Preferentialism in Services Trade

An interpretation of the WTO rules and their application to the European Union's trade agreements in the field of services

Johanna Jacobsson

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

Florence, 12 December 2016

European University Institute
Department of Law

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I , Johanna Jacobsson, certify that I am the author of the work "Preferentialism in Services Trade: an interpretation of the WTO rules and their application to the European Union's trade agreements in the field of services" I have presented for examination for the Ph.D. at the European University Institute. I also certify that this is solely my own original work, other than where I have clearly indicated, in this declaration and in the thesis, that it is the work of others.

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I confirm that Chapter IV draws upon an earlier chapter called "GATS Mode 4 and Labour Mobility: The Significance of Employment Market Access" I published in The Palgrave Handbook of International Labour Migration (2015), edited by Marion Panizzon, Gottfried Zürcher and Elisa Fornalé, Palgrave Macmillan, Hampshire, UK (pages 61-94).

I also confirm that Section V.2 of Chapter V draws upon an earlier article called "Liberalization of Service Mobility in the EU's International Trade Agreements: As External as it Gets" I published in 15(3) European Journal of Migration and Law (2013), BRILL (pages 245-261).

September 12, 2016

ABSTRACT

The thesis focuses on the liberalization of services in the context of preferential trade agreements (PTAs). The first part develops an interpretation of Article V of the General Agreement on Trade in Services (GATS) that regulates the conclusion of the so-called economic integration agreements (EIAs). It is argued that in the context of preferentialism, the GATS does not impose any market access discipline but aims at creating a non-discriminatory trading environment. Special attention is paid to Mode 4 and to the type of liberalization that it covers.

In the second part of the thesis the main elements of Article V GATS (sectoral/modal coverage and non-discrimination) are employed to conduct an empirical analysis of EIAs. The chosen sample includes four of the European Union's international trade agreements that feature significant services liberalization. The services schedules of these four agreements are reviewed and rated to find out their level of liberalization. In the context of the EU, its services commitments continue, to a large extent, to be determined individually by its Member States. As the thesis shows, significant variations still exist among different Member States both in horizontal and sector-specific commitments.

The thesis connects the EU's internal situation to the wider issue of how deep EIAs should be in order to escape claims of non-compliance. It asks the question of how the exact coverage and level of non-discrimination should be assessed in a situation where commitments vary across different states or regions of the same contracting party. No clear answer can be provided but the thesis proposes that in order to be in line with its international obligations, the EU, as well as any WTO Member with internally divided regulatory powers in services, should ensure that when signing EIAs, the commitments of all Member States (or, in the case of other WTO Members, all states/regions/other entities with regulatory powers in services) reach the GATS threshold of 'substantiality' in their level of liberalization.

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In Madrid, 23rd November 2016

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I. INTRODUCTION

1. WTO, EU and international trade agreements on services

The purpose of the thesis is twofold. Firstly, it examines the rules of the World Trade Organization (WTO) on economic integration agreements (EIAs) in the field of services.[1] Secondly, it presents the results of an empirical analysis of international trade agreements concluded by the European Union (EU) and including liberalization of trade in services.[2] Drawing on the interpretation of the relevant WTO rules, the thesis gives an evaluation of the level of liberalization reached by the EU in these agreements.

The thesis contributes to the growing amount of research on preferential trade agreements (PTAs). Such research has become topical with the vast increase in the numbers of PTAs globally. Whereas earlier research used to be focused on PTAs in the field of goods, there is now a significant number of trade lawyers, social scientists and economists working on preferentialism in the field of services too. At the moment, almost all new PTAs, especially among developed countries, include provisions on the liberalization of services. Moreover, a subset of WTO Members (including the EU) is currently negotiating on a so-called plurilateral initiative to liberalize services through a new international agreement – the Trade in Services Agreement (TiSA).[3] Considering that tariffs on goods, especially preferential ones, are already relatively low, many countries have turned their attention to services. This is a logical development also in the light of new technologies that enable services to become more globally tradable. It is also widely understood that services play a key role in infrastructure as well as global supply chains. Thus, the dismantling of barriers in services trade often leads to productivity gains also in other sectors of the economy.

[1] EIAs are preferential trade agreements (PTAs) focusing on the liberalization of services. The term EIA is employed in Art. V of the WTO's General Agreement on Trade in Services (GATS).

[2] 'Empirical' in the present thesis refers to the nature of our method which is to go through the EU's services schedules in four chosen EIAs. Even though it concerns interpretation of legal text and thus corresponds to the traditional method of conducting legal research, we refer to our analysis as empirical in order to distinguish it from the interpretation of the proper texts of the agreements. Instead of engaging in an extensive interpretation of the EU's schedules in accordance with the customary rules of interpretation, we give numerical values to the EU's commitments based on placing the commitments in simple categories. Our choice of vocabulary is therefore meant to take some distance to a traditional legal analysis. However, 'empirical' in this thesis does not mean information gained by experience, observation or experiment – even though experience and repeated observations are definitely useful to understand the complex nature of services schedules and the way in which services commitments are formulated. The scheduled services commitments are part of the overall agreement but each party provides its own commitments. They are typically vaguer and more practically oriented than the actual chapters of the agreement. That makes the interpretation of services schedules somewhat special and, arguably, especially challenging.

[3] For information on the negotiations, see, for example, the webpages of the European Commission and the United States Trade Representative: http://ec.europa.eu/trade/policy/in-focus/tisa/ and https://ustr.gov/TiSA (accessed on September 1, 2016).

The thesis aims at presenting an original theory on preferentialism in services, taking into account the law as well as the special characteristics of services trade as compared to trade in goods. The starting point of the theoretical analysis is Art. V of the WTO's General Agreement on Trade in Services (GATS)[4]. Art. V lays down the discipline for economic integration agreements (EIAs), which are PTAs including liberalization of trade in services.[5] In principle, all EIAs concluded by WTO Members[6] with each other or non-Members should abide by its provisions. In practice, however, compliance with the Art. V rules is questionable to the least. There are numerous reasons behind the lack of respect for the legal discipline, but they can, in essence, be summarized to two: the rules are vague and they have proved hard to enforce.

So far, the legal content of Art. V GATS has attracted relatively little attention. Compared to the existing literature on Art. XXIV of the General Agreement on Tariffs and Trade (GATT)[7], research on Art. V is modest in amount. Preferentialism in the field of goods has been the object of economic and policy-oriented research already for decades. However, notwithstanding the large interest, the exact conditions that Art. XXIV GATT sets for free-trade agreements (FTAs) and customs unions (CUs) also remain unclear due to the open-endedness in the wording of the conditions. No significant clarification has been attained due to the extremely low number of PTA-related disputes brought under the GATT/WTO dispute settlement procedure. The Members lack enthusiasm in enforcing Art. XXIV through multilateral control of PTAs. In practice, the legal disciplines of both Art. XXIV GATT and Art. V GATS have given up to the highly political nature of preferential trade.

The thesis focuses on the rules of Art. V GATS. They are arguably even more vague than those of Art. XXIV GATT, which is part of a much older agreement. The essence of Art. V is that it allows

[4] General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, The legal texts: the Results of the Uruguay Round of Multilateral Trade Negotiations 284 (1999), 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) (hereinafter GATS).

[5] In the following, the acronym PTA is used when referred to preferential trade agreements in general sense. Such agreements may include liberalization of goods, services or both. Several commentators, as well as the WTO Secretariat, prefer to use the term Regional Trade Agreements (RTAs). The term PTA is here considered more appropriate since the most essential feature of such agreements is their preferentiality in the relations of the participating countries. Moreover, many of todays PTAs are not limited to any specific region. See Bhagwati 2008, XI. When referring especially to the service part of a specific PTA or specific PTAs, the thesis refers to EIA(s). This clarifies that the purpose is to refer solely to the service elements of the agreement(s).

[6] Hereinafter referred to only as Members.

[7] General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The legal texts: the Results of the Uruguay Round of Multilateral Trade Negotiations (1999), 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) (hereinafter GATT).

a limited derogation from the corner stone of WTO law, the most-favoured nation principle.[8] The main requirements for GATS-consistent EIAs are that, firstly, they have substantial sectoral coverage and, secondly, that they provide for the absence or elimination of substantially all discrimination in the sectors covered by the agreement.[9] In addition, the so-called internal and external trade requirements should be fulfilled. According to these requirements, an EIA should, on the one hand, be designed to facilitate trade between the parties to the agreement (the internal requirement) and, on the other hand, not raise the overall level of barriers to trade in services with regard to any Member outside the agreement (the external requirement). So far, we have no clear understanding of any of these requirements due to the open-ended nature of definitions such as 'substantial', and because of methodological difficulties in calculating the effects of barriers to services trade. At least so far, Members have been reluctant to challenge each other's PTAs and the GATT/WTO dispute settlement has so far not given much guidance on the relevant rules.

In the absence of effective control over PTAs, it is up to the Members party to such agreements to make sure that they are complying with their obligations towards other Members. However, due to the ambiguous nature of Art. V, it unclear what is the degree of integration that Members should follow. Thus, Members inevitably face a challenge in structuring their EIAs in a WTO-consistent fashion. Due to non-enforcement, they also lack sufficient incentive to do so. Because of the uncertainty surrounding the WTO rules on PTAs, the WTO-consistency of PTAs already in force is naturally also covered by uncertainty.[10]

Economists and lawyers have already for long worried about the systemic consequence of PTAs to the multilateral trading system. So far, the debate on whether PTAs should be seen as building blocks or stumbling blocks to multilateralism has been mostly confined to the liberalization of trade in goods.[11] One of the main observations of the thesis is that due to inherent differences between trade in goods and services, preferentialism in services is fundamentally different from preferentialism in goods. Another important observation is that preferentialism in services is potentially less dangerous than in the field of goods but it should still be carefully analyzed and to at least some extent controlled as to prevent increase in the forms of integration that have most

[8] In case a PTA regulates trade in goods in addition to trade in services, its WTO-consistency is determined also under Art. XXIV GATT.
[9] This is to be done through elimination of existing discriminatory measures, and/or prohibition of new or more discriminatory measures, "either at the entry into force of the agreement or on the basis of a reasonable time-frame, except for measures permitted under Articles XI, XII, XIV and XIV bis". Discrimination is specified to be understood "in the sense of" Art. XVII GATS (national treatment).
[10] Mitchell and Lockhart 2009, 113.
[11] Fink and Jansen 2009, 222; Bhagwati and Panagariya (1996).

harmful discriminatory effects on outsiders and, in many cases, to those inside the agreement as well.

Whereas in goods trade, the central element of a PTA is a preferential tariff reduction vis-à-vis a WTO Member's multilateral tariff binding, in EIAs the central element is the heightened elimination of discrimination towards one's preferential partner. The difference is reflected in the legal disciplines. Unlike Art. XXIV GATT that focuses on elimination of tariffs and thus on enhanced market access for goods of preferential origin, Art. V GATS does not include any market access ("MA") discipline but is focused on the elimination of discrimination between the parties to the agreement. We argue that the difference stems from the basic features of services trade. Whereas altering the conditions for MA through tariffs is easily done with regard to goods, in the field of services the application of different sets of MA conditions to different partners is often unpractical and in some cases close to impossible. Instead of focusing on mostly quantitative MA limitations, Art. V requires extensive elimination of discrimination. It is proposed in this thesis that the emphasis on non-discrimination alleviates concern over growing preferentialism in services. Unlike the elimination of tariffs that takes place in goods PTAs, the elimination of discrimination through EIAs is more likely to benefit outsiders as well and thus makes EIAs less susceptible of creating trade diversion. This effect is coupled with the generous rules of origin that are required from EIAs by Art. V. Such rules are often implemented also in practice.[12]

As all PTAs, EIAs are capable of creating negative effects especially for outsiders. Art. V aims at reducing such effects but it suffers from the same problem as Art. XXIV. The problem is the general ambiguity in the rules. So far there is no general understanding of the level and type of liberalization EIAs must adopt in order to satisfy the Art. V requirements.[13] Neither the WTO's dispute settlement mechanism nor the Members themselves have been able to provide guidance on the issue. The WTO's Committee on Regional Trade Agreements (the CRTA), the official review body of all PTAs, is now mainly an enforcer of transparency.[14] At the same time, however, there

[12] As Miroudat et al. (2010) note, liberal rules of origin for service suppliers play an important role in minimizing the distortions introduced by EIAs as companies from third-countries can benefit from the preferential treatment of EIAs through commercial presence in the territory of the parties. See Miroudot, Sauvage, and Sudreau 2010, 27.

[13] The same problem applies to the interpretation of Art. XXIV of the GATT. It is, however, claimed that the GATS rules on PTAs are even more open-ended than those of Art. XXIV GATT.

[14] On 14 December 2006, the General Council established on a provisional basis a new transparency mechanism for all PTAs. The transparency mechanism provides for early announcement of any PTA and notification to the WTO. Members will consider the notified PTAs on the basis of a factual presentation by the WTO Secretariat. In contrast to the previous review procedure, there is, however, no longer review of the consistency (from a legal perspective) of the notified PTA with the WTO rules. See Mavroidis 2011, 377.

seems to be a general agreement on the urgent need to clarify what is required from PTAs. Without such clarification, PTAs continue to be undisciplined and MFN will be reduced to "LFN".[15]

The thesis consists of two parts. The first part presents and develops WTO law regarding preferentialism in services. It starts by exploring the historic background of regional and preferential trade agreements and the reasons for their significant increase especially during the last two decades. It then provides a substantive analysis and interpretation of Art. V GATS that includes the detailed rules on services PTAs. The aim of the first part is to provide a theoretical framework for a legal analysis of individual services agreements. The thesis focuses on the so-called internal requirement for EIAs included in the first paragraph of Art. V, as well as on the possibility to give consideration to the relationship of the agreement to a wider process of economic integration or trade liberalization among the countries concerned (paragraph 2 of Art. V). On the contrary, the external requirement of Art. V:4, which concerns the requirement of not to raise the overall level of barriers in respect of any Member outside the agreement, is not explored to the same length. That is because the thesis aims at providing a framework for analyzing the internal liberalization levels of EIAs. The possible tools for assessing the fulfillment of the external requirement differ from the analysis of EIAs under the internal requirement and the provisions of Art. V:2. Such tools, which largely remain to be developed, would be challenging to integrate in a purely textual analysis of EIAs.

The first part of the thesis is thus concentrated on exploring the WTO rules on EIAs, mainly through Art. V GATS. One of the crucial elements of Art. V is that it demands the inclusion of all modes of supply.[16] The requirement is problematic as it is not entirely clear what is the exact scope of each mode.[17] Much confusion relates especially to Mode 4 which concerns the cross-border movement of natural persons supplying services. Understanding the coverage of each mode is

[15] Mavroidis 2005, 246. See Bhagwati who refers to LFN, "least favoured nation", as a demonstration of the increasing proportion of non-MFN trade in the overall volume of world trade: Bhagwati 2008, 14.

[16] The GATS differentiates between four modes of supply: 1) from the territory of one Member into the territory of any other Member (cross-border trade); 2) in the territory of one Member to the service consumer of any other Member (consumption abroad); 3) by a service supplier of one Member, through commercial presence in the territory of any other Member (commercial presence, or investment) and 4) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member (Art. I:2(d) GATS).

[17] There is very limited case law on the GATS in general and hardly any concerning the definition of the modes. Moreover, in one of the central GATS cases, *Mexico-Telecoms*, the Panel might have got it wrong. Neven and Mavroidis argue that the Panel misinterpreted the service provided by the U.S. operators to their subscribers to be in the scope of Mode 1. The case did concern a Mode 1 type of supply but in reality the supplier was the Mexican telephone operator which terminated the calls originating in the U.S. in Mexico (and not the U.S. operator, as considered by the panel). See Neven and Mavroidis (2006) and the panel report in *Mexico – Measures Affecting Telecommunications Services*, Report of the Panel, WT/DS204/R, circulated April 2, 2004.

important in order to conclude how well EIAs correspond to the requirements of Art. V. Extensive inquiries into the nature of all four modes would make too vast a project for the purposes of the present thesis. We have, therefore, decided to focus on Mode 4. It is arguably the most disputed of the four modes and it remains the least liberalized among them. Chapter IV is thus dedicated to a substantial analysis of the coverage of Mode 4.

The second part of the thesis looks into practice. It provides an analysis of four EIAs concluded by the EU. The analysis is built on a methodology that is based on the theoretical findings of the first part of the thesis. As a result, the thesis provides an evaluation of the EU's services commitments in light of the GATS-discipline on EIAs. The method consists of a textual analysis of the EU's EIAs, including both the text of the agreement and the EU's services commitments. However, the focus is on the commitments, especially on sector-specific commitments.

Only the EU side's commitments are analyzed: the purpose is to find out the approximate level of liberalization reached by the EU, as well as to assess how the EU's method of liberalization corresponds to the Art. V criteria. Thus, no conclusions can be drawn on the agreements in their entirety. Since the EU has concluded EIAs with very different types of countries from several regions, the agreements are useful material for an analysis under the various elements of Art. V. Yet considering that all EU Member States are highly developed countries and advanced economies, the flexibility that Art. V GATS provides for developing countries does not apply to the EU side. Whereas the overall purpose of the agreement can be taken into account in the analysis under Art. V, it is argued that the EU side's level of liberalization should always correspond to the strict requirement of 'substantiality' in terms of sectoral coverage and elimination of discrimination.

In the interpretation of the results in light of the WTO rules, particularly Art. V GATS, specific attention is paid to the EU's commitments under Mode 4. We assess how the EU understands Mode 4 and to what extent the EU's position matches our understanding of Mode 4, explained in Chapter IV. As with the other modes, we also try to evaluate how the liberalization level in the EU's Mode 4 commitments corresponds to the criteria of Art. V.

The methodological approach is adapted to take into account the special circumstances of services trade liberalization by the EU towards third countries, especially the fact that regulation of services, unlike goods, is not uniform throughout the Union. However, it is proposed that such special circumstances are relevant not only in the study of the EU, but in the study of all WTO Members

with constitutionally divided powers in the regulation of service activities.[18] Similar circumstances are likely to rise also with regard to any other existing or future free trade area that would start concluding services agreements independently in its own name, similarly to the EU.[19]

The challenges that the EU as a multi-state actor faces in concluding services trade agreements are often similar to countries that have a federal structure. Trade liberalization by the EU reflects the combination of supranational and national jurisdiction over trade negotiation areas. Within the field of services, as in goods, the competence to conclude agreements with third parties is within the powers of the Union.[20] However, due to the lack of internal harmonization of services regulations within the EU, the EU Member States keep scheduling their own nationally based restrictions to the common EU services schedule in PTAs. In this sense, there are similarities to countries with de-centralized regulation of services. In the case of many federal states, however, such non-central measures are not explained in detail in the country's services schedule. A prominent example of a federal state with regional powers in the field of services is the United States. The United States ("U.S.") has recently begun including an illustrative list of non-conforming measures ("NCMs") in the field of services for state level restrictions. However, the NCMs illustrated at the state and local

[18] 'Regulation' in this thesis is understood as a broad, general political and legal concept that includes all governmental policies and measures that are aimed at influencing, controlling and guiding all private activities with impacts on others. See Krajewski 2003, 4. Similarly to Krajewski, we also refer to Reagan who defines regulation as "a process or activity in which government requires or proscribes certain activities or behaviour on the part of individuals and institutions, mostly private, but sometimes public". See Reagan 1987, 15. Regulation can take place on all levels of a state, as well as on supranational and international level.

[19] So far, to our knowledge, the EU is the only free trade/common market area that is clearly concluding trade agreements in its own name in addition to its member states (and thus binding itself legally too). It is also the only organization that is a Member of the WTO in its own right, in addition to its member states. This might, however, change, as more regions are engaging in deeper integration. The EU, for its own part, is interested in agreements with other free-trade areas or common markets. Negotiations for an Association Agreement are on-going with Mercosur. Mercosur appears as the contracting party or negotiating party to several trade agreements but it is the individual member states rather than Mercosur that are the formal contracting parties to those agreements. The EU also wishes one day to integrate its separate deals/negotiations with certain Southeast Asian countries and conclude a region-to-region trade agreement with the Association of Southeast Asian Nations (ASEAN). See European Commission's memo "The EU's bilateral trade and investment agreements – where are we" of December 3, 2013, available at http://trade.ec.europa.eu/doclib/docs/2012/november/tradoc_150129.pdf, accessed 17 December 2015. Whether any future agreement would bind the ASEAN as an organization naturally depends on the level of integration and legal structure that ASEAN countries are willing to adopt for the organization. According to its Charter, ASEAN has been accorded legal personality as well as an explicit international treaty-making power. In most cases, however, all member states of the ASEAN are listed as parties to the agreement. See Cremona et al. 2015, 84-87.

[20] Originally, in Opinion 1/94, the Court of Justice of the European Union had concluded that only cross-border trade (Mode 1) fell within the Union's Common Commercial Policy (CCP) since it was 'not unlike trade in goods' and involved no movement of persons. See Opinion 1/94, *Opinion of the Court of 15 November 1994 - Competence of the Community to conclude international agreements concerning services and the protection of intellectual property* [1994] ECR I-05267. The Amsterdam Treaty and the Treaty of Nice extended the Union's competences in the field of external trade. However, prior to the Lisbon Treaty, the EU's exclusive competence did not apply in a number of services sectors. Since the entry into force of the Lisbon Treaty on 1 December 2009, Art. 3 and Art. 207 of the Treaty on the Functioning of the European Union (TFEU) provide that trade in services, as well as commercial aspects of intellectual property and foreign direct investment, belong to the area of the CCP and thus to the category of the EU's exclusive competence.

level are provided for transparency purposes only and are not bound by the services provisions of these PTAs.[21] In its GATS schedule, the U.S. has, however, specified also state-level measures. Art. I of the GATS specifies "measures by Members" meaning measures taken by central, regional or local governments and authorities alike. The exclusion of a Member's regional or local limitations from its schedule would thus go against the GATS.

This thesis asks how such sub-federal limitations to cross-border services trade should be taken into account when analyzing the GATS Art. V criteria for substantiality. In the present work the focus is solely on the EU and on the question whether the EU's and its Member States' EIA commitments reach the Art. V threshold of substantiality as regards their sectoral coverage and the level of non-discrimination. A similar research question could, however, be applied also to such countries that have a federal structure or which otherwise regulate services on sub-central levels. The methodology would in most cases need to be adapted since, as in the case of the U.S., most countries do not specify sub-central restrictions to services trade in the way that individual EU Member States do.

In the WTO the EU has been one of the most active proponents of service trade liberalization. This is logical considering that the EU is the world's biggest exporter of commercial services.[22] During the past decade the EU has become active in liberalizing services trade also through PTAs with third countries. Especially in the most recent, so-called deep and comprehensive free trade agreements (FTAs), new market opening in services is one of the main goals of the negotiations.[23] Detailed commitments on the liberalization of services can also be found in certain other types of

[21] See p. 12 of KORUS, Annex I, the schedule of the United States and Appendix I-A to the same schedule. Page 12 includes the following statement: "For purposes of transparency, Appendix I-A sets out an illustrative, non-binding list of non-conforming measures maintained at the regional level of government."

[22] World Trade Report 2015, p. 25, available at https://www.wto.org/english/res_e/booksp_e/wtr15-1_e.pdf (accessed 30 November 2015). If one were to take into account the share of individual countries, the biggest exporter of commercial services would be the United States. In the EU, the single biggest exporters are United Kingdom, Germany and France. See Annex 1 for a list of all PTAs, including EIAs, notified by the EU to the WTO.

[23] The first such "deep and comprehensive" FTAs aimed at more market opportunities are the EU-South Korea Free Trade Agreement of 2011 and the EU-Singapore Free Trade Agreement of 2013. The EU-Singapore agreement was initialed in September 2013. It was not yet officially published and ratified during the writing of the thesis and it is therefore not included in the empirical analysis. In November 2013 the EU initialed deep trade agreements also as part of Association Agreements with Moldova and Georgia (the agreement initialed with Armenia is no longer pursued as in September 2013 Armenia announced to join a customs union with Russia, Belarus and Kazakhstan). A deep and comprehensive trade agreement was signed with Ukraine in June 2014 (the political chapters of the agreement were signed already in March 2014). Deep trade agreements remain in the focus of the EU's trade agenda: In October 2013 the EU and Canada reached a political agreement on the key elements of a trade agreement, labeled as Comprehensive Economic and Trade Agreement (CETA). In June 2013 the EU opened negotiations on a Transatlantic Trade and Investment Partnership with the U.S. (TTIP). Other negotiation partners include Japan, Malaysia, Vietnam, Thailand, Morocco, India and Mercosur.

agreements concluded by the EU with third countries. These agreements include two association agreements, one economic partnership agreement and one agreement simply referred to as "trade agreement".[24] The empirical analysis conducted for the purposes of the thesis covers four agreements belonging to three different groups of agreements (AA, FTA and EPA). The results partly reflect differences in these three types of agreements.[25] However, overall, and maybe surprisingly, the differences are revealed to be relatively modest.

Earlier research on the level of liberalization of EIAs has demonstrated that the services commitments in the EU's EIAs go further than the EU's multilateral commitments under the GATS and the EU's latest GATS offer of 2005.[26] Earlier studies have also studied the various policy areas covered by EIAs.[27] So far, there is, however, only limited empirical research that would consider specific EIAs in light of the criteria of Art. V GATS.[28] Most studies focus only on certain modes of delivery, most often on Modes 1 and 3. Their point of departure is not Art. V but rather the level of liberalization set by the chosen Members GATS commitments. Most studies also do not differentiate between market access ("MA") and national treatment ("NT") limitations but group them together. In such an analysis, every improvement or deterioration of a commitment under either field leads to a higher or lower value in the index.[29] This is in contrast to the present study

[24] Association Agreements (AAs) are international agreements that the EU has concluded with third countries with the aim of setting up an all-embracing framework to conduct bilateral relations. These agreements normally provide for the progressive liberalization of trade and, in certain cases, they prepare for future membership of the European Union. Economic Partnership Agreements (EPAs) are trade and development agreements negotiated between the EU and African, Caribbean and Pacific countries. Their aim is to contribute, through trade and investment, to sustainable development and poverty reduction. All PTAs notified by the EU to the WTO are listed in Annex 1. For the list of agreements included in the empirical study see Annex 2.

[25] The methodology is explained in detail in Chapter V. The results are given in section V.3 and in Annex 4.

[26] See; Roy, Marchetti, and Lim (2007), Marchetti and Roy (2008) and Roy (2011). The dataset in Roy et al. (2007) and Marchetti and Roy (2008) covers 37 Members in 40 PTAs, and the extended dataset in Roy 2011 covers 53 Members in 67 Agreements. The studies focus on Mode 1 and Mode 3. The dataset has been made available on the WTO website: http://www.wto.org/english/tratop_e/serv_e/dataset_e/dataset_e.htm. Roy et al. also analyze to what extent EIA commitments go beyond services offers in the Doha Development Agenda.

[27] Horn, Mavroidis, and Sapir 2010.

[28] Fink and Molinuevo (2008) analyze the liberalization content of 25 East Asian EIASs and their compliance with WTO rules on regional integration. Their point of departure is, however, different than in this study as they define trade-restrictive measures as all measures that are inconsistent with GATS-style market access and national treatment disciplines. They look at all the four modes of supply but merge market access and national treatment commitments. Moreover, their study is limited to East Asian agreements. The present study focuses only on sectoral coverage and the level of non-discrimination since it is argued here that Art. V does not impose any discipline on market access. At least two studies have adopted an approach that makes a separate comparison of MA and NT commitments possible. Wang (2012) takes China's eight EIAs as test cases for interpreting GATS Art. V in light of their sectoral coverage and level of non-discrimination. However, he does not engage in a detailed empirical analysis of China's EIAs in this respect. Miroudot, Sauvage, and Sudreau (2010) follows Hoekman (1995), Roy et al. (2007), Marchetti and Roy (2008) and Fink and Molinuevo (2008) but go further by providing the information for each signatory of the EIA, by sub-sector and by mode of supply, for both market access and national treatment commitments. Additionally, they break down partial commitments into nine categories accounting for different types of trade restrictive measures. A more detailed overview of previous empirical studies in included in Chapter V.1 on methodology.

[29] Several studies adopt the restrictivity index developed by Hoekman (1995) for the assessment of Members GATS

that indexes limitations to NT only. Since Art. V GATS requires the elimination of existing discriminatory measures and/or prohibition of new or more discriminatory measures, any commitment falling short of full NT (whether no commitment at all or a partial commitment) brings in this study the value for that specific commitment to zero. Naturally, it can be argued that partial commitments are better than nothing but since the thesis applies the Art. V criteria, arguably only commitments providing for full non-discrimination should pass the test of compliance with the GATS discipline on EIAs.

Even if the present method is less sophisticated than the methods based on Hoekman (1995), our approach makes it relatively easy and straightforward to compare EIAs to the Art. V criteria and also to each other.[30] The methodology adopted here lacks the value judgment that is present in studies that index improvements in commitments by giving them values between 0 and 1. Our method follows the way that MA and NT limitations are scheduled under the GATS but it is compatible to analyze commitments also in so-called negative-list agreements modeled after the NAFTA.[31] In the case of negative scheduling, the analysis is, however, more challenging to carry out as our approach is built on going systematically through the 155 sub-sectors of the WTO's Services Sectoral Classification List.[32] In an analysis of a negatively scheduled agreement, one needs to engage in the burdensome exercise of picking each discriminatory reservation and placing it in the correct place in the sectoral classification list. Our analysis includes one agreement (the EU-Georgia EIA) that has negatively scheduled commitments under Mode 3. Otherwise, our results

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commitments. Hoekman covers all four modes of supply and distinguishes between market access and national treatment commitments. His study assessed GATS schedules only but can be used to analyze EIAs as well. In Hoekman's index the content of GATS schedules emerging from the Uruguay Round is assessed by giving, for each sub-sector and mode of supply, a score of 1 for a full commitment (without limitations), 0.5 for partial commitments, and 0 for the absence of commitments. In Roy, Marchetti, and Lim (2007), the Hoekman index is adapted so as to allow the comparison of a Member's partial commitments in different PTAs. The index gives a higher score for each improvement in a Member's partial commitments: for each step, half the difference between the score for a full commitment (1) and the score of the partial commitment being improved is added.

[30] Naturally, the comparison is rougher than comparisons based on more sophisticated analyses of differences in commitments. For comparing the degree of preferentialism between different EIAs, the method applied by Miroudot, Sauvage, and Sudreau (2010) is especially useful.

[31] There are two principal methods to schedule services commitments: the so-called positive and negative scheduling, often referred to as "top-down" (negative) and "bottom-up" (positive) approach. In negative listing, a country covers all services except those listed, while in positive listing a country covers only listed services. The most famous example of a top-down agreement is the NAFTA, whereas the GATS is a positively-listed agreement. The issue is taken up in more detail further in the thesis.

[32] We employ a sectoral classification list prepared by the WTO Secretariat. It is a comprehensive list of services sectors and sub-sectors and it is typically used by the Members to schedule their commitments under the GATS and often also in EIAs. It was compiled by the WTO in July 1991 and its purpose was to facilitate the Uruguay Round negotiations, ensuring cross-country comparability and consistency of the commitments undertaken. The 160 sub-sectors are defined as aggregate of the more detailed categories contained in the United Nations provisional Central Product Classification (CPC). Services sectoral classification list, Note by the Secretariat, WTO document MTN.GNS/W/120, 10 July 1991. See also United Nations International Trade Statistics information on the Sectoral Classification List: http://unstats.un.org/unsd/tradekb/Knowledgebase/Sectoral-Classification-List-W120.

are based on analyzing positively scheduled commitments.

To summarize, the empirical method used in the present thesis is designed in a way that allows an EIA's direct comparison with the principal requirements of Art. V:1 GATS (substantial sectoral coverage and elimination of discrimination). The work does not neglect any of the so-called GATS "modes of delivery" but, in fact, presents a new possible way to approach Mode 4 and adapts the methodology to include this specific mode as well. In addition, the empirical study takes into account the special structure of the EU, which is a free trade area itself but does not have uniform service regulations across its territory. As will be shown, a common characteristic of the EU's EIAs is the varying degree of asymmetry in the Member States' services commitments. How well the EU does in respect of sectoral coverage and non-discrimination depends on how well it manages to bring its Member States' commitments over the threshold of substantiality separately, and also as a whole.

In the following, the central research questions are introduced more thoroughly.

2. The research questions

The thesis is composed of two parts: the first is an interpretation of Art. V GATS and the second is a study of the EU's EIAs. The two questions at the core of the thesis are the following:

1) What conditions does Art. V GATS set for EIAs?
2) How does the EU's method of liberalization in its EIAs correspond to these conditions?

The first question refers to the criteria set by the GATS for preferential liberalization in services. The second question asks where the EU's trade agreements stand in respect of these criteria.

The thesis claims that the interpretation of the WTO rules on PTAs cannot be formed in a vacuum but should be analyzed in interaction with existing agreements. This is especially the case with Art. V that is more open-ended than the corresponding provision under the GATT. The GATS discipline on EIAs arguably allows very distinct types of agreements and gives relevance to the overall objective of each agreement. Because of this flexibility, it is impossible to give any universal interpretation of Art. V. Instead, the different components of Art. V must be analyzed in the specific context of each EIA.

It is proposed that Art. V includes different elements, some of which are more demanding than others. The core of the provision is formed by the condition of substantiality that is expressed both in terms of sectoral coverage and non-discrimination. The level of coverage and non-discrimination are the elements that can be best used as key indicators in the examination of existing agreements. They are the elements with the clearest legal content even though they are qualified by the obscure requirement of 'substantiality'.

In addition, Art. V includes more open-ended elements that provide for flexibility. Such an element is especially the provision of Art. V:2 which gives significance to "a wider process of economic integration or trade liberalization among the countries concerned". In addition, Art. V:3 provides for flexibility whenever developing countries are parties to the agreement.

In the empirical part of the thesis, the key indicators of Art. V (coverage and non-discrimination) are used to analyze the EU's trade agreements in the field of services. At the same time, the analysis picks out the ingredients of the EU's agreements that point towards 'a wider process of economic integration'. The results of the empirical case study are then used to estimate where the EU's agreements stand in light of the criteria set down in Art. V.

The empirical study consists of a detailed analysis of four EIAs concluded by the EU.[33] The agreements chosen for the review comprise the EU's trade agreements featuring specific GATS-type commitments on services trade liberalization. The EU began including detailed services commitments in its trade agreements in the mid-2000s when, in accordance with a new global strategy, it started to enter into so-called deep and comprehensive trade agreements.[34] So far, the EU has concluded eight agreements with a proper EIA element. The most recent concluded EIAs comprise three AAs with the EU's so-called Eastern Neighbourhood countries: Moldova, Georgia and Ukraine (in 2014). The agreement with Georgia is included in the study and it demonstrates the current level of the EU's commitments in its so-called Deep and Comprehensive Free Trade Areas ("DCFTA").[35] Altogether, the study includes two AAs (Central America and Georgia), one

[33] See the details on the four agreements in Annex 2.
[34] 'Global Europe, competing in the world', the European Commission's contribution to the EU's Growth and Jobs Strategy, 2006, available online at: http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc_130376.pdf (accessed 1 December 2015).
[35] The EU's EIAs with Ukraine, Georgia and Moldova, however, differ from the other EIAs with regard to the parties' commitments under Mode 3 (commercial presence). Instead of listing commitments under Mode 3 similarly to the other modes, all parties use a negative list to formulate reservations on "Establishment". The list of reservations indicates the

Economic Partnership Agreements (EPA) (CARIFORUM), and one FTA (South Korea). All four agreements include a GATS-type EIA-element.

The EU has concluded also several other agreements with service trade-related components. Especially the so-called Stabilisation and Association Agreements (SAA) include long-term service liberalization but they do not contain GATS-type specific commitments providing clear indications as to the extent of liberalization sector by sector. These agreements establish an FTA but they also aim at a closer integration with the Union by following the principles of services liberalization within the Union.[36] Because of the lack of detailed services commitments, there are no SAAs in the study. Also the EU's agreements with the countries of the European Free Trade Association (EFTA)[37] have been left outside the study as their liberalization logic is different from the GATS and the EU's other trade agreements. In principle, the trade components of such agreements should also respect the WTO disciplines on PTAs. Their detailed analysis would, however, require a somewhat different type of methodology. Therefore, we have not included any agreement without a clear GATS-type service schedule. Similarly, the EU's FTA with Mexico has been left outside the empirical analysis, as the parties have not yet proceeded to full liberalization of services. So far, they have only agreed not to introduce new restrictions in the national legislation in the fields of services and investment.[38]

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economic activities where reservations to national treatment or most favoured treatment apply to establishments and investors of the other party (the EU-Georgia EIA refers to "entrepreneurs" instead of "investors").

[36] SAAs are primarily FTAs applicable to trade in goods with asymmetric timetables for liberalization alongside provisions for deeper political integration. They also include a degree of liberalization of services, with NT for the establishment of companies, subsidiaries and branches, provision for intra- corporate transferees and the possibility of future extension to the establishment of nationals of the parties for the purpose of self-employed activities and the provision of services on a temporary basis. But since SAAs are oriented towards preparation for possible future accession to the EU, their primary aim is deep integration with the EU. SAAs thus include provisions on all four EU's single market "freedoms" (although they do not achieve them fully) and on harmonization of standards with the EU. See Cremona 2010b, 251.

[37] All four current members of EFTA participate in the EU's single market: Iceland, Liechtenstein and Norway through the Agreement on a European Economic Area (EEA) and Switzerland through a set of bilateral agreements. Cremona notes that of the agreements with Switzerland the only PTA in the strict sense requiring Art. XXIV GATT notification is the 1972 FTA on trade in industrial goods; no general agreement on services liberalization has been reached. However the EU and Switzerland have a wide framework of agreements designed to support economic integration. See Cremona 2010b, 254.

[38] The EU and Mexico have concluded an Economic Partnership, Political Coordination and Cooperation Agreement in 1997 which included trade provisions that were developed in a comprehensive Free Trade Agreement that entered into force in October 2000 for the part related to trade in goods and in 2001 for that related to trade in services. However, the parties have not proceeded in elimination of discrimination in the field of services as planned at the conclusion of the agreement. In financial services, the EU enjoys the same access as NAFTA countries. "NAFTA-equivalent" access has been granted to EU service suppliers also with regard to certain other sectors, including energy, telecommunications and tourism. See Condon 2009, 88. Due to lack of multilateral control over PTAs, it is unclear whether such restrictive liberalization of certain service sectors is in compliance with the Art. V criteria. We argue that it is not.

In the discussion of the results of the empirical study, the thesis concentrates on three central issues. Before that, the same issues are first examined from a more theoretical point of view. These three issues at the center of the thesis are the following:

1) WTO law on EIAs and especially the requirements for EIAs under Art. V of the GATS
2) Mode 4 as a special case of services liberalization
3) The multi-level liberalization of services in the EU's trade agreements

The first issue forms the framework for the main research question of the thesis: the criterion that Art. V sets for EIAs. In addition, two other relevant areas are analyzed in detail.

Firstly, in the analysis of the legal conditions of Art. V, special attention is paid to a specific area of services trade liberalization: that relating to the movement of natural persons supplying services (the so-called "Mode 4"). The study of Mode 4 is relevant for understanding the type and extent of service supply that EIAs are supposed to cover. The presence of another Member's service suppliers in the territory of another Member, Mode 4 in the GATS-parlance, is one of the four categories that the GATS uses to define trade in services. The exact scope of Mode 4, however, remains contested among the Members and academics alike. The definition of Mode 4 is, nevertheless, relevant for the interpretation of the Art. V conditions as Art. V explicitly calls for the elimination of discrimination with regards to all modes of supply. Nevertheless, in the light of the Members' practice, the fundamental criterion of non-discrimination (in the sense of Art. XVII GATS), does not appear directly suitable for the liberalization of Mode 4. That is because foreign nationals are usually never treated as favorably as one's own nationals. Even if the conditions for supplying the service were the same (which they most often are not due to various qualification and professional requirements), foreign nationals' entry and stay in any given country is usually strictly restrained. Mode 4 is thus generally the least liberalized mode. From the point of view of preferentialism, however, Mode 4 is maybe the most feasible way of granting preferential access to one's market. Whereas with regard to other modes, countries often do not adjust their regulatory environment depending on the origin of the service supplier, under Mode 4 this is a common practice.[39] Different rules regarding entry, stay and qualifications are generally applied to nationals of different states.

[39] Hoekman and Mattoo note that reciprocity may be less powerful in services because policy reforms made at the request of a specific trading partner are often automatically benefiting all other countries as well. Service policies and

In the thesis, the issue of Mode 4 is brought up both under the interpretation of Art. V and in the empirical analysis of the EU's services PTAs. It is argued that from the GATS' point of view, Mode 4 should be considered a special form of mobility ("service mobility") for the purpose of providing specific services and should thus exclude traditional labour migration. The thesis differentiates service mobility from labour mobility by arguing that Mode 4 does not require host states to allow any access to their national employment market. Naturally, host states are free to do so, but from the point of view of Art. V and its condition of non-discrimination, this is not required. By providing a clearer conceptualization of Mode 4, the thesis provides tools to analyze commitments under Mode 4 and reflect them in light of the Art. V criteria. This is especially enlightening in order to interpret the Mode 4 commitments of the EU, which has not harmonized rules relating to the entry and stay of third-country services suppliers.

The third area of more detailed investigation is focused on how international trade in services is liberalized by the EU. The thesis suggests how the Art. V criteria should be applied to a multi-state actor such as the EU. There are several reasons justifying the choice of the EU as the object of analysis. Firstly, the EU is one of the most active WTO Members in concluding EIAs. Secondly, the EU has agreements with countries at very different stages of development, which is especially illustrative for the scrutiny of the EU's agreements in light of the Art. V conditions. Thirdly, the EU's services schedules follow the scheduling logic of the GATS and they are therefore a practical object of analysis under the GATS provisions for services trade liberalization. Fourthly, the EU's agreements comprise the commitments of over 20 different countries, which makes it possible to analyze the commitments of all these countries at once.[40]

When analyzing the EU's trade agreements, the thesis pays attention to the nature of the EU as a free trade area itself. The EU has a highly integrated commercial policy, known as the Common Commercial Policy (CCP). Under the CCP the Union enjoys exclusive competence to conclude trade agreements on behalf of all of its Member States. Notwithstanding this exclusive competence and centralized negotiation authority, the EU's schedules of services commitments are not unified: all EU Member States prescribe their own services commitments and limitations to the common EU schedule. This is an interesting phenomenon that has implications outside the EU as well. Several

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regulations often apply in a similar manner to all firms operating in the market, notwithstanding their origin (Hoekman and Mattoo 2013, 141). Mode 4 is different in this regard.

[40] The exact number depends on the number of EU Member States at the time of conclusion of each agreement.

Members have internally divided competences on the regulation of services. In case there are discrepancies between the depths of liberalization on different levels of government, the relevant question is how to determine the GATS-consistency of their EIAs. In case the extent of liberalization varies between regions (or member states, as in the case of the EU), the relevant question is how the coverage and degree of non-discrimination of an EIA by such a contracting party should be assessed. What is the salient unit in such an analysis? Should only state-level measures be analyzed or are regional measures as relevant? The thesis analysis this problem in the light of the EU example. For this purpose, the EU's services PTAs are examined in the wider context of the EU's Common Commercial Policy (CCP).

The result of the thesis is, on the one hand, a better understanding of the criteria that the GATS sets for EIAs and, on the second hand, a clearer picture of the level of liberalization reached in the EU's services trade agreements. The thesis also shows how the EU's EIAs vary depending on the overall process of integration among the countries concerned.

3. The structure of the thesis

The thesis is organized in two parts. Part 1 deals with the WTO law on PTAs and provides the theoretic frame of the thesis. It starts by explaining the historic background of preferentialism and all the relevant WTO rules and procedures relating to them (Chapter II). Chapter III focuses on EIAs: it develops an original interpretation of the legal criteria for EIAs under Art. V GATS. Chapter IV builds a theory around Mode 4 and suggests a clear way for its conceptualization.

Part 2 of the thesis concentrates on the EU. It begins by a review of the legal issues in the EU's trade policy in the field of services (Chapter V.1). The development of the EU's competences in the field of services is analyzed in light of the jurisprudence of the Court of Justice of the EU ("the Court"). The thesis explains what are the consequences of the unfinished nature of the EU's internal services market on its external liberalization of services. Finally, the first part of Chapter V demonstrates what types of discrepancies arise from the under-developed internal services market by providing examples of the EU's EIA schedules.

The second part of Chapter V provides a detailed explanation of the methodology for the empirical study on the EU's EIA commitments. The results of the empirical study are presented in the third part of the chapter. They show the overall level of liberalization in the EU's EIAs and the elements

included in the wider process of economic integration between the EU and its EIA partners. The results also shed light on how the EU's EIAs correspond to the conceptualization of Mode 4 put forward in Chapter IV.

Chapter VI discusses the results of the empirical study in light of the understanding of Art. V developed in Part 1 of the thesis. We also look into the conceptualization of Mode 4 in the EU's EIAs, and analyze how the internal diversity in the EU's services commitments is shown by our results. We do not give any final judgment as to the EU's compliance with Art. V, but contemplate the degree of liberalization attained in the EU's EIAs. Finally, Chapter VII concludes.

II. PREFERENTIAL TRADE AGREEMENTS IN THE WTO

1. The historical background of PTAs

Preferential trade is not a new phenomenon. Trade relations between selected countries have been secured through various preferential arrangements throughout modern history – from colonial preferences to bilateral commercial treaties and broader regional arrangements. The most-favoured nation (MFN) clause was regularly applied in bilateral treaties of friendship, commerce and navigation in the 19th century. These agreements contributed to a network of interlinked agreements that preceded the formation of a proper multilateral system after World War II.[41]

In the field of goods, PTAs were concluded in modest numbers until the 1990s. The inclusion of services in PTAs is a later phenomenon. According to the DESTA database[42], the first agreement mentioning services trade liberalization as a goal is the Treaty Establishing the European Economic Community (Treaty of Rome, 1957), while the first agreement that actually includes commitments in services trade liberalization is the Yaoundé Convention of 1969 more than ten years later.[43] Since the early 1990s, the number of EIAs has, however, grown very fast. Starting from 1994, some 180 PTAs including rules on services trade have come into existence, compared with only 38 in the previous forty years. Of the cumulative total of all PTAs including services, over 40 % has come into existence since 2000.[44] Overall the numbers of PTAs have greatly multiplied since the early 1990s. The vast increase in the numbers of PTAs is often described as 'proliferation'.[45]

In the 1960s and 1970s, services trade was included mostly in the so-called North-South and South-South agreements, concluded between developed and developing countries (N-S), and developing countries (S-S) respectively. In the 1980s the first North-North agreements were concluded. The period of the GATS negotiations marked the beginning for a trend towards the conclusion of PTAs

[41] Cottier and Oesch 2011, 3.
[42] "Design of Trade Agreements (DESTA) Database", available at http://www.designoftradeagreements.org/ (accessed 1 August 2016).
[43] The Yaoundé Convention was a treaty signed in the city of Yaoundé, Cameroon between the European Economic Community (EEC) and the AASM (Associated African States and Madagascar) for the first time in 1963. The second convention was signed in 1969. The treaties governed relations between the EEC and the EEC Member States' overseas countries and territories. See Sieber-Gasser 2016, 63.
[44] The agreements typically include rules on both services and investment. See Heydon and Woolcock 2009, 90.
[45] See Fiorentino, Verdeja, and Toqueboeuf 2007, 2. Dür et. al have identified a total of 733 PTAs signed between 1945 and 2009 (including concrete steps towards the preferential liberalization of trade in goods and/or services). At the same time, a list maintained by the WTO included 356 of those agreements. See Dür, Baccini, and Elsig (2014).

with a service component. Their number is steadily growing.[46] The most active participants to EIAs have been industrialized countries with strong service industries, especially the EU and the U.S., but since the 1990s developing countries have been rapidly catching up.[47]

Preferential trade was disciplined for the first time in the original GATT agreement of 1947. Art. XXIV GATT set the rules for the formation of customs unions (CUs) and free-trade areas (FTAs). The rigid classification of regional integration into these two formations can be seen as the result of the historic context of the GATT. Two customs unions participated in the negotiation of the GATT: the Benelux and the Syrian-Lebanese customs union. The GATT negotiators where therefore presented with a *fait accompli*. FTAs, on the contrary, were included only in the last draft of the GATT; the seven drafts prepared before that included CUs only. According to Chase, the U.S. negotiators played a leading role in designing the FTA provision to accommodate a secret trade agreement that the U.S. was planning with Canada.[48]

The text of Art. XXIV GATT has remained unchanged since then. In 1994, the provision was clarified with an Understanding agreed upon by the Members during the Uruguay Round.[49] From the beginning, the contracting parties, and later the Members of the WTO, have been under an obligation to notify every PTA they conclude. During the GATT years, the examination of PTAs was conducted in working parties established individually for that purpose. In 1996 a new body, the Committee on Regional Trade Agreements (CRTA), was created to consider individual PTAs, the relationships between them and their systemic implications for the multilateral trading system.

[46] Sieber-Gasser (2016), 63-64.
[47] *Ibid*., 66.
[48] Chase 2006, 10-15. The U.S. had a significant role in the formulation of the FTA provision notwithstanding its commitment to multilateralism. According to Chase, the evidence shows that the U.S. position on preferential arrangements changed because the U.S. wanted to accommodate a possible FTA with Canada. In the end of 1947, Canada asked the U.S. for tariff cuts on its key exports but was not willing to enter into a CU with the U.S. The U.S then came up with the idea of free trade without a common tariff system. As the U.S. did not want to present the idea itself because of likely public relations problems, it planted the proposal with the Lebanese and Syrian representatives. In the process, the U.S. representatives had three goals. First, they wanted interim agreements to be accommodated. Second, they came up with the elimination of tariffs on "substantially all trade" – not "all trade" – so that protection for sensitive items could be retained. And third, they wanted to ensure that clauses banning tariff increases against third countries applied only at the time a FTA was formed, and did not operate indefinitely. Consequently, neither the Havana Charter nor the U.S.-Canada FTA became law. However, the rules on CUs and FTAs survived as part of the GATT and remain in force today.
[49] Understanding on the Interpretation of Art. XXIV of the General Agreement on Tariffs and Trade (Uruguay Round Agreement). The Understanding is so far the only legislative clarification of the text of Art. XXIV GATT.

In addition to Art. XXIV GATT, another, limited, possibility for preferential arraignments in goods trade was created by the 1979 Enabling Clause.[50] Adopted under the GATT, it enables developed Members to give differential and more favourable treatment to developing countries. This takes place under the so-called Generalized System of Preferences (GSP) through which developed countries offer non-reciprocal preferential treatment to products originating in developing countries. The Enabling Clause is also the legal basis for regional arrangements among developing countries. Moreover, it provides for the Global System of Trade Preferences (GSTP), under which a number of developing countries exchange trade concessions among themselves. According to Paragraph 4 of the Enabling Clause, Members pursuing arrangements under it must notify the other Members and furnish them with all the information they deem appropriate. The provision also provides for consultations with a view to reaching solutions that are satisfactory to all Members. Notifications under the Enabling Clause are made to the Committee on Trade and Development (CTD). A debate is held at a CTD meeting but generally the CTD requires no in-depth examination by the CRTA.

Besides Art. XXIV GATT, Art. V GATS is the other WTO provision that creates a legal basis for PTAs in the strict sense.[51] The GATS rules concerning the notification and control of EIAs are less strict than those of the GATT. Art. V:7(a) GATS requires parties to an EIA to promptly notify such an agreement and any enlargement or any significant modification of the agreement to the Council for Trade in Services (CTS). In addition, Art. V:7(b) includes the obligation of periodic reporting with regard to EIAs that are implemented on the basis of a time-frame. The CTS may pass a notified agreement to the CRTA for examination. Unlike PTAs that are notified under Art. XXIV GATT, the examination of EIAs by the CRTA is optional.

We will now turn into the issue of how PTAs are controlled in the WTO. There are two possible mechanisms: the multilateral review and dispute settlement. As we will explain, neither mechanism has proved successful in putting the GATT and GATS disciplines on PTAs into practice.

[50] Decision of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, GATT Document L/4903 (Enabling Clause).
[51] There is no separate "Enabling Clause" for services PTAs. However, Art. V.3 GATS creates a less rigid setting for EIAs involving developing countries. According to the provision, flexibility shall be provided for where developing countries are parties to an EIA in accordance with the level of development of the countries concerned.

2. The control of PTAs under WTO law

i. The multilateral review of PTAs

The multilateral track for the control of PTAs concerns the review of PTAs by the Members themselves. As no panel has ever pronounced on the GATT/WTO-consistency of any PTA, it can be considered that the main responsibility over the examination of PTAs belongs to the Members.[52] Examination was first carried out in individual working parties but since the establishment of the Committee on Regional Trade Agreements (CRTA) by a decision of the WTO's General Council in February 1996, it has been the task of the CRTA. The original CRTA procedure is explained very briefly as the nature of the review mechanism has changed with the introduction of the Transparency Mechanism in 2006.

The rules for the examination of PTAs are included in Art. XXIV GATT and Art. V GATS. Art. XXIV GATT gives Contracting Parties/Members wide powers to examine notified PTAs. That is especially evident in Art. XXIV.7(b) that deals with interim agreements leading to PTAs:

> *"If the CONTRACTING PARTIES find that such agreement is not likely to result in the formation of a customs union or of a free-trade area - - the CONTRACTING PARTIES shall make recommendations to the parties to the agreement. The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations."*

Mavroidis notes that the provisions give the impression of a multilateral review system designed as an institution akin to a modern merger authority: PTAs would not be consummated unless cleared through the process established.[53] In reality, however, the Contracting Parties/Members have never lived up to their institutional promise of a genuine multilateral review. Prior to the establishment of the WTO, Working Party reports on PTAs notified under Art. XXIV GATT were usually adopted even though Members had divergent views on the end result. Consensus on consistency hardly existed: only on five occasions were the Contracting Parties able to agree that a PTA satisfied the

[52] Panels are not likely to do so either in the future. See Mavroidis (2006).
[53] Mavroidis 2011, 376.

requirements of Art. XXIV GATT.[54] The Contracting Parties never reached a decision on a notified PTA's inconsistency with the GATT.[55]

The review mechanism under Art. V GATS is less rigid. According to Art. V:7(a), EIAs are to be notified to the Council for Trade in Services. The Council *may* then establish a working party to examine such an agreement or enlargement or modification of that agreement and to report to the Council on its consistency with Art. V (emphasis added). Under Art. V:7(b), Members that are parties to EIAs implemented on the basis of a time-frame shall report periodically to the Council on the implementation. The Council may establish a working party to examine such reports if it deems such a working party necessary. Under Art. V:7(c), the Council may, based on the reports of the working parties, make recommendations to the parties as it deems appropriate.

Since the establishment of the CRTA, the Council has passed a number of EIAs to the CRTA for examination (typically examined together with the goods component of the agreement). But in contrast to PTAs notified under Article XXIV GATT, such examination of EIAs is optional, not mandatory. Moreover, unlike Art. XXIV.7(b) GATT, Art. V GATS does not preclude the enforcement of agreements that are in conflict with working party recommendations; it simply allows for recommendations to be made to the parties of the agreement. In practice, however, the difference has been inconsequential as no PTAs have been considerer inconsistent under neither procedure.

The CRTA conducts its examination of based on information provided by the parties to the PTA. Other material includes written replies to written questions posed by other Members and discussions at CRTA meetings. Prior to 2006, the factual examination was followed by an examination report drawn by the WTO Secretariat. Once the report was accepted by the CRTA, it was to be submitted for adoption by the Members. The difficulty in reaching consensus over the consistence of PTAs with the GATT and GATS rules, however, led to a situation where no report was finalized since 1995.[56]

[54] Schott 1989 (at p. 25) mentions four decisions where the PTA was considered broadly consistent with the GATT. Since then, consensus has been reached only once: the report on the 1993 CU between the Czech Republic and the Slovak Republic states clearly that the PTA is fully compatible with the GATT rules. See Mavroidis 2011, 376.
[55] WTO 2000, 10 and Mavroidis (2006). See also Mitchell and Lockhart 2009, 112.
[56] The WTO website on the CRTA, available at: https://www.wto.org/english/tratop_e/region_e/regcom_e.htm (accessed 10 May 2016).

As a response to this deadlock, a new mechanism was adopted in 2006. The procedure to control the WTO-consistency of PTAs went through a drastic change with the General Council's adoption of a decision concerning the *Transparency Mechanism for Regional Trade Agreements*.[57] The Transparency Mechanism *de facto* replaced the existing multilateral review system of PTAs. The practical consequence of the resolution is that the consistency of PTAs responding to Art. XXIV GATT, Art. V GATS or the Enabling Clause is actually no longer checked multilaterally.[58] The new mechanism is implemented by the CRTA with regard to PTAs falling under Art. XXIV GATT and Art. V GATS. The Committee on Trade and Development is responsible for the implementation with regard to agreements falling under paragraph 2(c) of the Enabling Clause.

Under the Transparency Mechanism the WTO Secretariat prepares a factual presentation of each notified PTA. The factual presentation is distributed to the Members at least eight weeks in advance of the meeting devoted to the consideration of the PTA. The parties to the agreement must circulate answers to questions sent by other Members at least three working days before the corresponding meeting. In addition, there is a written record of the meeting devoted to the consideration of each notified agreement. The Members' questions and the parties' responses as well as a record of the discussion are available on a WTO database. The decision on the Transparency Mechanism also requires that at the end of the PTA's implementation period, the parties submit to the WTO a short written report on the realization of the liberalization commitments in the PTA as originally notified. However, there is no longer need to prepare a final report for adoption by the Members.[59]

In fact, the introduction of the Transparency Mechanism has normalized a practice that is to ignore the Members' treaty-based responsibilities to enforce the rules on PTAs. The enforcement of the rules has proved too hard to accomplish in a situation where, first, there is no general understanding of the exact contents of the substantive rules on PTAs, and, secondly, where there is not enough political willingness to tackle the issue.

From a legal point of view, it is clear that partial trade deals are allowed for Members only if they meet the requirements of Art. XXIV GATT, Art. V GATS or the Enabling Clause. Only such PTAs

[57] Transparency Mechanism for Regional Trade Agreements, General Council, Decision of 14 December 2006, WTO Document WT/L/671 of 18 December 2006. The transparency mechanism was negotiated in the Negotiating Group on Rules and is implemented on a provisional basis. The purpose is that Members replace it by a permanent mechanism to be adopted as part of the overall results of the Doha Round.
[58] Mavroidis 2011, 377.
[59] The Decision on the Transparency Mechanism and the WTO website on the Transparency Mechanism, available at: https://www.wto.org/english/tratop_e/region_e/trans_mecha_e.htm (accessed 10 May 2016). The WTO database with reports on the agreements is available at http://rtais.wto.org.

that fall within one of these exceptions are valid under WTO law. Thus, any Member entering a PTA should ensure that the agreement complies with the conditions of the relevant WTO exception. Otherwise, the Member risks acting inconsistently with its WTO obligations.[60] No one claims that the vast majority of the well over two hundred PTAs that have been notified since the establishment of the WTO are 'customs unions'. Since most of the agreements involve liberalization of trade in goods and are not concluded solely for development purposes, they must be "free-trade areas" within the meaning of Article XXIV.8(b) of the GATT. However, no one knows what a free trade area really is – or really wants to know. The GATT/WTO trading system has thrived for more than half a century without knowing the answer to this question.[61] As to understanding what exactly is "economic integration" under the criteria of Art. V:1 GATS, we are not any more enlightened.

Clearly, the main reason for the lack of comprehension of the rules on PTAs is the obscurity of the rules. Naturally, there is the possibility for the Members to provide for more legal clarity and detail to the rules. The former Director-General of the WTO, Pascal Lamy, has brought up this possibility by pointing out that it is for the governments to determine whether they need greater legal certainty in this domain.[62] This option is, however, undermined by the fact that years of effort before and during the Doha Round to address the multilateral provisions on PTAs have not proved successful.[63] New rules, therefore, seem highly unlikely.

A politics of tolerance towards PTAs has been practiced already for decades. According to Snape (1993), the formation of the EEC marked a significant start in this regard. Political considerations affected the GATT Contracting Parties in their decision not to scrutinize the deal too heavily. The Community's six original member states had made sufficiently clear that they could withdraw from the GATT were the Contracting Parties to find that the EEC Treaty violated Art. XXIV GATT. Given that the ECC of the 1950s most likely did not meet the requirements of Art. XXIV, a precedent was created and it has been subsequently followed.[64]

The Members seem divided on all significant aspects of the WTO disciplines on PTAs. In addition, there does not seem to be enough political willingness to tackle the issue. The obscurity of the

[60] Mitchell and Lockhart 2015, 82.
[61] Foreword by James Bacchus, Former Chair of the WTO Appellate Body in Lester, Mercurio, and Bartels 2015, xiv.
[62] WTO 2011, 4.
[63] In the beginning of the Doha Round, Members agreed to clarify and improve the disciplines and procedures for PTAs. See Doha Ministerial Declaration, WT/MIN(01)/DEC/1, adopted 14 November 2001, para. 29 and Negotiating Group on Rules, Compendium of Issues related to Regional Trade Agreements, TN/RL/W/8/Rev.1, 1 August 2002.
[64] See Hoekman and Sauvé 1994a, 61 and the references therein, especially Snape (1993).

provisions is potentially damaging but it is also in the benefit of many. As noted by Mavroidis, it is actually counter-intuitive why Members would be willing to enforce the so-called internal requirement of the rules on PTAs. That is because the less trade liberalization exists among parties to a PTA, the less trade diversion is likely to take place.[65] It is maybe more understandable why Members would be willing to enforce the external trade requirement which under both Art. XXIV GATT and Art. V GATS requires that trade barriers towards outsiders must not be raised as a whole.

However, the economic consequences of PTAs for outsiders are complex and depend on a variety of factors. Moreover, we do not have a straightforward answer to the question of whether preferentialism in general is detrimental to multilateralism or more of a catalyst for further trade liberalization. Economic consequences matter but it is important to keep in mind that PTAs are not only about GDP. The Members' reluctance to clarify and enforce the rules may also relate to the understanding that PTAs do not serve economic motives only. The WTO rules on PTAs are built on mainly economic criteria but the Members use PTAs to address various types of issues. Even if the GATT rules do not acknowledge the variety of policy reasons for CUs and FTAs, PTAs are in practice largely used also for non-economic aims.[66] The rise of the so-called mega-regionals, referring especially to the U.S-centered Transpacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP) between the U.S. and the EU, as well as some new initiatives by China and Russia in their geographic proximity, shows the growing importance of geo-politics as a driving factor for preferentialism.[67]

In this sense, Art. V GATS may provide more room for agreements having wider motivations than Art. XXIV GATT since its second paragraph allows consideration to be given to the 'wider process of economic integration' between the participating countries. It is, however, unclear what the provision means in practice. There is no more consensus on the meaning of Art. V:2 GATS than on

[65] Mavroidis 2006, 210-211. The internal requirement concerns the criteria on the liberalization of 'substantial' amount of trade in the case of both goods and services.
[66] Damro lists seven big themes behind the preference to pursue PTAs: 1) Marginalization syndrome ("the fear of being left out"), 2) security via economic means, 3) "New security needs" (eg. environmental damage, illegal migration, drug smuggling), 4) increase in negotiating leverage, 5) lock-in domestic reforms, 6) accommodate domestic constituents and 7) practical ease. See Damro 2006, 29-30 in Bartels and Ortino (2006).
[67] The geopolitical motivations of PTAs were present already during the negotiations on the International Trade Organization in the 1940s. Chase notes that despite its hatred of colonial preferences and dedication to MFN rules, the U.S. came to regard FTAs as instruments to promote economic and political unity against the Soviet threat and achieve broader trade liberalization than was possible multilaterally. Chase 2006, 22.

the meaning of any other WTO provisions on PTAs. With so many partly conflicting interests involved, any particular interpretation of the rules is unlikely to gather the support of all Members.

It seems fair to conclude that the Members are clearly not fulfilling their supervisory role over PTAs. Considering that the CRTA is now close to a pure enforcer of transparency, the legal status of current and new PTAs is set to remain unclear. Even if the primary responsibility over the enforcement of the rules on PTAs has been considered to belong to the Members, any solution one way or the other seems now possible through litigation only. However, as it will be explained in the next section, GATT/WTO panels have so far been very reluctant to interpret the rules on PTAs.

ii. PTAs in GATT/WTO dispute settlement

Considering the importance of PTAs to the world trade today, one could expect that GATT/WTO panels had been involved in a legal review of at least some of the agreements. However, the panels and the Appellate Body (AB) have not yet got fully engaged in the interpretation and enforcement of the rules on PTAs. The reasons arguably lie both with the Members and the panels/AB themselves. Firstly, legal challenges are not likely. One of the most convincing explanations behind this lies in strategic reasons: all Members are now parties to PTAs and many of them do not want to limit their options or to risk their own PTAs being subjected to legal review.[68] Therefore, a situation of certain 'co-operative equilibrium' has developed: in order to avoid being challenged, Members do not challenge each other's PTAs.[69] Mavroidis also mentions such reasons as collective action problems, the benefits of non-enforcement (reduced trade diversion) and the institutional design of panels (mistrust of amateur judges).[70]

Secondly, Panels and the AB themselves do not seem willing to engage in a 'complex undertaking which involves consideration by the CRTA, from the economic, legal and political perspectives of different Members, of the numerous facets of a regional trade agreement in relation to the provisions of the WTO'.[71] The adjudicating organs of the GATT/WTO have been extremely sparing in their rulings concerning PTAs and seem to prefer to leave the consistency issues of PTAs

[68] Following Mongolia's decision to join the Asia-Pacific Trade Agreement (APTA), all WTO members are now members of one or more PTAs (some belonging to as many as 30). See the WTO website https://www.wto.org/english/thewto_e/minist_e/mc9_e/brief_rta_e.htm (accessed 10 May 2016).
[69] Matsushita, Schoenbaum, and Mavroidis 2006, 585.
[70] Mavroidis 2010, 1150.
[71] A quote from the Panel Report in EC-Citrus, para. 9.52. See *European Community — Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region*, L/5776, GATT Panel Report, 7 February 1985 (unadopted).

to the Members themselves. The following statement of the former chair of the AB, James Bacchus, is revealing:

> "*More ominously, no one knows what a 'free-trade area' is within the meaning of Article XXIV.8(b) of the GATT – or really wants to know. The GATT/WTO trading system has thrived for more than half a century without knowing the answer to this question. As I have often said, and not entirely in jest, one of my greatest accomplishments as a Member for eight years of the Appellate Body of the WTO was that I was able to get out of Geneva alive without having to answer this question.*"[72]

So far, the only case that has dealt, in a limited manner, with Art. V GATS has been *Canada-Autos*[73]. However, the arguments used by the Panels or the AB with regard to Art. XXIV GATT or the Enabling Clause may be considered relevant also for the analysis of EIAs under the GATS. Since Art. V is the service trade equivalent of Art. XXIV GATT, the considerations reached in the GATT/WTO dispute settlement with regard to CUs and FTAs may be of relevance also in the interpretation of Art. V GATS.[74]

Unfortunately, the substantive guidance on the provisions of Art. XXIV is also almost nonexistent. There have been several disputes that have dealt with or touched upon Art. XXIV but the panels have refrained from targeting PTAs directly. Instead, they have taken a piecemeal approach and focused on particular measures that have followed from the agreements. At least so far, panels and the AB have not been explicitly asked to rule on the validity of a specific PTA. In *US-Line Pipe Safeguards*, the evidence submitted by the U.S. on NAFTA's compliance with Art. XXIV:8(b) led the Panel to conclude that the U.S. had established a *prima facie* case that the criteria of an FTA were met. However, the AB did not consider it necessary to address this finding and declared it to be of no legal effect.[75]

The only substantive issue has been taken up by the AB in the case *Turkey-Textiles*. The case concerned the Turkey-EC Association Council Decision of 1/95 setting out certain modalities for the completion of a CU between the EC and Turkey. The decision required the elimination of

[72] Foreword by James Bacchus, Former Chair of the WTO Appellate Body in Lester, Mercurio, and Bartels 2015, xiv.
[73] *Canada - Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R, Report of the Panel, circulated 11 February 2000.
[74] The GATS does not distinguish between FTAs and CUs as the GATT does. However, EIAs appear to be closest to FTAs. See Mitchell and Lockhart 2009, 110.
[75] Appellate Body Report, *US-Line Pipe Safeguards*, paras. 198-199. The US had submitted evidence that NAFTA eliminated duties on 97 per cent of the Parties' tariff lines, representing more than 99 per cent of the trade among them in terms of volume. See *United States - Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, Report of the Appellate Body, circulated 15 February 2002.

customs duties, alignment of the common customs tariff, and provisions to harmonize certain other policies.[76] The dispute arose between Turkey and India, towards which Turkey, upon the formation of the CU with the EC, began to apply a series of restrictive quantitative measures similar to those already applied by the EC. The unilateral measures were put in place for textiles and clothing products originating from a total of 28 countries, India among them.

