GATS and offshoring: is the regulatory framework ready for the trade revolution?

Dr Gabriel Gari¹

This article examines the relevance of GATS in light of the rise of trade in ICT-enabled services and, in particular, the rapid expansion of the offshore industry. It provides considerable evidence about the difficulties to adjust trade rules and specific commitments negotiated in the late 1980s and early 1990s to a significantly different commercial environment led by technological innovations and the emergence of global supply chains. It reviews various alternatives that could be considered for upgrading rules on trade in services and argues that inaction could result in GATS early obsolescence.

¹ Senior Lecturer in International Economic Law, Queen Mary University of London (g.gari@qmul.ac.uk). The author wishes to thank Heng Wang and Pierre Sauvé for their insightful comments on earlier drafts of this paper. Any errors are the fault of the author.
I. INTRODUCTION

Over the last two decades, a remarkable progress on Information and Communication Technologies (ICTs) has dramatically increased the efficiency of telecommunications and reduced its costs, paving the way for the digitalisation and transmission ‘over the wire’ of almost every kind of information. Many services which not long ago where considered non-tradable because of the need of physical proximity between supplier and consumer, now can be digitalised and supplied electronically at high speed and virtually no cost. From a management perspective, corporations have been using these new technologies to contract out parts of their business process to outsiders in search of efficiencies and economies of scale. These new management strategies unleashed a process usually referred to as “outsourcing”, i.e. “the act of transferring some of a company’s recurring internal activities and decisions rights to outside providers, as set in a contract.” The same phenomenon is known as international outsourcing, offshore outsourcing or simply “offshoring” when the outside provider is located outside the territory where the company is located.

The type of activities that a company can outsource cuts across a wide range of service sectors. What began with the outsourcing of information technology services (Information Technology Outsourcing) now includes a wide array of information technology-enabled services including business process services (Business Process Outsourcing) and higher value services associated with knowledge-process services (Knowledge Process Outsourcing). In 2009, the global market for the outsourcing of services was estimated to be worth $785 billion–805 billion, of which 88 per cent was

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4 Id.
5 E.g. programming, systems integration, application testing, IT infrastructure management and maintenance, IT consulting, software development and implementation services, data processing and database services, IT support services, data warehousing and content management and development (UNCTAD, Information Economy Report 2009).
6 E.g. ‘front office services’ such as call centres and customer contact centres and ‘back office centres’ such as data entry, human resources, payroll, finance and accounting, procurement, transcription, insurance claims processing (UNCTAD, Information Economy Report 2009).
7 E.g. financial analysis, data mining, engineering, research and development, architectural design, remote education and publishing, medical diagnostic and journalism (UNCTAD, Information Economy Report 2009).
domestic and the remainder international (i.e. offshoring). In 2004, five countries – Canada, India, Ireland and the Philippines – accounted for as much as 93 per cent of the total market for business process offshoring. Six years later, new countries are emerging as serious contenders to compete in this lucrative market, including China, Thailand and Sri Lanka in Asia, Argentina, Brazil, Costa Rica and Mexico in Latin America and Egypt, Mauritius, Morocco and South Africa in the African Continent. UNCTAD points out that the trend towards outsourcing and offshoring is still at an early stage, and is expected to continue to expand geographically as well as across business functions.

But the expansion of the offshore industry is already facing trade barriers. Serious concerns have emerged in offshoring countries about the loss of local jobs to overseas destinations. Leaving aside their accuracy, these concerns have managed to spark a wave of anti-offshoring sentiments, particularly in times of financial hardship and high unemployment. In the United States, the top customer market for outsourcing services, concerns about the impact of offshoring on the local job market rank high in the political agenda. In excess of 100 pieces of anti-offshoring legislation have been introduced in at least 36 US states. Most of them are mainly aimed at preventing government services from being outsourced overseas, some also include measures aimed at discouraging offshoring in the private sector by way of elimination of fiscal incentives, government procurement restrictions and eligibility restrictions to get access to financial rescue packages to those companies

8 UNCTAD, Information Economy Report 2010 based on Everest Research Institute analysis and NASSCOM, 2009 and 2010. Offshore sourcing here includes both offshore outsourcing and offshoring to a foreign affiliate, also called ‘captive’ offshoring.
12 The American consultancy Forrester predicted that by 2015, a total of 3.3 million American service jobs will have moved abroad, most of these in BPO, and to developing countries. Cited by Business Process Outsourcing, Key Lessons for Developing Countries. International Trade Centre Thematic Paper, 2009.
13 For a comparison of the economic effects of offshoring and the political reactions to it see Smith, David ‘Offshoring: Political Myths and Economic Reality’ 29 World Economy (2006) p.3.
14 According to A.T. Kearney, in 2010, the US accounted for 63 percent of global IT offshore outsource spending. See A.T. Kearney global Services Location Index 2011 p.7.
15 For example, President Barack Obama’s remarks in his State of the Union Address to Congress on January 27, 2010 included the following reference to offshoring: ‘It’s time to finally slash the tax breaks for companies that ship our jobs overseas, and give those tax breaks to companies that create jobs right here in the United States of America’. (http://www.whitehouse.gov/blog/2010/01/27/putting-washington-service-middle-class [accessed 20/10/2011]).
16 Smith, David, supra note 13, p.251.
that outsource part of their business process to offshore locations. The anti-offshore backlash in the US and elsewhere has been widely condemned by the Indian’s National Association of Software and Services Company (NASSCOM), the world’s largest industry association for the offshore industry.17

Concerns about offshoring are not restricted to job losses. The exposure of local consumers to service suppliers located beyond the reach of domestic regulators’ jurisdiction also generates anxieties. For example, the possibility to digitalise medical images may allow an American hospital to save costs and increase efficiencies by hiring the services of radiologists in Bangalore to read the X rays from its patients instead of carrying the task in house or outsourcing it to local radiologists.18 But how can domestic regulators ensure the quality of the service and the competence of the service supplier in these circumstances? How can the foreign radiologist be held accountable for its behaviour in the event of malpractice? From a consumer perspective, there is a case to protect the right of the host country to regulate the supply of services in its territory, including the right to impose commercial presence requirements for the supply of services or even a total prohibition of the remote supply of services. Otherwise, it has been argued, there is a risk of a race to the bottom “where service providers decamp to minimally regulated jurisdictions from which they supply the world”.19

The trade rules that we currently have in place to address the challenges of the digital age where negotiated three decades ago. Back in the 1980s, there were mixed views about the need to create a multilateral framework exclusively for trade in services. While many developed countries were keen to support the idea, developing countries – particularly Brazil and India – could not see how trade liberalisation could advance their economic interests in a sector they perceived as being at a comparative disadvantage vis a vis developed countries.20 In addition, since barriers to trade in services are embedded in domestic regulations which, at the same time, are a key policy instrument to pursue a variety of legitimate public policy objectives, there were concerns about the impact that trade disciplines could have on Members’ right to regulate services.21 In spite of such reservations, the initiative to discuss multilateral rules for trade in services found its way into the Uruguay Round

17 See, for example, Kiran Karnik, Sunil Mehta and Gaurav Singh, ‘Globalization of Services: Facilitators and Barriers’, Background paper prepared for the workshop – Grand Challenges in Services, organized at Oxford University, May 2006, p.15.

18 This example has been suggested by Chander, Anupam ‘Trade 2.0’, 34 The Yale Journal of International Law, (2009), p.291.

19 Id, p 285.


21 Id, p.196.
mandate and after nine years of negotiations concluded in what we now know as the General Agreement on Trade in Services (GATS).

Echoing the concerns expressed during the negotiation process, the Agreement aims to liberalise trade in services in a very flexible way. On the one hand, it contains provisions on market access and national treatment proscribing quantitative restrictions and discriminatory measures against foreign services and service suppliers, but allowing Members to choose the sectors and modes of supply in which they are willing to make specific commitments to comply with such obligations. The idea is to achieve progressively higher levels of liberalisation through successive rounds of multilateral negotiations, but always keeping on Members’ hands the control over the pace and scope of the liberalisation process. On the other hand, the Agreement explicitly recognises the right of Members to regulate, and to introduce new regulations, on the supply of services in order to meet national policy objectives; but acknowledging that non-discriminatory regulations can also have trade-restrictive effects, it mandates the negotiation of disciplines on domestic regulations relating to qualification requirements and procedures, technical standards and licensing requirements.22

Is this flexible structure adequate to meet the needs of the so-called ‘trade 2.0’?23 Can the GATS secure a meaningful degree of openness, transparency and predictability for the offshore industry which neither overrides local preferences nor succumbs to protectionist interests? If not, what is missing and what can be done about it? Sacha Wunsch-Vincent has written extensively about the challenges faced by trade rules in the digital age, assessing progress made both at multilateral and regional level.24 Lapid25, Aaditya Mattoo and Wunsch-Vincent26 have looked in particular at the capacity of GATS to pre-empt protectionist backlashes against offshoring. In its turn, Chander’s work outlines a series of stimulating considerations about tensions between trade liberalisation and the right to regulate e-services, and suggests interesting ways to reconcile them.27 The purpose of this paper is

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22 Article VI.4, GATS.
23 Chander, Anupam, supra note 18.
27 Chander, Anupam, supra note 18.
to make a further contribution to this debate by discussing the capacity of GATS to secure an open, transparent and predictable regulatory framework for the offshore industry without unduly undermining the right to regulate services transactions between non-resident suppliers and resident consumers. The paper is structured as follows: section II examines the capacity of GATS to tackle market access restrictions and discriminatory measures against offshore service suppliers, section III examines the capacity of GATS to tackle non-discriminatory restrictions that particularly affect offshore service suppliers such as technical regulations on data protection and multiple licensing and qualification requirements; section IV examines the GATS general exceptions and its implications for cross border data flows; section V looks at other barriers to offshoring beyond the reach of GATS disciplines including government procurement restrictions, immigration restrictions and double taxation problems; section VI discusses the way forward and section VII concludes.

