade (Article VII:3).

Community¹⁰⁸ and India have concluded PTAs with smaller nations, they do not have PTAs among themselves.¹⁰⁹ These countries still, to a large extent, rely on the multilateral system to resolve trade issues in the services sector and as a channel for negotiating future disciplines.¹¹⁰

In this context, an EIA could be an effective way for the U.S. and the EU to deepen cooperation in services trade between themselves. In 2006, the American business community in Europe urged the European and American leaders not to neglect their trade relationship while advancing relationships with China and India.¹¹¹ The business representatives argued that “the two transatlantic economies have become so interdependent that their future growth and job creation relies not on improving their relations with China and India, nor in completing a successful Doha Round, but in removing existing barriers to trade and investment between themselves in order to create a veritable transatlantic single market”.¹¹² Such an economic union could have the potential of producing more than 50 percent of the world’s GDP.¹¹³

In support, German Chancellor Angela Merkel “proposed the establishment of a transatlantic free-trade area composed of the EU and the U.S.” in 2006.¹¹⁴ Even though the attempt failed due to political realities, an EIA could offer a mechanism for strengthening the U.S-EU trade relations. “An EIA between the EU and U.S. over services could presumably be made legal under Article V, while avoiding the subject of trade in agriculture, which has always been the major stumbling block to a Free Trade Agreement (FTA) between the two”.¹¹⁵

B. *Shortcomings of EIAs*

While this paper has delineated the benefits and advantages associated with EIAs, it is important to note that there are also certain risks or costs¹¹⁶ associated with preferring EIAs, or other PTAs, over multilateral negotiations under the

¹⁰⁸ The Economic Community, and not the European Union, is a Member of the WTO. The EC is a new name given to the European Economic Community by the Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) 1, 31 I.L.M. 253 (1993).

¹⁰⁹ ROY, MARCHETTI & LIM, *supra* note 68, at 54-5.

¹¹⁰ *Id.*

¹¹¹ Leal-Arcas, *supra* note 31, at 413 *citing* Press Release, Center for Transatlantic Relations, U.S. Businesses Call for “Transatlantic Single Market”, (Nov. 21, 2006).

¹¹² Leal-Arcas, *supra* note 31, at 413-4.

¹¹³ Richard Rosecrance, *Bigger is Better: The Case for a Transatlantic Economic Union*, FOREIGN AFFAIRS, May/June 2010, at 46 & 48.

¹¹⁴ *Id.* at 45.

¹¹⁵ Gantz, *supra* note 105.

¹¹⁶ For further discussion *see* ROY, MARCHETTI & LIM, *supra* note 68, at 56-59.

GATS. The domino effect, for example, may not occur, because smaller countries may wish to preserve the preferred access to larger markets that they obtained.¹¹⁷ Also, negotiating EIAs before the conclusion of the Doha Round could divert some resources and attention from those negotiations as well as decrease the motivation to make generous offers of commitments within the GATS.¹¹⁸ Moreover, PTAs may offer lasting advantages to first movers that might be hard to reverse through subsequent extension of access to other countries. Countries who gained market access via PTAs may have vested interests in preventing erosion of such gained preferences.¹¹⁹

However, despite these extra costs, EIAs may still be more effective than individual FTAs or other RTAs which exist only among a few parties. Since the GATS has not been very effective nor do the Doha Round negotiations look promising at this point, EIAs seem to provide a more sensible way to account for different levels of Members' technological and infrastructural development while enabling further trade liberalization.

IV. GATS ARTICLE II (MFN TREATMENT) AND RELATED EXCEPTIONS

A. *Most-Favored-Nation (MFN) Treatment*

The requirement of MFN treatment established in Article II of GATS¹²⁰ has become one of the basic principles of the GATS regime.¹²¹ It applies across virtually all service sectors, whether subject to access commitments or not,¹²² in contrast to the Market Access and National Treatment obligations.¹²³ Only government procurements are exempted from MFN treatment's coverage by way of Article XIII of the GATS.¹²⁴ The MFN requirement is also suspended for Members that have not scheduled commitments in the maritime transport

¹¹⁷ *Id.* at 58.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 56.

¹²⁰ GATS, *supra* note 11, art. II:1 states: "With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country."

¹²¹ Adlung & Carzaniga, *supra* note 19, at 358.

¹²² *Id.*

¹²³ Federico Ortino, *The Principle of Non-Discrimination and Its Exceptions in GATS: Selected Legal Issues* 20 (King's College London, Working Paper, September 2006), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=979481 (hereinafter Ortino).

¹²⁴ Rudolf Adlung & Martín Molinuevo, *Bilateralism in Services Trade: Is There Fire Behind the (BIT) Smoke?*, 11 J. INT'L ECON. L. 365, 392 (2008) (hereinafter Adlung & Molinuevo).

sector.¹²⁵ Its principle purpose is to ensure “equality of opportunity for services and service suppliers from all WTO Members”.¹²⁶

Furthermore, the MFN provision sets out a three-tier test of consistency: (1) whether the measure at issue is a ‘measure covered’ by the GATS; (2) whether the services or service suppliers concerned are ‘like’ services or service suppliers; and (3) whether the Member accords ‘less favorable treatment’ to the services or service suppliers of another Member.¹²⁷ These tiers are discussed below.

1. ‘Measure Covered’ by the GATS

The GATS covers measures that are “measure[s] by a Member” and are “affecting trade in services”.¹²⁸ According to Article I:3(a), “measure[s] by a Member” are measures taken by (i) “central, regional or local governments and authorities”; and by (ii) “non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities”.¹²⁹ “Measure” is also defined in Article XXVIII(a) as “any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form”.¹³⁰ Whether the measure is of an international or a national nature should not make a difference for purposes of determining the scope of the MFN principle of Article II of GATS.¹³¹

As noted in Part II above, “trade in services” includes any of the four modes of supply defined in Article I:2 of GATS.¹³² Article XXVIII(c) also specifies which measures “affect trade in services”.¹³³ In *EC-Bananas III*, the WTO Panel concluded that a measure affects trade in services when it “modifies the conditions of competition in supply of a service”.¹³⁴ According to the Appellate Body in that

¹²⁵ *Id.* at 393.

¹²⁶ PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION – TEXT, CASES AND MATERIALS* 319 (2005) (hereinafter VAN DEN BOSSCHE).

¹²⁷ Ortino, *supra* note 123, at 21.

¹²⁸ GATS, *supra* note 11, art. I:1.

¹²⁹ *Id.* art. I:3(a).

¹³⁰ *Id.* art. XXVIII(a).

¹³¹ Ortino, *supra* note 123, at 21.

¹³² GATS, *supra* note 11, art. I:2.

¹³³ *Id.* art. XXVIII(c) includes measures in respect of: (i) the purchase, payment or use of a service; (ii) the access to and use of, in connection with the supply of a service, services which are required by those Members to be offered to the public generally; (iii) the presence, including commercial presence, of persons of a Member for the supply of a service in the territory of another Member.

