

The Interpretation of GATS Disciplines on Economic Integration: GATS Commitments as a Threshold?

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The interpretation of GATS Article V, which deals with economic integration, is of crucial importance to the growing number of economic integration agreements (EIAs) in services, in terms of dispute settlement, services negotiations, the WTO review of EIAs, the coordination between multilateralism and EIAs, and best practices in drawing up EIAs. However, the Article has received insufficient study and remains vague. This paper takes China's eight EIAs as test cases for interpreting GATS Article V and argues that GATS commitments may be an appropriate threshold for interpreting the Article, in particular the substantial sectoral coverage and elimination of discrimination requirements, which are probably among the major challenges.

1 INTRODUCTION

Economic integration agreements (EIAs) are spreading rapidly. Given the impasse in multilateral negotiations, most WTO Members increasingly favour setting up

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EIAs.¹ The requirements for economic integration are set out in the GATS and in particular its Article V, under which ninety-two EIAs have been notified as of July 2010.²

While EIA rules involving trade in goods have been studied in some depth, services EIA rules have been given less attention. The conformity of EIAs with GATS disciplines and in particular the way to address their interpretation challenges is seldom discussed,³ despite its great significance for dispute settlement, WTO negotiations, the WTO review of EIAs, the coordination between multilateralism and EIAs, and best practices in drawing up EIAs. Services trade is often constrained by quantitative restrictions than by overtly discriminatory practices,⁴ and services EIAs may actually result in discrimination. EIAs grant their participants – but not outside parties – preferential treatment that include enhanced market access and national treatment commitments (e.g., access to new sectors, lower registered capital and residence requirements, less restrictions on equity shareholding, geographical location and business scope). For instance, there is different treatment in terms of market access in financial services between EIA parties and outside parties. As analysed below, GATS Article V has been dealt with in the WTO dispute. If a Member invokes GATS Article V as an exception to most-favoured-nation (MFN) treatment, it bears the burden of proving the GATS consistency of a specific EIA.⁵ Although there are challenges in reviews of the GATS consistency of EIAs by panels or the Appellate Body (e.g., time constraints, expertise), a Member may challenge the consistency of an EIA with the multilateral disciplines through the Dispute Settlement Body (DSB).⁶ GATS Article XXIII tends to support this possibility. The Members therefore may want to ensure the WTO legality of the EIAs. For instance, the EC seemed particularly

¹ Juan A. Marchetti & Martin Roy, 'Summary and Overview', in *Opening Markets for Trade in Services: Countries and Sectors in Bilateral and WTO Negotiations*, ed. Juan A. Marchetti & Martin Roy (New York: Cambridge University Press, 2008), 4.

² WTO Secretariat, 'Regional Trade Agreements', <www.wto.org/english/tratop_e/region_e/region_e.htm>, 12 Dec. 2010.

It seems that eighty-three of these notified services EIAs are effective as of 1 Nov. 2010. Committee on Regional Trade Agreements, Draft Report (2010) of the Committee on Regional Trade Agreements to the General Council ('Draft Report'), WT/REG/W/57, 8 Nov. 2010, para. 4.

³ For current analysis of GATS Art. V, see, e.g., Thomas Cottier & Martin Molinuevo, 'Article V GATS', in *WTO-Trade in Services*, ed. Rudiger Wolfrum et al. (Leiden: Martinus Nijhoff Publishers, 2008), 125–164; Sherry M. Stephenson, 'Regional Agreements on Services in Multilateral Disciplines: Interpreting and Applying GATS Article V', in *Services Trade in the Western Hemisphere Liberalization, Integration and Reform*, ed. Sherry M. Stephenson (Washington, DC: Brookings Institution Press and Organization of American States, 2000), 86–104.

⁴ Pierre Sauvé & Anirudh Shingal, 'Reflections on the Preferential Liberalization of Services Trade', NCCR Working Paper No 2011/05, 12 May 2011, 4.

⁵ For a similar argumentation for EIAs in goods, see Panel Report, *Turkey—Restrictions on Imports of Textile and Clothing Products (Turkey—Textiles)*, WT/DS34/R, adopted 19 Nov. 1999, para. 9.58.

⁶ Petros C. Mavroidis, *Trade in Goods* (New York: Oxford University Press, 2007), 153–154.

keen to ensure that the EC-CARIFORUM Economic Partnership Agreement meet GATS Article V 'substantially all trade' test to avoid the WTO disputes and extension of the EIA concessions to the WTO membership.⁷

GATS Article V has been dealt with in the WTO dispute of *Canada-Auto*.⁸ Article V is only dealt with in a limited manner in this case and is likely to be increasingly invoked in the future. Such has been the case, in fact, for EIAs for goods, where there have been at least nine disputes decided relating to GATT Article XXIV.⁹ In these cases, the panels seem to have taken a piecemeal approach, not targeting the EIAs as such but rather particular measures. In the Doha Round negotiations, Members agreed to clarify and improve the disciplines and procedures under the WTO provisions on EIAs,¹⁰ including GATS Article V.¹¹ A focus on legal compliance issues will also help to shed light on how services EIAs can be better reviewed in the WTO and feed into the multilateral trade regime and should foster possible best practices in this regard.

