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Public services and the GATS

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Public Services and the GATS

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Public Services and the GATS

ABSTRACT

The status of public services is one of the most hotly debated issues surrounding the GATS. There are two approaches to distinguish such services from any other services: an institutional approach that focuses on the legal and institutional conditions governing supply (e.g. ownership status, market organisation), and a functional approach based on the policy objectives that may be involved (e.g. distributional and quality-related considerations, concepts of universal access). Given the wide range of institutional arrangements that exist in different jurisdictions, with significant variations over time, the former approach does not appear appropriate. The services provided by government-owned facilities, whose costs are covered directly by the State, may well be indistinguishable, for all practical purposes, from the services provided by private commercial operators, whose users (students, patients, passengers, etc.) are reimbursed.

This paper discusses the relevance of the GATS for different organisational settings - from government monopolies to regulated and/or subsidized private provision - that may be used by WTO Members to meet typical public service objectives. It turns out that virtually all forms of organisation can be accommodated within the framework of the Agreement. To fully exploit its opportunities and avoid unpleasant surprises, however, governments would need to thoroughly analyse the relevant provisions in the light of their own policy objectives.

JEL classification: F13, H40, H70

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I. INTRODUCTION

The General Agreement on Trade in Services (GATS) has drawn a lot of attention and - diverse - comments since its inception in 1995. While the verdicts of most economists range between indifferent and positive, subject to various caveats, commentators with a public-service background tend to be more sceptical, sometimes even hostile. One of their prime concerns is governments' continued ability to ensure adequate supplies of socially-relevant services such as health and education. The GATS could sound the death knell, it is feared, for the free provision of core public services - to the detriment of less privileged users and, ultimately, social cohesion.¹ The Agreement is still relatively young, however, and many statements appear to be influenced by personal interests and expectations, rather than thorough analysis or hard evidence. Also, various misunderstandings may have played a role, due in part to certain textual ambiguities.

At first glance, it might be tempting to equate 'public services' with the concept of 'governmental services' or, more precisely, of 'services provided in the exercise of governmental authority' as used in the GATS. The fact that the Agreement expressly excludes such services from cover could prove an element of comfort. This is not the case, however, if all remaining services are - erroneously - deemed to be destined for quasi-automatic liberalization and deregulation, regardless of national preferences and institutional conditions. Resulting apprehensions may be exacerbated by the fact that the definition of 'governmental services' in Article I:3 is not only relatively narrow, but subject to uncertainties. The GATS does not use such terms as 'public services' or 'services of general interest'.²

In any event, it would be unreasonable to confine a discussion of public services to activities covered by a particular concept or definition of the GATS. This would simply ignore the fact that the same services are provided in different jurisdictions in completely different economic and institutional settings, from government monopolies to open markets. If there is a common denominator across countries, it is the notion that the availability of certain services, however defined, is deemed to be in the general economic interest or, even more broadly, in the general interest of a country. The latter concepts are used, for obvious reasons, given the diversity of conditions in Member States, by the European Commission's Green Paper of 2003 which, in turn, builds on relevant EC Treaty provisions.³

According to the Green Paper, 'services of general economic interest' are provided in particular by big network industries, for example in the transport, postal, energy and communication sectors, but the term also covers any other economic activity subject to public service obligations. In addition, the Commission's following White Paper explicitly

¹ For example, an article published in early 2003 by The Lancet alleges: "In March 2003 trade ministries ... will have decided which public services they propose to open to foreign competition ..." (Pollock and Price, 2003). Others claim that the ongoing round of negotiations "targets the removal of restrictions on corporate involvement in public hospitals, water, and sanitation systems" (Shaffer et al, 2005, p. 24). And a pamphlet circulated by the Conférence Universitaire des Associations d'EtudiantEs (CUAE) at the University of Geneva in November 2004 lamented the "barbarian terminology" of GATS which masked a fundamental challenge to established systems of education: "The negotiations are about the abolition of public services, including our university, and their replacement by private facilities" (own translation).

² The closest match is a definition in Article XXVIII(c)(ii) of the GATS, which seeks to delineate the range of government measures that affect trade in services and are therefore covered by the Agreement. They include measures in respect of "the access to and use of, in connection with the supply of a service, services which are required ... to be offered to the public generally".

³ Commission of the European Communities (2003).

acknowledges the general (non-economic) interest in social services such as health, long-term care, social security and social housing.⁴ The Commission uses a relatively open definition of the entities involved, including their legal form and ownership status, and the types of services that might be covered.⁵ Reference is made in particular to the following common elements: universal service, continuity, quality, affordability, user and consumer protection.

The scope of the services concerned - in the following referred to as 'public services' - is bound to vary over time and between countries.⁶ This implies, by the same token, that there is no stable relationship between the measures governments might use in a sector and a particular set of GATS provisions. Measures affecting so-called governmental services are even completely beyond the Agreement. What ultimately matters are the legal and institutional arrangements that govern the provision of a particular ('non-excluded') service at a particular point in time.

The next sections trace the range of GATS provisions that might prove relevant for the supply of public services. Starting point is the question how the Agreement impinges in principle on governments' ability to regulate trade in services, whether public or not, and what options exist to accommodate national policy objectives within the framework of GATS commitments. A discussion of alternative arrangements for the provision of public services follows. The third section focuses on so-called governmental services, which are mostly provided directly by the State in core sectors. The fourth section describes various arrangements of a commercial nature, from monopolies and protected markets (or market segments) to the free provision of - regulated or subsidized - services. A concluding section discusses some open issues, if any, and the options for further clarification and/or individual action by interested Members.

II. APPLICATION OF GATS PROVISIONS TO PUBLIC SERVICES: SCOPE AND LIMITS

If the Green Paper's definition is used, many public services - or more precisely: the policies governing their supply - fall under the GATS. This is due mainly to two factors:

- First, the wide range of government measures, sectors and activities covered by the GATS.⁷ Existing jurisprudence confirms that the Agreement applies to all measures having "an effect on" trade;⁸ its definitional scope, in Article I:3(b), captures in principle "any service in any sector"; and Article XXVIII(b) lists a wide range of activities that may be involved in the supply of a service, including production, distribution, marketing, sale and delivery.
- Second, the broad modal concept of services trade. In addition to cross-border supplies (mode 1), the traditional focus of a trade agreement, Article I:2 lists three additional forms of transaction: supplies within the territory of one WTO Member to service consumers of another Member (mode 2); supplies of foreign-owned or foreign-controlled companies that have established a commercial presence in a Member's territory (mode 3); and, finally, services supplied by natural persons,

⁴ Commission of the European Communities (2004), p. 16.

⁵ "It is irrelevant under Community law whether providers of services of general interest are public or private; they are subject to the same rights and obligations" (Commission of the European Communities (2003), p. 7).

⁶ Krajewski (2003), p. 343 ff.

⁷ Article I:1: "This Agreement applies to measures by Members affecting trade in services."

⁸ 'European Communities – Regime for the Importation, Sale and Distribution of Bananas' (WTO document WTDS27/AB/R, 9 September 1997, p. 94). Panel and Appellate Body expressly rejected the notion that Agreement's scope could be confined to measures "regulating" or "governing" trade.

whether employed by a foreign company or self-employed, in the territory of another Member (mode 4).⁹

There are only two wholesale exemptions from the Agreement's coverage, which are relevant from a public-service perspective. One exemption is of a general, cross-sectoral nature and applies to services provided "in the exercise of governmental authority", while the second exemption is sector-specific. An Annex to the GATS excludes all measures affecting traffic rights and services directly related to the exercise of traffic rights (the latter exclusion is, in turn, subject to certain qualifications).¹⁰ The exemptions may not provide cover, however, for the effects that policies in these 'excluded sectors' may have on trade in other services. Once a measure impinges on the supply of a service that falls under the Agreement, it would need to be assessed in the light of potentially relevant obligations and commitments.¹¹

It is not immediately clear, whether and to what extent the Agreement's wide definitional coverage affects governments' scope for action. On the one hand, there might be concerns about the extension of trade policy concepts like most-favoured-nation treatment, market access and national treatment to measures governing domestic investment, production and employment (under modes 3 and 4). On the other hand, however, the Agreement offers an enormous degree of flexibility to adjust a country's obligations to the particular circumstances of individual sectors. Market access and national treatment need to be granted only in services that a country has inscribed in its schedule of specific commitments, and only to the extent that no limitations have been attached (Box 1 and Section IV.C).