¹³⁴ Panel Report, *European Communities–Regime for the Importation, Sale and Distribution of*

case, “measures [...] affecting trade in services’, as provided by Article I:1, are not necessarily measures ‘regulating’ or ‘governing’ trade in services, nor measures taken ‘in respect of’ trade in services”.¹³⁵ Rather, “any measure bearing upon conditions of competition in supply of a service, regardless of whether the measure directly governs or indirectly affects the supply of the service” is deemed to fall under the scope of the Agreement.¹³⁶

Within the GATT context, the WTO Panel interpreted “affecting” even more broadly including a measure “even if it is not shown to have an impact under the current circumstances”.¹³⁷ Under the GATS, however, there may be “no need to determine actual effects, rather [it may be] enough to demonstrate a potential effect on trade”.¹³⁸

2. ‘Like’ Services or Service Suppliers¹³⁹

There is no express definition of the term “like service suppliers” in the GATS.¹⁴⁰ The WTO adjudicatory forum has considered its meaning in the context of the GATS only twice.¹⁴¹ In *EC – Bananas III* and in *Canada – Autos*, it stated that “to the extent the entities provide like services, they are like service suppliers”.¹⁴² The issue of “likeness” has been extensively litigated under the GATT. To the extent that the Dispute Settlement Understanding’s (DSU) reasoning under the GATT may be applicable to the GATS, the following factors could be applied: (a) service’s end-uses in a given market; (b) consumer habits and preferences regarding the service or the service supplier; (c) characteristics of the service or the service

Bananas, ¶ 7.281, WT/DS27/R/ECU (adopted May 22, 1997) (hereinafter *EC–Bananas III* case). See also Panel Report, *Italian Discrimination Against Imported Agricultural Machinery*, ¶ 12, GATT BISD 7S/60 (adopted Oct. 23, 1958) (“The selection of the words “affecting” would imply, in the opinion of the Panel, that the drafters of the Article intended to cover [...] any laws or regulations which *might* adversely *modify the conditions of competition* between [like products]”) [emphasis added].

¹³⁵ Appellate Body Report, *European Communities–Regime for the Importation, Sale and Distribution of Bananas*, ¶ 220, WT/DS27/AB/R (adopted Sept. 25, 1997).

¹³⁶ *Id.*, adopting *EC–Bananas III* case, *supra* note 134, ¶ 7.282.

¹³⁷ Panel Report, *Canada–Certain Measures Affecting the Automobile Industry*, ¶ 10.80 and ¶ 10.84, WT/DS139R and WT/DS/142/R (adopted June 19, 2000) (hereinafter *Canada–Auto* case).

¹³⁸ Ortino, *supra* note 123, at 23.

¹³⁹ GATS, *supra* note 11, art. XXVIII(g) defines a “service supplier” as “any person who supplies a service”.

¹⁴⁰ Ortino, *supra* note 123, at 23.

¹⁴¹ *Id.*

¹⁴² *EC–Bananas III* case, *supra* note 134, ¶ 7.322. See also *Canada–Auto* case, *supra* note 137, ¶ 10.248.

supplier; and (d) classification and description of the service in the United Nations' Central Product Classification system.¹⁴³

3. No 'Less Favorable Treatment' 'Of Any Other Country'

The last obligation to satisfy the MFN test requires Members to afford to other Members "treatment no less favorable than that it accords to like services and service suppliers of any other country".¹⁴⁴ This obligation extends also to non-Members ("any other country").¹⁴⁵ The Appellate Body in *EC-Banana III* took the view that 'treatment no less favorable' in GATS Article II:1 should be taken to include both *de jure* and *de facto* discrimination.¹⁴⁶

B. Three Specific Exceptions to MFN – ELAs, MRAs and the One-Time Exemption

In addition to the generally available exceptions stated in Appendix 1,¹⁴⁷ there are three other exceptions applicable specifically against, and capable of overriding, the MFN obligation under GATS.¹⁴⁸ The first opportunity to avoid extending preferential treatment to all Members is to conclude an EIA pursuant to Articles V (and V *bis*) of the GATS.¹⁴⁹ In contrast with the other two exceptions discussed below,¹⁵⁰ EIAs are a recent phenomenon.¹⁵¹ EIAs are advantageous in that they are not subject to time constraints and could probably also be concluded with non-Members. This exception is discussed in part V below.

The second type of exceptions, MRAs, relate mainly to standards, certificates

¹⁴³ CENTRAL PRODUCT CLASSIFICATION, CPC Version 1.1, Submitted to the United Nations Statistical Commission (*updated* Feb. 21, 2002) *available at*: <http://unstats.un.org/unsd/statcom/doc02/cpc.pdf> (last visited Sept. 26, 2010) ("CPC constitutes a complete product classification covering goods and services. It was intended to serve as an international standard for assembling and tabulating ... [and] to provide a framework for international comparison ..."); Aaditya Mattoo, *National Treatment in the GATS – Corner Stone or Pandora's Box*, 31 J. WORLD TRADE 107, 128 (1997); VAN DEN BOSSCHE, *supra* note 126, at 323-4; Ortino, *supra* note 123, at 23.

¹⁴⁴ GATS, *supra* note 11, art. II:1.

¹⁴⁵ *Id.*

¹⁴⁶ *EC–Bananas III* case, *supra* note 134, ¶ 231-234.

¹⁴⁷ GATS, *supra* note 11, art. XIV (General Exceptions), art. XIVbis (Security Exceptions) and Annex of Financial Services (Prudential Measures). *See also* Adlung & Carzaniga, *supra* note 19, at 366.

¹⁴⁸ Adlung & Carzaniga, *supra* note 19, at 357-8.

¹⁴⁹ *Id.*

¹⁵⁰ *See* Part IV.B *supra*.

¹⁵¹ Of the 66 notifications made under Article V by October 2008, three-quarters have been submitted only since January 2000 (one-half since January 2004), and many more are in the making. *See* Adlung & Carzaniga, *supra* note 19, at 359.

and the like and are afforded under Article VII of GATS.¹⁵² The MRAs are not subject to time constraints either.¹⁵³ Because MRAs have been used infrequently,¹⁵⁴ or have been mostly pursued in another way in the context of EIAs,¹⁵⁵ the author refers to the research undertaken by UNCTAD¹⁵⁶ for further discussion of MRAs and their potential use in liberalization of international trade in services.

The third exception, negotiated in terms of Article II:2 of the GATS and the Annex on Article II Exemptions,¹⁵⁷ allows a Member a one-time opportunity to exempt itself from MFN treatment without limitation as to minimal sectoral coverage, modes of supply, Members affected or measures selected.¹⁵⁸ This exemption was afforded when GATS entered into force in 1995, and in case of new Members, is available from the date of their accession to the WTO.¹⁵⁹ However, the “one-time MFN exemptions”¹⁶⁰ are subject to a review and are limited by time, at which point they will be renegotiated in trade rounds.¹⁶¹ Although their application should not exceed 10 years, this principle is “enforced softly”.¹⁶² When a Member seeks a new exception under Article II at a later occasion, it can apply for a Waiver pursuant to Article IX:3¹⁶³ of the WTO Agreement at any time.¹⁶⁴ However, for such a Waiver to be granted, “exceptional circumstances”¹⁶⁵ must be shown to exist and a three-fourths majority of Members must approve it.¹⁶⁶ But the waiver procedure and non-availability of new exemptions, could have contributed to the increase of EIAs, broad interpretation

¹⁵² GATS, *supra* note 11, art. VII (Recognition).

¹⁵³ Adlung & Carzaniga, *supra* note 19, at 357-8.

¹⁵⁴ Only 17 notifications have been tabled since January 2000 to June 2009. Between January 1995 and October 2008, less than 50 notifications, covering some 120 agreements or measures, were submitted under relevant provisions. The majority dates from the early years of the WTO and relates to pre-existing agreements. *See* Adlung & Carzaniga, *supra* note 19, at 361.

¹⁵⁵ Adlung & Carzaniga, *supra* note 19, at 361.

¹⁵⁶ Simonetta Zarrilli, United Nations Conference on Trade and Development, Moving Professionals Beyond National Borders: Mutual Recognition Agreements and the GATS (Feb. 21, 2005), Document No. UNCTAD/DITC/TNCD/2005/2.

¹⁵⁷ GATS, *supra* note 11, Annex on Article II Exemptions.

¹⁵⁸ Adlung & Carzaniga, *supra* note 19, at 363.