In its ruling, the AB introduced the so-called necessity test for CU measures that are inconsistent not just with the MFN obligation but also with some other GATT provisions (in this case with Articles XI and XIII GATT on quantitative restrictions). According to the AB, Art. XXIV justifies such measures only if the party to a CU demonstrates that the formation of the CU would be prevented if it were not allowed to introduce the measure at issue. In addition, the party must demonstrate that the measure is introduced upon the formation of a CU that fully meets the requirements of Art. XXIV GATT.[77] The AB concluded that Turkey had failed to demonstrate the necessity of violating Articles XI and XIII as other means were available to accommodate the internal trade requirement of Art. XXIV:8, for example through the adoption of rules of origin with certificates of movement.[78]

As the case was focused on analyzing the legality of a particular measure applied upon the completion of the CU, the AB did not engage in scrutinizing the CU itself. However, it established that a CU formed in accordance with the criteria of Art. XXIV can work as a type of "defence" for CU parties to violate certain other GATT provisions. Two conditions would need to be demonstrated in this regard:

> " - - First, the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV. And, second, that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue. Again, both these conditions must be met to have the benefit of the defence under Article XXIV."[79]

[76] Mathis 2002, 195.
[77] *Turkey - Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, Appellate Body Report, circulated 22 October 1999, para. 58. For a detailed account of the case law on Art. XXIV GATT, see Mathis (2002).
[78] *Turkey-Textiles*, Appellate Body Report, para. 62.
[79] *Turkey-Textiles*, Appellate Body Report, para. 58.

In addition to the necessity test, the AB thus established that the party claiming the benefit of the defence must coincidentally demonstrate that the CU fully meets the requirements of Art. XXIV. As to the requirements themselves, the AB noted that "neither the GATT Contracting Parties nor the WTO Members have ever reached an agreement on the interpretation of the term "substantially" in this provision". It then went further and stated that 'substantially all the trade' as mentioned under Art. XXIV:8 is clearly "something considerably more than merely *some* of the trade". At the same time, however, the members of a CU were allowed to maintain, in their internal trade, certain restrictive regulations of commerce. According to the AB, the terms of Art. XXIV thus offer "some flexibility" to the constituent members of a CU when they liberalize their internal trade. Yet, the AB cautioned that the degree of "flexibility" is limited by the requirement that "duties and other restrictive regulations of commerce" be "eliminated with respect to substantially all" internal trade.[80]

The ruling in *Turkey-Textiles* was welcome as it made it clear that the rules on PTAs are to be taken seriously. At the same time, it did not bring much assistance to the interpretation of Art. XXIV. The central conclusion would seem rather obvious: 'substantially all' is more than some.

The only case that has dealt with Art. V GATS is *Canada-Autos*. In that dispute, Canada had accorded duty-free treatment to motor vehicles imported by certain manufacturers producing cars in Canada. The Panel found that the Canadian regime favored products of certain origins and concluded that Canada did not accord the advantage on equal terms to like products of different origin. Canada tried to invoke Art. V as a defence to its breach of the MFN obligation but the Panel rejected it. The Panel noted that the Canadian measure did not grant more favourable treatment to all services and service suppliers from NAFTA member countries. In practice, only a small number of U.S. and Mexican manufacturers/wholesalers enjoyed the more favourable treatment. According to the Panel, the requirement of Art. V:1(b) was to provide non-discrimination in the sense of NT. Once that was fulfilled, it would also ensure non-discrimination between all service suppliers of other parties to the EIA. The Panel also stated as its view that the object and purpose of the provision of Art. V:1(b) was to eliminate "all discrimination among services and service suppliers of parties to an economic integration agreement, including discrimination between suppliers of

[80] *Turkey-Textiles*, Appellate Body Report, para. 48 (original emphasis).

other parties to an economic integration agreement".[81] The Panel did not advance any further on Art. V and its conclusions on Art. V were not appealed.

Thus not much light was shed by on the internal requirement of Art. V apart from the obligation to eliminate discrimination between all services and suppliers originating in Members of the EIA. The following clarifying statement was, nevertheless, made, along the lines of *Turkey-Textiles*:

> "Moreover, it is worth recalling that Article V provides legal coverage for measures taken pursuant to economic integration agreements, which would otherwise be inconsistent with the MFN obligation in Article II. Paragraph 1 of Article V refers to "an agreement liberalizing trade in services". Such economic integration agreements typically aim at achieving higher levels of liberalization between or among their parties than that achieved among WTO Members. Article V:1 further prescribes a certain minimum level of liberalization which such agreements must attain in order to qualify for the exemption from the general MFN obligation of Article II. In this respect, the purpose of Article V is to allow for ambitious liberalization to take place at a regional level, while at the same time guarding against undermining the MFN obligation by engaging in minor preferential arrangements."[82]

With the proliferation of PTAs, it may be only a question of time before a panel is forced to take a stand on the legality of a specific PTA. It may not be asked about the legality directly, but getting around the issue may, under the right conditions, become close to impossible. WTO panels are in a growing manner being engaged also in disputes having their origin in PTAs. Some case law at least is, therefore, likely to develop. Mitchell and Lockhart point out that it would, however, be unrealistic and even inappropriate to expect panels or the AB to develop a refined definition of 'substantially all the trade' under Art. XXIV:8 GATT. How would a panel find a textual basis for a finding that a precise threshold of exactly 95 %, for example, would be 'substantial' but 90 % never is?[83] The same expectation, or lack of expectation, applies also to Art. V:1(a) GATS. Under the GATS, reaching a precise threshold on textual grounds is likely to be even harder due to the open-endedness of such definitions as a 'wider process of economic integration' (Art. V:2). Nevertheless, in spite of these difficulties it is now settled that panels have a right (or an obligation) to review the quality of PTAs when raised on a defence.[84] With a growing number of agreements, we are likely to

[81] *Canada - Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R, Report of the Panel, circulated 11 February 2000, para. 10.270 and Ortino 2008, 202-203.
[82] *Canada-Autos*, Report of the Panel, para. 10.271.
[83] Mitchell and Lockhart present that if the clarification of the notion is left to panels and the AB, it is likely that they will adopt a flexible test based on the specific facts at issue. They consider that the test is likely to be premised on the word 'substantial', which indicates the need to eliminate internal restrictions covering a very considerable proportion of the trade between the parties. Mitchell and Lockhart 2009, 96.
[84] Mathis 2011, 39 in Bagwell and Mavroidis 2011.

witness many more PTA-related cases in the future. If and when PTAs are invoked as a defence to violations of WTO law, panels will find themselves facing a task which they would rather avoid, but which someone will need to tackle, sooner or later.

3. The implications of proliferating preferential trade

The growing number of PTAs has now become a constant feature of international trade. In the past, PTAs were more common between trading partners in geographic proximity. During the past two decades, an increasing number of PTAs has been concluded between partners a large distance apart; some of them are located in different continents. This is also true for services PTAs: trading services from one side of the world to the other is made possible by globalization, improved means of international transportation and technological developments.[85]

The causes to the proliferation of PTAs are complex. One of the most significant underlying reasons is the crisis in multilateralism in general. The world is becoming increasingly complex and trade policies are highly politicized. The post-Second World War momentum that enabled the integration of world trade is, to a certain extent, gone. Trade is no longer limited to manufacturing and its meaningful liberalization necessitates regulation that reaches deep behind the borders. This means that trade is not an area free from politics and expression of societal values, whether regional, cultural or religious values. The expansion of the demand for democracy coincides with the emergence of important developing nations that express restraint in submitting to rules and values determined by the established economies. The attainment of a consensus is an enormous challenge in the expanding and pluralistic organization that the WTO has become. This can be seen as the principal reason behind the failure of the Doha Round. While the multilateral trade negotiations are at a stalemate, economic growth is pursued elsewhere. Countries are turning to like-minded countries in the search of companions for trade agreements that could go deeper than simple tariff liberalization.[86]

[85] Munin 2010, 217.

[86] Various governments are now openly advocating PTAs as an engine for much-needed economic growth. For instance, the European Commission has promoted the TTIP agreement as a project that would generate jobs and growth across the EU. The Commission has often cited an economic impact assessment (CEPR) released in the beginning of the TTIP negotiations and has let it become widely understood that a European family of four would see their annual disposable income increase by an average of €545 per year as a result of the agreement. See the Commissions brochure "The Transatlantic Trade and Investment Partnership: the Economic Analysis Explained", available at http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151787.pdf (accessed on 1 July 2016). The economic impact assessment of the Centre for Economic Policy Research (CEPR), commissioned by the Commission's Directorate General for Trade, is available at http://cepr.org/content/independent-study-outlines-benefits-eu-us-trade-agreement (accessed on 1 July 2016).

The possible negative effects of PTAs are well known and are not dealt with in detail here. It suffices to say that PTAs, while creating trade, may also create diversion and thus lead to overall welfare losses.[87] However, there are also more political and principled arguments against PTAs. One of the most outspoken critics of preferentialism, Jagdish Bhagwati, sees the new mega-regional projects as hegemonic templates that strong countries use to take advantage of weaker economies. He is advocating for 'garbage-free' PTAs that would adhere to trade objectives and discard what special-interest lobbies in the U.S. and Europe seek to foist on PTAs.[88]

An often-raised concern is that PTAs erode multilaterally negotiated concessions, which is especially detrimental for developing countries. However, at the same time developing countries are suffering from the formalistic requirement to reach the level of 'substantial' liberalization in their negotiations with the developed countries. As Bartels et al. point out, the attainment of very high liberalization levels leads to perverse outcomes especially for the least-developed countries. They argue that different levels of development should be taken better into account under Art. XXIV GATT and Art. V GATS for development-oriented PTAs to be genuinely development-oriented without artificial and harmful formalism.[89]

Realpolitik arguments suggest that MFN liberalization is not the appropriate counterfactual to preferences among PTA partners. The willingness of countries to participate in the WTO agreements might be different were they deprived of the possibility to conclude agreements on a preferential basis.[90] The banning of PTAs might, thus, have led to less satisfactory results on the multilateral level. Along this argumentation, the non-rigorous interpretation and non-enforcement of WTO rules on PTAs tell us that the Members understand this: PTAs are inevitably part of the reality in which they all live.

Mavroidis points out that the rigorous enforcement of the rules on PTAs is actually not likely to be to the benefit of the Members outside a specific PTA. The crucial criterion for PTAs under both the

[87] For a discussion of the evolving economic analysis regarding PTAs, see the volume edited by Bagwell and Mavroidis (2011). They explore recent empirical research that casts doubt on the traditional "trade diversion" school.
[88] Bhagwati, Jagdish: "The Broken Legs of Global Trade", Project Syndicate, 29 May 2012. Available at https://www.project-syndicate.org/commentary/the-broken-legs-of-global-trade, accessed 5 July 2016. See also Bhagwati (2008).
[89] Bartels et al. (2013).
[90] Mavroidis 2011, 380. Mathis points out that Art. XXIV itself acknowledges the desirability of increasing freedom of trade through the voluntary agreements of closer integration between regional parties. This is thus the essence of what the GATT and now WTO Members have settled on – irrespective of the welfare implications of such agreements. See Mathis 2011, 38-39.

GATT and the GATS relates to the requirement of substantiality: PTAs must cover substantially all the trade in products or they must have substantial sectoral coverage in the case of services. However, the classic Vinerian analysis suggests that wide PTAs covering a substantial amount of tariff lines also lead to a substantial trade diversion. Therefore, quite understandably, Members lack the incentive to urge a very strict interpretation of the rules on PTAs. Taking into account the economic theory on trade diversion, the poor enforcement of the rules on PTAs should thus maybe not be considered a one-sided misfortune.[91] Keeping in mind the necessity in guarding the principal rules of Art. XXIV and Art. V to prevent at least the worst types of cherry picking to the detriment of multilateral commitments, the *de facto* approach between the requirement of full implementation of the rules and complete latitude may be a well-placed compromise.

This thesis does not attempt to answer the question of whether PTAs should be shunned or embraced but rather to bring more focus on what is happening in practice. The thesis gives a picture of the level of liberalization reached in a sample of EIAs. Even if the Art. V requirements are too ambiguous to give strict guidelines as to the exact content and liberalization level of EIAs, they do point us towards a clear direction. The rules call for a substantial sectoral coverage and elimination of substantially all discrimination. These are therefore the two starting points for our empirical analysis. We argue that each EIA can, and should be, scrutinized with these two criteria in mind. Whereas no concrete values for 'substantial' can be set, Art. V makes clear that real, cross-the border liberalization is required. In a world where trade liberalization is currently happening mostly through PTAs, the requirement for wide and deep liberalization is more necessary than ever to avoid a complex web of narrow agreements focusing on selected areas only.

We emphasize that different methodologies may be used to analyze EIAs. The results of such analyzes can all feed into the discussion on preferentialism. In general, profound and extensive information of existing PTAs is needed for a more informed discussion. As noted by Wang, a focus on legal compliance issues helps to shed light on how EIAs can be better reviewed in the WTO and feed into the multilateral trade regime. As a result, best practices may be fostered in this regard.[92] Pascal Lamy has pointed out that the provisional establishment of the Transparency Mechanism "may pave the way for non-litigious deliberations that could build confidence and understanding among members regarding the motives, contents and policy approaches underpinning regional

[91] See Mavroidis (2010) and (2011).
[92] Wang 2012, 399.

initiatives, leading over time to a shared vision and reinforced legal provisions".[93] The kind of deliberation referred to by the former Director-General requires in-depth information of the content and coverage of PTAs. This thesis provides some useful tools for such deliberation with regard to EIAs.

4. Preferentialism in services – are services special?

i. Particularities of going preferential in services

The share of trade in services in global cross-border trade is approximately 20 per cent. This is in stark contrast to the importance of the service sector in national economies.[94] The discrepancy reflects the difficulties in trading services across borders.[95] It is noteworthy that Mode 3 (commercial presence) covers approximately 50 per cent of international trade in services.[96] Trade in services is therefore, in practice, much about foreign investment. As pointed out by Fink and Jansen, this is one of the reasons why the perceived wisdom about regional integration coming from traditional trade literature does not necessarily apply to preferentialism in services.[97]

In general, the study of services liberalization can be considered more challenging than the study of trade in goods. Whereas goods trade is liberalized primarily through tariff cuts and elimination of goods-specific regulatory barriers, deep liberalization of services involves a scrutiny of the entire national regulatory framework. Given the broad modal coverage of the GATS, which extends, *inter alia*, to factor movements, i.e. capital and labour, services trade touches upon more complicated issues than goods trade. This complexity is reflected in the lack of coherent theory of services trade liberalization in academic research.

Trade diversion is usually considered to be significant if participating countries have had a high level of external protection prior to the establishment of a PTA. For PTAs concerning goods this concern has become less topical in the post-Uruguay Round era when the level of duties has, for most products, been reduced to low levels.[98] For trade in services, however, the concern is still very

[93] WTO 2011, 4.
[94] Services represent about two-thirds of global GDP and over 70 per cent of GDP in most developed countries. World Bank data on services, available at http://data.worldbank.org/indicator/NV.SRV.TETC.ZS (accessed on 15 July 2016).
[95] Fink and Jansen 2009, 224.
[96] Magdeleine and Maurer (2008)
[97] Fink and Jansen 2009, 224.
[98] Mavroidis, Bermann, and Wu 2013, 155-156.

valid. The level of liberalization reached since the conclusion of the GATS in 1995 is modest and the barriers to trade in services are still high. There are big differences between the different modes under which services are traded. Therefore, the motivations of countries to liberalize services trade also vary between the modes. Incentives to grant better access to foreign investment under Mode 3 are not necessarily similar to the incentives that an enhanced movement of service suppliers under Mode 4 may offer, or a better access for online services for example. Moreover, the applicable regulations tend to vary greatly depending on the mode of delivery.

Many scholars and practitioners consider that preferentialism in the field of services is likely to be less harmful than in the field of goods. Finck and Molinuevo summarize three basic reasons for this. First, there is the issue of domestic stocktaking. Second, services regulations are often applied in a non-discriminatory manner. The third reason are the liberal rules of origin that are set out in Art. V GATS and also typically applied in EIAs.[99]

The first reason, domestic stocktaking, refers to the positive spillover effects from PTA to WTO negotiations. According to Finck and Molinuevo, such effects may be more important in services than in goods. Services negotiations require a resource-intensive stock-take of all such domestic laws and regulations that might be considered to affect trade in services. Governments that have carried out a comprehensive analysis of their domestic regulatory framework may be better prepared for services negotiations also in other contexts, particularly in the WTO. EIAs may therefore "play a useful role in overcoming 'informational' obstacles to further multilateral integration".[100]

The second reason behind the less dangerous character of service preferentialism lies in the way regulations are typically applied in practice. Behind-the-border regulations are relevant in goods and services trade alike. In the field of services, however, regulations are the only form of protection. The lack of tariffs means that a central, discriminatory means of protection is completely absent in trade in services. This has important implications for the liberalization of services considering that origin-based discrimination is often hard or at least unpractical to implement through domestic regulation. Adapting one's internal service-related regulation depending on the origin of the service supplier is more difficult to accomplish and can be welfare-reducing as a

[99] Fink and Molinuevo (2008).
[100] *Ibid.*, 668.

whole.[101] As is noted by Miroudot et al. (2010), such a practice can create economic distortions that can further translate into productivity losses.[102]

Miroudot and Shepherd note that overall the concept of preferences is not easy to tackle in the context of services trade considering that many service-related measures are not really prone to discrimination between domestic and foreign suppliers. They give the examples of market regulations introducing rules on prices, access to networks or increasing the powers of a competition authority. Such regulations equally benefit domestic and foreign services suppliers. As they note, it is not possible to create a more competitive market for domestic suppliers only. Foreign suppliers would have to be totally excluded from such a market.[103]

Countries therefore often apply the same rules to services and service suppliers of all countries without differentiating between their MFN and PTA partners.[104] Naturally, domestic suppliers may be treated more favorably *de jure* or *de facto* as many service-related rules require nationality, residency or country-specific qualifications. For foreign service suppliers, they often prove equally burdensome for all of them.

Nevertheless, discriminatory application of domestic regulation to service suppliers of different origins is not impossible. Even if governments typically abstain from applying different sets of regulation depending on the origin of the service supplier, some of the most restrictive measures are applied on a preferential basis only. Such restrictive preferential measures are most easily applied under Modes 3 and 4. Miroudot and Shepherd note that discriminatory measures usually appear in the form of foreign equity restrictions, labour market tests for the entry of natural persons and the recognition of qualifications. But, as they note, even in these areas, not all countries introduce discriminatory measures.[105]

[101] With this type of legislation we mean all generally applicable regulation that applies to service suppliers in the territory of a country (to nationals and foreigners alike). Whereas MA limitations are quantitative, this type of regulation is qualitative in nature. Generally, genuine liberalization of internal service-related regulation often happens through unilateral reforms and not through trade negotiations. The preferential treatment of service suppliers of any specific country is thus not usually in a central role when new service-related regulations and reforms are put in place. See Bosworth and Trewin (2008).
[102] See Miroudot, Sauvage, and Sudreau 2010, 9. As an example they mention the promotion of a competitive market in telecoms where the facilitation of new entrants through regulation will benefit all companies.
[103] Miroudot and Shepherd 2014, 16.
[104] This is different under the so-called Mode 4 of the GATS, which involves the cross-border movement of natural persons supplying services. Different conditions are generally applied to nationals of different states. The analysis of liberalization of Mode 4 requires methods somewhat different from other modes of delivery under the GATS. Chapter IV of the thesis deals with this problem.
[105] Miroudot and Shepherd 2014, 16.

Undertakings originating in EIA partners may sometimes be allowed to benefit from preferential, and often earlier, access to the market. In such a case, preferential liberalization may exert more durable effects on competition than in the case of goods. For instance, if second-best suppliers obtain a first-mover advantage, it may result in the country being stuck with such suppliers even if liberalization was subsequently carried out on an MFN basis. The establishment of preferences may thus result in entry by inferior suppliers.[106] As noted by Sauvé and Shingal, in the field of services, the sequence of liberalization matters more than in goods.[107]

EIAs sometimes include certain harmonization or coordination of regulatory measures, which may benefit their service suppliers in comparison to service suppliers originating in countries with differing regulatory standards. However, regulatory coordination between EIA partners may have positive effects as well. Sometimes regulatory changes may create schemes that benefit not just the preferential partners but all foreign suppliers.[108]

In addition to the benefits of domestic stocktaking and the non-discriminatory application of services regulation, the third essential element in the less-risky character of EIAs are the liberal rules of origin. Such rules are necessitated by Art. V:6 GATS that requires service suppliers also from countries outside the EIA to benefit from the agreement as long as they are established in one of the parties and engage in substantive business operations in their territories.[109] Rules of origin formed in accordance with Art. V:6 help to attenuate the so-called 'stumbling bloc' effect of PTAs.[110]

In the case of goods trade, rules of origin are typically based on a value-added criterion. Only goods which have sufficient value added within a specific territory (thus are sufficiently transformed) are eligible for preferential treatment. The design of rules of origin for services trade is essentially different. Instead of targeting the service and its transformation within the relevant territory, they focus on the characteristics of the service supplier. Jansen points at two reasons behind the differences in rules of origin in manufacturing and services. First, the nature of services trade

[106] Winters 2008a, 223-224. For economic considerations on services preferentialism, see especially Mattoo and Fink (2002) and Hoekman and Sauvé (1994b).
[107] Sauvé and Shingal 2011, 954.
[108] WTO 2011, 54.
[109] In accordance with Art. V:6 GATS, service suppliers of other Members constituted as juridical persons under the laws of a party to an EIA must be entitled to treatment granted under such agreement, provided that they engage in substantive business operations in the territory of the parties to such agreement.
[110] Fink and Jansen 2009, 248.

significantly differs from goods trade and thus the rules of origin for services make references to issues such as place of incorporation, particular ownership or control and the level of business operations within a specific territory. Value-added rules are inappropriate for services where only under Mode 1 the service alone is crossing the border. Secondly, the rules of origin in manufacturing and services do not always serve the same purpose. In services, rules of origin similarly delimit the extent to which non-members may benefit from the EIA but they also pursue goals that are more related to regulatory issues than economic interests. Therefore, rules of origin are sometimes constructed in a way that allows for more regulatory oversight within the EIA or domestically.[111]

ii. The lack of market access discipline in Art. V GATS

EIAs tend to follow the disciplines of the GATS in their design: they generally include provisions similar to at least Art. II (MFN), Art. III (Transparency), Art. VI (Domestic regulation), Art. XVI (MA), Art. XVII (NT) and Art. XIV and XIV bis (general and security exceptions) of the GATS. Similarly to the GATS, Members typically undertake their EIA commitments in respect of both MA and NT. It is, however, noteworthy that Art. V GATS does not include any MA discipline: it does not require any specific level of liberalization as regards the various, mostly quantitative, limitations included in Art. XVI GATS.

This is reflected in the wording of Art. V that places the emphasis in a specific EIA's analysis to the level of non-discrimination granted to one's partners. Requiring MA commitments from EIA partners would not be desirable, as countries would in that case be incentivized to apply different MA conditions to different trading partners. Relaxed quotas and other quantitative limitations in EIAs could lead to a more restrictive trading environment towards countries outside the EIA. Service suppliers from EIA partner countries would have less restrained access to each other's markets whereas outsiders would be subject to stricter requirements in the form of a higher number of discriminatory quotas and other quantitative restrictions. As a consequence, service suppliers from MFN countries would suffer while EIA service suppliers would enjoy a more favorable operating environment through more open MA conditions.

[111] Jansen 2008, 139-140. Jansen notes that in a number of sectors, such as the financial sector and telecommunications, regulation plays a crucial role in guaranteeing the efficient functioning of the markets. The policy-makers must therefore make sure that trade liberalization does not jeopardize the regulation of relevant markets. In some cases, rules of origin are designed for protectionist purposes. For example, the condition that owners or managers of foreign companies are domestic may reflect the intention to ensure that their decisions reflect the interest of the domestic establishment and not those of holding companies situated outside the EIA territory.

As Fink and Jansen note, preferential liberalization of services may create a long-term trade diversion effect.[112] In service markets, high location-specific sunk costs and network externalities can give first-movers a durable advantage. Second-best service suppliers may thus take over the market and will not be replaced by first-best suppliers from outside the EIA when trade is eventually liberalized on an MFN basis. Even short-term preferences can thus be detrimental as they have long-term effects.[113]

Preferential MA conditions can take the form of bigger quotas and more relaxed conditions as to the types of legal entities. They may also waive otherwise applicable economic needs tests. Also, a limited number of licenses may be made more easily available to preferential partners and the numbers of their personnel may be unlimited.[114] The creation of preferential MA conditions can thus significantly alter the conditions of competition to the benefit of service suppliers from an EIA partner country as others may in practice be blocked from the market due to later arrival. Even if such policies may not applied widely in practice, it may be considered whether Art. V has been designed in a way that deliberately does not put emphasis on the liberalization of MA conditions.

In contrast, the requirement of elimination of discrimination towards one's EIA partner is potentially less harmful as it is more likely to benefit also those service suppliers who come from countries outside the EIA. Differentiation among foreign suppliers is more easily carried out with regard to MA conditions as various limitations on the number of services suppliers, economic needs tests and other MA requirements usually involve some type of case-specific discretion.

Considering that MA limitations tend to be the most harmful types of limitations, it can nevertheless be asked why Art. V does not include any discipline on MA at all. If the discipline existed, it could require the elimination of substantially all MA limitations (in addition to the requirement to eliminate substantially all discrimination). Such a requirement could be seen as a counterpart to the requirement of elimination of duties with respect to substantially all the trade between parties to CUs and FTAs under Art. XXIV:8 GATT. The negotiation background of Art. V

[112] "Trade diversion" is a term originally coined by Jacob Viner. In his groundbreaking work of 1950 Viner analyzed the effects of PTA on economic welfare. He labeled those conflicting forces as "trade creation" and "trade diversion". See Viner (1950).
[113] Fink and Jansen 2009, 230. The authors point out that the potential for trade diversion effects greatly depends on the rules of origin adopted by an EIA.
[114] Especially self-regulated industries tend to have *numerus fixus* constraints on new entry (certain professions). See Hoekman 1995, 30.

does not reveal any specific reason for this – actually, we have not identified any specific reason for the neglect of a MA discipline in Art. V either in literature or through various discussions with specialists who were observing the GATS negotiations. As to the MA discipline in Art. XVI of the GATS, there is a wide array of opinions as to its reach and dimensions, especially as a result of the *U.S.-Gambling* dispute.[115]

A close observer of the GATS negotiations has noted that, in his view, one of the underlying and also explicit purposes of Art. XVI was to reform domestic service markets. At least for such countries that were expecting the GATS to induce domestic liberalization, and not just trade liberalization, Art. XVI clearly covered not only discriminatory but also non-discriminatory MA measures.[116]

One option is thus to consider whether the lack of a MA discipline in Art. V is related to the perceived function of Art. XVI as a vehicle of domestic liberalization. In such a case there would be less reason to include a MA discipline in the rules on EIAs, which are primarily targeted to ensure a high level of non-discrimination between the participating countries. As we already proposed above, an explicit encouragement towards taking commitments on quantitative limitations in the form of a MA discipline could lead to quotas and other numerical limitations being taken on a preferential basis. That type of preferentialism can be considered especially harmful in the field of services.

Due to the absence of a specific MA discipline in Art. V, Members appear free to include MA limitations in their EIAs. They are, however, restricted by the requirement to eliminate discrimination in the sense of NT as that requirement applies to such MA limitations that are prescribed or implemented in a discriminatory manner.[117] Already this has a restrictive effect on the use of MA limitations, as Members may be reluctant to formulate MA limitations that they would have to extend also to their own service suppliers.[118]

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[115] *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Report of the Appellate Body, WT/DS285/AB/R, circulated 7 April 2005. For a discussion on the scope of Art. XVI GATS (the GATS discipline on MA), see Pauwelyn (2005) and Mavroidis (2007).

[116] Interview with Hamid Mamdouh, Director, Trade in Service Division, WTO Secretariat, 31 January 2013.

[117] It should be noted that subsection (f) of Art. XVI:2 refers to limitations that are by their nature discriminatory (limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment).

[118] In light of the *U.S.-Gambling*, Art. XVI covers also non-discriminatory measures that are in conflict with a Member's MA commitments. A Member may, however, choose to formulate its commitments in a discriminatory way or leave a specific sector completely unbound. Under Art. V, however, Members are restricted as the EIA should have a wide sectoral coverage and eliminate "substantially all" discrimination.

Some commentators have argued that Art. XVI should encompass discriminatory MA limitations only.[119] If this was the case, the reason for the lack of a MA discipline in Art. V could be quite straightforward: since Art. V requires the elimination of discrimination there would be no reason for it to include specific rules for the scheduling of discriminatory MA limitations. The majority opinion, however, appears to be that Art. XVI covers discriminatory and non-discriminatory measures alike. This is also the WTO Secretariat's view[120] and, importantly, it has been confirmed by the result in *U.S.-Gambling*.[121] However, when the negotiation history of Art. V is considered, it cannot be ruled out that some Members might have understood Art. XVI to cover discriminatory measures only.

The following chapter analyses the core requirements of Art. V GATS. The purpose is to address the lack of comprehension over the rules on PTAs and provide a legal interpretation of the GATS rules in light of the wider understanding of preferentialism in services that has been introduced in this chapter. The interpretation is then used as the basis for the empirical analysis of EIAs, which makes the part II of the thesis. The underlying idea is that new proposals for the interpretation and analysis of PTAs should actively be put forward to avoid a situation where the trade community simply stops caring about the WTO rules and their enforcement altogether. The move to the so-called "mega-regionals" is already a reality. Even if the risks relating to preferential treatment in services are lower than in the field of goods, it is still important to keep track of the current developments and analyze to what extent new agreements open up trade in services.

[119] See especially Mavroidis (2007).
[120] See page 4 of the 2001 Scheduling Guidelines (S/L/92, 28 March 2001). The guidelines have been prepared by the WTO Secretariat and adopted by the Council on Trade in Services.
[121] The AB did not deal with this question explicitly but since the zero-quota was applied also to domestic service suppliers, the AB must have considered Art. XVI to cover non-discriminatory measures as well. The issue of discrimination came up only under the analysis of the availability of general exceptions (Art. XIV GATS).

III. SUBSTANTIVE ANALYSIS OF THE RULES ON EIAs

1. The background of Art. V GATS

International trade in services was not born at the advent of the GATS: services had been traded for centuries before the talks on a multilateral services agreement were initiated during the Uruguay Round. Moreover, regulation of services trade had started to take place on a bilateral and a regional level already prior to the conclusion of the GATS. In addition to the EU[122], where detailed provisions on regional services liberalization existed since the EEC Treaty, the U.S. pioneered by including specific service disciplines in its FTA with Canada, concluded in 1987. The U.S.-Canada FTA contained provisions on trade and investment in services and even covered temporary movement of businesspersons.[123]

In addition to bilateral and regional initiatives, industry-specific standard setting contributed to the increasing service flows already prior to the GATS. For example, the International Telecommunications Union, the Basel Committee on Banking Supervision and the International Aviation Organization established standards and administered agreements concerning the services provision in their respective fields. Moreover, specific schemes existed with respect to certain services. The U.S., for example, had been active in concluding treaties of Friendship, Commerce and Navigation (FCN) that regulated, among other issues, aviation, shipping and communications services.[124]

The Uruguay Round, however, marked the debut of comprehensive trade negotiations across a wide spectrum of services sectors. Since then, trade in services has become an indispensable element of bilateral, regional and multilateral efforts of trade liberalization.[125] A significant phenomenon in the development of world trade since the establishment of the WTO in the mid-1990s is that the number of PTAs has rapidly multiplied. Today, the majority of PTAs include rules on services.[126] The stalled state of multilateral trade negotiations has driven countries to seek further opening of goods and services trade also through more innovative arrangements. A selected group of countries

[122] The term EU refers to all historical denominations (EEC, EC) of the European integration process.
[123] Marchetti and Mavroidis 2011, 690.
[124] *Ibid*.
[125] Marchetti and Roy 2008, 1.
[126] According to the WTO's RTA database, over 130 EIAs and over 260 PTAs in total were notified and in force as of May 1, 2016. See https://www.wto.org/english/tratop_e/region_e/region_e.htm. The numbers do not include accessions to existing PTAs.

keen to proceed with further liberalization of services is currently negotiating a cross-regional services agreement outside the WTO. If a critical mass of participants is achieved, the so-called Trade in Services Agreement (TiSA) will possibly be applied on an MFN-basis.[127] The increasing number of EIAs and the TiSA project show the willingness of Members to engage in the liberalization of services where very little has happened in the multilateral scene since the first commitments taken upon the entry into force of the GATS.

Whereas the U.S. demand was crucial in putting services on the multilateral negotiation agenda, the EU's role was instrumental in shaping the final agreement.[128] The EU's own example was also essential in the formulation of the GATS rules on EIAs. The EEC Member States had detailed provisions for the liberalization of services trade in place; they needed to be taken into account in the formulation of the GATS provisions. Since preferential liberalization of trade in services was already a reality during the negotiations of the GATS, the agreement had to provide a possibility for their existence. According to Stephenson, during the Uruguay Round negotiations, a draft provision on preferential trade for services was introduced by the EU and supported by Switzerland, Australia, and New Zealand. The proposed draft was included in the "Dunkel text" of December 1991. At the end of 1991, the footnote to Art. V:1(a) was added. The final version of Art. V found in the GATS is almost identical to that set out in the Dunkel draft.[129]

The GATS allows the conclusion of EIAs that ensure comprehensive trade liberalization in trade in services. In contrast to the two strict forms of PTAs allowed under the GATT (CUs and FTAs), the drafters of the GATS opted for a broader term of 'economic integration'. The more open-ended formulation made it possible to abstain from specifying the exact type of liberalization required from EIAs.[130] Nevertheless, Art. V GATS includes a set of legal criteria that all EIAs should respect.

[127] The economic case for a plurilateral agreement on services is clear. Lee-Makiyama notes that neither is such an idea a novelty. The GATS itself started as a plurilateral agreement that was created by a group of countries that chipped in their commitments until the collective offer was good enough to be extended to all members of the WTO on the principle of MFN. See Lee-Makiyama 2012, 3.
[128] According to Marchetti and Mavroidis, the U.S. conditioned its participation in the Uruguay Round upon the inclusion of services trade in the negotiation agenda. The EU's priority was to defend its Common Agricultural Policy and only gradually it became a key participant in the services liberalization and drafting of the GATS. See Marchetti and Mavroidis 2011, 694-695, 716.
[129] Stephenson 2000a, 88.
[130] Munin 2010, 26.

Since few border measures are applied in the field of services, the concept of discrimination, or rather non-discrimination, forms the core of services liberalization. As will be shown in this Chapter, the requirement of non-discrimination with respect to domestic policies is the very essence of Art. V GATS.

Assessing the level of elimination of discriminatory measures is necessarily more qualitative in nature than assessing the level of duties. Notwithstanding the most blatant violations of MFN and NT, determining what constitutes discrimination requires discretion. This normally involves a value judgment. If one is to avoid empirical results being skewed by personal judgment, one has to take a relatively restrictive approach to the concept of discrimination or at least be very clear in defining one's methodology and its consistent application the deeper to the sphere of *de facto* discrimination one is willing to venture.

The present Chapter interprets the various elements of Art. V. The following, methodological part of the thesis is designed based on the understanding of Art. V proposed here. However, as we argue that the rules on EIAs cannot be interpreted in a vacuum, an overall understanding of Art. V must necessarily be inspired by empirical findings. Any empirical analysis of existing agreements shows the challenges and limitations present in a legal interpretation of the GATS rules on EIAs, and in the interpretation of the EIAs themselves.

As the external effects of EIAs are outside the scope of this thesis and its empirical analysis, our interpretation of Art. V is focused on the first two paragraphs of Art. V: the so-called internal trade requirement and the possibility to take into account a wider process of economic integration or trade liberalization between the EIA partners. The concept of non-discrimination is dealt with in detail, as it is the fundamental building block of Art. V:1. In addition, we add to earlier research by taking up the issue of internal differentiation in a specific Member's (in this case the EU's) services commitments and argue that such differentiation, which is due to the Member's regional subdivision, must be taken into account in the analyses of EIAs under the Art. V criteria.

2. The legal requirements for economic integration agreements (EIAs)

i. The main ingredients of Art. V

The GATS discipline on EIAs is almost five decades younger than the corresponding discipline for CUs and FTAs under the GATT. However, the two disciplines share common elements. Similarly to Art. XXIV GATT, Art. V GATS includes an internal requirement (facilitation of trade between the parties to the EIA), an external requirement (prohibition to raise the level of barriers applicable to outsiders) and a notification requirement.[131] In addition, Art. V includes features that are specific to EIAs only. This is arguably due to the different nature of preferentialism in goods and services, as well as to changes in Members' opinions towards PTAs in general. When the GATS was negotiated, PTAs were already part of the everyday practice of the Members. This was likely to call for more flexibility in the design of the discipline. In addition, as viewed in the previous chapter, services preferentialism can be considered less harmful than preferentialism in the field of goods. This may have encouraged a looser attitude to be reflexed in Art. V.

The flexibility is especially present in the provision of Art. V:2, which allows the EIA's contribution to the wider economic integration between its participants to be taken into account. Even more leeway is available to developing countries. Under the provision of Art. V:3, in EIAs involving developing countries, the condition regarding the elimination of discrimination is more flexible in accordance with the level of development of the countries concerned (both overall and in individual sectors and subsectors).

Unlike Art. XXIV GATT, Art. V also includes a specific rule regarding the origin of the service suppliers. Suppliers originating in Members outside the agreement will still benefit from the EIA if they have substantive business operations within the territory of one of the members to the agreement. As discussed in the previous chapter, this potentially greatly extends the field of application of EIAs.

[131] Since the CRTA has de facto been restricted to a mere transparency exercise, the notification requirement now mainly serves for transparency purposes. Those who believe that the requirements of Art. V have not been met, have the possibility to challenge the consistency of the notified EIA with the multilateral rules before a WTO Panel. Mavroidis, Bermann, and Wu 2013, 781.

The entire provision of our center of focus, Art. V:1 (including footnote (1)), reads as follows:

> *Art. V: Economic Integration*
>
> *1. This Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement, provided that such an agreement:*
>
> *(a) has substantial sectoral coverage (1), and*
>
> *(b) provides for the absence or elimination of substantially all discrimination, in the sense of Art. XVII, between or among the parties, in the sectors covered under subparagraph (a), through:*
>
> *(i) elimination of existing discriminatory measures, and/or*
>
> *(ii) prohibition of new or more discriminatory measures,*
>
> *either at the entry into force of that agreement or on the basis of a reasonable time-frame, except for measures permitted under Art.s XI, XII, XIV and XIV bis.*
>
> *(1) This condition is understood in terms of number of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the a priori exclusion of any mode of supply.*

The first paragraph, the *chapeau* of Art. V, gives reason to conclude that EIAs may take the form of either a bilateral or a plurilateral trade agreement between two or more countries and within one or more regions. The same provision implies that Art. V applies to both current and future EIAs. Further, the reference to 'parties' as participants to the agreements implies that the scope of the provision is not limited to agreements between Members but applies also to agreements between Members and non-Members.

To qualify as an EIA under Art. V, the agreement must satisfy three main requirements.[132] First, an EIA must have substantial sectoral coverage (paragraph 1(a)). Secondly, it must provide for the absence or elimination of substantially all discrimination between or among the parties and in the sectors covered under the first requirement (paragraph 1(b)). Finally, in addition to these two requirements designed to facilitate trade between the parties to the agreement (often referred to as the 'internal requirement'), an EIA must satisfy an external requirement (paragraph 4): it must not

[132] EIAs liberalizing trade in services are admitted "provided that" the conditions of the first paragraph are met. The language makes clear that the conditions are mandatory. Cottier and Molinuevo 2008, 130.

raise the overall level of barriers to trade in services with regard to any Member outside the agreement.

The AB has not yet had the occasion, or desire, to interpret Art. V. The only reference to Art. V so far has been in the Panel Report of *Canada-Autos*. The case dealt mostly with measures relating to trade in goods but the Panel concluded that a specific measure was inconsistent also under Art. V:1(b) since it accorded an advantage to U.S. firms and excluded other firms in another party to the EIA.[133]

In *Turkey-Textiles*, the AB indicated that the words "shall not prevent" in the opening paragraph of Art. XXIV.5 GATT mean that the GATT does not make impossible the formation of a customs union. The same, presumably, applies to FTAs under Art. XXIV GATT. It is noteworthy that Art. V GATS employs the same words "shall not prevent" in its *chapeau*. Since the context of Art. XXIV GATT and Art. V GATS is identical (both provisions justify an exception to certain WTO obligations for Members engaged in deep economic integration with their preferential trading partners), one may assume that the AB's reasoning in *Turkey-Textiles* is in this respect applicable also to EIAs concluded under Art. V GATS.

There is, however, a certain difference between Art. XXIV GATT and Art. V GATS regarding the legal effects of a PTA. Both disciplines include a notification requirement but Art. XXIV contains stronger language than Art. V on the 'conditionality' attached to the time frame for implementation. If a Working Party were to find that the plan or schedule for an interim agreement for a PTA is not likely to result in a GATT-consistent CU or FTA, its members "shall not maintain or put into force [an] agreement if they are not prepared to modify it in accordance with ... the recommendations." No such provision exists in Article V.[134] This difference has, however, become redundant as practically no multilateral control of PTAs exists any longer. The formal discussions on legal consistency of PTAs have been replaced by the Transparency Mechanism of 14 December 2006

There are commentaries on Art. V in a number of textbooks and articles dealing with services trade. Their analysis, however, typically stays on a relatively general level. A deeper analysis is provided by Cottier and Molinuevo who engage in an extensive legal commentary on the Art. V

[133] Panel Report in *Canada-Automotive Industry*, paras. 10.265-10.272.
[134] Hoekman and Sauvé 1994a, 60.

disciplines.[135] Also Stephenson provides a useful analysis and points to a number of challenges in effectively applying these disciplines.[136]

Art. V is explored at some length also in Hoekman and Sauvé (1994). They consider Art. V conditions to be weaker than those applying in the GATT context and point out that the weakness of the disciplines on EIAs implies only a limited constraint on 'strategic' violations of the MFN obligation.[137]

We will now proceed to a more detailed analysis of the two core requirements of Art. V:1: the requirement of 'substantial sectoral coverage' and the elimination of 'substantially all discrimination'. In addition, we will shortly explain the other principal criteria of Art. V: the possibility to pay attention to 'a wider process of economic integration or trade liberalization' (Art. V:2), the flexibility provided for developing countries (Art. V:3), the external requirement (Art. V:4) and the criteria for rules of origin in EIAs (Art. V:6). Even if the focus in the thesis and especially in the empirical analysis is on the first paragraph of Art. V, these other criteria are essential elements in services preferentialism and they inform the overall interpretation of Art. V.[138] Art. V:5 (renegotiation of commitments) and Art. V:8 (lack of compensation for trade benefits accruing from the EIA to non-parties) are not dealt with as they are not essential elements in a compliance analysis. Art. V:7 (notification and examination procedure) has been taken up in Chapter II.

ii. Substantial sectoral coverage (Art. V:1(a))

The term 'substantial' in Art. V defines sufficient coverage in terms of sectors covered as well as non-discrimination provided. It appears in two different forms: 'substantial' (Art. V:1(a)) and 'substantially' (Art. V:1(b)).

According to Art. V.1(a), an EIA must have substantial sectoral coverage. The requirement is designed to prevent the conclusion of numerous sector-specific agreements that would pick and

[135] Cottier and Molinuevo (2008).
[136] Stephenson (2000a). See also Stephenson (2000b).
[137] Hoekman and Sauvé 1994a, 71.
[138] The basic parameters for the empirical analysis are built on Art. V:1. However, elements arguably belonging under 'a wider process of economic integration' in line with Art. V:2 are also included in the analysis.

choose from areas of mutual interest. The goal is trade promotion while containing trade diversion to which randomly concluded sectoral agreements are likely to contribute.[139]

The use of the word 'substantial' gives reason to conclude that EIA partners are never under an obligation to liberalize trade in all service sectors. The requirement can be contrasted to Art. XXIV:8 GATT. In that context, in *Turkey-Textiles*, the AB noted that 'substantially all the trade' as mentioned under Art. XXIV.8 GATT is 'something considerably more than merely *some* of the trade'.[140] Mitchell and Lockhart conclude that the relevant amount of trade must, therefore, fall somewhere between *some* and *all* trade among the parties to the PTA. However, since there is no clear definition or agreement about the meaning of the word 'substantial' under the GATT, the practice under the GATT does not shed light on the word's definition either in the context of the GATS.[141]

Similarly to Art. XXIV.8 GATT, Art. V.1(a) GATS focuses on the level of liberalization rather than the type of trade affected.[142] Unlike paragraph 8 of Art. XXIV, Art. V.1(a) GATS, nevertheless, gives some further guidance for its interpretation. It includes the following footnote:

> *"This condition is understood in terms of number of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the a priori exclusion of any mode of supply."*

However, the precise application of these additional elements remains unclear. Fink and Molinuevo point out several essential questions. First, how to understand 'volume' of services trade. Is it opposed to the 'value' of such trade? At what level of disaggregation should the count of sectors be made? And, moreover, can entire sectors be excluded from the agreement? If so, at which point would an exclusion of a sector reduce the volume of trade to a non-substantial level? As noted by

[139] Cottier and Molinuevo 2008, 132. Ortino and Sheppard cite the WTO Secretariat and conclude that the 'substantial sectoral coverage' appears to have been designed to prevent Members from using the Art. V exception for economic agreements that are limited to one specific mode of supply, such as cross-border services (mode 1) or foreign direct investment (mode 3). See Sheppard and Ortino 2006, 211 in Bartels and Ortino (2006). On governments' incentives to exclude certain economic sectors from liberalization in FTAs, see Grossman and Helpman (1995).
[140] *Turkey - Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, Report of the Appellate Body, circulated 22 October 1999, para. 48 (original emphasis).
[141] Mitchell and Lockhart 2009, 96; 111.
[142] *Ibid*., 89.

the authors, the lack of sufficiently disaggregated data on trade in services further complicates the determination of volumes and value of trade covered by a specific EIA.[143]

Under the GATT, various suggestions regarding 'substantially all the trade' have been made, also among the Members. According to one of such propositions, a threshold could be set at 95 per cent of all tariff lines at the six-digit level. That starting point could then be complemented by an assessment of trade flows at various stages of the implementation of the PTA.[144] The proposal did not receive support.

With regard to Art. V, there has been a variety of opinions regarding the scope of 'substantial sectoral coverage' among the Members. Because of the wording 'number of sectors' in the footnote to paragraph 1(a), it has been suggested that not all sectors need to be covered under an EIA to meet this criterion. Otherwise the text would have clarified that all, and not a 'number of', sectors had to be covered.[145] Some Members have argued that the exclusion of certain sectors and volume of trade would be permissible, given that the footnote to Article V.1(a) only condemns the *a priori* exclusion of a mode of supply, not specific sectors. Some have emphasized that the number of exclusions to the sectoral coverage must be restricted and not further limited by the volume of affected trade and the modes of supply.[146]

According to another line of argumentation, the word 'substantial' does not allow any, or at least any essential, sector to be excluded from an EIA. If a major sector were excluded, it would need to be considered in conjunction with the modes of supply and the volume of trade involved.[147]

Other issues brought up by the Members include the degree of detail in the examination of EIAs and the coverage of modes of supply. The first issue relates to the correct level of examination: it can be done either sector-by-sector, subsector-by-subsector or on a disaggregated basis. The coverage in terms of modes is seen to relate especially to Modes 3 and 4. For some Members, both investment and the movement of natural persons need to be included. At least one delegation has

[143] Fink and Molinuevo 2008, 660.
[144] Australia, WT/REG/W/22/Add.1, paras. 9-10.
[145] EC, WT/REG50-52/M/2, para. 16; New Zealand, WT/REG/W/22, para. 17. The opinions presented here have been expressed within the Committee on Regional Trade Agreements (CRTA). A synopsis of such systemic issues is included in WTO (2000).
[146] New Zealand, WT/REG/M/22, para. 17.
[147] Argentina, WT/REG/M/22, para. 16.

proposed that certain aspects exempted from the GATS through the MNP Annex need to be included in an EIA for consistency with the GATS.[148]

Whereas certain rough or approximate values for 'substantial' may be given, it is hard to see how to settle on any specific value. Such a set value may be even harder to conceive in respect of sectoral coverage than in respect of elimination of discrimination. The requirement to achieve substantial sectoral coverage presumes that we know the overall number of service sectors that exist. This is not really the case.

The GATS does not impose any specific set or list of sectors on the Members but they are free to use their own categorizations. Most Members have opted to use the WTO's Sectoral Classification List that is used as a basis of our empirical analysis.[149] However, they are not required to do so. And even if the Members typically do use the recommended list, they sometimes combine or divide certain sectors or sub-sectors to their own choosing. As witnessed by our analysis, also the EU Member States do this in certain instances even though generally they tend to follow the Secretariat's list.

Another issue relates to the emergence of new services sectors. Technological progress brings about challenges in the classification of new services. Should completely new services, or services that used to be delivered under a specific mode only, count towards the overall number of sectors towards which the 'substantial' sectoral coverage of a specific EIA should be compared? In this respect EIAs following the so-called negative listing model do better as they automatically extend all relevant disciplines to new services that were not yet developed or commercialized at the time of the conclusion of the agreement. Only such current or future measures or policy areas that have been specifically excluded from liberalization would remain outside the scope of liberalization in such new services sectors.[150]

In the present thesis the EU's EIAs are analyzed on the basis of the Sectoral Classification List. This makes it possible to compare the EU's EIA commitments to most other Members' commitments as the majority of them use the same list both in their EIAs as well as under the

[148] Japan, WT/REG/M/22, para. 18. More on this issue in Chapter IV concerning Mode 4.
[149] Services sectoral classification list, Note by the Secretariat, WTO document MTN.GNS/W/120, 10 July 1991.
[150] Robert and Stephenson 2008, 562.

GATS. However, it should be kept in mind that the overall number of sectors may, and is likely, to rise in the future and methodologies should be adapted to take them into account.

iii. Absence or elimination of substantially all discrimination (Art. V:1b)

The second sub-paragraph of Art. V:1 requires that an EIA provides for the absence or elimination of substantially all discrimination in the sectors covered by the agreement. This is to be attained either through "(i) elimination of existing discriminatory measures, and/or (ii) through prohibition of new or more discriminatory measures". There are two interlinked issues that complicate the interpretation of the provision.

Firstly, there is no common understanding of the link between 'substantial sectoral coverage' (subparagraph 1(a)) and 'substantially all discrimination' (subparagraph 1(b)). One view is that a sector would not be considered covered unless it satisfied also the requirements under Art. V:1(b). Another view holds that the two tests need to be distinguished. According to this view, the requirement of substantial sectoral coverage merely determines the proportion of sectors or subsectors subject to liberalization. Art. V:1(b), on the other hand, would apply as a separate requirement by determining the general degree of discrimination that is allowed in the liberalized sectors. It would seek to determine to what extent policy measures retaining a degree of discrimination in the liberalized sectors and modes are acceptable.[151]

The fact that Art. V:1(b) calls for the absence or elimination of discrimination in the sectors covered under subparagraph (a), would give reason to conclude that a sector should be considered covered only if it provides for full non-discrimination. However, in light of the Member's practice where hardly any service sector in any EIA provides for full (or even close to full) non-discrimination, we suggest that the two requirements could be treated separately. At least such an approach would be more informative than disregarding each sector where discrimination is not eliminated. Thus, each EIA could be given two separate scores under Art. V:1: one for sectoral coverage and another one for the level of non-discrimination (in the sectors covered). This is the approach in our empirical analysis on the EU's EIAs. Each sector and sub-sector gets two scores: one for being included with at least some level of a commitments (coverage) and another one for the elimination of

[151] WTO 2000, 20.

discrimination.[152] Both scores are expressed as percentage values depending on how many EU Member States have bound themselves.

The second challenge of interpretation relates to the question of whether the parties to an EIA must indeed eliminate substantially all discrimination or whether a mere standstill agreement could be considered sufficient. Hoekman and Sauvé have argued that a standstill is enough. They consider that the drafting of such a minimalistic requirement was linked to the outcome of the 1989 Canada-U.S. FTA which largely consisted of a standstill agreement applied to a finite list of covered services.[153]

Cottier and Molinuevo, on the other hand, argue that the answer should be 'no', because the introductory sentence of Art. V:1(b) specifically calls for the 'absence or elimination' of discrimination between the EIA parties. The options of (i) and (ii) are informed by this main obligation and need to be construed accordingly. In order to live up to the obligation, EIAs must abolish discriminatory measures where they exist and prohibit the future introduction of discriminatory policies in those sectors or sub-sectors where no discriminatory policies are maintained at the time of the conclusion of the EIA.[154]

We agree with the interpretation of Cottier and Molinuevo and consider that Art. V goes beyond a standstill and requires EIA parties to achieve a sufficient degree of rollback of protective measures. The provision of Art. V:1(b) needs to be read as a whole and in the light of its opening sentence that sets the required degree of liberalization, which is the *absence* or *elimination* of substantially all discrimination. We consider that the conjunction 'or' has been inserted in Art. V:1(b)(i) for such cases where parties have already prior to the EIA eliminated substantially all discrimination between them at least in certain sectors. In such a case, the parties are requested not to introduce any new or more discriminatory measures. As noted by Cottier and Molinuevo, the standstill

[152] See Annex 3 with the model review sheet. The types of discrimination counted for in the analysis are explained later in this Chapter. A detailed explanation of the methods of the empirical study is provided in Chapter V.1.
[153] Hoekman and Sauvé 1994a, 62.
[154] Cottier and Molinuevo 2008, 136. In general, the majority view in literature does not seem to support the existence of a mere standstill obligation. With regard to NAFTA, there was an interesting debate on this issue between the EU, U.S. and Mexico. The U.S. supports the view of Hoekman and Sauvé (1994) while the EU is behind the view put forward in here. Mexico appears to aim at a compromise by suggesting that the EU and U.S. delegations were speaking about the same thing – "that the result of the negotiations was to comply with the requirements of Art. XVII in substantially all the sectors". See "Examination of the North American Free Trade Agreement," Note on the meeting of 24 February 1997, WT/REG4/M/4, CRTA,16 April 1997, paras. 19-23.

obligation also ensures that the absence of discrimination will be maintained in sectors and modes that have previously been subject to unilateral liberalization.[155]

The absence of substantially all discrimination does not need to be provided at once. Art. V:b includes the possibility of eliminating discrimination on the basis of a reasonable time-frame. Therefore, discrimination does not have to be eliminated on day one but a time-frame must be set. In the discussions of the CRTA, Members have suggested periods ranging from five to ten years.[156] In any case, we consider that keeping in mind the purpose of Art. V:1, any open-ended undertaking to eliminate discrimination at a later stage should not suffice but a specific, 'reasonable' time-frame must be set.

In addition to these more technical issues, a central element in Art:1(b) relates to the meaning of 'discrimination'. Discrimination in WTO law covers two concepts: MFN treatment and national treatment (NT). With regard to the first, it is unclear what type of MFN treatment is required by the provision. Does the provision allow for an EIA to include a conditional MFN provision or different degrees of MFN treatment depending on the parties? Is gradual implementation of MFN treatment possible?[157] As an example, in the EU-CARIFORUM Economic Partnership Agreement ('EPA'), the commitments related to the presence of natural persons are not covered by the MFN clause at all. Compulsory provision of MFN could mitigate the possible harmful effects of proliferating PTAs. However, since Art. V requires the elimination of discrimination in the sense of NT only, we conclude that MFN as regards other EIAs is not expected from partners to an EIA. The existence of a general MFN discipline in the EU's EIAs is nevertheless noted in our empirical analysis as it tells about the overall depth of integration between the partners to the agreement.

With regard to the second aspect of discrimination, or rather non-discrimination, Art. V is clearer. It makes an explicit reference to the NT discipline of Art. XVII. Even though one could argue that it is not entirely clear whether exactly similar treatment is required under both provisions, such an argument is in our opinion far-fetched. There could hardly be any clearer indication of equivalence

[155] *Ibid*., 137. But even if one were to adopt the interpretation proposed by Hoekman and Sauvé, Art. V would create the obligation to "freeze" the situation across services sectors. Thus, a 'standstill' would need to have substantial sectoral coverage.
[156] WTO 2000, para. 84. Some Members have supported a ten year period since it would coincide with that provided for integration in the are of goods set out in Art. XXIV:5 and as explained in paragraph 3 of the Understanding on the Interpretation of Art. XXIV GATT 1994. Para. 3 of the Understanding specifies that the period should exceed ten years only in exceptional cases and subject to the provision of full explanation to the Council for Trade in Goods.
[157] Munin 2010, 231.

in interpretation than the specification that the discrimination should be eliminated 'in the sense of' Art. XVII.

Art. XVII requires that subject to any conditions and qualifications set in a Member's Schedule, "each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers." The second paragraph specifies that the requirement may be met by according either formally identical or formally different treatment to that accorded to the Member's own like services and service suppliers. This implies prohibition of both *de jure* as well as *de facto* discrimination.[158]

Some EIAs go beyond the obligations entailed in Art. XVII and engage in deeper forms of economic integration. The objective of deeper liberalization of services trade can be advanced through various regulatory cooperation instruments such as agreements on mutual recognition (MRAs) and harmonization.[159] Since the liberalization of services is primarily concerned with regulatory issues, the deeper the integration, the more issues there are that tend to fall outside NT and instead enter the sphere of non-discriminatory domestic regulation. Deep regulatory cooperation typically ends up eliminating discrimination but may, in addition, lead into an acceptance of certain parts of the service supplier's domestic regulatory framework as sufficiently adequate for the receiving Member's regulatory purposes. Our view is that because of the direct reference to Art. XVII, Art. V does not require more than elimination of discrimination in the sense of NT. Art V. nevertheless duly recognizes deeper integration: the second paragraph gives the possibility to take a wider process of economic integration into account in the analysis of EIAs. However, since the possibility is tied to evaluating whether the conditions under paragraph 1(b) are met, it would seem that Art. V:2 is recognizing elements that fall *short* of non-discrimination, not elements that go *further* than the provision of NT. The provision is thus giving leeway to EIAs that do *not* eliminate discrimination as extensively as required by Art. V:1.

[158] Munin 2010, 160. The coverage of *de facto* discrimination was confirmed by the AB in *EC-Bananas III*. See *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, Report of the Appellate Body, WT/DS27/AB/R, 9 September 1997. Defining *de facto* discrimination is challenging, as well as understanding what type of measures count as de facto discrimination. This issue is taken up below as well as in Chapter V.1 on methodology.

[159] As Trachtman notes, for mutual recognition to succeed, a satisfactory level of essential harmonization must have already taken place. Only then can countries agree on a minimum level of regulation. See Trachtman 2014, 110. Instead of mutual recognition, we can also talk about mutual acceptance of 'equivalence'. A MRA or mutual acceptance of 'equivalence' may be possible without straightforward harmonization but such outcomes are possible only once the parties are satisfied that at least the minimum requirements of domestic regulation are fulfilled, in a different but equivalent way, by the other party's regulation. Beviglia-Zampetti 2000, 308 in Cottier, Mavroidis, and Blatter (2000).

A possible interpretation is that Art. V:2 simply recognizes the overall aim of deeper economic integration in a specific EIA. While such an agreement may contain regulatory elements of deep, non-discriminatory integration in certain sectors (for example, through MRAs or even through harmonization), the agreement may still fall short of NT in some other sectors. Therefore, we consider that the mapping of instruments of deep economic integration, such as MRAs and harmonization that go beyond the requirement of non-discrimination, is in any case relevant as they might affect the overall discrimination analysis of an EIA.[160]

An EIA that does not reach the threshold of 'substantiality' may still be considered to respect the requirements of Art. V if its overall purpose is to engage in a deeper economic integration over time. Therefore, Art. V:2 must necessarily allow for a certain time-frame during which the wider process of economic integration or trade liberalization can take place. The possibility for a 'time-frame' is mentioned also under Art. V:1. The elimination of substantially all discrimination should take place either at the entry into force of that agreement or on the basis of 'a reasonable time-frame'. Since Art. V:2 allows for additional elements to be taken into account in evaluating the fulfillment of conditions under Art. V:1, the 'wider process' should be interpreted to allow for economic integration or trade liberalization to take place over a time period that is more extensive than 'a reasonable time-frame' that is available already under the conditions of Art. V:1.

Another unclear issue relates to the list of exceptions included in Art. V.1(b). Measures permitted under Articles XI, XII, XIV and XIV bis are excluded from the requirement of elimination and prohibition of discriminatory measures. Emergency safeguard measures (Art. X), on the contrary, are not mentioned in the list. A question often put forward thus is whether EIA partners retain the right to maintain them.[161] As these provisions act as exceptions, a Member is exempted from its obligations under a specific commitment in case it successfully invokes one of the provisions.

Let us assume that a Member in an EIA with another Member has prescribed a specific commitment in the field of professional services, more specifically concerning medical doctors. In

[160] A separate issue is whether MRAs concluded in the context of EIAs should still be notified to the WTO in accordance with the procedure of Art. VII and whether they should provide adequate opportunity to any other Member to indicate their interest in participating in the arrangement. Since Art. V does not require Members to engage in any MRAs or other deep regulatory instruments, a possible interpretation is that the independent obligations under Art. VII still apply. As noted by Mathis, to the extent that Art. V notifications incorporate recognition instruments falling within the meaning of Art. VII, it is up to the Members affected by them to bring cases to dispute settlement accordingly. See Mathis 2006, 98.

[161] See similar discussion on Art. XXIV.8 GATT in Mitchell and Lockhart 2009, 98-99.

the commitment, in respect of Modes 3 and 4, the Member has included a language requirement (complete fluency in the local language). In such a scenario it could possibly be argued that such a strict language requirement should be considered as a measure that is *de facto* discriminatory (at least if applicable across the board with no possibility for exemptions) and thus subject to elimination under the criteria of Art. V. However, in this specific case, the Member might be able to invoke Art. XIV:b and claim that the language requirement is necessary to protect human health since patients must be able to communicate with their doctor in their own language. An additional justifying argument could be that doctors must be able to effortlessly communicate with pharmacies and medical authorities. Assuming that the Member's claim was considered legitimate and it would satisfy all the requirements under one of the justifications of Art. XIV, and the *chapeau*, the language requirement would, in that specific case, not affect the Member's compliance with Art. V:1(b).[162]

The obvious problem is that an abstract, *ex ante* analysis cannot take such situations into account. The general exceptions, as well as security exceptions and restrictions to safeguard the balance of payments, are available as exceptions and thus do not need to be anticipated in one's schedule. Certain commitments falling short of NT may thus lower the 'compliance score' of the EIA even if they were in an *ex poste* situation (in dispute settlement) considered justified under one of the general exceptions. Since the consideration of EIA commitments in this light is purely speculative, any compliance analysis is necessarily somewhat skewed in this regard.[163]

Munin argues that Art. XVI (market access) restrictions are not covered by the requirement to eliminate substantially all discrimination since Art. V.1(b) requires elimination in the sense of Art. XVII only. Therefore, according to this interpretation, the depth of MA concessions is left to the discretion of the parties and only a wide scope of coverage of an EIA in terms of sectors is required. As has already been discussed above, we share this opinion and argue that Art. V is only concerned with the elimination of discrimination. This issue, however, invokes an important interpretative question relating to certain MA limitations: should discriminatory measures listed under Art. XVI.2 (joint venture requirements and foreign equity ceilings) be considered as measures 'in the sense of

[162] In order to comply with the requirements of Art. XIV, the measure would have to satisfy the necessity test, which requires, among other criteria, the Member to demonstrate that no other reasonably available alternative measure were at the Member's disposal. In this specific example of a language requirement for medical doctors, a possible alternative, less trade-restrictive measure could be cooperation with local doctors or the requirement of intermediate language skills instead of complete fluency. On the criteria of Art. XIV GATS, see Cottier, Delimatsis, and Diebold 2008.

[163] The same applies to Art. XXIV:8 GATT since duties and other restrictive regulations of commerce must be eliminated *except*, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX).

Art. XVII' to which the provision applies?[164] In our opinion, that should definitely be the case considering that in addition to being MA limitations, such measures clearly discriminate against foreign services suppliers when they limit the amount of foreign investment (but not domestic investment) and impose an obligation of cooperation with local companies (when they, on the contrary, can operate freely).

Among the Members, the central issue with regard to Art. V:1(b) has been the extent to which discriminatory measures are allowed. Most remarks have been made on the scope of the list of exceptions included in the provision. At least three Members have argued that the list is not exhaustive.[165] Divergent views have been expressed especially on safeguard measures. Some Members have argued that they can be applied on an MFN basis also between parties to an EIA, whereas some consider that safeguard measures should not be applied at all. A relevant question is also what other discriminatory measures, besides those falling under the enumerated Articles, should be allowed under an EIA.[166]

Some Members have paid attention to the difficulty of developing elaborate interpretations or formulas to clarify the requirements relating to EIAs, referring especially to the difficulty in arriving at a percentage-type test for quantitatively measuring 'substantially all discrimination', similar to the test used in defining 'substantially all the trade' in goods PTAs. As a result, it has been suggested that each EIA needs to be examined on its own merit.[167]

iv. Wider process of economic integration (Art. V:2)

According to Art. V.2, the relationship of the EIA to a wider process of economic integration or trade liberalization may be considered. The provision allows for an overall assessment of the agreement. One could consider a situation where a new Member State joins the EU. Under Art. V:2, the final result and the essence of the economic integration could possibly be taken into account.[168] It is important to note that such a wider process may only be considered in evaluating whether the EIA provides for the absence or elimination of substantially all discrimination, but not in regard to the requirement of substantial sectoral coverage.

[164] Munin 2010, 233.
[165] Argentina, Japan and Korea, WT/REG/M/22, paras.16, 18 and 20.
[166] Hong Kong, China, non-paper entitled Systemic Issues arising from Article V of the GATS, Section 2.
[167] New Zealand, WT/REG/M/22, para. 17 and WTO 2000, 34.
[168] Munin 2010, 235.