Government measures, whose focus is on consumers (patients, students, train or bus passengers) rather than suppliers (hospitals, universities, transport operators), tend to be compatible *per se* with all relevant provisions of the Agreement. This presupposes, of course, that there is no built-in bias favouring the use of domestic over foreign supplies (e.g. via restrictions on insurance portability or the use of scholarships). However, many policy schemes are structured differently. Subsidies are often extended to producers rather than to users, domestic producers have easier access than foreign competitors, or whole sectors are reserved exclusively for government providers. While there may be doubts whether the underlying policy objectives, normally related to quality and equity, necessarily call for such arrangements, the GATS is nevertheless able to accommodate them. National concepts of public services - in particular in consumer-related areas such as health and education - have evolved over decades, if not centuries, and are deeply rooted in countries' institutional fabrics. While a trade agreement may help to improve access conditions to individual markets, it can hardly be expected to redefine the scope of genuine government responsibilities.

⁹ The definition of mode 4 reads: "the supply of a service ... by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member". This implies that the supplier and the natural person involved must not necessarily be of the same nationality, but that they provide services in a country other than their respective home countries.

¹⁰ The Annex on Air Transport foresees that developments in the sector and the operation of the Annex are reviewed periodically, and at least every five years with a view to considering the further application of the GATS in this sector. A first such review was launched in 2000 and terminated, without results in substance, in November 2003. The beginning of the second review is scheduled for the last session of the Council for Trade in Services in 2005.

¹¹ See Article XXVIII(c)(ii) in conjunction with Article I:3. Cases in point are refusals to treat foreign natural persons, under otherwise freely available public health and retirement plans, on a par with their domestic counterparts.

Box 1: Relevance of the GATS for the supply of individual services

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

^a Permissible departures: (a) MFN exemptions listed pursuant to Article II:2; (b) participation in Economic Integration or in Labour Market Integration Agreements (Art. V and *Vbis*); and (c) recognition of foreign licences, certificates, etc. (Art. VII).

^b Purpose: Ensure compliance with MFN principle.

^c More comprehensive transparency obligations, including notification requirements, than in sectors not subject to specific commitments.

^d Purpose: Prevent excessive regulatory activities and/or particularly burdensome requirements from undermining the commercial value of specific commitments.

^e Purpose: Prevent market distortions (e.g. through anti-competitive cross-subsidization) in areas where specific commitments have been undertaken (see also footnote 66).

^f Market access and national treatment may be made subject to limitations.

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

The exercise of flexibility under the Agreement presupposes that national administrations are familiar with relevant provisions and, of, course, that they are not under undue pressure from trading partners.¹² The existing commitments and the initial offers submitted in the ongoing round do not testify to such pressure; if applied, it has left no visible traces, at least.¹³ On average, the schedules of commitments submitted at the end of the Uruguay Round in 1993/94 cover no more than one-third of the approximately 160 service sectors contained in a classification list developed by the WTO Secretariat. Yet there are wide variations between and within individual groups of Members. The number of sectors scheduled by developed countries exceeds 100 on average, which is 2.5 times the average for developing countries and more than 4 times the average for least developed countries. Virtually all initial offers submitted in the current negotiations between March 2003 and August 2005 have remained modest, both in terms of sector coverage and proposed access conditions, and do not significantly change the picture.¹⁴ More than one-third of the WTO's current 148 Members had not even submitted an offer by mid-2005, including the vast majority of African countries and virtually all least-developed countries. This contrasts with an increasing number of - relatively ambitious - regional or bilateral arrangements in services that have been or are being negotiated among WTO Members.¹⁵

To fully explore the impact of GATS on government's scope for action, it is also important to keep in mind certain conceptual limits. In contrast to the GATT, all substantive disciplines are exclusively 'import-related';¹⁶ the Agreement does not impose any constraints on Members' ability to promote or restrict own supplies under the four modes. In turn, this may enable or facilitate policies to promote the availability of public services.¹⁷ To give two examples:

- Obligations and commitments concerning mode 2 relate to government measures affecting the consumption of services by nationals who leave the country. Cases in point are prohibitively expensive tourist exit visas or the exclusion of university studies or medical treatment abroad from otherwise available domestic support schemes. Conversely, there are no constraints, under whatever GATS provision, that would diminish a government's ability to regulate the consumption of services by foreign tourists, students, patients, etc. within its own jurisdiction. The application of

¹² It has been alleged, for example: "While developing countries formally retain the right to choose which services they will offer up to GATS, they come under intense pressure in these negotiations to meet the demands of more powerful WTO members" (Hilary, 2003). See also Commonwealth Secretariat (2003), p. 26.

¹³ A qualification may be needed in the case of countries that recently acceded to the WTO (Adlung, 2004a, p. 7f).

¹⁴ Adlung and Roy (2005).

The negotiations were mandated in Article XIX of the GATS to start no later than five years from the date of entry into force of the Agreement, i.e. on 1 January 2000. Following the Doha Ministerial Conference of November 2001, they were integrated into the wider framework of the Doha Development Agenda. According to the Doha Ministerial Declaration, initial offers of specific commitments were to be submitted by 31 March 2003.

¹⁵ By end-June 2005, 29 preferential agreements had been notified under the relevant provisions of Article V:7(a) of the GATS.

¹⁶ The definition of services trade in Article I:2 is neutral in that regard. However, this is not the case for the core obligations contained in Parts II and III of the Agreement. Article II (most-favoured-nation treatment) focuses exclusively on the treatment of like services and service suppliers of other WTO Members and does not apply to the treatment of own supplies destined for others. Article XVI disciplines the use of quantitative and some other restrictions in sectors subject to specific commitments, while subsidies and similar measures are subject to the national treatment obligation of Article XVII. Both Articles refer only to measures affecting the ability of foreigners to supply services under any of the four modes, rather than to the reverse flows (i.e., inbound movements of foreign consumers under mode 2 or outbound movements of domestic suppliers under modes 3 and 4).

¹⁷ Adlung (2003) and (2004a).

deterrents such as special taxes or quotas would not fall under the GATS; they may be used, for example, to ensure domestic consumers priority access to relevant facilities (hospitals, universities, etc.).

- The range of persons covered by obligations and commitments on mode 4 is confined essentially to foreigners seeking to supply services within another WTO Member's territory. Outbound movements of domestic doctors, teachers, nurses, etc. are not covered, however. There are thus no constraints on government initiatives to discourage such movements with a view, for example, to preventing losses of scarce skills and expertise. Indonesia and other ASEAN Members maintain certain public service obligations on young medical professionals, thereby enabling hospitals in remote regions to recruit staff.¹⁸

III. POLICY AREAS BEYOND THE GATS

A. GOVERNMENTAL SERVICES

Like other trade agreements, the GATS excludes core governmental activities from cover. There would be no point, of course, for countries to assume trade obligations in areas that are completely closed for any form of commercial activity. Given the wide variety of institutional conditions among WTO Members, the drafters did not attempt to list these areas individually, however, but sought to define them in general terms. The relevant provisions, in Article I:3(c), relate to "any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers". Not surprisingly, this definition has been associated with various contents. A report commissioned by the Canadian government notes that the possibly only conclusion to be drawn from existing comments, including from individual WTO Members and the WTO Secretariat, is the existence of a range of interpretations.¹⁹ There are no definitional benchmarks, for example in the context of dispute rulings or decisions by WTO bodies, which would provide clarification. If there is a common thread running through many comments from the academic community, however, it is the view that none of the realistically conceivable interpretations would seriously impinge on the ability of governments to provide what they consider to be governmental services.

(i) Any service not supplied on a commercial basis ...

One of the first authors to discuss the governmental-service exclusion in more detail, Markus Krajewski, points out two possible meanings of the term 'commercial'.²⁰ Based on the Oxford Dictionary, he distinguishes between (a) acts of buying and selling, at whatever price, without profit intentions and (b) a more general association of 'commercial' with profit-seeking activities. Like other commentators, he prefers the second option without, however, exploring all ramifications.²¹ The question remains, *inter alia*, why the drafters, had their sole

¹⁸ ASEAN Workshop on the GATS Agreement (2002), p. 43f.

¹⁹ VanDuzer (2004), p. 64 f.

²⁰ Krajewski (2003), p. 351.

²¹ Krajewski refers to the definition of commercial presence (mode 3) in Article XXVIII(d) of the GATS, which covers "any type of business or professional establishment ...". His conclusion, somewhat surprisingly: "This definition suggests that 'commercial' in the context of GATS implies a notion of profitability, because businesses or professional establishments are usually set up to make a profit". However, the definition of commercial presence in Article XXVIII(d) is complemented by two examples: "(i) the constitution, acquisition and maintenance of a juridical person, or (ii) the creation or maintenance of a branch or a representative office ..." The definition of juridical person follows in Article XVIII:(1): "any legal entity constituted or otherwise organized under applicable law, whether for profit or otherwise(!), and whether privately-owned or governmentally-owned ...". This suggests that public utilities and other non-profit organisations are not excluded *per se* from the scope of mode 3 (commercial presence) and, by implication, from the GATS. Or, in other words, the Agreement's

focus been on profit-seeking activities and organisations, did not write this directly into the Agreement.