Moving to a concrete scenario, China's fast-developing services EIAs have so far received insufficient attention.¹² Given the increasingly important role China plays in international trade, the EIAs signed by China may have a significant effect

⁷ Pierre Sauv e & Natasha Ward, 'The EC-CARIFORUM Economic Partnership Agreement: Assessing the Outcome on Services and Investment', *European Centre for International Political Economy* (2009), 22.

⁸ The Appellate Body has indicated its jurisdiction to assess the compatibility of EIAs with GATT Art. XXVI. This should also apply to GATS Art. V. In fact, the Panel in *Canada-Autos* dealt with GATS Art. V. See Panel Report, *Canada-Certain Measures Affecting the Automotive Industry (Canada-Autos)*, WT/DS139/R, WT/DS142/R, adopted 19 Jun. 2000, paras 10.265-10.272.

⁹ Appellate Body Report, *Brazil-Measures Affecting Imports of Retreaded Tyres (Brazil-Retreaded Tyres)*, WT/DS332/AB/R, adopted 17 Dec. 2007, paras 123, 217, 253-256; Panel Report, *United States-Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea (US-Line Pipe)*, WT/DS202/R, adopted 8 Mar. 2002, paras 7.137-7.163; Appellate Body Report, *United States-Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities (US-Wheat Gluten)*, WT/DS166/AB/R, adopted 19 Jan. 2001, paras 13, 94, 99; Panel Report, *Canada-Autos*, *supra* n. 8, paras 10.55-10.56; Appellate Body Report, *Turkey-Restrictions on Imports of Textile and Clothing Products (Turkey-Textiles)*, WT/DS34/AB/R, adopted 19 Nov. 1999, paras 42-63; Appellate Body Report, *European Communities-Regime for the Importation, Sale and Distribution of Bananas (EC-Bananas III)*, WT/DS27/AB/R, adopted 25 Sep. 1997, para. 25; GATT Panel Report, *EEC-Import Regime for Bananas (EEC-Bananas II)*, DS38/R, 11 Feb. 1994, unadopted, para. 170; GATT Panel Report, *Panel on Newsprint (EEC-Newsprint)*, L/5680, adopted 20 Nov. 1984, BISD 31S/114, para. 55; GATT Panel Report, *EEC-Quantitative Restrictions Against Imports of Certain Products from Hong Kong (EEC-Imports from Hong Kong)*, L/5511, adopted 12 Jul. 1983, BISD 30S/129, para. 28.

¹⁰ Doha Ministerial Declaration, WT/MIN(01)/DEC/1, adopted 14 Nov. 2001, para. 29.

¹¹ For a discussion on negotiation issues related to GATS Art. V, see Negotiating Group on Rules, Compendium of Issues related to Regional Trade Agreements (hereinafter 'Compendium of RTA Issues'), TN/RL/W/8/Rev.1, 1 Aug. 2002.

¹² For research focusing on or relating to China's EIAs, see, e.g., Francis Snyder, 'China, Regional Trade Agreements and WTO Law', *Journal of World Trade* 43, no. 1 (2009): 1-57; Rudolf Adlung & Peter Morrison, 'Less than the GATS: "Negative Preferences" in Regional Services Agreements', *Journal of International Economic Law* 13, no. 4 (2010): 1103-1143; Carsten Fink & Martin Molinuevo, 'East Asian Preferential Trade Agreements in Services: Liberalization Content and WTO Rules', *World Trade Review* 7, no. 4 (2008): 641-673.

on multilateral economic governance. China's first EIA step was its accession to the First Agreement on Trade Negotiations among Developing Member Countries of the Economic and Social Commission for Asia and the Pacific (Bangkok Agreement, now renamed Asia Pacific Trade Agreement (APTA) in 2001).¹³ Since then, China has continued to conclude EIAs with other countries.¹⁴ Interestingly, China has also concluded EIAs domestically, in part because trade rules in different parts of China are not the same. For instance, there are substantial differences between the trade rules of the Mainland and the Hong Kong Special Administrative Region (Hong Kong) or the Macao Special Administrative Region (Macao). The EIAs between different parts of China have advanced bilateral economic exchanges and cooperation.¹⁵ All China's EIAs apart from the APTA cover trade in services as well as in goods.

This paper takes China's EIAs as test cases to analyse the issues involved in interpreting GATS Article V. The remainder of the paper consists of four parts. The next part, section 2, will provide an overview of China's services EIAs.¹⁶ Section 3 will then discuss whether China's EIAs are compliant with GATS Article V, concentrating on coverage and elimination of discrimination. Section 4 proposes that GATS commitments can be used as a baseline in interpreting the Article. Finally, section 5 concludes.