The Members themselves have proposed the 'wider process of economic integration' could be construed as one involving the elimination of barriers also in goods; the drafting history of this paragraph is said to support such an argument. The harmonization of domestic regulation among parties to an EIA could also contribute to such a process.[169] The meaning of the provision has been also been perceived as relating at to the interpretation of 'substantially all the trade' under Art. XXIV GATT and that of a 'reasonable time frame' in prohibiting new or more discriminatory measures under Art. V.1(b).[170]

As already discussed above with regard to the requirement of elimination of discrimination, the provision of paragraph 2 may allow for consideration to be given to economic integration going beyond non-discrimination. One example of such deeper integration are recognition agreements, which we consider to be one demonstration of a wider process of economic integration to be taking place and thus relevant for the analysis of an EIA under Art. V. A different angle to this question is possible as well. Trachtman considers that Art. V does not provide an exception for agreements on equivalence or harmonization from other GATS requirements. He argues that in light of the *Turkey-Textiles* case, the exception of Art. V is, similarly to the exception of Art. XXIV GATT, only available with respect to measures that are *necessary* in order to form an EIA, or a FTA/CU.[171] On the other hand, as argued by Klamert, the broad wording of Art. V supports a more extensive interpretation of this provision than Art. XXIV that was at issue in *Turkey-Textiles*. Art. V is not limited to any specific integration model but seems to encourage flexibility in the design of EIAs through the provision of Art. V:2. We agree with Klamert who considers that the strict standard applicable to CUs and FTAs would not make much sense under Art. V as it would have the effect of blocking many measures under deep EIAs from the start.[172] Thus, MRAs and harmonization should be possible through an EIA even if such arrangements were not strictly necessary for the formation of the EIA. In our view, the notification requirement (together or separately with the

[169] WTO 200034; WT/REG/W/34, para. 11; Japan, WT/REG/M/23, para. 31; EC, WT/REG/W/35, para. 11.
[170] Korea, WT/REG/M/21, para. 20.
[171] Trachtman 2014, 122. A similar view with regard to recognition agreements is put forward by Marchetti and Mavroidis 2012, 425-427.
[172] Klamert 2015, 62. It should be noted that the "necessity" test formulated in *Turkey-Textiles* to determine the legitimacy of a CU/FTA still requires further clarification. The language and approach of the AB are strongly reminiscent of the more famous necessity test under Art. XX GATT. However, as noted by Bartels, any analogy to the Art. XX necessity test includes various complications in the application of the Art. XXIV defence. The most striking complication is the absence of any catalogue of objectives for the achievement of which a trade measure taken in the context of forming a PTA might be "necessary". In *Turkey-Textiles*, the AB assumed that it was permissible for the European Communities to seek to avoid trade diversion while concluding a PTA with Turkey but the AB did not explain why precisely was this objective considered legitimate. See Bartels 2004, 269.

EIA), as well as the offering of adequate opportunity to outsiders to participate to any recognition measures under Art. VII still apply. In this sense, we agree with Marchetti and Mavroidis who argue that the establishment of an EIA cannot provide legal shelter from requests of extension of recognition agreements from Members outside the EIA.[173]

v. Special and differential treatment (Art. V:3)

In the GATS, developing countries do not benefit from an "enabling clause" but are subject to the same requirements under Art. V as developed countries. However, Art. V:3 allows for flexibility in the application of the substantive liberalization requirements when developing countries are parties to EIAs, "in accordance with the level of development of the countries concerned, both overall and in individual sectors and subsectors". Unlike the flexibility provision of Art. V:2, flexibility for developing countries is allowed also in regard to sectoral coverage. However, it could be argued that there is a higher degree of flexibility available towards Art. V:1(b) than Art. V:1(a) since Art. V:3(a) states that 'flexibility shall be provided... particularly with reference to subparagraph b'.

In addition, Art. V:3(b) allows developing countries concluding EIAs among themselves to give more favorable treatment to firms that originate in parties to the agreement. It therefore allows for discrimination against undertakings originating in countries outside the agreement, even if they were established within the territory of one of the parties.

Unlike under the Enabling Clause, Art. V:3 is not limited to EIAs among developing countries. Flexibility also applies to EIAs between developed and developing countries and operates as a limitation on the principle of reciprocity present in Art. V:1(b).[174]

vi. The external requirement (Art. V:4)

The so-called external requirement of Art. V is set in paragraph 4. It provides that EIAs must not "raise the overall level of barriers" to trade in services with respect to third parties. The assessment is made in comparison to the level applicable prior to such an agreement and in respect of each

[173] Marchetti and Mavroidis 2012, 427.
[174] Cottier and Molinuevo 2008, 141. The authors remark that some Members have suggested that the flexibility would extend to developed countries too when they participate in EIAs with developing countries. As the authors note, such an interpretation would lead to the awkward result that developed countries were required to provide for greater liberalization in agreements among themselves and maintain more restrictions towards their developing EIA partners.

sector and subsector covered by the agreement. The provision builds upon the tradition of Art. XXIV:5 GATT and aims to prevent parties from embarking on so-called "fortress" economic integration.[175] The coverage of 'barriers' is not defined and it is therefore unclear whether the provision covers measures subject to the general disciplines of the GATS (e.g. MFN, domestic regulation and transparency), or merely specific commitments under Art. XVI and XVII.[176]

The interpretation of the external requirement includes similar challenges to the quantification of the internal requirement. As noted by Stephenson, the difficulty of calculating the overall level of barriers to services trade in effect before and after the formation of an EIA makes it almost impossible to translate this requirement in practice.[177] Therefore, other approaches would need to be developed. Among the Members, there has been a proposition to require that an EIA did not reduce either the level, or growth, of trade in any sector or subsector below a historical trend.[178]

One way to analyze at least perceived changes to the overall level of barriers towards third parties is to review how many negotiations based on Art. XXI ("Modification of schedules") have been initiated between third parties and the EIA parties. The modification of schedules has been topical between the EU and third countries after the accessions of new Member States to the Union.[179]

vii. Rules of origin (Art. V:6)

Art. V:6 includes the requirement to establish a liberal rule of origin for EIAs. The benefits of the EIA must be extended to any service supplier of any Member that is a "juridical person constituted under the laws of a party", provided that such a service supplier "engages in substantive business operations in the territory of the parties to such agreement". As has already been discussed in Chapter II, this feature of Art. V is unparalleled in the area of goods trade and is one of the reasons

[175] Cottier and Molinuevo 2008, 144. In "fortress" integration, countries liberalize their internal trade but do so to the detriment of third parties by raising compensatory protection in relation to services/service suppliers from countries outside the EIA.
[176] *Ibid*.
[177] Stephenson 2000a, 96.
[178] Hong Kong, WT/REG/W/34, para. 13.
[179] See for example the Commission proposal COM/2013/0689/final where the Commission explains the changes relating to the modification of commitments in the schedules of the Republic of Bulgaria and Romania in the course of their accession to the European Union and asks the Council to authorize agreements in the form of an Exchange of Letters between the European Union and third countries who had submitted claims of interest. See also Jacobsson (2013) that analyzes the horizontal commitments of the EU's schedule on Mode 4 in the Doha Round services offers of 2003 and 2005. It is observed that due to the EU's desire to aim at a common offer in services, there are certain occasions where certain Member States' offers have either improved or deteriorated with the adoption of a more unified offer.

why preferentialism in services is potentially less harmful for outsiders than preferentialism in goods.

3. The elimination of discrimination in EIAs

i. The key obligation: non-discrimination

The essence of Art. V is the requirement of elimination of discrimination.[180] This is in contrast to the multilateral liberalization of services under the GATS. The Preamble to the GATS does not mention elimination of discrimination but merely calls, among other objectives, for progressive liberalization of services trade. The framework for such liberalization to take place over time is provided in Part IV of the GATS: under Art. XIX GATS, Members should enter into successive rounds of negotiations of specific commitments with a view to achieving a progressively higher level of liberalization. The GATS Preamble can be compared to the Preamble of the GATT 1994, which calls for the "elimination of discriminatory treatment in international commerce". Elimination of discrimination is thus one of the GATT's long-term objectives but a similar statement is lacking in the GATS.

There is thus a principal difference in the way multilateral and bilateral services negotiations should be conducted. The fact that non-discrimination has a key role to play in the GATS discipline on EIAs may give reason to suspect that GATS-compliant EIAs are possible between very trusting partners only. At least a certain level of similarity in cultural, political and economic backgrounds of the participating countries seems to contribute to a deeper integration in the field of services.[181]

The obligation to provide for a high level of non-discrimination (a 'substantial' level) brings with itself a certain challenge for any compliance analysis. Under the GATS, discrimination can exist only in a situation where the services and/or service suppliers under comparison are 'like'. The determination of the existence of discrimination thus requires a comparison of specific services and/or service suppliers to each other. This cannot be done in an abstract analysis of an EIA, and thus no completely accurate compliance analysis under Art. V can be concluded.

[180] Cottier, Delimatsis, and Diebold 2008, 317-318.
[181] On the relevance of the "trust theory of economic integration" in the EU and the WTO, see Lianos and Odudu 2012. One form of economic integration are mutual recognition agreements (MRAs). Marchetti and Mavroidis (2012) argue that MRAs in the WTO are frequently concluded between countries having a similar cultural background. Moreover, the majority have so far been signed across geographically proximate partners who usually also share the same language.

The question of likeness is only the first step in a discrimination analysis under Art. XXIV GATS. The finding of discrimination also requires a finding of 'a treatment no less favourable' than that accorded to one's own like services and/or service suppliers. The question of treatment, however, becomes topical only after likeness has been established.[182] In the field of services, the establishment of likeness and less favourable treatment can be a taunting task because governments can always invoke difference in treatment due to various regulatory distinctions. In the lack of any real-life service or service suppliers, we lack the means to carry out a full discrimination analysis. In the following sub-section, we explain how to approach this problem in an abstract, legal analysis of EIAs.

ii. Discrimination analysis in the EIA context

Non-discrimination entails the idea of a level playing field between domestic and foreign like products and services. The legal framework for the creation of such a playing field is set in Art. XVII GATS. Based on the rulings of the Panel and the AB in *EC-Bananas III*, we know that the following four cumulative elements need to present in a successful NT violation claim:

1) First, there needs to be a specific commitment in the relevant sector and mode of supply;
2) Second, there must be a measure *affecting* the supply of services in the sector and mode of supply concerned;
3) Third, the measure is applied to foreign and domestic *like* services and/or service suppliers; and
4) Fourth, the measure accords to foreign services and/or service suppliers *treatment less favourable* than that accorded to their domestic counterpart.

There is thus a four-prong test to establish inconsistency of a particular measure with Art. XVII GATS.[183] The existence of a specific commitment in a given sector is a factual issue. Even though interpretative problems are always present, in an *ex ante* analysis of services commitments we have to take the existence of a commitment as taken. We also have to assume that the scheduled measure is meant to affect the supply of services in the sector and mode concerned. If that were not the purpose, the measure would not have been prescribed. The two final elements, however, pose more

[182] For an analysis of the 'less favourable treatment' obligation, see Ortino 2008, 174 onwards in Andenæs and Alexander (2008). See also Krajewski and Engelke 2008, 409-416 in Wolfrum, Stoll, and Feinäugle (2008).
[183] Mavroidis, Bermann, and Wu 2013, 829.

difficulties for an abstract analysis of services commitments. We do not have any real-life services/service suppliers to compare to each other and we typically have very few details on the measure to estimate whether it accords less favourable treatment or not. This is a genuine problem because a conclusion one way or another may result in a false finding of discrimination or non-discrimination.[184]

As noted by Mattoo, the narrower the definition of likeness, the more likely is the possibility that measures will escape the Article XVII net.[185]. This issue was dealt with in the most recent WTO dispute settlement case in the services context, *Argentine – Financial Services*. The dispute concerned eight financial, taxation, foreign exchange and registration measures imposed by Argentina mostly on services and service suppliers from jurisdictions that did not, at the time, exchange information with Argentina for the purposes of fiscal transparency. In its ruling, the Panel found that the relevant services and service suppliers were 'like' under both Art. II:1 and Art. XVII of the GATS, because the eight challenged measures provided for differential treatment on the basis of the origin of the services and service suppliers at issue. The AB, in its ruling, pointed out that likeness may indeed be presumed where a measure provides for differential treatment based exclusively on the origin of the services and service suppliers concerned. The AB, however, found that in its analysis under Art. II:1, the Panel did not make a finding that the distinction between cooperative and non-cooperative countries in the measures at issue was based exclusively on origin, and that the Panel erred in finding likeness "by reason of origin" in the absence of such a finding. Instead, the Panel should have undertaken an analysis of likeness on the basis of various criteria relevant for an assessment of the competitive relationship of the services and service suppliers of cooperative and non-cooperative countries. Because the Panel's finding of likeness under Art. XVII was based on its finding of likeness under Art. II:1, the AB found that the Panel erred also in its analysis under Art. XVII. Consequently, the Panel's findings of likeness of the services and service suppliers at issue under Articles II:1 and XVII of the GATS were reversed.[186]

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[184] The establishment of likeness and less favourable treatment require a case-by-case analysis. In *Japan-Alcoholic Beverages II*, regarding Art. III:2 GATT, the AB came to the conclusion that "the interpretation of the term [likeness] should be examined on a case-by-case basis". According to the AB, this allows a fair assessment in each case of the different elements that constitute a "similar" product. See *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Report of the Appellate Body, circulated 4 October 1996.

[185] Mattoo 1997, 122 and Mattoo 2000, 55. For a comprehensive analysis in the literature, see Diebold (2010).

[186] *Argentina – Measures Relating to Trade in Goods and Services*, WT/DS453/AB/R, Report of the Appellate Body, circulated 14 April 2016. In the same report, the AB concluded that, where a measure is inconsistent with the non-discrimination provisions of the GATS, regulatory aspects or concerns that could potentially justify such a measure are more appropriately addressed in the context of the relevant exceptions and not in the context of the analysis of 'treatment no less favourable' under Art. II:1 and Art. XVII. Likeness in the services context has also been dealt with in *EC-Bananas III* (para. 7.322) and *China–Publications and Audiovisual Products* (paras. 7.975–7.976). See *China –*

Because the AB did not draw any conclusions on the question of whether the services and service suppliers of cooperative and non-cooperative countries were like or not, it was left unclear to what extent a country's cooperation with other countries on tax matters may affect the position of its services and service suppliers in a discrimination analysis. What the AB said was that the differing treatment between cooperative and non-cooperative countries inherent in the eight measures at issue was origin-related; however, it is not origin in itself that determines which countries are on the "cooperative" list but rather those countries' respective regulatory frameworks. The AB thus left the door open to the possibility of taking certain regulations, or rather the lack of such regulations, of the country of origin into account in the determination of 'likeness'. In this case, such regulations did not even relate to the quality of the services or the service suppliers but rather to their operating environment. However, the AB abstained from explaining how 'likeness' should be defined.[187]

As a result of differences between goods and services, WTO-compliant, unilateral and extra territorial application of one's regulations may be more feasible in the field of services than in the field of goods. One could, for example, ask if two service suppliers are like if one of them respects the rules of the core ILO Conventions with respect to employed personnel supplying services and the other one does not.[188] Could the service supplier in another Member be considered 'unlike' to one's domestic supplier if the foreign supplier's employees had working conditions considered degrading in the other Member? One may also ask to what extent the 'method' of achieving one's

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Measures Affecting Trading Rights and Distribution Services for Certain Publication and Audiovisual Entertainment Products, WT/DS363/AB/R, Report of the Appellate Body, circulated 21 December 2009.

[187] The AB and panels have abstained from taking a clear stand on 'likeness' in the services context also in earlier instances. In *EC-Bananas III*, the panel accepted that foreign and domestic services and services suppliers were like without justifying its decision in detail. Its restraint is obvious in its infamous conclusion of likeness according to which "... to the extent that entities provide these like services, they are like service suppliers" (Panel Report, para. 7.322). In *Canada-Autos* the same conclusion (this time with respect to Art. II GATS) was repeated with the addition that it was applied for "the purpose of the case" (*Canada - Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R, Report of the Panel, circulated 11 February 2000, para. 10.248). In the same case, the Panel also introduced the concept of "likeness across modes" (Panel Report, para. 10.307). The Panel also found that in the absence of "like" domestic service suppliers, a measure by Canada could not be found to be inconsistent with the NT obligation (Panel Report, paras. 10.283-10.289). The Panel thus seemed to assume that the absence of like suppliers implied the absence of like services. The correlation between the likeness of services and service suppliers is one of the key questions in the likeness analysis. In general it appears that the determination of likeness, as well as the application of the NT principle as a whole, gives rise to a wider range of questions and uncertainties under the GATS than under the GATT. See Cossy 2006, 2.

[188] The question addresses a situation where the foreign service supplier's employees do not access the employment market of the other Member. In such a situation, the employment laws of the home state usually apply. Under Mode 4, the receiving state may in certain cases require the application of its core labor laws to the employees of a foreign service supplier (especially in the case of contractual service suppliers). This question is examined in more detail in Chapter IV dealing with specific issues relating to Mode 4.

professional capacity, such as the quality of one's educational institute, may affect the evaluation of 'likeness'.[189]

The liberalization of services has an important particularity. In contrast to the GATT whose disciplines are confined to the cross-border flow of goods, the GATS extends to measures affecting both the services (i.e. the product) and the service supplier (i.e. the producer). The extension of coverage to service suppliers is significant considering that many typically national regulations, such as quality standards, are based on the characteristics of the supplier.[190] This is in contrast to goods where the AB has, at least so far, drawn a line between the methods of production and the product itself. In simple terms, the basic method of differentiation has been that only such methods of production that leave a trace on the product can be taken into account in the discrimination analysis.[191] In the field of services, the competence and the performance of the 'producer', the service supplier, are inherently linked with the result of the 'production' – the service. This means that there is possibly a wide scope for differentiation of like services and service suppliers based on characteristics attributable to the service supplier and the methods that the supplier employs while supplying the traded service.[192]

Mattoo explains the great role played by regulatory distinctions.[193] Even if cross-price elasticity, consumer choice and other case law -established factors would point towards likeness, nothing prevents a government from intervening and imposing a regulatory component on a given service or service supplier and thus differentiating the foreign supplier from a domestic one. Moreover,

[189] There is discussion of more meaning to be given to non-product related production methods and to the production environment also in the field of goods. For example, Cottier and Oesch argue that it is only a matter of time before human rights will inform the basis of definition for a like product, and "thus will relevantly and explicitly shape the operation of non-discriminatory treatment". See Cottier and Oesch 2011, 12.

[190] Lim and De Meester 2014, 1-2.

[191] So far, the AB has considered that the method of production cannot affect the analysis of 'likeness', unless the method affects the product itself. However, the placement of import controls on products produced according to a specific method of production may be allowed if justified under one of the general exceptions of Art. XX GATT. In *US-Shrimp/Turtle* the AB made clear that Members have the right to take trade action to protect the environment (in particular, relating to the conservation of exhaustible natural resources). According to the ruling, measures relating to the method of harvesting sea turtles could be considered legitimate under Art. XX(g). The U.S., however, lost the case, not because it sought to protect the environment but because it discriminated between Members by violating the chapeau of Art. XX. See *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R, circulated 12 October 1998. On the notions of non-product related and product related processes and production methods ('PPMs'), see Joshi 2004, 69, 73-74. Joshi defines non-product related PPMs as 'measures that relate to processes that do not impart any distinguishing characteristics to the final product' (at p. 73). See also Kudryavtsev 2013, 40-47 in Epps and Trebilcock (2013).

[192] According to Krajewski, the extension of the NT obligation to service suppliers can be interpreted as allowing for a certain degree of differentiation according to the production process methods (PPMs) of the service in regulatory measures. See Krajewski 2003, 97.

[193] Mattoo 2000, 73-75. Mattoo is writing on likeness in the context of Art. II (MFN) but similar conclusions on likeness can be drawn under Art. XVII. See also Mavroidis, Bermann, and Wu 2013, 833-834.

likeness is of course not the sole ground for regulatory distinction; 'less favourable treatment' is the other one. The finding of discrimination between like services/service suppliers similarly requires a case-by-case analysis of the treatment granted.[194] In addition, as we have discussed above, there is also the possibility of recourse to one of the justifications under Articles XI, XII, XIV and XIV bis. No matter where the burden of proof is placed, getting a final answer in an unclear situation is possible through dispute settlement only.[195]

iii. An analysis of discriminatory measures in specific commitments

Because of the above-mentioned problems in an abstract, empirical analysis of EIAs, we consider that the most legitimate way to conduct such an analysis is to focus on explicitly discriminatory measures only.[196] Measures constituting *de facto* discrimination have to be largely omitted in an *ex ante* analysis of an EIA. Instead, the focus must be on the most detrimental types of discrimination, those constituting direct (or nearly direct) discrimination.[197] For the analysis to be possible, a likeness between foreign and domestic services and/or service suppliers in the scheduled commitments must be assumed. We consider this reasonable as otherwise no discrimination analysis is possible to carry out. In any case, legal analyses of commitments under trade agreements always include a certain margin of error since they remain on an abstract level.

[194] In this regard, Mattoo notes that the sequential procedure of first determining likeness and than less favourable treatment is actually not ideal in the services context but leads into a legal cul-de-sac. Instead, he proposes simultaneous consideration of the degree of unlikeness and differences in treatment. See Mattoo 2000, 73.

[195] Discussing likeness under Art. II (MFN), Mattoo argues that in case a Member refuses access to another Member's service or service supplier the burden of proof should be placed on that Member. The Member would thus be requested to demonstrate why the foreign and domestic services/service suppliers are not like. Mattoo 2000, 75. As to seeking clarity through dispute settlement, a certain reservation is warranted. As the scant case law (most recently in *Argentina-Financial Services*) on 'likeness' under the GATS demonstrates, the meaning and scope of the concept remains largely unresolved.

[196] Other methodologies are, of course, available, in other types of approaches (e.g. econometric analyses). However, since our approach is legal and our intention is to analyze EIA commitments directly in the light of the Art. V criteria, a strict methodology is required.

[197] This can be equated to *de jure* discrimination. A measure that openly links a difference in treatment to the origin of the service or services and therefore modifies the conditions of competition in favour of domestic services and services suppliers is generally considered *de jure* discrimination. See Krajewski and Engelke 2008, 410. As for *de facto* discrimination, there is no positive concept for its determination and various views have been put forward in the literature. However, it can be considered to cover measures which do not distinguish services/services suppliers based on their origin but which with respect to a "neutral" criterion modify the conditions of competition in favour of domestic services and/or service suppliers. *Ibid*., 411. See also Krajewski 2003, 113, where he argues that only those measures which can at least theoretically be scheduled should be seen as discriminatory. This is because the possibility to schedule a *de facto* discriminatory measure only exists if the adverse effect on foreign services/service suppliers is foreseeable or can reasonably be expected.

In this type of abstract discrimination analysis, we divide the clearest, most explicit types of discriminatory measures in services trade into four different groups. These four groups consist of the type of measures that are taken into account in our empirical analysis.[198]

The first group covers all commitments that prescribe an 'unbound' in a specific sector or sub-sector. In substance, an 'unbound' means that the Member takes no commitment at all. It is the most straightforward limitation to NT as it entails the widest possible scope of discretion in the treatment of foreign services and service suppliers. Outside the general obligations that may apply across the sectors even when no specific commitments are undertaken, specific commitments that are left 'unbound' do not grant any guarantee of non-discrimination. Such "empty" commitments are thus always considered discriminatory.

The second group consists of measures that are discriminatory in the clearest sense of the word: they are applied to foreigners only. This category of measures is directly discriminatory as the basis for the application of the measures lies solely in the foreign origin of the service supplier. Naturally, measures that grant more positive treatment to foreigners than to one's own nationals are not of relevance here but only the type of measures that restrict trade in services.[199] Typical measures under this first category are discriminatory market access restrictions such as the requirement of a specific legal entity, limitations to numbers of foreign services suppliers and such economic needs tests (ENTs) that are applied to foreigners only. Other clearly discriminatory measures are foreigners' non-eligibility for subsidies, prohibition to acquire real estate, discriminatory taxes and discriminatory licensing and qualification requirements. With the last types of requirements, we refer to cases where licensing is required from foreigners only and cases where foreigners are required to have higher qualifications than one's own nationals.

[198] Our analysis of the types of measures to be considered as limitations to national treatment is close to that of Miroudot and Shepherd (2014). In their analysis of existing EIAs, they map commitments that are either 'full' (no limitation), 'partial' (some limitations listed), or 'unbound' (no commitment). 'Partial' commitments are broken down into nine different types of trade restrictive measures, four for market access and five for national treatments. See the "Typology of Limitations in Partial Market Access and National Treatment Commitments" in Miroudot and Shepherd 2014, 1770. The authors use a database developed at the OECD that covers all services agreements where an OECD economy, China or India is a party (Miroudot, Sauvage, and Sudreau (2010)). The database includes a similar analysis for commitments taken under the GATS. See also the illustrative list of frequently occurring limitations to the NT obligation published by the WTO Secretariat. It is included as Attachment 1 in the Scheduling Guidelines (S/L/92, 28 March 2001). The list gives examples of measures Members consider as possible violations of NT. Some of the measures discriminate overtly, while others appear to amount to *de facto* discrimination.

[199] Essentially, states have a sovereign right to treat their own products and nationals less favourably than imported products and foreign nationals (reverse discrimination, discrimination à rebours). See Cottier and Oesch 2011, 8.

The third group covers measures that relate to nationality. Such measures are also based on one's origin and can thus be seen as a sub-group of the second category of measures. However, they differ from the second group in the sense that they concern measures, which are not applied only to foreigners, but include a requirement concerning one's nationality. For example, a specific commitment under professional services may prescribe that companies acting in the field of auditing services must have in their board at least one person with the nationality of the Member in question. In contrast to the second group of measures, the measures belonging to this category are applied indistinctively to all service suppliers, but since they are based on nationality, they are clearly discriminatory.

The fourth group of considered NT limitations forms an exception to our otherwise strict approach. It consists of measures concerning one's residency. In trade law, residency requirements are typically considered to form a type of indirect, or covert, discrimination as they are not directly based on one's nationality.[200] However, because of how the GATS is structured, we consider residency requirements to be discriminatory but *only* with regard to Modes 1, 2 and 4. This is because the essence of these three modes is in that they enable the supply of services *without* residency. The requirement of residency would thus often strip a commitment under any of these three modes of its liberalization content. Although the measure does not formally distinguish service suppliers on the basis of national origin, it *de facto* offers less favourable treatment to foreign service suppliers because they are less likely to be able to meet a prior residency requirement than like service suppliers of national origin.[201] With regard to this group of measures, our analysis includes a certain margin of error but we consider that the margin of error would be more significant if residency requirements under Modes 1, 2 and 4 were not taken into account.

We do not take note of residency requirements under Mode 3 even if such requirements could potentially be considered discriminatory at least when they do not apply to the legal entity but to its personnel. For example, foreign companies established in the receiving Member may have board members or members of personnel that have their permanent residence in their country of origin. Requiring such persons to change their residence to the receiving Member may thus be seen as a restriction to the supply of services under Mode 3. However, if a similar residency requirement is

[200] Klamert 2015, 274-275.
[201] See the WTO Secretariat's Scheduling Guidelines, S/L/92, p. 6. In the Scheduling Guidelines it is explained that the need to schedule residency requirements should be decided on a case-by-case basis, and in relation to the activity concerned. For example, a residency requirement may be considered discriminatory when there is no justified need to live in the country as opposed to having a bare mailing address in the country.

applied also to legal entities of national origin, it is not directly based on the origin/nationality of the service supplier. Even though such requirement may potentially constitute a violation of the NT obligation (in case the requirement modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member), such a conclusion is not straightforward and arguably based on a case-specific analysis. Under Mode 3, the service supplier has a commercial presence in the receiving Member and, therefore, the local regulatory framework typically applies in its entirety (in the case of juridical person constituted under local laws) or at least to a larger degree than in respect of the other modes (in the case of branches and representative offices).[202] Thus, there is more leeway for residency-based measures under Mode 3 than under the other modes.

Notwithstanding the residency requirements (which are arguably a form of *de facto* discrimination), our analysis is thus limited to *de jure* discrimination. These types of discrimination can be considered to constitute the clearest violations of the NT obligation. Outside such direct forms of discrimination, we enter a far less certain ground. The more hidden types of discrimination are revealed only when reviewed in the context of a specific case.[203] Taking the example of qualification requirements, the requirement of a local qualification (such as a professional degree in the receiving state) may be considered discriminatory or non-discriminatory depending on whether service suppliers with and without the qualification can be considered like. In addition, the qualification requirement must modify the conditions of competition in favour of the Member's own services or service suppliers.[204]

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[202] See our analysis of the scope of Mode 4 in the following Chapter. There we advance the argument that one constitutive element of service supply under Mode 4 is that the service supplier (a natural or a juridical person) remains largely subject to the regulatory framework of the state of origin. Under Mode 3, the establishment of a commercial presence in the receiving state brings the service supplier deeper, or completely (depending on the legislation that is applied to different types of commercial presence), within the regulatory framework of the receiving state. Nevertheless, the discrimination analysis of residency requirements needs to be case-specific. Certain services may be practically impossible to provide without residence (e.g. daily postal delivery services), whereas certain others may require no residency or residency of a certain type of personnel only. In addition, in many occasions public policy concerns may justify the need of a local representative. Since it is often not possible to conclude whether such justified concerns are present in a residency requirement under a specific commitment, we have opted to disregard all residency requirements under Mode 3 (unless it is obvious that they are applied on a discriminatory basis).

[203] The situation can be contrasted to an analysis of a goods agreement in light of Art. XXIV GATT. Even though Art. XXIV requires the elimination of duties and other restrictive regulations of commerce on substantially all the trade between the parties, the analysis is, in practice, to a large extent limited to the elimination of duties. If there is an extensive amount of restrictive regulations of commerce left in place, such a situation is typically revealed only in practice.

[204] Members sometimes include in their schedules also measures that cannot easily be considered discriminator. This is probably a sign of lack of clarity over the borderlines between national treatment and domestic regulation. However, such over-scheduling may also be a smart policy as some of the measures that do not at first glance appear discriminatory between domestic and foreign service suppliers can be that in practice, depending on the way they are

The problems relating to the analysis of discriminatory measures in a schedule of specific commitments are taken up in mode detail in Chapter V.1 on Methodology.

Finally, it should be noted that the absence of 'substantially' all discrimination depends not only on sectoral commitments but also on crosscutting horizontal commitments. They pose an additional challenge for any empirical analysis as they often include discriminatory limitations that are applied to all or a significant part of services sectors (for example, subsidies available only to one's own nationals). This issue is taken up in mode detail in Chapter VI concerning the methodology of our empirical analysis.

4. Regional subdivision and EIA commitments

Research on services preferentialism has so far largely neglected the question of how to address a regional subdivision of a Member and the consequences it possibly has on that Members' services commitments. It is noteworthy considering that several Members have constitutional structures that give powers to states, regions or other local entities in the regulation of services.[205] The issue has, however, entered into spotlight in the currently ongoing trade negotiations, especially in those involving the EU and Canada (the CETA) and the EU and the U.S. (TTIP).

Regional powers are applied across various economic activities. For example, both in the EU and the U.S, technical regulations on products and processes to protect health, safety, consumers and the environment are set on federal, state, regional and even on local agency level. In the U.S., state regulation often coexists with federal regulation and thus imposes a double layer of regulatory requirements with a significant economic impact on business. In the EU, national (and several layers of sub-national) regulations are abundant, especially in the non-harmonized sectors.[206] Considering the various policy preferences and regulatory goals that are at play in economic activities concerning services, there can be significant differences in the ways they are regulated on different levels of government. The same applies to public procurement.[207]

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applied. Therefore the inclusion of such measures in a schedule releases the Member from its responsibility and gives it more leeway in the application of the measure.

[205] The issue of commitments/restrictions on the level of sub-central governments is particularly important for federal states, such as Canada, Australia and the U.S.

[206] Beviglia-Zampetti 2000, 315.

[207] See Woolcock and Grier (2015).

Such a variety in the internal regulations of a country, or a trading block in the case of the EU, can clearly be a hindrance to trade in services. Therefore, one of the explicit aims of the new generation trade agreements has become to include regulatory measures imposed on services not only on the level of the central government but also on regional levels.[208]

In the EU-Canada Comprehensive Economic and Trade Agreement (CETA), Canada has for the first time in its PTA history included a list of provincial and territorial non-conforming measures in the field of services and investments.[209] The Canadian provinces and territories are bound to regulatory *status quo* and have committed to providing to the EU the benefits of autonomous liberalization in a number of sectors (architectural, engineering, foreign legal consultancy, urban planning, tourism, business services).[210]

There is practically no literature on sub-central measures in services liberalization but Marchetti et Roy (2008) have paid some attention to the phenomenon. They have noted that a number of agreements using a negative-list approach do not include in their "List of existing non-conforming measures" such measures that are applied by sub-central entities, either at the state/provincial level or local level. Even if the measures of such entities are not listed, the existing level of access provided by them is nevertheless bound and cannot be made more restrictive. Given the importance of state/provincial entities in federal states, the authors have in their empirical study considered as 'partial commitments' − as opposed to 'full commitments' with a score of 1 − situations where a country had not prescribed any limitations in a given sector but where state/provincial level

[208]See, for example, the Commission's negotiation mandates for both the CETA and TTIP agreements. In the CETA negotiation directives it is stated that "The Agreement shall include substantial, explicit and binding commitments in all those areas under negotiation which fall, wholly or in part, under the jurisdiction of Canadian Provinces and Territories". Moreover, "the Agreement shall enter into force only upon the completion of the necessary procedures to bind the Canadian Provinces and Territories in all those areas under negotiation which fall wholly or in part under their jurisdiction." See Annex 1 of the partially declassified 2008 negotiation directives, available at http://data.consilium.europa.eu/doc/document/ST-9036-2009-EXT-2/en/pdf (accessed 5 April 2016).

[209] "Technical Summary of Final Negotiated Outcomes, Agreement-in-principle, documents summarizing the important negotiated outcomes of the Canada-European Union Comprehensive Economic and Trade Agreement as of October 18, 2013", The Government of Canada, p.13, available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/ceta-aecg/ceta-technicalsummary.pdf (accessed on May 2, 2016). The CETA has not yet been signed nor ratified by the Parties. It is therefore not included in the empirical part of the present thesis.

[210] *Ibid*. Another area of major commercial interest is government procurement. Enhanced access to the Canadian public procurement market, including in particular access to the sub-federal levels of procurement, was a major negotiating aim of the EU in CETA. The final (not ratified) agreement provides full coverage of Canadian procurement, covering federal, provincial and municipal procurement, with relatively few explicit exceptions. See "EU-Canada Comprehensive Economic and Trade Agreement (CETA)", European Parliament, Directorate-General for External Policies, Policy Department, EP/EXPO/B/INTA/FWC/2013-08/Lot7/02-03, December 2015, available at http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/535016/EXPO_IDA(2015)535016_EN.pdf (accessed on 2 May, 2016). The EU is pushing for an enhanced sub-federal market access in services and in government procurement also in the TTIP negotiations. See "The Beauty of Public Procurement in TTIP" by Patrick Messerlin, ECIPE Bulletin No. 1/2016, available at http://ecipe.org/app/uploads/2016/02/Bulletin-0116-.pdf (accessed on 2 May, 2016).

measures were not listed. These were only scored as 'full commitments' in view of information suggesting that non-conforming measures were not applied (for example where a commitment in another negotiating context revealed that no such measures were in existence).[211]

In general, sub-central measures are typically not excluded from PTAs; they are often bound at existing levels, but they are not listed. That naturally complicates their analysis. That is why the listing of sub-central measures in the CETA is such a big step forward. With countries that do not list their sub-central measures, it is sometimes possible to find out what these existing measures are from other PTAs where they have been listed.[212]

From a practical and methodological point of view, it may be difficult, or practically impossible, to map all existing non-conforming measures by regional entities in different countries and thus understand to what extent they do away with the amount of non-discriminatory treatment granted on the central level. That is the case especially when sub-central restrictions are not listed in a specific EIA (as is the case of the EIAs concluded by the U.S.). Sometimes it may be possible. This is the situation in CETA.[213] The binding of provincial and local measures by Canada makes it possible to analyze whether Canada's commitments reach the thresholds of Art. V as a whole.

The thesis argues that no matter how they are listed, from a legal point of view, sub-central measures can, in excessive amounts, always be against Art. V GATS. A contradictory conclusion would seriously undermine the criterion of substantiality in the case of countries that have constitutionally divided powers in their internal regulation of service activities.

Art. V does not say anything about the level of government on which the preferential liberalization of services needs to take place. It mentions only "between or among the parties", meaning two or several contracting parties. This should be interpreted as referring to states or customs territories

[211] Marchetti and Roy 2008, 109-110.
[212] According to Martin Roy, that is the case, e.g., with the Australia-China FTA which includes state measures by Australia. An email discussion with Senior Trade Policy Advisor Martin Roy (former senior economist in the Canadian Department of Finance and former Counsellor in the Trade in Services Division of the WTO Secretariat), 25 May 2016.
[213] Canada has included in its schedule separate federal, and provincial and territorial annexes, which together form the entirety of its commitments. Canada's two annexes with federal measures take approximately 50 pages of the agreement, whereas the two annexes with provincial and territorial restrictions occupy over 200 pages. Both the EU's and Canada's commitments follow the so-called negative scheduling practice. This is unusual for the EU, which has so far been using GATS-type scheduling practice in its PTAs. The GATS is based on a "hybrid" approach: it combines a positive listing of sectors with a negative listing of restrictions. See Carzaniga 2003, 2. According to the EU, "the clear and comprehensive listing of the reservations provides unprecedented transparency on existing measures, in particular at provincial level". See "CETA – Summary of the final negotiating results" by the European Commission. Available at http://trade.ec.europa.eu/doclib/docs/2014/december/tradoc_152982.pdf (accessed 20 January 2016).

such as the EU that can appear as contracting parties. In the GATS, only Art. XVI on MA refers to a 'regional subdivision'. As has been noted by Krajewski, the ordinary meaning of the term would suggest that it is a unit which is smaller than the entire territory of a country but which is also larger than any particular local entity. According to Krajewski, regional subdivisions could be the states or provinces in a federal system or other larger administrative units in a centralized state. Since the term 'subdivision' implies that the entire territory of a country can be divided into regional subdivisions, a measure applying only to a particular, limited area or distinct units of the country (such as national parks or river basis) should not be covered.[214]

The question we put forward in this thesis is whether Art. V covers measures taken on sub-central levels or on the state/CU level only. We consider the first option to be correct. The required level of non-discrimination should be provided across all levels of government considering that the GATS covers measures taken by regional and local governments and authorities in addition to the central authorities. According to Art. XX:1 GATS, each Member shall set out in a schedule the specific commitments it undertakes under Part III of the agreement. Art. XX:2 mentions 'measures' and states that such measures which are inconsistent with both Articles XVI and XVII shall be inscribed in the column relating to Art. XVI. Under Art. V:1(3)(a), "measures by Members" means 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.*

Art. V and Art. XVII do not include any reference to a 'regional subdivision". It is therefore unclear to what extent regional measures are covered by the said provisions. The issue is as relevant under the GATS as it is in EIAs but in the multilateral context Members have more leeway as they may choose the level of government on which they desire to liberalize and how much they desire to liberalize. However, we would argue that they still need to exclude such local measures that they do not wish to liberalize. In EIAs the situation is different. Art. V GATS requires the elimination of substantially all discrimination between the parties with no exceptions made depending on the constitutional structure of the country concerned. Considering that in many countries services activities are to a large extent regulated on sub-central levels, the application of the Art. V

[214] Krajewski 2003, 85.

requirements only to the central government could potentially leave a significant amount of non-discrimination uncounted for.

In the EU, the issue of regional subdivision is relevant on two levels. First, on the level of the Union and secondly, on the level of individual Member States. On the level of the Union there is still a considerable degree of diversity in the liberalization of services among different Member States. Considering that the EU is a contracting party of the WTO and has exclusive external competence to conclude trade agreements also in the field of services, the level of liberalization of services should match the requirements of Art. V throughout all of its constituent territories. The methodology of the empirical analysis of the present thesis has been built to take account of such differences. The liberalization scores of the EU reflect the number of Member States that have eliminated discrimination under each sector and sub-sector.

In the EU, the second level consists of the discriminatory regulations that are potentially in force on the sub-central level of individual Member States. There are only a few examples of such occasions in the reviewed schedules of the EU's EIAs and we have not taken them into account in our scoring.[215]

As the results of our empirical analysis show, the EU's services commitments, to a large extent, continue to be determined individually by its Member States. Significant variations still exist among different Member States both in horizontal and sector-specific commitments. The EU's internal situation can be connected to the wider issue of how deep EIAs should be in order to escape claims of non-compliance. We put forward the question of how the exact coverage and level of non-discrimination should be assessed in a situation where commitments vary across different states or regions of the same contracting party and try to answer it with regard to a customs union, the EU (which is not a full customs union in the field of services). We suggest that in order to be in line with its international obligations, the EU (or any WTO Member with internally divided regulatory powers in services) should ensure that when signing EIAs, the commitments of all Member States (or, in the case of other WTO Members, all states/regions/other entities with regulatory powers in services) reach the GATS threshold of 'substantiality' in terms of sectoral coverage and elimination of discrimination.

[215] For example, the Åland Islands of Finland. The archipelago of Åland is a region of Finland, but compared to the other regions, it enjoys a high degree of home rule.

5. Conclusions on the interpretation of Art. V

i. The main challenges

The biggest challenge in the analysis of EIAs under the Art. V criteria is that we do not have a clear benchmark for the requirements of sectoral coverage and elimination of discrimination. There is no unequivocal answer to the question of what 'substantial' and 'substantially' really mean. This forces one to ask whether the negotiators' purpose has been to avoid any clear-cut interpretations from being made. The diversity in the Members' positions as to the correct interpretation of 'substantiality' confirms that no common understanding exists.

In addition, an empirical analysis of the level of discrimination in EIAs includes two other significant challenges. First, because only the most blatant forms of discrimination can be taken into account, the results of an abstract empirical analysis (to which we also refer as *ex ante* analysis) are likely to show less discrimination than the agreement in reality entails. The second challenge, on the other hand, relates to the possible event of finding discrimination there where it could potentially be permitted under Articles XI, XII, XIV and XIV bis.

The measurement and assessment of 'substantial coverage' and 'substantially all discrimination' in quantitative and qualitative terms inevitably entails a case-by-case analysis on the level of specific commitments under each sector. However, the review procedure under the Transparency Mechanism of 14 December 2006 is limited to the preparation of a simple factual presentation that only gives an overall assessment of the agreement. A more specific examination may only take place in dispute settlement where Panels and the AB would be called upon to examine the WTO-compatibility of a specific domestic measure based upon an EIA. In such a case, the compatibility of the agreement with Art. V may be examined as a preliminary matter.[216]

Dispute settlement on PTA-related issues is extremely rare and we are not likely to receive much clarity on the WTO-compliance of EIAs through that route. While the number of PTAs is growing, it would, however, be important to keep some track of their relationship to the legal disciplines. Due to the modesty of the Transparency Mechanism, it is mainly left to scholars to propose alternative methods for the analysis of PTAs and to inform decision-makers of the results of such analyses. In

[216] Cottier and Molinuevo 2008, 138-139.

this thesis, we propose one approach that pays due respect to the flexibility and complexity depicted in the discipline while providing concrete means to assess EIAs and compare them to each other.

ii. What benchmark for EIAs?

The internal and external requirements set out the principal intent behind Art. V. They express the desirability of increasing trade by voluntary agreements between willing partners. Similarly to Art. XXIV GATT, they recognize that the purpose of an EIA should be to facilitate trade between the parties and not to raise barriers towards those remaining outside the agreement.[217] As in Art. XXIV, there is, however, a clear tension between the two requirements: the deeper the integration, the more dramatic are typically the effects on outsiders. This seeming irrationality was already brought up by Viner who noted the paradox of demanding a 100 per cent preference, "which suddenly turns to a maximum evil at 99 per cent…" In Viner's view, a completed customs union was still preferable since in that case the removal of duties is non-selective by its very nature and the "beneficial preferences are established along with the injurious ones, the trade-creating ones along with the trade-diverting ones".[218]

This very tension is maybe behind what has become a systemic disregard of the basic principles of Art. XXIV GATT and Art. V GATS. Moreover, it is now practically impossible to know how far or close PTAs come to fulfilling the requirements, as there is no longer any comprehensive multilateral review system. There has also been a shift in the analysis of PTAs in literature. Today, most studies focus on systemic issues stemming from PTAs as well as on reviewing the so-called WTO+ elements contained in them. Even when presenting observations on a specific PTA's consistency with the WTO criteria, scholars avoid drawing any dramatic conclusions based on such observations.

Especially in the context of EIAs this is understandable considering the vagueness of the terms 'substantial' and 'substantially', as well as the complex modalities of liberalizing services. We lack a clear benchmark as to how much discrimination EIAs should be allowed to maintain. In addition, an objective analysis is close-to an impossible task to carry out. Because of difficulties in measuring services liberalization, assessing the fulfillment of the Art. V criteria necessarily includes a great

[217] Mathis 2006, 79-80.
[218] Viner 1950, 44, 51.

deal of subjectivity.[219] Another challenge is that Art. V gives some room to the so-called "living agreements". First, the absence/elimination of discrimination can be attained on the basis of a reasonable time-frame and second, Art. V:2 allows consideration to be given to a wider process of integration. In deep economic integration projects, such as the EU, higher level of liberalization is being attained in a continuous, slow process with occasional setbacks.[220]

In the present thesis the emphasis is on analyzing the EU's EIAs in the light of the internal requirement of Art. V:1. The aim is to show how far the EU comes in eliminating discrimination across the services sectors. The purpose is not to reach any final conclusion on the compliance of the EU's EIAs with Art. V:1. Some suggestions can, however, be made. They are made on two different grounds. First, it is suggested that if an EIA provides for non-discrimination in less than 50 % of the coverage of the agreement, *a priori* assumption of the agreement falling short of Art. V requirements can be made. That is because under no circumstances can 'substantial' be considered to be less than 50 % of coverage. Such a low level of liberalization cannot, in our view, be saved even by the possibility of taking any wider process of integration into account. In the case of the EU, our results do not show the overall level of coverage but the percentage of Member States providing for non-discrimination. The implications of this are analyzed in Chapter VI.

The second ground for conclusions as to the liberalization level of a specific EIA in relation to the Art. V criteria relates to the Members' practice. Considering the intentional flexibility built in Art. V, the Members' practice becomes more relevant than in a situation where a clear interpretation of the wording of Art. V was available. We do not suggest the establishment of subsequent practice in the sense of Art. 31:3(b) of the Vienna Convention on the Law of Treaties as that would require going through a much bigger sample (if not all) of EIAs with a rigorous methodology. Such a methodology is hardly available for the analysis of EIAs. Instead, we suggest a more modest comparison of the Members' EIAs to each other. In such a comparison, the overall purpose of the agreement should be taken into account. An EIA aiming to create a common market should be viewed somewhat differently from an EIA aiming at simple commercial market opening. Such

[219] The. U.S. has argued that since there is no objective data to base conclusion on, an assessment requires looking at "the sum of the parts". According to the view expressed by its representative in one of the meetings of the CRTA., we should not wait for more numbers, but rather draw some subjective conclusions according to the elements of Art. V. See "Examination of the North American Free Trade Agreement," Note on the meeting of 24 February 1997, WT/REG4/M/4, CRTA,16 April 1997, para. 18.

[220] In the NAFTA debate the representative of Mexico claimed that NAFTA was planned as a living agreement; it did not represent the end of a process of negotiations, but rather was an instrument moving all elements toward greater liberalization. The representative added that the EC, too, had developed in this manner. *Ibid*., para. 20.

comparisons should be made also between the different agreements of any single Member. The average level of liberalization in both types of comparisons gives us some scope of realistic expectations to be made as regards the liberalization level of EIAs.

In the present thesis, the EU's EIAs are compared to each other keeping this purpose in mind. Each agreement's numerical scores on sectoral coverage and non-discrimination provide the tool for comparison, between the agreements themselves as well as to the criteria of Art. V:1. In addition, the scores show the internal differentiation of EU Member States in their EIA commitments.

IV. THE SPECIFIC CASE OF SERVICE MOBILITY (MODE 4)

1. Introduction

One of the substantial issues of the thesis is to clarify what is the exact scope of Mode 4. The thesis thus sheds light on the question concerning the differentiation between labour mobility and the movement of natural persons supplying services (labeled by us as 'service mobility'). This is done, firstly, by analyzing the GATS provisions on Mode 4 and, secondly, by interpreting the provisions in the light of the Members' practice. The chapter serves the overall goal of the thesis, which is to find out how well the EU's EIAs correspond to the requirements of Art. V GATS. Even though there are uncertainties relating to the exact scope of all modes under the GATS, Mode 4 is arguably the most disputed one. At the same time, due to its connection to migration, Mode 4 is especially sensitive to political considerations.[221] For that reason, it also remains generally the least liberalized mode in the WTO Members' commitments.[222] The extent to which the EU's preferential services commitments correspond to the Art. V criteria depends partly on how we should understand the scope of Mode 4. This is the question we engage with in this chapter.

The present chapter thus analyses the scope and coverage of the so-called Mode 4 in the international trade in services and especially within the framework of the WTO.[223] Instead of presenting Mode 4 as another form of labour migration, the focus is on the conceptualization of Mode 4 as an instrument of multilateral trade liberalization.[224] The analysis is built upon the issue of employment market access that is argued to distinguish Mode 4 from traditional labour migration. It is proposed that for employment market access to occur, two criteria need to be simultaneously met. First, the host state's labour laws must apply, and secondly, the foreign worker must occupy, in the host state, a post that could be taken up by a local worker. The normative conclusions are supported by an empirical study of the biggest service importers' Mode 4 commitments.

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[221] Winters et al. 2002, 3.

[222] Mattoo and Carzaniga 2003, 3-18. A Background Note prepared by the WTO Secretariat on Mode 4 points out that the Members' GATS schedules show that levels of commitments vary strongly across modes of supply. In general, trade conditions for Mode 4 tend to be significantly more restrictive than conditions in particular, under Mode 2. This reflects many Members' approach to scheduling Mode 4 entries. In contrast to other modes, they normally started from a general "unbound" which was then qualified by liberalization commitments applying to specified types of persons (e.g. managers), movements (e.g. intra-corporate) and stays (e.g. up to four years). See WTO 1998, 2.

[223] The present chapter is a modified version of Jacobsson (2015) in Panizzon, Zürcher, and Fornalé (2015).

[224] Betts and Nicolaidis portray Mode 4 as a shift to a market-based logic to govern human mobility. See Betts and Nikolaidis (2009).

The relevance of cross-border movement of labour was evident early on in the GATS negotiations but the question of the scope of Mode 4 took longer to resolve.[225] According to the final formulation, Mode 4 covers the supply of a service by a service supplier of a WTO Member in the territory of another WTO Member through the presence of natural persons. The GATS applies to measures affecting natural persons who are service suppliers themselves and to natural persons who are employed by a service supplier. Both independent service suppliers and employees of service suppliers are thus covered. In the second case, the employer is either a natural person (an independent service supplier) or a service company. In order to benefit from Mode 4, the natural persons and their employer must all originate in a WTO Member.[226]

The GATS does not set any time limits for the supply of a service under Mode 4 and the WTO Members remain free to regulate the issue as they choose. In most cases the Members' Mode 4 commitments are limited to a specific period of time. It has therefore become customary to speak of Mode 4 as covering the temporary movement of service suppliers.[227]

This chapter argues that the temporary nature of the movement of service suppliers is only one element of Mode 4 and does not suffice for its conceptualization. Instead of concentrating on the duration covered, the focus should be on the principal issue that is necessarily pertinent whenever the movement of people is at stake. The natural question is to ask if the GATS regulates labour migration, i.e. the inward movement (immigration) for employment purposes. The answer characterizes the nature of the GATS as an international agreement and significantly affects the types of migration and transactions it can cover. This chapter takes the position that the question should be answered in the negative. The reasoning behind this is principally based, first, on the text of the GATS and, secondly, on its nature as a trade agreement.

The starting point is the GATS Annex on Movement of Natural Persons Supplying Services (the MNP Annex) which provides some clarification on the scope of Mode 4. According to the Annex, 'the Agreement shall not apply to measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis'. This blunt statement seems to carve out employment market

[225] See Reyna and Stewart 1993, 27. As this chapter shows, the exact scope of Mode 4 remains uncertain.
[226] The natural and juridical persons covered are defined in Art. XXVIII of the GATS. In the case of natural persons, the criteria are based on nationality and/or permanent residence.
[227] See Mattoo and Carzaniga 2003, 3 and Stephenson and Hufbauer 2011, 31.

access from the agreement's scope. However, nowhere in the GATS is it explained what employment market access means. While making the scope of Mode 4 extremely vague, the ambiguity is understandable especially for the following reasons. Firstly, the Annex strikes a delicate balance between the interests of countries at different stages of development and with different economic profiles.[228] Without being too restrictive, the carve-out protects the most developed countries against the demands for the liberalization of labour immigration.[229] Secondly, employment market access is impossible to define in exact terms in an international trade agreement because it is a concept that is dealt with under national employment law and thus differs from state to state. Thirdly, because international service transactions can be carried out through different types of contractual arrangements, the issue necessarily enters into the field of contract law and private international (labour) law. No internationally harmonized codes exist in either discipline.

Notwithstanding these inherent difficulties in defining Mode 4, this chapter builds upon the issue of employment market access that the GATS itself places at the centre of its definition.[230] In the absence of any generally agreed definition for employment market access, and the dependence on national employment and conflict of law rules, the chapter proposes one possible construction with the help of which the issue may be analysed.

Employment market access is here understood to cover at least two issues. Firstly, it means that the migrant worker enters the regulatory framework of the host state. From the point of view of employment regulation, this entails that the labour laws of the host state apply in their entirety. Secondly, employment market access implies that the foreign worker is occupying, in the host state's labour market, a post that might equally well be occupied by a domestic worker. It is argued that for full employment market access to occur, both criteria need to be fulfilled simultaneously.

The first criterion is a legal one. Although the applicability of the host state's labour varies across the WTO Members, the issue is usually contractual in nature: the extent to which a service supplier

[228] Bast asserts that the MNP Annex represents a specific legal regime in which the contracting parties maintain a careful balance between the sensitive issue of migration and the narrow confines of trade. The ambiguous language of the Annex is understandable in the light of the diverging interests of different WTO Members that the drafters of the Agreement had to accommodate. See Bast 2008, 575.

[229] The Annex rules out access to the employment market but does not define what such access means. WTO Members can thus largely determine the exact scope of Mode 4 through their own labour and immigration regulation.

[230] Perhaps due to these challenges in the definition of employment market access, the extensive literature on Mode 4 has largely neglected the conceptualization of employment market access despite its importance for the understanding of the GATS.

enters the regulatory framework of the host state depends on the nature of the service supplier's relationship with the host state entity that is acting either as an employer or as a client. A work contract entails employment in the host state, whereas a service contract provides for a private transaction with a wider freedom of contract. In a service contract there is no employment relationship between the foreign service supplier and the host state client. Instead, a work contract may exist between the service supplier and its employees. Such an employment relationship is primarily subject to the laws of the sending state and the labour laws of the host state apply to the workers only to a limited extent. How widely they apply, greatly affects the conditions under which the service supply can take place.

The second criterion compares a Mode 4 service supplier to a person employed in the host state (a participant in the host state's employment market). Any exhaustive assessment of the effects of a foreign workforce on local workers requires an economic analysis.[231] However, another way to approach the issue is more analytical. For that purpose it suffices to ask which Mode 4 categories involve persons performing activities that could equally well be performed by local workers.

Both criteria are examined below. In addition, a short study on the biggest service importers' GATS commitments is presented. The results of this study show how some of the biggest WTO Members approach the issue of employment market access and how it is to be understood based on their practice, in the light of the commitments they have taken under the GATS.

When addressing Mode 4 type movement, we refer to *service mobility*. This term encompasses both natural persons acting as service suppliers and natural persons employed by service suppliers (which, in turn, are either companies or natural persons themselves). In contrast, the movement of natural persons who gain access to the host state's labour market and are thus employed there is referred to as *labour mobility*. This term basically means the same as *labour migration* or *labour immigration*. The term mobility, however, encompasses a wider scope of activities than migration. Whereas migration is usually understood as a movement of an often permanent nature, the term mobility lays emphasis on today's reality of a mobile workforce and on the blurriness of the limits between permanent and temporary types of work.

[231] Several such analyses have been conducted by economists. See useful overviews in Jensen (2011) and Trachtman (2009).

The chapter starts by briefly explaining the historical and economic background of the GATS and analyses how Mode 4 is constructed in it. It then concentrates on the central question of employment market access. The final, empirical section starts by explaining the method used in the study on the chosen WTO Members' Mode 4 commitments, after which it turns to the analysis of the results. Both the empirical results and the arguments presented in the chapter are drawn together in the conclusion.

2. What is Mode 4?

i. Historical and economic background

The scope and significance of Mode 4 is best understood in the light of the negotiations that led to the conclusion of the GATS in 1994. Before the advent of the GATS, trade in services was already regulated in certain bilateral and regional schemes, the focus of which was, however, quite narrow.[232] In the 1980s it became clear that technological development was beginning to open foreign markets to services more widely. The U.S. in particular saw the opportunities that a multilateral trade agreement on services could create.[233]

The GATS was negotiated at the end of the 1980s and the beginning of the 1990s, at a time when the importance of the services sector was becoming increasingly evident. By that time services already accounted for over 60 per cent of the gross domestic product (GDP) of Organisation for Economic Co-operation and Development (OECD) countries.[234] Even though there was a general understanding of the significant economic gains that could be attained through liberalization of services, the challenge was to draft an agreement that would meet the expectations of countries at different stages of development. Several developing countries at first refused to negotiate on services for fear of having to open their vulnerable services markets to foreign competition. In the course of the negotiations they also became concerned that their own comparative advantage, abundant labour, would not be adequately addressed in a services agenda that was mainly focused on the liberalization of the financial sector and investment. For reasons of parity, certain leading

[232] Marchetti and Mavroidis 2011, 690.
[233] Commentators share the view that the U.S. financial services sector played a prominent role in the inclusion of services in the multilateral trade negotiation agenda. See Marchetti and Mavroidis 2011, 692.
[234] Since then the economic significance of services has only grown: at the moment services account for approximately 75% of the GDP in OECD countries and over 70% of global output (The World Bank's World Development Indicators, available at http://databank.worldbank.org).

developing countries thus pushed for the inclusion of labour movement in the GATS.[235] The results of the negotiations only partially met the demands of these countries. Whereas, in principle, the GATS allows for the movement of all categories of natural persons, in practice, the Members have liberalized the movement of very specific types of professionals only.

Notwithstanding the significant economic potential that freer movement of service suppliers holds, many authors have drawn attention to the extremely modest level of liberalization that was reached under Mode 4 in the Uruguay Round.[236] Very few WTO Members have taken any significant commitments under Mode 4 and the existing commitments mainly relate to the movement of intra-corporate transferees (most often executives, managers and specialists), business visitors and highly skilled self-employed persons. Moreover, Mode 4 commitments generally do not even bind the status quo but often reflect stricter entry conditions than the access granted in practice.[237] Considering that the GATS commitments were made in the mid-1990s, the difference between bound and applied entry conditions is likely to have become wider since then. Taking into account the modest level of liberalization achieved so far, it is not surprising that trade in Mode 4 represents less than 5 per cent of overall services trade.[238]

It can be argued that, for the sake of increased relevance, the WTO Members should extend their Mode 4 commitments to include temporary employment with nationally-owned host state employers.[239] The supporters of this point of view emphasize the economic gains stemming from the liberalization of labour migration and the difficulties in distinguishing service contracts from employment contracts.[240] In this chapter it is proposed that the placing of Mode 4 outside the ambit of labour mobility follows the logic of a trade agreement and can lead to benefits that participation in the local employment market would not offer. There is a growing need to efficiently transfer expertise and labour force internationally, either through the temporary relocation of specialists or

[235] Dey 2007, 84 and Bast 2008, 576.
[236] Dey 2007, 88; Bast 2008, 576; Self and Zutshi 2003, 27 and Chanda 2001, 639.
[237] Carzaniga 2003, 21.
[238] Kelsey 2010, 18. Magdeleine and Maurer (2008) note the challenges relating to the 'adequate translation' of the Mode 4 legal provisions into statistical concepts. In the economic literature, compensation of employees and migrant workers' remittances are often used as statistical indicators to estimate the value of Mode 4 trade. They are not suitable indicators, however, since they are labour income measures. To grasp Mode 4 type movement, Magdeleine and Maurer concentrate on two aspects which aim to measure trade flows (transactions): the value of the service provided and the number of natural persons moving. Under Mode 4, most value is created in contractual service supply since other types of movement are usually related to Mode 3 (ICTs) or to transactions that take place at a later stage (business visitors and service sellers) (at p. 8).
[239] On the scope of Mode 4 see Self and Zutshi (2003), Chaudhuri, Mattoo, and Self (2004), Grynberg and Qalo (2007), Mukherjee (1996) and OECD, IOM, and World Bank (2004).
[240] See especially Winters 2008b, 515.

for the purposes of contractual service supply.[241] Even though such transactions do not replace traditional immigration for labour purposes, they can increase gains and bring additional income to both sending and receiving states. A more practical consideration is that it would be unrealistic to expect OECD countries to open their markets to labour mobility in a multilateral, legally binding agreement. Instead of arguing that WTO Members should do this, it could be more productive to call for deeper commitments that remain purely within the sphere of services trade.[242]

A significant impediment to a more liberalized Mode 4 is the lack of incentive. Instead of taking binding commitments on a multilateral basis in accordance with MFN treatment, WTO Members have the possibility to do so unilaterally or bilaterally by granting access to certain nationals only. It seems that even if access to local employment markets is ruled out, the requirement of MFN creates an issue of trust. Unilateral market opening or specifically negotiated bilateral migration schemes have the advantage that they can be easily reversed and are concluded with certain countries only. Such arrangements provide the flexibility that is often needed for the regulation of movement of people.[243]

Mode 4 does, however, have certain advantages over bilateral migration agreements. Being part of a trade deal, Mode 4 commitments can be used as a trade-off for other goals: the commitments are part of a wider negotiation agenda and hence contribute to the attainment of a quid pro quo.[244] Moreover, a trade agreement can be an easier instrument to use politically than an agreement liberalizing immigration outright.

Multinational companies and developing countries share an interest in having a more open Mode 4. Whereas the latter wish to increase the movement of their nationals in ways unrelated to commercial presence abroad, multinational companies would like more scope for the international movement of their personnel (related to Mode 3).[245] Moreover, both big and smaller companies are increasingly interested in deploying foreign personnel for short, specific projects with tight deadlines.[246] An attractive prospect for these companies would be the possibility to bypass frustrating visa procedures and employer's obligations. Considerable economic gains have been

[241] The EU's Communication to the Special Session of the Council for Trade in Services, WTO Document S/CSS/W/45 of 14 March 2001, p. 1.
[242] Chaudhuri, Mattoo and Self make a similar argument: Chaudhuri, Mattoo, and Self 2004, 381-382.
[243] See Cholewinski (2015), 238.
[244] Panizzon (2010) and Trachtman (2009).
[245] Mattoo and Carzaniga (2003), 1-3.
[246] Chaudhuri, Mattoo, and Self 2004. 369.

demonstrated to be achievable even by modest liberalization of Mode 4 if the relatively abundant medium-skilled and less-skilled workers from developing countries were allowed to provide their services in developed countries[247] In the developed parts of the world, temporary access is often preferred to more permanent types of immigration due to the lower social and political costs involved. In developing countries, on the other hand, temporary outward movement can lead to less brain drain than permanent emigration.[248]

ii. Definition under the GATS

Article 1 of the GATS defines trade in services under Mode 4 as the supply of a service by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member. In addition, the MNP Annex states 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.[249]

The GATS does not define the concepts 'access to the employment market', 'residence' and 'employment'. Whereas the exact scope of all GATS modes of supply is somewhat open to interpretation, in the case of Mode 4 the lack of clarity culminates in a very fundamental issue. Based on the reading of the GATS provisions dealing with Mode 4, it is not entirely clear to what extent measures pertaining to the field of labour mobility were intended to be covered.

The obscurity is principally due to two separate provisions of the GATS. First, it is sometimes claimed that Article 1:2(d) read together with the first paragraph of the MNP Annex leaves it unclear whether employment in the service of a host state employer can be considered part of Mode 4.[250] Secondly, the second paragraph of the MNP Annex has given some commentators reason to

[247] Winters 2008b, 480.
[248] WTO 1998, 6. Recent empirical research, however, questions the gravity of the brain-drain phenomenon and offers evidence of the benefits that skilled migration can offer both for migrants and for sending countries. Nonetheless, a comprehensive understanding of the effects of brain drain on sending country growth and development is still lacking. See Gibson and McKenzie (2011).
[249] For an overall explanation of the GATS text on Mode 4, see e.g. Schmitz (2015).
[250] Art. 1:2(d) defines Mode 4 to cover the supply of a service by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member. The first paragraph of the MNP Annex states that it applies to measures affecting service suppliers of a Member, and natural persons of a Member who are employed by a service supplier of a Member, without specification as to the origin of the employing service supplier. This paragraph, however, needs to be read together with Art. 1:2(d) which clearly states the presence of a cross-border element.

infer that only *permanent* employment in the host state is excluded.[251] They have, *a contrario*, concluded that temporary employment in the host state would be covered by Mode 4.

Some backing for such a proposition can be found in certain WTO Members' GATS schedules. The most notable example is the Mode 4 commitment of the U.S. that provides on an annual basis for the temporary employment of 65 000 persons in specialty occupations (the so-called H1-B visa). Moreover, a significant number (43) of mostly developing Members have included in their schedules a versatile group of executives, managers and specialists (EMSs) without specifications as to the nationality or location of their employer.[252] Section 5 of this chapter will show that in the case of the biggest service importers, no access to the host state employment market is allowed in the majority of their commitments.

It has been proposed that a combined reading of the MNP Annex, Art. I:2(d) as well as the Members' commitments could be seen as resulting in the coverage by Mode 4 of the following categories of persons:

- foreign self-employed persons supplying services to host state companies of individuals (independent professionals, IPs)
- employees of a foreign service supplier who are temporarily transferred to the supplier's commercial presence in another Member (intra-company transferees, ICTs)
- employees of a foreign service supplier who enter the host state to supply a service pursuant to a service contract between their employer and the host-country client (contractual service suppliers, CSSs) and
- business visitors (BVs) and services salespersons who seek entry for the purpose of setting up a commercial presence or negotiating the sale of a service.[253]

As already mentioned, some Members have also included in their schedules the group of executives, managers and specialists (EMSs) who appear on some occasions to overlap with ICTs and on other occasions to provide for the possibility of entry to the host state employment market. Notwithstanding these differences in the Members' practice and certain scholars' desire for an

[251] The second paragraph of the MNP Annex clarifies that the GATS 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.
[252] WTO 2009, 23.
[253] WTO 2009, 23; Carzaniga 2008, 477. Similar categorization was also proposed by the EU, Canada and a group of developing countries led by India during the Doha Round negotiations. See Schmitz 2015, 391-392.

extended coverage of Mode 4, the majority view among commentators appears to be that host-country employers are not covered.[254] Self and Zutshi point out that during the GATS negotiations the issue of employment of foreigners by host state employers did not even come up for a detailed examination because access to the employment market was understood to be outside the coverage of the agreement.[255] However, as the GATS does not define Mode 4 in any detail, there is no clear answer to the question of which categories of persons exactly are covered.

The most common conceptualization of Mode 4 is built around its temporary character. The GATS, however, does not set any time limits and the definition of period of stay is left to the discretion of the Members.[256] A look at the Members' schedules reveals that there is considerable variety in the periods of time covered: they extend from a couple of months to several years. Bilateral migration schemes, such as temporary worker programmes, usually also limit the maximum period of employment and they are categorically conceptualized as providing temporary employment in the host state.[257] Trade agreements, however, do not follow an entirely similar logic to that of migration agreements; it is thus questionable whether the most accurate conceptualization of service supply under a trade agreement should be built similarly to migration schemes.