Even the equation of commercial with profit-seeking would not solve all definitional problems. Follow-up questions abound. What concepts of profit or profitability would be relevant: positive cash-flow, revenue surplus over full costs (including interest on equity), etc.? What is the relevant time period? What would be the status of an activity that fails to live up to the supplier's underlying profit intentions - and what about a service that, unintentionally, turns out to be profitable? To what extent would losses that are attributable to poor managerial performance be allowed to trigger the exclusion? And so forth.

It might go too far, on the other hand, if any supplies for which a price is charged were considered to be 'commercial'. A distinction might need to be made between (a) the use of rather symbolic dues that may be aimed at preventing excessive demand, waiting queues or cost explosion, and (b) deliberate pricing strategies with a view to maximising revenue in the pursuit of a public policy objective (e.g., peak load pricing in the energy or transport sectors). In order for an activity to be considered as commercial, an element of strategic economic behaviour may need to be involved. For example, in setting prices, the operator concerned would take into account the preferences of potential users and/or the availability of alternative sources of supply. Contrasting with many universities or museums, etc., even monopoly rail or postal operators might contemplate such parameters. (Potential clients might otherwise travel by plane or use their own cars, rely on the internet or send a fax.) They may then be deemed to act in a 'commercial' manner. At the same time, this broader interpretation tends to blur the distinction between 'commercial' and 'competitive' behaviour, the second definitional element of the governmental-service exclusion. They may be viewed as two facets of the same concept.

Public entities, including universities, have increasingly sought in recent years to develop new sources of revenue. Relevant activities range from software development, applied chemical or medical research and design studies to courses in staff management and language training. Concerns have been voiced that such initiatives could affect the applicability of the exclusion to other services provided by the same supplier.²² However, such concerns are mistaken. Article I:3 refers explicitly to the conditions governing the supply of a particular service ("any service, which is supplied neither on a commercial basis nor in competition ...") and not to its overall role within a supplier's accounting system, or to the existence of remunerative activities that might be conducted in parallel.

(ii) ... nor in competition with one or more service suppliers

It is interesting to see that Article I:3(c), contrasting with Articles II (most-favoured-nation treatment) and XVII (national treatment), does not use the concept of likeness. It refers to the supply of any service in competition between one or more suppliers, rather than to competition between like services or like suppliers. This entails the possibility that unlike services might be in competition (e.g. surgery in a hospital and pharmaceutical treatment by a medical practitioner) and/or that seemingly like services might be offered by unlike suppliers for different clienteles (e.g. primary education in private and public schools).²³ If so, however, where would be the borderline between services that are (still) in competition and others that are not? Marchetti and Mavroidis use the concepts of direct competition and substitutability as relevant determinants, which they consider to be more meaningful than a

reference to 'commercial' can not be narrowed down to notions such as 'profitable' or 'profit-seeking'. See also footnote 29.

²² According to Shackleton (2003), "[h]igher education institutions are ... nowadays selling at least some services on a commercial basis, in competition with other suppliers, and seem thus to fall clearly within the scope of the GATS".

notion of likeness, while Krajewski builds on "a certain degree of elasticity of substitution", which might need to be established case-by-case and, according to relevant jurisprudence, could vary between countries.²⁴

Questions remain. It is not clear, for example, how an elasticity of substitution could be established for services, such as public education or basic medical care, that are supplied at close to zero prices (the elasticity is normally defined in terms of demand changes in response to changes in relative prices). Moreover, the concept provides no guidance for governments, which prior to admitting private supplies in sectors hitherto dominated by public monopolies would like to establish whether a competitive relationship in the sense of Article I:3(c) could ensue. And, finally, one may wonder to what extent considerations inspired by the GATT and related jurisprudence (for example in 'Japan - Taxes on Alcoholic Beverages' and 'Korea - Taxes on Alcoholic Beverages') are relevant for an Agreement that not only covers access conditions in cross-border trade, but also the possibility for consumers (or producers) to move between, and consume (or supply) services in, some 150 geographically distinct markets.

Even in a country like Canada, where education and health services are normally provided for free by the government without parallel private supplies, it might be argued that an element of competition exists. Commercial supplies are readily available across the national border. Hip surgery in the United States - from the Canadian perspective a transaction falling under mode 2 (consumption abroad) - might be considered a perfect substitute for an intervention within Canada. The same could be said for courses offered by a traditional brick-and-mortar university and those supplied cross-border via the internet (mode 1). In other words, if coexistence and substitutability were equated with the existence of competition, the governmental-service exclusion of Article I:3(b) could largely be devoid of substance.²⁵ Mere existence of a domestic monopoly would not be sufficient a criterion in the context of GATS, given the existence of alternative supplies that are accessible via consumer movements or electronic means. In the same vein, it might even be argued that the public universities of different countries, e.g. Switzerland and Germany, are in competition if their exams are mutually recognized and students are free to choose and express their personal preferences under mode 2.²⁶ (Or is there already an element of 'competition' within the public university systems of both countries, which are rather diversified and allow students to select their preferred alma mater?)

These considerations are based, however, on a particular definition of competition, which hinges on the availability of alternative sources of supply. Other, possibly more convincing options exist. VanDuzer refers to the Panel report in 'Mexico – Measures Affecting Telecommunications Services', which uses the Oxford English Dictionary's definition of competition to clarify the meaning of "anti-competitive practices" (para. 7.230).²⁷ The core notion in this context is "rivalry in the market, striving for custom between

²³ VanDuzer (2004), p. 76, opines that the drafters, had they relied on the concept of likeness (as in the case of Articles II and XVII), would have said so. The same argument may be applied, however, to the discussion of 'commercial' versus 'profit-seeking'.

²⁴ See Marchetti and Mavroidis (2004), p. 531ff, Fidler (2004), p. 35ff, and Krajewski (2003), p. 353.

²⁵ This presupposes, of course, that one takes the view that a competitive relationship may exist across different modes of supply. A precedent exists insofar as the Panel, 'Canada - Certain Measures Affecting the Automotive Industry', even accepted the possibility, in its application of the national treatment principle (Article XVII), that like services may be supplied through various modes (WTO document WT/DS139R, 11 February 2000, p. 417).

²⁶ According to Cottier et al (2003), competition in the sense of Article I:3 even exists among Swiss universities: "There is no legal monopoly in higher education at the exclusion of private education. ... We therefore conclude that higher educational services funded by the government are basically covered by GATS and subject to its disciplines".

²⁷ WTO document WT/DS204/R, 2 April 2004, p. 191, and VanDuzer (2004), p. 77f. See also Cossy (2005).

those who have the same commodities to dispose". Thus, inferences on the existence of competition would depend on the behaviour of the supplier concerned, rivalling or not, regardless of the actions of others within or beyond a country's jurisdiction. VanDuzer calls this a "one-way" conception of competition. Consequently, as long as public universities or hospitals do not seek to poach students or patients with a view to raising revenue, they can not be deemed to be in competition. If they do, however, they behave like commercial market participants in a competitive environment – and the relevant supplies should be treated accordingly.

(iii) Special cases

Article I:3(b) and (c) are rather complicated constructs. If their sole purpose is to exempt services that are supplied neither on a commercial basis nor in competition, a single sentence might have sufficed. Reference to the exercise of governmental authority would not have been necessary. This could prompt speculation about a third criterion, direct participation of a governmental agency, which might be hidden. VanDuzer, unlike Krajewski, seems to entertain this idea insofar as he establishes a link between the government's role, or, rather, lack thereof, and the commercial nature of a service. In his view, the absence of government involvement is one possible indicator of a service being supplied on a commercial basis. Thus, according to VanDuzer, if a service is destined for purely private not-for-profit purposes, for example recreational activities for members of a club, it should not be within the exclusion.²⁸ However, this issue may not prove particularly relevant in practice, since governments are unlikely in any event to take measures within the meaning of Article I:1 that affect trade in such (private) services.

The governmental service exclusion of Article I.1 does not contain any reference to particular sectors or legal forms of establishment. It might also be applicable in cases where a governmental agency, for example a municipal office, tasks a private company with certain public functions, such as road cleaning or garbage collection. The underlying contractual relationship between municipality and supplier might fall in part within the realm of government procurement. Article XIII of the GATS confers a special status on such activities insofar as they are expressly exempt from the application of Articles II (most-favoured-nation treatment), XVI (market access) und XVII (national treatment) (Box 1).²⁹ In most cases, the relevant transactions are likely to involve infrastructural services and meet the usual public goods definition of joint (i.e., non-divisible) supply and consumption.