¹⁵⁹ *Id.* at 357 & 358.

¹⁶⁰ MFN exemptions are contained in lists submitted by the Members concerned. These lists are publicly available at http://www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm.

¹⁶¹ Adlung & Carzaniga, *supra* note 19, at 363.

¹⁶² *Id.* at 357 & 358.

¹⁶³ WTO Agreement, *supra* note 32, art. IX(3).

¹⁶⁴ Adlung & Carzaniga, *supra* note 19, at 365-6.

¹⁶⁵ WTO Agreement, *supra* note 32, art. IX(3).

¹⁶⁶ Adlung & Carzaniga, *supra* note 19, at 365-6.

of existing exemptions and discouragement of rescinding exemptions that already served the initial purpose.¹⁶⁷

V. GATS ARTICLE V (ECONOMIC INTEGRATION)

The GATS does not prescribe any specific level of liberalization of service trade commitments. A Member can decide to open its markets fully, make no commitments or make partial commitments¹⁶⁸ in specific sectors or modes of delivery.¹⁶⁹ Its chosen degree of liberalization then becomes legally binding. As to how many sectors or modes of supply shall be included in a schedule of commitments, there is no rule or understanding in the GATS.¹⁷⁰ The prevailing view among economists, however, holds that only modest results were achieved under the GATS, as most countries made only partial commitments for limited sectors.¹⁷¹

Although Article V¹⁷² enables and regulates the creation of EIAs, the scope and understanding of EIAs should not be evaluated without the context of the GATS. First, EIAs have their origin in the GATS and support its broader goal of greater liberalization of trade in services.¹⁷³ Second, the GATS is an agreement inherently superior to EIAs according to the interpretations of Article 41(1) of the Vienna Convention.¹⁷⁴

¹⁶⁷ *Id.* at 357-8.

¹⁶⁸ The third option (partial commitments) was most widely chosen during the Uruguay Round, a fact that makes it quite difficult to quantify the extent of liberalization accomplished by GATS. *See* Hufbauer & Stephenson, *supra* note 13, at 611.

¹⁶⁹ Hufbauer & Stephenson, *supra* note 13, at 611.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² GATS, *supra* note 11, art. V.

¹⁷³ The GATS, *supra* note 11, Preamble states in its part: “*Wishing* 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 as a means of promoting the economic growth of all trading partners and the development of developing countries.” (emphasis supplied).

¹⁷⁴ The Vienna Convention on the Law of Treaties, art. 41(1), May 23, 1969, 1155 U.N.T.S. 331 (hereinafter the Vienna Convention). Article 41(1) of the Vienna Convention states as follows:

“Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

(a) the possibility of such a modification is provided for by the treaty; or

(b) the modification in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

In this regard, a discussion about the approach to evaluating EIAs ensued during negotiations of Article V. Some Members argued that EIAs should be evaluated according to actual liberalization achieved under the EIA itself.¹⁷⁵ Certain other Members argued that EIAs should be evaluated in the context of a broader PTA falling under Article XXIV¹⁷⁶ of the GATT.¹⁷⁷ This latter group also asked for the services framework agreement to be drafted “as parallel to the GATT as possible”.¹⁷⁸ The delegates reached a ‘middle-ground’ understanding that EIAs would be evaluated by specific criteria set out in Article V of the GATS, as well as by considering the context of overall economic liberalization¹⁷⁹ and whether such an integration process also included goods sectors.¹⁸⁰ The WTO Committee on Regional Trade Agreement (CRTA)¹⁸¹ did not discuss in the Note by its Secretariat whether an overall economic liberalization may be considered even when concluded with a non-Member[s].¹⁸²

Arguably, an EIA can be concluded with non-Members.¹⁸³ Article V states: “This Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the

(ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.”

Since Article V of the GATS (and Article XXIV of the GATT) clearly allow for the execution of international treaties in the form EIAs/ FTAs, the EIAs/FTAs can modify the provisions of the GATS/GATT only if the GATS/GATT allow for such modifications. *See also* Thomas Cottier and Marina Foltea, *Constitutional Functions of the WTO and Regional Trade Agreements*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 43-56 (Lorand Bartels & Federico Ortino eds., 2006).

¹⁷⁵ WTO, COMMITTEE ON REGIONAL TRADE AGREEMENT, SYSTEMIC ISSUES RELATED TO “SUBSTANTIALLY ALL TRADE”, ¶ 14, WT/REG/W/21/Rev.1 (1998). (hereinafter WTO Committee on RTA, Note by the Secretariat)

¹⁷⁶ GATT, *supra* note 39, art. XXIV (Territorial Application - Frontier Traffic - Customs Unions and Free-trade Areas).

¹⁷⁷ WTO Committee on RTA, Note by the Secretariat, *supra* note 175, ¶ 14.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* ¶ 133.

¹⁸⁰ *Id.* ¶ 16.

¹⁸¹ Since 1996, the CRTA examines individual regional agreements’ compliance with the WTO rules and considers “the systemic implications of the agreements for the multilateral trading system and the relationship between them”. *See* http://www.wto.org/english/tratop_e/region_e/regcom_e.htm (last visited Dec. 5, 2010).

¹⁸² *See generally* WTO Committee on RTA, Note by the Secretariat, *supra* note 175.

¹⁸³ Md. Rizwanul Islam & Shawkat Alam, *Preferential Trade Agreements and the Scope of GATT Article XXIV, GATS Article V and the Enabling Clause: An Appraisal of GATT/WTO Jurisprudence*, 56(1) NETH. INT’L L. REV. 1, 31 (2009) (hereinafter Islam & Alam).

parties to such an agreement, ...".¹⁸⁴ Since Article V:1 provides for "an agreement liberalizing trade in services between or among the *parties to such an agreement*",¹⁸⁵ (emphasis added) and not 'between or among the *contracting parties*', it differs in scope from the GATT 1994.¹⁸⁶ The GATS does not express or imply that an EIA engaging non-Members is not covered within the meaning of 'such an agreement', if it fulfills the other conditions of Article V, discussed below.¹⁸⁷ The fact that a corresponding provision to paragraph 10 of the GATT Article XXIV does not exist in Article V reinforces this textual interpretation.¹⁸⁸

To prevent abuse of the MFN exception under Article V and to achieve greater liberalization of trade in services, the drafters incorporated a balancing requirement into Article V in the form of two main conditions for EIA creation. The first condition expressed in subparagraph (a) of Article V:1 requires the EIA to have "substantial sectoral coverage".¹⁸⁹ The second condition provides for the "absence or elimination of substantially all discrimination ... in the sectors covered under subparagraph (a)"¹⁹⁰ between or among the parties to the EIA. The second condition can be fulfilled through "(i) elimination of existing discriminatory measures, and/or (ii) prohibition of new or more discriminatory measures, either at the entry into force of that agreement or on the basis of a reasonable time-frame, except for measures permitted under Articles XI, XII, XIV and XIV *bis*".¹⁹¹ The scope of both conditions is analyzed below.

A. Article V:1(a) – "Substantial Sectoral Coverage"

1. Textual Interpretation

Some guidance as to the scope of V:1(a) can be deduced from the express terms of the agreement itself. According to footnote one in Article V:1, 'substantial sectoral coverage' is "understood in terms of number of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the *a priori* exclusion of any mode of supply".¹⁹²

¹⁸⁴ GATS, *supra* note 11, art. V.

¹⁸⁵ *Id.*

¹⁸⁶ Won-Mog Choi, *Legal Problems of Making Regional Trade Agreements with Non-WTO-Member States*, 8 J. INT'L ECON. L. 825, 845 (2005).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ GATS, *supra* note 11, art. V.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* art. V:1(a).