According to the MNP Annex, employment market access is the factor that distinguishes labour mobility (labour immigration) from service mobility (Mode 4). Employment market access would entail employment with host state entities. Even though the majority view is that domestic employment, and thus labour mobility, is not covered, making the distinction between service and labour mobility is largely neglected in the scholarly analysis of Mode 4.[258] This neglect results from difficulties in distinguishing between the two phenomena, as their boundaries vary between the different legal cultures. Furthermore, the distinction tends to be further blurred by economic

[254] See, for instance, Carzaniga 2008, 479; Chanda 2001, 2004 and Chaudhuri, Mattoo, and Self 2004, 370. Also the WTO Secretariat's background notes on Mode 4 adopt this view. See WTO 1998 and WTO 2009.
[255] Self and Zutshi 2003, 34.
[256] The duration of stay should be included in the Members' commitments. In the absence of such a determination, it can be considered that no binding is undertaken thereof. See paragraph 34 of the Scheduling Guidelines, document S/L/92, dated 28 March 2001.
[257] See the examples of the Canadian seasonal agricultural worker programme and the Spain–Ecuador Agreement on Migratory Flows in Chanda 2009, 486-489.
[258] Some commentators bring up the issue but do not go into it very deeply. See, for example, Chanda 2004, 16; and OECD, IOM, and World Bank 2004, 105. Bast enquires into the GATS concepts of 'employment' and 'employment market' but does not consider how the formation of an employment relationship affects different categories of Mode 4 entrants (Bast 2008, 581). Chaudhuri et al. analyse differences between service and work contracts and provide an interesting analysis of existing commitments on contractual service suppliers. See Chaudhuri et al. 2004, 381–384. In addition to Bast and Chaudhuri et al., useful information on how to distinguish service contracts from employment contracts is included in the UN Background Note of 2005 (WTO and OECD 2005) and in the WTO Secretariat's Background Note of 2009 (WTO 2009).

analyses that do not take the conceptual differences between labour and service mobility into account.[259]

Analyses of Mode 4 usually focus on the formation of an employment relationship between the Mode 4 entrant and the service recipient. According to Bast, 'the decisive element in distinguishing employment from other forms of personal service is the degree of freedom from the instructions of a superior since a substantial degree of independence is usually seen as a typical feature of self-employment'.[260]

The analysis by Bast is correct. Based on a case-by-case analysis, and in accordance with the host state law, it helps to establish whether a specific situation is covered by Mode 4 or not. There are, however, practical considerations which limit the usefulness of a blunt differentiation between work and service contracts. For these reasons, the analysis should be taken further. There are two groups that require specific attention. The first are intra-company transferees (ICTs) who appear in most Members' schedules.[261] ICTs are a special case in the sense that they are employed in the host state. Their employer, however, is a foreign-owned entity whose presence in the host state is often linked to Mode 3.[262] If one were to distinguish Mode 4 entrants from labour migrants purely based on their type of contract, ICTs would necessarily have to be categorized as labour migrants because they are employed in the host state.

A second complex category of Mode 4 entrants are contractual service suppliers (CSSs). So far they appear in only a few schedules, the EU being the most prominent example. Nevertheless, the biggest potential for further liberalization of Mode 4 lies in this category.[263] This would be the case especially if WTO Members opened their markets to less-skilled contractual workers in sectors such as construction, health-care or any other sector where there is significant labour input. In these

[259] In the WTO Secretariat's latest background note on Mode 4 it is pointed out that several empirical studies have attempted to quantify the potential economic impact of liberalizing Mode 4. It is, however, stressed that at the outset all these studies seek to estimate the effects of freeing up the temporary movement of workers (labour mobility), rather than the effects following from liberalization of Mode 4. See WTO 2009, 13.

[260] Bast notes that a natural person offering services on a regular basis to one particular customer under the customer's instructions is usually seen as being engaged in an employment relationship, any other denomination used in the contract notwithstanding. Bast 2008, 581. See an enlightening example of the types of criteria that are used in one jurisdiction: WTO 2009, 5.

[261] An overview of all Members' commitments in 2002 revealed that almost 280 out of 400 entries in the Members' GATS schedules pertained to executives, managers and specialists. Of these, 168 entries explicitly related to ICTs (42% of aggregate entries). See Carzaniga 2003, 24–25.

[262] Carzaniga notes that the economic value of commitments on ICTs is dependent on access conditions for Mode 3. Carzaniga 2003, 24.

[263] Winters 2008b, 519.

sectors, however, there is a strong prospect for the contractual relationship between the Mode 4 entrant and the host state client to become blurred. To stay in the field of Mode 4, the person performing the service should not become a subordinate of the host state entity but should retain a strong degree of freedom and take regular instruction only from the employer based in the sending state.

In fields where CSSs work closely with the host state entity, the maintenance of independence can be problematic. In the construction field, for example, part of a project can be outsourced to a foreign service supplier. When the employees of the foreign service supplier work side-by-side with local workers and under the supervision of the same master builder, they become easily identifiable with the locally employed workers. Even if formally in a contractual relationship, such workers may be categorized as labour migrants by local authorities. This can be detrimental to their status as Mode 4 entrants. A similar problematic situation can arise in the case of independent professionals (IPs). IPs, however, are usually highly-skilled professionals, such as architects and lawyers. Since they usually perform their services independently, the formation of an employment relationship is avoided. In the case of less independent IPs, similar problems to those faced by CSSs may arise.

The examples of ICTs, CSSs and IPs demonstrate that it is problematic to use the type of contract as the main criterion for distinguishing Mode 4 entrants from more traditional labour migrants. Even if the distinction is legally correct, it leads to situations where further liberalization of Mode 4 would be challenged due to its identification with labour immigration. To keep Mode 4 in the field of services and within the scope of the GATS, Members should aim to construct their commitments in a way that does not entail the formation of an employment relationship with a host state entity.

To help in this endeavour, additional criteria for defining ‘employment market access’ in the GATS context could be used. Special attention should be paid to the cross-border element of Mode 4 that is present in all service trade. The cross-border element separates service mobility from labour mobility. Whereas employment-based work performance is regulated by host state norms, in service contracts the employment relationship remains under the regulation of the sending state. Even if host states sometimes extend the application of their most important labour norms to foreign workers performing services on behalf of their home state employers, the home state rules on the employment of the workers continue to apply. One can take the example of CSSs and IPs. If they retain a sufficient degree of independence from their customers, they are usually not considered to be in employment in the host state. This means that they continue to be subject to the rules of the

sending state, even if certain mandatory host state rules, for example on minimum pay, are often applied.

The first aspect specific to Mode 4 entrants thus relates to the regulatory framework in which these entrants operate. The second aspect is the competition with local workers. Employment market access can occur only in cases where the Mode 4 entrant is occupying a post that could potentially be filled by a local worker. With CSSs and IPs this is often the case since most services could also be provided by domestic workers. In the case of ICTs, however, the situation is different. When they are required to possess knowledge specific to the foreign company, no local worker is replaced.[264] The situation is different when ICTs are simply categorized as experts or managers with no special connection to any foreign entity belonging to the same group of companies as the receiving entity in the host state. If they are in an employment relationship with the group's host state entity and their job could be performed by a local worker, under the criteria presented here, employment market access can be said to occur.

As the examples of CSSs, IPs and ICTs show, both criteria put forward here need to be simultaneously met for employment market access to occur in a specific case. In the case of CSSs and IPs, attention should be paid to the applicable regulation. Where closer links to the sending state prevail, no employment market access occurs even if the job could be performed by a local worker. In the case of ICTs, a conceptual differentiation between labour entrants and Mode 4 entrants relates to their capacity to provide expertise that could not be easily supplied by local workers.

Before going further into the issue of employment market access, it is necessary to explain why the issue is important and why employment market access (or rather, non-access) should be seen as the core criterion in the definition of Mode 4. Two issues arise in particular: trade logic and MFN. Each will be dealt with separately below.

iii. Mode 4 as a trade instrument

[264] The company-specific specialty is usually demonstrated with a prior employment requirement. Of the ten biggest service importers whose Mode 4 schedules were examined for the purposes of this chapter, eight explicitly require prior employment in the sending state for a minimum of one year before the transfer. Two (Brazil and China) do not mention any prior employment criterion but limit transfers of ICTs to senior employees only.

Mode 4 suffers from a lack of clear conceptualization. This is evident both in the light of the Members' schedules and the literature. The absence of generally agreed definitions makes it hard to distinguish between different categories of Mode 4 and to compare them across the Members' commitments. Particular terms, such as specialists and executives, and open-ended notions, such as economic needs tests, are not used consistently even by individual Members. The problems in classification and in determining the exact scope of Mode 4 allow for administrative discretion and loss of relevance.

The main challenge is the location of Mode 4 in the middle of trade and migration, due to which it is often poorly coordinated between the authorities administering the two fields. Even though it is part of a trade instrument, the fate of the persons entering a country under Mode 4 is in the hands of immigration authorities. Even though some countries have special procedures for entrants under Mode 4 (for example, the GATS visas in the UK and Australia), service suppliers may need to be fitted into immigration categories designed for employment-based movement.

The variety of actors involved is thus a challenge. Another factor blurring the distinction between labour and service mobility is that developing country Members of the WTO, as well as several commentators, are pushing for further liberalization of labour mobility. Bringing labour mobility under the GATS would make any commitments on immigration binding and subject to compulsory WTO dispute settlement. This would greatly increase the relevance of Mode 4 as a migration instrument considering that there are no other legally enforceable migration agreements.[265]

It is, however, hard to see many countries being willing to tie their labour migration schemes to a multilaterally fixed level enforced with MFN. The overemphasis on Mode 4 as a labour migration scheme actually limits its use in trade negotiations: Mode 4 already risks becoming a non-trade issue in some countries. For example, in the U.S., as a consequence of the opposition of the Congress, no PTA negotiated by the U.S. since the early 2000s has contained a chapter aimed to facilitate the movement of natural persons.[266] In the EU, on the other hand, the Union's exclusive competence to conclude trade agreements does not extend to agreements liberalizing immigration. Agreements entering into the field of labour mobility would thus need to be signed and approved

[265] Trachtman (2009).
[266] Stephenson and Hufbauer 2011, 282. In 2005 the Congress started to oppose the inclusion of immigration measures in trade agreements especially because of the limited possibility to exercise control. This has blocked the inclusion of Mode 4 commitments in US trade agreements altogether. See Sarah Anderson, U.S. Immigration Policy on the Table at the WTO, http://www.globalpolitician.com/default.asp?21446-immigration/, date accessed 31 July 2015.

separately by each Member State, which otherwise is no longer a necessity in services trade. This would mean that any national parliament that was discontented with the immigration aspect of the trade deal could veto it in its entirety.[267]

Limiting the scope of Mode 4 to service mobility would not eliminate opposition but could increase the tradability of Mode 4. Moreover, such a limitation more closely follows the logic of a conventional, cross-border trade agreement. In an international trade transaction a sales contract is concluded between economic actors in (at least) two different countries. In labour mobility the economic actor (the migrant) moves to the regulatory framework of the host state and no formal tie with the country of origin necessarily remains. The economic benefits of such a move accrue primarily to the migrant himself or herself. Naturally, the migrant's family and the country of origin often benefit in the form of remittances, but such transfers are subject to individual discretion.[268]

It is worth emphasizing that the GATS is an agreement that provides for the liberalization of trade in services between different countries. Trade in services under Mode 4 is defined as the supply of a service by a service supplier of one Member, through presence of natural persons of a Member in the territory of *any other Member*. In the case of natural persons acting as employees of a service supplier, the service being liberalized is the one supplied by their employer, not by themselves.[269] If domestic service suppliers (other than foreign-owned entities established under Mode 3) could also appear as employers, there would be no trade in the sense of the GATS.

For the sending state it is relevant that the service supplier and its employees remain in the field of application of home state regulation. In this case, the employees' work performance, as well as the value created by the service supplier, can be subjected to home state taxes and social security contributions.[270] If the service supplier or its employees instead enter the host state employment

[267] Bungenberg 2010, 132.
[268] For an excellent account of the welfare economics of migration see Trachtman 2009. The economic effects of temporary v. permanent migration in home and destination countries are debated among economists. There are no simple conclusions but the theory suggests that the biggest benefits accrue to the migrants themselves. See Trachtman 2009, 48. Temporary migration, or, as in this case, service mobility, does not necessarily make the home country better off. Temporary migration, however, appears better suited than permanent migration to ensure that the arrangement benefits developing countries. See Chaudhuri, Mattoo and Self, 381.
[269] In the MNP Annex persons covered by Mode 4 are defined either as natural persons who are service suppliers of a Member or as natural persons of a Member who are employed by a service supplier of a Member, 'in respect of the supply of a service'. See Bast 2008, 579.
[270] The host state may on certain occasions require similar contributions. However, in many cases where work is subcontracted to a foreign company, social security contributions are paid by the foreign company according to the provisions of its home country. See OECD et al. 2004, 85.

market, these connections to the sending state are in most cases lost. It is hard to see what is left to be considered as trade in such circumstances.

It is important to note that Mode 4 entrants are often subject to the host state's minimum wage and certain other labour standards.[271] Low-wage countries are thus, to a certain extent, stripped of their comparative advantage: being subject to mandatory rules imposed by the host state, means that they cannot necessarily benefit from their home state's more lenient regulation. Lower wages are, however, only one factor that encourages companies to engage in cross-border services trade. Gains in productivity, and especially the availability of persons with different levels of skills, are often more relevant considerations.[272] Significant benefits to both sending and receiving countries could be attained especially if the movement of less-skilled persons was facilitated. Developing countries could benefit more were they to pursue deeper Mode 4 commitments that would remain strictly in the field of services trade but would be extended to cover categories of less-skilled workers. Ideally, developed countries would also open their labour markets to more entrants from developing countries. In the context of a trade agenda, to strive for employment market access can, however, put at risk the attainment of a more liberal Mode 4 regime overall.[273]

iv. The issue of MFN

Another consideration in drawing the limits of Mode 4 stems from the need to avoid clashes with bilateral and regional migration schemes. There are numerous bilateral and regional agreements, in the field of both trade and migration, which provide for different types of movement of labour. If Mode 4 of the GATS was considered to cover labour mobility, the signatories to such agreements would risk violating their MFN obligation.

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[271] This consideration is mostly relevant for CSSs since ICTs and IPs are usually highly-skilled and highly-paid specialists. Fifty WTO Members have inscribed the application of domestic minimum wages in their schedules, often coupled with some other laws regarding working conditions. See OECD et al. 2004, 84. In principle, scheduling is not necessary since Members are allowed to apply their national laws to Mode 4 entrants. In the absence of an explicit statement, it is, however, hard to know to what extent local wages and other working conditions are extended to temporary service suppliers.

[272] The US, for example, imports most of its services from other high-wage, skill-abundant countries. Jensen notes that even the US companies establishing affiliates overseas to export services back to the parent company are usually located in high-income countries and thus pay relatively high wages. See Jensen 2011, 156.

[273] In Bast's opinion the legal construction of the terms of the MNP Annex should aim at preserving the fragile compromise represented therein. Winters shares the view that bringing the WTO into the contested field of domestic labour law without proper support by the Members puts at risk the attainment of other trade objectives. See Bast 2008, 577 and Winters 2002, 29.

The reach of the MFN can be avoided through PTAs, labour markets integration agreements (LMIAs), MFN exemptions and waivers. Art. V GATS does not apply to agreements limited in their scope. Most labour mobility schemes would thus not qualify as EIAs. Very few of them would qualify as LMIAs either. LMIAs, regulated under Art. V bis of the GATS, exempt the citizens of the parties from requirements concerning residency and work permits, and typically provide them with a free entry to the parties' employment markets. LMIAs thus require full liberalization of labour markets between the contracting parties.[274]

An MFN exemption, on the other hand, releases the Member from applying MFN as far as a specific measure has been prescribed as an exemption in the Members' schedule. All MFN exemptions had to be notified before the entry into force of the GATS and new ones cannot be added.[275] Moreover, according to the GATS Annex on MFN exemptions, such exemptions should not, in principle, exceed a period of ten years. The availability of MFN exemptions is, therefore, limited.[276]

The last option for deviating from the MFN obligation is to apply for a waiver. A waiver is a permission granted by all WTO Members for a certain WTO Member not to comply with its normal commitments. Waivers are difficult to obtain and they are limited in time. A waiver has been successfully adopted with regard to the least-developed WTO Members (LDCs). At the eighth WTO Ministerial Conference of 2011 the Members adopted a waiver that provides for a departure from the MFN principle and allows Members to give preferential treatment to services and service suppliers of LDCs.[277] Favourable treatment of LDC service suppliers, however, depends on the willingness of the other Members to make preferential concessions in this regard.

At the conclusion of the Uruguay Round in 1994 certain labour mobility schemes were inscribed as MFN exemptions, most notably by European countries towards their former colonies and with

[274] Art. V bis of the GATS was tailored especially to meet the needs of the Nordic countries that had deeply integrated labour markets and did not want to risk the compatibility of their arrangement with the GATS. Bast also mentions India's integrated labour market with Nepal (Bast 2008, 154).
[275] An exception is made for new Members who have the option to inscribe their own MFN exemptions when acceding to the WTO. See Wolfrum, Stoll, and Feinäugle 2008, 570.
[276] Wolfrum notes that the wording 'in principle' and the fact that MFN exemptions remain subject to future negotiations imply that the ten-year period is not indefinite. In fact, most Members' exemptions were introduced as indefinite. *Ibid.*, 571.
[277] Preferential Treatment to Services and Services Suppliers of Least-Developed Countries, Ministerial Conference Decision of 17 December 2011, WTO Document WT/L/847. The existence of the exceptional circumstances justifying the waiver is reviewed annually. The waiver terminates in 15 years from the date of adoption.

regard to traditional recruitment areas.[278] Some scholars claim that the presence of such MFN exemptions demonstrates that WTO Members understood labour migration to be covered by Mode 4 since otherwise they would not have included them. They thus conclude that bilateral labour mobility schemes are covered by the WTO disciplines (especially by MFN) and consequently several of them appear to be clear violations of WTO law.[279]

This is not a viable position. If labour mobility (employment market access) was part of the scope of the GATS, WTO Members could no longer favour labour immigration from certain countries only. It is difficult to believe that the purpose of the GATS negotiators was to render all labour mobility schemes, including those between countries with especially close cultural ties, potential violations of WTO law.

It is more likely that the MFN exemptions were inscribed for other reasons, some of which were probably purely political. An easily understandable reason is that the scope of Mode 4 was unclear from the beginning and several Members felt that in the presence of doubt, it was better to protect themselves against accusations of MFN violations (even though this was only for a period of ten years). Another completely rational reason may be the degree of overlap between service and labour mobility: many labour mobility schemes facilitate the movement of service suppliers as well. By exempting the entire arrangement, the Member can preserve the preferential arrangement for service suppliers originating in a specific country without violating its MFN obligation towards other Members.[280]

It is worth noting that the GATS does not prevent Members from regulating the entry of service suppliers from different countries.[281] In the case of two similar suppliers, the main distinguishing feature being their origin, the MFN obligation, however, prevents favouring one of them with respect to the supply of a service. Were the MFN discipline to be extended in the field of labour

[278] See a comprehensive account of such exemptions in Grynberg and Qalo 2007. See also Annex of WTO 2009.
[279] See especially Grynberg and Qalo 2007, 758.
[280] Similar reasons are likely to be behind the inclusion of Art. V bis in the GATS (labour markets integration agreements). Since entire labour market integration agreements are exempted, the countries involved can liberalize the movement of service suppliers as well. This may be a practical necessity since many countries' immigration schemes do not differentiate between employment-based movement and service supply.
[281] The MNP Annex specifies 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. Visas, for example, can be administrated differently among different nationalities. Border and entry measures cannot, however, be applied in such a manner as to nullify or impair the benefits accruing under the terms of the Member's specific commitment. Excessive border control measures or work permit procedures could, therefore, potentially be the subject of a GATS dispute. See Worster 2006, 68.

mobility, unexpected consequences would follow as the same treatment would need to be extended to all similar labour migrants originating in WTO Members and entering service sector activities covered by the GATS.

It is also important to note that the MFN obligation is binding with regard to all services covered by the GATS, irrespective of a Member's commitment to liberalize a specific sector. Schmitz takes the example of a Ugandan lawyer who has legally entered the EU and cannot consequently be discriminated against in favour of a lawyer from any other Member with respect to the provision of legal services, even if no commitment in legal services exists.[282] Similarly, immigration and visa policies are covered by the MFN obligation even if no specific commitment has been taken.[283]

3. Employment market access as a defining criterion

i. The categories of persons covered by Mode 4

It has been proposed that employment market access under the GATS necessitates two separate criteria: full application of the host state's employment regulation and occupation in the host state of a post that could be taken up by a local worker. Both of these criteria need to be fulfilled before a foreign worker can be said to have entered the local employment market.

The first criterion is especially complex since it is at the crossroads of both (national) public and private law and public and private international law. It points to the fact that the type of contract the foreign service supplier is engaged under cannot be disregarded since, depending on the national legislation, it can bring about very distinct regulatory outcomes. The principal difference is that while host state employment contracts are in the field of application of local labour laws, the employment aspects of service contracts are to a certain extent beyond their reach. A necessary condition for a service contract is that its connections to the host state are limited. That goes hand in hand with the assertion that no employment market access occurs. The two regulatory outcomes are

[282] Schmitz 2015, 383. It should, however, be noted that the GATS provides for a comparison with *like* service suppliers. Considering the significance of a service supplier's personal characteristics (such as education and skills), it can be extremely difficult to prove that likeness exists in any given case.

[283] Some commentators have referred to the MNP Annex, which allows Members to regulate the entry and stay in their territory, and stated that immigration and visa policies are covered by specific commitments only. This can be contested since MFN is a general obligation and applies to all measures relevant for the application of the GATS. See Worster 2006, 74.

analysed in more detail in the following sub-section which concentrates on the question of conflict of laws.

The consideration of the second criterion of employment market access, replacement of a local worker, is here more limited. For the purposes of the conceptual analysis of Mode 4, it is relevant to ask which Mode 4 categories involve persons performing activities that could potentially be performed by local workers.

Business visitors (BVs) are most clearly performing tasks that cannot easily be done by local workers. BVs represent themselves or their employers and go on short visits to prepare the establishment of a subsidiary or to negotiate a trade deal. They are the group of service suppliers that are most clearly outside the application of host state labour laws. ICTs, by contrast, are employed by local entities and are therefore usually covered by the host state labour laws. They do not, however, enter the local employment market because their place of work cannot be occupied by a local worker. As Bast points out, ICTs cannot, on the basis of Members' GATS commitments, present themselves to other potential employers in the host state. At the point of entry, they are already employed by the foreign entity established in the host state.[284]

CSSs can most easily be seen as replacing local workers. Their movement is not related to Mode 3, as in the case of ICTs, and their service supply is usually much closer to a work performance than is the case for BVs. They are engaged in the type of projects that can potentially create jobs for local workers. Maybe for these reasons few Members have so far facilitated the movement of CSSs and, where they have done so, it is limited it to a few sectors. In 2009, the number of such Members was 31 (including all EU Member States).[285] Since CSSs' employers compete directly with domestic suppliers, the liberalization of the movement of CSSs carries similar types of risks to the opening of domestic labour markets. Although conceptually a separate regime, the risk that CSSs pose to domestic workers can be considered even higher than in the case of traditional labour immigration since foreign suppliers may, in certain cases, benefit from differences between their home state's and the host state's operating environments.[286]

[284] Bast interprets the MNP Annex's carve-out of employment on a *permanent* basis to refer mainly to ICTs who are formally employed by a host state entity but who do not seek entry to the employment market and whose stay is temporary by definition. Bast 2008, 586–587.
[285] See WTO 2009, 24. In addition to the EU, several newly acceded Members have inscribed a commitment on CSSs, which may imply that this category is becoming more widely acknowledged.
[286] OECD et al., 2004, 85.

Certain Members have scheduled a category of EMS (executives, managers and specialists) whose movement is not limited by an obligation of prior employment in the sending state. When employed by a host state entity and with no special link to a foreign establishment, in the case of such employees, as in the case of the US H1-B visa holders, employment market access can be seen to occur.

Some Members use quotas or economic needs tests (ENTs) to make sure that service suppliers are not replacing local workers. In the case of Mode 4, ENTs are usually applied in the form of labour market tests which allow entry only when it is not expected to have a negative impact on the domestic labour market. ENTs therefore generally establish as the sole criterion the non-availability of suitably qualified persons in the local employment market.[287]

In the case of ICTs, a few Members have inscribed quotas or ENTs, concerning mostly specialists. Specialists can potentially replace local employees where the required expertise is very general in nature. The requirement of ENTs is thus understandable from the point of view of avoiding employment market access. In the case of BVs, only two Members impose ENTs. No quotas are applied. For CSSs and IPs the use of quotas and ENTs is rare, even though by definition CSSs and IPs can win contracts that could create jobs for local workers. The requirement of an ENT would, however, make the relevant commitment largely obsolete since it would not create any opportunity for foreign service suppliers to compete with local providers. Access would be granted only if no domestic service suppliers were available.[288]

The examples of the various categories covered by Mode 4 demonstrate that both criteria of employment market access used here have to be met simultaneously. It is worth stressing that the absence of employment market access does not mean that the presence of foreign service suppliers, especially CSS and IPs, in the host state does not have any implications on local jobs. Instead, the purpose is to show how the issue of employment market access can be used to conceptually differentiate Mode 4 from labour mobility.

[287] WTO 2009, 14; 22.
[288] The numbers of applied quotas and ENTs can be found in WTO 2009, 22–24.

ii. Regulation of service contracts in the national sphere

Typically the regulatory outcome differs depending on whether the service is supplied through a work contract or a service contract.[289] From a legal point of view, the basic distinction is that a work contract is regulated by labour laws, many of which are mandatory, whereas a service contract is in the field of private law. Another important distinction can be made based on the choice of law. In cross-border transactions the parties usually select the law applicable to the contract. In employment contracts the choice of law is typically more restricted. Where there is no cross-border element involved, all compulsory employment norms of the state of employment usually apply. For example, in cases where a work contract is concluded between a host state employer and a foreign worker employed in the host state, the work contract is regulated by host state labour laws notwithstanding the foreign origin of the worker. In service contracts the contractual relationship is between the client and the service supplier. The employment relationship, on the other hand, is between the service supplier and its employees. The work contract is thus subject to the rules of the sending state.

In many legal systems it is accepted that an employee temporarily sent abroad by his or her employer remains subject to the law of the home state. Several regional and sub-regional social security conventions establish a similar principle. There are, however, variations regarding what is considered temporary. Some social security conventions, for example, limit the application of the state-of-origin rules to six months or one year with a possibility of extension. There is, however, great variety in how countries treat contracts with foreign elements. Each state's choice of law rules finally determines which country's law is applied.[290]

Even in situations where foreign service suppliers are performing under a service contract, the host state has an interest in ensuring that the most crucial norms of the country are adhered to. Such norms can be referred to as mandatory or overriding rules[291] and they apply for public policy reasons even in situations where a foreign law would otherwise apply.[292] In the field of employment such generally applicable rules can relate to crucial issues such as minimum wage, working hours

[289] As has been pointed out above, in practice an employment relationship can, however, be seen to form between the customer and a service supplier.
[290] Choice of law rules are determined by private international law. Each country has its own private international law that is a branch of national law.
[291] Different terms, such as *lois de police, lois d'application immediate* and *Eingriffsnormen*, are used. See Liukkunen 2006, 76.
[292] Hepple 2005, 155. This approach was adopted in the Rome Convention on the law applicable to contractual obligations adopted by EC Member States in 1980. See Liukkunen (2004).

and safety at work. Even when no employment relationship exists in the host state, the employees of foreign service suppliers may be subject to such overriding rules of the host state. The basic feature of Mode 4, however, is that the law primarily applicable to the employment relationship is that of the home state.

For a trade scholar, employment law and private international law can be unfamiliar areas. Labour laws, as well as choice of law rules, are not issues dealt with by the WTO. It is, however, important to keep in mind that trade in services is crucially different from trade in goods. Barriers to services are not tariffs but instead take the form of regulations. To understand how to liberalize services, one needs to understand regulations. Therefore, it is crucial to determine whose regulations apply. Certainly, it would be unrealistic to expect WTO Members to come to a joint agreement on the issue. It suffices to look at the EU where the Member States did not manage to agree on any clear-cut rule for the choice of law in the long-awaited Services Directive adopted in 2006.[293]

Instead of aiming to adopt any WTO-wide choice of law rules, WTO Members could look at Mode 4 from the perspective of their own national laws and formulate their commitments in a way that would be in line with the GATS as a trade instrument. Naturally, nothing would prevent Members from making commitments that would provide for employment market access. Such commitments would, however, be so-called WTO+ issues that are outside the scope of the GATS.[294]

Countries interested in further liberalization of Mode 4 should do a careful analysis of the types of migratory movements that are most beneficial to them.[295] Remittances sent home by their nationals who are immigrants in richer countries are attractive but they do not necessarily bring similar, long-

[293] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market. The Commission originally proposed a country-of-origin principle, which stipulates that service providers should be subject to the laws of their own country rather than of the country where the service is provided.

[294] However, where such WTO+ commitments are made, they should, *a priori*, be considered binding. One can draw a parallel to commitments made by new WTO Members in their accession protocols. The new Members' commitments sometimes go further than the WTO rules but are still binding. Such rules relate, for example, to export duties regarding which China at least was required to make commitments that do not exist for original WTO Members on the basis of the GATT. The binding nature of China's WTO+ commitments was upheld in the WTO dispute settlement. See Espa (2012)

[295] Betts and Nicolaïdis note that, India excluded, developing countries are not doing research on demand and supply to find out what would benefit them most. India, by contrast, is on a path significantly different from most other developing countries but tries to speak on behalf of the developing world as a whole. Betts and Nicolaïdis 2009, 70.

term and widely distributed benefits to those to be gained from a more developed services economy.[296]

At present, the most successful bilateral migration schemes are considered to be those that are holistic in their approach. In addition to providing adequate protection and benefits to the workers, they enforce temporariness and facilitate formal channels for transferring remittances and for directing them towards productive investments in the sending state. Their aim is to make sure that the state of origin and its society as a whole benefits from its nationals working abroad, not just the migrant and the receiving state. Similar perspectives should be adopted with respect to Mode 4. It is in the interests of labour-abundant countries to develop such institutional and practical mechanisms that would help in persuading other WTO Members to let in those countries' service suppliers.[297] Nothing prevents countries from simultaneously aiming at labour mobility agreements. Keeping Mode 4 in the field of trade would, however, bring different sources of income that would contribute to the development of a services economy.

Trachtman notes that it is highly unlikely that a one-size-fits-all approach to migration liberalization would suit all states. Neither would it be consistent with maximizing global welfare. According to him, the WTO negotiation procedure with request–offer-type negotiations seems attractive since it is country-specific and allows the exchange of liberalization commitments in migration for commitments in other areas, such as investment or goods.[298] It is, however, questionable how practical it is to have a very diverse and inconsistent group of Mode 4 commitments from different countries. Mode 4 already suffers from lack of common understanding as to its scope, which from the point of view of the service suppliers undermines its legal predictability. The main Mode 4 categories need to be clearly defined, and for the sake of clarity and consistency, they should correspond to the scope of the GATS.[299] If the categories could be made clearer, there would still be plenty of room for negotiations on questions such as length of stay, professional experience,

[296] Kelsey writes about the 'fetishisation' of turning Mode 4 into labour migration in exchange for remittances. She points out how 'the broader rights and interests of workers, their communities and the long-term development vision of the country are often left out of the equation altogether'. Kelsey 2010, 286.
[297] For CSSs, Chanda proposes a form of juridical affiliation for less-skilled workers in the home country. Such affiliation could sponsor a worker and appear as the contracting party for the overseas client. The return of the Mode 4 entrants could be encouraged through different incentives for the entrant or through obligations imposed on the sending country. Chanda (2009).
[298] Trachtman 2008, 33.
[299] The EU notes in a communication to the Special Session of the Council for Trade in Services that the definitions of terms such as personnel, administrators, managers, and specialists are often neither clear nor consistent between different country schedules. According to the EU, the vague terms and definitions lay the ground for administrative discretion and can thus be subject to arbitrary and discriminatory application by regulatory authorities. See WTO Document S/CSS/W/45 of 14 March 2001.

economic needs tests and covered sectors. The national treatment commitments would ideally take a stand on the question of to what extent host state labour laws apply to workers sent to perform a contract. The situation is different in each country and binding the national rules would greatly improve transparency and predictability.

The rest of the chapter is dedicated to the results of an empirical study on the biggest WTO service importers' Mode 4 commitments. The results show that most of the Members reviewed seem to differentiate Mode 4 from labour mobility and formulate their commitments in a way that is aimed to prevent the establishment of an employment relationship in the host state.

4. Mode 4 in WTO Members' commitments

i. Method of the study

We now turn to an analysis of the issue in the light of WTO Members' commitments.

The countries chosen for review include the ten WTO Members with the highest share in imports of commercial services in 2011.[300] Ranked according to volume of imports from the biggest to the smallest these ten countries are the EU-27 (extra-EU imports), the United States, China, Japan, India, Singapore, Canada, Republic of Korea, Russian Federation and Brazil. Imports were considered most relevant for the study since each Member's schedule of commitments defines the level of liberalization applied to imports only. It is, however, noteworthy that an almost identical group of countries appears in the list of the top ten services exporters.[301]

Most Members' schedules were formulated in 1994 at the conclusion of the GATS. China and Russia joined the WTO during the Doha Round and their schedules date from 2001 and 2011, respectively. Offers made during the Doha Round were not reviewed in this study. It is likely that since 1994, the conditions for service supply under Mode 4 have changed in many Members to a large extent. However, rather than enquiring into currently applicable entry conditions, the purpose of this small study is to examine the Members' approach to the question of employment market

[300] The EU is counted as one Member and intra-EU trade is excluded. See 'Leading exporters and importers in world trade in commercial services (excluding intra-EU(27) trade), 2011', Appendix Table 6 of the World Trade Report 2012 (p. 33), http://www.wto.org/english/res_e/reser_e/wtr_e.htm, date accessed 31 May 2016.
[301] In the list of the top ten importers of commercial services, Russia is number 9, whereas among exporters it is number 11. Brazil is number 10 in the list of top importers but only number 18 in the list of exporters.

access. Despite the study's limitations, the Members' perception of the scope and purpose of Mode 4 at the time of its negotiation can be illustrated in the light of the original GATS commitments.[302]

The review is limited to the chosen Members' horizontal Mode 4 commitments. Most Members include the categories of persons covered under Mode 4 in the horizontal section of their schedule of commitments. The exact depth of liberalization for a specific service sector is, however, revealed only by reviewing the specific commitment for the sector concerned. Under Mode 4, in those cases where a commitment exists, it is common practice to refer to the schedule's horizontal section, which includes the common rules for the types of movement that the Member accepts under Mode 4.[303] These rules contain the categories of persons covered and the conditions for their access to the host state. The categories of persons usually apply to all sectors although some Members limit some categories of persons to certain sectors or to certain professional groups.[304]

National treatment is usually provided for the categories of persons covered in the horizontal commitments. This is usually expressed in the horizontal commitments' national treatment column in the following blanket reference to immigration law or similar: 'Unbound except for the measures concerning the entry and temporary stay of natural persons who fall into the categories referred to in the market access column'. Such blanket references are problematic since they allow for broad discretion which diminishes legal security. Moreover, giving foreign service suppliers the same treatment as one's own nationals does not mean that foreign qualifications, education and experience were accepted. Especially in regulated professions the Members generally require national qualifications or limit considerably the scope of activity allowed. This is usually expressed in the horizontal commitments by noting that the natural person must possess the necessary academic qualifications and professional experience as specified for the sector or activity concerned. The possibility to practise one's profession in the Member in question is thus revealed only by reviewing the applicable requirements in the relevant service sector.

Even though qualifications, education and professional experience are relevant to whether foreign workers can practice their professions in other countries, for the purposes of this chapter the review

[302] It is, however, noteworthy that the categories of persons covered have not radically changed in the Doha Round offers. Instead, certain Members have aimed at solidifying the four most established categories (ICTs, BVs, IPs and CSSs). See Schmitz (2015).
[303] In many schedules this is expressed by inscribing in the relevant sector 'Unbound, except as indicated in horizontal commitments'.
[304] For example, Canada limits the entry of professionals to foreign legal consultants, urban planners and senior computer specialists.

is limited to issues directly relevant for employment market access. Such issues include the type of contract that the service supplier is engaged under, the foreign or national ownership of the entity engaging the workers, the existence of a link between the service provider and an employer in the sending country (e.g. the requirement of prior employment), the requirement of an economic needs test (to check for the availability of similarly qualified workers in the host state), the period of stay, the source of remuneration and the status of the service supplier in the company hierarchy (for ICTs).

ii. Results of the study

The categories that appear most often in the Members' schedules that were reviewed are ICTs, IPs and BVs. ICTs are included in 60 per cent of all Members' schedules and they are clearly the category of persons most frequently covered.[305] The movement of ICTs is almost always connected to commercial presence in the host state.[306] BVs are the second-biggest group, whereas CSSs and IPs appear only in a small number of Members' schedules. Some Mode 4 commitments provide for the possibility of an employment relationship in the host state, the most notable one being the US quota for highly skilled persons in specialty occupations (H-1B visa). Such bindings, however, seem to represent a small minority.

The results of the present study show that the biggest service importers follow the MNP Annex's demarcation and cover in their horizontal commitments only categories of persons who do not access the national employment market. There are, however, two important exceptions. Firstly, the H-1B visa category of the US allows employment market access for up to 65,000 persons annually in specialty occupations.[307] Secondly, Brazil allows foreign specialized technicians and highly qualified professionals to work under temporary contracts with all legal entities established in Brazil, whether of national or foreign capital.[308]

The commitment of the US is peculiar in the sense that it clearly provides for access to the country's employment market. It concerns persons engaged in specialty occupations that require theoretical and practical application of a body of highly specialized knowledge and the possession of a bachelor's or higher degree in the specialty as a minimum for entry into the occupation in the

[305] Carzaniga 2008, 481.
[306] Persin 2010, 786-787.
[307] The United States of America, Schedule of Specific Commitments, WTO Document GATS/SC/90.
[308] Brazil, Schedule of Specific Commitments, WTO Document GATS/SC/13.

US.[309] The persons and their US employers must comply with a number of conditions regarding wages and conditions of work. In addition, the employer must not have laid off or displaced workers during a specific period before or after engaging the foreign worker. The employer must also take timely and significant steps to recruit and retain sufficient US workers in the relevant specialty occupation. The length of stay is limited to three years.

Brazil's commitment is more open-ended. It states that foreign specialized technicians and highly qualified professionals may work under a temporary contract with legal entities, whether of national or foreign capital, established in Brazil. The company has to justify the need to contract such professionals and technicians in relation to similar professionals and technicians available in Brazil. In addition, the contract must be approved by the Ministry of Labour. With regard to certain service activities (e.g. communications, land transportation, commercial stores, hotels and restaurants), the engaging entities must obey the proportionality requirement of at least two Brazilians for every three employees. There are no specifications as to wage parity or other working conditions. In the light of the terminology used (*work* under a temporary contract and the proportionality of two Brazilians for three *employees*) it seems that the commitment is meant to cover employment relationships between local companies (also of national capital) and foreign workers.[310]

None of the other schedules reviewed include such clear examples of employment market access. The most commonly occurring category of persons in them are ICTs. All the schedules reviewed include ICTs and all of them cover companies established in the host state. In most cases the receiving entity must be in the form of a subsidiary, dependent company or branch of a juridical person of another Member performing the intra-corporate transfer.

In the schedules reviewed, the category of ICTs covers only persons who are not easily replaceable by local workers. They need to be highly qualified and possess experience and knowledge relevant to the company in question (evident in light of the obligation to have a prior employment in the sending company). Even if such persons are in the field of application of local labour laws, they can hardly be seen as occupying in the employment market a place that could equally well be occupied by a local worker and thus be displacing a domestic worker. Therefore, there is generally no requirement to apply an economic needs test before this type of transfer. There is, however, some

[309] In addition to persons engaged in specialty occupations, the US commitment covers fashion models who are of distinguished merit and ability. There are no further requirements or specifications and it is unclear whether fashion models are to be engaged as independent professionals or under employment contracts.
[310] Brazil, Schedule of Specific Commitments, WTO Document GATS/SC/13.

haziness concerning the employment market access of ICTs in the schedule of the EU. There, certain EU Member States (Finland, Latvia and Poland) state that either an economic needs test is applied or that the post needs to be open for applications before the transfer can take place.[311]

Another group of service suppliers that can in certain cases take away jobs from local workers and thus become comparable to employees are CSSs.[312] This seems to be the view of some EU Member States at least. The EU's schedule states that an economic needs test for CSSs will not be required except where otherwise indicated for a specific sub-sector. Such tests can be found in certain sectors. For example, the United Kingdom requires an economic needs test for persons admitted under Mode 4 in engineering services.

The rather strict limits imposed on the use of CSSs (for example, maximum three months in any 12-month-period for most EU Member States) reflect the sensitivities relating to the use of foreign workers through service contracts. CSSs are engaged in work that can usually be similarly performed by domestic workers. Even though several countries require that local labour standards must be adhered to, the control of such standards is much harder where no employment relationship to a domestic company exists.

An especially interesting sub-sector from the point of view of employment market access is the "Placement and supply services of personnel".[313] It seems that the intra-EU development has inspired the formulation of the EU's GATS offer of 2005.[314] There the EU has in two instances (CSSs and IPs) defined that the offer applies to natural persons engaged in the supply of a service as employees of a juridical person as long as the juridical person is not an agency engaged in the placement and supply services of personnel. The exception appears to reflect the EU's internal case law according to which the making available of labour (hiring-out of workers by temporary work

[311] European Communities and their Member States, Schedule of Specific Commitments, WTO Document GATS/SC/31.
[312] Other schedules reviewed do not include CSSs, but the category of 'professionals' in the schedules of Japan and Canada seems to include persons who may be in an employment relationship in the sending country and thus in a situation similar to that of CSSs. See WTO Documents GATS/SC/46 (Japan) and GATS/SC/16 (Canada).
[313] In the WTO Secretariat's Sectoral Classification (W/120) placement and supply services of personnel (CPC 872) are part of "Other Business Services" under the "Business Services" sector (1.F.k).
[314] WTO Document TN/S/O/EEC/Rev.1 of 29 June 2005. The Doha Round offers are not otherwise reviewed as part of this study.

agencies) is not within the scope of free movement of services but comes in the field of free movement of workers.[315]

Interestingly, Canada has also paid attention to avoiding the formation of a relationship that resembles employment, between the client and the foreign service supplier's workers, by excluding temporary agency work. Canada's commitment on professionals engaged by a services contract obtained by a juridical person of another Member with no commercial presence in Canada excludes agencies engaged in the placement and supply services of personnel (service sector CPC 872). In addition, Canada clarifies that professionals may not engage in secondary employment while in Canada.

Even though the GATS covers the supply services of personnel, i.e. manpower services, there are especially strong tensions that relate to the liberalization of such services. This is visible in the EU where the rules concerning the free movement of workers, rather than services, are in some respects applied to hired workers. If one applies the criteria for employment market access established in this chapter, one can conclude that hired workers do in certain cases enter the host state employment market. Countries may provide for the full application of local labour laws.[316] In addition, hired workers are usually engaged to perform jobs that could as well be done by local workers.

Certain clear exceptions (most notably the U.S.) and certain borderline cases (executives, managers and specialists) notwithstanding, the Members reviewed have formulated their Mode 4 bindings so as to avoid the formation of employment relationships between service suppliers and host state employers. At the same time it is notable that there are considerable differences in the periods of

[315] See especially the first rulings in cases C-113/89, *Rush Portuguesa* [1990] ECR I-1417 and C-43/93, *Raymond Vander Elst v Office des migrations Internationales* [1994] ECR I-3803. The EU's position on hired labour force is taken up in more detail in Chapter VI where the EU's EIA results are analyzed.

[316] For example, the Temporary Agency Work Directive of the EU requires equal treatment of temporary agency workers. Workers hired out by temporary work agencies must be assured the working and employment conditions that would have applied if they had been recruited directly by the user undertaking to perform the same work. See Art. 5 (the principle of equal treatment) in Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on Temporary Agency Work. The Directive is partly in conflict with the PWD, which, according to the Court's case law, requires the application of only certain mandatory rules for minimum protection to posted workers. It is up to the Member States to provide that temp-agencies posting hired workforce guarantee to their workers the same terms and conditions which apply to temporary workers in the Member State where the work is carried out (para. 9 of Art. 3). In the Commission's proposal for the amended PWD (see the previous footnote), it is put forward that undertakings participating in hiring out of workers need to comply with the equal treatment principle of the Temporary Agency Work Directive (Art. 1 of the proposal). Moreover, with regard to all posted workers, it is proposed that the host state's labour laws would apply to posted workers when the duration of posting is superior to 24 months (unless no other choice of law was made by the parties, and even then such provisions that cannot be derogated from by agreement under the law of the host Member State would apply (Paragraph 1 of proposed Article 2a).

time for which access is allowed, ranging between 90 days and several years. The results give reason to conclude that the biggest importers of services consider that movement under Mode 4 is something that takes place primarily outside the host state's employment market.

5. Conclusions on Mode 4

The object of this chapter has not been to rule out the possibility of regulating migration for employment purposes through GATS commitments. Members remain free to do so since they can schedule the types of movement they prefer. As the study conducted for the purposes of this chapter showed, some Members have indeed done this. Where such commitments exist, they should be considered binding. An analogy can be drawn to new Members' accession protocols which remain binding in their entirety even if they sometimes contain elements that are outside the general WTO disciplines.

The chapter has aimed at forming a more conceptual understanding of Mode 4, inspired by the specific context it is part of. The analysis of Mode 4 often suffers from analytical confusion regarding the differences between labour and service mobility. The purpose is not to deny the significant and desirable benefits that would follow from deeper liberalization of labour mobility. Instead, it is considered that imprudent extension of Mode 4 commitments in the field of employment-based migration carries the risk of making Mode 4 less relevant and more prone to violations of WTO law. Labour migration is currently rarely administered on an MFN basis. In WTO law, however, the treatment of a temporary labour migrant of one specific nationality would need to be extended to all similarly positioned nationals of WTO Members. Moreover, the availability of MFN exceptions is limited and new exceptions are hard to add. In practice, several WTO Members already seem to operate in a legally grey area. Restricting the scope of Mode 4 to genuine service transactions would clarify the types of situations it covers and improve the credibility of Mode 4 as a trade instrument which, instead of providing for a status quo, could entail real liberalization.

As the study on the Members' commitments demonstrated, there seems to be a certain distinction between service mobility and traditional labour mobility built around the issue of employment market access. Drawing the line between employment and supply of services can, however, prove difficult and often necessitates a case-by-case analysis. The issue is resolved in accordance with the host state's legislation, which means that similar situations may be judged differently in different

countries. A good example of difficulties relating to the differentiation of service supply from an employment relationship is the EU experience with the posting of third-country workers. In its case law on posted third-country nationals, the Court has drawn a subtle and somewhat blurry distinction between work carried under a service contract and a service carried out with the sole purpose of entering the host state's employment market.

Employment market access almost always leads to wage parity. Temporary service contracts, in contrast, can sometimes be used to benefit from differences in wages and other conditions of work. This is, however, not self-evident under Mode 4 as many countries understandably require wage parity for ICTs and CSSs even if no employment market access is seen to occur. Independent professionals and business visitors (such as sale negotiators) are the groups that in most cases remain outside the application of domestic labour laws and thus easily fall under Mode 4. One can, however, perceive that movement of natural persons in conjunction with cross-border trade (Mode 1) and commercial presence (Mode 3) is capable of creating a growing number of situations where added value is brought about by the temporary relocation of personnel from one Member to another. One can take the example of IT specialists who usually provide cross-border services, but occasionally travel to the location of the client. In such cases the natural persons are easily left outside the application of the host state labour laws. When it comes to CSSs, the most interesting category of Mode 4 especially for low-skilled workers, it is unlikely that developed countries would give up on requirements of wage parity.[317]

Even if widened employment market access were to bring about significant economic gains and open up attractive possibilities for workers, especially in developing countries, from a trade perspective the liberalization of contractual service supply would be especially beneficial if it allowed the movement of low-skilled workers into a wide spectrum of service sectors. It is often conceived that employment market access is the most sensitive issue relating to cross-border movement of natural persons and especially hard to justify to national constituencies. This is understandable since employment market access is usually reserved for immigrants and any extension of immigration rights is likely to cause controversies. The resistance to immigration may, however, turn against itself when companies seek to benefit from cheaper ways to perform jobs.

[317] An interesting issue is whether the national treatment obligation of the GATS actually requires wage parity. If foreign service suppliers are to be treated similarly to domestic employees, all domestic labour laws would need to be applied. Winters mentions that the exclusion of foreign service suppliers from the host state's social security systems may have to be registered with the WTO as exception to national treatment (Winters 2008, 516). One can, however, also conclude that conflict-of-law rules are part of the host state regulations and should therefore be normally applied when a specific situation points towards the application of the laws of a different state.

Thus, when there is a specific need for a foreign workforce (as in the US for IT specialists), an increase in labour immigration may to a certain extent prevent the outsourcing of the same jobs to foreign service suppliers. When the need for foreign workers grows in the developed countries, opening up their employment markets may in practice be the most effective way to ensure compliance with local wage and labour laws. For labour-rich countries, on the other hand, the extension of possibilities to supply services on a contractual basis outside the regulatory jurisdiction of the host country should appear at the top of their Mode 4 agenda. This would allow them to benefit from their abundant labour force without losing the workers to host countries' employment markets.

In the second part of the thesis, the EU's Mode 4 commitments under its EIAs are reviewed. The results show how the EU understands Mode 4 in its preferential trade relations and how far it has been willing to liberalize movement under Mode 4 so far. The scope of Mode 4 in the EU's EIAs is contrasted to the conceptual understanding developed here. We also assess how the EU's internal division of competences is visible in the EU's Mode 4 commitments. Since a very long time has passed since the EU and its Member States took commitments under the GATS, the most recent EIAs tell more about the current situation. As has been discussed earlier, Mode 4 is an area that, in the EU, is especially prone to divisions between the Member States. Our results show to what extent that is the reality in some of the EU's recent EIAs.

V. ANALYSIS OF THE EU'S ECONOMIC INTEGRATION AGREEMENTS

V.1 METHODOLOGY

1. Earlier empirical research on EIAs

While there is decades' worth of research on the nature and magnitude of goods trade, much less is known about services trade and its impediments. Data on cross-border transactions in services became available only in the last decade and data on service trade impediments have been collected and made available even more recently.[318] Knowledge about the main driving factors and consequences of barriers in services trade is now being developed constantly. A growing amount of literature is also focusing on preferentialism in the context of services. That research still pales in comparison with studies on preferentialism in goods trade but since services have become an important feature of PTAs their study is attracting a growing interest. There is also an increasing amount of research being carried out on services commitments, both under the GATS and EIAs. Several of such studies employ empiric methods.

As is noted by Shingal and Egger (2014), most research on services preferentialism has so far been devoted to studying the trade effect of services accords on aggregate and disaggregated services trade flows. The impact of different levels of regulation and various barriers to trade in services and to trade costs are currently being the object of an increasing number of research projects.[319] Empirically oriented legal and/or economic literature has evolved to explain services commitments in the GATS and EIAs (Hoekman, 1995, 1996; Roy et al., 2007; Roy, 2011), reciprocal services commitments (Marchetti et al., 2012[320]) as well as GATS+ commitments in PTAs (Roy et al. (2007)[321] and Van der Marel and Miroudot, 2012[322]).

The authors of existing empiric studies on services commitments readily acknowledge the inherent difficulties in approaching services agreements empirically. In contrast to the GATT, the measures under the GATS are not primarily about pricing but qualitative in nature. To convert qualitative information into a numerical assessment of the degree of trade restrictiveness can be approached

[318] Shingal and Egger 2014, 3.
[319] See the references to recent literature in Shingal and Egger 2014, 4.
[320] Marchetti, Roy, and Zoratto (2012).
[321] Roy, Marchetti, and Lim (2007).
[322] Van der Marel and Miroudot (2014).

through a variety of methods ranging from the so-called frequency indices to price equivalents.[323] Hoekman (2006) explains the challenges relating to such efforts to "quantify" the coverage of service commitments.[324] Hoekman himself focuses on GATS commitments but similar difficulties arise in quantifying commitments in EIAs. A simple method used by most quantifying studies is to count all sectors and modes where commitments are made or employ a weighting scheme that is a function of the type of commitment made.

As Hoekman notes, even if a country submits an 'unbound' in its schedule, its actual policy may be much more liberal in practice.[325] However, when characterizing commitments in an empiric legal study this is not relevant: "unbound" means that there is no commitment. Weighing a full commitment or no commitment is straightforward but much more challenging is to weigh the various restrictions and specifications that countries list across various service sectors and modes of supply. As Hoekman points out, this is analogous to the problem affecting efforts to characterize the restrictiveness of national policy stances through indices. A simple and transparent way adopted by Hoekman himself is to give a weight of zero to "unbound" type commitments; a weight of 1 to full commitments (i.e., the party has subscribed "none", meaning there are no limitations), and a weight of 0.5 to commitments where restrictions are specified. This methodology was first adopted by Hoekman (1995, 1996)[326] and it has subsequently been used and extended by numerous authors.[327]

One of the most interesting studies is by Marchetti and Roy (2008)[328] who have built an impressive dataset of EIA commitments. The dataset demonstrates the preferentiality of various countries' EIA commitments as compared to the same countries' MFN commitments under the GATS. The approach taken by the authors builds upon Hoekman (1995, 1996). The main difference to Hoekman is that rather than giving a score of 0.5 to all partial commitments, the index gives a higher score for each improvement in a Member's partial commitments. For each step, half the difference between the score for a full commitment (1) and the score of the partial commitment being improved is added. For example, a partial commitment that is improved by way of a foreign

[323] Langhammer 2005, 314.
[324] Hoekman 2006, 34.
[325] 'Unbound' is part of GATS language and used by WTO Members in accordance with the WTO Secretariat's Scheduling Guidelines. 'Unbound' means that the Member has not submitted any commitments but remains free to impose any limitations under the relevant sector and mode. On the contrary, 'none' means that the relevant mode and sector is fully committed and no derogations from MA and/or NT are allowed.
[326] Hoekman (1995) and Hoekman (1996).
[327] Hoekman 2006, 34.
[328] Marchetti and Roy (2008). Their study is developed further in Roy (2011). Their dataset is available at http://www.wto.org/english/tratop_e/serv_e/dataset_e/dataset_e.htm. The publication of 2011 also updates the information collected on the basis of an index of GATS+ commitments in EIAs (Marchetti et al. 2007).

equity limit moving from 49 to 51 per cent would obtain a score of 0.75. A further improvement by the Member in the same sub-sector and mode would get a score of 0.875 (e.g., the foreign equity limit moving up to 60%).[329]

Thus, Roy and Marchetti's index takes into account the level of commitments undertaken. The information also permits to compare a Member's commitments across its different EIAs. Overall, their results highlight that, on average, commitments undertaken in EIAs far outweigh those contained in Members' GATS schedules, but also those offered in the current Doha Round of negotiations. This stands for both modes 1 and 3, and for countries of different levels of development. Naturally, as the authors note, the level of GATS+ commitments varies significantly across Members.[330]

Importantly, the index analyses commitments only under Modes 1 and 3. Another shortcoming is that the evaluation of the extent to which EIAs provide for new and improved bindings necessarily involves a degree of value judgment. As the authors point out, this is the case especially when comparing commitments framed under a positive-list approach and others under a negative-list one. Therefore, the authors highlight that their overview does not in any way amount to a legal evaluation of commitments.[331]

This is in contrast to the present study, which aims at a legal evaluation of the EU's EIAs. The goal of legal accuracy, especially with respect to finding the level of discrimination in the EU's commitments, requires a somewhat simpler methodology than the methods employed in the studies mentioned above. Since we map the commitments only with regard to sectoral coverage and full NT, there is less space for such value judgment that is present in studies that quantify different types of limitations in the commitments. Naturally, also in the present study, there is always the possibility of errors. Our analysis also requires interpreting provisions, in particular for comparison purposes (for example, when the EU does not entirely follow the WTO's Services Sectoral Classification List (MTN.GNS/W/120)) and especially in cases where it is not completely certain whether a specific limitation in a commitment is discriminatory or not. Therefore, the results of all empirical studies on services commitments, ours included, should be regarded more as an "approximation" of the reviewed commitments rather than a perfect representation of the content of

[329] Roy 2011, 8.
[330] Roy 2011, 14.
[331] Marchetti and Roy 2008, 109-110.

a specific EIA.

Fink and Molinuevo (2008) offer an assessment of EIAs in East Asia, focusing on their liberalization content and their compliance with WTO rules on regional integration. Their analysis is divided into two parts. The first part evaluates to what extent the chosen 25 EIAs have offered liberalization undertakings that go beyond those to which countries are committed under the GATS. Also their dataset presents the value added of EIA liberalization undertakings relative to pre-existing GATS commitments. They cover the all four modes of supply. Moreover, they use the database to empirically assess the effect of the scheduling approach on the depth and breadth of liberalization undertakings.[332] The second part is similar to our approach in the sense that it seeks to shed light on whether the 25 East Asian services EIAs are compatible with Art. V GATS. As the authors note, while a number of authors have commented on the disciplines of Art. V, only few studies have confronted specific agreements with these disciplines.[333] By using the first parameter of Art. V (sectoral coverage), the authors conclude that current commitments under the investigated EIAs do not manifestly provide for substantial sectoral coverage. As an obvious shortcoming, the authors' database does not separately record MA and NT commitments. However, they do observe that none of the East Asian EIAs provides for full NT across all sectors and modes. In cases where sub-sectors have been scheduled, modes 1 and 2 are subject to the least number of explicit discriminatory measures. In several EIAs, however, parties require the establishment of a commercial presence or the registration with local professional bodies as a prerequisite for supplying services. The authors consider that even if such restrictions are *de jure* non-discriminatory and are inscribed as MA limitations, they may be considered *de facto* discriminatory and thus be taken into account in an assessment of whether substantially all discrimination is eliminated. With regard to Mode 3, most agreements feature horizontal limitations that are relatively far-reaching and allow for the maintenance of significant discriminatory measures. Under Mode 4, the value added of the EIAs' commitments relative to the GATS is minor. Fink and Molinuevo conclude that the reviewed EIAs currently do not comply with the requirements of substantial sectoral coverage and elimination of substantially all discrimination. They contemplate that if the agreements were legally tested by the WTO, much would depend on what is considered a 'reasonable' time-frame for achieving those requirements.[334]

[332] Their outcome suggests that negative lists appear to induce wider but not deeper PTA commitments than positive lists. See Fink and Molinuevo 2008, 666.
[333] Ibid, 644.
[334] Ibid, 666.

A study by Miroudot et al. (2010) also follows the methodology used by Hoekman (1995, 1996), Roy et al. (2007), Marchetti and Roy (2008) and Fink and Molinuevo (2008) by looking at specific MA and NT commitments in the 155 sub-sectors of the WTO's Services Sectoral Classification List (MTN.GNS/W/120).[335] Additionally, the authors have broken down partial commitments into nine categories accounting for different types of trade restrictive measures (four for market access and five for national treatment). These categories of limitations correspond to "partial" commitments, where countries decide to take MA and/or NT commitments but maintain non-conforming measures. As the point of departure is to measure how preferential EIAs are, the commitments are compared to the parties' GATS commitments.

Also these authors' finding is that EIAs in services are quite preferential. Out of the 72 % of sub-sectors with non-discrimination commitments, 30 % have commitments similar to GATS. This means that in 42% of the sub-sectors, parties to EIAs have improved their commitments or offered MA or NT in sectors previously unbound. These 42 % are further decomposed into 13 percentage points attributed to improved commitments and 29 percentage points explained by commitments in new sectors. According to the authors, among these new commitments, the majority (about 20 percentage points) corresponds to full commitments.

Whereas the referenced studies provide important information on EIAs, none of them pay special attention to the internal discrepancies in the EU's services commitments. There are, however, two interesting studies that take the internal divergence within the EU into account: Langhammer (2005)[336] and Eschenbach and Hoekman (2006)[337]. Both studies use a methodology that enables to assess the degree of uniformity across the EU Member States' commitments. Eschenbach and Hoekman look into the EU's and its post-GATS accession countries' (and certain other transition economies') commitments under the GATS and in the context of the Doha Round offers. Langhammer, on the other hand, analyzes the EU Member States' commitments solely under the EU's services offer during the WTO's Doha Round (the EU including 15 Member States at the time).

Eschenbach and Hoekman's study assesses the following four main issues: (a) the formal degree of service sector openness reflected in the commitments made by EU Member States in the GATS, (b)

[335] Miroudot, Sauvage, and Sudreau (2010). They examine services schedules of commitments in 56 EIAs where an OECD country is a party.
[336] Langhammer (2005).
[337] Eschenbach and Hoekman (2006).

the extent to which the Member States deviate from the EU 'baseline' by imposing country-specific restrictions, (c) the degree of uniformity across Member States' commitments, and (d) the extent to which greater convergence is implied by the offers made by the EU and its members as in the context of the Doha Round. The deviation from the EU's baseline is found by setting a benchmark score for the EU as a whole, based on which it is assessed to what extent each EU Member State imposes country-specific restrictions. The authors find that the pre-Doha level of commitment for the EU-15 as a whole was 47 % and that most Member States do not deviate significantly from this average 'benchmark' in terms of national commitments across modes. Using Langhammer's (2005) data on the EU's Doha Round offer, the authors calculate that the offer substantially increases the average commitment index from 46 % to slightly above 58 %. At the aggregate level, the standard deviation among the Member States would with such an offer fall from 2 under the GATS to 1.6 under the offer, indicating an increase in uniformity at the Member State level.

Langhammer's central argument is that in the field of services, the EU's level of integration is not yet comparable to the attainment of a full customs union in goods. Given the remaining national sovereignties in regulating service trade also against other EU Member States, the EU is arguably not yet even a free trade area. The author measures the EU's distance from a customs union by calculating frequency indices of trade measures by refining the 1995 Hoekman index. His database is the EU's first offer in service trade in the Doha round in February 2003.

In order to identify differences between sector-specific concessions of individual EU Member States Langhammer modifies and expands Hoekman's method with respect to the in-between category 0.5 (ranging between 'unbound' and 'none'). Because of the importance of service trade enabled by factor flows, he gives a higher weight to modes 3 and 4 in the assessment of openness to service trade. The author then calculates the so-called overlap or similarity index and asks which proportion of a Member State A's concession is 'matched' by concessions of Member State B in the same service sector. The index ranges between 0 (no overlap) and 100 (total overlap). A total overlap would point to identical concessions towards third countries and thus would indicate a complete customs union. In contrast to his central argument of a far-from-complete customs union, Langhammer, however, concludes that the similarity is high, at between 90 % and 100 %. Some elements of national 'specialities' of trade policy sovereignty remain, especially in three Member States who were the last ones to join the Union at the time (Austria, Finland and Sweden).[338]

[338] The results of both studies appear to imply that the EU Member States' commitments towards third-country suppliers are relatively uniform. As explained in more detail in Chapter V, we question this end result to some extent as

These two studies concentrate on the EU's commitments under the GATS (including the EU's more recent Doha Round offer) and they give valuable information of the relative openness of the EU Member States under the GATS and the Doha Round offer (at EU-15). Unlike Eschenbach and Hoekman, we do not compare the EU Member States' commitments to each other. This information is of relevance also to us as one of the central arguments of the thesis is that the internal diversity in a WTO Members' commitments affects the conformity analysis of an EIA under the Art. V criteria. Our methodology, however, is focused on showing the attainment of non-discrimination per each sector as a percentage of EU Member States. Since in the EU's EIAs there is a significant degree of variation between the Member States in the number of non-discriminatory commitments offered, a percentage value quickly shows under which sectors the biggest number of Member States has provided for such a treatment. Under our analysis, this is most relevant as we argue that a contracting party with an internally divided structure in the regulation of services must reach the threshold of eliminating substantially all discrimination across its entire territory. The percentage of states thus shows to what degree such coverage is reached.

In Langhammer's study the EU's average score of openness is calculated by weighing the EU Member States' regulations with the share of the states in the EU's gross national income.[339] Such an approach could arguably be apt also for our method as there are significant differences in the sizes and economic weight of different EU Member States. We have, however, chosen to give the same weight to each Member State. The choice reflects the EU's structure as a union of sovereign states where each state retains powers also as an independent WTO Member. Also from the point of view of service suppliers, national boundaries still mean more in services than in the field of goods. Suppliers may choose a specific EU Member State as point of access due to proximity, cultural and language factors – not necessarily because of its economic significance. The methodology can, however, be easily adapted to take economic significance of a state into account. This could be a more correct approach in the case of a singular country with a regional division in the regulation of services (e.g. Canada and U.S.).

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similarities, or even identical concessions, on the part of the EU Member States do not necessarily mean that the conditions for third-country service suppliers are the same or even similar. For example, a similar measure, such as an economic-needs test (ENT), in one Member State is not necessarily applied according to the same criteria as an ENT applied by another Member State. Unless the conditions to access a specific service sector and to supply one's services post-access have been harmonized within the EU, a uniformity analysis would need to go much further in order to confirm that the conditions of service supply for third-country operators are indeed the same (as they should be in a real free trade are in services).

[339] Langhammer 2005, 316.

To summarize, our methodology differs from previous empirical studies on EIAs in two important respects. Firstly, whereas most studies are primarily econometric in their design, our method is adapted for a purely legal analysis. It shows how EIAs correspond to the exact requirements set for EIAs by Art. V:1 GATS under all four modes of supply. It therefore allows a legal analysis of how the chosen agreements correspond to the requirements of substantial coverage and elimination of substantially all discrimination. In addition, we take into account regional differences in the liberalization of services, in this case the differences among various EU Member States, and conduct the study in a way that shows the level on which the EU has committed to non-discriminatory liberalization as a whole.

2. Detailed explanation of the chosen methods

i. Overview of the empirical part and the choice of agreements

The purpose of the empirical review is to analyze, first, how the EU has liberalized services trade in its EIAs, and, second, to what extent the EU's EIAs correspond to the requirements of Art. V GATS. Under these requirements, a specific agreement should reach the threshold of 'substantiality' both in terms of sectoral coverage and elimination of discrimination. A central element of the analysis is to show, first, how the level of liberalization varies among the EU Member States and second, how the type of the agreement affects the level of liberalization reached in the agreement on the EU side. The results of the empirical analysis are presented in the following section of this chapter and an interpretation of the results in light of Art. V is given in Chapter VI.

Overall, the EU has concluded eight agreements with a proper EIA element. Four of them are included in the study. Altogether, the study includes two AAs (Central America and Georgia), one Economic Partnership Agreement (EPA) (CARIFORUM) and one Free Trade Agreement (South Korea).

Of the analyzed agreements, the EU-South Korea Free Trade Agreement of 2011 is the first of the EU's new generation PTAs, DCFTAs[340], and it represents a stepping-stone for future liberalization. According to the EU, the agreement with Korea goes further than any of its

[340] Deep and Comprehensive Free Trade Areas.

previous agreements in lifting trade barriers in services.[341] The EU's new generation, commercially driven PTAs are based on primarily economic criteria and according to the EU, go beyond the market opening that can be achieved in the WTO context.[342] The trade pact of the agreement with Georgia is part of an AA, the purpose of which is wider than the objectives behind the more economically oriented EU-Korea PTA. An important part of the AA with Georgia is the approximation of Georgian trade-related laws to the selected pieces of the EU's legal framework. According to the EU, the adoption of EU approaches to policy-making will improve the quality of governance, strengthen the rule of law and provide more economic opportunities in Georgia, as well as in Moldova and Ukraine with whom similar agreements have been concluded. Opening of the EU market to their goods and services is also expected to attract more foreign investment.[343]

The EIA with Georgia thus differs from the rest of the EU's EIAs with regard to the commitments taken under the agreement's Chapter 6 that concerns "Establishment, trade in services and electronic commerce".[344] The chapter aims at integrating Georgia as much as possible into the EU market. It provides for both the freedom of establishment in services and non-services sectors, subject to limited reservations, and the expansion of the internal market for a set of key services sectors once Georgia effectively implements the relevant EU *acquis*. The agreement thus provides for a right of establishment (as opposed to commercial presence under Mode 3) in services and non-services sectors. The reservations to this right are provided in a negative list and automatic coverage for new services and further liberalization not listed as exceptions is guaranteed.