The provision of such services must not be confounded with monopoly situations in which a particular - public or private - supplier operates in protected market segments on a private contractual basis (postal, telecommunications, transport services, toll roads, etc.). Consumption of such services is determined by individual user decisions. Yet there may be a grey area between publicly provided (governmental) services and the (private) activities of an exclusive supplier. A case in point are so-called 'built-operate-transfer (BOT) arrangements',

²⁸ VanDuzer (2004), p. 71. Krajewski takes the view that the notion of governmental service does not necessarily imply a public interest in its provision or the involvement, directly or indirectly, of a public administration.

²⁹ Article XIII replicates the wording of Article III:8(a) of the GATT, which exempts government procurement of goods from the national treatment obligation. An interesting feature is the definitional association of government procurement with purchases of goods (services) that are not destined "for commercial resale" or for the production of goods (the supply of services) for "commercial sale". The provision seems intended to prevent governments from using procurement as a pretext to buy and resell particular goods/services with a view to affording them a competitive edge over alternative supplies. Such practices are likely to be particularly distortive in cases where no profit intentions are involved. Again, this suggests that the drafters of the Agreement(s) associated the term 'commercial' with wider connotations than simply 'profitable' or 'profit-seeking'.

where a private company undertakes to construct an infrastructural facility (hospital, motorway, etc.) in return for the right of temporary exploitation.³⁰ However, given the commercial background of such arrangements, Article I:3 is not likely to apply in any event.

The Article I:3 exclusion has one sector-specific variant, in financial services. The relevant Annex to the GATS introduces the following definition of governmental services: activities forming part of a statutory system of social security or public retirement plans, and other activities conducted by a public entity for the account or with the guarantee or using the financial resources of the Government. However, whenever such activities are open to competition from financial service suppliers, they fall under the GATS (Annex on Financial Services, 1(b)(ii) und (iii)). Although these provisions could have been couched in clearer terms, they are unequivocal in two respects. First, only the existence of competition matters, the (non-)commercial nature of an activity is not relevant. Second, the sole focus is on whether (private) financial service suppliers are allowed to compete, the behaviour of the public entity is not decisive.³¹

B. NEED FOR (RE-)NEGOTIATION IN THE CURRENT ROUND?

As noted before, the uncertainties surrounding the governmental-service exclusion have tended to overshadow discussions of the Agreement's impact on public services. However, how relevant are these uncertainties in practice? Is it possible that policy control over public services is lost if the Article's scope has been overestimated and GATS obligations actually apply? Is it conceivable in such cases that WTO bodies decide on substance and content of core policy competencies?

A closer look at the structure of the Agreement shows that there is little reason to worry. The services that are covered by the GATS essentially fall into two groups, depending on whether or not they are subject to specific commitments.

- No commitments: A range of unconditional obligations apply (Box 1). These include, first and foremost, the most-favoured-nation principle, i.e., the obligation not to discriminate between like foreign services and service suppliers. Yet it is difficult to conceive of cases where the MFN rule impinges on governments' ability to provide public services. Why should it be necessary, for example, in pursuit of particular policy concept to discriminate among foreign hospital operators or university lecturers on the basis of their origin or nationality?³² In any event, governments remain entitled to maintain a wholesale sale ban on any foreign participation in the areas concerned.
- Specific commitments: The entries inscribed in the country's schedule with regard to market access (Article XVI), national treatment (Article XVII) and, if relevant, any

³⁰ Cossy (2005).

³¹ It is interesting to note that the Annex' definition of 'public entity' hinges on public ownership and control and leaves no scope for the relevant functions being conferred on private suppliers. See VanDuzer (2004), p. 83f.

³² Fidler and his co-authors are thus "hard pressed to think of many health policy reasons for explicitly treating one foreign service or service provider less favourably than a like foreign service and service provider in any health-related service sector" (2003, p. 52). Similar views have been expressed by VanDuzer (2004), p. 113, and Marchetti and Mavroidis (2004), p. 536f.

It needs to be noted, however, that the GATS allows for a range of departures even from the basic MFN requirement. The possibly most relevant cases are: (a) MFN exemptions that could have been listed at the date of entry into force of the Agreement; (b) the preferences extended between participants in Economic Integration Agreements under Article V; and (c) recognition measures relating to standards, authorization and certification requirements, etc. pursuant to Article VII. See, for example, Adlung (2004a).

additional commitments (Article XVIII) must be respected. While commitments may imply very different levels of access, depending on the scheduling of limitations, a range of related obligations, which are triggered by their inscription ('conditional obligations') apply *per se*. Their main purpose is to protect the commercial value of the committed access conditions from gradual erosion as a result, for example, of non-transparent and/or excessively burdensome regulations or the use of foreign exchange restrictions. Of course, the unconditional obligations continue to matter as well (Box 1).

In this second scenario, misinterpretations of the governmental-service clause might have unwarranted ramifications under the national-treatment obligation: the measures extended to public facilities (universities, hospitals, etc.), should these unexpectedly fall under the Agreement, could set the benchmark for the treatment of like foreign services and service suppliers. The government would then be required, in the absence of appropriate limitations, to extend financial and other benefits to the services and/or suppliers concerned. Otherwise, the commitments might need to be changed, or even withdrawn, in negotiations pursuant to Article XXI (Modification of Schedules). The relevant provisions have been invoked only once to date, in the context of the European Communities' enlargement.

From that perspective, it appears that the safest approach for a WTO Member is not to undertake any commitments in potentially sensitive areas. However, safety could come at a cost in terms of missed investment and growth opportunities. If a government intends to promote sector development via private participation in open segments, commitments may help to stabilize market expectations and enhance investors' confidence. Empirical research for the telecom sector confirms a significant positive relationship not only between openness *per se*, but between GATS-committed access conditions, and typical performance indicators in the sector.³³ Absence of commitments might have impeded sector expansion.

There are two options, in principle, to avoid such problems and facilitate the assumption of GATS commitments in public service sectors. One is country-specific and consists of the conditioning of specific commitments in a manner that confines their scope to closely circumscribed segments of a sector. This will be discussed later in some more detail. While sceptics might point out a remaining risk of misspecification, this should not be overestimated. The fact that an increasing number of Members have used similar approaches in their schedules should help to defuse the potential for conflict.³⁴ Another possible concern relates to the continued application of the MFN principle and other unconditional obligations even in the segments that are excluded from commitments. However, as noted before, the ensuing policy constraints, if any, are not likely to be substantial.

A second, more ambitious option could consist of a joint declaration by WTO Members that seeks to clarify the scope of the public-service exclusion and its two constituting elements (not on a commercial basis/not in competition). The possibility of such a declaration has been considered by the EC Ministers of Education and was also raised in an expert study commissioned by the politically competent body in Switzerland.³⁵ However, no relevant initiative has been launched in the WTO to date. This may be for two reasons. First,

³³ Bressie et al (2005).

³⁴ Moreover, the wording of Article I:3 has since been used without modification in several preferential agreements on services (see, for example, the Free Trade Agreement between the United States and Chile, WT/REG160/1, 22 January 2004, p. 116, and the Economic Partnership Agreement between Japan and Mexico, WTO document WT/REG198/1, 9 May 2005, p. 64). Building on relevant provisions in the EC Treaty (Article 45), the Europe Agreements between the Communities and central and eastern European countries contain exclusion clauses with regard to "activities which in the territory of each party are connected, even occasionally, with the exercise of official authority".

³⁵ Krafft (2003) p. 36ff. For a similar proposal see WTO (2001), p. 124.

many Members may not see an urgent need for action, given the scope for national solutions which may produce (almost) the same effects. Second, previous attempts to specify the meaning of particular GATS provisions have not certainly been encouraging.³⁶ Apparently, the consensus-based approach to WTO decision-making is not well suited for the solution of complex problems that have not materialized in practice.³⁷

IV. GOVERNMENT INTERVENTION WITHIN THE FRAMEWORK OF GATS

A. GENERAL OBSERVATIONS

The following discussion focuses on government measures to ensure the supply of public services in areas not covered by the carve-out of Article I.3. In general, the services concerned may be provided on a commercial basis under either of three scenarios:

- Traditional public monopolies in infrastructure-related sectors such as rail transport, postal or telecommunication services where no other suppliers are admitted within the relevant jurisdiction (sector A.2 in Box 2) .
- Natural monopolies, which exist without government interference because of the particular characteristics of the sector concerned (e.g. existence of economies of scale; see C.2).
- Open competition subject to various forms of government intervention in pursuit of public service objectives (see B.)