The meaning and method of measurement of Article V:1(a) are not clear.¹⁹³ Even though Article V is loosely drafted, it probably requires EIAs to be more ambitious in their objectives and go beyond the GATS commitments in terms of liberalization.¹⁹⁴ Article V does not allow a “cherry-picking” approach in preferential agreements.¹⁹⁵ Further, the definition of “substantial sectoral coverage” can be understood in both quantitative and qualitative terms¹⁹⁶ and will be interpreted by the WTO Panels on a case-by-case basis or during the discussions in the WTO CRTA.¹⁹⁷

There are several ways in which the footnote’s factors relate to each other and how each may be interpreted individually. By applying the Vienna Convention’s¹⁹⁸ principles of interpretation, the “and” connector among individual factors in footnote one indicates that all three factors should ultimately be applied in concert. The three factors seem to apply cumulatively.¹⁹⁹ For example, bilateral investment treaties (BITs) covering only one sector, but in substantial volume (and in all modes of supply), would probably not qualify for substantial sectoral coverage.²⁰⁰

It may also be argued that each of the three factors may, by itself, exclude an EIA as not having a sufficient “substantial sectoral coverage”.²⁰¹

(a) Number of Sectors

Selecting the term “number of sectors”, and not the term “all service sectors”, in the footnote seems to indicate that all sectors do not need to be covered under an EIA to meet the “substantial sectoral coverage” test.²⁰² However, it is clear that

¹⁹³ Ortino, *supra* note 123, at 26.

¹⁹⁴ MARION JANSEN, WORLD TRADE ORGANIZATION - ECONOMIC RESEARCH AND STATISTICS DIVISION SERVICES TRADE LIBERALIZATION AT THE REGIONAL LEVEL: DOES SOUTHERN AND EASTERN AFRICA STAND TO GAIN FROM EPA NEGOTIATIONS? 2 (2006), available at: http://www.wto.org/english/res_e/reser_e/ersd200606_e.pdf (last visited Oct. 01, 2010).

¹⁹⁵ See Thomas Cottier, *The Challenge of Regionalization and Preferential Relations in World Trade Law and Policy*, 2 EUR. FOREIGN AFF. REV. 149 (1996).

¹⁹⁶ Dr. Christine Breining, *Symposium on Assessment of Trade in Services 14-15 March 2002, Financial Services – Remarks from a Swiss Perspective* (2010).

¹⁹⁷ Gantz, *supra* note 105.

¹⁹⁸ The Vienna Convention, *supra* note 174, art. 31.

¹⁹⁹ Ortino, *supra* note 123, at 26.

²⁰⁰ Adlung & Molinuevo, *supra* note 124, at 393.

²⁰¹ Ortino, *supra* note 123, at 26.

²⁰² VAN DEN BOSSCHE, *supra* note 126, at 663. See Justice Chimugwuanya Nwobike, *The WTO Compatible ACP-EU Trade Partnership: Interpreting the Reciprocity Requirement to Further Development*, 8 ASPER REV. INT’L BUS. & TRADE L. 87, 109 (2008) (hereinafter Justice Nwobike).

the “number of exclusions must be limited”.²⁰³ This can be implied from the WTO Panel’s decision in the *Canada—Auto*²⁰⁴ case, even though the case involved only one sector. In that decision, the Panel stated that “...the purpose of Article V is to allow for ambitious liberalization to take place at a regional level, while at the same time guarding against undermining the MFN obligation by engaging in minor preferential arrangements”.²⁰⁵ “Ambitious liberalization” and “no minor preferential agreements” prompt towards a more expansive interpretation of Article V. Even though this decision provides some insight into the Panel’s interpretation of Article V, it does not provide for closer guidance in administering EIAs’ compliance with Article V.

In considering “number of sectors,” the definition of the term “sector”,²⁰⁶ remains crucial. When a Member makes a specific commitment in its Schedule²⁰⁷ of Commitments,²⁰⁸ a “sector” includes one or more, or all, subsectors of the service in which a Member committed to liberalize its trade under the GATS.²⁰⁹ Yet, the Schedule of Commitments is limited only to extending National Treatment benefits in the sectors committed.²¹⁰ The Member remains obligated to extend the MFN treatment to all Members in all other service sectors in which it trades with any other country. Otherwise, when there is no “specific commitment”, “sector” of a service means the “whole of that service sector, including all of its subsectors”.²¹¹ This provision refers to the sectors which are covered by the MFN treatment obligation, but which the Member did not commit to in its Schedule of Commitments. Since every party to an EIA may be in a different stage of development and committed to the GATS to a different extent, for an EIA to have “substantial sectoral coverage”, each of its Members should probably satisfy the “substantial sectoral coverage” criterion individually.

²⁰³ Justice Nwobike, *supra* note 202, at 109.

²⁰⁴ *Canada—Auto* case, *supra* note 137.

²⁰⁵ *Id.* ¶ 10.271.

²⁰⁶ GATS, *supra* note 11, art. XXVIII(e). (“[S]ector” of a service means, (i) with reference to a specific commitment, one or more, or all, subsectors of that service, as specified in a Member’s Schedule, (ii) otherwise, the whole of that service sector, including all of its subsectors”).

²⁰⁷ GATS, *supra* note 11, art. XX (Schedules of Specific Commitments).

²⁰⁸ GATS, *supra* note 11, art. XXVIII(e).

²⁰⁹ *Id.*

²¹⁰ National treatment means that “[i]mported and locally-produced goods should be treated equally — at least after the foreign goods have entered the market. The same should apply to foreign and domestic services, and to foreign and local trademarks, copyrights and patents”. See http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited Sept. 26, 2010).

²¹¹ GATS, *supra* note 11, art. XXVIII(e)(i) and (ii).

The WTO Members are not in agreement as to whether one or more service sectors can be excluded from an EIA.²¹² A closer analysis of the definition of “sector” reveals at least three possible interpretations that would enable different extents of liberalization in fulfilling the “substantial sectoral coverage” requirement. None of these interpretations requires all sectors to be covered, since the term “substantial” equals neither “all”, nor “substantially all”. The term “substantial” includes only a part of the total possible coverage, although that “part” should be relatively large, because of the “ambitious liberalization” and “no minor preferential agreements” standards expressed by the WTO Panel in *Canada-Auto*.²¹³

First, in fulfilling the “substantial sectoral coverage” standard and in finding the required level of liberalization, the most restrictive interpretation would take into account a complete list of service sectors itemized on the Schedule of Commitments. The initial pool of sectors, from which “substantial sectoral coverage” would be derived, would then comprise of all possible service sectors. Liberalization in certain “number of sectors” of the complete list of sectors would become a minimal requirement to satisfy the “substantial sectoral coverage” standard. This “complete list of sectors” approach would allow for the least number of EIAs to be valid. Also, the bigger traders or more developed Members would benefit over other Members. Possibly, the “complete list of sectors” approach could require not just all sectors to be considered in finding the minimal level of liberalization via EIA, but that all subsectors be included as well. But this approach would likely hinder liberalization for many Members. For example, subsectors of transportation services like air transport and maritime transport services are almost universally excluded from Members’ GATS schedules which would turn this most strict interpretative approach into a theoretic possibility only.

Second, only the service sectors in which a Member trades internationally would create the total coverage from which the “substantial sectoral coverage” would be derived. This “actual trade” approach would be more lenient, since the “part of the total coverage” for the purpose of determining “substantial sectoral coverage” would be taken from a lesser “number of sectors” – assuming that all Members do not trade in all sectors.

Third, the initial pool of sectors from which “substantial sectoral coverage” would be determined during the assessment of an EIA’s legality under GATS, would consist only of those sectors in which a Member already liberalizes by

²¹² Justice Nwobike, *supra* note 202, at 109.