The rest of the analyzed EIAs have varying motivations. They have a combination of objectives relating to commercial purposes, development, and economic and political integration between the EU and the country or countries concerned.[345] These various motivations can be taken into account in accordance with Art. V:2 GATS since the provision allows flexibility in assessing compliance

[341] See the European Commission's information page on the EU-South Korea Free Trade Agreement, available at http://ec.europa.eu/trade/policy/countries-and-regions/countries/south-korea/ (accessed 1 November 2015).
[342] See the Commission's Quick Reading Guide to the EU-South Korea FTA, October 2010. http://trade.ec.europa.eu/doclib/docs/2009/october/tradoc_145203.pdf (accessed 1 November 2015).
[343] See the Commission's country sheets on Georgia and Ukraine, available at http://ec.europa.eu/trade/policy/countries-and-regions/countries/georgia/ and http://ec.europa.eu/trade/policy/countries-and-regions/countries/ukraine/ (accessed 15 January 2016). In April 2014, in response to the various challenges faced by Ukraine since the signing of the AA with the EU, the EU unilaterally granted Ukraine preferential access to the EU market until 31 December 2015. The trade part (the DCFTA) of the EU-Ukraine AA became operational as of 1 January 2016. The political and cooperation provisions had already been provisionally applied since November 2014.
[344] See the Commission's Reading guide on the similarly structured EU-Ukraine Deep and Comprehensive Free Trade Area, available at http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_150981.pdf (accessed 15 January 2016).
[345] See Cremona 2010b, 245-246.

with the criteria of the first paragraph of the article depending on the relationship of the agreement to a wider process of economic integration or trade liberalization among the countries concerned. We map these wider elements of all the analyzed agreements. The results show how the various characteristics relating to the type of the agreement affect the level of liberalization reached by the EU.[346] In the discussion, we assess how the features relating to a 'wider process of economic integration' located in the EU's EIAs should affect the EU's compliance with the GATS discipline on EIAs – or if they should at all.

ii. The methods of the empirical study

The methodology used in the study corresponds to the core requirements of Art. V GATS regarding sectoral coverage and non-discrimination. In the study, a numerical score representing the number of committed EU Member States is counted separately for both requirements. This way, each mode of service supply gets two scores: one for sectoral coverage and another for the level of non-discrimination. This is considered useful as Art. V distinguishes the two requirements. Even if in the light of Art. V only those sectors where non-discrimination is guaranteed are counted towards the threshold of substantial coverage, separating sectoral coverage from NT gives more information on a specific agreement. This approach is also useful for taking note of such instances where discrimination is eliminated only within a specific timeframe (something that is allowed under Art. V:1(b).

All service sectors are given the same weight in the analysis. An alternative approach would be to give more weight to the most important sectors. They could be chosen by economic relevance in terms of value or volume. Footnote 1 to Art. V states that the condition of 'substantial sectoral coverage' is to be understood in terms of "number of sectors, volume of trade affected and modes of supply". Volume of trade is thus relevant. However, since Art. V does not give any clear guidance on how these different factors should be weighed, it was considered more adequate for the purposes of this study to treat all modes and sectors equally. Volume of trade is a changing factor and we do not know what is the relevant point in time.[347] Moreover, there are problems relating to

[346] As will be discussed later, the special characteristics of a specific type of an agreement (AA, EPA, FTA etc.) can be considered to explain only partly the level of liberalization achieved in the EIA part of a PTA. In the context of services, similarities in the countries' political, economic and social systems arguably have an important role to play. So do the specific aims relating to the agreement (commercial, development, economic integration aims etc.). Naturally, all these issues affect the choice of the type of agreement.

[347] The liberalization of a specific sector can grow the volume significantly. Also, should a normally very important service sector (for example, financial services) be given less weight only because the volume of trade in that specific

the availability of reliable data on volumes of services trade. Nevertheless, for informative purposes, we provide aggregated results for a few important service sectors on each reviewed EIA (average score sheets in Annex 4). Those sectors are business services, tourism and travel related services, transport services and financial services. Furthermore, the annexed review sheets reveal the exact score for each mode and each subsector.

Based on our substantive analysis of Art. V:1, the most important criterion in measuring the compliance of an EIA with this provision is the level of non-discrimination that the agreement provides for. In this sense, as we have discussed earlier, discrimination can be more or less severe. In accordance with our substantive analysis, we, however, conclude that Art. V:1(b) requires the elimination of substantially all discriminatory *measures* (not discrimination in an aggregate amount), and thus only those commitments that provide for full NT are counting towards the fulfillment of that requirement.

All the results of the empirical analysis are included in Annex 4. This Annex comprises a review sheet on each analyzed agreement in Excel format (a model review sheet is included in Annex 3). Each sheet starts by basic facts of the agreement in question (the name and parties to the agreement, the dates of signature, coming into force, notification to the WTO and full implementation of the agreement in case such a date has been agreed upon). The development level of the agreement refers to the other party's status as a developing or developed country. It is also marked whether the EIA has been concluded bilaterally with one state ("bilateral") or with a region/group of states ("regional").

The following part of the review sheet takes note of the elements in the agreement that relate to non-discrimination. These are clauses relating to MFN (necessary in order to conclude that the agreement provides for non-discrimination) and standstill obligations (prohibition of new or more discriminatory measures in the future).

After that, the elements relating to a wider process of economic integration are taken note of. We have chosen twenty elements that we consider to represent not just economic but closer political, social or cultural approximation of countries.

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sector happens to be low between the partners to a specific EIA? How to weigh the importance of supply through a specific mode is also problematic. As noted by Hoekman, establishing 'mode-of-supply' weights on a sector-by-sector basis would be a monumental task. See Hoekman 1995, 14.

After these elements, the review sheet contains the mapping of the most important element of each EIA: the sector-specific commitments. The sectoral coverage of the EU's commitments is marked by "SC" and national treatment by "NT". The scores are usually given on the level of sub-sectors. In some cases, however, the EU has not separated a sector into sub-sectors, in which case the score is given on the level of the entire sector. In case the EU has excluded a specific sector or sub-sector from its commitments, such excluded sectors are marked by a grey color. Thus, a review sheet with much of grey color reflects a large number of excluded sectors or sub-sectors.

In the review sheet, we have decided to follow the WTO Secretariat's services sectoral classification list that is to a large extent based on the United Nations' product classification list (marked as corresponding CPC).[348] In the following, the WTO Secretariat's sectoral classification list is generally referred to as "W/120". There are some problems relating to the use of W/120. First, it is only one means to categorize services into sectors. W/120 is not part of the GATS but has been suggested for use by the WTO Members in the Scheduling Guidelines that have been approved by the WTO's Council for Trade in Services.[349] Secondly, W/120 is based on an aggregated system that sometimes combines certain services sectors that appear separated in some other classification systems, notably the UN's CPC classification system. There is some discretion in the way that sectors have been aggregated. For example, financial services and telecommunications are divided into a number of detailed sub-sectors while health related and social services receive only four overall categories with no further sub-sectors whatsoever.[350]

However, as many WTO Members use the W/120 classification and it is an agreed reference point for the categorization of services[351], we consider it to be the most appropriate template for the comparison of services commitments in EIAs in light of Art. V. At the same time it should be acknowledged that it does not give a perfect representation of the universe of services. Naturally,

[348] Services sectoral classification list, Note by the Secretariat, WTO document MTN.GNS/W/120, 10 July 1991. The list was prepared by the WTO Secretariat based on comments from participating Members. The GATS does not require WTO Members to use this or any other specific classification list but most Members are using the W/120. CPC is the Central Products Classification as set out in Statistical Office of the United Nations, Statistical Papers, Series M, No 77, CPC Prov, 1991.

[349] Guidelines for the scheduling of specific commitments under the General Agreement of Trade in Services (GATS), WTO's document S/L/92 of 28 March 2001. Adopted by the Council for Trade in Services on 23 March 2001. On page 8 it is specified that "in general the classification of sectors and sub-sectors should be based on the Secretariat's Services Sectoral Classification List". In addition it is stated that "Where it is necessary to refine further a sectoral classification, this should be done on the basis of the CPC or other internationally recognised classification (e.g. Financial Services Annex)".

[350] Krajewski 2003, 101.

[351] *Ibid*.

the choice also leads to certain approximation in the results, as practically no schedule is identical to another schedule in its classification of services sectors. Also the EU has on some occasions moved certain sectors to another location in its schedule. This, however, does not affect the results of our study and the value for such sub-sectors is marked in the relevant place in the W/120 classification.

On some other occasions, however, the EU has divided a specific sub-sector of the W/120 classification list into smaller sub-sectors. In this case the EU's commitments in these smaller sub-sectors are aggregated so that the lowest score among the EU's own sub-sectors becomes the overall score for the sub-sector in the review sheet.[352] In some instances, the EU has prescribed an 'unbound' for a sub-sector which is in a more aggregate form in W/120.[353] In this case, the lack of commitment in the sub-sector used by the EU nullifies the commitment for the entire sub-sector in the W/120 classification. The EU has also scheduled certain sub-sectors that are not included in the W/120 classification. These EU's own sub-sectors are not taken into account in the review sheets but are taken note of and included in the annexed sheets containing the detailed explanations on each reviewed agreement.

These last three methodological choices somewhat reduce the real value of the EU's commitments but these cases are overall rare. The exclusion of the additional sectors prescribed by the EU is necessary so that the scheduling modalities of the classification list prepared by the WTO Secretariat can be followed. The chosen method makes the EU's commitments comparable to other WTO Members' commitments scheduled according to the same classification model (or according to slight variations of it).

As the idea behind the methodology is not to find out how restrictive the commitments are, their level is not rated. This would be difficult, as such rating would require a careful qualitative analysis

[352] For example, in the EU-Korea FTA the EU has divided placement and supply services of personnel (grouped together in the WTO Secretariat's list as CPC 872) into executive search (CPC 87201), placement services (CPC 87202), supply services of office supply personnel (CPC 87203) and supply services of domestic help personnel, other commercial or industrial workers, nursing and other personnel (CPCs 87204/05/06 and 87209). Overall, the EU's commitments across all of these sub-sectors are low but the lowest score (unbound for 26 out of 27 Member States) in placement services (Mode 1) and supply services of domestic help personnel etc. (Mode 1 and Mode 2) gives the aggregate score 0,04 (bound only for 1 out of 27 Member States) for the entire sector of placement services.

[353] An example are related scientific and technical consulting services (CPC 8675) under which the EU has otherwise committed a full binding but has specified 'unbound' for exploration services under Mode 1. Even though exploration services are only part of the larger service sector CPC 8675, the lack of commitment in part of the sector nullifies the commitment for the rest of the sector.

of each commitment.[354] Instead, the purpose is, to provide a relatively simple and straightforward tool to analyze EIAs in the light of Art. V GATS. Thus, the method is primarily designed to find out the number of sectors providing for non-discrimination.

iii. The scoring of sector-specific commitments

The coverage of the agreement is revealed by the numerical scores given to all sector-specific commitments of a party. Under this method, in the case of a contracting party that has made its commitments only on the level of the central government (no regional commitments included), the value given to each commitment is either 1 or 0. Under the column of sectoral coverage (SC), value 1 means that there is some type (any type) of a commitment under the relevant sector or sub-sector. Value 0 means that the relevant sector or sub-sector has been completely excluded from the party's commitments. Under the NT column, value 1 means full commitment (i.e. full NT) and value 0 means that the specific sector or sub-sector is unbound or that the commitment is qualified (limited) in a way that does not provide for full NT.

In the case of the EU, the numerical scores reveal the internal dispersion among the commitments between different Member States. The number of EU Member States depends on how many Member States the EU had at the time of conclusion of the agreement. For the reviewed EIAs, the number of Member States is either 27 (EIAs with CARIFORUM, South Korea, Colombia and Peru, or 28. The maximum possible score for the EU party is 1, corresponding to 100 % of the Member States (all Member States committed), and the minimum score is 0 (no Member State has given a commitment). If the score for SC is 1, it means that all the Member States have some type of a commitment for the sector or sub-sector in question. The commitment does not need to provide for full NT, a qualified commitment suffices. If, for example, all 27 Member States signatory to the EIA have a full or a qualified commitment on a specific sector, the score for that sector's coverage is 100 %. If 20 of them have a commitment, the score is 20/27, that is 0,74, which represents 74 % of the Member States. If, for example, only 5 Member States have some type of a commitment for a specific sector, the score is 5/27, which makes 19 % (0,19).

With regard to the column on NT, score 1 indicates that all EU Member States provide for non-discriminatory treatment in respect of the other party's service suppliers. If the score is 0, no

[354] Something that is recognized by Roy, Marchetti, and Lim (2007) in their empirical study on the preferentiality of WTO Members PTA commitments as compared to their GATS commitments.

Member State has prescribed a non-discriminatory commitment. In most cases, however, the score is something between 0 and 1. For example, if 10 out of 27 Member States have committed to NT, the NT commitment for that specific sector or sub-sector gets the score 10/27 which equals 0,37. This is the same as 37 % of the Member States. For example, in the EU-Korea EIA, under taxation services (CPC 863) and concerning Mode 1, four out of 27 Member States have prescribed 'unbound' which means that 23 Member States have some kind of a binding. 23 Member States out of 27 represent 85 %, which gives the relevant sub-sector of professional services the score 0,85 for sectoral coverage (SC). Under NT, however, two of the committed Member States have included a discriminatory specification. Therefore, for NT the score is slightly lower, representing 21 out of 27 Member States (0,78, i.e. 78 %).[355]

Under the NT column, only such bindings that provide for full NT are taken into account in the score. The bindings can be somehow qualified but they cannot be overtly discriminatory. For example, a Member State may have prescribed a quota but if the quota is directed towards the other party's service suppliers only, the Member State's score for NT in that sub-sector is 0. If, on the other hand, the quota is applied in a non-discriminatory way to all service suppliers willing to offer their services in the market (domestic and foreign alike), it does not affect the Member State's NT score. Even though even non-discriminatory quotas are MA limitations under the GATS, they are not relevant in our study as our methodology is based on an interpretation of Art. V GATS that requires the elimination of discrimination without the need to eliminate non-discriminatory MA limitations such as those listed in Art. XVI GATS.

Problems in interpretation arise in the very often-occurring case of qualified commitments, i.e. commitments that provide for some type of limitations. The separation of discriminatory limitations from non-discriminatory ones is the most challenging aspect of the chosen approach. The EU follows a scheduling practice that generally does not separate discriminatory MA restrictions from non-discriminatory ones. Instead, the EU's EIA schedules include only two columns, of which the first one contains the relevant sector and the second one the "description of reservations". This practice is likely to result from the EU's interpretation of the GATS[356] and especially Art. XVI on

[355] Cyprus has inscribed a requirement of authorization that is subject to an economic needs test applied only to foreigners. Austrian commitment includes a nationality condition for representation before competent authorities.
[356] The issue is not completely clear under the GATS. There is a scholarly debate concerning the applicability of Art. XVI GATS to non-discriminatory MA limitations. The general opinion appears to favour the view that also non-discriminatory limitations are covered as long as they come under the list of measures included in Art. XVI:2 GATS. See especially Pauwelyn (2005) and Mavroidis (2007).

MA [357] The list of prohibited MA limitations of Art. XVI does not differentiate between discriminatory and non-discriminatory limitations. Many WTO Members, including the EU, have decided not to differentiate between the two types of limitations in their EIA schedules. This scheduling practice, however, differs from the GATS. In the EU's GATS schedule, as in the case of all other Members' GATS schedules, there are altogether four columns. The first column includes the sectors and sub-sectors, after which there are two separate columns: one for "Limitations on Market Access" and another one for "Limitations on "National Treatment". The fourth column is reserved for "Additional Commitments".[358]

The combination of MA and NT limitations means that if a specific sector or sub-sector is prescribed as 'unbound' (no commitment at all), the score is automatically 0 for SC and NT alike. If a Member State, or the EU as a whole, has prescribed 'none', it means that the sector or sub-sector is bound and there is full NT. This practice has its positive sides. When all restrictions are in one column, one does not need to contemplate how a commitment in the MA column affects the commitment in the NT column. This problem was at issue in *China-Electronic Payment Services* where it was considered in what case an 'unbound' in the MA column takes over the notation 'none' in the national treatment column.[359] In the EU's schedule, an 'unbound' is clearly effective for both MA and NT.

However, the combination of MA and NT limitations under one column in the EU's EIAs makes it difficult, and sometimes impossible, to understand whether a specific restriction is applied on a discriminatory basis or not. This is the case, for example, with conditions relating to quotas or economic needs tests that do not always specify whether the conditions are applied only to

[357] The EU's EIAs follow closely the wording of the GATS in its provisions on MA and NT. See, for example in the EU-Korea EIA, Art. 7.5 (MA) and Art. 7.6 (NT) with regard to Cross-Border Supply and Art. 7.11 (MA) and Art. 7.12 (NT) with regard to Establishment. The section on "Temporary presence of Natural Persons for Business" does not have provisions on MA and NT.

[358] Entries in this column are not obligatory and rarely used. If a Member so wishes, it may in a given sector make additional commitments relating to measures other than those subject to scheduling under Articles XVI and XVII. These commitments can deal, for example, with qualifications, standards and licensing matters. The column should be used to indicate positive undertakings, not to list additional limitations or restrictions. See the WTO Secretariat's Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS), adopted by the Council for Trade in Services on 23 March 2001, S/L/92, 28 March 2001 ("Scheduling Guidelines").

[359] Panel Report, *China – Measures Affecting Electronic Payment Services*, WT/DS413/R, adopted 31 August 2012, paras. 7.661-7.669. The Panel found that the special scheduling rule in Art. XX:2 GATS applied to China's inscription of "Unbound" under the MA column for the cross-border supply of electronic payment services under Mode 1 even though with regard to NT China had inscribed "none". China was therefore allowed to maintain the full range of limitations expressed in Art. XVI:2, whether discriminatory or not. According to Art. XX:2 GATS, "measures inconsistent with both Articles XVI and XVII shall be inscribed in the column relating to Article XVI. In this case the inscription will be considered to provide a condition or qualification to Article XVII as well".

foreigners or to domestic and foreign service suppliers alike. In most cases, however, it is possible to understand which type of measure is in question. Therefore, if it is obvious that restricting measures such as standards and licensing requirements are applied to domestic and foreign suppliers alike, they are considered non-discriminatory.

The EU has paid attention to the issue of scheduling of measures that apply to domestic and foreign service suppliers alike. The EU prescribes MA limitations listed in Art. XVI GATS but does not prescribe measures that somehow restrict the supply of services but do not constitute MA or NT limitations. The EU has included the following statement in the beginning of its services schedules on all modes:

> *"The list below does not include measures relating to qualification requirements and procedures, technical standards and licensing requirements and procedures when they do not constitute a market access or a national treatment limitation within the meaning of Articles 7.5 and 7.6. Those measures (e.g. need to obtain a licence, universal service obligations, need to obtain recognition of qualifications in regulated sectors and need to pass specific examinations, including language examinations), even if not listed, apply in any case to services and service suppliers of [Korea]."*[360]

The EU's statement makes the empirical analysis easier in the sense that if a Member State or the EU as a whole has included a measure listed above, it can be assumed to be a limitation either to MA or NT. Therefore, if a specific licensing requirement has been prescribed in a schedule, we assume that is applied to foreign services or service suppliers only.

Some of the most challenging limitations to interpret are quotas and economic needs tests (ENTs). The EU's practice appears to be to list both discriminatory and non-discriminatory MA limitations such as these two types of measures. It is not often clear whether they apply only to foreigners or to all service suppliers, domestic and foreigners alike.[361] In the review, there is a certain margin of error in this regard. Sometimes it is possible to interpret that a certain ENT applies to all service suppliers (domestic and foreigners alike), in which case it is considered a non-discriminatory MA limitations and it thus does not affect the relevant commitment's NT score. In certain other cases, however, the field of application of the ENT remains a mystery, as it is often not specified whether ENTs are applied on a discriminatory or non-discriminatory basis. There are, however, differences

[360] Annex 7-A-1 of the EU-Korea FTA, p. 1165. The EU's other EIAs include similar statements.
[361] The same problem relates also to other WTO Members' schedules. Many schedules do not provide a precise description as to whether the origin of the service or service supplier is a criterion of the test. Sometimes the discriminatory criterion may be inferred from the commitment. See the WTO Secretariat's Note "Economic Needs Tests", WTO document S/CSS/W/118, 30 November 2001, Council for Trade in Services, Special Session.

between the Member States in this regard. An example of a clearly formulated condition of a non-discriminatory ENT is Italy's commitment under services auxiliary to transport (heading 17 A) in the EU-Korea EIA. It includes a footnote 75 specifying that an ENT is applied on a non-discriminatory basis. An example of a unclear scheduling is France's commitment under legal services (CPC 861) which specifies that lawyers' access to the profession of 'avocat auprès de la Cour de Cassation' and 'avocat auprès du Conseil d'État' is subject to quotas and to a nationality condition. It is not specified whether the quota applies also to France's own national. The nationality condition, however, ensures that the service supply by Korean nationals is prohibited and there is thus no NT.

The analysis of ENTs therefore requires a careful case-by-case analysis based on the wording of each commitment. If there is no sign of discrimination, there is no effect on the score for NT. In case the field of application of the measure is unspecified, the score for NT goes to 0 as the Member State in question can, in principle, claim that it is free to apply the quota or ENT as it wishes. There is thus at least a possibility of discrimination. One specific case of ENTs are those that are applied to the groups of persons admitted to the Member States under Mode 4. The EU has in its annexes on the reservations applying to Mode 4 specified that in those sectors where ENTs are applied, "their main criteria will be the assessment of the relevant market situation in the Members State of the European Union or the region where the service is to be provided, including with respect to the number of, and the impact on, existing service suppliers".[362] Considering that the assessment is extremely open-ended ("relevant market situation") and conducted with respect to the number of *existing* service suppliers, it is likely to affect foreign service suppliers differently from domestic suppliers. Foreigners' access to the market is usually subject to visas or some other type of entry permission. ENTs are usually applied at the point of entry to the country. ENTs can be applied to domestic service suppliers as well but typically only in certain regulated professions. Open-ended ENTs under Mode 4 were therefore considered discriminatory by definition as Member States remain free to deny entry to the country altogether.

The biggest challenge in our method of interpretation and legal analysis relates to reservations that appear especially burdensome for foreign suppliers. As has already been discussed in Chapter III, Art. XVII GATS prohibits both *de jure* and *de facto* discrimination.[363] In accordance with

[362] See, for example, Annex IV D to the EU-CARIFORUM EIA.
[363] The EU's EIAs have almost identical NT provisions to the GATS Art. XVII:3. For example, Art. 7(6) of the EU-Korea EIA reads as follows: "Formally identical or formally different treatment shall be considered to be less

paragraph 2, "treatment no less favourable" is attained by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment than the treatment accorded to the Member's own like services and service suppliers. Under paragraph 3, the treatment is to be considered less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

A modification in the conditions of competition in favour of a Member's own services or service suppliers can be hard to establish in a real life situation and it is possibly even harder to establish based on a simply-worded commitment in a service schedule. Under the GATS, the requirement to provide "treatment no less favourable" than to one's own like services and service suppliers depends, to a large extent, on the definition of 'likeness'. Likeness can be hard to prove in any given context, let alone in an abstract situation of a scheduled commitment. In addition, even though Art. XVII clearly covers also *de facto* discrimination, its exact meaning and scope remains unclear. As explained by Krajewski, a measure can be considered to constitute *de facto* discrimination if it (a) does not formally discriminate against foreign services and service suppliers but (b) has the same or similar effects as a formally discriminating measure. The absence of formal discrimination is usually easy to determine on the basis of the plain language of the measure but the existence of a situation under condition (b) is harder to ascertain, as it requires the determination of a discriminatory effect.[364] Therefore, to know whether a Member should in any particular case apply formally identical or formally different treatment to a foreign service or service suppliers often depends on the particularities of the specific case and on the effects that the measure has in that specific case.[365]

So far, the case law on 'likeness' in the context of the GATS remains elusive. With regard to NT under Art. XVII, the Panel in *China – Publications and Audiovisual Products* held that likeness is established when origin is the only factor on which a measure bases a difference of treatment between domestic and foreign service suppliers.[366] Such a "presumption of likeness" was confirmed

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favourable if it modifies the conditions of competition in favour of services or service suppliers of a Party compared to like services or service suppliers of the other Party."

[364] Krajewski 2003, 108. In addition, the GATS-case law on non-discrimination is very limited and we do not have much guidance on the issue of what types of discrimination *de facto* are covered by the agreement.

[365] On the concept of national treatment and likeness under the GATS, see especially Diebold 2010, 50-62. The issue of what constitutes discrimination in services trade is taken up in more detail in Chapter III that provides the substantive analysis on Art. V GATS.

[366] *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Products,* WT/DS363/R, Report of the Panel, circulated 12 August 2009, para. 7.975.

in the recent case *Argentina – Financial Services*, where the AB considered that a complainant may establish "likeness" by demonstrating that the measure at issue makes a distinction between services and service suppliers based exclusively on origin.[367] The AB also noted that "measures allowing the application of a presumption of "likeness" will typically be measures involving a *de jure* distinction between products of different origin."[368] If there are issues other than origin, a more detailed analysis becomes necessary. The panel engaged in a somewhat deeper analysis in *China – Electronic Payment Services*, where it concluded that like services are to be in a competitive relationship with each other. In any case, a case-by-case analysis is required.[369]

This is the challenge with an *ex ante* review. A case-by-case review cannot be engaged in with regard to each commitment with potential implications of indirect discrimination. Moreover, the analysis of 'likeness' requires the establishment of a *competitive relationship* between services considered like. With no real-life services and service suppliers this is impossible. Any analysis is bound to stay on the level of speculation. In addition, as noted by the AB in *Argentina – Financial Services*, the scope for a "presumption of likeness" under the GATS should more limited than in the context of trade in goods. According to the AB, establishing "likeness" based on the presumption may often involve greater complexity in trade in services, due to the fact that the determination of "likeness" under Articles II:1 and XVII:1 GATS involves consideration of both the service and the service supplier. This may render it more complex to analyze whether or not a distinction is based exclusively on origin, in particular, due to the role that domestic regulation plays in shaping the characteristics of services and service suppliers and consumers' preferences. In addition, in the field of services there are notable complexities of determining origin and whether a distinction is based exclusively on origin. Furthermore, an additional layer of complexity stems from the existence of different modes of supply and their implications for the determination of the origin of services and service suppliers.[370]

Due to these inherent challenges in determining likeness in the context of services, as a general rule, our analysis can only take account of *de jure* discrimination and the most blatant forms of *de facto* discrimination. The most obvious cases of discrimination are nationality requirements. All limitations requiring residency in the host state are also considered discriminatory as they

[367] *Argentina – Measures Relating to Trade in Goods and Services*, WT/DS453/AB/R, Report of the Appellate Body, circulated 14 April 2016, para. 6.38.
[368] *Ibid*., para. 6.36.
[369] *China - Electronic Payment Services*, WT/DS413/R, Report of the Panel, circulated 16 July 2012, paras. 7.700-7.702.
[370] *Argentina – Measures Relating to Trade in Goods and Services*, paras. 6.38-6.40.

effectively preclude the supply of services through modes 1, 2 and 4. Under Mode 3 residency requirements, on the other hand, are considered discriminatory only when they go further than requiring establishment (for example, by requiring permanent establishment for a specific period of time prior to granting full non-discriminatory treatment).[371] Measures that require specific types of legal entity or joint venture through which a service must be supplied are also considered discriminatory in case they apply only to foreign service suppliers.[372]

On the contrary, potentially indirectly discriminatory requirements can escape our analysis. Such requirements can relate to various aspects of host-state legislation relating, for example, to specific quality requirements or professional requirements that are not openly discriminatory but can be more easily fulfilled by host state nationals, for example, due to their education, language skills or acquired experience in the host state. In principle, Art. XVII could possibly be considered to prohibit excessive requirements relating to host-state permissions, qualifications and procedures that modify the conditions of competition in favour of local service suppliers compared to like services or service suppliers of the other party.[373] However, since service schedule commitments are typically extremely vague and we do not have any specific, real-life service suppliers whose situation to analyze, such potential breaches of the NT obligation cannot be included in an empirical analysis such as the one in the present study. Uninformed estimations one way or another could skew the final outcome considerably if incorrectly analyzed. Therefore, in this study only clearly discriminatory limitations are noted. More covert indirect discrimination may thus escape the analysis and qualify as a full NT commitment.

[371] Also conditions that *in practice* necessitate extensive prior residence are considered discriminatory. For example, in the EU-Korea EIA, Denmark requires that marketing of legal advice services under Mode 1 is reserved to lawyers with a Danish licence to practice and to law firms registered in Denmark. In addition, there is a requirement of a Danish legal examination to obtain a Danish licence. In the case of an individual lawyer, this would usually necessitate university studies in Denmark and thus prior residence there. For law firms, it is not clear what registration in Denmark means but it is likely to require some type of establishment, which contravenes the essence of Mode 1 that is to supply services across borders without local presence.

[372] Such measures appear under subsection (e) of Art. XVI:2 on MA. However, measures requiring a special type of legal entity from foreigner service suppliers are clearly discriminatory so such measures must be considered to be in breach of Art. XVII. The same conclusion applies to subsection (f) of Art. XVI:2 (limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment).

[373] When considering the scope of de facto discrimination, the interpretative footnote to Art. XVII:1 must be taken into account. The footnote states "Specific commitments assumed under this Article shall not be construed to require any Member to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers". The footnote implies that inherent characteristics of a foreign service supplier working to the supplier's disadvantage need to be separated from a disadvantage created by *de facto* discrimination. Therefore, only "true" discrimination should be considered as a violation of Art. XVII. In addition, the existence of a separate discipline on domestic regulation (Art. VI) suggests that Art. XVII should be clearly distinguished from non-discriminatory measures subject to Art. VI:4. See the discussion in Krajewski 2003, 108-114 and Diebold 2010, 58-59. On drawing the limits between the disciplines on domestic regulation, MA and NT see also Pauwelyn (2005) and Mavroidis (2007).

We, however, estimate that such cases are very limited. Considering that NT is not an all-encompassing concept under the GATS but available only in situations where Members have opted in for NT through their commitments, it would be far-fetched to assume that any measure causing adverse effects on service suppliers of other countries would amount to discrimination. Such measures would be extremely hard to schedule, as their effects are often not foreseeable. We agree with Krajewski who argues that only those measures should be seen as discriminatory, which can at least theoretically be scheduled. A broader interpretation of the NT obligation of Art. XVII could be detrimental to national regulatory autonomy.[374] Therefore, even though a certain margin of error exists, our analysis should be able to catch most forms of discrimination according to this approach. Another issue is that measures, which are not considered discriminatory by a Member, are typically not prescribed in its schedule. Their discriminatory effect may be revealed only in dispute settlement. Naturally, such measures escape any empirical analysis, as we can only consider measures that are scheduled. On the other hand, as the example of the EU shows, countries tend to compensate such a risk by being careful and prescribing certain measures even if their discriminatory nature is subject to doubt. For example, the EU has included in all of its reviewed EIAs a statement specifying that that certain measures relating to qualification requirements and procedures, technical standards and licensing requirements and procedures are not schedules. It, however, specifies that such measures apply even if they do not constitute discrimination. Without case-by-case analysis, we cannot of course be sure that some of such measures could not be considered violations of the NT obligation, but as long as they are not included in the specific commitments, they cannot in any case be taken into account.

Lastly, state monopolies, even though not discriminatory per se (they are listed under Art. XVI GATS on MA), are considered of equal value to 'unbound' in the review since state monopolies in practice make it impossible for a foreign service supplier to access the market. State monopolies therefore nullify the score for both sectoral coverage and NT for the Member State in question.[375] In addition, in light of the recent WTO dispute settlement case *China – Electronic payment services*, monopolies can be considered NT violations if not scheduled as limitations.[376]

[374] Krajewski 2003, 113-114.
[375] Under wholesale trade services (Section B of the EU-Korea FTA) the state monopolies on tobacco are not taken into account in the score as their significance in the entire sector is minor.
[376] Hoekman and Meagher 2014, 439. See the Panel Report in *China – Measures Affecting Electronic Payment Services*, WT/DS413/R, adopted on 31 August 2012.

iv. The treatment of horizontal limitations

In addition to sector-specific commitments, most services schedules include a section referred to as 'horizontal commitments'. They include commitments, typically limitations, applying to all of the sectors included in the schedule. They often refer to a particular mode of supply, in most cases to modes 3 and 4. Any evaluation of sector-specific commitments must therefore take any such horizontal entries into account.

Quantifying the restrictiveness of horizontal limitations is, however, especially problematic. While they apply to all modes of supply across all the sectors, the effects they have on particular sectors greatly differ from each other.[377] In the EU's EIAs, horizontal limitations for modes 1 and 2 typically concern real estate. In the case of Mode 3, they concern real estate, public utilities, some aspects of investment and types of establishment. Under Mode 4, the horizontal limitations relate to ENTs and certain categories of persons, their residence and qualifications. Since the limitations are in most cases discriminatory, taking them into account under each separate sector would nullify most of the commitments altogether.

While horizontal commitments are often discriminatory, we consider that there must be some room for them and the rest of the analysis on sector-specific commitments should be separated from them. Naturally, the horizontal limitations must be taken into account in the overall assessment as their extent may largely affect the conditions of service supply. This is the case especially under Mode 4, where the horizontal commitments in principle determine the conditions of entry for foreign suppliers.

Authors of empirical studies have treated horizontal commitments in varying ways. Fink and Molinuevo treat them as if they were inscribed in each scheduled sub-sector. They consider the approach most appropriate from a legal perspective as it directly follows the scheduling guidelines under the GATS.[378] Since their method in analyzing sectoral commitments is less aggregated than ours, it accommodates such an approach. Hoekman (1995) takes horizontal limitations into account with regard to Mode 4.[379] Roy et al., on their part, also assess the horizontal limitations. However, so as not to overestimate their effect, they only factor into the scoring the more stringent types of

[377] Hoekman 1996, 14.
[378] Fink and Molinuevo 2008, 671.
[379] Hoekman 1995, 15: "In all cases where a reference is made under the temporary entry mode of supply to a horizontal commitment (restriction), a value of 0.5 was entered."

horizontal limitations (and improvements to them). In their analysis, those are foreign equity restrictions, limitations on the number of suppliers, including through economic needs tests, joint-venture requirements, and nationality requirements.[380]

In our analysis, we review all the horizontal limitations in the EU's EIA schedules. However, so as not to overestimate their impact on the sector-specific analysis, we only take note of them and do not factor them into the non-discrimination analysis. Naturally, in assessing the extent of non-discriminatory treatment granted to each EIA partner, the horizontal part of the commitments is relevant and it is thus separately analysed in connection with each agreement.

v. Issues relating to a wider process of economic integration or trade liberalization

In addition, the review sheet takes into account the wide array of issues included in the EU's modern PTAs. They are considered to form part of the larger context that can be seen reflected in Art. V:2 GATS which gives consideration to a "wider process of economic integration or trade liberalization". The existence or non-existence of these elements does not affect the scoring and they are thus simply noted in the beginning of the empirical review (see the model review sheet in Annex I).

vi. Review of commitments on Mode 4

Mode 4 liberalization commitments are typically crafted along somewhat different parameters than the other modes and are also subject to specific disciplines. In the EU's EIAs, the types of categories of persons admitted under Mode 4 are specified in the text of the agreement. Limitations to Mode 4 are sometimes included also in the horizontal section of the commitments. The text of the agreement already specifies what type of service suppliers are allowed to enter the EU under Mode 4. The structure of commitments thus critically differs from the rest of the modes, as the freedom of supply through Mode 4 greatly depends on the categories of persons admitted. The analysis of Mode 4 thus necessarily requires a more qualitative assessment. This is done in connection with each agreement through a separate analysis of the EU's Mode 4 commitments. The sector-specific Mode 4 commitments applicable to these specified categories of persons are, in addition, taken into account normally in the empirical analysis and marked into the review sheet. It

[380] Roy 2011, 18.

should, however, be noted that the value of the sector-specific commitments under Mode 4 greatly depends on the types and number of categories of persons admitted in the first place.

Under Mode 4, the most often-occurring limitations are citizenship, nationality and residency requirements. They are considered discriminatory as they in essence prohibit the supply of a service by a foreign national through temporary presence. The biggest challenges in interpretation relate to ENTs. The cover page of the EU's schedules on Mode 4 contains a statement on ENTs that is not present in the cover page on modes 1-3. The statement includes the criteria used for ENTs but does not specify whether they are applied in a discriminatory or non-discriminatory manner.[381] However, it is worth noting that under Mode 4 ENTs are likely to be applied in a discriminatory manner as they generally concern the right to work in a specific field where no economic criteria are applied to one's own nationals.[382] As is also noted in the WTO's Secretariat's Note on ENTs, in cases where movement of natural persons is subject to an ENT, the limitation is typically intended to discriminate between foreign and local workers. This is clearest when an ENT conditions the access on the "lack of availability in the local labour market", or the "lack of domestic supply".[383]

Lastly, the analysis of the EU's commitments on Mode 4 also informs us of the EU's position as to the scope of that specific mode. In thus allows us to consider the EU's stance to the issue of employment market access as the dividing factor between service mobility and labour mobility.

[381] See, for example, Annex 7-A-3 in the EU-Korea EIA.
[382] In contrast, seemingly non-discriminatory ENTs usually include specifications on the criteria applied. For example, the EU Member States have often inscribed ENTs with regard to certain social and health care services (e.g. hospital and ambulance services). The criteria typically applied are the number of and impact on existing establishments, transport infrastructure, population density, geographic spread, and creation of new employment. In these cases, the measure's application to all service suppliers can often be inferred (though a margin of error does exist). In the case of Mode 4, the EU Member States typically impose an ENT without any further criteria and in such sectors where access to employment would not typically be restricted with regard to one's own nationals.
[383] See the WTO Secretariat's Note "Economic Needs Tests", WTO document S/CSS/W/118, 30 November 2001, Council for Trade in Services, Special Session, p. 6.

V.2 EU'S TRADE POLICY AND SERVICES AGREEMENTS

1. The development of the EU's competences in the field of trade

In this part of the thesis we provide a short overview of the EU's trade policy and the Union's competences in the field of external trade.[384] As we have chosen some of the EU's EIAs as our data, the methodology of the thesis is adapted to the EU's practice of scheduling services commitments. An essential characteristic of this practice is that the EU's commitments are a compilation of separate commitments of a large number of different states. To understand and interpret the EU's PTAs, one needs to understand the Union's policy and competences in the field of trade. In the field of services the extent to which the EU can act as a uniform actor externally is also closely related to the state of development of its own internal market in services. Therefore, before embarking on the results of the study, we provide a brief overview of the legal aspects of the EU's trade policy in services. This serves the understanding and interpretation of the EU's services commitments and the results of our study. It also clarifies the EU's position on the types of movement covered by Mode 4.

Trade in services is today, in its entirety, part of the EU's Common Commercial Policy (CCP). Due to the special, more politically sensitive nature of services, as compared to goods, the current state of affairs required a constitutional struggle regarding the scope of the CCP. Most modes of supply were first considered to be outside the CCP and even when included, the EU's exclusive competence did not apply in a number of services sectors. The Lisbon Treaty brought about a significant change in this respect: the main subject matters of the WTO, goods and services, were matched by the new formulation of the CCP.[385] Whereas the Nice Treaty had left agreements relating to certain sensitive service sectors subject to the common accord of the Union and the Member States, Art. 3 and Art. 207 TFEU clearly provide that trade in services, as well as commercial aspects of intellectual property and foreign direct investment, belong to the area of the CCP and thus to the category of the EU's exclusive competence.[386] Under TFEU, trade agreements with third countries can therefore, in principle, be concluded solely by the Union without the need for separate ratification by the Member States.[387]

[384] Parts of this chapter have been published earlier in Jacobsson (2013).
[385] Müller-Graff 2008, 190.
[386] Rosas and Armati 2010, 205.
[387] There are some possible areas that may bring a trade agreement within the field of shared competence. These typically relate to non-trade matters (such as cultural cooperation). A trade-related area is transport where the

In practice, however, the EU continues to conclude its trade agreements as so-called mixed agreements, which means that both the EU and the Member States are signatories to the agreements.[388] That is partly because the EU's agreements include issues outside the CCP and the Union's exclusive competence but also because it is not entirely clear whether certain trade-related areas (such as mutual recognition of professional qualifications) are within the Union's competence.[389] Especially the extent to which the EU has powers in respect of foreign direct investment (FDI) has been a controversial issue since the Lisbon Treaty came into force. The Commission has interpreted the treaty broadly as allowing the EU the exclusive competence to negotiate and conclude agreements regarding all aspects of investment.[390] Many Member States, however, have taken an alternative interpretation, arguing that the EU has powers only in relation to the narrow category of FDI, admission of investment, and that the type of portfolio investments and post-establishment investment protection covered by BITs (including the so-called investor-state

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competence between the Union and the Member States remains shared (Art. 4(2)(g) TFEU). If a trade agreement includes such transport services that remain outside the Union's exclusive competence, Member States must appear as co-parties to the agreement. The scope of such services is, however, reduced by the development of the Union's secondary law, which in combination with the AETR/ERTA principle and the principle of loyal cooperation means that the Member States' action is significantly limited and the Union's competence accordingly extended. Pursuant to the AETR/ERTA judgment of 1971 (and the doctrine of implied powers), the Member States have no right to undertake obligations with third countries which affect common rules laid down by the Community (now the EU), only the EU itself can do so. As a general rule, the doctrine means that the EU enjoys implied external competence in areas where it enjoys internal competence. With the Lisbon Treaty, the principle is now also codified in Articles 3(2) and 216(1) TFEU. See Rosas and Armati 2010, 209 and Case 22/70, *Commission v Council* [1971] ECR 263.

[388] 'Mixed agreements' are international agreements concluded jointly by the EU (before, the Community) and the Member States because they include issues in shared competence. Cremona notes that this is a particular kind of shared competence, which requires joint action instead of permitting the Community and the Member States to act either alone or together. See Cremona 2010a, 679.

[389] The lack of clarity around the issue of competence is evident in the controversy relating to the conclusion of the CETA. The Commission decided on 5 July 2016 that CETA is a "mixed" agreement. Since then, the Commission and the Member States have been at odds as to which parts of the agreement can be subjected to provisional application and with varying opinions as to which parts need to wait for each Member State's ratification. See the news piece "EU members unsure how to apply CETA, 2 months from signing", 15 August 2016, CBC News, available at http://www.cbc.ca/news/politics/canada-european-union-ceta-trade-provisional-application-1.3715488 (accessed 18 August 2016). It would appear that under Art. 218(5) TFEU, all areas of agreements between the Union and third countries can be provisionally applied before the entry into force of the agreement by an authorization of the Council. However, it seems that certain Member States wish to keep certain areas out of provisional application (such areas potentially being or not being in the shared competence) prior to the ratification of the agreement in their national legislature(s). In an answer to the European Parliament, the EU Commissioner for Trade, Cecilia Malmström, stated that if the Council decided to sign CETA as a mixed agreement, "it could be applied provisionally before it has been ratified by the Parliaments of the Member States at least in part, that is to the extent that CETA falls within the Union's competence and if the Council so decides on the basis of a Commission proposal". In the same answer, Commissioner Malmström said that "in case the Council decided to apply provisionally CETA, the fact that a national parliament voted against CETA would not automatically put an end to the provisional application". See "Answer given by Ms Malmström", 8 July 2016, Parliamentary questions, European Parliament, available at: http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2016-003206&language=EN (accessed 19 August 2016).

[390] Reinisch 2014, 118.

dispute settlement) do not fall within the concept of FDI. Such issues would thus remain within the scope of shared competence, needing approval from both the EU and individual Member States.[391]

With the conclusion of the EU-Singapore FTA, the Commission has decided to legally address the question of the EU's powers in the fields of trade and investment. The EU organs are currently waiting for the opinion of the Court of Justice, which is expected to clarify on the Union's competence to sign and ratify the agreement.[392] The Commission is asking whether the Union has the requisite competence to sign and conclude the FTA alone. The Commission has been arguing that the agreement falls within the Union's exclusive competence but its stand does not necessarily apply to all EU's trade and investment agreements. For example, in the case of the CETA agreement with Canada, the Commission is proposing its conclusion as a mixed agreement.[393] In addition, in the press release concerning the request to the Court regarding the FTA with Singapore, the Commission expressly states that "In case of the EU-US trade talks, for instance there will most likely be a number of elements that will require ratification by national parliaments".[394] For the time being, it remains unclear which exactly are the areas of the EU's trade and investment agreements that the Commission believes to fall within the EU's exclusive competence. The Court's Opinion will hopefully clarify the issue as regards most of the areas in the EU's newest agreements. However, as the request is limited to the FTA with Singapore, the Court will not have the occasion to consider the new investment court system included in the agreements with Vietnam and Canada and proposed by the EU also to the U.S.[395]

[391] Since the entry into force of the Lisbon Treaty, there has been also a lively academic debate regarding the issue of EU's competences in the field of investment. For literature on the various aspects of the new EU investment powers, see footnote 6 in Reinisch 2014, 115-116.

[392] Request for an opinion submitted by the European Commission pursuant to Art. 218(11) TFEU (Opinion 2/15).

[393] The Commission's press release concerning the proposal to sign the CETA. See "European Commission proposes signature and conclusion of EU-Canada trade deal", 5 July 2016, available at http://europa.eu/rapid/press-release_IP-16-2371_en.htm (accessed 23 August 2016). According to the Commission, the conclusion of CETA as a mixed agreement is to allow for a swift signature and provisional application of the agreement. The Commission notes that "this is without prejudice to its legal view, as expressed in a case currently being examined by the European Court of Justice concerning the trade deal reached between the EU and Singapore." The Commission's stand on the question of 'mixity' as regards specific areas of the CETA agreement may be affected by political considerations.

[394] The Commission's Press Release: "Singapore: The Commission to request a Court of Justice Opinion on the trade deal", 30 October 2014, available at http://europa.eu/rapid/press-release_IP-14-1235_en.htm (accessed 23 August 2016).

[395] The CETA text follows the EU's new approach as set out in the recently negotiated EU-Vietnam FTA and the EU's TTIP proposal. See the Commission's Press Release "CETA: EU and Canada agree on new approach on investment in trade agreement", 29 February 2016, available at: http://europa.eu/rapid/press-release_IP-16-399_en.htm (accessed 26 August 2016). The EU is proposing the Investment Court System also to the U.S. in the context of the TTIP negotiations.

The formulation of the law on the EU's competences as it stands today started with the advent of the WTO in the mid-1990s when the Uruguay Round was closing and the Court was asked to give its opinion on the question of who had the competence to conclude the new GATS and TRIPS agreements embodying the results of the Round. Already much earlier the Court had declared that the Community enjoyed exclusive external competence in two fields in particular: the CCP (Opinion 1/75)[396] and the common fisheries policy[397]. The rationale with regard to the CCP (including only trade in goods at the time) was that there was no longer room for the Member States' unilateral action. Instead, in a common market where third country goods imported into any Member State were treated as goods originating in the Community, unified rules and policies were required to ensure an adequate direction for the Community's external trade. A common position was also needed to avoid the Community being weakened in its relations with third countries.[398]

However, at the advent of the WTO, the Court in Opinion 1/94[399] established that the logic applied in Opinion 1/75 to trade in goods was not suitable for all aspects of services trade. With respect to establishment (Mode 3) and the movement of natural persons as recipients or suppliers of services (Modes 2 and 4), the existence in the Treaty of specific chapters on the free movement of natural and legal persons led the Court to conclude that those matters did not fall within the CCP. Furthermore, the chapters were not inextricably linked to the treatment to be afforded in the Community to nationals of non-member countries. Therefore, in the absence of specific provisions to that effect, the treatment of TCNs crossing the external frontiers of the Member States was outside the ambit of the Community's exclusive competence. The Court concluded that only cross-border trade (Mode 1) fell within the CCP since it was 'not unlike trade in goods' and involved no movement of persons.

The Amsterdam Treaty empowered the Council to extend the scope of the CCP to services and intellectual property insofar as they were not already covered by it. The Council did not act upon the authorization but the reform was finally implemented by the Treaty of Nice, in which the ambit of the CCP was expanded to all modes of services.[400] Agreements relating to trade in cultural and

[396] Opinion 1/75, *Opinion of the Court of 11 November 1975 given pursuant to Article 228 of the EEC Treaty* [1975], ECR 01355.
[397] Case 804/79, *Commission v United Kingdom* [1981], ECR 1045.
[398] Leal-Arcas 2003, 4.
[399] Opinion 1/94, *Opinion of the Court of 15 November 1994 - Competence of the Community to conclude international agreements concerning services and the protection of intellectual property* [1994] ECR I-05267. Regarding foreign investment, see Opinion 2/92, *Third Revised Decision of the OECD on national treatment* [1995] ECR I-521.
[400] In Opinion 1/08 the Court confirmed that the Community was, as a result of the Nice Treaty, competent to conclude international agreements relating to trade in services supplied also under modes 2, 3 and 4. Opinion 1/08, *Opinion of the*

audiovisual services, educational services, and social and human health services were, however, still left within the shared competence of the Community and its Member States.[401] Consequently, in addition to the applicable Community decision-making procedure, the conclusion of agreements including such services required the common accord of the Member States.

The impractical state of affairs was finally rectified by the Lisbon Treaty that changed the law in two important ways. Firstly, all service sectors, except for transport services, were brought within the exclusive competence of the Union. Consequently, the ratification of agreements covering services, as well as trade-related intellectual property rights, in the Member States' parliaments can be precluded as long as no liberalization of transport services is included.[402] Secondly, the powers of the European Parliament in the area of the CCP were increased. The European Parliament is now required to give its consent to any trade agreement and, during negotiations, it must be kept regularly updated on their progress. The Lisbon Treaty has thus significantly enhanced the Parliament's voice in the international trade matters of the EU.

In 2013, the Court handed down two more important rulings on the scope of the CCP. In *Daiichi Sankyo*[403], the Court confirmed that the Treaty amendments of the Lisbon Treaty brought the TRIPs Agreement in its entirety within the scope of the CCP. In that case, as well as in the second case, *Conditional Access Services*[404], the Court also clarified the relationship between Articles 114 and 207 TFEU. Art. 114 constitutes the main Treaty article used to enact harmonization measures in the internal market. In both cases, one of the central issues was the potential 'abuse' of Art. 207 TFEU as a means of externally harmonizing the internal market and therefore infringing upon the EU competences under Art. 114 TFEU. The Court did not find reason for such concern. The latter case concerned an international agreement on Conditional Access Services, an area for which a similar level of protection had already been established through the EU's internal legislation. The Court found that Art. 207, and not Art. 114 TFEU, was the correct legal basis for the conclusion of an

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Court (Grand Chamber) of 30 November 2009 — Opinion pursuant to Article 300(6) EC [2009] ECR I-11129, paragraph 119. Opinion 1/08 concerned the modification and withdrawal of the EU's specific commitments under the GATS following the EU's enlargement.

[401] Art. 133(6)(2) EC. In Opinion 1/08 (paragraphs 135-140) the Court stated that also such agreements that concern neither exclusively nor predominantly sensitive sectors (cultural, audiovisual, educational, social and health services) fell within the shared competence.

[402] A shared competence between the Union and the Member States applies in the area of transport (Art. 4 TFEU). Thus, the EU can still not operate as an entirely exclusive actor in the WTO or in bilateral trade negotiations involving transport. See Waele 2011, 70. However, as noted above, the EU may enjoy implied external powers at least in certain areas of transport services. On this issue, see Eeckhout 2011, 59.

[403] Case C-414/11, *Daiichi Sankyo Co. Ltd, Sanofi-Aventis Deutschland GmbH v. DEMO Anonimos Viomikhaniki kai Emporiki Etairia Farmakon* [2013] EU:C:2013:520.

[404] Case C-137/12, *Commission v. Council (Conditional Access Services)* [2013] EU:C:2013:675.

international agreement which lead to external harmonization of conditional access services with third countries, even if the agreement had certain internal effects. By applying the so-called "centre of gravity" test in determining the correct legal basis for measures falling within separate competences, the Court concluded that the Convention's aim was not to promote conditional access services within the EU, but rather to protect EU service providers beyond the borders of the EU. Its primary objective had a specific connection with international trade in those services, and thus it could be legitimately linked to the CCP.[405]

In a similar vein, the Court in *Daiichi Sankyo* rejected the argument that allowing TRIPs to fall within the scope of the CCP would unduly affect the EU's competence in internal market matters by leading to indirect harmonization of the internal market or even deactivation of a shared competence.[406] The Court pointed out that the main objective of the TRIPS Agreement was to strengthen and harmonize the protection of intellectual property on a worldwide scale.[407] It remained open to the EU to legislate on intellectual property rights within the internal market. The Court admitted, however, that such competence must be exercised in conformity with TRIPs, 'as those rules are still, as previously, intended to standardize certain rules on the subject at world level and thereby to facilitate international trade'.[408]

By the two judgments, the Court has given good ground to expect that it will continue to consolidate the wide interpretation of the scope of the CCP. The possible effect of external harmonization on the EU's internal rules may bring up new questions as a result. For example, one can ask to what extent the EU's unified external trade commitments on third-country service suppliers' entry, stay and professional qualifications will affect their rights within the internal market. So far there is only limited EU legislation in that regard (mainly the ICT Directive). Therefore, it would seem that the Commission-led unification of conditions in trade agreements, so far seen at least in the EU's horizontal commitments on third-country service suppliers, is creating common rules that are the main source of EU rules on third-country service suppliers. However, the reach of such rules is limited considering that trade commitments do no extend to such natural TCNs who are legal residents in the EU and outside the limited scope of Mode 4. Nevertheless, as

[405] In accordance with the centre of gravity test, it is sufficient that the "main purpose" of an agreement is the external harmonization for it to fall within the scope of the CCP. "Incidental" internal harmonization does not require reference to another legal base. Para. 53 of C-137/12, *Conditional Access Services* and Ankersmit (2014). On the centre of gravity test, see e.g. Van Vooren and Wessel 2014, 158-185.
[406] Ankersmit 2014, 205.
[407] Para. 58 of C-414/11, *Daiichi Sankyo.*
[408] Para. 59, *Ibid.*

is discussed in this thesis, the borderlines between Mode 4 and other migrants are not always so clear.

The decision-making procedure for the conclusion of trade agreements is governed by Articles 207 and 218 TFEU. Unless the agreement covers a field for which unanimity is required for the adoption of the EU's internal rules or in case of specific risks relating to certain politically sensitive services enumerated in Art. 207 (4) TFEU, the Council acts by a qualified majority throughout the procedure. The reason for the exception of unanimity is to safeguard the parallelism of the decision-making rules in the internal and external dimension of EU legislation.[409]

The significance of the all-encompassing exclusivity of the CCP should, nevertheless, not be overemphasized. Considering that trade agreements are becoming increasingly complex and encompass various behind-the-border issues, there will be a need for mixed agreements also in the future. Trade deals covering policies outside the EU's exclusive competence and involving issues that have not been harmonized in the EU will need to be concluded by the EU and Member States together.[410]

2. The (lack of) EU's internal market of services – implications for external trade

Even though goods and services are now equally located within the CCP and the EU's exclusive competence, the offers which the EU makes to its trading partners in respect of services look very different from its offers in respect of goods. Whereas goods are treated similarly in each Member State once they enter the territory of the Union, in services the diversity of national rules prevails. This is due to the fact that the EU still, to a large extent, lacks harmonized legislation with regard to how services and services-related areas of law are regulated in the Member States.[411] For example, in the absence of a genuine EU-wide immigration policy, service suppliers from third countries face a different immigration scheme in each Member State. Even if the Member States aim at formulating unified conditions relating to issues such as period of stay and prior employment, there is still a separate work and residence permit procedure in each Member State. [412] Another example

[409] Müller-Graff 2008, 200.
[410] Bungenberg 2010, 133. For example, in the fields such as social policy, health and culture intra-EU harmonization is largely absent or impossible.
[411] See Langhammer who notes that given the significant amount of national sovereignties that remain in the services trade amongst EU Member States, the EU is not yet even a free trade area. Langhammer 2005, 311.
[412] The directive on a single application procedure for TCN workers does not apply to self-employed persons nor ICTs. See Art. 3 of Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single

is the absence of uniform rules regulating service professions (most relevant for sector-specific commitments under the GATS). Each Member State can apply its own qualification, license and residence requirements across the sectors. The complex and Member State-specific sectoral commitments that the EU has offered under the GATS and its services PTAs illustrate how the incompleteness of the EU's internal services market appears in its external trade relations.

Even though the Commission is the exclusive trade negotiator of the Union and undoubtedly aims at as consistent a schedule as possible, each Member State formulates its own concessions and limitations to be included in the EU's common, consolidated services schedule. Significant differences still exist among Member States both in horizontal and sector-specific commitments. After the entry into force of the Lisbon Treaty in December 2009, the continuing diversity within the EU's services schedule can be seen in all of the EU's most recent trade agreements, as is showed also by our results.

A look at the EU's services schedules demonstrates the situation. Both in horizontal and sector-specific commitments, the description of reservations is prescribed separately by each Member State. In some cases two or more Member States have adopted the same position, in which case the relevant states are grouped together. On some occasions, the commitment or restriction is marked as being taken by the EU if all Member States share the same commitment or restriction. The following example concerning auditing services is from the EU-Korea FTA:

6. BUSINESS SERVICES A. Professional Services … b) 2. Auditing services (CPC 86211 and 86212 other than accounting	AT: Korean auditors' (who must be authorised according to the law of Korea) equity participation and shares in the operating results of anyAustrian legal entity may not exceed 25 percent, if they are not members of the Austrian Professional Body. CY: Access is subject to an economic needs test. Main criteria: the employment situation in the sub-sector.

application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State. ICTs and the self-employed are outside the scope of application. Contractual service suppliers are sometimes required to obtain a work permit in the host country but the Directive applies only to workers whose employer is based in the EU.

services)	CZ and SK: At least 60 percent of capital share or voting rights are reserved to nationals. DK: In order to enter into partnerships with Danish authorised accountants, foreign accountants have to obtain permission from the Danish Commerce and Companies Agency. FI: Residency requirement for at least one of the auditors of a Finnish liability company. LV: In a commercial company of sworn auditors more than 50 percent of the voting capital shares shall be owned by sworn auditors or commercial companies of sworn auditors of the European Union. LT: Not less than 75 % of shares should belong to auditors or auditing companies of the European Union. SE: Only auditors approved in Sweden may perform legal auditing services in certain legal entities, inter alia, in all limited companies. Only such persons may be shareholders or form partnerships in companies which practice qualified auditing (for official purposes). Residency is required for approval. SI: The share of foreign persons in auditing companies may not exceed 49 percent of the equity.

As the commitment shows, ten of the EU Member States have state-specific restrictions on the supply of auditing services in or to their territory. Between them, only two Member States provide for the same restriction (CZ and SK). For the 17 Member States that have not prescribed restrictions, the sector is 'bound', meaning that they do not restrict the supply of auditing services by Korean nationals.

In practice, the Commission thus coordinates the Member States' positions that vary according to their national legislation. The Commission does act as the sole negotiator but in the formulation of the EU's offer on services, the content of the offer is largely dependent on how far each Member State is willing to go. International services negotiations are generally hampered by the challenge of coordinating various positions of national authorities in the fields of taxation, social security, immigration and employment (to name just a few). It is conceivable that in the field of services, the Commission has to be particularly attentive to the prerequisites of the Member States. Running over the Member States and their various regulatory authorities would risk the Council not accepting the final agreement.[413] This risk is emphasized by the European citizens' interest in safeguarding public services in Europe, which makes them especially alert to trade agreements in the field of services.[414]

A uniform, common services schedule of the EU is not likely to be achieved. Only a completed, largely harmonized internal market in services would make a customs union in services possible. And even in a harmonized internal market uniform conditions towards third-country service suppliers would exist only if the Member States were able to agree on issues such the entry conditions for TCNs and acceptance of their professional qualification. Mode 4 is formally in the EU's exclusive competence but immigration and professional recognition rules are not.[415] Actually, EU Member States keep concluding bilateral migration agreements, which may, in a limited extent, include some overlap with service mobility.[416] From an external point of view, the formal existence of the Union's exclusive competence in services may not seem to matter much as long as internal policies are not aligned. Especially as most of the EU's trade agreements are likely to require

[413] In concluding trade agreements, the Council acts by a qualified majority (Art. 207(4) TFEU). In certain cases, and especially when unanimity is required for the adoption of the EU's internal rules, the negotiation and conclusion of agreements requires unanimity. Moreover, Art. 207(6) provides that the exercise of the competences conferred by the article "shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation". In addition, as noted above, EU's trade agreements continue to be 'mixed' and thus subject also to national ratifications (which can be seen as especially risky).

[414] This is the case also in intra-EU services trade. A good example is the EU's Services Directive in which several sectors were excluded for political reasons (Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market). In particular, the directive does not apply at all to healthcare services and audiovisual services. Social services are also largely excluded. For a good account of the Services Directive and its somewhat complicated relationship to the Court's case law, see Snell (2008).

[415] One possible argument is that if the rules concerning the movement and professional recognition of TCN service suppliers within the EU were harmonized, the EU could have an implied external competence in that regard. One may, however, question to what extent the Member States are willing to let go of their national policies in the control of the movement of TCNs and accept trade agreements setting a common policy for the entry, stay and service supply by TCNs. Especially since so far they have managed to agree on internal rules only in a very limited amount.

[416] Arguably, the GATS MFN clause acts as a tool to discipline bilateral immigration agreements. See Panizzon (2010). However, as we explain in Chapter IV concerning Mode 4, there is no MFN obligation with regard to such rules that provide for an access to the host state's labour market as labour migration is outside the scope of Mode 4. There is likely to be only a limited overlap between EU Member States' bilateral migration agreements and Mode 4.

national ratifications in any case. However, having a single negotiator (the Commission) is likely to be in the interest of everyone.[417]

3. Service mobility as part of the CCP

The EU's Mode 4 commitments belong to the field of the CCP and can be negotiated and concluded under the EU's exclusive competence. The Union's exclusive competence on Mode 4 does not mean that the Union could, by means of trade agreements, aim to harmonize the Member States' immigration legislation. Any harmonizing measures must, instead, be adopted in accordance with the usual internal legislative procedures.[418] As long as there is no common EU framework for issues such as TCN service suppliers' entry conditions, free movement rights and recognition of qualifications, the Member States continue to schedule their own national preferences. It is also worth noting that the Member States are always guaranteed the right to determine the volumes of admission of TCNs coming to their territory from third countries. This applies to TCNs arriving to seek work as employed but also as self-employed.[419]

Among the most significant entry barriers to service suppliers are work permits and economic needs tests (ENTs) that countries use to assess whether the same job or service could be carried out by a local person.[420] Since the entry conditions for TCN service suppliers have not been harmonized, the uniformity of the EU's offer in this respect depends on coordination among the Member States. The political sensitivities and different Member State preferences relating to the entry and movement of TCNs make it challenging to adopt EU-wide legislation. A partial move to this effect, however, is

[417] The exclusive Union competence enables the Commission to act as the sole negotiator of the Union with third countries. It is one factor in the institutional balance that is a key principle in the relations between different EU institutions. However, it is not always clear how the principle should play out in practice. There are unfortunate examples of international negotiations where the composition of the EU's negotiation team has been unclear also to the Europeans themselves. To guard the correct institutional balance, the Commission has also legally challenged the practice of concluding mixed agreements as 'hybrid' acts consisting concurrently of a decision of the Council (acting for the Union) and of the Representatives of Governments of the Member States meeting within the Council. Commission has argued that the involvement of the Member States in the Council's decision-making procedure violates the treaties as it undermines the qualified majority rule and blurs the division of competences between the different actors. The Court has ruled in the favour of the Commission in the case C-28/12, *European Commission v. Council of the European Union* [2015] EU:C:2015:282. The EU's complicated institutional rules and practices cause legal uncertainties, and they may be especially difficult to understand for third parties. See van Elsuwege 2014, 131-133.

[418] Art. 79 TFEU is a more specific legal base in this respect and specifically provides for enacting 'common immigration policy' in the Union. See also Art. 207 (6) TFEU according to which the exercise of the competences in the field of the CCP does not affect the delimitation of competences between the Union and the Member States.

[419] Art. 79(5) TFEU. See De Baere 2011, 172.

[420] On these requirements in the EU Member States, see Tans (2011).

the EU's ICT Directive.[421] The directive aims at making the EU more attractive for multinational corporations and their key personnel by providing harmonized conditions of entry and stay, provisions ensuring certain social and economic rights, enhanced family rights and intra-EU mobility. Even though ICTs are the least sensitive group of persons moving under Mode 4, their easy access to the EU and movement from one Member State to another is crucial for many multinationals opening or running a business in Europe.

Another piece of legislation potentially relevant for third-country service suppliers is the seasonal workers directive.[422] Even though it is primarily meant to cover direct working relationships between seasonal workers and employers in the Member States, it does not exclude situations where a Member State's national law allows admission of TCNs as seasonal workers through temporary work agencies established on its territory and which have a direct contract with the seasonal worker.[423] Therefore, at least in some Member States, a TCN may be able supply his services in seasonal work through a contract with a local temporary work agency. However, such a presence in the EU should, in our opinion, be seen primarily as a form of labour migration instead of service mobility, even if work through temporary work agencies may seem close to freelancing. Nevertheless, local employment legislation typically applies in its entirety or to a large extent, and thus the TCN should be seen as accessing the local employment market.

Outside the ICT directive, there is little progress in the facilitation of service mobility within the EU.[424] Too much should neither be expected in that regard. The lack of expectations relates to earlier failures that the EU has experienced in trying to liberalize the intra-EU movement of TCN service suppliers. Article 56 (2) TFEU includes an option for the European Parliament and the Council to extend the freedom to provide services to natural TCNs who supply services and are

[421] Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer. Under Art. 6 of the directive, Member States retain the right to determine the volumes of admission of third-country nationals in accordance with Art. 79(5) TFEU. On that basis, an application for an intra-corporate transferee permit may either be considered inadmissible or be rejected. The maximum duration of an intra-corporate transfer under the directive is three years for managers and specialists and one year for trainee employees after which they must leave the territory of the Member States unless they obtain a residence permit on another basis in accordance with Union or national law (Art. 12). Under certain conditions, ICTs may move to work, within the same undertaking, from one Member State to another for a period of up to 90 days in any 180-day period.

[422] Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers.

[423] See recital 12 of the directive.

[424] For measures concerning legal migration for employment purposes, an overview of EU legislation is available at http://www.europarl.europa.eu/aboutparliament/en/displayFtu.html?ftuId=FTU_5.12.3.html (accessed 27 August 2016). Following the difficulties encountered in adopting a general provision covering all labour immigration in the EU, the current approach consists of adopting sectoral legislation, by category of migrants, in order to establish a legal migration policy at the EU level.

established within the Union.[425] Despite certain attempts, such an extension has not yet taken place.[426] Progress in developing intra-EU movement rights for TCNs under Mode 4 is even harder to attain considering that Mode 4 does not necessitate establishment (as self-employed or through an undertaking) in any Member State as Art. 56 (2) TFEU does.

The EU's Services Directive[427] has not changed the situation in this regard. It removes certain barriers in intra-EU service provision but does not apply to TCN service suppliers unless they establish a subsidiary in a Member State in accordance with Art. 54 TFEU. Only legal persons that are duly established in such a way begin to enjoy the freedom to provide services under Art. 56 TFEU.[428]

In addition to immigration and intra-EU movement rules, the other important set of entry barriers for TCN service suppliers are the laws regulating services within the Member States. There are significant legal and administrative barriers that apply across the sectors, including requirements for specialized professional knowledge, residence and even nationality. Regulations on professional services vary across Member States and the Services Directive has not changed the situation in this regard either as it is not aimed at the harmonization of any service sectors and does not set any common sets of professional qualifications. There is a number of sectoral directives that include harmonized requirements for the practice of various professions in the EU's internal market, but the internal recognition rules of the EU do not apply to TCNs supplying services under Mode 4.[429]

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[425] 'Establishment' is not defined in the TFEU or in the implementing legislation. However, Art. 49 TFEU provides for the 'freedom of establishment' which covers the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms (Art. 49(2)) TFEU).

[426] In 1999, the Commission proposed such an extension and put forward an "EC service provision card" which would have facilitated the movement of TCN service providers in the EU. The proposed directive would have covered "self-employed persons who are not citizens of the Union, but third-country nationals legally present in the Community" (recital 1 of the proposed directive). See the Proposal for a Council directive extending the freedom to provide cross-border services to third-country nationals established within the Community, COM (1999) 3 final. The proposal was withdrawn in 2004. See Eisele 2014, 38.

[427] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (the "Services Directive").