II. MARKET ACCESS AND DISCRIMINATORY RESTRICTIONS

A. MARKET ACCESS

The GATS does not define Market Access, but Article XVI:2 provides an exhaustive list of six types of restrictions that a Member is not allowed to adopt or maintain in sectors where market access commitments are undertaken unless otherwise specified in its Schedule. The restrictions relate to the number of service suppliers, the value of service transactions or assets, the number of operations or quantity of output, the number of natural persons supplying a service, the type of legal entity or joint venture and the participation of foreign capital.

With respect to limitations on the total number of service operations and the total quantity of service output, a footnote to article XVI.2(c) expressly states that “such limitations do not cover measures of a Member which limit inputs for the supply of services”. This is particularly relevant for the offshore industry, which is all about the provision of input services for manufacturers or service suppliers. Say that a software company from country A outsources core aspects of workforce administration to country B. The fact that its schedule includes an unlimited market access commitment on mode 1 for computer and related services does not prevent country B from limiting

28 Note 9, GATS.

the total quantity of service output relating to workforce administration support. Hence, support and input services must be scheduled and committed in an exhaustive manner to obtain legally certain market access and national treatment.\textsuperscript{30}

The precise scope of the Market Access provision and, by implication, the scope of the right to regulate the supply of services through electronic means has been the subject of close scrutiny in recent trade disputes. One question that has arisen is whether a total prohibition to the remote supply of services in a scheduled sector is consistent with the Market Access provision. Article XVI:2(a) and XVI:2(c) refers to limitations to the number of service suppliers and limitations to the total number of service operations in various forms (numerical quotas, economic needs tests, etc.), but do not expressly refer to a “total prohibition”. In \textit{US-Gambling}, the United States challenged the Panel finding that a prohibition on the remote supply of gambling and betting services imposed by three federal statutes (Wire Act, the Travel Act, and the Illegal Gambling Business Act) constitutes a "zero quota" on the supply of such services by particular means, and that such a "zero quota" is a limitation that falls within sub-paragraphs (a) and (c) of Article XVI:2.\textsuperscript{31} The US argued, among other reasons, that such interpretation would "unreasonably and absurdly" deprive Members of much of their right to regulate services by not allowing them to prohibit selected activities in sectors where commitments are made, which is in contradiction with the approach to market access liberalization reflected in the GATS and at odds with the balance between liberalization and regulation reflected in the Members’ recognized right to regulate services.\textsuperscript{32} However, the Appellate Body confirmed the Panel’s interpretation.\textsuperscript{33} It also upheld the Panel’s finding that in spite of the fact that the prohibition was origin-neutral, it was still inconsistent with the United States’ Market Access commitments on other recreational services (except sporting) and hence violated GATS Article XVI.1 and XVI.2 (a) and (c).\textsuperscript{34}

Such a broad interpretation of the market access provision, which casts the net not just on measures designed to restrict foreign services’ access to the domestic market, but on measures that restrict market access to any service or service supplier (foreign or domestic), has major implications for Members’ right to regulate the supply of services. For example, one of the obvious policy measure available for regulators concerned about the quality of the services or the competence of the providers

\textsuperscript{30} Mattoo, Aaditya and Sacha Wunsch-Vincent, \textit{supra} note 26 p.779.
\textsuperscript{32} Id, para. 26.
\textsuperscript{33} Id, para. 238 and 252.
\textsuperscript{34} Id, para. 265.
of remote supplied services would be to prohibit the remote supply of that particular service altogether. Yet, according to US-Gambling such measure is inconsistent with full market access commitments on the cross border supply of services. The ruling was severely criticised for being in blatant contradiction with the aim of an agreement which has been characterised as a ‘negative integration contract’ in the sense that it presupposes the unilateral definition of domestic policies.\(^3\)

Alternatively, regulators concerned with the quality of the service or the competence of remote service suppliers, could prohibit the consumption of remote supplied services. The question in this case would be whether restrictions on service consumers, as opposed to service suppliers, fall within the scope of the prohibitions laid down by Article XVI:2(a) and (c). In US-Gambling, the Panel held that the Colorado State statute that penalises persons who engage in gambling is not directed at "service suppliers" for the purposes of Article XVI:2(a) nor to "service operations" and "service output" for the purposes of Article XVI:2(c) and hence do not fall within the scope of application of this provision.\(^3\) Similarly, the Panel argued that a provision of the New Jersey Code which renders wagers, bets or stakes dependent on gaming unlawful is a measure which is directed at persons who engage in gambling and not at service suppliers or service operations as prescribed by Articles XVI:2(a) and (c).\(^3\) In the particular case, the Appellate Body decided that it need not rule on these Panel findings because it had ruled out consideration of the state laws under GATS Article XVI.\(^3\) Thus, it remains to be seen whether the right to regulate includes the right to prohibit the consumption of cross-border supplied services in sectors where market access commitments on mode 1 have been made.

**B. NATIONAL TREATMENT**

The national treatment principle (NT) prohibits any form of discrimination against foreign services and service supplies compelling Members to accord to services and service suppliers of any other


\(^3\) Id, para. 6.401.

\(^3\) Id, para. 373 (C), iv.
Member treatment no less favourable than that accorded to its own ‘like’ services and service suppliers in respect of all measures affecting the supply of services.\textsuperscript{39} To assess the suitability of the NT standard for tackling barriers against the offshore industry it is necessary to determine whether electronically delivered services and those delivered by other methods should be considered ‘like services’. The Work Programme on Electronic Commerce has mandated the CTS to consider this issue. The general view among Members, consistent with the principle of technological neutrality, is that within the limits of individual sectors and modes of supply, it should be possible to agree that likeness would not depend on whether a service was delivered electronically or otherwise, but no official conclusion has been reached so far.\textsuperscript{40} However, bearing in mind the rulings on \textit{US-Gambling} and \textit{China Publications}, it is not unreasonable to suggest that should a dispute on likeness arise, the Dispute Settlement Body will most probably follow a criterion based only on the attributes of the service or the service supplier regardless of the means by which the service is delivered.

The NT principle can help to combat protectionist measures against the offshore industry disguised as technical standards allegedly aimed at pursuing legitimate public policy objectives such as the protection of the privacy of individuals in relation to the processing and dissemination of personal data. For example, the “Notify Americans Before Outsourcing Personal Information Act” prohibits a business from transferring personally identifiable information of a U.S. citizen to any foreign affiliate or subcontractor in another country without providing notice to such citizen that the information may be transferred to such affiliate or subcontractor.\textsuperscript{41} Arguably, requiring U.S. companies that send their customers’ data abroad to obtain an affirmative consent requirement from each and every of its customers, but not imposing the same requirement if data is sent to local suppliers, discriminates against the offshore service supplier. Similar arguments could be made in relation to the “Call Centre Consumers’ Right to Know Act” Bill, which requires employees from telephone call centres initiating or receiving calls from individuals located in the United States to disclose their own physical location to the consumer.\textsuperscript{42}

\textsuperscript{39} Art.XVII.1, GATS.
The NT principle can also help to combat the use of fiscal incentives to the detriment of companies that outsource part of their business processes to an offshore location. For example, The Troubled Assets Relief Programme Reform and Accountability Act of 2009 bill prevents assisted institutions from entering “… into a new agreement, or expand a current agreement, with any foreign company for provision of customer services functions, including call-centre services, while any of such assistance is outstanding”. At state level, the New York “State Financial Incentive Protection Act” bill prohibits businesses that outsource jobs from receiving state economic development assistance. These measures clearly undermine the conditions of competition between offshore service suppliers and like domestic competitors since the customers of domestic competitors are not be threatened by the withdrawal of fiscal incentives for using their services.

It has been argued that the mere existence of a provision calling Members to enter into negotiations with a view to developing multilateral disciplines on subsidies leaves this matter completely un-regulated under GATS. By contrast, there are good reasons to argue that the MFN and NT obligations constrain the use of subsidies. First, the 2001 Scheduling Guidelines expressly state that Article XVII applies to subsidies in the same way that it applies to all other measures. In addition, Members’ practice in scheduling specific commitments suggests that there is an understanding, at least among some Members, that subsidies are covered by Article XVII. More importantly, the words

44 Bill number A 4250 introduced to the New York State Assembly on 2 February 2009, text available at <http://assembly.state.ny.us/leg/?bn=A04250>, [accessed 01/04/10]. Similar bills were introduced in 2004, 05, 07 and 08.
45 Article XV, GATS.
48 WTO Document (S/L/92), Guidelines for the scheduling of specific commitments under the General Agreement on Trade in Services, 23 March 2001, para. 16.
used to define the scope of application of Article XVII (i.e. “... in respect of all measures affecting the supply of services...”) have been interpreted broadly by WTO adjudicatory bodies. 50 The real concern, however, is that the scope of application of the NT standard, like the market access standard, is limited to those service sectors and modes of supply where specific commitments have been made and subject to the conditions and qualifications set out in the Member’s schedule of specific commitments. 51 Hence, offshore service suppliers that provide services in sectors where no specific commitments on NT have been made are not protected against discriminatory measures.