In practice, of course, public services do not always fall clearly in one of these groups. There may be many overlaps. Competition in one market segment may coexist with governmental and/or monopoly supplies in another segment, for example in educational services, or certain minimum supplies may be provided directly by the government, for example in the context of health insurance or retirement plans, while additional supplies may be contracted on an individual basis.

The status of individual services may vary over time and between countries, depending on history, culture and/or technical change. Telecommunications is a typical example of how technical progress may create new economic opportunities and, consequently, result in profound institutional reform of a large infrastructural sector. In less than two decades, the share of monopolized markets in total telecom revenue dropped from close to 100 per cent to significantly less than 10 per cent. This also helps to explain why access commitments in telecom services are far more frequent than commitments in other sectors that may be considered to be public services as well (Table 1).

Monopolized markets do not contribute *per se*, without additional forms of government intervention, to the attainment of public policy objectives. To ensure compliance

³⁶ A case in point are discussions concerning the interpretation of Article XX:2, which the Committee on Specific Commitments conducted over an extended period. At stake was the overlap between market access commitments under Article XVI and the national treatment obligation under Article XVII. Would it be possible for a Member that has not assumed commitments on market access ("unbound"), but full commitments on national treatment ("none"), to operate discriminatory quotas and similar measures? See WTO document S/C/W/237, 24 March 2004 for a summary of the - inconclusive - discussion. In a similar vein, the question of how to classify certain electronic transmissions - under mode 1 or mode 2 - was raised in the extended negotiations on financial services in 1997, but no solution was agreed either. Two WTO Secretariat Notes (see attachments to WTO document S/L/92, 28 March 2001) explain the various positions.

³⁷ See also Marchetti and Mavroidis (2004), p. 526.

with distributional, equity and quality-related objectives, a panoply of measures may be needed, including various regulations, controls, financial incentives or sanctions. Trading partners may not have strong objections in such cases, since core parameters of the Agreement - including market access, national treatment and the regulatory disciplines pursuant to Article VI - are largely irrelevant in cases where no other suppliers are allowed to establish.

Box 2: Typology of measures governing the supply of public services

Freely available services	Commercial supplies	
A. Public monopolies		B. Competition subject to government intervention**
1. Justice, police, military, central banking	2. Traditional postal, telecom and transport monopolies	<ul style="list-style-type: none"> • Supply-side intervention → <u>Domestic regulation</u> [TV broadcast quotas; Universal service obligations in transport, telecom and similar services] → <u>Financial incentives/sanctions</u> [Subsidies for public transport, movie and theatre production; training subsidies for companies] → <u>Regulated prizes</u> [Bookshops, pharmacies, various professions (notaries, etc.)] • Demand-side intervention → <u>Consumer subsidies</u> [Scholarships, tax breaks for private retirement plans]
C. "Natural" monopolies*		
1. Construction and maintenance of freely accessible public infrastructures, e.g. roads	2. Water supply Electricity grids(?) Integrated transport networks (e.g. municipal transport)(?)	
D. Minimum social policy obligations*		
Basic social services [e.g. education, health], emergency services		

Grey: Beyond the scope of GATS (especially A.1).

* Supplied by public agencies or by private companies as part of government procurement.

** Supplied by private companies or parastatal organisations (hospitals, pension homes, educational institutions) with financial support or other flanking measures.

B. MONOPOLY SUPPLIES

The provisions applying to monopolies, in Article VIII, are intended in particular to avoid cross-sectoral spillovers. Their focus is on ensuring compliance with the MFN principle, regardless of whether a sector has been scheduled or not, and with specific commitments in areas where the monopolist acts as a supplier or as a competitor.³⁸

Articles VIII:1 and 2 are directly related to Article I:1 insofar as government instructions on a domestic monopoly supplier may be deemed measures affecting trade in services. Accordingly, their impact on other sectors is to be vetted in the light of relevant

³⁸ To give an example: If a country has undertaken full commitments on national treatment in road freight transport services (or restaurant services) under mode 3, the national railways would neither be allowed to: (a) to charge foreign-owned trucks that it carries on long-distance routes higher prices than domestically-owned trucks nor (ii) support its own fleet (own restaurants) through internal cross-subsidization.

obligations and commitments. However, Article VIII sets a particularly high standard insofar as the Member concerned is explicitly required to act ("... the Member shall ensure ...") in order to enforce compliance. Not covered are monopolies that emerged without government interference, including so-called natural monopolies, or monopoly positions reflecting the technical lead of a particular supplier.³⁹

The Annex on Telecommunications contains specific provisions governing access to and use of public telecommunications networks and services. In sectors subject to specific commitments, foreign suppliers are to be accorded conditions of access and use that are reasonable and non-discriminatory. Novel elements in this context are the reference to reasonable conditions, which are not further defined, however, and the extension transport networks.

Article VIII captures situations in which a Member grants monopoly rights in sectors subject to specific commitments. Article VIII:4 requires the measures to be notified to the Council for Trade in Services. If other Members raise concerns, which cannot be addressed satisfactorily, the provisions governing modification and withdrawal of commitments apply (Article XXI). The affected Members are entitled to compensatory adjustments in other sectors or modes. VanDuzer takes the view that an extension of the scope of governmental services may need to be treated in the same way, since it could not be left to a Member to exclude private providers of scheduled services by simply offering them through the State.⁴⁰ However, there is no provision in the Agreement that would explicitly establish such a link.

Article VIII relates only to the supply of services by monopolies, but not to their purchases of services for own consumption (example: a monopoly supplier of telecom services builds or buys new offices). Does this imply that the supplier is free - even in areas subject to specific commitments - to discriminate in favour of domestic companies? The answer may be in the affirmative. First, it might be argued that, in the absence of government interference, the GATS has no role to play in this context. Second, even if the purchases were covered by the GATS, Article XIII on government procurement might apply and provide protection from the application of Articles II (MFN), XVI (market access) and XVII (national treatment). However, the relevant provisions offer some scope for interpretation.⁴¹

³⁹ The definition of a monopoly supplier in Article XXVIII(h) covers any public or private person which "in the relevant market... is authorized or established formally or in effect by that Member as the sole supplier of that service".

⁴⁰ VanDuzer (2004), p. 125. In this context, the author gives the hypothetical example of an extension of public coverage of Canada's health insurance scheme at the expense of private insurers. The example may be equally relevant for other WTO Members pondering the reorganisation of their national insurance systems in areas subject to commitments.

⁴¹ Article XIII:1 refers to "procurement by governmental agencies of services purchased for governmental purposes". The question arises whether these two criteria are actually met in the case of a monopoly supplier of, say, postal, transport or telecommunication services.

Table 1: WTO Members with specific commitments under Mode 3 in selected services sectors, April 2005
All Members / (Developing countries)

	Health		Education		Telecom (voice telephony)	Sewage services	Road passenger transport
	Medical services	Hospital services	Primary education	Higher education			
WTO Members with specific commitments^a	52 (46)	43 (39)	32 (25)	37 (30)	85 (73)	44 (33)	37 (26)
Limitations in sector coverage	13 (12)	4 (3)	5 (4)	10 (9)	42 (41)	8 (7)	20 (10)
No bindings under mode 3	7 (5)	3 (3)	2 (2)	2 (2)	2 (2)	0 (0)	2 (1)
Quantitative limitations (Art. XVI:2(a)-(d)^b	9 (7)	10 (5)	-	2 (1)	51 (51)	1 (1)	4 (1)
<i>Of these: Economic needs tests</i>	8 (6)	7 (4)	-	1 (-)	8 (8)	-	4 (1)
Discriminatory regulation^c (Art. XVII)	15 (13)	5 (5)	3 (3)	4 (4)	8 (4)	-	6 (2)
Discriminatory taxes/subsidies (Art. XVII)	-	3 (3)	1 (1)	1 (1)	1 (1)	-	-

a Including the schedule of EC 12, which is counted as one entity. It is conceivable in individual cases that not all Member States have assumed commitments in the sector concerned. The more recent EC Members are counted individually.

b Only sectoral limitations. Double-counting is possible if one schedule contains several limitations. Not covered are horizontal limitations, which apply across all scheduled services (e.g. the EC's 'public utilities carve-out').

c Limitations on national treatment with regard to discriminatory licensing and qualification requirements and technical standards.