[428] As noted by Krajewski, the Services Directive aims at an effective implementation of the freedom of establishment and the freedom to provide services. These freedoms are enjoyed by natural and legal persons that are nationals of a Member State and are established in a Member State as provided in Art. 49 and 56 TFEU. See Krajewski 2008, 198-199. The opening of a branch is not enough to bring a foreign entity in the sphere of freedom of establishment within the EU. According to Art. 2 of the Services Directive, the directive applies to services supplied by providers established in a Member State. Pursuant to recital 36, "the concept of a provider should not cover the case of branches in a Member State of companies from third countries because, under Art. 48 of the Treaty, the freedom of establishment and free movement of services may benefit only companies constituted in accordance with the laws of a Member State and having their registered office, central administration or principal place of business within the Community.

[429] Under Art. 2 of the EU's professional qualifications directive, only EU nationals are covered by the general rules (Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of

Therefore, the EU's services market remains greatly differentiated with regard to the conditions for the provision of professional services by third-country service suppliers. The EU's internal diversity in this regard is not always visible in its EIA services schedules in case Member States' professional regulations do not include violations of NT.[430] However, the diversity of professional rules in itself (even when such rules are *de jure* non-discriminatory towards TCNs) makes the access to the EU additionally complicated and burdensome for TCNs interested in supplying their services in more than just one Member State.

Arguably for this reason and because of EU's trade partners' expectations, the Commission is, aiming at a more uniform services schedule for the Union. The quest for a more harmonized services offer was visible already in the EU's services offer made in the first years of the Doha Round (which now, over ten years later, is largely meaningless).[431] Following the EU's first GATS commitments at the end of the Uruguay Round, the EU has made two offers as part of the Doha Round: one in 2003 and another, revised offer, in 2005.[432] The horizontal commitments of the EU's Doha Round offers reveal a reasonable unification of the general conditions for the entry and stay of TCN service suppliers. Notwithstanding certain examples where a limited number of Member States have either gone further or remained below the EU's common standard, the offers on horizontal commitments significantly streamline the Member States' commitments as compared to their consolidated GATS commitments that remain in force. The change is noteworthy considering that in the Community's original horizontal commitments concluded at the end of the Uruguay Round, the entry conditions and periods of stay largely vary between the Member States.[433] Within the consolidated schedule of EU-25 the diversity is manifold compared to the Doha Round offers.[434]

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professional qualifications). See Guild 2007, 2-3. The exclusion of TCNs from the coverage of the recognition rules is also specified in all EU's EIAs.

[430] However, often they do include violations of NT as well. There are numerous Member State-specific examples of nationality and residency requirements in various service professions. The differences between the Member States' regulations (the diversity) is easily visible in such instances.

[431] Klamert 2015, 68-69 and Langhammer 2005, 323. Since the EU's latest offer, the Doha Round has become embroiled in deep controversies and the offers are no longer relevant as such. Nonetheless, they can be reviewed to analyse to what extent the EU has managed to formulate a unified stand on services before the halt of the Doha Round.

[432] Communication from the European Communities and its Member States – Conditional Initial Offer, 10 June 2003, TN/S/O/EEC and Communication from the European Communities and its Member States – Conditional Revised Offer, 29 June 2005, TN/S/O/EEC/Rev.1. According to Persin, the EU's original Doha Round offer of 2003 is more generous on Mode 4 than those of most other WTO Members, the U.S. included. See Persin 2008, 840, fn. 2.

[433] In the original commitments of 1994 the duration of stay and several other rules were left to the discretion of the Member States and were mostly not specified in the schedule. In the draft consolidated schedule of EU-25 several of such Member State-specific measures are explicitly mentioned in the horizontal part of the schedule, which makes it falsely appear more diverse than the Community schedule of 1994.

[434] See the study on the EU's Doha Round offers on Mode 4 in Jacobsson (2013). The draft consolidated schedule, which at least in the time of writing was still in the process of being ratified in some of the Member States, is included in the WTO document S/C/W/279 of 9 October 2006. The schedules of Bulgaria and Romania were not yet consolidated with the schedules of the other Member States and were not reviewed in the study.

The EU's GATS offers of 2003 and 2005 also show that there are at least two occasions where the Member States' offers have deteriorated with the adoption of a more unified offer since the consolidated Uruguay Round commitments. However, their overall importance is not significant and there are also several examples of situations where individual Member States' commitments have ameliorated with the more streamlined EU offer.[435]

We have not compared the EU's EIAs to the EU's GATS commitments and offers, but what is noteworthy is that in the EIAs a big part of the horizontal commitments on TCNs regarding their entry and stay in the EU's territory have been included in the actual text of the agreement. There are still numerous Member State –specific deviations in the sectoral commitments but horizontal commitments have been largely harmonized.

As noted by Hoekman and Sauvé, integration agreements, even when not formally seeking to establish a common external policy, often involve some degree of harmonization of regulatory policies at least in certain sectors. This may imply that some participating countries become more liberal, while others need to be more restrictive. As the authors note, harmonization up is nevertheless the more likely result than harmonization down and thus the balancing requirement of Art. V:4 towards outsiders is usually not risked.[436]

It is, however, important to keep in mind that the EU's more unified stand on Mode 4 in the 2003 and 2005 offers has not been attained by harmonizing EU legislation but by coordinating the positions of the Member States. The common position is thus dependent on the flexibility provided by the Member States' national legislation. That is necessary since the EU has so far succeeded in enacting only very limited legislation on the conditions for the entry and stay of TCN service suppliers (basically, only the ICT Directive). Moreover, in the study referred to here, only the EU's horizontal commitments under Mode 4 were analyzed. Horizontal entry commitments are most suitable for a unified formulation across Member States, even without harmonizing EU rules. Further difficulties arise when sector-specific commitments come into play in which case the complexity and variety of services regulations across the Member States becomes quickly evident.

[435] Jacobsson 2013, 255-256.
[436] Hoekman and Sauvé 1994a, 58-59. The balancing requirement towards outsiders means that the overall level of barriers has not risen on a sectoral basis.

The sectoral commitments offered in the Doha Round still reveal a considerable amount of Member State-specific limitations.

Eschenbach and Hoekman have carried out an interesting analysis of the EU's GATS commitments and Doha Round offers.[437] They use the index score (from 0 to 100) of Hoekman 1996 to characterize EU's GATS commitments.[438] As the authors note, the index used is a somewhat arbitrary measure of the depth of commitments in that its value is unlikely to be very informative of the actual policies that prevail. However, it provides a way of weighting commitments and allowing cross-country comparisons, thus permitting to assess the degree to which there is certain uniformity in GATS commitments across EU members. They find that the pre-Doha level of commitment for the EU-15 as a whole was 47%. Most EU members do not deviate much from this average 'benchmark' in terms of national commitments across modes. At 46%, the EU weighted average is only one percentage point below the benchmark value.

Among the most interesting findings is that the greatest variance in specific commitments is found for Mode 3. The standard deviation of the commitments is twice as high for Mode 3 commitments as for other modes on market access. Although Modes 1 and 4 are more 'sensitive' for all countries, the sensitivities on Mode 3 vary more between the Member States. They also find that the GATS Doha Round offers made by the EU substantially increase the EU's average commitment index. At the aggregate level, the standard deviation falls from 2 to 1.6, indicating an increase in uniformity at the EU Member State level. With the Doha offers, the variance across EU members would fall for Mode 3 market access commitments, but the structure of commitments remains similar to the pre-Doha status quo. They find that the 'lagging' countries are mostly the same – only Greece would converge to the EU average as a result of the offers that were on the table as of 2004.

Langhammer (2005)[439] uses the same methodological approach as the Hoekman commitment index (1996), except that he modifies the index by also taking account of differences in in-between commitments (ranging between 'unbound' and 'none) and assigning them values 0.25 and 0.75. Similarly to Hoekman and Eschenbach, he finds relatively low coefficients of variation. The

[437] Eschenbach and Hoekman (2006).
[438] As explained in the chapter on methodology, the Hoekman method (1996) assigns a value of 1 to full commitment to liberalization; 0.5 (partial) to specific limitations; and 0 ('unbound') to instances where no commitments at all are made for a subsector. Average scores are provided for MA and NT (also combined) across all four modes and 155 sub-sectors.
[439] Langhammer (2005).

average levels of commitments thus do not differ much between the Member States. Overall, there is most diversity under Mode 4.

Both studies give useful insight into the uniformity, or lack of uniformity, in the EU's services commitments. However, they only note the existence of restrictions and distinguish between severe and minor trade restrictions to a limited extent. The fact that with the Doha Round offers more EU Member States have a similar number of bounds, unbounds and partial commitments than in the original GATS commitments does not mean that the commitments provide for identical conditions towards third-country service suppliers. The actual content of the conditions would be very hard to index. As noted by Langhammer, because of the non-quantitative nature of trade restrictions in services, it is very difficult to assess how far the EU is from a customs union (common external policy) in services. The heterogeneity of both service sub-sectors and policy measures makes the quantification of services barriers virtually impossible.[440] Also in our study, we only note the existence or lack of NT, not the reason for it. To learn more of the types of differences existing between different Member States in their services commitments, a more qualitative study would be needed.

[440] Ibid., 313.

V.3 THE RESULTS OF THE EMPIRICAL ANALYSIS

1. An overview of the reviewed agreements

The reviewed agreements include four different international agreements concluded between the EU and its Member States on the hand and partner countries on the other hand. The agreements represent three different types of EU's trade agreements: they comprise an economic and partnership agreement (EPA), a free trade agreement (FTA) and two association agreements (AAs). Two of the agreements are bilateral (EU-South Korea FTA and EU-Georgia AA) and two regional (EU-Central America AA and EU-CARIFORUM EPA). The first, with CARIFORUM countries, was concluded in 2008 and the last one, with Georgia, in 2014. The EU-Georgia AA entered into force in July 2016, and it is the latest of the EU's so-called "Deep and Comprehensive Free Trade Agreements" (DCFTAs) that has entered into force (the AAs with Moldova and Ukraine being only provisionally applied)[441].

The objectives of the reviewed agreements differ. The commercially oriented FTA with South Korea is focused mostly on trade, whereas the three other agreements cover also other areas of cooperation in addition to a chapter on trade. The AA with Georgia relates to the EU's framework of the European Neighbourhood Policy and its eastern regional dimension, the Eastern Partnership. The key goal is to extend the EU's influence in its close neighbourhood and to bring Georgia closer to the EU by requiring it to adopt a significant amount of the Union's internal market regulation. After implementing the agreement, Georgian business may access the EU's internal market in selected sectors and will function in those sectors in the same regulatory environment as businesses in the EU. This objective and method separates the EU-Georgia AA from the other reviewed agreements. However, the agreement includes a GATS-type services schedule, which makes it possible to analyze the EIA by employing our methodology. The most significant difference to the other reviewed EIAs is that Mode 3 has been scheduled according to the so-called negative listing

[441] Deep and Comprehensive Free Trade Agreements (DCFTAs) open up markets on services, investment, public procurement and include regulatory issues, on top of removing tariffs. See the Commissions website on its trade policy and agreements: http://ec.europa.eu/trade/policy/countries-and-regions/agreements/index_en.htm. (accessed 15 August 2016). DCFTAs have been concluded with Georgia, Moldova and Ukraine, all of which require the partner countries also to match a significant part of their trade-relevant regulation with that of the EU. On 14th December 2011, the Council authorized the Commission to open bilateral negotiations to conclude DCFTAs with Egypt, Jordan, Morocco and Tunisia. The EU already has AAs with all of theses countries and at least in the negotiations with Morocco the goal is the gradual integration of the Moroccan economy into the EU single market. See the overview of the EU's trade negotiations available at: http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf (updated in May 2016, accessed 15 August 2016).

modality. Its analysis is significantly more burdensome than for positively listed schedules but the same method can be used.

The AA with Central America, on the other hand, is the EU's first ever region-to-region AA. It aims at closer political and economic cooperation between the EU and the participating countries by relying on three mutually reinforcing pillars, namely political dialogue, cooperation, and a trade agreement.[442] The agreement, however, does not require the Central American countries to adopt EU legislation similarly to the Eastern Neighbourhood AAs. Instead, the Central America AA aims at supporting the region's own integration process. An important factor in the negotiations for the agreement was the need to replace the unilateral preferential access to the EU market, which was granted to Central America under the EU's General Scheme of Preferences (GSP). Being expirable, GSP preferences are more unpredictable than preferences given under a PTA, and countries having achieved high or upper-middle income per capita no longer benefit from the scheme. One of the main benefits of the AA with Central America was thus considered to be a unilateral system with a stable, predictable and reciprocal framework.[443]

Out of the four reviewed agreements, the EU-CARIFORUM EPA[444] has the strongest development agenda. EPAs are development-oriented PTAs that are being concluded with African, Caribbean and Pacific (ACP) countries that participate to the Cotonou Agreement.[445] The ACP-EU Partnership Agreement, signed in Cotonou on 23 June 2000, was concluded for a 20-year period from 2000 to 2020. It is a comprehensive partnership agreement and has been the framework for EU's relations with the 79 ACP countries. With the expiry of the WTO waiver that allowed their existence, the

[442] The trade pillar of the AA has been provisionally applied since 1 August 2013 with Honduras, Nicaragua and Panama, since 1 October 2013 with Costa Rica and El Salvador, and since 1 December 2013 with Guatemala.

[443] The Commission's webpage on the trade agreement with Central America, available at: http://ec.europa.eu/trade/policy/countries-and-regions/regions/central-america/ (accessed 15 August 2016). According to the Commission, the strengthening of the regional integration process in Central America in practical terms means the creation of a customs union and economic integration between the region's countries. The EU supports this process through the trade agreement and its trade-related technical cooperation programs. For a comparison of different trends of regional intergration and on the links between the EU and other regional processes, see Warleigh-Lack, Robinson, and Rosamond (2011). On the effects of EU trade preferences on developing countries' exports, see Persson and Wilhelmsson (2007).

[444] CARIFORUM's membership comprises Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, Saint Kitts and Nevis, Surinam, Trinidad, Tobago, and the Dominican Republic.

[445] The relations between the EU and the ACP countries date back to 1975 and the first Lomé convention. The latter was a successor to the first Convention of Yaoundé in 1963, binding the then European Economic Community and former colonies of some of its Member States. Since then, successive partnership agreements have been concluded until the present time. The currently applied Cotonou Agreement was revised in 2005 and 2010. It was concluded for a twenty-year period and will expire on 29 February 2020. On the Cotonou Agreement, the EPAs and the participating countries' capacity to implement them, see Gathii (2013).

trade preferences of the agreement expired at the end of 2007. EPAs have been negotiated to replace the preferences. According to the EU, EPAs are WTO-compatible agreements but go beyond free trade by focusing on ACP countries' development, taking account of their socio-economic circumstances and including co-operation and assistance. They are reciprocal but allow ACP countries long transition periods to open up partially to EU imports while providing protection for sensitive sectors. EU tariffs are liberalized immediately.[446] The story is, however, very different for services, as our results show. ACP' countries access to the EU's services market is restrained, as it is in all EU's EIAs.

The EU-Korea FTA is an example of the EU's most recent, primarily commercially driven agreements. The agreement can be seen as the flagship of the EU's Global Europe strategy of 2006, which marked the debut for bilateral trade negotiations with commercially meaningful partner countries with limited non-trade agendas.[447] So far, it remains the only such agreement that has entered into force. As explained above, negotiations on a FTA with Singapore were concluded already in October 2014 but the initialled agreement still needs to be formally approved by the European Commission and then agreed upon by the Council of Ministers and ratified by the European Parliament. Another important and already negotiated trade agreement, the CETA with Canada, is still waiting to be signed in the midst of uncertainty. As the EU's commercial trade agenda has encountered difficulties, including large resistance among some parts of the European population, the EU-Korea FTA remains the EU's most liberal trade-focused agreement so far. Our results put the EU-Korea EIA approximately on the same level with the EU-Georgia AA.

2. Detailed results of the review

The section on the results is structured as follows. First, we note some of the common features in all of the reviewed EIAs. These are the type of features that directly affect the level of liberalization

[446] See the Commission's webpage on EPAs: http://ec.europa.eu/trade/policy/countries-and-regions/development/economic-partnerships/ (accessed 19 August 2016). In practice, the negotiations of EPAs have proved difficult. According to critics, the EU has sent mixed signals: its partners have believed that the main idea was to make existing preferential relationships WTO compatible whereas the EU wanted to move forward on trade. The EU also seems to have underestimated how difficult it is for partners from regional organizations of developing countries to negotiate trade deals in view of their poor capacities and the need to find agreement among one another. See Ramdoo and Bilal (2013).

[447] The Global Europe agenda marked a strategic shift in the EU's trade policy. It ended the EU's PTA moratorium, which the Commission had put in place to focus on the WTO's Doha Round. Bilateral engagement between the richest economies of the world were seen to undermine the Doha Agenda but ever since 2006, the Commission, backed by a trade-oriented coalition of Member States in the Council, has been aiming at creating economic growth through "deep and comprehensive" trade integration with some of the most commercially attractive regions of the world. See Kleimann 2013, 5.

granted by the agreement. As our analysis is focused on assessing the agreements' level of discrimination in terms of NT, the issues brought up in our review are directly related to that aspect. After presenting the common features affecting NT across the agreements, we provide separate results for each agreement. In this section we give the average scores for each mode across the entire EIA as well as for certain selected service sectors. Here the results are summarized but the detailed results for each single sub-sector can be viewed in Annex 4, which includes the sector-specific analysis of each EIA. The detailed review sheets of Annex 4 also note such ingredients of the EIAs that we consider to be relevant for the so-called "wider process of economic integration" under Art. V:2 GATS. These additional ingredients are analyzed in more detail in Chapter VI where the results presented here are assessed in light of the GATS rules on EIAs.

i. Common features of the reviewed EIAs

In its EIAs, the EU groups Modes 1 and 2 together as "Cross-Border Supply of Services". The two modes are defined similarly to the GATS. In the EU-CARIFORUM EIA, Mode 3 is referred to as "Commercial presence" (using the GATS terminology), but in the three other EIAs the EU is using the term "Establishment". Mode 4 is referred to as "Temporary presence of natural persons for business" in all of the agreements. All modes of supply are thus covered by the agreements, even though the level of commitments greatly differs depending on the mode and the sectors. There are commitments in most of the sectors by at least some EU Member States.

According to Art. 65 of the EU-CARIFORUM EIA, commercial presence means "any type of business or professional establishment" through constitution, acquisition or maintenance of a juridical person or the creation or maintenance of a branch or representative office within the territory of the EU for the purpose of performing an economic activity. The other EIAs define "establishment" in a similar manner. For the EU, the two concepts thus appear to have the same meaning.[448] Both concepts cover also branches and representative offices, in accordance with the definition of commercial presence in Art. XXVIII GATS. Considering that the establishment of branches and representative offices is an essential and legally accepted part of commercial presence

[448] In EU-CARIFORUM EIA, another concept, "Investment", is used in the heading of Title II ("Investment, trade in services and e-commerce"). "Investment" seems to be equivalent to GATS Mode 3, combined with investment in certain non-services sectors (agriculture, manufacturing, mining). The content of the Chapter on "Commercial presence" (Mode 3) is, however, similar to "Establishment" in the other agreements (which also include certain non-service sectors). If not in the title, all of the agreements seem to use the term 'investment' interchangeably with Establishment/Commercial Presence at least under certain provisions (e.g. in the Article "Review of the investment legal framework" at the end of each chapter on Establishment, except for EU-Georgia). For a comparison of the EU's EIA with the GATS architecture, see South Centre (2009).

also under the EU's EIAs, limitations to their use can be seen discriminatory. The denial of their use modifies conditions of competition in favour of services suppliers of national origin as foreign service suppliers are required to fully establish themselves even though they already have a legal establishment in their home country. As to domestic suppliers, limitations to the use of branches do not concern them at all.[449] The EU's scheduling practice also appears to support the conclusion that the requirement of a subsidiary or other type of incorporation in the EU Member States is to be considered discriminatory. All reviewed EIAs include a statement according to which non-discriminatory requirements as regards the types of legal form of an establishment are not included in the schedules of commitments.[450] However, reservations on the use of branches are inscribed as limitations in the EU's schedules. In addition to a few sector specific limitations, there are horizontal limitations to the use of branches in all of the EIAs (see below in the results). As we have not factored horizontal limitations in the scores, limitations on the use of branches or representative offices do not affect our scoring results in any significant manner.

Under Mode 3, the Member States have undertaken commitments relating also to such economic activities that are not purely in the field of services.[451] Such commitments relate to agriculture, hunting, forestry, logging, fishing and aquaculture, mining and quarrying and manufacturing (referred to by the EU typically as non-service activities). For the non-service sectors, reservations are scheduled on a negative list basis. They are always listed before the section of "Business Services" which are the services corresponding to the WTO's Sectoral Classification List. Under Business Services, the Member States have also on some occasions included certain service activities that are not included in the WTO's Classification.[452] As they extend the scope of the agreement, such extra service activities are listed in the results for each EIA.

Each reviewed EIA specifies in the beginning of each schedule that it does not apply to any subsidies or grants provided by any of the EU Member States, including government-supported

[449] Setting up of a subsidiary instead of a branch may bring with it many advantages, for example in terms of liabilities (because the subsidiary and the parent company are distinct legal entities, the parent company is not usually exposed to any liabilities of its subsidiary). What is central here is, however, the free choice among the types of establishment enabled by Mode 3. We recognize that it may sometimes be desirable for public policy reasons to demand incorporation but the requirement goes similarly against the nature of Mode 3 as residency requirements for foreign natural persons under Mode 4.

[450] See, e.g., para. 5 of Annex 7-A-2 of the EU-South Korea EIA ("List of commitments in conformity with Article 7.13 (Establishment)").

[451] In the EIAs with South Korea, CARIFORUM and Central America, there is one non-service related activity also under Mode 4: "Publishing, printing and reproduction of recorded media" (part of "Manufacturing").

[452] It is possible that the extra services are on some occasions part of "Other services" that is an additional category in the Classification under some of the main service sectors.

loans, guarantees and insurance. It is also separately specified under some sectors (especially under Research and Development Services (1.C.) that publicly funded R&D services, exclusive rights and/or authorizations can only be granted to EU nationals and to EU juridical persons having their headquarters in the EU.[453] Thus, even though the EU's commitments on R&D services under Computer and Related Services are liberal, public funding covers EU establishments only.

In the commitments regarding health services and social services, as well as most education services, it is specified that the commitments cover only privately funded services. None of the EU Member States have thus allowed access to their publicly funded education and health services networks. In addition, in the EU-Korea, EU-Central America and EU-CARIFORUM EIAs it is specified that the participation of private operators in the education network is subject to concessions.

In financial services, the EU Member States have typically grouped several sub-sectors together under the two main sectors. Therefore, there are only two overall scores: one for insurance-related services and one for banking and other financial services. The EU's scores are low for both insurance and banking services. This is due to the high number of discriminatory limitations that the Member States have inscribed and which thus bring the score close to zero. There is also a high number of 'unbounds' which often brings also the SC score close to zero.

It is noteworthy that the EU's Mode 1 commitments are sometimes relatively low also for such services that are not easily supplied cross-border (such as maintenance and repair of vessels and pushing and towing services as well as beauty services). It is not always easy to understand what goals such reservations serve. On some occasions it may mean that the Member States want to limit cross-border consulting relating to such services.

Under Mode 4, there is a large number of excluded sub-sectors across the EIAs. They are easily visible as the grey areas in the review sheets of Annex 4. The most often-occurring NT limitations are nationality and residency requirements. It is crucial to notice that the EU's commitments apply only to the limited categories of persons covered by each EIA. The commitments on key personnel and graduate trainees apply only with regard to services liberalized under Mode 3. The entry of foreign nationals is also subject to many other criteria regarding their legal entry and stay and non-

[453] E.g. EU-CARIFORUM EIA, Annex IV A (Mode 3) and Annex IV B (Modes 1 and 2).

access to the host-state's employment market. As will be discussed in the following chapter, all of the reviewed agreements confirm our position on the scope of Mode 4: they do not allow for any access to the Member States' employment markets.

All the EIAs' cover pages for the Mode 4 schedules include a statement on economic needs tests (ENTs). They state the criteria used for ENTs[454] but do not specify whether ENTs are applied in a discriminatory or non-discriminatory manner. However, we consider that under Mode 4 ENTs are especially likely to be applied in a discriminatory manner. EU Member States do not usually restrict the employment of their own nationals and thus ENTs applied to natural persons are likely to concern third-country nationals only. However, it is possible that in certain regulated professions, EU Member States may restrict the entry of new suppliers among their own nationals as well. As we have regarded all ENTs discriminatory under Mode 4, there is some scope for interpretation errors in the reading of the schedules in this sense.

All schedules on Mode 4 also note that the lists of commitments do not include measures relating to qualification requirements and procedures, technical standards and licensing requirements and procedures when they do not constitute a limitation within the meaning of NT. Those measures (e.g. need to obtain a license or need to pass specific examinations) apply to the categories of admitted natural persons even if not listed in the EU's schedule. Among such measures the EU has included also the "need to have a legal domicile in the territory where the economic activity is performed". In our view, such a measure is, however, in principle discriminatory under Mode 4 if it requires residence. In our analysis, all explicit residency requirements in the scheduled commitments reduce NT to zero.

ii. The results

Below each of the four EIAs is presented separately. We first give the average scores for each mode across the entire services schedule of the agreement. All scores represent percentages and are shown as decimals between 0 and 1 in order to follow the presentation model of the detailed review sheets of Annex 4. Thus, a score of 0,75 refers to 75 % of the EU Member States (27 or 28 states, depending on the agreement).

[454] The main criteria are "the assessment of the relevant market situation in the Member State of the European Union or the region where the service is to be provided, including with respect to the number of, and the impact on, existing services suppliers". See, e.g., para. 6 of Annex IV D of the EU-CARIFORUM EIA.

There are two different scores: the first for sectoral coverage (SC) and the second for national treatment (NT). The SC score shows the percentage of EU Member States that have given a binding commitment under each mode. The commitments counted under SC do not need to provide for NT but any commitment suffices. This method of providing a separate score for SC allows us to note the overall number of sectors covered by the EIA even without full NT. For example, in the EU-Korea EIA, the EU's SC score for Mode 1 is 0,40, which means that, in average, 40 % of the Member States have given some type of a commitment across all sectors of the WTO's Sectoral Classification under Mode 1. A commitment under SC means any type of commitment except for 'unbound' or a complete exclusion of the sector or sub-sector in the EU's schedule.[455] An 'unbound' or outright exclusion always gives the score 0.

The second score, NT, on the other hand, gives the score that we are most interested in: the percentage of EU Member States that have granted full NT. This score gives the number of Member States providing non-discriminatory treatment under each sector and sub-sector. It is important to note that sectoral exclusions do not affect the overall average score for NT. This is because under Art. V:1(b), there is a requirement to eliminate discrimination only in the sectors covered by the agreement. Even though it is not entirely clear what this requirement means, we have opted to provide the overall NT score only for such sectors that the EU has not excluded from its specific commitments.[456] Therefore, as the NT score is provided only for liberalized sectors, the NT score may occasionally be higher than the SC score.[457]

The average scores for both SC and NT under each mode are counted on the highest sectoral level (e.g. 1. BUSINESS SERVICES). In case the main sector is divided further into two lower sub-groups (on the level of A, B, C… and further into a, b, c…), the average scores for both the numerical level (1, 2, 3…) and the following sectoral level (A, B, C…) are marked with a bold font in the review sheet. If no sub-sectors (a, b, c…) are specified, the upper sector (A, B, C…) alone is marked by a bold font. On some instances the Member States have given identical commitments under all sub-sectors of a specific sector in which case the sub-sectors have been hidden to save

[455] An example of a complete exclusion of an entire sector is the exclusion of audiovisual services in all EU's EIAs. In addition, there are several examples of partial exclusions of sectors, for example in air transport services.
[456] See the explanation for choosing this more conservative method in section 2(iii) of Chapter III.
[457] Some of the sectoral (or sub-sectoral) exclusions apply to all four modes, some only to one or two of them. As sectoral coverage is understood in terms of number of sectors *and* modes of supply, NT score under a specific mode is not affected by a sectoral exclusion even if only that specific mode has been excluded in the sector in question. The NT score gives the level of non-discrimination in the sectors covered under each mode.

space (the scores being the same and thus giving an identical average).[458] There are also certain occasions where the Member States have given their sub-sectoral commitments combined on a higher sectoral level (e.g. in the EU's EIAs all sub-sectors are combined under "1B. Computer and Related Services"). In that case, the smallest sub-sectors are also hidden. The overall average score for each mode ("AVERAGE FOR MODE") is the combined average of the highest level of sectors (the main service sectors from 1 to 11)[459]. The score for each main sector from 1 to 11, on the other hand, is the average of the scores for the sectors below it (A, B, C…), which themselves are the average of the scores for the lowest level of sub-sectors (a, b, c…). Each average is marked by a bold font in the review sheet.

When looking at specific sectors and sub-sectors one soon notices that there are significant differences in the scores between them. Therefore, instead of focusing on the overall average scores across the modes, it is more informative to look at the average scores across specific sectors and at the exact scores for specific sub-sectors. For this reason, we have chosen a few important service sectors for which we provide the NT score separately. The score is the average NT score across the sub-sectors for that specific sector. For example, in the EU-Korea EIA the NT score for professional services under Mode 1 is 0,45 – meaning that, in average, 45 % of the EU Member States have given non-discriminatory commitments to Korean service suppliers in professional services under Mode 1. Again, the more specific scores by sub-sector can be viewed in Annex 4. There one can see that, for example, in the sub-sector of engineering services, the EU's score is 0,70. Thus, 70 % of the EU Member States give full NT for engineering services through Mode 1. That can be compared to the "services provided by midwives, nurses, physiotherapists and para-medical personnel" where the EU's score is as low as 0,04 – meaning that only 4 % of the Member States have given full NT to Korean professionals in this specific sub-sector (representing actually just one Member State).

We present the summary of our results in the following order, from the oldest to the most recent agreement (the year refers to the timing of the signing the agreement):

[458] The hidden sub-sectors can be seen in Annex 3, where we have provided a clean, model review sheet with all sub-sectors untouched.

[459] In the WTO's Sectoral Classification list there are altogether twelve main service sectors (see the model review sheet in Annex 3). Because the EU has not included any commitments under sector 12 ("Other services not included elsewhere"), that sector is not shown in the review sheets. The fact that there are no EU commitments under this "left-over" sector, has not affected the results. It is not clear as to what exactly should be included under the sector from the point of view of sectoral coverage. It was thus considered best to leave it outside the analysis.

EU-CARIFORUM EPA 2008
EU-Korea FTA 2010
EU-Central America AA 2012
EU-Georgia AA 2014

To provide a full picture of the agreements, we also note such service activities regarding which the EU has included commitments but which are not part of the WTO's Sectoral Classification List. To save space, the different modes are marked as M1, M2, M3 and M4. Only the NT score is noted with respect to these additional services.

The EIAs with the CARIFORUM countries and Georgia include two different categories of Mode 4 service suppliers. In addition to key personnel and graduate trainees that appear in all reviewed EIAs and are marked as Category 1 (Cat. 1) in these two EIAs, these two agreements include specific commitments also on contractual service suppliers (CSSs) and independent professionals (IPs). CSSs and IPs are marked as Category 2 (Cat. 2). In the EU-Georgia EIA, the EU has scheduled specific commitments for business sellers (good and services) together with key personnel and graduate trainees, and they are thus all included in Cat. 1. In the EU-CARIFORUM EIA, the EU has covered business services sellers and short-term visitors for business purposes (endeavour to facilitate such visits) but there are no specific commitments on these two groups of natural persons.

The EU's EIA with South Korea has specific commitments with regard to key personnel, graduate trainees and business services sellers. They are scheduled together and thus noted as one group under Mode 4. The EIA with the Central American countries has specific commitments in respect of key personnel and graduate trainees only (scheduled together).

In our review, we have noted all the horizontal limitations applied by the EU Member States. As they are not factored in the scores, they deserve special attention. On some occasions, such horizontal limitations applied across the sectors can greatly diminish the value of the sector specific commitments. The limitations are analyzed in more detail in the following chapter. Here below, in the results concerning horizontal limitations, the number in the parentheses indicates the number of EU Member States having inscribed some type of a horizontal limitation for the type of issue in question. For example, "types of establishment (EU (branches) + 10)" means that all EU Member States have included a reservation on allowing the use of branches across all service sectors in

addition to which ten Member States have inscribed some other types of cross-cutting discriminatory reservations concerning the types of establishment available to service suppliers of the partner country. These measures are discriminatory if the foreign service suppliers' choice of legal form for the establishment is restricted as compared to domestic suppliers or if the foreign suppliers are subjected to more burdensome establishment requirements than domestic suppliers.

The detailed scores on SC and NT can be viewed in the review sheets of Annex 4. In the beginning of each review sheet of Annex 4, we have noted issues that may be considered relevant under Art. V:2 (the wider process of economic integration or trade liberalization). The presentation of the service sectors depends on the EU's commitments. Where the commitments are identical across the entire main sector (as they generally are e.g. for all sub-sectors of "Computer and Related Services"), only the main sector is shown. Where the EU has provided different commitments across the sub-sectors, the scores are provided separately for each sub-sector.

EU-CARIFORUM EPA 2008

AVERAGE SCORES (27 Member States)

SC = sectoral coverage
NT = national treatment (the level of non-discrimination)

All Mode 1 commitments (averages on the level of the main sectors)

SC: 0,40

NT: 0,43

All Mode 2 commitments

SC: 0,70

NT: 0,76

All Mode 3 commitments

SC: 0,78

NT: 0,72

All Mode 4 commitments

Category 1	Category 2
SC: 0,51	SC: 0,22
NT: 0,82	**NT: 0,33**

The average level of non-discrimination (NT) in certain sectors and sub-sectors:

Professional services

Mode 1: 0,44
Mode 2: 0,95
Mode 3: 0,85
Mode 4 Cat 1: 0,66 / Cat. 2: 0,31

Other business services

Mode 1: 0,72
Mode 2: 0,88
Mode 3: 0,86
Mode 4: Commitments only in certain sub-sectors

Communication services

Mode 1: 1,00
Mode 2: 1,00
Mode 3: 1,00
Mode 4: Excluded in its entirety

Financial services

Mode 1: Insurance 0,04 / Banking and other 0,00
Mode 2: Insurance 0,07 / Banking and other 0,93
Mode 3: Insurance 0,63 / Banking and other 0,52
Mode 4: Insurance 0,81 / Banking and other 0,81 (Cat. 1 only, Cat. 2 excluded in its entirety)

Transport services (excludes much of air transport services and all space transport services)

Mode 1: 0,40
Mode 2: 0,79
Mode 3: 0,62
Mode 4: 0,64 (Cat. 1 only, Cat. 2 mostly excluded)

HORIZONTAL LIMITATIONS OF THE EU MEMBER STATES

Modes 1 and 2:

Real estate (18)

Mode 3:

Real estate (19)
Public utilities (all EU)
Types of establishment (7)
Investment (1)
Geographical zones (1)

Mode 4:

Certain Member States have prescribed horizontal reservations relating to:

Economic needs test for graduate trainees (2)
Scope of intra-corporate transfers (2)
Residency and citizenship requirements for managing directors and/or auditors (5)
Mutual recognition directives apply to EU citizens only (EU)
Transitional periods (12)

The EU has excluded the following sectors:

Mining, manufacturing and processing of nuclear materials;
Production of or trade in arms, munitions and war material;
Audiovisual services;
National maritime cabotage; and
Most national and international air transport services (excl. aircraft repair and maintenance, selling and marketing of air transport services, computer reservation system services, and other ancillary services that facilitate the operation of air carriers as contained in the specific commitments).

In addition, the EU's schedule shows that there are no commitments on Space transport services.

The EU has commitments in the following services not appearing in the WTO's classification:

The EU has included certain sub-sectors of energy services that do not appear in the WTO's model list (see section 18. Energy Services). They include "Wholesale trade services of solid, liquid and gaseous fuels and related products (CPC 62271), wholesale trade services of electricity, steam and hot water (NB: the horizontal limitation on public utilities applies), and retailing services of motor fuel (CPC 613) as well as retail sales of fuel oil, bottled gas coal and wood (CPC 63297) and retailing services of electricity, (non bottled) gas, steam and hot water. However, the Member States' commitments under these sub-sectors are modest (except for Mode 2 where the EU has given full commitments almost under each of these sub-sectors).

Under business services (F. Other Business Services), the EU has included certain services that appear in the WTO's model list only in the aggregated form "Other (CPC 8790) under F. Other Business Services. The EU's schedule specifies translation and interpretation services (M1 89 % / M2 100 % / M3 81 % / M4 Cat. 1 93 %)[460], interior design services (M1 100 % / M2 100 % / M3 100 %), collection agency services (M1 7 % / M2 7 % / M3 93 % / M4 Cat. 1 89 %), credit reporting services (M1 7 % / M2 7 % / M3 88 % / M4 Cat. 1 89 %), duplicating services (M1 4 % / M2 100 % / M3 100 %), telecommunications consulting services (M1 / 100 % and M2 / 100%) and telephone answering services (M1 100 % / M2 100 % / M3 100 %).

In addition, under section 12 (services auxiliary to transport), the EU has included certain sub-categories that are not part of the CPC system and thus are not present in the WTO's model list. The services in question are customs clearance services, container station and depot services, maritime agency services and maritime freight forwarding services. The EU has given a full commitment for these services both for M1 and M2. Under M3, the score is 96 % for customs clearance and 100 % for the rest of these sub-sectors. Under M4, there are no non-discriminatory commitments.

Under the heading "Other services not included elsewhere" (Included under 12. "Other services not included elsewhere" in the WTO's model list), the EU has prescribed the following: Washing (M2 100 % / M3 100 %), hairdressing (M2 100 % / M3 96 %), cosmetic treatment (M2 100 % / M3 96 %), other beauty treatment services (M2 100 % / M3: 96 %) and spa services (M2 100 % / M3 100 %). Included here are also telecommunications connection services (M1, M2 and M3 100 %). For Mode 4 Cat. 1, there is no coverage for telecommunications connections services and all the commitments for the rest of these sub-sectors are discriminatory.

[460] Cat. 1 = key personnel and graduate trainees / Cat. 2 = contractual service suppliers and independent professionals. All values represent NT. If there is no value for a specific mode, it means that the value is zero.

Under rental/leasing services without operators, the EU has included telecommunications equipment rental (CPC 7541) (100 % for M1, M2 and M3, no NT for M4). In addition, there are retail sales of pharmaceuticals and retail sales of medical and orthopaedical goods (CPC 63211) and other services supplied by pharmacists (M1 4 % / M2 100 % / M3 22 % / M4 Cat. 1 74 %).

Concerning Mode 4

The EIA with CARIFORUM includes six different types of natural persons – more than in any of the other reviewed EIAs. There are specific commitments on four of them: key personnel and graduate trainees (Category 1) and CSSs and IPs (Category 2). The key personnel includes business visitors setting up a commercial presence and intra-corporate transferees. In addition, there are short-term business visitors – a type of Mode 4 appearing only in this EIA out of the four agreements. However, there are no binding commitments: Art. 84 includes an endeavour to facilitate short-term business visits for specific purposes (such as for research and design, training seminars, trade fairs and exhibitions). The last category comprises business services sellers for which there are no specific commitments but under Art. 82 their entry and stay is allowed for a period of up to 90 days in any 12-month period, subject to the EU's scheduled reservations across the liberalized service sectors.

The commitments on key personnel and graduate trainees include a limited commitment for a manufacturing activity outside business services: publishing, printing and reproductions of recorded media (Section 4 H).

According to Art. 81 of the EIA, the temporary entry and stay of key personnel and graduate trainees shall be permitted for a period of up to three years for intra-corporate transferees, one year for graduate trainees, and 90 days in any 12-month period for business visitors and business services sellers. Art. 83 includes the requirements for CSSs and IPs. Their entry and stay is subject to a number of conditions. Most importantly, the natural persons must be engaged in the supply of a service on a temporary basis as employees of a juridical person, which has obtained a service contract for a period not exceeding 12 months. In addition, the temporary entry and stay of CSSs and IPs shall be for "a cumulative period of not more than six months or, in the case of Luxembourg, 25 weeks, in any 12-month period or for the duration of the contract, whichever is less". The EU's sector-specific commitments on CSSs and IPs are so heavily restricted that only a small part of the sectors are in reality covered.

EU-SOUTH KOREA FTA 2010

AVERAGE SCORES (27 Member States)

SC = sectoral coverage
NT = national treatment (the level of non-discrimination)

All Mode 1 commitments (averages on the level of the main sectors)

SC: 0,44

NT: 0,46

All Mode 2 commitments

SC: 0,73

NT: 0,79

All Mode 3 commitments

SC: 0,80

NT: 0,79

All Mode 4 commitments

SC: 0,48

NT: 0,84

The average level of non-discrimination (NT) in certain sectors:

Professional services

Mode 1: 0,45
Mode 2: 0,95
Mode 3: 0,81
Mode 4: 0,73

Other business services

Mode 1: 0,72
Mode 2: 0,88
Mode 3: 0,84
Mode 4: Mostly no commitments

Communication services

Mode 1: 1,00
Mode 2: 1,00
Mode 3: 1,00
Mode 4: Excluded in its entirety

Financial services

Mode 1: Insurance 0,07 / Banking and other 0,00
Mode 2: Insurance 0,11 / Banking and other 0,93
Mode 3: Insurance 0,59 / Banking and other 0,00
Mode 4: Insurance 0,81 / Banking and other 0,81

Transport services (excludes much of air transport services and all space transport services)

Mode 1: 0,43
Mode 2: 0,75
Mode 3: 0,76
Mode 4: 0,83 (some sub-sectors completely excluded)

HORIZONTAL LIMITATIONS OF THE EU MEMBER STATES

Modes 1 and 2:

Real estate (16)

Mode 3:

Real estate (18)
Public utilities (EU)
Types of establishment (EU (branches) + 10)
Investment (6)
Geographical zones (1)

Mode 4:

Certain Member States have prescribed reservations relating to:

Economic needs test for graduate trainees (2)
Scope of intra-corporate transferees (2)
Training of graduate trainees (5)
Residency and citizenship requirements for managing directors and/or auditors (5)
Mutual recognition directives apply to EU citizens only (EU)

The EU has excluded the following sectors:

See above the EU-CARIFORUM EIA

The EU has commitments in the following services not appearing in the WTO's classification:

Energy services: certain sub-sectors (similar to the EU-CARIFORUM EIA, see above).

Under business services (F. Other Business Services): translation and interpretation services (M1 89 % / M2 100 %), interior design services (M1 100 % / M2 100 %), collection agency services (M1 7 % / M2 7 %), credit reporting services (M1 7 % / M2 7 %), duplicating services (M1 4 % / M2 100 %) and telephone answering services (M1 100 % / M2 100 %).

In addition, under section 12 (services auxiliary to transport), the EU has included the following "Other services not included elsewhere": washing, hairdressing, cosmetic treatment, and spa services. All are unbound for M1 (100 %) provide full NT for M2 (100 %) and M3 (100 %).

Under rental/leasing services without operators, the EU has included telecommunications equipment rental (CPC 7541) (100 % for M1, M2 and M3, 0 % for M4). There are also commitments on the retails sales of pharmaceuticals and retail sales of medical and orthopaedical goods (CPC 63211) and other services supplied by pharmacists (M3: 22 %, M4: 74 %).

Concerning Mode 4

The EU's schedule on Mode 4 includes a limited commitment for one manufacturing activity: publishing, printing and reproductions of recorded media (Section 4 H).

According to Art. 7.18 of the EIA, the temporary entry and stay of key personnel and graduate trainees shall be permitted for a period of up to three years for intra-corporate transferees, one year for graduate trainees, and 90 days in any 12 month period for business visitors and business services sellers. The scheduled commitments concern only key personnel (including business visitors responsible for setting up an establishment), graduate trainees and business service sellers. There are no commitments on CSSs and IPs. Instead, Art. 7.20(1) provides that "the Parties reaffirm their respective obligations arising from their commitments under the GATS". According to the second paragraph, the Parties' commitments in respect of CSSs and IPs depend on the results of the Doha Round and thus remain to be negotiated.

EU-CENTRAL AMERICA AA 2012

AVERAGE SCORES (27 Member States)

SC = sectoral coverage
NT = national treatment (the level of non-discrimination)

All Mode 1 commitments (averages on the level of the main sectors)

SC: 0,41

NT: 0,44

All Mode 2 commitments

SC: 0,77

NT: 0,83

All Mode 3 commitments

SC: 0,77

NT: 0,67

All Mode 4 commitments

SC: 0,51

NT: 0,84

The average level of non-discrimination (NT) in certain sectors:

Professional services

Mode 1: 0,44
Mode 2: 0,94
Mode 3: 0,85
Mode 4: 0,67

Other business services

Mode 1: 0,72
Mode 2: 0,89
Mode 3: 0,87
Mode 4: Commitments only in certain sub-sectors

Communication services

Mode 1: 1,00
Mode 2: 1,00
Mode 3: 1,00
Mode 4: Excluded in its entirety

Financial services

Mode 1: Insurance 0,00 / Banking and other 0,00
Mode 2: Insurance 0,11 / Banking and other 0,96
Mode 3: Insurance 0,56 / Banking and other 0,00
Mode 4: Insurance 0,81 / Banking and other 0,81

Transport services (excludes much of air transport services and all space transport services)

Mode 1: 0,38
Mode 2: 0,74
Mode 3: 0,56
Mode 4: 0,80

HORIZONTAL LIMITATIONS OF THE EU MEMBER STATES

Modes 1 and 2:

Real estate (18)

Mode 3:

Real estate (19)
Public utilities (EU)
Types of establishment (EU (branches) + 9)
Investment (6)
Geographical zones (1)

Mode 4 (key personnel and graduate trainees):

Certain Member States have prescribed reservations relating to:

Economic needs test for graduate trainees (2)
Scope of intra-corporate transferees (2)
Training of graduate trainees (5)
Residency and citizenship requirements for managing directors and/or auditors (5)
Mutual recognition directives apply to EU citizens only (EU)

The EU has excluded the following sectors:

See above the EU-CARIFORUM EIA

The EU has commitments in the following services not appearing in the WTO's classification:

Energy services: certain sub-sectors (similar to the EU-CARIFORUM EIA, see above).

Under business services (F. Other Business Services), translation and interpretation services (M1 89 % / M2 100 % / M3 81 % / M4 93 %), interior design services (M1, M2 and M3 100 %), collection agency services (M1 7 % / M2 7 % / M3 93 % / M4 89 %), credit reporting services (M1 7 % / M2 7 % / M3 89 % / M4 89 %), duplicating services (M1 4 % / M2 and M3 100 %) and telephone answering services (M1, M2 and M3 100 %).

Under section 12.A. (services auxiliary to maritime transport), the EU has included customs clearance services, container station and depot services, maritime agency services and maritime freight forwarding services. The EU has given a full commitment for these services only under M2. Under M1, there is a full binding only for maritime agency services and maritime freight forwarding services (unbound for customs clearance services and container station and depot services). Under M3, the score is 96 % for customs clearance and 100 % for the rest.

"Other services not included elsewhere": washing, cleaning and dyeing services; hairdressing services; cosmetic treatment, manicuring and pedicuring services; other beauty treatment services and spa and non-therapeutical services (non-medical): unbound for M1 and M4 and bound for M2 (100 %) and M3 (100 %). Included here are also telecommunications connection services (M1, M2 and M3 100 %).

Under rental/leasing services without operators, the EU has included telecommunications equipment rental (CPC 7541) (100 % for M1, M2 and M3). Retails sales of pharmaceuticals and retail sales of medical and orthopaedical goods (CPC 63211) and other services supplied by pharmacists ((M1 4 % / M2 100 % / M3 22 % / M4: 74 %).

For Environmental Services, the EU has included some more sub-sectors than specified in the WTO's model list (sub-sectors C-G of 6. Environmental Services). However, under Mode 1 they are unbound except for consulting services. Under Mode 2, there are no reservations.

Concerning Modes 1 and 2

In this agreement, the EU has more tendency to schedule simple 'unbounds' under modes 1 and 2 instead of qualifying discriminatory reservations. Therefore the score is often the same for SC and NT for both modes.

Concerning Mode 4

The AA with Central America covers the same categories of persons as the EU-Korea FTA. A slight difference is that there are no sector-specific commitments their entry is subject to commitments under the other modes (entry and stay is similarly allowed for a period of up to 90 days in any 12-month period). There are no commitments on CSSs and IPs but parties simply reaffirm their respective commitments under the GATS.

EU-GEORGIA AA 2014

AVERAGE SCORES (28 Member States)

SC = sectoral coverage
NT = national treatment (the level of non-discrimination)

All Mode 1 commitments (averages on the level of the main sectors)

SC: 0,44

NT: 0,46

All Mode 2 commitments

SC: 0,77

NT: 0,83

All Mode 3 commitments

SC: 0,93

NT: 0,74

All Mode 4 commitments

Category 1	Category 2
SC: 0,50	SC: 0,19
NT: 0,84	**NT: 0,40**

The average level of non-discrimination (NT) in certain sectors:

Professional services

Mode 1: 0,45
Mode 2: 0,95
Mode 3: 0,79
Mode 4: Cat 1: 0,66 / Cat. 2: 0,43

Other business services

Mode 1: 0,72
Mode 2: 0,91
Mode 3: 0,83
Mode 4: Commitments only in certain sub-sectors

Communication services

Mode 1: 1,00
Mode 2: 1,00
Mode 3: 1,00
Mode 4: Excluded in its entirety

Financial services

Mode 1: Insurance 0,00 / Banking and other 0,00
Mode 2: Insurance 0,11 / Banking and other 0,93
Mode 3: Insurance 0,54 / Banking and other 0,54
Mode 4: Insurance 0,79 / Banking and other 0,79

Transport services (excludes much of air transport services and all space transport services)

Mode 1: 0,29
Mode 2: 0,70
Mode 3: 0,86
Mode 4: Cat 1: 0,79 / Cat. 2: 0,54 (several sub-sectors excluded in both categories)

HORIZONTAL LIMITATIONS OF THE EU MEMBER STATES

Modes 1 and 2:

No horizontal limitations. Only subsidies are mentioned in the beginning of the annex (in accordance with Art. 76(3) of the agreement.

Mode 3:

Real estate (16)
Public utilities (EU)
Types of establishment (EU (branches) + 9)
Investment (6)

Mode 4:

Certain Member States have prescribed reservations relating to:

Economic needs test for graduate trainees (2)
Scope of intracorporate transferees (2)
Training of graduate trainees (6)
Residency and citizenship requirements for managing directors and/or auditors (5)
Mutual recognition directives apply to EU citizens only (EU)

The EU has excluded the following sectors:

See above the EU-CARIFORUM EIA

The EU has commitments in the following services not appearing in the WTO's classification:

Energy services: certain sub-sectors (similar to the EU-CARIFORUM EIA, see above).

Under business services (F. Other Business Services, translation and interpretation services (M1 86 % / M2 100 % / M3 % 86 % / M4 Cat. 1 96 %, for Cat. 2 only translation services: 39 %), interior design services (M1 96 % / M2 100 %), collection agency services (M1 7 % / M2 7 % / M3 93 % / M4 Cat 1. 89 %, not covered for Cat. 2), credit reporting services (M1 7 % / M2 7 % / M3 93 % / M4 Cat. 1 89 %, not covered for Cat. 2), duplicating services (M1 4 % / M2 100 % and M3 % / M4 Cat. 1 0 %, not covered for Cat. 2) and telephone answering services (M1, M2 100 %). Included here are also telecommunications connection services (M1, M2 100 %).

For Environmental Services, the EU has included some more sub-sectors than specified in the WTO's model list (sub-sectors C-G of 6. Environmental Services). However, under Mode 1 they are mostly unbound (only 3-5 MSs bound) except for consulting services. Under Mode 2, there are no reservations. Under professional services, there are retail sales of pharmaceuticals and retail sales of medical and orthopaedical goods (CPC 63211) and other services supplied by pharmacists (M1 7 % / M2 100 % / M4 Cat. 1 75 %, not covered for Cat. 2).

Under section 12.A. (services auxiliary to maritime transport), the EU has included customs clearance services, container station and depot services, maritime agency services and maritime freight forwarding services. The EU has given a full commitment for these services only under M2. Under M1, there is a 96 % binding only for maritime agency services and maritime freight forwarding services (unbound for customs clearance services and container station and depot services). These auxiliary services are not mentioned in the negatively listed Mode 3 commitments and are therefore presumably covered by Mode 3.

In addition, the EU has included a section 13. Other transport services, which includes "Provision of combined transport services". The score is 46 % for Modes 1 and 2 but it is specified that the commitment is without prejudice to the EU's schedules' limitations affecting any given mode of transport.

"Other services not included elsewhere": washing, cleaning and dyeing services; hairdressing services; cosmetic treatment, manicuring and pedicuring services; other beauty treatment services and spa and non-therapeutical services (non-medical): unbound for M1 and for a part of M4 (0 % for specialists and for graduate trainees, otherwise 100 %) and bound for M2 (100 %) and M3 (%). Included here are also telecommunications connection services (M1, M2 and M3 100 %).

Mode 4 Cat. 2 includes site investigation work (CPC 5111) where NT score is 61 % (covers CSSs only).

Concerning Mode 3

A negative scheduling modality. MFN exceptions are included in the sector-specific commitments where as in the other EIAs they are listed in a separate annex. Similar horizontal limitations and

sectoral exclusions to the other EIAs (Art. 78: audiovisual services, national maritime cabotage and most of air transport services excluded completely) but a high coverage of sectors and sub-sectors in the sector-specific commitments (SC 93 %).

Relating to air transport services: The conditions of mutual market access in air transport are to be dealt with by the Common Aviation Area Agreement between the EU and Georgia.

Concerning Mode 4

There are five different Mode 4 categories covered by the agreement (the same as in the EU-CARIFORUM EIA, except for short-term visitors for business purposes who are not included).

The conditions for the entry of key personnel, graduate trainees, CSSs and IPs are very similar to the text of the agreement in the EU-CARIFORUM EIA. A slight difference is that in the agreement with Georgia, there are sector specific commitments on business service sellers (scheduled together with key personnel and graduate trainees). In the agreement with CARIFORUM, the entry and stay of service sellers is subject to the reservations across the other modes. In addition, in the agreement with Georgia, the specific group of natural persons is referred to as “business sellers” as the EU covers in this agreement the sellers of both goods and services (except for the UK that covers only the sellers of services).

VI. EU'S EIAs THROUGH THE LENS OF WTO LAW

1. Introduction to the discussion of the results

In the present chapter we give a concise view on the reviewed EIAs from the point of view of WTO law, and particularly Art. V GATS. In accordance with our methodology, our analysis is focused on the level of liberalization included in the EU's sector-specific commitments. Where necessary, we bring up issues in the actual texts of the agreements but instead of interpreting the articles of the agreements, we focus on discussing the EU's EIAs' relationship to the Art. V requirements of sectoral coverage and elimination of discrimination.[461]

First it can be noted that only one of the reviewed EIAs includes a statement on the agreement's compatibility with the GATS. In the EU-South Korea FTA the parties list among the objectives of the agreement "to liberalise trade in services and investment between the Parties, in conformity with Article V of the General Agreement on Trade in Services". It is hard to say what type of conclusions can be drawn in this regard. What is clear is that according to the EU itself, the FTA with South Korea goes further than any previous EU agreement in lifting trade barriers.[462] The Commission has stated that "both in terms of sectoral coverage and depth of market access commitments, the EU-Korea FTA is by far the most ambitious services FTA ever concluded by the EU and goes beyond any services agreement Korea has concluded so far."[463]

The fact that the EU has not included a similar compatibility statement in its other EIAs does not necessarily mean that the EU has doubts about those EIAs' compliance with Art. V GATS. But the conclusion of the statement in the EIA with South Korea may mean that the EU wants to explicitly underline its view of WTO-compliance in respect of this specific agreement. Legally, all EU's EIAs should comply with Art. V. However, the EU may be especially willing to emphasize such compatibility with its most commercially driven PTA as that agreement lacks such other factors that could be considered to contribute to extensive trade liberalization in longer term.[464] Moreover, for this particular PTA's economic significance and strategic importance (concluded with a central

[461] For a recent and comprehensive interpretation of the EU's treaty obligations both under the GATS and EIAs, see Natens (2016). The author analyzes the EU's obligations especially from the point of view of regulatory autonomy.
[462] The Commission's web page on the EU-South Korea FTA, available at http://ec.europa.eu/trade/policy/countries-and-regions/countries/south-korea/ (accessed on 1 September 2016).
[463] The EU Commission's brochure "The EU-Korea Free Trade Agreement in practice", available at http://trade.ec.europa.eu/doclib/docs/2011/october/tradoc_148303.pdf (accessed on 1 September 2016).
[464] Such long-term trade liberalization and/or economic integration being a possible factor in the compliance analysis under Art. V:2 GATS.

Asian economy), the emphasis on GATS-compatibility may also be planned to play down legal threats by other Members.

In this chapter we give some appraisal of the level of liberalization reached in the four reviewed EIAs. However, we refrain from any judgment on their GATS-compatibility. Reaching any exact conclusions in that regard would be challenging for two reasons. First, our methodology is only one possible way to analyze EIAs and it does not give any ultimate correct answer in this regard. Our results show how many Member States have provided NT under each sub-sector of the WTO's Sectoral Classification List. Our methodology does not take into account differences in the gravity of the limitations to NT. However, we consider such an approach to be in line with Art. V:1(b) since it defines non-discrimination in terms of NT. One either grants NT or does not. The empirical exercise of the four EIAs revealed that a large number of the inscribed reservations were serious NT limitations, for example nationality and residency requirements. However, it should be kept in mind that also small discriminatory elements in the commitments bring the value of the commitment to 0. Under the SC column, however, we have included all types of commitments, also discriminatory ones. One can thus see the difference between a binding (any kind of binding) and a non-discriminatory binding by comparing the SC and NT scores on the lowest sub-sectoral level. The score for SC is often higher, but only slightly. That shows that in a large number of the Member States' commitments only non-discriminatory bindings are given. The other alternative is a simple 'unbound' (giving a zero also under SC). In the average scores, which are counted across several sub-sectors, the SC score is sometimes lower than the corresponding NT score. That is because sectoral exclusions affect the SC score but do not affect the NT score. The choice is based on Art. V:1(b) which requires the elimination of discrimination only in the sectors covered by the agreement.

All in all, the results are most informative on the lowest sub-sectoral level. That relates to the second challenge in our chosen methodology. The EU's own structure as an FTA itself makes it hard to come up with any exact scores as to the sectoral coverage and level of non-discrimination provided in the EU's EIAs. The EU's commitments in the reviewed EIAs comprise the commitments of 27 or 28 different countries. Even though in some instances there is an identical commitment from all Member states, the much more often occurring situation is that there are at least a few different types of commitments with varying degrees of restrictiveness. On some occasions, often in the most sensitive sectors (e.g. in financial services and health services), there are over 20 different commitments. We have tried to solve this challenge by giving percentage

values to the EU's commitments under each sub-sector. Thus, our results do not give the percentage of sectoral coverage and level of non-discrimination granted by the EU as a whole.[465] What they do give is the percentage of EU Member States providing for sectoral coverage (by granting some type of a commitment) and non-discrimination (by granting NT) under each sub-sector of the WTO's Sectoral Classification List. This can be considered to give some guidance as to the overall coverage of each EIA by the EU as a whole. However, one should not focus on the average percentages counted across all the sectors. They do not give very relevant information because there is a great variety in the sector-specific percentage scores. In a specific sub-sector the score may be 100 % (NT by 28 Member States) and in another it may be 0 % (a discriminatory commitment by 28 Member States). An average of 50 % of these two sub-sectors does not tell much. The averages should therefore be approached cautiously, and mainly to compare different EIAs to each other. Our analysis is best suited for looking at the scores on the sub-sectoral level. They show what percentage of the EU in terms of Member States provides for NT in each sub-sector. They also show the degree of dispersion among the Member States. Very high and very low scores tell of similarity in policies, whereas the scores closest to the middle tell about large diversity in the Member States' policies in that specific sub-sector.

As in the rest of the thesis, we discuss the EU's commitments under Mode 4 in more depth than the other modes. An essential caveat to keep in mind is that the assessment of Mode 4 commitments is especially difficult since it is hard to say what exactly are the categories of persons that should be covered from the point of view of Art. V. With respect to Mode 4 the question is not only "to what extent" but also "in respect of who".

2. Discussion of the results

i. Issues of interpretation

Liberalization of services is a complex exercise and it can be conducted in a number of ways. Art. V GATS includes a significant degree of choice as to the method of liberalization. In contrast to the elimination of duties, the Members are not required to use any specific template for scheduling their commitments across services sectors. Even though most Members have opted for the W/120

[465] If the methodology was applied to a singular state giving one commitment for its entire territory in each sub-sector, the score under each sub-sector would be either 1 or 0. In that case, the average score across all the sectors would directly show the level of sectoral coverage and non-discrimination granted by that state in the entire agreement.

template recommended by the WTO Secretariat, there are differences in the grouping of the sectors. This is especially evident in EIAs where approaches to services liberalization are more varied than in the WTO context. The comparison of services schedules is challenging, especially between such agreements that employ different methodologies in their scheduling.

There are two principal methods: the so-called positive and negative scheduling, often referred to as "top-down" (negative) and "bottom-up" (positive) approach. The most famous example of a top-down agreement is the NAFTA, whereas the GATS is a positively-listed agreement.[466] Whereas, in principle, both methods can lead to exactly same level of liberalization, there are, however, a variety of opinions as to the supposed superiority of one of the methods to the other one. It is often considered that, at least in practice, negative scheduling leads to higher levels of liberalization. Negative scheduling starts from an empty board and only non-conforming measures are inscribed. This may, partly maybe even for psychological reasons, lead to fewer restrictions being inscribed. In positive scheduling, the listing of restrictions takes place through a specific set of service sectors (for example, based on the WTO's Sectoral Classification List) and the state can decide with each sector whether it wants to include and liberalize it or not. However, also under this method, the restrictions applied under each sector must be inscribed "negatively". From the national authorities' point of view, it may be easier to grasp the types of national measures requiring explicit limitations under positive scheduling. However, if the state has already liberalized trade through a positive schedule earlier, it is likely to be easier to adjust the desired restrictions to the negative model in another agreement.[467]

Whereas the EU has traditionally engaged in GATS-type positive scheduling, in its current trade negotiations the EU is actively using both methods. In the CETA with Canada, the parties have opted for negative scheduling across all modes. The same applies to the ongoing negotiations with Japan. In the recently negotiated agreements with Singapore and Vietnam, on the other hand, a

[466] In reality, the GATS approach is "hybrid" as only sectors are inscribed positively. Restrictions, on the other hand, are inscribed negatively. On differences between the approaches and on possible implications for the resulting level of liberalization, see e.g. Houde, Kolse-Patil, and Miroudot (2007) and Adlung and Mamdouh (2014). Adlung and Mamdouh are of the opinion that the method of scheduling has limited, if any, impact on the results achieved. They consider that what ultimately matters are not negotiating or scheduling techniques, but the political impetus that the governments concerned are ready to generate. However, it may be considered whether it is actually the political impetus that determines the scheduling technique in the first place. This may be visible in the EU's latest, primarily commercially driven trade negotiations where the scheduling technique is negative in contrast to the EU's earlier, positively listed services agreements.

[467] Most Members use positive scheduling on the basis of the CPC Product Classification (used in the WTO's Sectoral Classification List). The U.S. generally uses negative scheduling and also a specific NAFTA classification system. See NAFTA Appendix 1001.1b-2-B: Common Classification System. Anderson and Müller 2008, 450-451.

positive listing was used.[468] In the reviewed EIAs, the EU has used the so-called positive method for the scheduling of its sector-specific commitments. The only exception is the chapter on "Establishment" with Georgia where negative scheduling is used. Our methodology is planned primarily for analyzing positively listed services schedules. It works for negative scheduling as well, but the analysis is much more burdensome in the case of negatively listed schedules. Each commitment has to be "built" by looking at all possible restrictions applying under a sector. In the case of the EU-Georgia EIA, the negatively listed restrictions are nevertheless organized under the same eleven main sectors as in the WTO's Sectoral Classification List, which facilitated our work. Altogether, it was, however, hard to understand which sub-sectors were meant to be covered by the negative schedule. We assumed that the liberalized sectors were meant to be the same as under the other modes of the same agreement. However, it if all modes were negatively scheduled, one would not know for certainty which sectoral classification list to us as a point of comparison, unless that was specifically specified in the agreement.

In the EU-Georgia EIA, the EU has included in its commitments under modes 1, 2 and 3 certain sub-sectors which do not appear under the WTO's Sectoral Classification List (the relevant sub-sectors are all written out in the chapter on results).[469] Most of these sub-sectors are not mentioned under the negatively scheduled chapter on Establishment. Considering that the sub-sectors are liberalized to a certain extent under the other modes, one could maybe assume that they are meant to be covered also under Establishment. However, we cannot be certain, as it is not clear towards which list of service sectors the commitments under the negatively-listed Establishment should be compared to.

By far the most challenging part of our empirical analysis is, nevertheless, the interpretation of the EU's sector-specific restrictions. In this context it is maybe more correct to say "the Member States' restrictions" as the difficulty is most often related to the specific way that each Member State has formulated its commitments. Some Member States are clearer than others. The repetition of the same restrictions under several sectors and across the agreements, however, helps the exercise.

[468] See the Commission's brochure "Services and investment in EU trade deals: Using 'positive' and 'negative' lists". Available at http://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154427.pdf (accessed on 2 September 2016).
[469] Such "additional" sub-sectors could possibly be referred to as GATS-x services similarly to WTO-x areas in PTAs. "WTO-x" has been used to signify commitments dealing with issues going beyond the current WTO mandate. See Horn, Mavroidis, and Sapir (2010). The EU's EIA commitments in non-service activities could also be labeled as GATS-x.

Pursuant to Art. XX:3 GATS, the Members' schedules form an integral part of the agreement. In principle, services schedules are thus interpreted as any other kind of treaty language.[470] That means that the interpretational rules of Articles 31 and 32 of the Vienna Convention on the Law of Treaties apply also to services schedules. Their interpretation must thus take into account the common intention of the Members.[471]

However, as noted by the Appellate Body, each schedule has its own intrinsic logic.[472] Other Members' schedules are of "limited utility in elucidating the meaning of the entry to be interpreted".[473] This finding is clearly evident in our analysis. In practice, service schedules follow their own intrinsic logic. That is because they are formulated only by one side to the agreement and because they form a certain collective entity where the meaning of each commitment is often revealed only in connection with the other commitments of the same party. Naturally, the general rules of treaty interpretation must be applied but in an empirical exercise that goes through hundreds, or even thousands of commitments, certain short-cuts must be created. Therefore, in unclear situations, we have opted to give to particularly blurry commitments the value zero (mainly under NT). That is because of the lack of clarity as regards the value of the commitment: the state may, in practice, choose to apply it in a discriminatory way. A good example of such a situation are economic needs tests for which certain EU Member States do not always specify whether they apply them only to foreigners or to the state's own nationals as well. As there is a wide margin of discretion left to the state in this regard, we have chosen to give such unclear ENTs the score zero under NT.

There are two different ways of interpreting the results. First, the higher the score for NT, the higher is the level of non-discriminatory access to the EU market for the partner countries' service suppliers. The lower the score, the lower the access. However, as the scores represent percentages of Member States providing for SC and NT under each sector, the scores do not directly show the level of sectoral coverage and non-discrimination for the entire EU party. The second way to interpret the results is to consider the internal dispersion across the EU Member States. The very high and the very low scores show that the either the majority or the minority of the Member States

[470] For an extensive account of the interpretation of WTO Members schedules both under the GATT and the GATS, see Van Damme 2009, 305-353.
[471] *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Report of the Appellate Body, WT/DS285/AB/R, circulated 7 April 2005, para. 160 and *China – Measures Affecting Trading Rights and Distribution Services for Certain Publication and Audiovisual Entertainment Products*, WT/DS363/AB/R, Report of the Appellate Body, circulated 21 December 2009, para. 405.
[472] *U.S.-Gambling*, para, 182.
[473] *China-Publications and Audiovisual Products*, para. 383.

is willing to provide SC and NT. The commitments are often not identical and the reasons for the denial of NT may differ but the result is that the foreign service supplier either has or does not have non-discriminatory access to the EU market. But there is also a large number of scores that are somewhere in the middle, on either side of 50 %. In these cases there is more dispersion among the Member States as a large number of them provides for NT and an equally, or close to equally, large number does not.

ii. Sectoral coverage

In the following, we make some observations on the results of the empirical analysis concerning the sectoral coverage, the modal coverage and the level of non-discrimination of the four reviewed EIAs. We focus on certain general remarks only. The detailed results on each agreement can be viewed in Annex 4, in addition to which a summary of the results on each EIA has been presented above in Section 2(ii) of Chapter V:3.