C. SPECIFIC COMMITMENTS

Each Member must submit a schedule recording the commitments on market access and national treatment as well as any additional commitments it undertakes in individual sectors. 52 The GATS does not provide a classification system of service sectors for the purpose of structuring commitments. Members rely on a Services Sectoral Classification List prepared by the WTO Secretariat which is based on the United Nations Provisional Central Product Classification (CPC) and comprises twelve core service sectors, further subdivided into 160 sub-sectors, indicating for each of them the corresponding CPC number. 53 In theory, the list provides universal coverage by including a residual category to accommodate any service that does not fall within any specific sector or sub-sector. But in practice, it is widely acknowledged that the list has gaps and it is very cumbersome to update. This makes it unsuitable for structuring commitments on the new generation of services created by the information technology revolution, which are under a constant state of flux. 54 Under the GATS ‘positive list’ approach, it is the inscription of a sector in a Member’s schedule what determines whether a market access commitment has actually been made. In this context, the difficulties to match in an unambiguous way ITO, BPO or KPO type of services with any sector of the classification list,
evidences an important limitation of Members’ schedules to provide the offshore industry with certain and predictable conditions to access foreign markets.

GATS commitments where made almost twenty years ago, at a time when most of the services that today are offered by the offshore industry did not even exist. Trade diplomats could not have possibly anticipated the scale of the ITC revolution and the wide range of possibilities for supplying cross-border trade in services through electronic means that it created.\(^{56}\) Hence, it is necessary to consider the applicability of GATS rules and Members’ specific market access commitments to the electronic delivery of services.

The Work Programme on Electronic Commerce\(^ {57}\) mandates the Council for Trade in Services (CTS) to consider this issue. The general view among most Members of the Council is that GATS is technologically neutral in the sense that it does not contain any provisions that distinguish between the different technological means through which a service may be supplied.\(^ {58}\) As a result, it has been argued, the Agreement applies to all services regardless of the means by which they are delivered, and specific commitments cannot be contingent to the means of delivery of services, unless otherwise specified in the schedule of commitments.\(^ {59}\) Some delegations, however, expressed reservations about the recognition of this principle\(^ {60}\) preventing the CTS from reaching a consensual decision on this.\(^ {61}\) By contrast, some rulings adopted by the Dispute Settlement Body appear to embrace the principle of technological neutrality, though not explicitly. In a finding not revised by the Appellate Body, the Panel in US-Gambling considered that the definition of mode 1 in Article I:2(a) “does not contain any indication as to the means that can be used to supply services cross-border. This indicates […] that the

\(^{56}\) This technological unawareness is less relevant for commitments made by countries that acceded to the WTO more recently like China (2001) and the Russian Federation (2011) and, to some extent, to the commitments made in the financial and basic telecommunications sectors negotiated after the conclusion of the Uruguay Round, between 1995 and 1998.

\(^{57}\) Adopted by the General Council on 25 September 1998 (WT/L/274).


\(^{59}\) Id.

\(^{60}\) Id.

GATS does not limit the various technologically neutral possible means of delivery under mode 1. [...] a market access commitment for mode 1 implies the right for other Members’ suppliers to supply a service through all means of delivery, whether by mail, telephone, Internet, etc., unless otherwise specified in a Member’s Schedule.62 Similarly, in China Publications the Appellate Body confirmed the Panel finding that China’s specific commitments on 'Sound recording distribution services,' under the heading of 'Audiovisual Services' in sector 2.D of its Schedule, 'extends to the distribution of sound recordings in non-physical form, notably through electronic means.63

Another issue that requires clarification is whether an electronic cross-border transaction should be classified as a mode 1 or a mode 2 transaction. The Agreement refers to four modes for the supply of services, depending on the territorial presence of the supplier and the consumer at the time of the transaction. Mode 1 is defined as the supply of a service “from the territory of one Member into the territory of another Member”64, whereas Mode 2 is defined as the supply of a service “in the territory of one Member to the service consumer of any other Member”.65 The possibility of supplying services cross-border without the establishment of a commercial presence by the supplier in the host country raises the issue of whether the transaction has taken place under mode 1 or mode 2. The WTO Secretariat has rightly noted that thanks to continuing technological developments, “… much fuller and continuous interaction is now possible in a wide range of services between a consumer and a supplier located abroad, which raises the question of whether such services are supplied “into the territory” of the consumer (mode 1) or in the territory of the foreign supplier (mode 2). In this latter case the consumer, although not physically present in the supplier's territory, might in some circumstances be considered to consume the service abroad”.66 So far, the CTS has failed to clarify the matter.67 In US-Gambling, discussions were focused

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64 Article I.2(a), GATS.
65 Article I.2(b), GATS.
66 For example, the WTO Secretariat refers to the way in which a call centre may operate: “… a firm's traffic representing domestic calls from its clients is routed abroad to a foreign service supplier who takes calls and handles client inquiries within its own territory”. See Background Note by the WTO Secretariat Note on Cross-Border Supply (Modes 1 & 2) (S/C/W/304), 18/9/09, para 9 and 10.
67 See Progress Report to the General Council, adopted by the CTS on 19 July 1999, S/L/74, 27/07/99, paragraph 5: “It was recognized that services could be supplied electronically under any of the four modes of supply. However, there was particular difficulty in making a distinction between supply under modes 1 and 2 in
on market access commitments on mode 1 for gambling and betting services, implying that this is the mode of supply applicable to the cross-border delivery of electronic services but, as Wunsh-Vincent notes\textsuperscript{68}, neither the Panel nor the Appellate Body formally examined the difference between GATS mode 1 and mode 2.

This uncertainty has practical implications for the offshore industry because a number of Members have scheduled their commitments on modes 1 and 2 at different levels for the same service sector.\textsuperscript{69} It has been noted that specific commitments undertaken with respect to mode 2 are significantly more liberal than those for the other three modes of supply and that most of the time, limitations scheduled for mode 1 have not been repeated under mode 2.\textsuperscript{70} In these circumstances, market access conditions cannot be secured unless the importing Member has made commitments in the relevant sectors both for modes 1 and 2.

In addition to the uncertainties about the scope of GATS rules and commitments caused by the emergence of the electronic delivery of services, existing levels of commitments are quite modest both in terms of the number of sectors included in Members’ schedules and in terms of the quality of commitments in relevant modes of supply, which, at best, bind status quo conditions.\textsuperscript{71} Within this overall level of modesty, commitments on mode 1 (cross-border supply) have attracted far fewer commitments than mode 2 (consumption abroad) and mode 3 (commercial presence).\textsuperscript{72} One political economy reason that explains Members’ preference for commitments on modes 2 or 3 over commitments on mode 1 is the principle of regulatory precaution by which governments are reluctant to guarantee access for services over which they cannot exercise regulatory control.\textsuperscript{73}

\textsuperscript{68} Sacha Wunsch-Vincent, supra note 61, p.502.
\textsuperscript{69} Note of WTO Secretariat, Cross-border supply (Modes 1 & 2), S/C/W/304, 18/09/09, pp.11-12.
\textsuperscript{70} World Trade Report 2005, p.292.
\textsuperscript{72} Note of WTO Secretariat, Cross-border supply (Modes 1 & 2), S/C/W/304, 18/09/09, pp.11-12.
Commitments on mode 1 in Business and Professional services, arguably one of the most relevant sectors for the offshore industry, vary significantly across sub-sectors.\(^{74}\) There are still many business and professional sub-sectors which are not even included in Members’ schedules or where commitments on mode 1 remain unbound or subject to strict limitations.\(^{75}\) Even full commitments on mode 1 are subject to horizontal limitations such as tax measures, subsidies and foreign exchange controls.\(^{76}\) In addition, although ITO, BPO or KPO type of services are mainly supplied across borders by electronic means, service providers frequently need to resort to other modes of supply. For example, as companies initially offering only cross-border supply grow larger, they may need to set up affiliates in their major markets to maintain closer contacts with clients.\(^{77}\) Also, employees of the offshore service supplier may need to travel to the importing country to address their clients’ in person.\(^{78}\) All these needs expose offshore service suppliers to limitations on modes 3 and 4, which can severely hamper the effectiveness and capability to conduct cross-border trade. Finally, it has been noticed that two-thirds of all offshoring is “captive”\(^{79}\), which involves foreign direct investment, so limitations imposed by exporting Members to the commercial presence of foreign service providers in potential offshore destinations also hit the offshore industry.

There is a clear gap between existing levels of commitments and the current market access conditions enjoyed by the offshore industry. The fact that the exponential growth of the offshore industry occurred in spite of the total absence of specific market access and national treatment commitments in

\(^{74}\) Take for example the differences in the percentage of full market access commitments on mode 1 for the following Professional Sectors: Architectural (67%), Engineering (62%), Taxation (62%), Veterinary (62%), Medical and dental (44%), Accounting (42%), Legal (23%). Similar differences can be found in ‘Other Business Services’, ranging from Market Research and Public Opinion Polling Services (76%) to the ‘Other’ sub-sub sector (18%). The latter covers some forms of business support services and call centres which are part and parcel of the offshore business. The percentage corresponds to the number of schedules with full commitments on mode 1 out of the total number of schedules with commitments on mode 1 in that particular sub-sector. The other two alternatives are partial commitments or unbound. See Note of WTO Secretariat, Cross-border supply (Modes 1 & 2), S/C/W/304, 18/09/09, Figure A3-a.