²¹³ *Canada-Auto* case, *supra* note 137, ¶ 10.271.

having selected those sectors in its Schedule of Commitments.²¹⁴ This seems to be the bare minimum requirement for an EIA to become approved as a MFN exception. This “minimalistic” approach would enable more EIAs to be validated, although it may not be that simple. The “essential”²¹⁵ sectors of an individual EIA Member’s trade, whether qualitative or quantitative, would probably need to be considered in addition to the sectors liberalized under Member’s Schedule of Commitments.

In possible disputes before the WTO, the Panel would evaluate the combinations on case-by-case basis in its assessment of “substantial sectoral coverage.” In interpreting the definition of a “sector” and weighing the factors of footnote one, the WTO Panel would likely consider other factors as well. For example, an EIA concluded among the least developed countries would receive a different treatment under Article V than an EIA concluded among developed countries. Also, the overall purpose of an EIA, to enable liberalization and/or the “wider process of economic integration”,²¹⁶ could influence the interpretation selected.

(b) Volume of Trade

Despite the imprecision of the treaty provisions and the divergent views among Members, the Members generally agree that Article V does not authorize exclusion of essential services from an EIA, that is, those which serve as “infrastructure for economic activity”.²¹⁷ An EIA would not qualify under Article V, if a service sector essential to a Member’s economic activity were to be excluded.

Although distinct from its qualitative meaning, a service can also be considered essential when expressed in quantitative terms. The “volume of trade affected” factor in footnote one supports a requirement to include an essential sector determined by quantitative criteria. A greater liberalization without opening-up an essential sector to EIA partner(s) may not be considered “ambitious liberalization”, but rather a “minor preferential agreement”, by a WTO Panel as in *dicta* in the *Canada—Auto* case.

²¹⁴ By selecting a sector in its Schedule of Commitments, a Member affords National Treatment benefits to foreign service suppliers.

²¹⁵ Such service sectors are vital as an infrastructure for economic activity, or because of the volume of trading. For more discussion see Part V.A.1.b *infra*.

²¹⁶ See Part V.A.2 *infra*.

²¹⁷ Islam & Alam, *supra* note 183, at 24, *citing* WTO, COMMITTEE ON REGIONAL TRADE AGREEMENTS, SYNOPSIS OF ‘SYSTEMIC’ ISSUES RELATED TO REGIONAL TRADE AGREEMENTS: NOTE BY THE SECRETARIAT, ¶ 72(b), WTO Doc. WT/REG/W/37 (2000).

(c) Mode of Supply

All modes of supply should be liberalized according to footnote one for an EIA to be valid. Yet, the problem of definition of “substantial sectoral coverage” arose even regarding modes of supply.²¹⁸ Despite the express prohibition of *a priori* exclusion of any mode of supply²¹⁹ from an EIA, an ambiguity of interpretation remains.²²⁰ The conundrum involves *de jure* or *de facto* interpretation. Does *a priori* exclusion mean “legally explicit exclusion”, exclusion resulting from the “particular commitments” of an individual Member, or an exclusion resulting from the “implementation of the EIA”?²²¹

The language of footnote one in Article V seems to prevent an EIA from limiting its scope to just one specific “mode of supply” such as cross-border services (mode 1) or foreign direct investment (mode 3).²²² Further, no EIA should *a priori* exclude modes as important as investment and labor mobility, in the sense of modes 3 and 4.²²³ This requirement is best illustrated in the context of trade in professional services as most trade in professional services takes place via the temporary presence of natural persons.²²⁴ Given the importance of mode 4 for professional services, the real value of Members’ commitments with regards to modes 1 and 3 would be difficult to assess.²²⁵ For instance, while establishment rights are valuable, they lose importance when the capacity to transfer professionals from the home country is limited.²²⁶

2. Interpretation in the Light of ‘Wider Process of Economic Integration’

Article V:2 could be found influential in interpreting Article V:1(a), even though it seems to expressly limit its relation to Article V:1(b).²²⁷ Given that the

²¹⁸ GATS, *supra* note 11, art. V.

Article V:1(a) states: “In order to meet this condition, agreements should not provide for the *a priori* exclusion of any mode of supply.”

²¹⁹ *Id.*

²²⁰ Luis Abugattas, *Swimming in the Spaghetti Bowl: Challenges for Developing Countries under the ‘New Regionalism’*, at 19, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1280188 (last visited Apr. 10, 2010) (hereinafter Abugattas).

²²¹ *Id.*

²²² See WTO Secretariat Document, available at: http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto06/wto6_17.htm.

²²³ Justice Nwobike, *supra* note 202, at 109.

²²⁴ ROY, MARCHETTI & LIM, *supra* note 68, at 46.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ GATS, *supra* note 11, art. V:2 states: “In evaluating whether the conditions under paragraph 1(b) are met, consideration may be given to the relationship of the agreement to

overall purpose of Article V is to encourage greater liberalization among WTO Members, an EIA could satisfy the requirements of Article V when evaluated as part of a wider process of economic integration. This consideration could save an EIA that would otherwise fail as lacking “substantial sectoral coverage” if considered independently. In other words, in light of a wider process of economic integration, two (or more) independent treaties covering different aspects of trade in services among the same parties could satisfy the requirements of Article V:1(a) if their effects were cumulated.²²⁸ Arguably, this combined effect could enable each treaty to pass the “substantial sectoral coverage” test despite a possible insufficiency to do so when considered separately.²²⁹

For example, a BIT (covering investment in services), or investment provisions in a Free Trade Agreement (FTA), when combined with effects of an FTA (covering the cross-border trade in services, consumption abroad and presence of natural persons) concluded among the same parties could effectively create an EIA among such parties.²³⁰ A similar issue could arise when a PTA covering some aspects of trade in services were supplemented by a limited agreement extending service liberalization of the original PTA.

On the other hand, an unintentional creation of an EIA without an actual treaty to that effect is incidental and would provide a relatively easy exception from the MFN for countries with extensive number of specialized treaties. To avail themselves of the EIA exception to MFN, an agreement formalizing the advanced level of liberalization needs to exist for the CRTA or DSB to evaluate. Also, to avoid abuse of this MFN exception, the “substantial sectoral coverage” should be defined more precisely. An argument in favor of an EIA based purely on “wider process of economic integration” considerations would then become acceptable.

3. Interpretation of V:1(a) by WTO Panels

There is no WTO case law that has directly interpreted Article V:1(a). The *Canada-Autos* case, the only case in WTO jurisprudence to have dealt with Article V of the GATS, interpreted the “substantial sectoral coverage” requirement only indirectly. It refused to find an EIA (NAFTA) applicable where a Canadian measure was applied only to a few manufacturers.²³¹ Yet, it did not explain its findings in terms of sectoral coverage, since it applied a measure within the narrow

a wider process of economic integration or trade liberalization among the countries concerned.”

²²⁸ Ortino, *supra* note 123, at 27.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Canada-Auto* case, *supra* note 137.

sector of services related to the “car manufacturing” industry.

The GATT Article XXIV Comparison:

In case of a future dispute before the WTO, the Panel could consider its interpretation of “substantially all trade” criterion of the GATT Article XXIV in its deliberations of the “substantial sectoral coverage” scope,²³² because the GATT has many provisions similar to the GATS. The GATT Article XXIV requirement was analyzed in *Turkey – Restrictions on Imports of Textile and Clothing Products (Turkey-Textile)*.²³³ As noted by the Appellate Body in *Turkey – Textiles* with regard to the provision in Article XXIV:8 GATT, “ ‘substantially all’ is not the same as ‘all’, and is something considerably more than merely ‘some’ ”.²³⁴

Article V does not demand liberalization of “substantially all trade” like the GATT Article XXIV.²³⁵ Article V is much more liberal than GATT Article XXIV.²³⁶ Article V does not require “substantially all sectoral coverage”, but only “substantial sectoral coverage”. According to the Oxford Dictionary, “substantial” means, among other descriptions, “of considerable importance, size, or worth”²³⁷ and “concerning the essentials of something”.²³⁸ Thus, arguably, a certain sector, or maybe even sectors, would not need to be covered by an EIA for that EIA to still fulfill the Article V requirement. This is valid regardless of whether the scope of Article V includes all service sectors in general or only those to which the individual EIA party committed itself under the GATS.