C. ACCESS BARRIERS AND SECTOR SEGMENTATION

As noted before, in order to retain as many policy options as conceivable, a WTO Member might not want to undertake commitments in areas considered to be key governmental responsibilities. For example, the Canadian Government has left no doubt that it would not negotiate on health and education services in whatever international context.⁴² Other governments, operating under different political and institutional conditions, may not share this view. For example, India's health sector has operated traditionally on a mainly commercial basis and, possibly with a view to improving the framework conditions for private investment, the country undertook specific commitments in the Uruguay Round.⁴³ Moreover, there are mixed systems in many other countries, whose governments may want to consider the possibility of binding access conditions in commercially-organized segments or modes, in which case a clear delimitation vis-à-vis the protected (monopoly) areas can prove crucial. This applies in particular if there are doubts about whether the protected provider actually supplies governmental services within the meaning of Article I:3 (Section III.B). Finally, if monopolies are earmarked for gradual opening over time, there is the option of undertaking pre-commitments with a view to enhancing the credibility of the envisaged reforms and stabilize expectations. The latter scenario played an important role in the extended negotiations on basic telecommunications, which were concluded in early 1997.

The different approaches are reflected in different patterns of commitments in areas considered as public services (Table 1). At one end of the spectrum is primary education, associated with deeply rooted social and cultural policy objectives, on which less than one quarter of WTO Members have assumed commitments (32 out of a total of 137 Members).⁴⁴ In two additional cases, the sector has been scheduled, but the most important mode of delivery, commercial presence (mode 3), left unbound. At the other end are telecommunication services or, more precisely, voice telephony, which in the 1980s was a traditional monopoly domain, but has since undergone profound changes. Over 60 per cent of Members have undertaken commitments in this sector. Interestingly, a very significant share of Members (42 out of 85), mostly developing economies, nevertheless scheduled quantitative limitations. To a large extent, these reflect the gradual transformation from monopoly to oligopoly and, finally, open regimes which many countries underwent or are still undergoing.⁴⁵

On average across all sectors, about three quarters of commitments on mode 3 are subject to quantitative limitations.⁴⁶ The share tends to be higher in sectors that have drawn relatively many commitments, including telecommunications and financial services, than in sectors that have been shunned by many Members, such as educational services. A similar pattern emerges from the sample included in Table 1. While the two sub-sectors of education are mostly free of quantitative limitations, medical and hospital services, respectively, have not only been scheduled more frequently, but also made subject to more limitations. In many

⁴² See International Trade Canada (2005) [www.dfait-maeci.gc.ca/tna-nac/TS/gats-ps-h-edu-en.asp]. In the 2002 Speech from the Throne, the Canadian government considered the national health care system to be "a practical expression of the values that define us as a country" (according to VanDuzer, 2004, p. 3).

⁴³ The only limitation scheduled by India under mode 3 is a cap of 51 per cent on foreign equity participation (Box 3).

⁴⁴ EC 12 is counted as one entity.

⁴⁵ Temporary access restrictions have been counted as limitations in Table 1 regardless of whether the phase-in period had lapsed.

⁴⁶ Adlung and Roy (2005), p. 16.

Pursuant to Article XVI:2(a)-(d) quantitative limitations may take four different forms and restrict either: (a) the number of suppliers, (b) the total value of transactions or assets, (c) the total number of service operations or total quantity of output, or (d) the total number of natural persons employed.

cases, these have been expressed in terms of an economic needs test.⁴⁷ Also, mode 3 has been excluded completely from a significant share of commitments in medical services.

A number of countries that scheduled commitments on these 'public services' explicitly confined their scope to market segments open to competition. This is the case, for instance, for the majority of commitments on road passenger transport.⁴⁸ However, similar entries can be found in other sectors, including education (see Box 3 for relevant examples from the schedules of Australia, EC/Germany, China, Japan, Mexico and Switzerland). The underlying intention is to limit the scope of commitments to privately funded and/or privately owned institutions.

Another option to circumscribe commitments consists of exempting a broadly defined range of public services on a horizontal basis, i.e., across all scheduled sectors. The EC has inscribed such a limitation up-front in its schedule under mode 3. It provides that services considered as 'public utilities' may be subject to monopolies or exclusive rights in one or more Member States or at Community level. The EC is of the view that a detailed and comprehensive enumeration would not be practical; its schedule thus provides an illustrative list only of potentially affected sectors, including environmental, health and transport services. The question may be raised whether the range of the entities covered is confined to existing or, possibly, envisaged monopolies at the time of scheduling or whether it extends as well to new arrangements that might be added over time. The latter version might prove difficult to reconcile, however, with the provisions of Article VIII:4. In areas covered by specific commitments, both the extension of current monopolies and the conferment of new rights are made subject to the provisions of Article XXI (Section IV.B). In other words, affected countries would need to be compensated, on an MFN basis, for the trade effects ensuing from the modification or withdrawal of commitments.

⁴⁷ For instance, several EC Member States have made the approval of new hospitals contingent on such tests (France, Italy and Luxemburg: "The number of beds authorized is limited by a health services plan established on the basis of needs").

⁴⁸ A similarly high share of exclusions from sector coverage for voice telephone services (42 out of 85 commitments) may be attributed in part to the regulatory or institutional specificities of individual WTO Members. The inscription of country-specific sector definitions may have been motivated predominantly by the perceived need to ensure coherence between domestic institutional structures and external legal obligations, rather than by particular policy intentions.

Box 3: Specific commitments of selected WTO Members in educational and health services, 2005

WTO Member	Commitment				Sector Limitation (Modes 1 – 3)	Horizontal Limitation (Modes 1 – 3)*	Modification of Sector Coverage
	PE	HE	MS	HS			
Australia	-	X	-	-	MA&NT (1)-(3) None.	MA (3) Investments are approved until "national interest considerations arise". NT(3) Residency requirement for at least two of the directors; unbound for R&D subsidies.	Provision of private tertiary education services, including at university level.
EC (Germany)	X	X	X	X	MA&NT (1)-(3) None. MA&NT (1) Unbound. (2) None. MA&NT (3): <u>Medical Services</u> Access restricted to natural persons; ENT for doctors that are allowed to treat members of public insurance schemes. <u>Hospital Services</u> None.	MA (3) Services considered as public utilities may be subject to monopolies or exclusive rights. NT (3) Unbound for R&D subsidies; supply of a service or its subsidisation within the public sector is not in breach of the commitment.	Privately funded education services.
China	X	X	X	-	MA&NT (1) Unbound. (2) None. MA (3) Joint schools with foreign majority ownership. NT (3) Unbound. MA&NT (1)-(2) None. MA (3) Joint venture requirement, ENT. NT (3) Majority of doctors & medical staff must be nationals.	Not relevant.	Primary Education: Excluding national compulsory education.
India	-	-	-	X	MA&NT (1)-(2) Unbound. MA (3) Foreign equity share limited to 51 per cent. NT (3) None.	Not relevant.	
Japan	X	X	-	X	MA&NT (1)-(2) Unbound. MA (3): Only non-profit juridical persons established to supply educational services under Japanese law. NT (3): None. MA&NT (1) Unbound. (2) None. MA&NT (3) Unbound except that there are no limits on foreign capital participation.	NT (3) Unbound for R&D subsidies.	Educational Services supplied by Formal Education Institutions established in Japan.

WTO Member	Commitment				Sector Limitation (Modes 1 – 3)	Horizontal Limitation (Modes 1 – 3)*	Modification of Sector Coverage
	PE	HE	MS	HS			
Mexico	X	X			MA&NT (1)-(2) None. MA (3) Foreign capital participation limited to 49 per cent; prior authorization requirement. NT (3) None. MA&NT (1)-(3) None. MA&NT (1) Unbound. (2) None. MA (3) Foreign capital participation limited to 49 per cent.		Private education services. Private hospital services.
Switzerland	X				MA&NT (1)-(2) Unbound. (3) None. MA&NT (1)-(3) None. MA & NT (1)-(2) None. MA (3) Unbound. NT (3) Nationality requirement for independent practitioners.	NT (1)-(2) Unbound for subsidies, tax incentives and tax credits. NT (3) Eligibility for subsidies, tax incentives and tax credits may be limited to residents of a particular region of the country; composition requirements concerning participation of Swiss citizens in company boards.	Private educational services.
United States	-	-	-	X	MA&NT (1) Unbound. MA (2) None. NT (2) Government reimbursement of expenses limited to facilities in the US. MA (3) ENT; ownership limitations in New York. NT (3) None.	NT (1)-(2) Unbound for subsidies. NT (3) Unbound for R&D subsidies.	Hospital services: Direct ownership and management and operation by contract of such facilities on a "for fee" basis.

Legend:

Sectors: PE = Primary Education; HE = Higher Education; MS = Medical Services; HS = Hospital Services

Commitments: MA = Market Access; NT = National Treatment; none = full commitment (no limitation); unbound = no commitments (full policy discretion)

ENT: Economic needs tests and similar provisions.