\(^{75}\) For example, citizenship and residency requirements, various forms of commercial presence requirements, compulsory liaison with local firms, economic needs tests for professional services and national treatment restrictions regarding the processing of personal data outside the national jurisdiction. See Note of WTO Secretariat, Cross-border supply (Modes 1 & 2), S/C/W/304, 18/09/09.

\(^{76}\) Id, p.13.

\(^{77}\) Id, p.13.

\(^{78}\) See infra Section V.B.

\(^{79}\) World Trade Report 2005, p. 275.
the relevant service sectors and modes of supply, does not guarantee that current market access conditions will remain unchanged for the foreseeable future. Despite the fact the offshore industry is still in its infancy, we have already seen evidence of a protectionist backlash. In the current economic climate, it is not unreasonable to suggest that protectionist measures against offshoring may increase. But given the poor level of specific commitments, there is nothing in the GATS that could prevent offshoring countries from adopting further market access restrictions or discriminatory measures against offshore service suppliers.

To address this problem, in 2006, a group of Members with export interests on the cross-border supply of services requested from twenty recipients a series of concessions aimed at bridging the gap between the latter’s existing commitments and the commercially meaningful market access opportunities created by technological developments on the cross-border supply of services. The collective request asks for full market access and national treatment commitments in strategic sectors and sub sectors for both Modes 1 and 2. Given the uncertainty regarding classification of electronic delivery of certain services as either Mode 1 or Mode 2, the collective request also asks Members to provide for similar levels of commitments on Mode 2 where commitments on Mode 1 exist or are planned to be offered in the identified sector/sub-sectors. Finally, to address the limitations of the services sectoral classification system in capturing existing and potential business opportunities for the offshore sector, the collective request demands: a) to make commitments for Computer Related Services at two digit level – CPC 84 instead of the usual three digit level and b) to use the more recent CPC version (CPC 1.1) for “Other Business Services” since the description in the

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80 Chile, Hong Kong China, India, Mexico, New Zealand, Pakistan, Switzerland, Singapore, Thailand, The Separate customs Territory of Taiwan, Penghu, Kinmen and Matsu.
81 US, EU, Canada, Japan, Korea, China, Malaysia, Philippines, Indonesia, Brazil, Argentina, Egypt, South Africa, Peru, Colombia, Uruguay, Brunei Darussalam, United Arab Emirates, Australia, Norway.
82 Plurilateral requests have not been circulated as WTO documents. This one is available in the Indian Department of Commerce website at [http://commerce.nic.in/trade/Plurilateral%20Request%20in%20Cross%20Border%20Supply.pdf](http://commerce.nic.in/trade/Plurilateral%20Request%20in%20Cross%20Border%20Supply.pdf) [accessed 15/10/11].
83 Id.
84 Id.
85 As Chaudhuri and Karmakar note, in the CPC classification system, the categories with fewer digits are more encompassing and include those categories with additional digits. See Chaudhuri, Sumanta and Suprana Karmakar, ‘Cross-border trade in services’ in Marchetti, Juan A. And Martin Roy (eds) Opening Markets for Trade in Services. Countries and Sectors in Bilateral and WTO Negotiations (CUP 2008)p.184-233, note 27.
corresponding provisional CPC-8790 does not capture emerging and dynamic cross border services like call centres, etc.\textsuperscript{86}

Chaudhuri and Karmakar note that even if fully met, this plurilateral request would merely involve binding the actual policy regime, calling for fresh liberalisation only in a few cases.\textsuperscript{87} Yet, they have identified substantial gaps between the level of commitment being sought and the latest offers made by targeted Members.\textsuperscript{88} In the same vein, a study by Adlung and Roy, based on sixty eight initial offers and twenty six revised offers provides no basis for inferring that the new commitments are significantly deeper than existing entries.\textsuperscript{89} A particularly striking feature is the continued low level of bindings proposed for mode 1, with more than 40 percent of the envisaged new sectoral entries being “unbound”. After over a decade of negotiations, there has been virtually no liberalisation and the prospects of plugging the gap between existing levels of specific commitments and de facto market access conditions are, to say the least, slim.\textsuperscript{90} Some proposals have been tabled to break the stalemate\textsuperscript{91}, but it is unlikely that will happen anytime soon.

In short, the purpose of specific commitments on market access and national treatment, comparable to that of tariff concessions under GATT, is to open service markets and ensuring stable and predictable trading conditions, but existing levels of specific commitments do not provide offshore service suppliers with an insurance against quantitative restrictions or discriminatory measures.

IV NON-DISCRIMINATORY RESTRICTIONS

Even in the absence of quantitative restrictions or discriminatory measures, foreign service suppliers must comply with non-quantitative and non-discriminatory regulatory requirements governing the

\textsuperscript{86} Id.
\textsuperscript{87} See Chaudhuri, Sumanta and Suprana Karmakar, ‘Cross-border trade in services’ in Marchetti, Juan A. And Martin Roy (eds) \textit{Opening Markets for Trade in Services. Countries and Sectors in Bilateral and WTO Negotiations} (CUP 2008)p.203.
\textsuperscript{88} Id.
\textsuperscript{90} Id.
supply of services. For example, professional services are renowned for being heavily regulated, including, inter alia, qualification requirements and procedures aimed at ensuring the quality of the service and professional competence and integrity of the professionals. An offshore service supplier cannot export professional services to multiple markets unless it meets the local qualification, license and certification requirements in force in each of the markets it plans to export its services. The mere absence of regulatory uniformity or duplication of regulatory requirements constitutes in itself a huge obstacle to trade. But the capacity of GATS to address non-discriminatory restrictions is extremely limited. As mentioned, the aim of the agreement is to achieve progressively higher levels of liberalisation of trade in services, while recognising the right of Members to regulate the supply of services in order to meet national policy objectives. The fact that Members’ retain full control of their sovereign right to regulate the supply of services in each sector as they see fit, will inevitably result in disparities among domestic regulations that deny effective market access to foreign services and service suppliers.

The GATS does not seek to address these restrictions by pursuing the harmonisation of Members’ standards and policy choices. The Agreement has been rightly characterised as a ‘negative integration contract’\(^\text{92}\), which presupposes the unilateral definition of domestic policies. Its main disciplines are focused on reducing or removing quantitative restrictions and discriminatory measures against foreign service suppliers, with a view to ensure they can enter the host country market ‘as currently structured’\(^\text{93}\) and enjoy equality of competitive opportunities \textit{vis a vis} their domestic counterparts. Article VI, however, contains both substantive and procedural disciplines on domestic regulation aimed at minimising some of their potentially trade restrictive effects. First, in sectors where specific commitments are undertaken, Members must ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.\(^\text{94}\) Where authorization is required for the supply of a service on which a specific commitment has been made, the competent authorities of a Member must inform applicants within a reasonable period of time after the submission of an application of the decision concerning the application.\(^\text{95}\) They must also provide at the request of the applicant information concerning the status of the application without undue delay.\(^\text{96}\) And in sectors where specific commitments regarding professional services are undertaken, Members must provide for adequate procedures to verify the competence of professionals of any other

\(^{92}\) See Petros C Mavroidis, \textit{supra} note 35 p.11.


\(^{94}\) Article VI.1, GATS.

\(^{95}\) Article VI.3, GATS.

\(^{96}\) Id.
Member. While phrased in general terms, these procedural standards at least provide a legal basis to challenge public authorities’ most overt abuses of power such as unreasonable delays in considering applications for the recognition of foreign qualifications or arbitrary rejection of applications. In practice, however, their disciplining effect is tied to the outcome of the negotiations of specific commitments, which, so far, has made limited progress. In addition, Article VI prescribes some procedural disciplines of horizontal application including the right of service providers affected by administrative decisions to have access to an impartial and objective review of those decisions and, where necessary, to appropriate remedies.

With respect to substantive disciplines, Article VI.4 of GATS mandates the Council for Trade in Services to develop multilateral disciplines associated with licensing, qualifications, and technical standards rather than prescribing final binding disciplines. Initially, the CTS established the Working Party on Professional Services (WPPS) with the specific mandate to develop disciplines on domestic regulation in the Accountancy sector. Once it fulfilled its mandate, the WPPS was replaced with a Working Party on Domestic Regulation (WPDR) with the task of developing generally applicable disciplines pursuant to Article VI.4. Negotiations under the WPDR umbrella have been carried on for the past twelve years, but so far Members have been unable to reach an agreement. The failure of the WPDR to develop generally applicable disciplines pursuant to Article VI.4 leaves unresolved regulatory issues that are critical for striking an adequate balance between the right to regulate in order

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97 Article VI.6, GATS

98 A survey among service industry operators on the most frequent barriers to trade in services found that in many cases the barriers are not written into the rulebook but it is a matter of official practice, i.e. ‘…the way things have always been done…’ or the ‘general bureaucratic tendency not to approve new activities’. Price Waterhouse, “Business Views on International Trade in Services: The Results of a Survey of Fortune’s Directory of Service Companies, December 1983, mimeo, cited by Feketekuty, Geza, supra note 24 p.141.