On the other hand, the GATS is a broader agreement than the GATT, because it covers not only cross-border trade in services, but also three other modes of supply.²³⁹ Instead of one negotiable type of restriction (tariffs), the GATS permits a “variety of negotiable restrictions” that apply to the treatment of products (services) and/or their suppliers.²⁴⁰ Since the nature of trade in services is more complex than trade in goods,²⁴¹ the DSU’s interpretations may not be

²³² GATS, *supra* note 11, art. V:2.

²³³ Appellate Body Report, *Turkey–Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, (adopted Oct. 22, 1999) (hereinafter *Turkey–Textile* case).

²³⁴ *Id.* ¶ 48.

²³⁵ GATS, *supra* note 11, art. V.

²³⁶ *Id.* art. V:2.

²³⁷ OXFORD DICTIONARY, Definition of Substantial, *available at*:

http://oxforddictionaries.com/view/entry/m_en_us1295386#m_en_us1295386.

²³⁸ *Id.*

²³⁹ BERNARD M. HOEKMAN & MICHEL .M. KOSTECKI, THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: THE WTO AND BEYOND 355 (2001).

²⁴⁰ ADLUNG, *supra* note 14, at 4.

²⁴¹ Ortino, *supra* note 123, at 29.

applicable. Even common legal provisions like the MFN, National Treatment, or public policy exceptions would need to be interpreted differently in the services context.²⁴²

Yet, the conclusion that not *all* sectors need to be covered may still be valid, since the reasoning in *Turkey – Textiles* is based purely on textual interpretation. Although, in the context of the GATS, the ultimate number of sectors or the volume of trade covered will be greater than under the GATT, the GATS still requires a less stringent standard (“substantial”) for formation of EIAs than GATT Article XXIV (“substantially all”).²⁴³ This could be reflected in the WTO Panels’ interpretations.

4. In Practice: Article V:1(a) Defined by Specific Interests

There is no agreement about the meaning of “substantial sectoral coverage” requirement of Article V among the Members.²⁴⁴ But the practical application of this requirement may provide an insight into the scope of its meaning. In practice, most EIAs that have come into effect to date exclude some specific sector(s), besides services provided in the exercise of governmental authority.²⁴⁵ Some EIAs exclude even important sectors, or modes of supply, such as financial services,²⁴⁶ or Mode 4 in the case of NAFTA-Type Agreements.²⁴⁷ Other common exclusions include sub-sectors like audiovisual services, maritime services and air transport.²⁴⁸

Since the “substantial sectoral coverage” requirement has not been satisfactorily defined in the GATS, nor by a WTO Panel or by the Members in an “Understanding”,²⁴⁹ it is being determined pragmatically on the basis of Members’ specific interests.²⁵⁰ Instead of the GATS principles or any WTO Panels’ interpretation, individual EIAs’ precedents shape multilateral understanding of the

²⁴² *Id.*

²⁴³ Islam & Alam, *supra* note 183, at 24.

²⁴⁴ WTO, *Rules: Regional Agreements, Building blocks or stumbling blocs?*, Cancún WTO Ministerial 2003: Briefing Notes, available at: http://www.wto.org/english/thewto_e/minist_e/min03_e/brief_e/brief12_e.htm (last visited Apr. 10, 2010) (hereinafter CANCÚN WTO MINISTERIAL 2003).

²⁴⁵ Abugattas, *supra* note 220, at 18.

²⁴⁶ For e.g. Canada–Chile Free Trade Agreement, July 5, 1997, available at: <http://ptas.mcgill.ca/Agreements%20pdfs/Canada-Chile.pdf>. See Decision on Financial Services, *supra* note 66.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ Article XXIV was clarified by the Understanding on the Interpretation of Article XXIV of the GATT 1994 reached during the Uruguay Round.

²⁵⁰ Abugattas, *supra* note 220, at 19.

scope of Article V.²⁵¹ It appears that some Members concluding EIAs have begun to autonomously define²⁵² the consistency of their EIA with Article V standards.²⁵³

In the absence of a more uniform definition of “substantial sectoral coverage”, it is difficult to assess whether EIAs are consistent with Article V.²⁵⁴ The Council for Trade in Services, and the CRTA, have so far not found any EIA incompatible with the GATS pursuant to factual findings mandated by Article V:7, although specific recommendations were made in individual cases.²⁵⁵ The actual measurement of sectoral coverage may be impossible without a better classification to be utilized for all EIAs (and RTAs).²⁵⁶ Historically, the GATT/WTO has approved all regional agreements submitted to it,²⁵⁷ or “at least did not disapprove them”.²⁵⁸ The Sutherland Report on the future of the WTO states: “In practice there are now just too many WTO Members with interests in their own regional or bilateral arrangements for a critical review of PTA (and EIA) terms to take place and for consensus on their conformity to be found”.²⁵⁹

B. *Article V:1(b) – “Elimination of Substantially All Discrimination”*

1. Textual Interpretation and Scope

The second condition of Article V, the removal of substantially all discrimination, is to be met by eliminating the existing measures that discriminate against EIA partners, “either at the entry into force of the EIA..., or on the basis of a reasonable timeframe”.²⁶⁰ Subject to valid exceptions,²⁶¹ it also forbids any

²⁵¹ *Id.*

²⁵² The EC concluded in relation to its agreement with Mexico: “Although certain services sub-sectors i.e. audio-visual, air transport ... as well as maritime sector are explicitly excluded from the coverage of the agreement, it should still be considered to have ‘substantial sectoral coverage’ in the sense of Article V:1(a)”. European Commission, EU–Mexico Free Trade Agreement, 2000.

²⁵³ Abugattas, *supra* note 220, at 18-19.

²⁵⁴ CANCÚN WTO MINISTERIAL 2003, *supra* note 244.

²⁵⁵ WTO–Interpretation and Application of Article V, *available at*: http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gats_02_e.htm#article5B (hereinafter WTO–Interpretation and Application of Article V).

²⁵⁶ Abugattas, *supra* note 220, at 18.

²⁵⁷ WTO–Interpretation and Application of Article V, *supra* note 255.

²⁵⁸ Gantz, *supra* note 105.

²⁵⁹ PETER SUTHERLAND *ET AL.*, THE FUTURE OF THE WTO: ADDRESSING INSTITUTIONAL CHALLENGES IN THE NEW MILLENNIUM, 22 & 77 (2004), *available at*: http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf (last visited Oct. 1, 2010). For a discussion of the rules regarding regionalism, see C. O’Neal Taylor, *Of Free Trade Agreements and Models*, 19(3) *IND. INT’L & COMP. L. REV.* 569, 580 (2009).