As has been noted by Krajewski, the development of the scope of the CCP with regard to trade in services can be described as "movement from sensitive modes to sensitive sectors".[474] This development relates to the extension of the EU's external trade competencies from a partial coverage of services trade to complete competence in the field. Whereas there are no longer any specific decision-making procedures applying to any particular modes, the sensitivity of certain modes can still be visible in the EU Member States' sector-specific commitments.

All four modes are covered in all of the reviewed agreements but there are significant differences in coverage as well as in the level of non-discrimination. The results show that, in average, the EU Member States have given the highest number of sectoral commitments under Mode 3. The average score for the percentage of Member States having given commitments across all the sectors under Mode 3 is 77 % in the EIA with Central America, 78 % with CARIFORUM, 80 % with Korea and as high as 93 % with Georgia. As the Mode 3 Chapter with Georgia has been negatively scheduled, it is possible that the negative scheduling modality has increased the overall level of coverage by the EU Member States in that specific agreement. However, the high number of sectoral commitments under Mode 3 with Georgia may also relate to one of the main objectives of the agreement, which is the gradual approximation of the Georgian trade-relevant legislation to that of

[474] Krajewski 2008, 195.

the EU's. This integration aspect of the agreement may have prompted more liberal attitude from the Member States as they can already anticipate future approximation in regulation. The especially high score for SC in the EU-Georgia EIA for Mode 3 is, however, not reflected in the NT score (74 %), which is on the level of the other agreements.

The overall average score for Mode 3 is higher for SC than for NT in all of the reviewed agreements. This is different to the other modes and is because of the lower level of sectoral exclusions under Mode 3 than under other modes.[475]

The overall lowest sectoral coverage scores are found to apply to CSSs and IPs under Mode 4. The movement of CSSs and IPs has, however, been liberalized only in two of the agreements. In the agreement with CARIFORUM, there are, in average, commitments from 22 % of the Member States across the sectors. For the EU-Georgia EIA, the score is 19 %. The low scores reflect the high number of sectoral exclusions for the CSSs and IPs. A quick look at the score sheets of Annex 4 shows that about half of the sectors are excluded. In addition to outright exclusions of certain sectors on the level of the text of the agreement, several and sometimes all Member States have excluded more sub-sectors in their sector-specific commitments. The average scores for the first category of Mode 4 (key personnel and graduate trainees, i.e. ICTs) are also relatively low: around 50 % in each agreement. However, direct comparison of scores under Mode 4 to the scores under other modes is problematic as treatment under Mode 4 is provided to a few limited categories of persons only. We give more insight into the Member States' commitments on Mode 4 below.

Notwithstanding the very limited category of CSSs and IPs, the lowest average number of Member States having given sectoral commitments is found under Mode 1. The result is the same in each

[475] Of the four EIAs reviewed in this study, three of them refer to Mode 3 as 'establishment'. As an exception, the oldest of the agreements, EU-CARIFORUM EIA of 2008, employs the traditional GATS term, 'Commercial Presence'. The EU's most recently negotiated trade and investment agreements with Vietnam and Canada employ the term 'investment'. In the negotiated, and also not yet concluded, agreement with Singapore the term "Establishment" is used. The CETA and Vietnam agreements are the first examples of deals where the EU's "Investment" chapter combines Mode 3 with one overall framework for the market access and protection of investments, including investor-state dispute settlement. The consolidated text of the CETA has been made available by the Commission at http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf (accessed 15 May 2016). In CETA, there are separate chapters for "Investment", "Cross-Border Trade in Services" (Modes 1 and 2) and "Temporary Entry and Stay of Natural Persons for Business Purposes" (Mode 4). The EU's proposal in the TTIP agreement follows the same logic: there is no separate chapter or section on Mode 3 but one common chapter for investment which covers both service and non-service activities. The EU's proposal for "Trade in Services, Investment and E-Commerce" in the TTIP negotiations is available at http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153669.pdf (published in July 2016, accessed last on 1 September 2016). In the EU's previous trade agreements, the chapters on Establishment/Commercial Presence have concentrated on Mode 3 type of investment and covered non-service activities only in a very limited extent. On the overlap of GATS Mode 3 with the provisions of BITs, see Adlung (2016).

agreement. The lowest numbers of Member States have given commitments in services relating to transport, energy distribution ("services incidental to energy distribution") and certain professional services (e.g. nurses, midwives and physiotherapists; accountants and auditors and veterinarians). Only one or two Member States have provided any commitments on the placement and supply services of personnel as well as on investigation and security services. A low number of bindings applies also to wholesale trade services.

In the important sector of financial services, there are almost no binding commitments under Mode 1. However, this does not mean that no insurance or banking services were liberalized at all. The grouping of financial services is quite special in the sense that they are grouped together under the large headings of "All insurance and insurance-related services" and "banking and other financial services". Typically, each Member State has provided an 'unbound' with regard to at least certain sub-sectors that belong to these two big categories. However, the exclusion of even a small fraction of insurance and/or banking services takes the score to zero for the entire sector.

Overall, we should be especially wary about making far-reaching conclusions on the average scores across entire modes or even across specific service sectors. Because the scores are averages, they are not very informative as to the level of liberalization reached in each individual sub-sector. A better way to read the results is to look at individual sub-sectors and draw conclusions on the overall impression that the scores give. The average scores on sectoral and modal level give only some guidance on the openness of the EU Member States as a whole. What is especially noteworthy in the average scores, however, is how similar they are across the agreements. The sectoral exclusions are almost identical across the reviewed EIAs (meaning no commitments from any of the Member States). Between the EIAs, certain differences in excluded sectors are to be found mainly under Mode 4 only.

iii. The level of non-discrimination

The scores for NT are occasionally higher than for SC. This is because we have counted the NT score only for such sectors that have been bound. According to Art. V:1(b) GATS, elimination of substantially all discrimination is required only in the sectors covered by the agreement. If the NT score was provided for all sectors, also to such sub-sectors that have been excluded by the EU, the final scores for NT would be slightly lower.

Our results show that the number of Member States providing for full NT under the agreements varies on the level of entire modes between 40 % and 80 %. However, there are big differences between different modes and sectors. The lowest level of liberalization is granted under Mode 1. This applies to all of the reviewed EIAs. The average NT scores for Mode 1 in all of the agreements are between 43 % and 46 %. The low numbers are not due only to one or two sectors but there is a large number of sectors that are more poorly liberalized under Mode 1 than under the rest of the modes. Especially poor levels of liberalization appear under professional services. The same applies to real estate services, certain tourism and travel-related services, health services, recreational and cultural services, as well as transport services. Only in computer and related services, R&D services, educational services[476] as well as construction and related services the number of Member States providing for NT is on the level of the other modes. The low commitment levels under Mode 1 may reflect the difficulty in regulating services supplied especially through the internet. Whereas countries may more easily retain control over movement taking place under the other modes, provision of services under Mode 1 may be especially disruptive. A significant part of discrimination under Mode 1 is due to residency requirements, which, in practice, make empty any commitments for the supply of services through the internet. Such requirements are thus scored at zero for NT.

Under Mode 3, there is in most cases some type of commitment from all of the Member States (bringing the sectoral coverage to 100 %) but the commitment is then qualified by a discriminatory element. The most often appearing discriminatory elements are limitations to the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or measures which restrict or require specific types of legal entity or joint venture through which the service can be supplied. The latter is considered discriminatory if the specific form of legal entity clearly applies to foreigners only.

The average levels of Member States providing for NT are quite similar under Modes 2 and 3. The NT scores for modes 2 and 3 are the highest across the four modes. Mode 2 is typically the most liberalized mode in EIAs. However, the Member State's commitments show that they remain wary also under this particular mode. There is a lack of NT typically in the same sectors as under the other modes. The denial of NT in the case of movement of one's own consumers may reflect caution in accepting regulatory difference especially in sensitive sectors, even if the consumption of

[476] Only privately-funded educational services are covered by the EU's EIAs.

the service would take place outside the national territory. Limitations to Mode 2 typically also relate to sectors that may affect domestic employment. For example, placement and supply services of personnel are heavily limited under all modes, also under Mode 2. The same concerns, for instance, technical testing and analysis services (CPC 8676). Some types of testing services may be supplied relatively easily over the internet. The limitations under Mode 2 may reflect the purpose of making sure that both supply side (Mode 1) and demand side (Mode 2) are covered by the limitations.[477]

The average level of NT under Mode 3 is 79 % in the EU-Korea EIA, 74 % with Georgia, 72 % with the CARIFORUM states and 67 % with the Central-American states. Whereas the negatively scheduled Mode 3 chapter with Georgia scored the highest average for SC (93 %), a similar level of liberalization does not apply to NT. The EU's NT score with Georgia is in line with the provision of NT under Mode 3 to Korea and the CARIFORUM states. The NT score with Central America is somewhat lower at 67 %. The results show that, in average, EU Member States are slightly more discriminatory towards Georgian undertakings willing to establish in the EU than towards undertakings originating in Korea, and slightly less discriminatory than towards undertakings originating in the CARIFORUM states.

Overall, there is a somewhat higher number of Member States providing NT under the agreements with Korea and Georgia than in the EIAs with the CARIFORUM and Central American states. However, differences are small and depend on the mode and sectors. It is not possible to point towards a generally much higher liberalization level in any of the agreements. What is common to the agreements, is the generally low levels of NT especially under modes 1 and 4 (a low number of Member States providing for NT under several sectors) and the higher NT scores under Modes 2 and 3. Under these two modes, in most sectors more than half of the Member States have provided for NT. In general, the results are best interpreted on a sub-sectoral basis.

The second paragraph of Art. V:1 allows for the elimination of existing discriminatory measures and/or prohibition of new or more discriminatory measures to take place on the basis of a reasonable time-frame. We have identified only once instance where the EU has provided for

[477] A low number of NT bindings from the Member States for Mode 2 are found also under investigation and security services, commission agents' and wholesale trade services, insurance and insurance-related services, certain transport services as well as – quite surprisingly - library, archives, museums and other cultural services. The rational for reserving the right to place restrictions on the use of foreign insurances by one's own nationals is maybe more comprehensible than reserving the right to limit the use of foreign libraries.

liberalizing measures to take place on a later date. In the EIA with the CARIFORUM certain EU Member States have applied transitional periods to their commitments with regard to CSSs and IPs. Ten Member States have stated that their commitments enter into force on 1 January 201, and two Member States have provided for an entry into force on 1 January 2014.[478] The dates have already passed, and we have not taken them into account in our analysis. The results thus reflect the level of liberalization in the EU's EIAs as they stand in their final form.

The AA with Georgia is a special case as it provides for a gradual approximation of a significant part of Georgia's trade-relevant legislation with the EU's legislation. Therefore, a full implementation of the agreement is to be attained only through such a gradual process. This special characteristic of the agreement with Georgia, however, does not affect the way the EU has given its commitments. They can thus be analyzed similarly to the other agreements. It is possible that the gradual integration process leads to a more level playing field for Georgian service suppliers in the long-term but any higher level of elimination of discrimination is not visible in the sector-specific commitments as they stand today as compared to the other types of EIAs (the most visible difference being the wider than usual sectoral coverage under Mode 3). The overall process of integrating Georgia further into the EU's legislative framework can possibly be taken into account under Art. V:2 to which we now turn.

iv. Wider process of economic integration

Art. V:2 includes a possible remedy for EIAs remaining below the required level of non-discrimination. Its provisions give the possibility to take the wider process of economic integration or trade liberalization into account in the estimation of the attainment of the conditions under Art. V:1(b). However, the provision does not give any leeway as to the requirement of substantial sectoral coverage of Art. V:1(a).

As has been noted in Chapter III, there is no consensus as to the exact issues that can be taken into account under Art. V:2. The most common understanding is that the "wider process of economic

[478] Annex IV D of the EU-CARIFORUM EIA (p. 1699 of the agreement).

integration" refers especially to the liberalization of trade in goods in the terms of Art. XXIV:5 GATT.[479] However, it is not specified how the relationship should be considered.[480]

In our review of the EU's EIAs, we have noted a wide range of issues that may tell about a wider economic integration or trade liberalization taking place between the contracting parties. We do not argue that all these issues should definitely be taken into account and we cannot say how they should affect the assessment of the liberalization levels of any specific agreement. The purpose is to shed some light into the overall framework in which services liberalization is taking place. Such liberalization does not happen in a vacuum but often requires different types and levels of cooperation between national authorities. For example, cooperation in the fields of mutual recognition or transparency may be required for countries to open their markets to foreign suppliers.

Within the issues listed under "Wider process of economic integration" in the review sheets of Annex 4, we have included different topics ranging from harmonization and regulatory cooperation to policies on competition and environment. The list is not based on any specific formula but exemplary of the types of issues included in modern trade agreements. We have not given much detail but simply marked whether such disciplines are included in the EIAs, without paying attention to their legal enforceability. The noted issues do not affect the sector-specific scores in any way but bring some additional light into the contents of each agreement.

One way to approach elements of a "wider process" is to analyze the relationship of the liberalization levels of each agreement to the extent that such elements are included in an EIA. When comparing the lists of issues in the analyzed agreements, one notices, once again, that they are quite similar to each other. Even though the reviewed agreements range from a development-oriented agreement (the EPA with the CARIFORUM) to a commercially driven "deep" FTA with a highly developed industrial nation (the FTA with Korea), they all follow similar patterns. The similarity in the negotiation templates that the EU is using is visible both in the types of issues covered (both in general and especially in relation to services) as well as in the liberalization levels in the field of services, both in terms of SC and NT. The most significant difference between the types of issues covered in the four EIAs is the inclusion of regulatory cooperation in the agreements with Korea and Georgia. Whereas the EIAs with the CARIFORUM and the Central American states

[479] Members' views on the issue are found e.g. in the document WT/REG/W/34, "Systemic Issues Arising from Article V of the GATS, Communication from Hong Kong, China, Committee of Regional Trade Agreements, 19 February 1999, para. 11. See also WTO (2000), para. 85.
[480] Cottier and Molinuevo 2008, 139.

provide for regulatory dialogues only, the agreements with Korea and Georgia include a more specialized institutional setting for regulatory cooperation.[481] Such a setting is taken the furthest in the EU-Georgia EIA, which is the only EIA among the four agreements that provides also for harmonization (to take place through Georgia's approximation to the EU legislation). These two agreements are also the ones providing for the highest levels of SC and NT across the four EIAs.

3. The scope and depth of the EU's Mode 4 commitments

i. Mode 4 commitments in the EU's EIAs

In order to be GATS-consistent, EIAs should not, a priori, exclude any mode of supply.[482] The question of coverage is especially complicated with Mode 4, which is liberalized through different categories of persons. Such categories do not have their basis in the GATS but have been formed in the Members' practice. Each country determines its own categories and there is thus great variety in the types of persons admitted as well as in the conditions for their entry and stay.

In the GATS, Mode 4 is defined as the supply of a service "by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member".[483] As explained in Chapter IV, further indications as to the types of situations covered by Mode 4 are given under Art. XXVIII ("Definitions"). We are not aware of any Member having liberalized the supply of services by all natural persons of other Members without any further specifications. Typically, the main types of specifications relate to the type of persons admitted and to the period of their stay. In light of Art. XXIII and taking into account the Members practice, it is therefore possible to conclude that Mode 4 does not need to cover all possible service supply by natural persons. Instead, Mode 4 can be liberalized through specific categories of persons. However, we are left in the dark as to how many and what types of categories exactly should there be and what type of entry and stay conditions should be applied.

[481] The EU-Korea FTA establishes a Trade Committee, as well as more specialized committees and working groups that are responsible for ensuring the operation of the agreement. According to the Commission, the different bodies provide an opportunity both to seek resolution of market access concerns and to engage in closer regulatory cooperation. See the Commission's brochure "The EU-Korea FTA in practice", available at http://trade.ec.europa.eu/doclib/docs/2011/october/tradoc_148303.pdf (accessed on 5 September 2016). Even if most regulatory cooperation relates to trade in goods, institutionalized contacts between each party's authorities may improve transparency and reduce regulatory conflicts also in other areas.
[482] The footnote to Art. V:1(a) GATS.
[483] Art. 1:2(d) GATS.

What appears to be clear is that some movement of natural persons should be allowed at least. In this respect, it would seem that the U.S. is in an outright breach of Art. V as no PTA negotiated by the U.S. for over a decade has contained commitments aimed to facilitate the movement of natural persons.[484] The exclusion of an entire mode of supply cannot fulfill the requirement of substantial sectoral coverage under Art. V GATS, especially as the condition is understood not only in terms of number of sectors and volume of trade affected but also in terms of modes of supply.[485]

The EU is in a much safer zone in this regard. All of the reviewed EIAs include commitments on Mode 4. They thus seem to comply with the requirement that EIAs should not provide for the *a priori* exclusion of any mode of supply. Altogether another question is to what extent Mode 4 is covered in the EU's agreements. As we have established earlier, the GATS does not extend to labour mobility *per se*, and its exclusion in EIAs does thus not amount to a violation of Art. V. Parties should, nevertheless, cover the scope of Mode 4 as provided by the GATS.[486]

Therefore, whereas under Modes 1-3 there are two essential issues to check (the level of SC and NT), under Mode 4 there are three separate issues that arise. The first issue is the categories of persons covered, and only then come the sectoral coverage and the level of non-discrimination provided to such persons. Whereas one could argue that also under Mode 3 there are several ways to access the host state and that countries impose requirements as to the use of specific legal entities, the GATS clearly provides that "commercial presence" (Mode 3) for the purpose of supplying a service means "any type of business or professional establishment", including through "the constitution, acquisition or maintenance of a juridical person" or "the creation or maintenance of a branch or a representative office".[487] Thus, the parameters for Mode 3 are largely set by the GATS, whereas the types of natural persons to be admitted under Mode 4 is, in practice at least, determined by the Members themselves. The GATS gives some guidance as to types of persons

[484] See, for example, Art. 12:1(7) of the FTA between the U.S. and South Korea, which states that "Nothing in this Chapter or any other provision of this Agreement shall be construed to impose any obligation on a Party regarding its immigration measures, including admission or conditions of admission for temporary entry." According to a report prepared for the Members and Committees of the U.S. Congress by the Congressional Research Service, "No U.S. FTA negotiated after the agreements with Chile and Singapore agreements includes provisions on the temporary movement of personnel". See "The Trans-Pacific Partnership (TPP): Negotiations and Issues for Congress", March 20, 2015, available at https://www.fas.org/sgp/crs/row/R42694.pdf (date accessed 15 August 2016). See also Stephenson and Hufbauer 2011, 282.
[485] Footnote to Art. V:1(a) GATS.
[486] Similarly in Cottier and Molinuevo 2008, 134-135.
[487] Art. XXVIII GATS ("Definitions"). Moreover, under the MA discipline of the GATS (Art. XVI), measures which restrict or require specific types of legal entity or joint ventures are prohibited unless otherwise specified in the schedule. As we have explained earlier, such requirements go against Art. V in case they are discriminatory.

covered, but there are no legal definitions for the exact categories persons and the conditions for their entry and stay.

In Chapter IV we listed the four basic categories of persons that are typically seen as resulting from the GATS and the Members' commitments on Mode 4: 1) IPs, 2) ICTs, 3) CSSs, and 4) BVs (business visitors) and services salespersons.[488] Only two of the EU's EIAs cover all these categories: the EIAs with the CARIFORUM and Georgia. The two other EIAs do not contain any commitments on CSSs and IPs but simply refer to possible advancement to be made in the GATS negotiations.

The covered categories of persons are thus not identical across the EU's agreements. Among the reviewed EIAs, the most extensive Mode 4 coverage is found in the EU-CARIFORUM agreement. The agreement covers six different types of natural persons: CSSs, IPs, key personnel, graduate trainees, short-term business visitors and business services sellers.[489] 'Key personnel' covers business visitors (responsible for setting up a commercial presence) and ICTs (which is further divided into managers and specialists). 'Graduate trainees' are, in essence, a sub-group of ICTs as they cover persons who have been employed by the transferring undertaking in the home country for at least one year and are temporarily transferred to a commercial presence or to the parent company of the same undertaking in the host state. They must possess a university degree and the transfer must take place for career development purposes or to obtain training in business techniques or methods. Business services sellers, on the other hand, are representatives of a service supplier seeking temporary entry for the purpose of negotiating the sale of services or to enter into agreements to sell services in the host state. It is specifically specified that they cannot engage in making direct sales to the general public or receive remuneration from a source located within the host state. However, the EU's sector-specific commitments under Category 2 of Mode 4 (CSSs and IPs) cover IPs only in about 50 % of the commitments.[490]

The EU has chosen to specify the sectors in which the supply of services into its territory by CSSs and IPs in the beginning of its schedule for CSSs and IPs. That is probably to make clear in which (limited) sectors such service supply is allowed. Both lists represent less than 50 % of all service

[488] See Section 2(ii) of Chapter IV.
[489] The categories of persons for each reviewed EIA are explained under the results of the empirical analysis in Chapter V.3.
[490] The exclusion of IPs under about a half of the EU's Category 2 commitments in the EIAs with CARIFORUM and Georgia has not been noted in the review sheets of Annex 4 as it would have excessively complicated their reading. More detailed review sheets are available from the author by request.

sectors but the list for IPs is even shorter than for CSSs. Both lists include a mix of main service sectors and sub-sectors. It is also specifically highlighted that "the Union does not undertake any commitment for contractual service suppliers and independent professions for any sector of economic activity other than those which are explicitly listed below".[491]

As there are commitments on CSSs and IPs only in two of the EIAs, the overall coverage for Mode 4 in terms of categories of persons cannot be considered comprehensive. Most EU's commitments apply to ICTs and business visitors and service sellers only. There are numerous sectoral exclusions and discriminatory limitations that apply to CSSs and IPs in the two EIAs that cover them. There is also another factor that is questionable from the point of view of Art. V requirements. The EU's Mode 4 commitments are not subjected to the MFN and NT disciplines as the rest of the modes are.[492] The chapters on the temporary presence of natural persons for business purposes simply provide for the definitions of the persons covered but do not grant any non-discrimination obligations for them. Therefore, it would seem that the EU is not promising any non-discrimination in terms of MFN and NT to service suppliers under Mode 4. The level of treatment granted is revealed solely by reading the sector-specific commitments. There, as shown by our results, the level of NT is revealed. But it is noteworthy that there is no GATS-like NT treatment discipline on the level of the text of the agreement. Moreover, MFN does not seem to apply to Mode 4 at all. This is probably due to the EU's, or all contracting parties', desire to protect its policy space with admitting persons on more favorable conditions from other countries. However, such exclusion of MFN and NT does not find support in the GATS discipline on EIAs as the provisions of Art. V do not differentiate between the modes of supply in this regard.

In addition to this obvious shortcoming, once one turns into the actual commitments, one notices that also the sector-specific commitments under Mode 4 are quite modest. In general, there is also a large number of sectoral exclusions. There are more exclusions under Mode 4 than under any other mode in the EU's EIAs. That is easy to spot by viewing Annex 4 where the sectoral exclusions are marked by grey color. As to the level of non-discrimination, the level of NT provided to ICTs is, in the average, higher than under Mode 1 but lower than under Modes 2 and 3. However, this applies only to the first category of Mode 4. For the second category (CSSs and IPs), the NT scores are much lower and an even higher number of sectoral exclusions are applied. The most common

[491] E.g. the front page of Annex XIV-D of the EU-Georgia EIA.
[492] In the EU-Georgia EIA, MFN applies only to Establishment (Art. 79(1) and 79(2), subject to reservations in Annex XIV-A and XIV-E). All of the other EIAs are subject to MFN reservations as well but a general MFN discipline is granted under the modes 1-3.

applied restriction are nationality and residence requirements. They immediately take the NT score to 0, which greatly decreases the value of the EU's commitments under Mode 4.

Finally, it can be noted that similarly to Mode 3, not all of the economic activities listed by the EU relate to services activities. Mode 4 has thus been partly extended to manufacturing businesses.[493]

ii. The EU's approach to the issue of employment market access

All of the reviewed EIAs include the following statements in the beginning of the chapter on services:

> *"This Chapter shall not apply to measures affecting natural persons seeking access to the employment market of a Party, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis."*
>
> *"Nothing in this Title shall prevent the [Parties or the Signatory CARIFORUM States] from applying measures to regulate the entry of natural persons into, or their temporary stay in, their territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across their borders, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Party under the terms of a specific commitment."*[494]

In addition to these straightforward carve-outs designed to protect the integrity of the EU Member States' labour markets and national borders, a careful reading of the definitions of the categories of persons covered in the texts of the agreement reveals that the purpose is to avoid employment market access from taking place.

In that light, it is somewhat contradictory that the Member States have included so many limitations in their sector-specific commitments. There is a large number of nationality and residency conditions for ICTs, as well as occasional ENTs. Such requirements show that the Member States choose to retain the opportunity to give preference to local workers. This is understandable in the case of CSSs (for whom such requirements are applied even more often) but creates blurriness around the issue of employment market access in the case of ICTs. According to the EU's own

[493] See Descheemaeker (2016) who deals with the EU's practice of extending Mode 3 and Mode 4 to non-services sectors.

[494] See, e.g. Art. 60 of the Chapter on "Investment, Trade in Services and E-Commerce" in the EU-CARIFORUM EIA.

definition of ICTs, their movement is designed to facilitate the business motivations of the foreign service supplier. ICTs must either get training in the host state or help in the development of the host state undertaking. A critical factor is that they have company-specific knowledge, which is typically confirmed by prior-employment requirements in the same undertaking. It is thus hard to imagine that they would be replaced by local workers who lack such a connection to the undertaking and the country of origin. Nevertheless, the EU Member States' commitments do not always reflect this reality.

In the EU's EIAs, Mode 4 is clearly temporary in nature. 'Temporary' is included already in the title of the chapters on Mode 4 ("Temporary entry and stay of natural persons for business purposes"). Clear time limits are provided for the stay in each category of persons covered.[495] With regard to the periods of stay (as well as to the definitions of the categories of persons), the EU Member States are perfectly aligned. However, there is once again no clarity as to what is required by Art. V. Beyond the exclusion of permanent migration, the GATS does not draw lines concerning periods of stay. For example, Japan's GATS commitments allow foreign business travelers to stay for a maximum of 90 days, but certain categories of ICTs can stay up to five years.[496]

When using foreign labour, the situation of TCN service suppliers established outside the EU is different to service suppliers who are established within the Union. In the EU, according to the Court's established case law, service suppliers posting workers to another EU Member State do not need to obtain work permits for their TCN employees (unless they are temporary work agencies). In contrast, third-country service suppliers established outside the EU typically must do so, although in some instances the service supply may take place with no permit if the service supplier is established in a country whose nationals do not need any visa to enter the Union. In this regard, there is internal EU diversity depending on whether the EU Member State is in the Schengen area or not.

The EU case law in question relates to the use of non-EU national workers in the intra-EU provision of services.[497] In that line of case law, the Court of Justice has built its legal analysis of cross-border

[495] For example, the temporary entry and stay of key personnel and graduate trainees "shall be for a period of up to three years for intra-corporate transfers, 90 days in any 12-month period for business visitors, and one year for graduate trainees". See Art. 81 in the EU-CARIFORUM EIA. The periods are the same across the reviewed EIAs.
[496] Mattoo and Carzaniga 2003, 3.
[497] When analysing the EU's own case law, it is important to keep in mind that services are understood in somewhat different terms in the EU and in the WTO. The GATS drafters did not use the EU example. Instead, they followed a four-mode typology developed by economists Gary Sampson and Richard Snape. See Sampson and Snape (1985). Only

service supply around the question of employment market access.[498] In 2011, the Court ruled that hired workers (temp-agency workers) are a group of service suppliers that specifically seek access to the host state's employment market and thus belong to the category of workers.[499] In cases where such workers are not EU nationals and are sent from one EU Member State to work in another, work permits may still be required (a requirement otherwise prohibited in intra-EU provision of services).[500]

The situation is different in the case of posted workers who are not hired out to the host-country company but are engaged in the direct provision of services by their home-state company under a service contract (corresponding to CSSs). According to the Court, such workers, employed by an undertaking established in one Member State and temporarily sent to another Member State to provide services, "do not in any way seek access to the labour market in that second State, if they return to their country of origin or residence after completion of their work".[501] Requiring work permits from such TCN service suppliers in the internal market has been illegal already for over 20 years, as it hinders the service provision by their employer. However, it is not difficult to imagine that sometimes separating such contractual service suppliers from hired temp-agency workers may be challenging.[502] The EU's Posted Workers Directive covers both situations, but the applicability of local labour laws is, to a certain extent at least, dependent on the national legislation.[503]

Modes 1, 2 and 4 coincide with the concept of services as it stands in EU law. Mode 3, by contrast, is the closest equivalent to the EU's freedom of establishment. In respect of Mode 4, the basic concept in EU law is the free movement of services, which, similarly to the GATS, encompasses legal entities and self-employed persons alike. EU law makes an important differentiation between workers and service suppliers. The dividing line is the relationship between the service supplier and the service recipient. If the relationship can be characterized as one of employment, the rules governing free movement of workers apply. Under the GATS, the exact division depends on each Member's national regime. See for EU case law Hatzopoulos and Do 2006, 951.

[498] See especially cases C-113/89, *Rush Portuguesa Ld[a] v Office national d'immigration* [1990] ECR I-1417, paras. 13-15, C-43/93, *Raymond Vander Elst v Office des migrations Internationales* [1994] ECR I-3803, para. 21, joined cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte and Others* [2001] ECR I-7831, para. 22 and case C-445/03 *Commission* v *Luxembourg* [2004] ECR I-10191, para. 38.

[499] Joined Cases C-307/09 to C-309/09, *Vicoplus* [2011] ECR I-00453.

[500] In one case the Court did not only reject the work permit/specific authorization requirement, but it also rejected the automatic expulsion of such third-country workers who had entered the host state's territory unlawfully. The Court concluded that by making it impossible to regularize the situation of a TCN worker that was lawfully posted by an undertaking established in another Member State but who had entered the host state without a required visa, the host state was imposing a restriction on that undertaking's freedom to provide services. Such an act exposes the worker in question to the risk of being excluded from the national territory, which is liable to jeopardize the planned posting. See Case C-168/04, *Commission v Austria* [2006] ECR I-9041, para. 61. The posted TCN workers did not enjoy any free movement rights on their own but rather a derived right stemming from their employer's freedom to provide services in the EU's internal market. The concept of "derived rights" is typically used in connection with TCN family members who sometimes enjoy a derived right to move within the EU together with their EU national family member. As with posted workers, in reality it is rather the EU national who has the right to move with his or her TCN family member. See Craig and De Búrca 2015, 857.

[501] Para. 21 of C-43/93, *Raymond Vander Elst v Office des migrations Internationales* [1994] ECR I-3803.

[502] To help in drawing the difference, the Court of Justice has put forward a method that is often employed in domestic and European employment law. The Court emphasized that one should look into under whose control and direction the

The EU's internal development with regard to temporary supply of personnel is reflected also in the EU's EIA commitments. All Member States have excluded the temporary supply of personnel in their Mode 4 commitments. Also under other modes, the commitments are of very limited nature.[504] There are, however, differences between the agreements. There are only one or two Member States that have given a commitment under Mode 1 in all of the four EIAs, but under Mode 3 there is a NT commitment from 37 % of the Member States in the EIAs with Central America and the CARIFORUM states (ten Member States out of 27 providing for non-discrimination under Mode 3). In the EU-Korea EIA, the score is 4 % (one Member State out of 27) and with Georgia it is 7 % (two Member States out of 28). The higher levels with the Central American and the CARIFORUM states may relate to less concern over those countries' service suppliers' potential activity in the placement services of personnel, or to a growing concern in the EU Member States over the liberalization of temp-agency services since the conclusion of those agreements and up to the conclusion of the more recent agreements with Korea and Georgia.

Considering the complexity involved in the liberalization of Mode 4, it is impossible to give any clear answer to the level of non-discrimination provided by the EU's EIAs. As has been noted before, the conditions to access a country through Mode 4 are typically by their nature discriminatory. The movement of natural persons is never entirely liberalized – passports and visas are required to access any country. Even within the EU, the EU citizens do not enjoy unlimited right

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workers perform their duties. In the *Vicoplus* case, the Court said that " - - as has been noted by all of the Governments which have submitted observations to the Court and also by the Commission, a worker who is hired out, within the meaning of Article 1(3)(c) of Directive 96/71 [The Directive on Posted Workers], works under the control and direction of the user undertaking. That is the corollary of the fact that such a worker does not carry out his work in the context of a provision of services undertaken by his employer in the host Member State". See Joined Cases C-307/09 to C-309/09, *Vicoplus* [2011] ECR I-00453, para. 47. In practice, however, it is not always straightforward to say under whose control and direction CSSs work. For example, one can imagine a construction site where workers posted by a sub-contractor in another Member State perform their part of the project in close cooperation with the main contractor. Their superiors might be in another country and the workers, in effect, under the direction of the main contractor.

[503] The Posted Workers Directive ("PWD") covers three categories of workers, two of which correspond roughly to the GATS-type CSSs and ICTs. The third category is temp-agency workers. The PWD sets the mandatory, host-state rules of employment that must be applied to all intra-EU posted workers (including the host state's minimum rates of pay). See Art. 3 of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services. The applicability to intra-EU CSSs of certain local labour laws and/or collective agreements outside the mandatory rules for minimum protection of the PWD has been restricted in the Court's case law. See especially Case C-341/05, *Laval un Partneri Ltd* [2007] ECR I-11767 (para. 80-81). Because of the political controversy concerning the PWD, especially after the judgment in Laval, the Commission has, under pressure from several Member States, recently proposed modifications to the Directive. See Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, See COM(2016) 128 final.

[504] "Placement and supply services of personnel" are listed under (k.) in F. Other Business Services which is located in the main sector of 1. Business Services.

to remain in each other's territory. Keeping the overall restrictiveness of Mode 4 in mind, the EU's EIAs show that the EU is relatively liberal as to the categories of persons covered. However, the especially meaningful categories of IPs and CSSs are covered only by two of the four agreements (EU-CARIFORUM EPA and EU-GEORGIA AA), and even in them the sectoral coverage especially for IPs is low. The average sector-specific scores for sectoral coverage are relatively low but for NT they are at around 80 %. Here one must, however, pay attention to the definitions of the Mode 4 categories already in the text of the agreement. The value of the NT score is limited. In the case of CSSs and IPs, the average non-discrimination score is as low as 33 % in the CARIFORUM EIA. In this sense, the coverage of Mode 4 is most extensive in the Georgia EIA, where the average NT score for ICTs (key personnel and graduate trainees) is 84 % and 40 % for CSS and IPs. However, all in all, and considering especially the overall poor level of commitments for CSSs and IPs, the EU can be considered to stay quite far from attaining the threshold of eliminating substantially all discrimination towards its preferential partners' service suppliers supplying services through the presence of natural persons.

Overall, there is much similarity in the scores for individual sub-sectors in all of the reviewed EIAs. The similarity in the commitments across the agreements is confirmed by reading the schedules. They are not identical and in some instances there are significant differences (the most radical being the higher than average sectoral coverage under Mode 3 in the EU-Georgia EIA), but the overall impression based on reading hundreds of pages of commitments is that many of the same restrictions keep repeating from one agreement to the other. The finding applies both to horizontal as well as sector-specific commitments. The reviewed agreements have been concluded within a relatively short period of time (2008-2014). It may be that the commitments reflect a *status quo* – a level of accession conditions that has taken place mostly through unilateral opening. They would thus not provide for new opening but simply lock-in the access conditions that are already applied. Another option is that the EU Member States have chosen to provide a relatively similar level of market opening across the agreements. However, considering that liberalization of service regulations is typically put into effect in a non-discriminatory manner (except maybe for Mode 4), any new openings granted in earlier agreements may possibly feed into later agreements as they have already become applied on a MFN basis in any case.[505]

[505] Roy, Marchetti and Lim note that it is very difficult to identify with exactitude the extent to which EIAs lead to real liberalization (i.e. to the removal of applied restrictions). Some countries may bind the status quo (the applied regime) while others may decide to withdraw certain restrictions and accordingly not list them as reservations or limitations in the agreement. One can ascertain the level of actual liberalization only by going through the laws and regulations of

This may be reflected also in the EU's EIAs. Instead of providing for new liberalization, they may rather reflect the *status quo*.[506] Our results point towards similarity in the commitments between the agreements but more qualitative analysis would be needed to find out to what extent the Member States' commitments have changed from the EPA with the CARIFORUM (2008) to the AA with Georgia (2014).[507] Such an analysis would also show which Member States are more liberal than others. However, our results give reason to conclude that the number of Member States having granted non-discriminatory access conditions to service suppliers of the partner countries in each agreement has not changed in any significant amount.

each country and compare the applied regime before and after the conclusion of the agreement. See Roy, Marchetti, and Lim 2007, 178.

[506] Considering the generally low levels of liberalization in EIAs, binding the currently applied regulations may already be considered some sort of an achievement. Mattoo and Sauvé note that a negative list approach can be more effective in locking in the regulatory *status quo*, whereas positive scheduling can more easily lead to levels below it. See Mattoo and Sauvé (2010).

[507] Tracking changes can be done, for example, by measuring consistency in the language of the commitments. One method for measuring consistency in treaty language is used by Alschner and Skougarevskiy who measure the textual similarity of investment treaties through a specific "heat map" which shows the overlap of the various textual components of each investigated agreement. See Alschner and Skougarevskiy (2016): "Mapping the Universe of International Investment Agreements", available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2801608 (forthcoming in Journal of International Economic Law).

VII. CONCLUSION

There is a certain paradox in the liberalization of trade today. The most central issues on the table involve at least some regulatory reform in the domestic setting. This applies to investment, public procurement, competition rules, and, of course, services. Agreeing over market-opening regulatory reforms, and related regulatory cooperation, is nevertheless extremely challenging in a multilateral organization with over 160 members. Countries are therefore entering smaller clubs with similarly thinking or otherwise willing partners. The paradox lies in the fact that regulatory reforms are nevertheless ideally implemented in a non-discriminatory manner. This is clearly the case in services. New market opening in services is typically likely to benefit outsiders as well. The incentives for negotiating preferential deals on services are therefore different to preferential deals in goods where tariff liberalization can be easily implemented on a discriminatory basis.

This is maybe partly behind the modest liberalization levels of EIAs so far. Countries lack incentive to commit to genuine market opening when they know that the preferences granted by their negotiation partner are likely to benefit at least some outsiders as well. Most EIAs go deeper than the same countries GATS commitments, but the GATS was over 20 years ago. In practice, EIA commitments typically do not provide for much new market opening but by committing to *status quo* they simply guarantee that the situation does not get worse.

At the same time, the significant economic advantages of services liberalization are of course well understood. That is why the so-called "Really Good Friends of Services", currently composed of 23 Members of the WTO, including the EU and the U.S., have practically abandoned the GATS and moved to negotiate a new trade agreement in services, the TiSA. What is essential is that together, the participating countries account for 70 % of world trade in services. Even if some important Members, such as China, are not included at least for the moment, the wide coverage alleviates concerns of significant free riding. From the outsiders' point of view, it would be important that the agreement was implemented on an MFN basis. Some more participants are possibly needed for MFN to become reality but if the agreement succeeds, that is a likely scenario. As we have discussed in this thesis, discriminatory application of service regulation is unpractical and risks being welfare-reducing as a whole.

In our view, the core conditions of Art. V relate to the overall positive spill-over effects that EIAs may have. The provisions require wide sectoral coverage and deep liberalization through

elimination of substantially all discrimination. Art. V:6 requires the application of very liberal rules of origin. The provision of 'wider process of economic integration or trade liberalization" (Art. V:2) allows some flexibility in the elimination of discrimination but for the overall objective of creating a more integrated market. Such a development is likely to benefit outsiders as well. The EU is a case in point. The creation of a single market in goods has made it possible for third-country importers to sell their products on similar conditions anywhere in the EU. In the field of services, such a situation is not yet a reality but a single market in services is progressing step by step. A highly integrated services market would fuel economic growth and provide interesting trading opportunities also for service suppliers from third countries. We consider that to be the objective of Art. V GATS as well.

We have refrained from making any ultimate determination as to the compliance of the EU with Art. V GATS in its external trade agreements. The results show varying degrees of liberalization across the different sub-sectors. All in all, a large number of sub-sectors have low scores on national treatment, meaning that there is only a part of the EU providing for a non-discriminatory access in those sectors. The practical relevance of that "part of the EU" depends on the significance of those individual Member States' markets to the foreign service supplier, either for selling services there or as an access point to other EU Member States. As there is no legal clarity on the exact meaning of the Art. V requirements, nor on their application to an entity such as the EU, we cannot say what percentage exactly of the EU is required to reach compliance with Art. V. Moreover, as our results show the percentage of Member States committed under each sub-sector, further calculations and methodological choices would need to be done to propose an overall score for the coverage of the entire EIA by the EU. However, from a legal point of view, it may be proposed that the Art. V thresholds should be separately reached both by the individual Member States (who are WTO Members also in their own right) and by the EU as a whole. A particular percentage of the Member States (for example, 90 %) could be considered to show committal by the EU "as a whole". Certain weights depending on the relevance of the individual Member States might need to be applied.

One way to approach the issue would be to compare the EU's EIAs to other Members' agreements. Similar (low) levels of liberalization in other agreements could demonstrate a Members' practice in this regard, or at least a general negligent attitude toward Art. V. It is not just the EU's EIAs, but EIAs in general, that have so far provided for only modest levels of liberalization. This thesis has, however, focused solely on the EU's EIAs and we have not engaged in comparisons with EIAs

concluded by other Members of the WTO. Nevertheless, we would consider that no matter how low is the overall level of liberalization in the Members' EIAs in general, it would be questionable to let it affect the interpretation of Art. V in any significant manner. It may be possible to debate, in light of the Members' practice or without it, whether 'substantially all' means 60 % or 90 %, but hardly anyone can reasonably claim that the threshold for 'substantial' or 'substantially all' could be lower than 50 %.

Our parameters for the study of EIAs are based directly on Art. V. The Members themselves have decided upon these parameters and they are thus a legitimate tool for a legal assessment of EIAs. However, instead of a strict legal scrutiny, and in the face of the seemingly impossible task of enforcing the WTO disciplines on preferential trade, the Members have opted for a more relaxed Transparency Mechanism to keep track of PTAs. The gathering of information on PTAs and the evaluation of their possible effects on multilateral trade liberalization is increasingly becoming a task for the academia.

That has been the main motivation for our work as well. The thesis develops a methodology that aims at providing new information on how one of the biggest Members is concluding its EIAs. The method takes into account the internal diversity that still exists between the EU Member States when they liberalize services internationally. But such an approach is not relevant only in the case of the EU. Services are in the center of attention in almost any current PTA project. In those negotiations, it is becoming increasingly topical, and urgent, to address also such restrictions that are applied by local entities beyond the central state. Arguably some of the most significant economic advantages would be realized if such sub-central entities (states, regions and municipalities) engaged in deeper liberalization of services. The thesis provides one possible method for analyzing services commitments across various levels of government.

In the context of the EU, the thesis demonstrates the diversity that still exists in the Member States' external services trade commitments. As services are now occupying a central place in trade negotiations, individual Member States may in the future face an increasing number of bilateral requests to open up their national service markets, especially in the economically most relevant sectors. A higher level of homogeneity within the EU, whether through internal harmonization or by simple coordination of the EU Member States' positions, would provide for more clarity and predictability for third-country service suppliers. The goal for the EU should be the creation of a more coherent internal services market. Such a development would reduce barriers in intra-EU

provision of services. At the same time, it would enhance the EU's international negotiation position. The dismantling of barriers within the EU would make it possible to extend similar treatment also to third country partners. Such a development is desirable as the reduction of trade barriers towards service suppliers from certain countries only is likely to create economic distortions that result in general productivity losses. However, it is realistic to anticipate that due to the numerous political and cultural sensitivities relating to the cross-border liberalization of services, significant advancement in the most sensitive areas, such as mutual recognition, is most likely to take place only in relatively closed groups of like-minded countries. An openly implemented, integrated services market along the lines of Art. V GATS is, nevertheless, an objective that we should rather encourage than try to prevent.

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ANNEXES

Annex 1: Preferential trade agreements notified by the EU to the WTO

Annex 2: The agreements reviewed in the empirical study

Annex 3: The model review sheet (WTO's Sectoral Classification List)

Annex 4: The review sheets of the analyzed agreements

ANNEX 1

PREFERENTIAL TRADE AGREEMENTS NOTIFIED BY THE EU TO THE WTO

ANNEX 1: Preferential trade agreements notified by the EU to the WTO (excl. inactive PTAs)

Source: WTO (RTA Information System, available at http://rtais.wto.org), 8 September 2016

RTA Name	Coverage	Type	Date of notification	Notification	Date of entry into force	Status
EU - Albania	Goods & Services	FTA & EIA	07-Mar-2007(G) / 07-Oct-2009(S)	GATT Art. XXIV & GATS Art. V	01-Dec-2006(G) / 01-Apr-2009(S)	In Force
EU - Algeria	Goods	FTA	24-Jul-06	GATT Art. XXIV	01-Sep-05	In Force
EU - Andorra	Goods	CU	23-Feb-98	GATT Art. XXIV	01-Jul-91	In Force
EU - Bosnia and Herzegovina	Goods & Services	FTA & EIA	11-Jul-2008(G) / 12-Jan-2016(S)	GATT Art. XXIV & GATS Art. V	01-Jul-2008(G) / 01-Jun-2015(S)	In Force
EU - Cameroon	Goods	FTA	24-Sep-09	GATT Art. XXIV	04-Aug-14	In Force
EU - Canada						Early announcement-Under negotiation
EU - CARIFORUM States EPA	Goods & Services	FTA & EIA	16-Oct-08	GATT Art. XXIV & GATS Art. V	01-Nov-08	In Force
EU - Chile	Goods & Services	FTA & EIA	03-Feb-2004(G) / 28-Oct-2005(S)	GATT Art. XXIV & GATS Art. V	01-Feb-2003(G) / 01-Mar-2005(S)	In Force
EU - Colombia and Peru	Goods & Services	FTA & EIA	26-Feb-13	GATT Art. XXIV & GATS Art. V	01-Mar-13	In Force
EU - Côte d'Ivoire	Goods	FTA	11-Dec-08	GATT Art. XXIV	01-Jan-09	In Force
EU - Eastern African Community (EAC) EPA						Early announcement-Under negotiation

EU - Eastern and Southern Africa States Interim EPA	Goods	FTA	09-Feb-12	GATT Art. XXIV	14-May-12	In Force
EU - Egypt	Goods	FTA	03-Sep-04	GATT Art. XXIV	01-Jun-04	In Force
EU - Faroe Islands	Goods	FTA	17-Feb-97	GATT Art. XXIV	01-Jan-97	In Force
EU - Former Yugoslav Republic of Macedonia	Goods & Services	FTA & EIA	23-Oct-2001(G) / 02-Oct-2009(S)	GATT Art. XXIV & GATS Art. V	01-Jun-2001(G) / 01-Apr-2004(S)	In Force
EU - Georgia	Goods & Services	FTA & EIA	02-Jul-14	GATT Art. XXIV & GATS Art. V	01-Sep-14	In Force
EU - Iceland	Goods	FTA	24-Nov-72	GATT Art. XXIV	01-Apr-73	In Force
EU - India						Early announcement-Under negotiation
EU - Israel	Goods	FTA	20-Sep-00	GATT Art. XXIV	01-Jun-00	In Force
EU - Japan						Early announcement-Under negotiation
EU - Jordan	Goods	FTA	17-Dec-02	GATT Art. XXIV	01-May-02	In Force
EU - Korea, Republic of	Goods & Services	FTA & EIA	07-Jul-11	GATT Art. XXIV & GATS Art. V	01-Jul-11	In Force
EU - Lebanon	Goods	FTA	26-May-03	GATT Art. XXIV	01-Mar-03	In Force
EU - Malaysia						Early announcement-Under negotiation
EU - Mexico	Goods & Services	FTA & EIA	25-Jul-2000(G) / 21-Jun-2002(S)	GATT Art. XXIV & GATS Art. V	01-Jul-2000(G) / 01-Oct-2000(S)	In Force

EU - Montenegro	Goods & Services	FTA & EIA	16-Jan-2008(G) / 18-Jun-2010(S)	GATT Art. XXIV & GATS Art. V	01-Jan-2008(G) / 01-May-2010(S)	In Force
EU - Morocco	Goods	FTA	13-Oct-00	GATT Art. XXIV	01-Mar-00	In Force
EU - Morocco						Early announcement-Under negotiation
EU - Norway	Goods	FTA	13-Jul-73	GATT Art. XXIV	01-Jul-73	In Force
EU ñ Overseas Countries and Territories (OCT)	Goods	FTA	14-Dec-70	GATT Art. XXIV	01-Jan-71	In Force
EU - Palestinian Authority	Goods	FTA	29-May-97	GATT Art. XXIV	01-Jul-97	In Force
EU - Papua New Guinea / Fiji	Goods	FTA	18-Oct-11	GATT Art. XXIV	20-Dec-09	In Force
EU - Philippines						Early announcement-Under negotiation
EU - Rep. of Moldova	Goods & Services	FTA & EIA	30-Jun-14	GATT Art. XXIV & GATS Art. V	01-Sep-14	In Force
EU - SADC EPA						Early announcement-Under negotiation
EU - San Marino	Goods	CU	24-Feb-10	GATT Art. XXIV	01-Apr-02	In Force
EU - Serbia	Goods & Services	FTA & EIA	31-May-2010(G) / 20-Dec-2013(S)	GATT Art. XXIV & GATS Art. V	01-Feb-2010(G) / 01-Sep-2013(S)	In Force
EU - Singapore						Early announcement-Under negotiation

EU - South Africa	Goods	FTA	02-Nov-00	GATT Art. XXIV	01-Jan-00	In Force
EU - Switzerland - Liechtenstein	Goods	FTA	27-Oct-72	GATT Art. XXIV	01-Jan-73	In Force
EU - Syria	Goods	FTA	15-Jul-77	GATT Art. XXIV	01-Jul-77	In Force
EU - Thailand						Early announcement-Under negotiation
EU - Tunisia	Goods	FTA	15-Jan-99	GATT Art. XXIV	01-Mar-98	In Force
EU - Tunisia						Early announcement-Under negotiation
EU - Turkey	Goods	CU	22-Dec-95	GATT Art. XXIV	01-Jan-96	In Force
EU - Ukraine	Goods & Services	FTA & EIA	01-Jul-14	GATT Art. XXIV & GATS Art. V	23-Apr-14	In Force
EU - US TTIP						Early announcement-Under negotiation
EU - Viet Nam						Early announcement-Under negotiation
EU - West Africa EPA						Early announcement-Under negotiation
European Economic Area (EEA)	Services	EIA	13-Sep-96	GATS Art. V	01-Jan-94	In Force

ANNEX 2

THE AGREEMENTS REVIEWED IN THE EMPIRICAL STUDY

ANNEX 2

THE AGREEMENTS REVIEWED IN THE EMPIRICAL STUDY

EU-CARIFORUM Economic Partnership Agreement 2008
Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part

Official Journal of the European Union L 289 of 30 October 2008

The CARIFORUM parties: Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, Saint Kitts and Nevis, Surinam, Trinidad, Tobago, and the Dominican Republic. Haiti signed the agreement in December 2009, but is not yet applying it pending ratification.

EU-South Korea Free Trade Agreement 2011

Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea

Official Journal of the European Union, L 127, 14 May 2011

EU-Central America Association Agreement 2013

Agreement Establishing an Association between Central America, on the one hand, and the European Community and its Member States, on the other

Official Journal of the European Union L 346 of 15 December 2012

The Central America parties: Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama. The trade pillar of the Association Agreement has been provisionally applied since 1st August 2013 with Honduras, Nicaragua and Panama, since 1st October 2013 with Costa Rica and El Salvador, and since 1st December with Guatemala.

EU-Georgia Association Agreement 2014

Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part

Official Journal of the European Union L 261 of 30 August 2014

The Agreement is provisionally applied since 1st September 2014.

ANNEX 3

THE MODEL REVIEW SHEET WITH ALL SUB-SECTORS INCLUDED (THE WTO SECRETARIAT'S SECTORAL CLASSIFICATION LIST W/120)

ANNEX 3: MODEL REVIEW SHEET																					
NAME OF AGREEMENT																					
PARTIES																					
Type		Bilateral	Regional		Number of EU Member State parties:																
Development level of the non-EU party		Developed	Developing																		
		Signature	In Force	Notification																	
STATUS OF THE AGREEMENT																					
ELEMENTS RELATED TO NON-DISCRIMINATION					Yes	No	Explanation														
MFN																					
Standstill (prohibition of new or more discriminatory measures)																					
WIDER PROCESS OF ECONOMIC INTEGRATION					Yes	No	Explanation														
Progressive liberalization																					
Art. XXIV GATT agreement																					
Art. V bis GATS agreement																					
Mode 3 relating also to goods																					
Harmonization																					
Mutual recognition																					
Domestic regulation discipline(s)																					
Regulatory cooperation																					
Transparency																					
Intellectual property																					
Public procurement																					
Competition policy																					
Investment protection																					
Labour mobility (labour market access)																					
Labour protection																					
Consumer protection																					
Environment																					
Cultural cooperation																					
Sustainable development																					
OTHER ELEMENTS **(related to services only)**					Yes	No	Explanation														
Time frame for implementation																					
Ratchet clause (autonomous liberalization included)																					
Safeguards																					
Subsidies																					
Exceptions							Art.	XI	XII	XVI	XIVbis	Other									
Compatibility clause (relationship to Art. V GATS)																					
Categories of Mode 4 covered					Yes	No															
	Key personnel																				
	Graduate trainees																				
	Business service sellers																				
	Contractual service suppliers																				
	Independent professionals																				
	Short term visitors for business purposes																				
SECTORS			CPC		MODE 1				MODE 2				MODE 3				MODE 4				
					SC		NT		SC		NT		SC		NT		SC		NT		
	AVERAGE FOR MODE																				
1.	BUSINESS SERVICES																				
A.	Professional Services																				
a.	Legal Services		861																		
b.	Accounting, auditing and bookeeping services		862																		
c.	Taxation Services		863																		
d.	Architectural services		8671																		
e.	Engineering services		8672																		
f.	Integrated engineering services		8673																		
g.	Urban planning and landscape architectural services		8674																		
h.	Medical and dental services		9312																		
i.	Veterinary services		932																		
j.	Services provided by midwives, nurses, physiotherapists and para-medical personnel		93191																		
k.	Other																				
B.	Computer and Related Services																				
a.	Consultancy services related to the installation of computer hardware		841																		
b.	Software implementation services		842																		
c.	Data processing services		843																		
d.	Data base services		844																		
e.	Other		845+849																		

C.	Research and Development Services																			
a.	R&D services on natural sciences		851																	
b.	R&D services on social sciences and humanities		852																	
c.	Interdisciplinary R&D services		853																	
D.	Real Estate Services																			
a.	Involving own or leased property		821																	
b.	On a fee or contract basis		822																	
E.	Rental/Leasing Services without Operators																			
a.	Relating to ships		83103																	
b.	Relating to aircraft		83104																	
c.	Relating to other transport equipment		83101+ 83102+																	
d.	Relating to other machinery and equipment		83106- 83109																	
e.	Other		832																	
F.	Other Business Services																			
a.	Advertising services		871																	
b.	Market research and public opinion polling services		864																	
c.	Management consulting service		865																	
d.	Services related to man. consulting		866																	
e.	Technical testing and analysis serv.		8676																	
f.	Services incidental to agriculture, hunting and forestry		881																	
g.	Services incidental to fishing		882																	
h.	Services incidental to mining		883+5115																	
i.	Services incidental to manufacturing		884+885 (except for 88442)																	
j.	Services incidental to energy distribution		887																	
k.	Placement and supply services of personnel		872																	
l.	Investigation and security		873																	
m.	Related scientific and technical consulting services		8675																	
n.	Maintenance and repair of equipment (not including maritime vessels, aircraft or other transport equipment)		633+ 8861-8866																	
o.	Building-cleaning services		874																	
p.	Photographic services		875																	
q.	Packaging services		876																	
r.	Printing, publishing		88442																	
s.	Convention services		87909																	
t.	Other		8790																	
2.	COMMUNICATION SERVICES																			
A.	Postal services		7511																	
B.	Courier services		7512																	
C.	Telecommunication services																			
a.	Voice telephone services		7521																	
b.	Packet-switched data transmission services		7523																	
c.	Circuit-switched data transmission services		7523																	
d.	Telex services		7523																	
e.	Telegraph services		7522																	
f.	Facsimile services		7521+7529																	
g.	Private leased circuit services		7522+7523																	
h.	Electronic mail		7523																	
i.	Voice mail		7523																	
j.	On-line information and data base retrieval		7523																	
k.	Electronic data interchange (EDI)		7523																	
l.	Enhanced/value-added facsimile services, incl. store and forward, store and retrieve		7523																	
m.	Code and protocol conversion		n.a.																	
n.	On-line information and/or data processing (incl.transaction processing)		843																	
o.	Other																			

D.	Audiovisual services																			
a.	Motion picture and video tape production and distribution services		9611																	
b.	Motion picture projection service		9612																	
c.	Radio and television services		9613																	
d.	Radio and television transmission services		7524																	
e.	Sound recording		n.a.																	
f.	Other																			
E.	Other																			
3.	CONSTRUCTION AND RELATED ENGINEERING SERVICES																			
A.	General construction work for buildings		512																	
B.	General construction work f or civil engineering		513																	
C.	Installation and assembly work		514+516																	
D.	Building completion and finishing work		517																	
E.	Other		511+515+518																	
4.	DISTRIBUTION SERVICES																			
A.	Commission agents' services		621																	
B.	Wholesale trade services		622																	
C.	Retailing services		631+632 6111+611																	
D.	Franchising		8929																	
E.	Other																			
5.	EDUCATIONAL SERVICES																			
A.	Primary education services		921																	
B.	Secondary education services		922																	
C.	Higher education services		923																	
D.	Adult education		924																	
E.	Other education services		929																	
6.	ENVIRONMENTAL SERVICES																			
A.	Sewage services		9401																	
B.	Refuse disposal services		9402																	
C.	Sanitation and similar services		9403																	
D.	Other																			
7.	FINANCIAL SERVICES																			
A.	All insurance and insurance-related services		812																	
a.	Life, accident and health insurance services		8121																	
b.	Non-life insurance services		8129																	
c.	Reinsurance and retrocession		81299																	
d.	Services auxiliary to insurance (including broking and agency services)		8140																	
B.	Banking and other financial services (excl. insurance)																			
a.	Acceptance of deposits and other repayable funds from the public		81115-81119																	
b.	Lending of all types, incl., inter alia, consumer credit, mortgage credit, factoring and financing of commercial transaction		8113																	
c.	Financial leasing		8112																	
d.	All payment and money transmission services		81339																	
e.	Guarantees and commitments		81199																	
f.	Trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise,the specified products (see W/120)		81321, 81333, 81339																	
g.	Participation in issues of all kinds of securities		8132																	

h.	Money broking		81339																
i.	Asset management		8119+																
j.	Settlement and clearing services for financial assets		81339																
k.	Advisory and other auxiliary financial services on all the activities listed in Article 1B of MTN.TNC/W/50		8131 or 8133																
l.	Provision and transfer of financial information, and financial data processing and related software by providers of other financial		8131																
C.	Other																		
8.	HEALTH RELATED AND SOCIAL SERVICES																		
	(other than those listed under 1.A.h-j.)																		
A.	Hospital services		9311																
B.	Other Human Health Services		9319 (other																
C.	Social Services		933																
D.	Other																		
9.	TOURISM AND TRAVEL RELATED SERVICES																		
A.	Hotels and restaurants (incl. catering)		641-643																
B.	Travel agencies and tour operators services		7471																
C.	Tourist guides services		7472																
D.	Other																		
10.	RECREATIONAL, CULTURAL AND SPORTING SERVICES																		
	(other than audiovisual services)																		
A.	Entertainment services (incl. theatre, live bands and circus services)		9619																
B.	News agency services		962																
C.	Libraries, archives, museums and other cultural services		963																
D.	Sporting and other recreational services		964																
E.	Other																		
11.	TRANSPORT SERVICES																		
A.	Maritime Transport Services																		
a.	Passenger transportation		7211																
b.	Freight transportation		7212																
c.	Rental of vessels with crew		7213																
d.	Maintenance and repair of vessels		8868																
e.	Pushing and towing services		7214																
f.	Supporting services for maritime transport		745																
B.	Internal Waterways Transport																		
a.	Passenger transportation		7221																
b.	Freight transportation		7222																
c.	Rental of vessels with crew		7223																
d.	Maintenance and repair of vessels		8868																
e.	Pushing and towing services		7224																
f.	Supporting services for internal waterway transport		745																
C.	Air Transport Services																		
a.	Passenger transportation		731																
b.	Freight transportation		732																
c.	Rental of aircraft with crew		734																
d.	Maintenance and repair of aircraft		8868																
e.	Supporting services for air transport		746																

D.	Space Transport		733																
E.	Rail Transport Services																		
a.	Passenger transportation		7111																
b.	Freight transportation		7112																
c.	Pushing and towing services		7113																
d.	Maintenance and repair of rail transport equipment		8868																
e.	Supporting services for rail transport services		743																
F.	Road Transport Services																		
a.	Passenger transportation		7121+7122																
b.	Freight transportation		7123																
c.	Rental of commercial vehicles with operator		7124																
d.	Maintenance and repair of road transport equipment		6112+8867																
e.	Supporting services for road transport services		744																
G.	Pipeline Transport																		
a.	Transportation of fuels		7131																
b.	Transportation of other goods		7139																
H.	Services auxiliary to all modes of transport																		
a.	Cargo-handling services		741																
b.	Storage and warehouse services		742																
c.	Freight transport agency services		748																
d.	Other		749																
I.	Other Transport Services																		
12.	OTHER SERVICES NOT INCLUDED ELSEWHERE																		
	95+97+98+99																		

ANNEX 4

THE REVIEW SHEETS OF THE ANALYZED AGREEMENTS

ANALYSIS OF THE EU-CARIFORUM EIA																										
NAME OF AGREEMENT		**Economic Partnership Agreement**																								
PARTIES		CARIFORUM states, of the one part, and the European Community and its Member States, of the other part																								
Type		Bilateral	Regional		Number of EU Member State part		27																			
			x																							
Development level of the non-EU pa		Developed	Developing																							
			x																							
		Signature	In Force	Notification																						
STATUS OF THE AGREEMENT		15-Oct-08	Provisional	16-Oct-08	Haiti signed on 11-Dec-09, pending ratification. For the EU side, provisional application as from 29-Dec-08																					
ELEMENTS RELATED TO NON-DISCRIMINATION					Yes	No	Explanation																			
MFN					x		Under Modes 1-3, subject to exceptions																			
Standstill (prohibition of new or more discriminatory measures)						x	Applies only to the CARIFORUM states with respect to Modes 1, 2 and 3																			
WIDER PROCESS OF ECONOMIC INTEGRATION					Yes	No	Explanation																			
Progressive liberalization						x																				
Art. XXIV GATT agreement					x																					
Art. V bis GATS agreement						x																				
Mode 3 relating also to goods					x		Establishment covers certain goods-related economic activities																			
Harmonization						x																				
Mutual recognition					x		Services: non-binding, encourages relevant professional bodies to develop recommendations (Art. 85)																			
Domestic regulation discipline(s)					x		Financial services (Art. 105), concerning certain procedures (Art.87), regulatory bodies & authorities (Art. 93&95)																			
Regulatory cooperation						x	Regulatory dialogues only																			
Transparency					x		Generally (Art. 235) and specifically regarding services (Art. 86)																			
Intellectual property					x																					
Public procurement					x																					
Competition policy					x																					
Investment protection						x																				
Labour mobility (labour market access)						x																				
Labour protection					x		Commitment to basic ILO conventions; upholding levels of protection in domestic legislation (Art. 193)																			
Consumer protection						x																				
Environment					x		Upholding levels of protection in domestic legislation (Art. 188)																			
Cultural cooperation					x																					
Sustainable development					x		Specifically in Art. 3																			
OTHER ELEMENTS **(related to services only)**					Yes	No	Explanation																			
Time frame for implementation					x		Some EU states apply transitional periods for Mode 4 commitments for CSSs and IPs (expired in 2011 and 2014)																			
Ratchet clause (autonomous liberalization included)						x																				
Safeguards						x																				
Subsidies						x																				
Exceptions							GATS Art:		XII	XVI	XIVbis															
									x	x	x															
Compatibility clause (relationship to Art. V GATS)						x																				
Categories of Mode 4 covered					Yes	No																				
Cat. 1	Key personnel				x		Includes business visitors (responsible for setting up a commercial presence) and intra-corporate transfers																			
Cat. 1	Graduate trainees				x																					
Cat. 2	Contractual service suppliers				x																					
Cat. 2	Independent professionals				x																					
	Short term visitors for business purposes				x		Endeavour to facilitate short-term business visits for specific purposes (Art. 84)																			
	Business services sellers				x		Temporary entry and stay for a period of up to 90 days in any 12-month period (Art. 82)																			
SECTORS			CPC		MODE 1				MODE 2				MODE 3				MODE 4: Cat. 1				Mode 4: Cat. 2			
					SC		NT		SC		NT		SC		NT		SC		NT		SC		NT	
	AVERAGE FOR MODE				**0,40**		**0,43**		**0,70**		**0,76**		**0,78**		**0,72**		**0,51**		**0,82**		**0,22**		**0,33**	
1.	BUSINESS SERVICES				**0,72**		**0,71**		**0,94**		**0,93**		**0,95**		**0,92**		**0,44**		**0,54**		**0,51**		**0,31**	
A.	Professional Services				**0,51**		**0,44**		**1,00**		**0,95**		**0,97**		**0,85**		**1,00**		**0,66**		**0,73**		**0,31**	
a.	Legal Services		861		1,00		0,48		1,00		0,48		1,00		0,81		1,00		0,44		0,00			
b.	Accounting, auditing and bookeeping services		862		0,33		0,22		1,00		1,00		1,00		0,70		1,00		0,74		0,00			
c.	Taxation Services		863		0,85		0,78		1,00		1,00		1,00		0,93		1,00		0,85		1,00		0,44	
d.	Architectural services		8671		0,56		0,56		1,00		1,00		1,00		0,93		1,00		0,81		1,00		0,48	
e.	Engineering services		8672		0,70		0,70		1,00		1,00		1,00		0,96		1,00		0,81		1,00		0,52	
f.	Integrated engineering services		8673		0,70		0,70		1,00		1,00		1,00		0,96		1,00		0,81		1,00		0,52	
g.	Urban planning and landscape architectural services		8674		0,56		0,56		1,00		1,00		1,00		0,93		1,00		0,81		1,00		0,48	
h.	Medical and dental services		9312		0,22		0,22		1,00		1,00		0,89		0,70		1,00		0,41		0,67		0,04	
i.	Veterinary services		932		0,15		0,15		1,00		1,00		0,96		0,89		1,00		0,52		0,78		0,00	
j.	Services provided by midwives, nurses, physiotherapists and para-medical personnel		93191		0,04		0,04		1,00		1,00		0,85		0,70		1,00		0,41		0,81		0,00	
k.	Other																									
B.	Computer and Related Services				**1,00**		**1,00**		**1,00**		**1,00**		**1,00**		**1,00**		**0,00**				**1,00**		**0,44**	
C.	Research and Development Services				**1,00**		**1,00**		**1,00**		**1,00**		**1,00**		**1,00**		**0,00**				**1,00**		**0,00**	
D.	Real Estate Services				**0,52**		**0,52**		**1,00**		**1,00**		**1,00**		**1,00**		**1,00**		**0,72**		**0,00**			
a.	Involving own or leased property		821		0,52		0,52		1,00		1,00						1,00		0,74		0,00			
b.	On a fee or contract basis		822		0,52		0,52		1,00		1,00						1,00		0,70		0,00			