99 Article VI.2, GATS.

100 Council for Trade in Services Decision on Professional Services’, S/L/3, 4 April 1995.

101 The WPPS concluded its work in November of 1998 and the Council for Trade in Services approved the final draft in December 1998, Document S/L/64, approved by the CTS on 14 December 1998. As noted by the WTO Secretariat “Although the work of the WPPS on accountancy does not pre-empt future work at the horizontal level and in other sectors, much of the discussion held in the WPPS on the accountancy disciplines constitutes helpful background for future work under Article VI.4 in general” Note by the Secretariat, Article VI.4 of the GATS Disciplines on Domestic Regulation applicable to all Services, para 6 (S/C/W/96, 1 March 1999).

102 Council for Trade in Services Decision on Domestic Regulation’ S/L/70, 28 April 1999.

103 Working Party on Domestic Regulation, Disciplines on Domestic Regulation pursuant to GATS Article VI.4, Chairman's Progress Report, S/WPDR/W/45, 14 April 2011.
to meet national policy objectives and the needs of the industry for openness, transparency and predictability to supply services electronically from one country into another.

First, bearing in mind that the technical barriers to supply services from a distance are declining rapidly, and the need to protect local consumers from services supplied from remote jurisdictions is increasing in equal measure, it is crucial to specify when a particular measure affecting the electronic delivery of services would meet the ‘reasonable’, ‘unnecessary barriers to trade’ and ‘not more burdensome than necessary’ criteria of Article VI. In a communication to the CTS, the EU has described the need for this clarification in eloquent terms:

“In the electronic commerce environment one of the most active debates at present is the balance between public regulation and business-self-regulation. Businesses claim that electronic commerce developments should be primarily industry-led. This principle is recognised by many administrations. At the same time it is widely recognised that some government regulation protecting basic public interests (public health, consumer and data protection, security of the transactions, etc) is necessary in the e-commerce world as much as in the non-digital one. The balance between those two recognised objectives is at the core of any international discussions between business and governments on electronic commerce. The importance of avoiding ‘excessive’ and/or ‘restrictive’ government regulation is becoming clear. There is therefore a need, - recognised by governments and industry as well as consumers -, for a clear indication as to what regulation would be ‘legitimate’ and non-restrictive for e-commerce transactions.” 104

To address this problem, the EC suggested the CTS to discuss the possibility to agree on a list of regulatory objectives – for example, consumers’ protection, universal service, and security of the transactions, as well as those covered by Article XIV of the GATS, among others – that could justify imposing ‘specific’ domestic regulation on services provided electronically.105 Other Members have argued that a safe harbour for digital trade regulations would only justify potentially unnecessary regulations.106 So far, the WPDR has not been able to provide a solution to this problem. In fact, one of the most difficult aspects of the negotiations under the WPDR umbrella has been the question of

105 Id.
106 Sacha Wunsch-Vincent, supra note 32, p.504.
whether a normative standard in the form of a ‘necessity test’ should be included into the disciplines.  

Another issue that requires urgent action is to develop domestic regulatory disciplines on technical standards affecting the electronic supply of services. This is not just about standards relating to ‘content services’, but primarily about those relating to ‘transport of content services by telecommunications means’. One of the basic characteristics of the internet is the use of common frameworks and standards for interconnectivity and interoperability in order to maintain "universal” communication. An excessive intervention of public regulations on technical standards could risk destroying the interoperability that so far has allowed worldwide provision of services via the internet. Here too there are different views on what should be the most appropriate regulatory approach to ensure that technical standards on e-services do not constitute unnecessary barriers to trade. Some argue that a special annex, reference paper or special version of Art. VI tailored for the special needs for e-services should be elaborated; others argue that the principle of technological neutrality should suffice to deal with electronic commerce issues. Meanwhile, progress on developing disciplines for technical standards under the WPDR umbrella has been scant.

A final issue that remains unresolved is whether or not the disciplines on domestic regulations to be developed under Article VI should be extended to ‘voluntary standards’ adopted by industry associations and, if so, how can Members effectively discipline action by private actors outside the overall scope of the GATS. This issue is quite relevant for the offshore industry because of concerns about the restrictive impact that the growing number of voluntary standards could have for trade in

107 Working Party on Domestic Regulation, Disciplines on Domestic Regulation pursuant to GATS Article VI:4, Chairman's Progress Report, S/WPDR/W/45, 14 April 2011, para 14.


109 See The Work Programme on Electronic Commerce. Note by the Secretariat. S/C/W/68, 16 November 1998, p.4. Also, the internet has thrived within a business self regulatory environment.


111 Working Party on Domestic Regulation, Disciplines on Domestic Regulation pursuant to GATS Article VI:4, Chairman's Progress Report, S/WPDR/W/45, 14 April 2011, para 40 and 41.

112 Adapting the definition included in Agreement to Technical Barriers to Trade (Annex 1, para 2) for services the voluntary standard could be defined as a “Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristic for services, service suppliers or related processes and methods, with which compliance is not mandatory.”
services. For example, when outsourcing is non-captive, the offshoring company needs to choose from
a range of suppliers the one that will take over businesses processes that hitherto were carried in-
house. This is both a delicate and complex decision. Not surprisingly, a number of voluntary standards
and certification processes have been created to protect the quality and reputation of the industry and
provide crucial information to prospective clients about the quality of the services offered.113

Potentially, voluntary standards could operate as an effective market access barrier (i.e. service
suppliers that do not get the relevant certifications become de facto unable to reach prospective
clients). Yet, there are strong arguments to suggest that voluntary standards remain beyond the scope
of disciplines on domestic regulations to be developed under Article VI:4. On textual grounds, the
GATS applies to ‘measures by members’ affecting trade in services.114 And ‘measures by members’
are defined as measures taken by: “(i) central, regional or local governments and authorities; and (ii)
non-governmental bodies in the exercise of powers delegated by central, regional or local governments
or authorities.”115 In its turn, the Article VI:4 mandate to develop regulatory disciplines refers to five
type of regulations, not including ‘voluntary standards’. It has also been suggested that incorporating
non-binding voluntary standards as binding standards in the WTO would mean that Governments
could be brought to court based on standards they have not put in place and this raises questions about
the legitimacy of such a law-making process.116 On the other hand, trade rules that fail to discipline
voluntary standards when the evidence suggests their impact on trade is growing, risk to become
obsolete. So far, the WPDR has also failed to resolve this issue.117

Pending the entry into force of the disciplines under Article VI:4, Members are required not to apply
licensing and qualification requirements and technical standards that nullify or impair their specific
commitments in a manner which does not comply with the criteria outlined in Article VI.4 and could

113 NASSCOM has developed a number of certification programmes for BPO organisations. See, for example,
the NAsSCOM + QAI’s certification program introducing certification programs for frontline management in
ITES-BPO organizations and the NASSCOM Assessment of Competence (NAC) program for the potential
employees in the BPO industry. See also, The Top Ten Certifications In Outsourcing, A Chillibreeze report,
[accessed 22/7/11].
114 Article I.1, GATS
115 Article I.3 (a), GATS.
116 South Centre, Domestic Regulation of Services Sectors: Analysis of the Draft Negotiation Texts (Analytical
117 See Working Party on Domestic regulation, Disciplines on Domestic Regulation Pursuant to GATS Article
not reasonably have been expected of that Member at the time the specific commitments in those sectors were made. Art VI.5(b) refers to international standards of relevant international organisations as a factor to be taken into account to determine whether a Member’s regulation is in conformity with the criteria set out in Article VI.5(a), but it does not go all the way to create a presumption of compliance in favour of obligations based on international standards (unlike similar provisions in the TBT and SPS Agreements.). The lack of presumption of compliance reduces the incentives for the adoption of international standards by members.

IV. GENERAL EXCEPTIONS

Article XIV of the GATS contains general exceptions that allow Members to take any measure necessary to achieve certain public policy objectives. Among other public policy grounds, this provision allows Members to take measures necessary to secure compliance with laws or regulations relating to the protection of the privacy of the personal data of individuals and the confidentiality of individual records and accounts. This ground for exceptions could justify a total prohibition of transfer of personal data to overseas destinations. While understandable from a public policy perspective, a total prohibition of cross-border data flows hit the increasingly important digital trading system at its heart, with serious consequences for the offshore industry, in particular for BPO services that require the transfer of personal data from the home country to the offshore destination and vice versa, such as back office support services for handling insurance claims or processing credit card transactions.