²⁶⁰ GATS, *supra* note 11, art. V:1(b).

new discriminatory measures.²⁶² Article V:1 (b) does not require the elimination of ‘all discrimination,’ but only the elimination of ‘*substantially* all discrimination’.²⁶³ The Appellate Body in *Turkey – Textiles*,²⁶⁴ which analyzed the ‘substantially all’ standard in the context of the GATT Article XXIV, explained that the ‘substantially all’ standard is not the same as ‘all’ and requires “something considerably more than merely ‘some’”.²⁶⁵

However, the tolerable degree of discrimination in the context of Article V is left unspecified. During the meeting of the CRTA in 1997, the issue of permissible discrimination was examined in the context of the NAFTA.²⁶⁶ One group of Members argued that before the scope of permissible discrimination could be ascertained, the implication of “and/or” mentioned in paragraph 1(b)(i) of Article V should first be specified.²⁶⁷ According to these Members, the “or” gives parties to an EIA the option to choose between the elimination of existing discriminatory measures and the preservation of the status quo.²⁶⁸

On the other hand, other Members (led by the EC) argued that Article V could not be interpreted without referring to Article XVII as well.²⁶⁹ This interpretation reads paragraphs (i) and (ii) of Article V:1(b) together and not as alternatives.²⁷⁰ Both paragraphs (i) and (ii) are considered to be options used on a case-by-case basis in assessing the sufficiency of the “substantially all discrimination” elimination.²⁷¹ Paragraph V:1(b) is, thus, construed as a whole and in connection with Article XVII as well as other applicable provisions.²⁷²

Not only does Article V:1(b) require the elimination of substantially all discrimination, but it also specifies that this requirement is to be understood “in

²⁶¹ Exceptions cited in Article V:1(b) GATS include: International payment and transfers (Art. XI); short-run balance of payments difficulties (Art. XII); general exceptions on grounds of protection of public morals, human, animal or plant life or health etc. (Art. XIV); and security exceptions (Art. XIV bis).

²⁶² GATS, *supra* note 11, art. V:1(b).

²⁶³ Ortino, *supra* note 123, at 28-9.

²⁶⁴ *Turkey–Textile* case, *supra* note 233.

²⁶⁵ *Id.* ¶ 48.

²⁶⁶ WTO, Committee on Regional Trade Agreements, *Examination of the North American Free Trade Agreement*, WT/REG4/M/4 (Apr. 16, 1997) (hereinafter CRTA, Examination of NAFTA).

²⁶⁷ *Id.* ¶ 14.

²⁶⁸ *Id.*

²⁶⁹ *Id.* ¶ 19.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

the sense of Article XVII²⁷³ [National Treatment].²⁷⁴ Article V gives an implied recognition to the Member's right to regulate their economies, given that Article V does not eliminate regulatory measures altogether.²⁷⁵ Article V further requires Members to provide only for National Treatment, leaving regulations intact,²⁷⁶ as long as they do not discriminate against foreign suppliers of services.

Article V:1(b) further limits its applicability to sectors covered under subparagraph (a) of the Article.²⁷⁷ Subparagraph (a) covers only service sectors in which parties to an EIA agreed to liberalize trade either via a positive or negative approach.²⁷⁸

The Article V:1(b) also requires a "reasonable timeframe" for elimination of substantially all discrimination.²⁷⁹ But "reasonable timeframe" has not been defined anywhere in the GATS.²⁸⁰ Rather, the CRTA evaluates whether an EIA meets the standard on a case-by-case basis leaving some uncertainty as to the outcome. Some scholars argue that it is possible to borrow the principles set forth in the WTO Understanding on the Interpretation of Article XXIV of the GATT 1994

²⁷³ GATS, *supra* note 11, art. XVII states:

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 favorable than that it accords to its own like services and service suppliers.
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 favorable if it modifies the conditions of competition in favor of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

²⁷⁴ GATS, *supra* note 11, art. V:1(b).

²⁷⁵ WALTER GOODE, AUSTRALIAN GOVERNMENT, DEPARTMENT OF FOREIGN AFFAIRS AND TRADE, NEGOTIATING FREE-TRADE AGREEMENTS: A GUIDE, *available at*: http://www.dfat.gov.au/publications/negotiating_ftas/negotiating_ftas.pdf (last visited Oct. 01, 2010).

²⁷⁶ *Id.*

²⁷⁷ GATS, *supra* note 11, art. V:1(b).

²⁷⁸ *See* analyses in Part V.A.1.a-c, *supra* of this article.

²⁷⁹ GATS, *supra* note 11, art. V:1(b) ("provides for ... through: (i) ..., and/or (ii) ..., either at the entry into force of that agreement or on the basis of a reasonable time-frame, except for measures permitted under Articles XI, XII, XIV and XIV bis").

²⁸⁰ *See generally* GATS, *supra* note 11.

(reasonable time is not to exceed ten years, save in exceptional cases²⁸¹).²⁸² But a reasonable timeframe for eliminating barriers to trade in services might not be the same as is required for trade in goods.²⁸³ Consequently, declaring that a ten-year period is a reasonable length of time may be more harmful than beneficial regarding trade in services.²⁸⁴

According to some interpretations, the “reasonable timeframe” requirement may apply only to paragraph 1(b).²⁸⁵ Then, parties to an EIA would not be limited by time to achieve the substantial sectoral coverage to which they have committed themselves.²⁸⁶ A flexible interpretation of these provisions would allow an EIA with very limited initial sectoral coverage to be compatible with Article V.²⁸⁷ An alternative interpretation would require “agreements to have substantial sectoral coverage from their entry into effect”.²⁸⁸ In practice, the majority of EIAs contemplate a progressive sectoral liberalization.²⁸⁹

2. Interpretation of V:1(b) by WTO Panels

In *Canada – Auto*,²⁹⁰ Canada awarded duty-free treatment to specified commercial vehicles by certain manufacturers.²⁹¹ Canada justified this treatment by local regulations and NAFTA.²⁹² The Panel noted in its decision that Canada’s favorable treatment was not awarded only to Mexico and the United States, but it was also awarded to some non-NAFTA parties.²⁹³ Regarding the Article V issue in the case, the Panel held that even if the Canadian measures “could be brought within the scope of the services liberalization provisions of the NAFTA, the exemption [was] accorded only to a *small number* of manufacturers/wholesalers of *the United States*, to the exclusion of all other manufacturers/wholesalers of the

²⁸¹ Exceptions to the Understanding are quite frequent. “Most of the US FTAs have long periods (18-20 years) for developing countries to eliminate restrictions on some agricultural imports.” Gantz, *supra* note 105.

²⁸² Understanding on the Interpretation of Article XXIV of the GATT 1994, *available at*: http://www.wto.org/english/docs_e/legal_e/10-24_e.htm (last visited Oct. 1, 2010).

²⁸³ VAN DEN BOSSCHE, *supra* note 126, at 665.

²⁸⁴ *Id.*

²⁸⁵ Abugattas, *supra* note 220, at 20.

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Canada–Auto* case, *supra* note 137.

²⁹¹ *Id.* ¶ 5.162.

²⁹² *Id.* ¶ 7.42.

²⁹³ *Id.* ¶ 7.44.

United States and of Mexico".²⁹⁴ Therefore, the Canadian measures in dispute were found to be discriminatory in effect.²⁹⁵

The Panel also ruled that it would be inconsistent with Article V, if a party to an EIA treats service suppliers of one EIA partner more favorably in comparison to another EIA partner of the same EIA.²⁹⁶ This ruling by the Panel is important, because it effectively imposes an obligation on the EIA partners to ensure internal MFN treatment within the particular EIA framework itself.²⁹⁷ The Panel stated that:

Although the requirement of Article V:1 (b) is to provide non-discrimination in the sense of Article XVII (National Treatment), we consider that once it is fulfilled it would also ensure non-discrimination between all service suppliers of other parties to the economic integration agreement. It is our view that the object and purpose of this provision is to eliminate all discrimination among services and service suppliers of parties to an economic integration agreement, including discrimination between suppliers of other parties to an economic integration agreement.²⁹⁸

3. Article V:4: Discrimination Against Non-Members

Providing preferential treatment among EIA Members can potentially increase trade barriers against non-EIA Members of the WTO. By enabling greater market access to EIA Members, a WTO Member can put other WTO Members in relative disadvantage, even if non-EIA Members are not directly impacted by the execution of the EIA.²⁹⁹ In *Brazil – Tyres*, the Panel noted "[t]his type of agreement inherently provides for preferential treatment in favor of its Members, thus leading to discrimination between those Members and other countries".³⁰⁰ Thus, for an EIA to avoid becoming a trade distortion, it must conform to the WTO rules.³⁰¹

Article V:4³⁰² directs parties to an EIA to comply with their obligations toward non-EIA Members which applied before the EIA was formed,³⁰³ thus creating another condition an EIA has to satisfy to be validated under the WTO rules.