* Only limitations that may have a significant impact on supplies in the four sectors concerned

D. MARKET-BASED SUPPLIES SUBJECT TO GOVERNMENT INTERVENTION

Apart from core government competencies in areas such as police, justice or the military, there are various options to organize the provision of public services. The policy considerations referred to before (Section I.), including continuity, quality or availability of supplies, do not necessarily call for particular arrangements (e.g. public versus private provision, restricted versus open market access, producer versus consumer subsidies, etc.). This tends to be the case at least in mature economies that are equipped with the legal and institutional infrastructure to effectively regulate and monitor developments in relevant markets.

As a general feature, market-based mechanisms have gradually gained ground in recent years at the expense of government supplies. The change in focus reflects predominantly technical and economic considerations and can hardly be attributed to trade negotiations. However, the creation of GATS might have been a stimulating element with regard to both the organisation of liberalization processes, in terms of timing and content, and the development of legal frameworks to accompany the introduction of more open, market-based sector structures. A prominent example is the so-called 'Reference Paper' in the area of basic telecommunications, which codifies - in addition to the Annex on Telecommunications and Article VIII - a number of basic competition-related disciplines.⁴⁹ These include the requirement to prevent major suppliers from engaging in anti-competitive cross-subsidization and an obligation to provide for an independent regulator. By the same token, the Reference Paper leaves relatively broad scope for policies to pursue universal service objectives; it explicitly confirms the right to define their scope and content.⁵⁰ The relevant provisions are based on the principle, already enshrined in the Preamble to the GATS, that governments retain the right to regulate the supply of services in line with national policy objectives.⁵¹

The following discussion seeks to explore the scope for autonomous policy making in sectors in which Members have undertaken commitments on market access and national treatment pursuant to Articles XVI and XVII of the GATS.

(i) Regulatory measures (prescriptions and prohibitions, administered prices)

Universal service requirements may be viewed a model case of regulations intended to pursue basic policy objectives in a market environment. The most relevant GATS provisions are Articles VI:1 as well as, possibly, VI:4 and VI:5.

Article VI:1 specifies three criteria for the administration of 'measures of general application' which affect trade in services: reasonable, objective and impartial. Although not further defined in the Agreement, it may be assumed that such measures are being used across many policy areas and take plenty of guises, including environmental standards, opening hours, price prescriptions and zoning laws. It is important to bear in mind that Article VI:1

⁴⁹ The Reference Paper was devised by a group of interested countries and then broadly recommended for inscription as an additional commitment under Article XVIII. Almost all 69 Members, which participated in the extended negotiations on basic telecommunications, proceeded accordingly. The number has increased since as a result of accessions to the WTO and autonomous obligations assumed by 'old' Members. See Tuthill (1997).

⁵⁰ The relevant section reads: "Any Member has the right to define the kind of universal service obligation it wishes to maintain. Such obligations will not be regarded as anti-competitive per se, provided they are administered in a transparent, non-discriminatory and competitively neutral manner and are not more burdensome than necessary for the kind of universal service defined by the Member".

⁵¹ The Preamble expressly recognizes "the right of Members to regulate and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives ...".

governs only the administration, rather than substance and content, of the measures.⁵² Moreover, its application is confined to areas subject to specific commitments.

Article VI:5 contains obligations in substance. They are based on three criteria laid down before in Article VI:4 in the form of a negotiating mandate.⁵³ It provides for the development of GATS disciplines on government regulations which should ensure, *inter alia*, that these are "not more burdensome than necessary to ensure the quality of the service".⁵⁴ Pending the entry into force of these disciplines, Article VI:5 prohibits Members from applying new regulations that would nullify existing commitments in a manner inconsistent with the above criteria and could not reasonably have been expected at the time the commitments were made. Article VI:4 lists the range of measures that are potentially covered (qualification requirements, etc.), without giving further guidance.⁵⁵ Nevertheless, their scope appears to be more narrowly defined than the measures of general application whose administration is covered by Article VI:1.

Qualification and licensing requirements feature prominently in regulated professions, such as legal, accountancy, architectural, or medical services. In contrast, requirements that are imposed via general legislation, with a view, for example, to regulating performance, prices and similar features, do not appear to fall under Articles VI:4 and VI:5. However, what is the status of typical universal service obligations entailing, for example, minimum capacity and service requirements for social, regional and similar policy reasons? Apart from Article VI:1, would Articles VI:4 and VI:5 apply as well? If so, to what effect?

Since the not-more-burdensome-than-necessary test of Article VI:4 is directly linked to the quality of the service, concerns have been voiced that the Article could prove very interventionist.⁵⁶ Strict application of quality test might indeed have questionable ramifications. To give an example: A developing country requires all commercial hospitals to reserve a certain number of beds for poor patients who are to be treated on a charity basis.⁵⁷ While such a requirement may be well justified on social policy grounds, it might be difficult to argue, at least from the perspective of 'commercial' patients, that it helps to ensure the quality of the service extended to them. Or is this the wrong perspective? Should the focus be on the general quality of health treatment across all population groups?

A narrow interpretation could have serious implications in practice and, moreover, send a perverse policy signal. If a country operated a universal service obligation targeted only at foreign-owned hospitals, it could seek legal cover under a national treatment limitation. However, in the current case no such solution appears feasible, since neither Article XVI nor Article XVII are affected. Inconsistencies with Article VI, however, cannot

⁵² The Panel, 'United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services' (WTO document WT/DS285/R, 10 November 2004), confirmed the procedural nature of these provisions (p. 230).

⁵³ Article VI:4 reads: "With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council, for Trade in Services shall ... develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, *inter alia*, (a) based on objective and transparent criteria ...; (b) not more burdensome than necessary to ensure the quality of the service; (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service".

⁵⁴ For a discussion of the concept of 'necessity' as used in Article VI:4 and in other contexts, e.g. in Article XIV (general exceptions), see for example Trachtman (2003) and VanDuzer (2004).

⁵⁵ A note by the WTO Secretariat contains certain definitional elements. However, the focus is on professional services and, thus, not easily applicable to other sectors (WTO document S/WPPS/W/9, 11 September 1996).

⁵⁶ Trachtman (2003), p. 68.

⁵⁷ Reportedly, such provisions exist in India. However, it was not possible in the context of this paper to establish any details.

be rectified by way of scheduled limitations, but would require the measure to be changed.⁵⁸ This problem, in turn, could prompt governments to opt for the less efficient approach and favour discriminatory interventions, which could be immunized under Article XVII, over non-discriminatory measures.

However, not many WTO Members appear to have acted accordingly. Looking at a sample of typical public-service sectors, the percentage of commitments that have been combined with potentially relevant limitations under mode 3 is rather modest, not generally exceeding some 10 to 20 per cent (Table 1). And there is relatively little variation across sectors.⁵⁹ The seemingly relaxed approach reflected in many schedules is understandable for two reasons: On the one hand, as noted before, the current provisional application of Article VI:4 is subject to two important qualifications: no nullification and impairment of commitments, and no reasonable expectations. It thus lacks teeth. On the other hand, there are clear indications that any benchmark emerging from current negotiations will be multi-dimensional in order to accommodate a wider range of possible objectives.⁶⁰ Very few governments appear ready to tie their hands as firmly as initially implied by the negotiating mandate.

There is one area in which the mandated negotiations under Article VI:4 have been concluded. In late 1998, WTO Members adopted the Disciplines on Domestic Regulation in the Accountancy Sector. The Accountancy Disciplines, which are to be integrated into the GATS as part of the Doha Round final package, might be viewed as a source of inspiration for similar rules covering other professions or, even more ambitiously, all services. The Disciplines are applicable only if a Member has undertaken specific commitments in the sector (the negotiating mandate does not contain this link), and their scope is expressly confined to measures not falling under Articles XVI und XVII.⁶¹ A pivotal element is the obligation for Members to ensure that qualification requirements and procedures, technical standards and licensing requirements are "not more trade-restrictive than necessary to fulfil a legitimate objective". The focus on a quality criterion has thus been replaced by a more openly defined requirement, which is outlined in rather general terms. The illustrative list of legitimate objectives that follows includes protection of consumers (immediate users as well as the public generally), the quality of the service, professional competence, and the integrity of the profession.

(ii) Financial incentives and sanctions (taxes and subsidies)

Governments have wide leeway under the GATS to use financial incentives and disincentives with a view to modifying market outcomes. The most-favoured-nation principle may operate as a potential constraint, but, as noted before, it is difficult to see why governments might want to discriminate between services or suppliers of different origin or nationality.

In areas subject to specific commitments, the national treatment principle applies as well. Again, the ensuing policy constraints do not appear to be substantial in many cases.