For example, the European Union has adopted a Directive which seeks to strike a balance between a high level of protection for the privacy of individuals and the free movement of personal data within the European Union (EU). The Directive imposes strict standards for the transfer of personal data to third countries, which should be allowed only if the third country in question ensures an adequate level of protection. The Directive also gives the Commission the power to determine whether a third country meets the minimum protection requirements by reason of its domestic law or of the

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118 Article VI.5 (a), GATS.
119 Article VI.5(b), GATS.
121 Article XIV (c) (ii), GATS.
123 Id, Article 25.
international commitments it has entered into.\textsuperscript{124} If a third country can obtain the Commission’s seal of approval, it means that it can receive personal data flows from EU member states without any further safeguard being necessary. The Commission’s decision has therefore a tremendous significance for offshore service suppliers from developing countries aiming to tap on the EU market. The Commission has so far recognized only a very small number of countries as providing adequate protection.\textsuperscript{125} In the United States, the National Foundation for American Policy (NFAP) identified in 2005 alone thirteen state bills proposing to restrict personal information from being sent outside the United States on consumer protection grounds.\textsuperscript{126} Similarly, the “Notify Americans Before Outsourcing Personal Information Act” prohibits a business from transferring personally identifiable information of a U.S. citizen to any foreign affiliate or subcontractor in another country without providing notice to such citizen that the information may be transferred to such affiliate or subcontractor.\textsuperscript{127}

To avoid abuses, the right to invoke the exceptions is subject to strict qualifications. Measures taken under Article XIV (a), (b) and (c) must be ‘necessary’ to achieve the public policy objective concerned and must not be applied in a manner which constitutes arbitrary or unjustifiable discrimination between Members where like conditions prevail, or a disguised restriction on trade in services.\textsuperscript{128} It has also been suggested that as an exception, this provision has to be interpreted narrowly and should not be expanded to cover other regulatory objectives than those expressly listed.\textsuperscript{129}

So far, the data protection ground has not been invoked by Members before the Dispute Settlement Body, but the public morals ground has. In \textit{US-Gambling}, both the Panel and the Appellate Body acknowledged that the prohibition of internet gambling was necessary to protect public morals and the maintenance of public order, but found, with some differences, that the measure was applied in a manner inconsistent with the requirements of the chapeau of Article XIV.\textsuperscript{130} The ruling lays down a detailed process of weighing and balancing a series of factors in order to determine whether a measure

\textsuperscript{124} Id. Article 25(6).
\textsuperscript{125} Switzerland, Canada, Argentina, Guernsey, Isle of Man, the US Department of Commerce's Safe harbor Privacy Principles, and the transfer of Air Passenger Name Record to the United States' Bureau of Customs and Border Protection as providing adequate protection. See: <http://ec.europa.eu/justice_home/fsj/privacy/thridcountries/index_en.htm> [accessed on 07/05/10].
\textsuperscript{126} “Privacy concerns and global sourcing restrictions’, (March 2006), NFAP Brief.
\textsuperscript{127} See \textit{supra} note n 42.
\textsuperscript{128} Chapeau Article XIV, GATS.
\textsuperscript{129} This view was held by the General Council for Trade in services in its progress report to the General Council on the Work Programme on Electronic Commerce. (CTS report, S/L/74, 27/11/99).
is "necessary" within the meaning of Article XIV\textsuperscript{131}, sending a clear message that measures taken on public policy grounds will not escape strict scrutiny.

But even if the right of Members to invoke the exception is subject to strict scrutiny, it would still leave the door open to block the transfer of personal data when the necessity test and the requirements of the chapeau of Article XIV are met. In other words, the Agreement allows for the fragmentation of the digital trading system so that Members’ preserve their right to regulate in order to meet national policy objectives. Clearly, this formula is too rudimentary to strike the delicate balance between the protection of personal data and the free flow of data at a time when the need for the free flow of data is becoming more and more relevant for the cross-border provision of services. There is an imperative need for WTO decision-making bodies, through its various ancillary bodies and working programmes, in particular the Working Programme on e-commerce and the WPDR, to deliver more fine-tuned disciplines on domestic regulation to balance this tension in a more precise and predictable way. Meanwhile, it is the Dispute Settlement Body that ends up with the difficult task of sorting out this problem by way of ruling on ad-hoc disputes that are growing in numbers and level of complexity.\textsuperscript{132} The systemic implications that this has for the governance of the multilateral trading system are extremely serious and well known.\textsuperscript{133}

V. RESTRICTIONS BEYOND THE REACH OF GATS

A. GOVERNMENT PROCUREMENT RESTRICTIONS

Business opportunities for the offshore industry in the international Government Procurement Market are unparalleled. Governments are major commercial spenders on computing services and software, ranked second in spending after the financial sector.\textsuperscript{134} NASSCOM has estimated that the market for the Indian IT-BPO industry in the Government sector would be approximately USD 70-80 billion in

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\textsuperscript{131} Id, para. 306 to 308.
\textsuperscript{132} The number of WTO cases on the cross-border provision of services by electronic means are growing rapidly. See, in addition to the US-Gambling case, China – Publications (DS363), China – Measures Affecting Financial Information Services and Foreign Financial Information Suppliers – Request for consultations by the European Communities (DS372), United States (DS373) and Canada (DS378) and China – Certain Measures Affecting Electronic Payments (DS413).
\textsuperscript{133} See, for example, Jackson, John ‘Dispute Settlement and the WTO. Emerging Problems’ Journal of International Economic Law (1998) 329-351.
\textsuperscript{134} Background note of the WTO Secretariat on Computing and Relating Services, 22 June 2009 (S/C/W/300), p. 5.
\end{flushright}
the next 10 years, growing at a CAGR of fourteen per cent. In the UK, for example, a significant number of National Health Service (NHS) Trusts have call centres and offices in Delhi and Pune that handle invoices and other administration for a fraction of the amount that UK-based labour would cost and it has been suggested that millions of pounds more could be saved by outsourcing more NHS administration to India.

However, the impact of the financial crisis on the job market in developed countries has paved the way for a surge in anti-offshore measures. Government procurement restrictions are one of the most popular mechanisms chosen by American authorities to curb offshoring. For instance, in 2004, New Jersey Governor Jim McGreevey issued a highly restrictive executive order to prevent state work from being performed offshore. In its relevant part, the order stipulates that the State of New Jersey shall not award a contract to a vendor that submits a bid proposal to perform services, or have a subcontractor perform services, pursuant to the contract at a site outside the United States, unless certain conditions are met. In 2008, the Assembly of the State of New Jersey introduced a bill prohibiting businesses that outsource jobs overseas from receiving State contracts or grants as well as the investment of state funds in such business. Likewise, in 2009 a bill was introduced to the General Assembly of Pennsylvania requiring all government contracts for services to include a provision that requires all services performed under the contract, or performed under any subcontract awarded under the contract, to be performed at a physical location within the United States. At federal level, the House of Representatives adopted a resolution urging federal agencies to take all possible actions to address the problem of rising unemployment including, inter alia, by “… reducing outsourcing, thereby helping to save existing jobs and to create new job opportunities for Americans”.

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136 Run the NHS from India to save cash, says health chief; Patients may not like it but services would be saved, administrator tells Chris Smyth The Times (London), January 3, 2011 Monday, NEWS; Pg. 10,11, words, Chris Smyth.

137 See Executive Order No. 129, 9/9/04, text available at <http://www.state.nj.us/infobank/circular/eom129.htm>, [accessed 01/04/10].


139 House Bill 440, the General Assembly of Pennsylvania 13 February 2009. Text available at: <www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2009&sessInd=0&billBody=H&billTyp=B&billNbr=0440&pn=0484>, [accessed 01/04/10].


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The GATS does not provide a remedy for government procurement restrictions.\textsuperscript{141} It simply calls Members to enter into multilateral negotiations on government procurement in services, but so far they have failed to achieve any tangible result.\textsuperscript{142} The WTO Agreements include a Plurilateral Agreement on Government Procurement (GPA) designed to make laws, regulations, procedures and practices regarding government procurement more transparent and to ensure they do not protect domestic products or suppliers, or discriminate against foreign products or suppliers, which has been recently revised.\textsuperscript{143} In theory, this instrument could help to challenge anti-offshore government procurement restrictions, but so far only a minority of WTO members are parties to this Agreement, not including key players in the offshore industry like India, Mexico or the Philippines.\textsuperscript{144} Bearing in mind the slow progress of negotiations on government procurement rules under the GATS umbrella, it appears that these countries could be better off by joining the GPA and negotiating market access commitments with other parties on service sectors relevant for their export industries.

**B. IMMIGRATION RESTRICTIONS**

Although the bulk of ITO, BPO and KPO services are supplied across borders by electronic means, proximity with customers remains important. A business visit may be necessary to cement the details and specifications of an offshore contract, to inspire customer confidence or to get a better understanding of cultural, administrative and regulatory issues.\textsuperscript{145} Occasionally, the offshore service supplier must send employees to the outsourcing country to address their clients’ needs in person. Hence, measures that prevent the cross-border movement of workers also constitute an important obstacle to the development of the offshore industry. NASSCOM has been battling against immigration restrictions imposed by the US and the EU for a long time now. Examples of immigration

\textsuperscript{141} Article XIII.1, GATS

\textsuperscript{142} See Chairman of the Working Party on GATS Rules Progress Report, 14 April 2011 (S/WPGR/21).

\textsuperscript{143} After ten years of negotiations, in December 2011 parties to the GPA agreed on a revised text of the Agreement and its Appendices, which include better disciplines for awarding government contracts, better rules to facilitate accession of new members and new market access commitments between existing parties. See Decision by the Committee on Government Procurement on the outcomes of the negotiations under Article XXIV:7 of the Agreement on Government Procurement (GPA/113, 2 April 2012).

\textsuperscript{144} As of 31 May 2012, the following are parties to the GPA: Armenia, Canada, EU, Hong Kong , China; Iceland, Israel, Japan, Korea, Liechtenstein, the Netherlands with respect to Aruba, Norway, Singapore, Switzerland, Chinese Taipei and the United States.