²⁹⁴ *Id.* ¶ 10.269.

²⁹⁵ *Id.*

²⁹⁶ *Canada–Auto* case, *supra* note 137, ¶¶ 10.268 & 10.270.

²⁹⁷ *Islam & Alam*, *supra* note 183, at 26.

²⁹⁸ *Canada–Auto* case, *supra* note 137, ¶ 10.271.

²⁹⁹ *Islam & Alam*, *supra* note 183, at 7.

³⁰⁰ Appellate Body Report, *Brazil–Measures Affecting Imports of Retreaded Tyres*, ¶ 217, WT/DS332/AB/R, (*adopted* Dec. 3, 2007).

³⁰¹ *Islam & Alam*, *supra* note 183, at 7.

³⁰² GATS, *supra* note 11, art. V:4 is derived from the equivalent provisions of Article XXIV of the GATT.

4. Article V:2: ‘Wider Process of Economic Integration’

Article V:1(b) should also be considered in the light of Article V:2 which provides: “In evaluating whether the conditions under paragraph 1(b) are met, consideration may be given to the relationship of the agreement to a wider process of economic integration or trade liberalization among the countries concerned”.³⁰⁴ Possibly, such evaluation could also include considerations of liberalization of international trade in goods.³⁰⁵ This provision, as well as Article V:3(a), raises an issue of the extent of flexibility in interpreting Article V conditions when the liberalization of international trade in services is part of a wider process of economic integration, and when developing countries are parties to an EIA.³⁰⁶

An interpretation limiting flexibility of Article V would require an EIA to encompass the four modes of supply.³⁰⁷ It would limit exclusion of sectors only to exceptional cases.³⁰⁸ An expansive view of Article V’s flexibility suggests that there is a “significant margin of flexibility to exclude modes of delivery and sectors as well as to allow for the maintenance of discriminatory measures with regard to National Treatment”.³⁰⁹

The flexibility in interpretation of Article V could influence whether an EIA would be validated under the WTO rules or not. For example, the European Communities Association Agreement with Jordan (EC-Jordan Agreement)³¹⁰ expressly recognizes that, in its current form, the agreement does not constitute an EIA under Article V.³¹¹ The parties’ objective is to develop Title III of the agreement “with a view to the establishment of an economic integration agreement

³⁰³ GATS, *supra* note 11, art. V:4 states: “Any agreement referred to in paragraph 1 shall be designed to facilitate trade between the parties to the agreement and shall not in respect of any Member outside the agreement raise the overall level of barriers to trade in services within the respective sectors or subsectors compared to the level applicable prior to such an agreement.”

³⁰⁴ *Id.* art. V:2.

³⁰⁵ Gantz, *supra* note 105.

³⁰⁶ Abugattas, *supra* note 220, at 19.

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Hashemite Kingdom of Jordan, of the other part, 2002/357/EC, O.J. (L 129) of May 15, 2002. For more information see http://europa.eu/legislation_summaries/external_relations/relations_with_third_countries/mediterranean_partner_countries/r14104_en.htm (last visited Dec. 5, 2010) (hereinafter Euro-Jordan Agreement).

³¹¹ Abugattas, *supra* note 220, at 19.

as defined in Article V of the GATS”.³¹² However, the EC-Jordan Agreement “incorporates significant liberalization commitments in its current form that, according to the alternative interpretation of paragraphs 2 and 3(a) of Article V, would make the agreement fully compatible with Article V even at this stage”.³¹³

VI. CONCLUSION

This article has raised discussions of a possible solution to the Doha Round impasse for the Members desiring to engage in further liberalization of trade in services: an Economic Integration Agreement. EIAs are effectively the only exception to the MFN treatment practicable for broader agreements in addition to the generally available exceptions.

EIAs may also serve as a transitional solution toward a greater liberalization at the multilateral level since the ‘single undertaking’ of the Uruguay Round is not flexible enough to embrace the current geopolitical changes. Similar results could potentially be achieved by a plurilateral trade agreement, because its signatories are not required to apply the PTA’s terms on MFN basis. But PTAs are difficult to incorporate into Annex 4 due to the requirement of a consensual decision under Article X (9) of the WTO Agreement. Further, no significant progress has been achieved with regard to the plurilateral negotiation process that was initiated after the Hong Kong Ministerial Conference in 2005. Also, EIAs may be able to reconcile different needs of developed and developing countries.

To prevent abuse of the MFN exception by EIA signatories while achieving greater liberalization of trade in services, the drafters balanced two main conditions for EIA creation within the GATS Article V. This paper analyzed the scope of both the “substantial sectoral coverage” and the “elimination of substantially all discrimination” requirements. Most likely, each of the parties to an EIA should satisfy the requirements individually.

The substantial sectoral coverage requirement is clarified in footnote one. The three factors stated seem to apply cumulatively while failure to satisfy any of them may, by itself, exclude an EIA as not having a sufficient “substantial sectoral coverage”. The “number of sectors” factor allows for the exclusion of some sectors, but the standards of “ambitious liberalization” and “no minor preferential agreements” expressed by the WTO Panel in *Canada-Auto* case limits the number of sectors excluded. Further, the definition of “sector” allows for at least three interpretations requiring a different extent of liberalization.

³¹² Euro-Jordan Agreement, *supra* note 310, art. 40. *See id.*

³¹³ Abugattas, *supra* note 220, at 19.

Although a WTO Panel would evaluate an EIA on case-by-case basis, the minimum coverage required would probably be derived from sectors in which a Member already liberalizes by affording National Treatment in its Schedule of Commitments. Other factors of footnote one and Article V would be considered in an EIA evaluation as well. For example, no mode of supply nor any essential service sector, whether a qualitative or quantitative measure, should be excluded from an EIA. Also, an EIA concluded among the least developed or developed countries would receive a different treatment. Moreover, the overall purpose of an EIA to enable liberalization and/or the “wider process of economic integration” in relation to trade in goods would likely influence the evaluation EIA’s coverage.

The “elimination of substantially all discrimination” requirement is limited to the sectors covered under the “substantial sectoral coverage” evaluation of an EIA. The better interpretation of paragraph V:1(b) will construe it as a whole and in connection with Article XVII - National Treatment. It further obligates EIA partners to ensure internal MFN treatment to all parties to the EIA and to comply with their obligations toward non-EIA Members that applied before the EIA was formed.

In practice, EIAs seem to be defined by specific interests. Most EIAs that have come into effect to date exclude some specific sector(s), besides services provided in the exercise of governmental authority. Individual EIAs’ precedents shape multilateral understanding of the scope of Article V. Neither the Council for Trade in Services nor the Committee on RTAs have found any EIA incompatible with the GATS, although specific recommendations have been made.

In the past, EIAs have been concluded within an FTA framework, but nothing prevents an EIA from being concluded as a stand-alone agreement, without relation to trade in goods or other trade. Once EIA partners agree on terms of their EIA or an enlargement of existing FTA, they should notify the agreement to the Council for Trade in Services. The Council will determine the EIA’s consistency with Article V. An EIA will likely satisfy those requirements if it covers most of each party’s major service sectors.