⁵⁸ The 'Gambling - Panel' expressly confirmed the mutually exclusive application of Articles XVI and XVII on the one hand and Articles VI:4 and VI:5 on the other (WTO document WT/DS285/R, 10 November 2004, p. 205 - 208). The Appellate Body ruling has not addressed this issue (WT/DS285/AB/R, 7 April 2005)

⁵⁹ A significantly higher share for medical services (ca. 30 per cent) may be due to the particular conditions governing a wide range of professional services. With a view to retaining leeway in recognizing diploma and other certificates held by foreigners, a significant number of Members inscribed national treatment limitations under modes 3 and 4.

⁶⁰ The reports of the relevant negotiating body, Working Party on Domestic Regulation, are publicly available via the WTO Website (documents S/WPGR/M/...).

⁶¹ WTO documents S/WPPS/3, 4 December 1998, and S/L/63, 15 December 1998.

Why would governments want to discriminate against foreign suppliers and their facilities (schools, hospitals, telecom operators, transport companies, etc.)? Are these less suited than their domestic counterparts to meet relevant sector objectives? As far as modes 3 and 4 are concerned, the answer can hardly be positive since all domestically established suppliers, regardless of nationality, are subject to the same regulations and controls. Although a number of Members nevertheless retained the option of operating discriminatory taxes and subsidies in particular under mode 3, it is interesting to note that many of these limitations are of a horizontal nature and specifically related to subsidies for research and development (R&D). They are thus more likely to reflect industrial policy considerations rather than, for instance, health- or education-specific concerns (Box 3).

A problem of national treatment could arise under modes 1 and 2, if domestic support schemes do not cover the consumption of foreign services supplied cross-border into the territory of a Member or consumed by nationals who travel abroad. This presupposes, of course, that the services concerned can be deemed to be alike.⁶² The possibility of mode 1 and 2 supplies may appear limited in certain public services (social services, basic education, emergency care, passenger transport, pollution abatement, etc.) that require producer and user to interact directly within the scheduling Member's jurisdiction. Nevertheless, there are many other services, including communication, higher education or specialized health care, where distance is less of a factor. To guard against unpleasant surprises, several Members have thus scheduled limitations excluding, for example, their nationals' consumption abroad of health and education services from coverage under relevant support schemes (Box 3; see United States for hospital services (HS) under mode 2).⁶³

It may be asked, of course, whether such restrictions actually contribute to the attainment of public service objectives. What is the ultimate rationale: To protect the financial basis of a collective insurance scheme from excessive claims? To prevent patients from seeking treatment from suppliers abroad that may not have been properly vetted? To ensure adequate utilization of domestic capacities which need to be maintained in any event? Or, quite simply, to satisfy the income interests of national suppliers and secure political support? But this is a different issue.⁶⁴

V. OPEN QUESTIONS(?)

Given the small number of services-related trade disputes, the GATS has functioned very smoothly to date. Since its entry into force some ten years ago, no more than five or six out of over 100 Panel cases concerned services. This track record might be attributed to several factors. These include, first, the small number of commitments assumed by most Members to date, in terms of sub-sectors inscribed in schedules, as well as the shallow levels of liberalization accorded in many cases. There is thus limited scope for conflict. Second, lack of experience may have played a role. Governments and industry associations are possibly less familiar with the new rules than with long-tested GATT provisions and, therefore, may have hesitated to launch cases. And, third, there might have been a common interest in retaining scope for interpretation in certain areas, including governmental services, rather than insisting on legal clarification.

⁶² See footnote 25. The so-called Scheduling Guidelines (WTO document S/L/92, 28 March 2001, p. 6) stipulate that WTO Members are not required to take measures outside their territorial jurisdiction and extend the national treatment principle to suppliers located abroad. However, the situation is different in the case of consumer-related transfers (scholarships, health insurance benefits, etc.) that may be spent on services 'imported' under modes 1 or 2. The national treatment obligation for these modes would otherwise be devoid of substance. (For a discussion of the legal status of the Scheduling Guidelines see the Panel and Appellate Body reports, 'Gambling and Betting Services', *op cit*).

⁶³ For further examples see Adlung and Carzaniga (2001), p. 361.

⁶⁴ See Adlung (2004b).

Moreover, there are still some blank spots in the Agreement. In four areas of rule-making, the GATS contains mandates for continued negotiations that are still ongoing: Domestic Regulation (mandated under Article VI:4), Emergency Safeguard Measures (Article X), Government Procurement (Article XIII) and Subsidies (Article XV). The drafters may have felt the need during the Uruguay Round to take some more time for reflection rather than going for quick results. Potential precedents in the GATT (e.g., Agreement on Technical Barriers to Trade or the safeguard clause of Article XIX) provided limited guidance only, given the structural peculiarities of the GATS. The fact, however, that little headway has been made since also points out the difficulties of advancing narrowly defined ("single-issue") negotiations within an open timeframe. Integration of these areas into the Doha Development Agenda may have provided new political impetus, however.

Two areas, in particular, may prove relevant for public services: Domestic Regulation and Subsidies. The former have sparked significantly more interest to date, including in terms of proposals submitted, than the latter.

Many public discussions of the Article VI:4 have focused on the potential threat of future regulatory disciplines to national sovereignty. The risk, on the other hand, that regulatory leeway may be absorbed by domestic producer interests has attracted less attention. Typically, while a significant number of governments have circulated the 'Accountancy Disciplines' to professional associations in other sectors, to explore whether the relevant principles are suitable for wider application, there is little evidence of similar consultations with potentially affected consumers (patients, students, etc.). It is even understandable that such consultations do not figure prominently on the political agenda. Whenever public services are provided for free, producer and consumer interests are not likely to differ fundamentally. Who would be concerned about efficiency, as long as high levels of quality are ensured?

The negotiating mandate in Article XV is confined to developing disciplines to avoid the trade-distortive effects that subsidies may have in certain circumstances. The focus is essentially on the need for and content of additional disciplines since, as mentioned before, Article II (most-favoured-nations treatment) and, in scheduled sectors, Article XVII (national treatment) are applicable in any event across the four modes of supply. What types of subsidies might still warrant attention?

Potential targets are financial measures, in particular export subsidies, that afford a competitive edge on third markets. Within the Agreement's current structure, it would not be possible to challenge such measures, whatever guise they may take. Even the MFN rule applies only to the treatment of services and suppliers of other Members, but not to the treatment of own supplies destined for foreign markets and/or foreign consumers (see also Section II). However, while this might be viewed a legal gap that needs to be closed, its relevance for the provision of public services appears to be limited.⁶⁵

Another target could be import-substituting subsidies. The objective could be, for example, to ban lavish domestic support programmes that effectively undermine market

⁶⁵ There should be no illusion about the conceptual problems of applying the notion of export subsidies to the Agreement's four modes of supply. In order to be effective, any relevant disciplines might need to include *de facto* measures, i.e., subsidies in sectors and modes that are predominantly exported and/or consumed by foreigners. Many domestic investment programmes, including in sectors such as hotels or hospitals, might thus need to be reviewed in order to ascertain that foreigners (tourists, patients, etc.) are not over-represented among users. Concerning mode 4, what would be the status of free education and training that is provided to professionals who ultimately move abroad? See also Benitah (2004), p. 20f.

access commitments under modes 1 or 2 (cross-border supply and consumption abroad). No change in the Agreement would be required in this context. Pertinent disciplines could be negotiated and inscribed as additional commitments under Article XVIII, either case-by-case or based on a commonly agreed model. Such a 'soft approach' would have the advantage over more rigid solutions, in the form of mandatory horizontal disciplines, that individual Members could simply exempt areas in which they grant subsidies for strong policy reasons.⁶⁶ However, as indicated before, no concrete proposals have been submitted to date in the negotiations under Article XV.

Despite these (potential) gaps, it is difficult to identify serious weaknesses in the GATS that would effectively prevent Members from undertaking commitments on public services. The Agreement's flexibility provides wide scope for national solutions, regardless of the outcome of the ongoing negotiations or any future Panel rulings. There appears to be one precondition only: thorough analysis of both the relevant GATS provisions and the government's sector-specific policy concerns.

⁶⁶ An issue that may warrant further attention in this context is company-internal cross-subsidization. It may be necessary to distinguish between several scenarios in this context, in particular (a) internal transfers of funds subject to government instruction, e.g. in pursuit of universal service policies, and (b) transfers on a company's own initiative. In the latter case, three variants might be relevant, depending on whether a company transfers funds (ba) between product/market segments that are open and competitive; (bb) from protected into competitive segments for which commitments exist; or (bc) from protected into competitive segments without commitments. Cases (bb) and (bc) may be considered to involve 'anti-competitive' cross-subsidization as referred to in the telecommunications 'Reference Paper' (Section D). See also Cossy (2004).

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