\textsuperscript{145} Background note of the WTO Secretariat on Computing and Relating Services, 22 June 2009 (S/C/W/300), p.8.
restrictions that they have identified include, amongst others, quota restrictions on visas, lack of transparency of visa programmes, cumbersome and costly procedures for securing visas and issuing work permits, wage parity requirements\textsuperscript{146}, economic needs tests and limitations on duration of stay.\textsuperscript{147} Recently, NASSCOM has been protesting against a US Government Border Security bill, aimed at increasing funding for US border security by increasing fees for H-1B or L-1 visa applications.\textsuperscript{148}

Even though trade in services is defined in broad terms, including the supply of services “...by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member”\textsuperscript{149}, so far the contribution of the agreement to the free movement of natural persons is negligible.\textsuperscript{150} In addition, an Annex on the movement of natural persons includes strict limitations to the scope of application of GATS disciplines regarding measures affecting the movement of natural persons. First, the Annex stipulates that the Agreement does not apply to measures affecting natural persons seeking access to the employment market of a Member, nor to measures regarding citizenship, residence or employment on a permanent basis.\textsuperscript{151} It also states that the Agreement does not prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment.\textsuperscript{152} In other words, immigration rules have been expressly carved out from the GATS. Hence, countries that export offshore services need to look outside the GATS to tackle immigration restrictions.

\textsuperscript{146} This requirement mandates that a foreign service provider must be paid wages equal to those being paid to domestic service providers. While this requirement ultimately aims at providing a non-discriminatory environment, it often tends to erode the cost-advantage of hiring foreign service providers.


\textsuperscript{148} ‘US Government passed the Border Security bill, NASSCOM protests and reaches out to key legislators and partners’, NASSCOM website updated on 17/08/2010, accessed 05/09/11.

\textsuperscript{149} Article I.2(d), GATS.

\textsuperscript{150} Mode 4 commitments are usually unbound except for the entry of only a reduced number of categories of natural persons (normally certain type of intra corporate transferees such as managers, executives and specialist) and only for limited periods of time. See Report of the Chairman of the CTS to the Trade Negotiations Committee (TN/S/36 21 April 2011), para 66.

\textsuperscript{151} Article 2, Annex on Movement of Natural Persons Supplying Services under the Agreement.

\textsuperscript{152} Id, Article 4.
C. TAX RESTRICTIONS

GATS disciplines do not encroach upon the sovereign right of its Members to develop their own tax policies and administrative rules to raise revenues in a fair and equitable way.\textsuperscript{153} The national treatment and most favoured nation standards compel Members not to discriminate between services and service suppliers. There is no doubt that the scope of application of these two standards covers tax measures. But an obligation to avoid discriminatory taxes does not suffice to address trade restrictions resulting from the overlap of jurisdiction between tax authorities from the exporting and importing country. The scale of the problem can be better appreciated by looking at consumption taxes and direct taxes separately.\textsuperscript{154}

The lack of internationally agreed principles on the application of consumption taxes such as VAT to international trade in services results in a number of inefficiencies and inconsistencies such as double taxation (e.g. when the supplier is subject to the origin principle and the consumer is subject to the destination principle), unintentional non-taxation (e.g. when the supplier is subject to the destination principle and the consumer is subject to the origin principle) and distortion of competition (e.g. both the supplier and the consumer are subject to the origin principle, but the VAT rate in the supplier’s jurisdiction is lower than the that applicable in the consumer’s jurisdiction). The scale of the problem is magnified both by the exponential growth of cross-border trade in services and the expansion of consumption taxes.\textsuperscript{155} The OECD is currently working on an initiative aimed at providing guidance for governments on applying VAT to cross-border trade in services. The objective is to develop an agreed set of framework principles and a series of guidelines on consumption taxation applicable to cross-border transactions on services to ensure that transactions are taxed only once in a single, clearly defined jurisdiction and that VAT remains neutral to taxable business.\textsuperscript{156}


\textsuperscript{154} For a detailed analysis of the problem of taxation on trade in services see Gari, G ‘International initiatives for reconciling the sovereign right to tax with free trade in services’, Law and Business Review of the Americas, forthcoming, winter issue, 2012.

\textsuperscript{155} The OECD notes that consumption tax revenues’ contribution to countries’ tax revenues in OECD countries typically accounts for one-fifth of total tax revenue. See OECD International VAT/GST Guidelines, February 2006.

\textsuperscript{156} So far, two principles have been agreed: a principle that relates to the place of taxation, which stipulates that ‘for consumption tax purposes internationally traded services and intangibles should be taxed according to the rules of the jurisdiction of consumption’ and a principle related to the impact on business, which stipulates that
Direct taxes levied on profits generated by service suppliers can also create restrictions to cross-border trade in services. For example, when a service supplier located in one country makes a taxable gain (earnings, profits) in another, it may be obliged by domestic laws to pay tax on that gain locally and pay again in the country in which the gain was made. Double taxation can be generally defined as the imposition of comparable taxes in two (or more) States on the same taxpayer in respect of the same subject matter and for identical periods.\textsuperscript{157} For example, while a supplier located in country A may be liable to pay income tax in its country of origin, the tax authorities from the destination country may require resident payers to report, and possibly withhold tax on payments to non-residents for services performed in their territory.\textsuperscript{158} The harmful effects of double taxation on trade are self-explanatory. In fact, export-led industry organisations have actively been denouncing in international forums that requesting residents to apply a withholding tax to the payment for services supplied by non-residents effectively acts as a non-tariff barrier to trade in services.\textsuperscript{159} But the GATS does not provide any mechanism to avoid double taxation. Again, it is under the OECD umbrella where most of the work to address this problem has been conducted, encouraging countries to enter into bilateral tax agreements inspired in the OECD Model Tax Convention on Income and on Capital.

The general principle on this matter provides that the profits of an enterprise of a Contracting State must be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein.\textsuperscript{160} If that is the case, then the profits of the enterprise may be taxed in the other State but only so much of them as it is attributable to that permanent establishment.\textsuperscript{161} Therefore, profits from services performed in the territory of a Contracting State by an enterprise of the other Contracting State are not taxable in the first-mentioned State if they are not attributable to a permanent establishment situated therein. This allocation of taxing rights has been justified by various policy and administrative considerations, in particular by reference to the idea that until an enterprise of one State sets up a permanent establishment in another

\textsuperscript{157} OECD Model Tax Convention on Income and on Capital (July 2008), para. 1.

\textsuperscript{158} OECD, Model Tax Convention on Income and Capital, Condensed version (July 2010), Commentary to Article 5, para. 42.17.


\textsuperscript{160} Article 7 OECD Model Tax Convention on Income and Capital.

\textsuperscript{161} Id.
State, it should not be regarded as participating in the economic life of that State to such an extent that it comes within the taxing jurisdiction of that other State.\textsuperscript{162}

\textbf{VI. THE WAY FORWARD}

The previous sections examined the extent to which GATS rules and specific commitments are lagging behind market developments on the service sector, highlighting the negative impact of this gap for the offshore industry. This section outlines recent developments both within the WTO and beyond the Agreement that explore possible alternatives to bridge this gap.

During the last Ministerial Conference in Geneva in December 2011 some important decisions were taken, suggesting that despite the Doha impasse not all is doom and gloom within the WTO. Although not all of the Decisions adopted are strictly related to trade in services, at least they warrant a moderate degree of optimism about the capacity of WTO decision making bodies to update trade rules to new market realities. Among them, it is worth highlighting the Decision that creates an MFN waiver in order to allow Members to grant preferential treatment on market access to services and service suppliers of least-developed countries\textsuperscript{163}, and a Decision aimed at reinvigorating the Work Programme on Electronic Commerce (WPEC), based on existing guidelines and on the basis of proposals submitted by Members.\textsuperscript{164}

The Decision on the WPEC lays down an open list of issues that ought to be discussed by the General Council and WTO bodies entrusted with the implementation of the Programme including, inter alia, the treatment of electronically delivered software and the need to adhere to basic principles of non-discrimination, predictability and transparency, in order to enhance internet connectivity and access to all information and telecommunications technologies and public internet sites, for the growth of electronic commerce.\textsuperscript{165} The Decision’s reference to proposals submitted by Members is particularly interesting in light of two recent communications that the EU and the United States submitted to the CTS with concrete proposals for reinvigorating the WPEC. The joint-communication from the EU and the United States propose Members to embrace a set of trade-related principles designed to support the expansion of ICT networks and services and enhance the development of electronic commerce, including transparency of rules affecting trade in ICT services, promotion of open networks, network

\begin{itemize}
\item \textsuperscript{162} Model Convention, Commentary to Article 5, para. 42.11
\item \textsuperscript{163} Ministerial Conference Decision on Preferential Treatment to Services and Service Suppliers from Least Developed Countries (WT/L/847, 19 December 2011).
\item \textsuperscript{164} Ministerial Conference Decision of 17 December 2011 (WT/L/843).
\item \textsuperscript{165} Id.
\end{itemize}
access and use, prevention of restrictions on cross-border information flows and cost-oriented, non-discriminatory and transparent interconnection rates.\textsuperscript{166} The communication from the US call Members to explore how trade rules can be adjusted to meet the needs of new market realities influenced by technology developments on mobile applications and cloud computing.\textsuperscript{167} The proposals are being discussed by the CTS, which last year resumed deliberations under the WPEC.\textsuperscript{168} So far only initial discussions have taken place, but Members expressed wide support for the resumption of deliberations under the WPEC and a number of issues were identified.\textsuperscript{169}