E.	Rental/Leasing Services without Operators				**0,59**		**0,58**		**0,75**		**0,75**		**0,83**		**0,82**		**0,20**		**0,00**		**0,00**		
a.	Relating to ships		83103		0,78		0,78		1,00		1,00		1,00		0,93		0,00				0,00		
b.	Relating to aircraft		83104		0,67		0,67		0,67		0,67		1,00		1,00		0,00				0,00		
c.	Relating to other transport equipment		83101+ 83102+		0,70		0,70		1,00		1,00		1,00		1,00		0,00				0,00		
d.	Relating to other machinery and equipment		83106- 83109		0,70		0,70		1,00		1,00		1,00		1,00		0,00				0,00		
e.	Other		832		0,07		0,07		0,07		0,07		0,15		0,15		1,00		0,00		0,00		
F.	Other Business Services				**0,72**		**0,72**		**0,88**		**0,88**		**0,87**		**0,86**		**0,42**		**0,79**		**0,36**		**0,49**
a.	Advertising services		871		1,00		1,00		1,00		1,00		1,00		1,00		0,00				1,00		0,52
b.	Market research and public opinion polling services		864		1,00		1,00		1,00		1,00		1,00		1,00		0,00				0,89		0,33
c.	Management consulting service		865		1,00		1,00		1,00		1,00		1,00		1,00		0,00				1,00		0,52
d.	Services related to man. consulting		866		0,96		0,96		0,96		0,96		0,96		0,96		0,00				1,00		0,52
e.	Technical testing and analysis serv.		8676		0,67		0,67		0,67		0,67		1,00		1,00		1,00		0,93		1,00		0,52
f.	Services incidental to agriculture, hunting and forestry		881		0,81		0,81		1,00		1,00		1,00		1,00		1,00		0,96		0,00		
g.	Services incidental to fishing		882		0,85		0,85		1,00		1,00		1,00		1,00		0,00				0,00		
h.	Services incidental to mining		883+5115		1,00		1,00		1,00		1,00		1,00		1,00		0,00				0,00		
i.	Services incidental to manufacturing		884+885 (except for 88442)		1,00		1,00		1,00		1,00		1,00		1,00		0,00				0,00		
j.	Services incidental to energy distribution		887		0,00		0,00		1,00		1,00		0,04		0,04		0,00				0,00		
k.	Placement and supply services of personnel		872		0,04		0,04		0,11		0,11		0,44		0,37		0,00				0,00		
l.	Investigation and security		873		0,07		0,07		0,07		0,07		0,19		0,19		0,00				0,00		
m.	Related scientific and technical consulting services		8675		0,33		0,33		1,00		1,00		0,96		0,96		1,00		0,81		0,93		0,44
n.	Maintenance and repair of equipment (not including maritime vessels, aircraft or other transport equipment)		633+ 8861-8866		1,00		1,00		1,00		1,00		1,00		1,00		1,00		0,00		1,00		0,56
o.	Building-cleaning services		874		0,07		0,07		1,00		1,00		1,00		1,00		1,00		0,78		0,00		
p.	Photographic services		875		0,81		0,81		1,00		1,00		1,00		1,00		1,00		0,93		0,00		
q.	Packaging services		876		1,00		1,00		1,00		1,00		1,00		1,00		0,00				0,00		
r.	Printing, publishing		88442		1,00		1,00		1,00		1,00		1,00		0,89		1,00		0,96		0,00		
s.	Convention services		87909		1,00		1,00		1,00		1,00		1,00		1,00		1,00		0,96		0,00		
t.	Other		8790																				
2.	COMMUNICATION SERVICES				**0,75**		**1,00**		**0,75**		**1,00**		**0,75**		**1,00**		**0,00**				**0,00**		
A.	Postal services		7511		1,00		1,00		1,00		1,00		1,00		1,00		0,00				0,00		
B.	Courier services		7512		1,00		1,00		1,00		1,00		1,00		1,00		0,00				0,00		
C.	Telecommunication services				1,00		1,00		1,00		1,00		1,00		1,00		0,00				0,00		
D.	Audiovisual services				0,00				0,00				0,00				0,00				0,00		
3.	CONSTRUCTION AND RELATED ENGINEERING SERVICES				**1,00**		**1,00**		**1,00**		**1,00**		**1,00**		**0,96**		**1,00**		**0,93**		**0,00**		
4.	DISTRIBUTION SERVICES				**0,00**		**0,00**		**0,00**		**0,00**		**0,94**		**0,88**		**0,25**		**0,96**		**0,00**		
A.	Commission agents' services		621		0,00		0,00		0,00		0,00		1,00		1,00		0,00				0,00		
B.	Wholesale trade services		622		0,00		0,00		0,00		0,00		0,93		0,93		0,00				0,00		
C.	Retailing services		631+632 6111+6113+		0,00		0,00		0,00		0,00		0,85		0,59		1,00		0,96		0,00		
D.	Franchising		8929		0,00		0,00		0,00		0,00		1,00		1,00		0,00				0,00		
E.	Other																						
5.	EDUCATIONAL SERVICES				**0,56**		**0,56**		**0,61**		**0,61**		**0,55**		**0,01**		**0,60**		**0,86**		**0,00**		
A.	Primary education services		921		0,67		0,67		0,78		0,78		0,67		0,00		1,00		0,89		0,00		
B.	Secondary education services		922		0,67		0,67		0,78		0,78		0,67		0,00		1,00		0,85		0,00		
C.	Higher education services		923		0,59		0,59		0,67		0,67		0,67		0,00		1,00		0,85		0,00		
D.	Adult education		924		0,78		0,78		0,78		0,78		0,67		0,00		0,00				0,00		
E.	Other education services		929		0,07		0,07		0,07		0,07		0,07		0,07		0,00				0,00		
6.	ENVIRONMENTAL SERVICES				**0,00**		**0,00**		**1,00**		**1,00**		**1,00**		**1,00**		**0,00**				**1,00**		**0,52**
7.	FINANCIAL SERVICES				**0,02**		**0,02**		**0,50**		**0,50**		**0,98**		**0,57**		**1,00**		**0,81**		**0,00**		
A.	All insurance and insurance-related services		812		0,04		0,04		0,07		0,07		1,00		0,63		1,00		0,81		0,00		
B.	Banking and other financial services (excl. insurance)				0,00		0,00		0,93		0,93		0,96		0,52		1,00		0,81		0,00		

8.	HEALTH RELATED AND SOCIAL SERVICES				**0,04**		**0,06**		**0,65**		**0,98**		**0,32**		**0,48**		**0,67**		**0,89**		**0,00**		
	(other than those listed under 1.A.h-j.)																					
A.	Hospital services		9311		0,04		0,04		1,00		1,00		0,48		0,48		1,00		0,89		0,00		
B.	Other Human Health Services		9319 (other than 93191)		0,00				0,00				0,00				0,00				0,00		
C.	Social Services		933		0,07		0,07		0,96		0,96		0,48		0,48		1,00		0,89		0,00		
D.	Other																						
9.	TOURISM AND TRAVEL RELATED SERVICES				**0,56**		**0,56**		**1,00**		**1,00**		**0,99**		**0,95**		**1,00**		**0,83**		**0,59**		**0,28**
A.	Hotels and restaurants (incl. catering)		641-643		0,11		0,11		1,00		1,00		1,00		0,93		1,00		0,96		0,00		
B.	Travel agencies and tour operators services		7471		0,93		0,93		1,00		1,00		0,96		0,93		1,00		0,96		0,96		0,52
C.	Tourist guides services		7472		0,63		0,63		1,00		1,00		1,00		1,00		1,00		0,56		0,81		0,04
D.	Other																						
10.	RECREATIONAL, CULTURAL AND SPORTING SERVICES				**0,44**		**0,44**		**0,58**		**0,58**		**0,56**		**0,54**		**0,25**		**0,96**		**0,24**		**0,00**
	(other than audiovisual services)																						
A.	Entertainment services (incl. theatre, live bands and circus services)		9619		0,07		0,07		0,56		0,56		0,59		0,59		1,00		0,96		0,96		0,00
B.	News agency services		962		1,00		1,00		1,00		1,00		1,00		0,96		0,00				0,00		
C.	Libraries, archives, museums and other cultural services		963		0,04		0,04		0,07		0,07		0,07		0,00		0,00				0,00		
D.	Sporting and other recreational services		964		0,63		0,63		0,70		0,70		0,59		0,59		0,00				0,00		
E.	Other																						
11.	TRANSPORT SERVICES				**0,34**		**0,40**		**0,71**		**0,79**		**0,50**		**0,62**		**0,35**		**0,64**		**0,10**		**0,53**
A.	Maritime Transport Services				**0,66**		**0,45**		**1,00**		**0,79**		**0,20**		**0,20**		**1,00**		**0,62**		**0,20**		**0,52**
a.	Passenger transportation		7211		1,00		0,37		1,00		0,37		0,04		0,04		1,00		0,93		0,00		
b.	Freight transportation		7212		1,00		0,37		1,00		0,37		0,04		0,04		1,00		0,93				
c.	Rental of vessels with crew		7213		0,00		0,00		1,00		1,00		0,04		0,04		1,00		0,89		0,00		
d.	Maintenance and repair of vessels		8868		0,26		0,26		1,00		1,00		1,00		1,00		1,00		0,96		1,00		0,52
e.	Pushing and towing services		7214		0,70		0,70		1,00		1,00		0,04		0,04		1,00		0,00		0,00		
f.	Supporting services for maritime transport		745		1,00		1,00		1,00		1,00		0,04		0,04		1,00		0,00		0,00		
B.	Internal Waterways Transport				**0,43**		**0,41**		**0,69**		**0,67**		**0,20**		**0,20**		**0,33**		**0,00**		**0,00**		
a.	Passenger transportation		7221		0,56		0,52		0,56		0,52		0,04		0,04		0,00				0,00		
b.	Freight transportation		7222		0,56		0,52		0,56		0,52		0,04		0,04		0,00				0,00		
c.	Rental of vessels with crew		7223		0,44		0,44		1,00		1,00		0,04		0,04		0,00				0,00		
d.	Maintenance and repair of vessels		8868		0,00		0,00		1,00		1,00		1,00		1,00		0,00				0,00		
e.	Pushing and towing services		7224		0,00		0,00		0,00		0,00		0,04		0,04		1,00		0,00		0,00		
f.	Supporting services for internal waterway transport		745		1,00		1,00		1,00		1,00		0,04		0,04		1,00		0,00		0,00		
C.	Air Transport Services				**0,24**		**0,60**		**0,40**		**1,00**		**0,39**		**0,98**		**0,00**				**0,20**		**0,56**
a.	Passenger transportation		731		0,00				0,00				0,00				0,00				0,00		
b.	Freight transportation		732		0,00				0,00				0,00				0,00				0,00		
c.	Rental of aircraft with crew		734		1,00		1,00		1,00		1,00		0,96		0,96		0,00				0,00		
d.	Maintenance and repair of aircraft		8868		0,19		0,19		1,00		1,00		1,00		1,00		0,00				1,00		0,56
e.	Supporting services for air transport		746		0,00				0,00				0,00				0,00				0,00		
D.	Space Transport		733		**0,00**				**0,00**				**0,00**				**0,00**				**0,00**		
E.	Rail Transport Services				**0,21**		**0,21**		**0,80**		**0,80**		**0,96**		**0,94**		**0,20**		**0,96**		**0,20**		**0,56**
a.	Passenger transportation		7111		0,00		0,00		1,00		1,00		0,96		0,96		0,00				0,00		
b.	Freight transportation		7112		0,00		0,00		1,00		1,00		0,96		0,96		0,00				0,00		
c.	Pushing and towing services		7113		0,00		0,00		0,00		0,00		0,96		0,93		0,00				0,00		
d.	Maintenance and repair of rail transport equipment		8868		0,07		0,07		1,00		1,00		0,96		0,93		1,00		0,96		1,00		0,56
e.	Supporting services for rail transport services		743		1,00		1,00		1,00		1,00		0,96		0,93		0,00				0,00		
F.	Road Transport Services				**0,50**		**0,50**		**1,00**		**1,00**		**0,78**		**0,68**		**0,80**		**0,66**		**0,20**		**0,48**
a.	Passenger transportation		7121+7122		0,00		0,00		1,00		1,00		0,00		0,00		1,00		0,85		0,00		

b.	Freight transportation		7123		0,00		0,00		1,00		1,00		0,96		0,74		1,00		0,89		0,00		
c.	Rental of commercial vehicles with operator		7124		0,48		0,48		1,00		1,00		0,96		0,85		1,00		0,89		0,00		
d.	Maintenance and repair of road transport equipment		6112+8867		1,00		1,00		1,00		1,00		1,00		0,96		1,00		0,00		1,00		0,48
e.	Supporting services for road transport services		744		1,00		1,00		1,00		1,00		0,96		0,85		0,00				0,00		
G.	Pipeline Transport				**0,00**		**0,00**		**0,07**		**0,07**		**0,54**		**0,52**		**0,50**		**0,96**		**0,00**		
a.	Transportation of fuels		7131		0,00		0,00		0,07		0,07		0,07		0,07		0,00				0,00		
b.	Transportation of other goods		7139		0,00		0,00		0,07		0,07		1,00		0,96		1,00		0,96		0,00		
H.	Services auxiliary to all modes of transport				**0,65**		**0,65**		**1,00**		**1,00**		**0,96**		**0,85**		**0,00**				**0,00**		
a.	Cargo-handling services		741		0,07		0,07		1,00		1,00		0,96		0,85		0,00				0,00		
b.	Storage and warehouse services		742		0,89		0,89		1,00		1,00		0,96		0,85		0,00				0,00		
c.	Freight transport agency services		748		1,00		1,00		1,00		1,00		0,96		0,85		0,00				0,00		
d.	Other		749																				

EU-Central America EIA																			
NAME OF AGREEMENT	**Association Agreement**																		
PARTIES	Central America, on the on hand, and the European Union and its Member States, on the other																		
Type	Bilateral	Regional		Number of EU Member State parti	27														
		x																	
Development level of the non-EU party	Developed	Developing																	
		x																	
	Signature	In Force	Notification																
STATUS OF THE AGREEMENT	29-Jun-12	Provisional	26-Feb-13	Provisional application since Aug-Dec-13 depending on the partner															
ELEMENTS RELATED TO NON-DISCRIMINATION				Yes	No	Explanation													
MFN					x	A MFN clause only in relation to intellectual property													
Standstill (prohibition of new or more discriminatory measures)					x														
WIDER PROCESS OF ECONOMIC INTEGRATION				Yes	No	Explanation													
Progressive liberalization					x														
Art. XXIV GATT agreement				x															
Art. V bis GATS agreement					x														
Mode 3 relating also to goods				x		Certain non-service sectors covered under Mode 3 (Establishment)													
Harmonization					x														
Mutual recognition				x		Services: non-binding, encourages relevant professional bodies to develop recommendations													
Domestic regulation discipline(s)					x	Financial services (Art.196), certain procedures Art.179 & regulatory authorities (Art.184, 186)													
Regulatory cooperation					x														
Transparency				x															
Intellectual property				x															
Public procurement				x															
Competition policy				x															
Investment protection					x														
Labour mobility (labour market access)					x														
Labour protection				x		Commitment to basic ILO treaties; upholding levels of protection in domestic legislation (Art.291)													
Consumer protection					x														
Environment				x		Reaffirming commitment to multilateral environmental agreements; upholding levels of protection													
Cultural cooperation				x															
Sustainable development				x		Specifically in Art. 284													
OTHER ELEMENTS **(related to services only)**				Yes	No	Explanation													
Time frame for implementation					x	No phase-out periods on the EU side in services													
Ratchet clause (autonomous liberalization included)					x														
Safeguards					x														
Subsidies					x	Only the possibility to exchange information upon request (Art. 344)													
Exceptions						GATS Art:		XII	XVI	XIVbis									
								x	x										
Compatibility clause (relationship to Art. V GATS)				x															
Categories of Mode 4 covered				Yes	No														
	Key personnel			x		Incl. business visitors responsible for setting up an establishment and intra-corporate transferees														
	Graduate trainees			x															
	Business service sellers			x		No sector specific commit's, Art.175: entry/stay for a period up to 90 days in any 12-month period														
	Contractual service suppliers				x	Both parties reaffirm obligations resulting from their GATS commitments.														
	Independent professionals				x	The same as for contractual service suppliers														
	Short term visitors for business purposes				x														

SECTORS		CPC	MODE 1		MODE 2		MODE 3		MODE 4	
			SC	NT	SC	NT	SC	NT	SC	NT
	AVERAGE FOR MODE		**0,41**	**0,44**	**0,77**	**0,83**	**0,77**	**0,67**	**0,51**	**0,84**
1.	BUSINESS SERVICES		**0,72**	**0,71**	**0,98**	**0,97**	**0,95**	**0,89**	**0,44**	**0,54**
A.	Professional Services		**0,51**	**0,44**	**1,00**	**0,94**	**0,97**	**0,85**	**1,00**	**0,67**
a.	Legal Services	861	1,00	0,44	1,00	0,44	1,00	0,81	1,00	0,37
b.	Accounting, auditing and bookeeping services	862	0,33	0,22	1,00	1,00	1,00	0,74	1,00	0,78
c.	Taxation Services	863	0,85	0,78	1,00	1,00	1,00	0,93	1,00	0,85
d.	Architectural services	8671	0,56	0,56	1,00	1,00	1,00	0,93	1,00	0,81
e.	Engineering services	8672	0,70	0,70	1,00	1,00	1,00	0,96	1,00	0,81
f.	Integrated engineering services	8673	0,70	0,70	1,00	1,00	1,00	0,96	1,00	0,81
g.	Urban planning and landscape architectural services	8674	0,56	0,56	1,00	1,00	1,00	0,93	1,00	0,81
h.	Medical and dental services	9312	0,22	0,22	1,00	1,00	0,89	0,70	1,00	0,41
i.	Veterinary services	932	0,15	0,15	1,00	1,00	0,96	0,85	1,00	0,52
j.	Services provided by midwives, nurses, physiotherapists and para-medical personnel	93191	0,04	0,04	1,00	1,00	0,81	0,70	1,00	0,48
k.	Other									
B.	Computer and Related Services		**1,00**	**1,00**	**1,00**	**1,00**	**1,00**	**1,00**	**0,00**	
C.	Research and Development Services		**1,00**	**1,00**	**1,00**	**1,00**	**1,00**	**1,00**	**0,00**	
D.	Real Estate Services		**0,52**	**0,52**	**1,00**	**1,00**	**1,00**	**1,00**	**1,00**	**0,72**
a.	Involving own or leased property	821	0,52	0,52	1,00	1,00	1,00	1,00	1,00	0,74
b.	On a fee or contract basis	822	0,52	0,52	1,00	1,00	1,00	1,00	1,00	0,70

E.	Rental/Leasing Services without Operators				**0,59**		**0,59**		**1,00**		**1,00**		**0,83**		**0,62**		**0,20**		**0,00**
a.	Relating to ships		83103		0,78		0,78		1,00		1,00		1,00		0,93		0,00		
b.	Relating to aircraft		83104		0,67		0,67		1,00		1,00		1,00		0,00		0,00		
c.	Relating to other transport equipment		83101+ 83102+		0,70		0,70		1,00		1,00		1,00		1,00		0,00		
d.	Relating to other machinery and equipment		83106- 83109		0,70		0,70		1,00		1,00		1,00		1,00		0,00		
e.	Other		832		0,07		0,07		1,00		1,00		0,15		0,15		1,00		0,00
F.	Other Business Services				**0,72**		**0,72**		**0,89**		**0,89**		**0,88**		**0,87**		**0,42**		**0,79**
a.	Advertising services		871		1,00		1,00		1,00		1,00		1,00		1,00		0,00		
b.	Market research and public opinion polling services		864		1,00		1,00		1,00		1,00		1,00		1,00		0,00		
c.	Management consulting service		865		1,00		1,00		1,00		1,00		1,00		1,00		0,00		
d.	Services related to man. consulting		866		0,96		0,96		0,96		0,96		0,96		0,96		0,00		
e.	Technical testing and analysis serv.		8676		0,67		0,67		0,70		0,70		1,00		1,00		1,00		0,93
f.	Services incidental to agriculture, hunting and forestry		881		0,81		0,81		1,00		1,00		1,00		1,00		0,00		
g.	Services incidental to fishing		882		0,85		0,85		1,00		1,00		1,00		1,00		0,00		
h.	Services incidental to mining		883+5115		1,00		1,00		1,00		1,00		1,00		1,00		1,00		0,96
i.	Services incidental to manufacturing		884+885 (except for 88442)		1,00		1,00		1,00		1,00		1,00		1,00		0,00		
j.	Services incidental to energy distribution		887		0,00		0,00		1,00		1,00		0,07		0,07		0,00		
k.	Placement and supply services of personnel		872		0,04		0,04		0,11		0,11		0,41		0,37		0,00		
l.	Investigation and security		873		0,07		0,07		0,07		0,07		0,19		0,19		0,00		
m.	Related scientific and technical consulting services		8675		0,33		0,33		1,00		1,00		1,00		0,96		1,00		0,81
n.	Maintenance and repair of equipment (not including maritime vessels, aircraft or other transport equipment)		633+ 8861-8866		1,00		1,00		1,00		1,00		1,00		1,00		1,00		0,00
o.	Building-cleaning services		874		0,07		0,07		1,00		1,00		1,00		1,00		1,00		0,78
p.	Photographic services		875		0,81		0,81		1,00		1,00		1,00		1,00		1,00		0,93
q.	Packaging services		876		1,00		1,00		1,00		1,00		1,00		1,00		0,00		
r.	Printing, publishing		88442		1,00		1,00		1,00		1,00		1,00		0,89		1,00		0,96
s.	Convention services		87909		1,00		1,00		1,00		1,00		1,00		1,00		1,00		0,96
t.	Other		8790																
2.	COMMUNICATION SERVICES				**0,75**		**1,00**		**0,75**		**1,00**		**0,75**		**1,00**		**0,00**		
A.	Postal services		7511		1,00		1,00		1,00		1,00		1,00		1,00		0,00		
B.	Courier services		7512		1,00		1,00		1,00		1,00		1,00		1,00		0,00		
C.	Telecommunication services				1,00		1,00		1,00		1,00		1,00		1,00		0,00		
D.	Audiovisual services				0,00				0,00				0,00				0,00		
3.	CONSTRUCTION AND RELATED ENGINEERING SERVICE				**1,00**		**1,00**		**1,00**		**1,00**		**1,00**		**1,00**		**1,00**		**0,96**
4.	DISTRIBUTION SERVICES				**0,17**		**0,17**		**0,75**		**0,75**		**0,92**		**0,86**		**0,25**		**0,96**
A.	Commission agents' services		621		0,00		0,00		0,00		0,00		0,93		0,93		0,00		
B.	Wholesale trade services		622		0,22		0,22		1,00		1,00		0,89		0,89		0,00		
C.	Retailing services		631+632 6111+6113		0,22		0,22		1,00		1,00		0,85		0,63		1,00		0,96
D.	Franchising		8929		0,22		0,22		1,00		1,00		1,00		1,00		0,00		
E.	Other																		
5.	EDUCATIONAL SERVICES				**0,56**		**0,56**		**0,61**		**0,61**		**0,46**		**0,33**		**0,60**		**0,85**
A.	Primary education services		921		0,67		0,67		0,78		0,78		0,56		0,41		1,00		0,89
B.	Secondary education services		922		0,67		0,67		0,78		0,78		0,56		0,41		1,00		0,85
C.	Higher education services		923		0,59		0,59		0,67		0,67		0,56		0,41		1,00		0,81
D.	Adult education		924		0,78		0,78		0,78		0,78		0,56		0,41		0,00		
E.	Other education services		929		0,07		0,07		0,07		0,07		0,07		0,00		0,00		
6.	ENVIRONMENTAL SERVICES				**0,00**		**0,00**		**1,00**		**1,00**		**1,00**		**1,00**		**0,00**		

7.	FINANCIAL SERVICES				**0,00**		**0,00**		**0,54**		**0,54**		**0,98**		**0,28**		**1,00**		**0,81**
A.	All insurance and insurance-related services		812		0,00		0,00		0,11		0,11		1,00		0,56		1,00		0,81
B.	Banking and other financial services (excl. insurance)				0,00		0,00		0,96		0,96		0,96		0,00		1,00		0,81
8.	HEALTH RELATED AND SOCIAL SERVICES				**0,04**		**0,06**		**0,65**		**0,98**		**0,32**		**0,00**		**0,67**		**0,89**
	(other than those listed under 1.A.h-j.)																		
A.	Hospital services		9311		0,04		0,04		1,00		1,00		0,48		0,00		1,00		0,89
B.	Other Human Health Services		9319 (other than 93191)		0,00				0,00				0,00				0,00		
C.	Social Services		933		0,07		0,07		0,96		0,96		0,48		0,00		1,00		0,89
D.	Other																		
9.	TOURISM AND TRAVEL RELATED SERVICES				**0,56**		**0,56**		**1,00**		**1,00**		**0,99**		**0,95**		**1,00**		**0,83**
A.	Hotels and restaurants (incl. catering)		641-643		0,11		0,11		1,00		1,00		1,00		0,93		1,00		0,96
B.	Travel agencies and tour operators services		7471		0,93		0,93		1,00		1,00		0,96		0,93		1,00		0,96
C.	Tourist guides services		7472		0,63		0,63		1,00		1,00		1,00		1,00		1,00		0,56
D.	Other																		
10.	RECREATIONAL, CULTURAL AND SPORTING SERVICES				**0,44**		**0,44**		**0,59**		**0,59**		**0,55**		**0,55**		**0,25**		**0,96**
	(other than audiovisual services)																		
A.	Entertainment services (incl. theatre, live bands and circus services)		9619		0,07		0,07		0,59		0,59		0,59		0,59		1,00		0,96
B.	News agency services		962		1,00		1,00		1,00		1,00		0,96		0,96		0,00		
C.	Libraries, archives, museums and other cultural services		963		0,04		0,04		0,07		0,07		0,07		0,07		0,00		
D.	Sporting and other recreational services		964		0,63		0,63		0,70		0,70		0,59		0,59		0,00		
E.	Other																		
11.	TRANSPORT SERVICES				**0,28**		**0,38**		**0,57**		**0,74**		**0,54**		**0,56**		**0,42**		**0,80**
A.	Maritime Transport Services				**0,41**		**0,41**		**0,79**		**0,79**		**0,34**		**0,34**		**1,00**		**0,30**
a.	Passenger transportation		7211		0,37		0,37		0,37		0,37		0,00		0,00		1,00		0,00
b.	Freight transportation		7212		0,37		0,37		0,37		0,37		0,00		0,00		1,00		0,00
c.	Rental of vessels with crew		7213		0,48		0,48		1,00		1,00		0,96		0,96		1,00		0,85
d.	Maintenance and repair of vessels		8868		0,00		0,00		1,00		1,00		1,00		1,00		1,00		0,96
e.	Pushing and towing services		7214		0,26		0,26		1,00		1,00		0,04		0,04		1,00		0,00
f.	Supporting services for maritime transport		745		1,00		1,00		1,00		1,00		0,04		0,04		1,00		0,00
B.	Internal Waterways Transport				**0,58**		**0,58**		**0,67**		**0,67**		**0,34**		**0,34**		**0,50**		**0,96**
a.	Passenger transportation		7221		0,52		0,52		0,52		0,52		0,04		0,04		0,00		
b.	Freight transportation		7222		0,52		0,52		0,52		0,52		0,04		0,04		0,00		
c.	Rental of vessels with crew		7223		0,44		0,44		1,00		1,00		0,89		0,89		0,00		
d.	Maintenance and repair of vessels		8868		1,00		1,00		1,00		1,00		1,00		1,00		1,00		0,96
e.	Pushing and towing services		7224		0,00		0,00		0,00		0,00		0,04		0,04		1,00		0,00
f.	Supporting services for internal waterway transport		745		1,00		1,00		1,00		1,00		0,04		0,04		1,00		0,00
C.	Air Transport Services				**0,20**		**0,56**		**0,40**		**1,00**		**0,40**		**0,50**		**0,00**		
a.	Passenger transportation		731		0,00				0,00				0,00				0,00		
b.	Freight transportation		732		0,00				0,00				0,00				0,00		
c.	Rental of aircraft with crew		734		1,00		1,00		1,00		1,00		1,00		0,00		0,00		
d.	Maintenance and repair of aircraft		8868		0,19		0,12		1,00		1,00		1,00		1,00		0,00		
e.	Supporting services for air transport		746		0,00				0,00				0,00				0,00		
D.	Space Transport		733		**0,00**				**0,00**				**0,00**				**0,00**		

E.	Rail Transport Services				**0,21**		**0,21**		**1,00**		**1,00**		**0,95**		**0,95**		**0,20**		**0,96**
a.	Passenger transportation		7111		0,00		0,00		1,00		1,00		0,96		0,96		0,00		
b.	Freight transportation		7112		0,00		0,00		1,00		1,00		0,96		0,96		0,00		
c.	Pushing and towing services		7113		0,00		0,00		1,00		1,00		0,96		0,96		0,00		
d.	Maintenance and repair of rail transport equipment		8868		0,07		0,07		1,00		1,00		0,93		0,93		1,00		0,96
e.	Supporting services for rail transport services		743		1,00		1,00		1,00		1,00		0,93		0,93		0,00		
F.	Road Transport Services				**0,50**		**0,50**		**1,00**		**1,00**		**0,78**		**0,69**		**0,80**		**0,66**
a.	Passenger transportation		7121+7122		0,00		0,00		1,00		1,00		0,00		0,00		1,00		0,85
b.	Freight transportation		7123		0,00		0,00		1,00		1,00		0,96		0,67		1,00		0,89
c.	Rental of commercial vehicles with operator		7124		0,48		0,48		1,00		1,00		0,96		0,89		1,00		0,89
d.	Maintenance and repair of road transport equipment		6112+8867		1,00		1,00		1,00		1,00		1,00		0,96		1,00		0,00
e.	Supporting services for road transport services		744		1,00		1,00		1,00		1,00		0,96		0,93		0,00		
G.	Pipeline Transport				**0,00**		**0,00**		**0,07**		**0,07**		**0,54**		**0,52**		**0,50**		**0,96**
a.	Transportation of fuels		7131		0,00		0,00		0,07		0,07		0,07		0,07		0,00		
b.	Transportation of other goods		7139		0,00		0,00		0,07		0,07		1,00		0,96		1,00		0,96
H.	Services auxiliary to all modes of transport				**0,37**		**0,37**		**0,67**		**0,67**		**0,95**		**0,59**		**0,33**		**0,96**
a.	Cargo-handling services		741		0,00		0,00		0,00		0,00		0,96		0,00		0,00		
b.	Storage and warehouse services		742		0,11		0,11		1,00		1,00		0,96		0,89		1,00		0,96
c.	Freight transport agency services		748		1,00		1,00		1,00		1,00		0,93		0,89		0,00		
d.	Other		749																

ANALYSIS OF THE EU-GEORGIA EIA																								
NAME OF AGREEMENT		**Association Agreement**																						
PARTIES		The European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part																						
Type		Bilateral	Regional		Number of EU Member State par		28																	
		x																						
Development level of the non-EU par		Developed	Developing																					
			x																					
		Signature	In Force	Notification																				
STATUS OF THE AGREEMENT		27-Jun-14	01-Jul-16	02-Jul-14																				
ELEMENTS RELATED TO NON-DISCRIMINATION					Yes	No	Explanation																	
MFN						x	MFN limited to establishment (Art. 79(1) and 79(2), subject to reservations in Annex XIV-A and XIV-E)																	
Standstill (prohibition of new or more discriminatory measures)						x	Limited to establishment (Art. 79(3))																	
WIDER PROCESS OF ECONOMIC INTEGRATION					Yes	No	Explanation																	
Progressive liberalization					x		Establishment (Art. 80) and Cross-border supply of services (Art. 87)																	
Art. XXIV GATT agreement					x																			
Art. V bis GATS agreement						x																		
Mode 3 relating also to goods					x																			
Harmonization					x		Georgia under obligation to approximate a significant part of its trade-relevant legislation with the EU's																		
Mutual recognition						x	Services: non-binding, encourages relevant professional bodies to develop recommendations																	
Domestic regulation discipline(s)					x		Articles 93-95 set out disciplines on domestic regulation as affecting trade in services																	
Regulatory cooperation					x																			
Transparency					x		Generally and also more specifically in the field of services																	
Intellectual property					x																			
Public procurement					x		Gradual approximation of the public procurement legislation of Georgia with the EU's *acquis*																	
Competition policy					x																			
Investment protection						x																		
Labour mobility (labour market access)						x																		
Labour protection					x		Commitment to basic ILO conventions, upholding their level of protection																	
Consumer protection					x		Georgia undertakes to approximate its consumer protection laws to the EU legislation																	
Environment					x		Cooperation on trade-related environmental issues & commitment to implement existing multilateral agreements																	
Cultural cooperation					x																			
Sustainable development					x		Reaffirming commitment to sustainable development																	
OTHER ELEMENTS **(related to services only)**					Yes	No	Explanation																	
Time frame for implementation					x		Full implementation to be attained through gradual legislative approximation with EU laws																	
Ratchet clause (autonomous liberalization included)						x																		
Safeguards						x																		
Subsidies					x		A transparency and information obligation under Art. 206																	
Exceptions					x		GATS Art:		XII	XVI	XIVbis													
									x	x	x													
Compatibility clause (relationship to Art. V GATS)						x																		
Categories of Mode 4 covered					Yes	No																		
Cat. 1	Key personnel				x		Includes business visitors for establishment purposes and intra-corporate transferees																	
Cat. 1	Graduate trainees				x																			
Cat. 1	Business sellers				x		Scheduled with key personnel&graduate trainees. Art. 90: incl. sellers of services & goods (UK: only service sellers)																	
Cat. 2	Contractual service suppliers				x																			
Cat. 2	Independent professionals				x																			
	Short term visitors for business purposes					x																		
SECTORS			CPC		MODE 1				MODE 2				MODE 3				MODE 4 Cat. 1				Mode 4 Cat. 2			
					SC		NT		SC		NT		SC		NT		SC		NT		SC		NT	
	AVERAGE FOR MODE				**0,44**		**0,46**		**0,77**		**0,83**		**0,93**		**0,74**		**0,50**		**0,84**		**0,19**		**0,40**	
1.	BUSINESS SERVICES				**0,73**		**0,72**		**0,95**		**0,94**		**1,00**		**0,90**		**0,44**		**0,57**		**0,46**		**0,49**	
A.	Professional Services				**0,54**		**0,45**		**1,00**		**0,95**		**1,00**		**0,79**		**0,99**		**0,66**		**0,59**		**0,43**	
a.	Legal Services		861		0,96		0,50		1,00		0,54		1,00		0,00		1,00		0,39		1,00		0,39	
b.	Accounting, auditing and bookeeping services		862		0,36		0,25		1,00		1,00		1,00		0,68		1,00		0,71		0,00			
c.	Taxation Services		863		0,86		0,79		1,00		1,00		1,00		1,00		1,00		0,86		0,93		0,46	
d.	Architectural services		8671		0,68		0,54		1,00		1,00		1,00		0,89		1,00		0,79		1,00		0,43	
e.	Engineering services		8672		0,75		0,71		1,00		1,00		1,00		0,93		1,00		0,75		1,00		0,43	
f.	Integrated engineering services		8673		0,75		0,71		1,00		1,00		1,00		0,93		1,00		0,75		1,00		0,43	
g.	Urban planning and landscape architectural services		8674		0,61		0,54		1,00		1,00		1,00		0,89		1,00		0,79		1,00		0,43	
h.	Medical and dental services		9312		0,21		0,21		1,00		1,00		1,00		0,86		1,00		0,46		0,00			
i.	Veterinary services		932		0,21		0,21		1,00		1,00		1,00		0,82		1,00		0,64		0,00			
j.	Services provided by midwives, nurses, physiotherapists and para-medical personnel		93191		0,04		0,04		1,00		1,00		1,00		0,93		0,93		0,43		0,00			
k.	Other																							
B.	Computer and Related Services				**1,00**		**1,00**		**1,00**		**1,00**		**1,00**		**1,00**		**0,00**				**0,96**		**1,00**	
C.	Research and Development Services				**1,00**		**1,00**		**1,00**		**1,00**		**1,00**		**1,00**		**0,00**				**0,93**		**0,00**	
D.	Real Estate Services				**0,52**		**0,52**		**1,00**		**1,00**		**1,00**		**1,00**		**1,00**		**0,73**		**0,00**			
a.	Involving own or leased property		821		0,50		0,50		1,00		1,00		1,00		1,00		1,00		0,75		0,00			
b.	On a fee or contract basis		822		0,54		0,54		1,00		1,00		1,00		1,00		1,00		0,71		0,00			

E.	Rental/Leasing Services without Operators				**0,61**		**0,61**		**0,77**		**0,77**		**1,00**		**0,79**		**0,20**		**0,00**		**0,00**		
a.	Relating to ships		83103		0,79		0,79		1,00		1,00		1,00		0,93		0,00				0,00		
b.	Relating to aircraft		83104		0,68		0,68		0,71		0,71		1,00		0,00		0,00				0,00		
c.	Relating to other transport equipment		83101+ 83102+		0,71		0,71		1,00		1,00		1,00		1,00		0,00				0,00		
d.	Relating to other machinery and equipment		83106- 83109		0,71		0,71		1,00		1,00		1,00		1,00		0,00				0,00		
e.	Other		832		0,14		0,14		0,14		0,14		1,00		1,00		1,00		0,00		0,00		
F.	Other Business Services				**0,72**		**0,72**		**0,91**		**0,91**		**1,00**		**0,83**		**0,47**		**0,88**		**0,31**		**0,52**
a.	Advertising services		871		1,00		1,00		1,00		1,00		1,00		1,00		0,00				1,00		0,57
b.	Market research and public opinion polling services		864		1,00		1,00		1,00		1,00		1,00		1,00		0,00				0,00		
c.	Management consulting service		865		1,00		1,00		1,00		1,00		1,00		1,00		0,00				1,00		0,50
d.	Services related to man. consulting		866		0,96		0,96		0,96		0,96		1,00		1,00		0,00				0,96		0,50
e.	Technical testing and analysis services		8676		0,68		0,68		0,75		0,75		1,00		0,96		1,00		0,93		1,00		0,54
f.	Services incidental to agriculture, hunting and forestry		881		0,82		0,82		1,00		1,00		1,00		1,00		1,00		0,96		0,00		
g.	Services incidental to fishing		882		0,86		0,86		1,00		1,00		1,00		1,00		0,00				0,00		
h.	Services incidental to mining		883+5115		1,00		1,00		1,00		1,00		1,00		1,00		1,00		0,96		0,00		
i.	Services incidental to manufacturing		884+885 (except		1,00		1,00		1,00		1,00		1,00		1,00		0,00				0,00		
j.	Services incidental to energy distribution		887		0,00		0,00		1,00		1,00		1,00		0,04		0,00				0,00		
k.	Placement and supply services of personnel		872		0,04		0,04		0,50		0,50		1,00		0,07		0,00				0,00		
l.	Investigation and security		873		0,07		0,07		0,07		0,07		1,00		0,07		0,00				0,00		
m.	Related scientific and technical consulting services		8675		0,36		0,32		1,00		1,00		1,00		0,96		1,00		0,79		0,89		0,46
n.	Maintenance and repair of equipment (not including maritime vessels, aircraft or other transport equipment)		633+ 8861- 8866		1,00		1,00		1,00		1,00		1,00		0,96		1,00		0,82		1,00		0,57
o.	Building-cleaning services		874		0,07		0,07		1,00		1,00		1,00		1,00		1,00		0,75		0,00		
p.	Photographic services		875		0,79		0,79		1,00		1,00		1,00		0,93		1,00		0,86		0,00		
q.	Packaging services		876		1,00		1,00		1,00		1,00		1,00		1,00		0,00				0,00		
r.	Printing, publishing		88442		1,00		1,00		1,00		1,00		1,00		0,86		1,00		0,89		0,00		
s.	Convention services		87909		1,00		1,00		1,00		1,00		1,00		1,00		1,00		0,96		0,00		
t.	Other		8790																				
2.	COMMUNICATION SERVICES				**0,75**		**1,00**		**0,75**		**1,00**		**0,75**		**1,00**		**0,00**				**0,00**		
A.	Postal services		7511		1,00		1,00		1,00		1,00		1,00		1,00		0,00				0,00		
B.	Courier services		7512		1,00		1,00		1,00		1,00		1,00		1,00		0,00				0,00		
C.	Telecommunication services				1,00		1,00		1,00		1,00		1,00		1,00		0,00				0,00		
D.	Audiovisual services				0,00				0,00				0,00				0,00				0,00		
3.	CONSTRUCTION AND RELATED ENGINEERING SERVICE				**1,00**		**1,00**		**1,00**		**1,00**		**1,00**		**1,00**		**1,00**		**0,96**		**0,00**		
4.	DISTRIBUTION SERVICES				**0,36**		**0,36**		**0,75**		**0,75**		**1,00**		**0,79**		**0,25**		**0,96**		**0,00**		
A.	Commission agents' services		621		0,11		0,11		0,11		0,11						0,00				0,00		
B.	Wholesale trade services		622		0,61		0,61		0,89		0,89						0,00				0,00		
C.	Retailing services		631+632 6111+611		0,36		0,36		1,00		1,00						1,00		0,96		0,00		
D.	Franchising		8929		0,36		0,36		1,00		1,00						0,00				0,00		
E.	Other																						
5.	EDUCATIONAL SERVICES				**0,60**		**0,56**		**0,62**		**0,62**		**1,00**		**0,72**		**0,60**		**0,86**		**0,00**		
A.	Primary education services		921		0,71		0,64		0,75		0,75		1,00		0,86		1,00		0,89		0,00		
B.	Secondary education services		922		0,71		0,64		0,79		0,79		1,00		0,86		1,00		0,86		0,00		
C.	Higher education services		923		0,68		0,61		0,68		0,68		1,00		0,89		1,00		0,82		0,00		
D.	Adult education		924		0,79		0,79		0,79		0,79		1,00		0,89		0,00				0,00		
E.	Other education services		929		0,11		0,11		0,11		0,11		1,00		0,11		0,00				0,00		
6.	ENVIRONMENTAL SERVICES				**0,10**		**0,10**		**1,00**		**1,00**		**1,00**		**0,00**		**0,00**				**1,00**		**0,54**
A.	Sewage services		9401		0,11		0,11		1,00		1,00						0,00						
B.	Refuse disposal services		9402		0,07		0,07		1,00		1,00						0,00						
C.	Sanitation and similar services		9403		0,11		0,11		1,00		1,00						0,00						
D.	Other																						

7.	FINANCIAL SERVICES				**0,00**		**0,00**		**0,52**		**0,52**		**1,00**		**0,54**		**1,00**		**0,79**		**0,00**		
A.	All insurance and insurance-related services		812		0,00		0,00		0,11		0,11		1,00		0,54		1,00		0,79		0,00		
B.	Banking and other financial services (excl. insurance)				0,00		0,00		0,93		0,93		1,00		0,54		1,00		0,79		0,00		
8.	HEALTH RELATED AND SOCIAL SERVICES				**0,04**		**0,06**		**0,65**		**0,98**		**0,67**		**0,75**		**0,67**		0,89		**0,00**		
	(other than those listed under 1.A.h-j.)																						
A.	Hospital services		9311		0,04		0,04		1,00		1,00		1,00		0,96		1,00		0,89		0,00		
B.	Other Human Health Services		9319 (other		0,00				0,00				0,00				0,00				0,00		
C.	Social Services		933		0,07		0,07		0,96		0,96		1,00		0,54		1,00		0,89		0,00		
D.	Other																						
9.	TOURISM AND TRAVEL RELATED SERVICES				**0,56**		**0,56**		**1,00**		**1,00**		**1,00**		**0,90**		**1,00**		**0,80**		**0,26**		**0,43**
A.	Hotels and restaurants (incl. catering)		641-643		0,11		0,11		1,00		1,00		1,00		0,96		1,00		0,93		0,00		
B.	Travel agencies and tour operators services		7471		0,93		0,93		1,00		1,00		1,00		1,00		1,00		0,93		0,79		0,43
C.	Tourist guides services		7472		0,64		0,64		1,00		1,00		1,00		0,75		1,00		0,54		0,00		
D.	Other																						
10.	RECREATIONAL, CULTURAL AND SPORTING SERVICES				**0,43**		**0,43**		**0,62**		**0,62**		**1,00**		**0,70**		**0,25**		**0,96**		**0,22**		**0,00**
	(other than audiovisual services)																						
A.	Entertainment services (incl. theatre, live bands and circus services)		9619		0,07		0,07		0,68		0,68		1,00		1,00		1,00		0,96		0,89		0,00
B.	News agency services		962		1,00		1,00		1,00		1,00		1,00		0,96		0,00				0,00		
C.	Libraries, archives, museums and other cultural services		963		0,04		0,04		0,07		0,07		1,00		0,86		0,00				0,00		
D.	Sporting and other recreational services		964		0,61		0,61		0,71		0,71		1,00		0,00		0,00				0,00		
E.	Other																						
11.	TRANSPORT SERVICES				**0,27**		**0,29**		**0,60**		**0,70**		**0,80**		**0,86**		**0,31**		**0,79**		**0,12**		**0,54**
A.	Maritime Transport Services				**0,46**		**0,46**		**0,82**		**0,82**		**1,00**		**0,67**		**1,00**		**0,62**		**0,19**		**0,54**
a.	Passenger transportation		7211		0,46		0,46		0,46		0,46		1,00		0,00		1,00		0,00		0,00		
b.	Freight transportation		7212		0,46		0,46		0,46		0,46		1,00		0,00		1,00		0,00				
c.	Rental of vessels with crew		7213		0,50		0,50		1,00		1,00		1,00		1,00		1,00		0,89		0,00		
d.	Maintenance and repair of vessels		8868		0,43		0,43		1,00		1,00		1,00		1,00		1,00		0,96		0,96		0,54
e.	Pushing and towing services		7214		0,00		0,00		1,00		1,00		1,00		1,00		1,00		0,89		0,00		
f.	Supporting services for maritime transport		745		0,93		0,93		1,00		1,00		1,00		1,00		1,00		1,00		0,00		
B.	Internal Waterways Transport				**0,43**		**0,42**		**0,71**		**0,70**		**1,00**		**0,96**		**0,17**		**0,96**		**0,16**		**0,54**
a.	Passenger transportation		7221		0,54		0,50		0,61		0,57		1,00		0,89		0,00				0,00		
b.	Freight transportation		7222		0,54		0,50		0,61		0,57		1,00		0,89		0,00				0,00		
c.	Rental of vessels with crew		7223		0,43		0,43		0,96		0,96		1,00		1,00		0,00				0,00		
d.	Maintenance and repair of vessels		8868		0,14		0,14		1,00		1,00		1,00		1,00		1,00		0,96		0,96		0,54
e.	Pushing and towing services		7224		0,00		0,00		0,11		0,11		1,00		1,00		0,00				0,00		
f.	Supporting services for internal waterway transport		745		0,96		0,96		0,96		0,96		1,00		1,00		0,00				0,00		
C.	Air Transport Services				**0,24**		**0,09**		**0,40**		**0,50**		**0,40**		**1,00**		**0,00**				**0,19**		**0,57**
a.	Passenger transportation		731		0,00				0,00				0,00				0,00				0,00		
b.	Freight transportation		732		0,00				0,00				0,00				0,00				0,00		
c.	Rental of aircraft with crew		734		1,00		0,00		1,00		0,00		1,00		1,00		0,00				0,00		
d.	Maintenance and repair of aircraft		8868		0,18		0,18		1,00		1,00		1,00		1,00		0,00				0,96		0,57
e.	Supporting services for air transport		746		0,00				0,00				0,00				0,00				0,00		
D.	Space Transport		733		**0,00**				**0,00**				**0,00**				**0,00**				**0,00**		
E.	Rail Transport Services				**0,21**		**0,21**		**0,80**		**0,80**		**1,00**		**0,98**		**0,00**				**0,19**		**0,57**
a.	Passenger transportation		7111		0,00		0,00		1,00		1,00		1,00		0,96		0,00				0,00		
b.	Freight transportation		7112		0,00		0,00		1,00		1,00		1,00		0,96		0,00				0,00		
c.	Pushing and towing services		7113		0,00		0,00		0,00		0,00		1,00		0,96		0,00				0,00		
d.	Maintenance and repair of rail transport equipment		8868		0,07		0,07		1,00		1,00		1,00		1,00		0,00				0,96		0,57

e.	Supporting services for rail transport services		743		0,96		0,96		1,00		1,00		1,00		1,00		0,00				0,00			
F.	Road Transport Services				**0,48**		**0,48**		**1,00**		**1,00**		**1,00**		**0,90**		**0,80**		**0,63**		**0,19**		**0,50**	
a.	Passenger transportation		7121+7122		0,00		0,00		1,00		1,00		1,00		0,75		1,00		0,82		0,00			
b.	Freight transportation		7123		0,00		0,00		1,00		1,00		1,00		0,75		1,00		0,82		0,00			
c.	Rental of commercial vehicles with operator		7124		0,46		0,46		1,00		1,00		1,00		1,00		1,00		0,89		0,00			
d.	Maintenance and repair of road transport equipment		6112+8867		1,00		1,00		1,00		1,00		1,00		1,00		1,00		0,00		0,96		0,50	
e.	Supporting services for road transport services		744		0,96		0,96		1,00		1,00		1,00		1,00		0,00				0,00			
G.	Pipeline Transport				**0,00**		**0,00**		**0,11**		**0,11**		**1,00**		**0,52**		**0,50**		**0,96**		**0,00**			
a.	Transportation of fuels		7131		0,00		0,00		0,11		0,11		1,00		0,07		0,00				0,00			
b.	Transportation of other goods		7139		0,00		0,00		0,11		0,11		1,00		0,96		1,00		0,96		0,00			
H.	Services auxiliary to all modes of transport				**0,36**		**0,36**		**0,99**		**0,99**		**1,00**		**1,00**		**0,00**				**0,00**			
a.	Cargo-handling services		741		0,00		0,00		0,96		0,96		1,00		1,00		0,00				0,00			
b.	Storage and warehouse services		742		0,11		0,11		1,00		1,00		1,00		1,00		0,00				0,00			
c.	Freight transport agency services		748		0,96		0,96		1,00		1,00		1,00		1,00		0,00				0,00			
d.	Other		749																					

ANALYSIS OF THE EU-KOREA EIA																				
NAME OF AGREEMENT		**Free Trade Agreement**																		
PARTIES		The European Union and its Member States, of the one part, and the Republic of Korea, of the other part																		
Type		Bilateral	Regional		Number of EU Member State pa		27													
		x																		
Development level of non-EU party		Developed	Developing																	
		x																		
		Signature	In Force	Notification																
STATUS OF THE AGREEMENT		06-Oct-10	01-Jul-11	07-Jul-11																
ELEMENTS RELATED TO NON-DISCRIMINATION					Yes	No	Explanation													
MFN					x		Limited to Modes 1 and 2 (Art. 7.8) and Mode 3 (Art. 7.14), subject to exceptions													
Standstill (prohibition of new or more discriminatory measures)					x		Only in relation to the scheduled commitments (Art. 7.7)													
WIDER PROCESS OF ECONOMIC INTEGRATION					Yes	No	Explanation													
Progressive liberalization						x														
Art. XXIV GATT agreement					x															
Art. V bis GATS agreement						x														
Mode 3 relating also to goods					x		Regarding Modes 3 and 4, the EU has commitments also on certain non-service sectors													
Harmonization						x														
Mutual recognition					x		Non-binding, encourages relevant bodies to develop recommendations + working group (Art.7.21)													
Domestic regulation discipline(s)					x		Non-binding, procedural requirements & endeavour to ensure objective criteria in different measures													
Regulatory cooperation					x		Bilateral regulatory cooperation through various committees and sectoral working groups													
Transparency					x		Generally and also more specifically in the field of services													
Intellectual property					x															
Public procurement					x															
Competition policy					x		Chapter 11: covers goods, services, establishment. Competitive safeguards in telecomm's services.													
Investment protection						x														
Labour mobility (labour market access)						x														
Labour protection					x		Commitment to basic ILO conventions, upholding their level of protection													
Consumer protection						x														
Environment					x		Reaffirming commitment to multilateral environmental agreements, upholding level of protection													
Cultural cooperation					x		Non-binding protocol													
Sustainable development					x		Non-binding: economic development, social development and environmental protection													
OTHER ELEMENTS **(related to services only)**					Yes	No	Explanation													
Time frame for implementation						x	No phase-out periods on the EU side in services													
Ratchet clause (autonomous liberalization included)						x														
Safeguards						x														
Subsidies						x														
Exceptions					x		GATS Art:	XII	XIV	XIVbis										
								x	x	x										
Compatibility clause (relationship to Art. V GATS)					x		Art. 1.1 of Chapter One ("Objectives")													
Categories of Mode 4 covered					Yes	No														
	Key personnel				x		Includes business visitors responsible for setting up an establishment and intra-corporate transferees													
	Graduate trainees				x															
	Business service sellers				x		Scheduled together with key personnel and graduate trainees													
	Contractual service suppliers					x	Reaffirm obligations resulting from GATS commitments. Further commit's depend on GATS results													
	Independent professionals					x	The same as for contractual service suppliers													
	Short term visitors for business purposes					x														
SECTORS			CPC		MODE 1				MODE 2				MODE 3				MODE 4			
					SC		NT		SC		NT		SC		NT		SC		NT	
	AVERAGE FOR MODE				**0,44**		**0,46**		**0,73**		**0,79**		**0,80**		**0,79**		**0,48**		**0,84**	
1.	BUSINESS SERVICES				**0,72**		**0,71**		**0,94**		**0,93**		**0,93**		**0,90**		**0,42**		**0,55**	
A.	Professional Services				**0,51**		**0,45**		**1,00**		**0,95**		**0,93**		**0,81**		**1,00**		**0,73**	
a.	Legal Services		861		1,00		0,48		1,00		0,48		1,00		0,81		1,00		0,37	
b.	Accounting, auditing and bookeeping services		862		0,33		0,22		1,00		1,00		1,00		0,67		1,00		0,96	
c.	Taxation Services		863		0,85		0,78		1,00		1,00		1,00		0,93		1,00		0,89	
d.	Architectural services		8671		0,56		0,56		1,00		1,00		1,00		0,93		1,00		0,81	
e.	Engineering services		8672		0,70		0,70		1,00		1,00		1,00		0,96		1,00		0,81	
f.	Integrated engineering services		8673		0,70		0,70		1,00		1,00		1,00		0,96		1,00		0,81	
g.	Urban planning and landscape architectural services		8674		0,56		0,56		1,00		1,00		1,00		0,93		1,00		0,81	
h.	Medical and dental services		9312		0,22		0,22		1,00		1,00		0,78		0,63		1,00		0,41	
i.	Veterinary services		932		0,19		0,19		1,00		1,00		0,81		0,70		1,00		0,67	
j.	Services provided by midwives, nurses, physiotherapists and para-medical personnel		93191		0,04		0,04		1,00		1,00		0,74		0,63		1,00		0,74	
k.	Other																			
B.	Computer and Related Services				**1,00**		**1,00**		**1,00**		**1,00**		**1,00**		**1,00**		**0,00**			

C.	Research and Development Services				**1,00**		**1,00**		**1,00**		**1,00**		**1,00**		**1,00**		**0,00**			
D.	Real Estate Services				**0,52**		**0,52**		**1,00**		**1,00**		**1,00**		**1,00**		**1,00**		**0,72**	
a.	Involving own or leased property		821		0,52		0,52		1,00		1,00		1,00		1,00		1,00		0,74	
b.	On a fee or contract basis		822		0,52		0,52		1,00		1,00		1,00		1,00		1,00		0,70	
E.	Rental/Leasing Services without Operators				**0,59**		**0,59**		**0,76**		**0,76**		**0,79**		**0,77**		**0,20**		**0,00**	
a.	Relating to ships		83103		0,78		0,78		1,00		1,00		1,00		0,93		0,00			
b.	Relating to aircraft		83104		0,67		0,67		0,70		0,70		0,00		0,00		0,00			
c.	Relating to other transport equipment		83101+ 83102+		0,70		0,70		1,00		1,00		1,00		1,00		0,00			
d.	Relating to other machinery and equipment		83106- 83109		0,70		0,70		1,00		1,00		1,00		1,00		0,00			
e.	Other		832		0,11		0,11		0,11		0,11		0,93		0,93		1,00		0,00	
F.	Other Business Services				**0,72**		**0,72**		**0,88**		**0,88**		**0,85**		**0,84**		**0,32**		**0,77**	
a.	Advertising services		871		1,00		1,00		1,00		1,00		1,00		1,00		0,00			
b.	Market research and public opinion polling services		864		1,00		1,00		1,00		1,00		1,00		1,00		0,00			
c.	Management consulting service		865		1,00		1,00		1,00		1,00		1,00		1,00		0,00			
d.	Services related to man. consulting		866		0,96		0,96		0,96		0,96		0,96		0,96		0,00			
e.	Technical testing and analysis serv.		8676		0,67		0,67		0,70		0,70		1,00		1,00		1,00		0,93	
f.	Services incidental to agriculture, hunting and forestry		881		0,81		0,81		1,00		1,00		1,00		1,00		0,00			
g.	Services incidental to fishing		882		0,85		0,85		1,00		1,00		1,00		1,00		0,00			
h.	Services incidental to mining		883+5115		1,00		1,00		1,00		1,00		1,00		1,00		0,00			
i.	Services incidental to manufacturing		884+885 (except for		1,00		1,00		1,00		1,00		1,00		1,00		0,00			
j.	Services incidental to energy distribution		887		0,00		0,00		1,00		1,00		0,04		0,04		0,00			
k.	Placement and supply services of Personnel		872		0,04		0,04		0,04		0,04		0,04		0,04		0,00			
l.	Investigation and security		873		0,07		0,07		0,07		0,07		0,15		0,11		0,00			
m.	Related scientific and technical consulting services		8675		0,33		0,33		1,00		1,00		1,00		0,96		1,00		0,81	
n.	Maintenance and repair of equipment (not including maritime vessels, aircraft or other transport equipment)		633+ 8861-8866		1,00		1,00		1,00		1,00		1,00		1,00		0,00		0,00	
o.	Building-cleaning services		874		0,07		0,07		1,00		1,00		1,00		1,00		1,00		0,78	
p.	Photographic services		875		0,81		0,81		1,00		1,00		1,00		1,00		1,00		0,93	
q.	Packaging services		876		1,00		1,00		1,00		1,00		1,00		1,00		0,00			
r.	Printing, publishing		88442		1,00		1,00		1,00		1,00		1,00		0,85		1,00		0,96	
s.	Convention services		87909		1,00		1,00		1,00		1,00		1,00		1,00		1,00		0,96	
t.	Other		8790																	
2.	COMMUNICATION SERVICES				**0,75**		**1,00**		**0,75**		**1,00**		**0,75**		**1,00**		**0,00**			
A.	Postal services		7511		1,00		1,00		1,00		1,00		1,00		1,00		0,00			
B.	Courier services		7512		1,00		1,00		1,00		1,00		1,00		1,00		0,00			
C.	Telecommunication services				1,00		1,00		1,00		1,00		1,00		1,00		0,00			
D.	Audiovisual services				0,00				0,00				0,00				0,00			
3.	CONSTRUCTION AND RELATED ENGINEERING SERV				**1,00**		**1,00**		**1,00**		**1,00**		**1,00**		**1,00**		**1,00**		**0,96**	
4.	DISTRIBUTION SERVICES				**0,40**		**0,40**		**0,40**		**0,40**		**0,95**		**0,95**		**0,00**			
A.	Commission agents' services		621		0,11		0,11		0,11		0,11		1,00		1,00		0,00			
B.	Wholesale trade services		622		0,11		0,11		0,11		0,11		1,00		1,00		0,00			

C.	Retailing services		631+632 6111+6113-		0,37		0,37		0,37		0,37		0,81		0,81		0,00		
D.	Franchising		8929		1,00		1,00		1,00		1,00		1,00		1,00		0,00		
E.	Other																		
5.	EDUCATIONAL SERVICES				**0,57**		**0,56**		**0,62**		**0,62**		**0,59**		**0,58**		**0,60**		**0,86**
A.	Primary education services		921		0,67		0,67		0,78		0,78		0,67		0,67		1,00		0,89
B.	Secondary education services		922		0,67		0,67		0,78		0,78		0,67		0,67		1,00		0,85
C.	Higher education services		923		0,67		0,59		0,67		0,67		0,67		0,67		1,00		0,85
D.	Adult education		924		0,78		0,78		0,81		0,81		0,89		0,89		0,00		
E.	Other education services		929		0,07		0,07		0,07		0,07		0,07		0,00		0,00		
6.	ENVIRONMENTAL SERVICES				**0,00**		**0,00**		**1,00**		**1,00**		**1,00**		**1,00**		**0,00**		
7.	FINANCIAL SERVICES				**0,04**		**0,04**		**0,52**		**0,52**		**1,00**		**0,30**		**1,00**		**0,81**
A.	All insurance and insuranc e-related services		812		0,07		0,07		0,11		0,11		1,00		0,59		1,00		0,81
B.	Banking and other financia l services (excl. insurance)				0,00		0,00		0,93		0,93		1,00		0,00		1,00		0,81
8.	HEALTH RELATED AND SOCIAL SERVICES				**0,05**		**0,08**		**0,65**		**0,98**		**0,35**		**0,52**		**0,67**		**0,89**
	(other than those listed under 1.A.h-j.)																		
A.	Hospital services		9311		0,04		0,04		1,00		1,00		0,52		0,52		1,00		0,89
B.	Other Human Health Services		9319 (other than 931'		0,00				0,00				0,00				0,00		
C.	Social Services		933		0,11		0,11		0,96		0,96		0,52		0,52		1,00		0,89
D.	Other																		
9.	TOURISM AND TRAVEL RELATED SERVICES				**0,56**		**0,56**		**1,00**		**1,00**		**0,98**		**0,96**		**1,00**		**0,83**
A.	Hotels and restaurants (incl. catering)		641-643		0,11		0,11		1,00		1,00		1,00		0,96		1,00		0,96
B.	Travel agencies and tour o perators services		7471		0,93		0,93		1,00		1,00		0,93		0,93		1,00		0,96
C.	Tourist guides services		7472		0,63		0,63		1,00		1,00		1,00		1,00		1,00		0,56
D.	Other																		
10.	RECREATIONAL, CULTURAL AND SPORTING SERVIC				**0,33**		**0,33**		**0,49**		**0,49**		**0,67**		**0,67**		**0,25**		**0,96**
	(other than audiovisual services)																		
A.	Entertainment services		9619		0,07		0,07		0,56		0,56		0,59		0,59		1,00		0,96
B.	News agency services		962		0,59		0,59		0,63		0,63		0,56		0,56		0,00		
C.	Libraries, archives, museums and other cultural services		963		0,04		0,04		0,07		0,07		0,93		0,93		0,00		
D.	Sporting and other recreational services		964		0,63		0,63		0,70		0,70		0,59		0,59		0,00		
E.	Other																		
11.	TRANSPORT SERVICES				**0,39**		**0,43**		**0,64**		**0,75**		**0,60**		**0,76**		**0,31**		**0,83**
A.	Maritime Transport Services				**0,75**		**0,75**		**1,00**		**1,00**		**0,98**		**0,94**		**1,00**		**0,72**
a.	Passenger transportation		7211		1,00		1,00		1,00		1,00		1,00		1,00		1,00		0,00
b.	Freight transportation		7212		1,00		1,00		1,00		1,00		1,00		1,00		1,00		1,00
c.	Rental of vessels with crew		7213		0,48		0,48		1,00		1,00		0,96		0,89		1,00		0,78
d.	Maintenance and repair of vessels		8868		0,26		0,26		1,00		1,00		1,00		1,00		1,00		0,96
e.	Pushing and towing services		7214		*		*		1,00		1,00		0,96		0,89		1,00		0,78
f.	Supporting services for maritime transport		745		1,00		1,00		1,00		1,00		0,96		0,89		1,00		0,78

B.	Internal Waterways Transport				**0,43**		**0,43**		**0,67**		**0,67**		**0,94**		**0,88**		**0,00**		
a.	Passenger transportation		7221		0,52		0,52		0,52		0,52		1,00		0,96		0,00		
b.	Freight transportation		7222		0,52		0,52		0,52		0,52		0,96		0,89		0,00		
c.	Rental of vessels with crew		7223		0,44		0,44		1,00		1,00		0,89		0,81		0,00		
d.	Maintenance and repair of vessels		8868		0,11		0,11		1,00		1,00		1,00		1,00		0,00		
e.	Pushing and towing services		7224		0,00		0,00		0,00		0,00		0,89		0,81		0,00		
f.	Supporting services for internal waterway transport		745		1,00		1,00		1,00		1,00		0,89		0,81		0,00		
C.	Air Transport Services				**0,20**		**0,10**		**0,40**		**0,50**		**0,40**		**0,50**		**0,00**		
a.	Passenger transportation		731		0,00				0,00				0,00				0,00		
b.	Freight transportation		732		0,00				0,00				0,00				0,00		
c.	Rental of aircraft with crew		734		1,00		0,00		1,00		0,00		1,00		0,00		0,00		
d.	Maintenance and repair of aircraft		8868		0,19		0,19		1,00		1,00		1,00		1,00		0,00		
e.	Supporting services for air transport		746		0,00				0,00				0,00				0,00		
D.	Space Transport		733		**0,00**				**0,00**				**0,00**				**0,00**		
E.	Rail Transport Services				**0,21**		**0,21**		**1,00**		**1,00**		**0,96**		**0,94**		**0,20**		**0,96**
a.	Passenger transportation		7111		0,00		0,00		1,00		1,00		0,96		0,96		0,00		
b.	Freight transportation		7112		0,00		0,00		1,00		1,00		0,96		0,96		0,00		
c.	Pushing and towing services		7113		0,00		0,00		1,00		1,00		0,96		0,93		0,00		
d.	Maintenance and repair of rail transport equipment		8868		0,07		0,07		1,00		1,00		0,96		0,93		1,00		0,96
e.	Supporting services for rail transport services		743		1,00		1,00		1,00		1,00		0,96		0,93		0,00		
F.	Road Transport Services				**0,50**		**0,49**		**1,00**		**1,00**		**0,96**		**0,68**		**0,80**		**0,69**
a.	Passenger transportation		7121+7122		0,00		0,00		1,00		1,00		0,93		0,00		1,00		0,85
b.	Freight transportation		7123		0,00		0,00		1,00		1,00		0,96		0,74		1,00		0,89
c.	Rental of commercial vehicles with operator		7124		0,48		0,46		1,00		1,00		0,96		0,85		1,00		1,00
d.	Maintenance and repair of road transport equipment		6112+8867		1,00		1,00		1,00		1,00		1,00		0,96		1,00		0,00
e.	Supporting services for road transport services		744		1,00		1,00		1,00		1,00		0,96		0,85		0,00		
G.	Pipeline Transport				**0,00**		**0,00**		**0,07**		**0,07**		**0,54**		**0,52**		**0,50**		**0,96**
a.	Transportation of fuels		7131		0,00		0,00		0,07		0,07		0,07		0,07		0,00		
b.	Transportation of other goods		7139		0,00		0,00		0,07		0,07		1,00		0,96		1,00		0,96
H.	Services auxiliary to all modes of transport				**1,00**		**1,00**		**1,00**		**1,00**		**0,00**		**0,89**		**0,00**		
a.	Cargo-handling services		741		*		*		1,00		1,00		0,00		0,89		0,00		
b.	Storage and warehouse services		742		1,00		1,00		1,00		1,00		0,00		0,89		0,00		
c.	Freight transport agency services		748		1,00		1,00		1,00		1,00		0,00		0,89		0,00		
d.	Other		749																
			* Unbound due to lack of technical feasibility																