Contrasting with the deadlock of the multilateral negotiations, there have also been interesting developments on the WTO Plurilateral Agreements. The Committee on Government Procurement approved a revised text of the Government Procurement Agreement, which includes better disciplines and new market access commitments between existing parties.\textsuperscript{170} In its turn, the Information Technology Agreement (ITA) celebrated fifteen years removing tariffs on IT products, making a huge contribution not only to trade on IT products, but also to the development of IT-enabled services, many of which developed thanks to lower cost communications networks and affordable IT equipment.\textsuperscript{171} Some Members have recently called for the launch of negotiations with a view to expand the product coverage of Agreement and to include non-signatory IT producers.\textsuperscript{172} The concept paper calling for the expansion of the ITA refers to the dramatic changes in the ICT sector over the last fifteen years, including the entrance into the market of new products and production methods (e.g. products that can send or receive digital signals with or without lines).\textsuperscript{173} The proposal was discussed by the ITA Committee meeting on 15 May 2012 and many delegations signaled they would be starting informal consultations on what products to add to the ITA coverage.\textsuperscript{174} In a similar vein, the EU delegation to the ITA Committee recently argued that in the ITA context, services and goods were increasingly traded together, and was of the opinion that the ITA Committee need to look into new areas and breaking new grounds such as manufacturing services, software and licensing services,

\textsuperscript{166} Communication from the European Union and the United States (S/C/W/338, 13 July 2011).
\textsuperscript{167} Communication from the United States (S/C/W/339, 20 September 2011).
\textsuperscript{169} Id.
\textsuperscript{170} See supra note n 143.
\textsuperscript{171} Lamy, Pascal, Foreword to WTO 15 Years of the Information Technology Agreement. Trade, Innovation and Global Production Networks (2012), p 3.
\textsuperscript{172} Communication from Canada, Japan, Korea, the Separate Customs Territory of Taiwan, Singapore and the United States (G/IT/W/36, 2 May 2012).
\textsuperscript{173} Id.
information technology consultancy services, telecom services, and even leasing and rental services.¹⁷⁵ From academic circles, Hosuk Lee-Makiyama has put forward a strong case for the replacement of the ITA with a broader ‘International Digital Economy Agreement’ that also encompasses consumer electronics and services in computer and related services and telecommunication services, which better suits the needs of the digital economy where goods and services are closely interlinked.¹⁷⁶

The plurilateral approach is also being explored as a possible avenue to break the stalemate of multilateral negotiations on services.¹⁷⁷ Since the beginning of 2012 a subgroup of sixteen WTO members are holding exploratory talks on this matter.¹⁷⁸ The path to move the trade agenda forward in services on a plurilateral basis is yet to be decided. Possible alternatives include a pure MFN-based plurilateral WTO agreement with benefits extending to non-participants, like the ITA; a conditional MFN-based plurilateral WTO agreement with benefits confined to participants like the GPA (possibly requiring a WTO MFN waiver); a plurilateral agreement meeting the GATS requirements for Economic Integration Agreements or a plurilateral agreement wholly outside the WTO framework.¹⁷⁹

The private sector has identified a number of ‘21st century’ issues that should be dealt by this new Agreement on services, including disciplines on state owned enterprises and assisted enterprises to ensure competitive neutrality, disciplines on cross-border data flows to guarantee the right of unrestricted cross-border trade in data services and disciplines to constrain governments from imposing ‘local content’ requirements or forced localization.¹⁸⁰ Needless to say, the proposal is strongly resisted by the BRICS countries, who argue that a plurilateral initiative will undermine the

¹⁷⁵ Committee of Participants on the Expansion of Trade in Information Technology Products, Minutes of the Meeting of 24 May 2011 (G/IT/M/53, 12 September 2011), para 3.2 to 3.4.
¹⁷⁸ Bridges Weekly Trade News Digest, Volume 16, Number 9 7 March 2012 available at http://ictsd.org/i/news/bridgesweekly/127881/. The subgroup currently includes the so-called ‘Real Good Friends’ of liberalisation of trade in services’: United States, EU, Japan, Canada, Australia, New Zealand, Norway, Switzerland, Singapore, South Korea, Hong Kong, Taiwan, Mexico, Chile, Colombia and Pakistan.
balance of trade negotiations on services, agriculture and NAMA, causing irreparable damage to the Doha Round’s aim to provide developmental dividends to developing countries.\textsuperscript{181}

Finally, at regional and bilateral level, disciplines on services included in Preferential Trade Agreements display the most advanced regulatory mechanisms to bridge the gap between trade rules and new trade in services patterns that should be considered when thinking about ways to update GATS rules. In this vein, Wunsch-Vincent, illustrates how far have PTA rules have gone compared with GATS rules, including clearer provisions on the applicability of trade rules to the digital service supply, stand alone chapters on e-commerce, and deep regulatory commitments including pledges for cooperation in the e-commerce and ICT area and to avoid unnecessary regulatory barriers to e-commerce.\textsuperscript{182}

\section*{VII. CONCLUSIONS}

The paper examined the relevance of GATS in light of the rise of trade in ICT-enabled services and, in particular, the rapid expansion of the offshore industry. Over the last ten years, a whole new range of trading opportunities has emerged to supply services remotely through electronic means. The growth of this fledging market is threatened by new type of barriers but, at the same time, creates new challenges for domestic regulators to ensure the effective protection of consumers exposed to services supplied from providers located outside their jurisdiction. A multilateral regulatory framework built under the assumption that trade in services mainly occurred in a limited number of sectors and through specific modes of supply, is struggling to meet the needs that these new patterns of trade in services demand.

The extremely modest achievements of the negotiation of specific commitments on market access and national treatment and an outdated service sector classification list has so far failed to provide exporters of ICT-enabled services with stable and predictable conditions for accessing foreign markets. The significant gap that exists between the level of Members’ specific commitments on market access and national treatment and current market access conditions, places the offshore industry in a vulnerable position, particularly in light of a growing protectionist trend exacerbated by increasingly difficult economic conditions in offshoring countries.


\textsuperscript{182} Sacha Wunsch-Vincent, ‘Trade Rules for the Digital Age’ in Panizzon, Marion and Pierre Sauvé (eds) \textit{GATS and the Regulation of International Trade in Services} (CUP 2008).
In addition, WTO political bodies have failed to sort out the regulatory ambiguities that the emergence of electronically delivered services have provoked, and to develop substantive disciplines on domestic regulation in order to fine tune the delicate balance between the needs of the offshore industry for openness, transparency and predictability and the right to regulate in order to protect consumers from services supplied from remote locations. For example, GATS rules do not provide adequate criteria to manage a typical new challenge of the digital era such as the tension between the protection of personal data and the need for the free movement of data. Most of the regulatory uncertainties and gaps are being dealt with by the Dispute Settlement Body on an ad-hoc and unsystematic fashion, which in the long run may have negative implications for the governance of the multilateral trading system.

Finally, there are significant restrictions to the development of the offshore industry such as government procurement restrictions, immigration restrictions and tax restrictions that lie beyond the reach of GATS disciplines. Exporting countries seeking to ensure effective market access conditions for their offshore service suppliers need to look elsewhere to address such restrictions, including the possibility of joining the Plurilateral Agreement on Government Procurement, negotiating ad-hoc bilateral temporary migration management agreements or entering into double taxation agreements.

The way forward to adjust trade rules and specific commitments negotiated in the 1990s to a significantly different commercial environment led by technological innovations and the emergence of global supply chains remains unclear. Recent developments at the WTO such as the Decision of the Ministerial Conference to reinvigorate the Work Programme on Electronic Commerce and discussions in the Information Technology Agreement Committee looking into new ways to respond to the link between trade in ICT products and ICT-enabled services, provide grounds for a moderate degree of optimism about the capacity of WTO political bodies to upgrade trade rules. But that hope must be counterbalanced with the impasse of the Doha round, which questions the wisdom of attempting to reform trade rules via overambitious multilateral and single undertaking negotiation rounds. The recent revamp of the Agreement on Government Procurement and the encouraging discussions under the umbrella of the Information Technology Agreement have sparked the interest among some members of diplomatic, industry and academic circles in revisiting the plurilateral avenue as a possible way forward. Since early 2012, a small but significant number of WTO Members are discussing plurilateral alternatives to break the stalemate of multilateral negotiations on services. A number of options are under consideration, including a plurilateral agreement with benefits offered on an MFN basis and a closed Economic Integration Agreement meeting the requirements of Article V of GATS.
With respect to the type of disciplines that could be included in a plurilateral agreement on trade in services to deal more effectively with 21st century issues, there is a lot to be learnt from Preferential Trade Agreements, many of which include more nuanced rules for dealing with issues such as cross-border data flows, forced localization and e-commerce.

In sum, there are many options on the table to move forward, but there is one that should be taken out of the menu and that is doing nothing. Multilateral rules on trade in services run the risk of early obsolescence if they fail to adapt to the realities of trade, investment and competition of the digital age. The challenge that lies ahead is huge and, as John Jackson put it back in 1998 there is a lot at stake:

“Perhaps almost every human institution has to face the task of how to evolve and change in the face of conditions and circumstances not originally considered when the institution was set up. This is most certainly true of the original GATT, and now of the WTO. With the fast-paced change of a globalizing economy, the WTO will necessarily have to cope with new factors, new policies, and new subject matters. If it fails to do that, it will sooner or later, faster or more gradually, be marginalized. This could be quite detrimental to its broader multilateral approach to international economic relations, pushing nations to solve their problems through regional arrangements, bilateral arrangements, and even unilateral actions. Although these alternatives can have an appropriate role and also can be constructive innovators for the world trading system, they also run considerable additional risks of ignoring key components and the diversity of societies and societal policies that exist in the world. In other words, they run a high risk of generating significant disputes and rancor among nations, which can inhibit or debilitating the advantages of cooperation otherwise hoped for under the multilateral system.”

183 Jackson, John, supra note 133 p.344.