2 CHINA'S SERVICES EIAs: AN OVERVIEW

At the time of writing, eight EIAs pertaining to the services trade have been signed by China and taken effect (China's EIAs):¹⁷ (1) the Mainland and Hong Kong Closer Economic Partnership Arrangement (Mainland-Hong Kong CEPA),

¹³ Amendment to the First Agreement on Trade Negotiations among Developing Member Countries of the Economic and Social Commission for Asia and the Pacific (Bangkok Agreement), renamed the Asia Pacific Trade Agreement on 2 Nov. 2005.

¹⁴ The terms 'EIAs', 'free trade agreements (FTAs)' or 'regional trade agreements (RTAs)' are used interchangeably. They are used in a broad sense in this paper, so as to embrace any agreements seeking to provide for the liberalization of trade, be it bilateral, regional or plurilateral, and regardless of the official designation given to it by the parties (Free Trade Agreement, Closer Economic Partnership Arrangement, Framework Agreement on Comprehensive Economic Cooperation, Agreement on Trade in Service, etc.). Free Trade Agreement between China and New Zealand A party to a FTA is not necessarily a country and could be a separate customs territory 'possessing full autonomy in the conduct of its external commercial relations,' as stipulated in Art. XII: 1 of the Agreement Establishing the World Trade Organization. See Agreement Establishing the World Trade Organization (WTO Agreement), The Results of the Uruguay Round of Multilateral Trade Negotiations, the Legal Texts (Geneva, 2003), 3.

¹⁵ Ministry of Commerce of China, 'Supplementary Agreement VI to CEPA signed in Macao', <<http://tga2.mofcom.gov.cn/aarticle/workaffaircenter/200905/20090506258560.html>>, 24 Jun. 2010.

¹⁶ This paper covers the first eight EIAs currently signed as of 10 Sep. 2010.

¹⁷ Francis Snyder has proposed a three-fold typology for China's FTAs: economic integration agreements, standard regional trade agreements with other countries in the Asia-Pacific region, and bilateral free trade agreements with non-Asian countries. See Snyder, *supra* n. 12, 6.

which came into force on 1 January 2004;¹⁸ (2) the Mainland and Macao Closer Economic Partnership Arrangement (Mainland-Macao CEPA), which became effective on 1 January 2004;¹⁹ (3) the Agreement on Trade in Service of the Framework Agreement on Comprehensive Economic Cooperation between China and ASEAN (China-ASEAN ATS), which entered into force on 1 July 2007;²⁰ (4) the Free Trade Agreement between China and New Zealand (China-NZ FTA), which entered into force on 1 October 2008;²¹ (5) the Supplementary Agreement on Trade in Services of the Free Trade Agreement between China and Chile (China-Chile ATS), which took effect on 1 August 2010;²² (6) the Free Trade Agreement between China and Singapore (China-Singapore FTA), which became effective on 1 January 2009;²³ (7) the Agreement on Trade in Services between China and Pakistan (China-Pakistan ATS),²⁴ which came into effect on 10 October 2009;²⁵ (8) the Free Trade Agreement between China and Peru (China-Peru FTA),²⁶ which began to take effect on 1 March 2010.²⁷ I propose a twofold typology for the EIAs, which China has concluded so far: domestic EIAs and international EIAs. Domestic EIAs refers to arrangements within China: 'deeper integration' EIAs. They are referred to as 'Closer Economic Partnership Arrangements' (CEPAs). International EIAs, in contrast, refers to the EIAs between China and partners abroad. These are GATS-type EIAs. Obviously both types of EIAs are of interest to foreign service suppliers when they plan to conduct services trade transactions with China.

¹⁸ Mainland and Hong Kong Closer Economic Partnership Arrangement (Mainland-Hong Kong CEPA), 29 Jun. 2003, <www.tid.gov.hk/english/cepa/legaltext/cepa_legaltext.html>, 1 Jan. 2004.

¹⁹ Mainland and Macao Closer Economic Partnership Arrangement (Mainland-Macao CEPA), 17 Oct. 2003, <www.economia.gov.mo/web/DSE/public?_nfpb=true&_pageLabel=Pg_CEPA_Index&locale=en_US>, 12 Jan. 2004.

²⁰ Agreement on Trade in Services of the Framework Agreement on Comprehensive Economic Cooperation between China and ASEAN (China-ASEAN ATS), 14 Jan. 2007, <<http://gjs2.mofcom.gov.cn/aarticle/policyreleasingcenter/200704/20070404583449.html>>, 18 Jul. 2007.

²¹ Free Trade Agreement between China and New Zealand (China-NZ FTA), 7 Apr. 2008, <<http://gjs.mofcom.gov.cn/accessory/200804/1208158780064.pdf>>, 17 Oct. 2008.

²² Supplementary Agreement on Trade in Services of the Free Trade Agreement between China and Chile (China-Chile ATS), 13 Apr. 2008, <http://fta.mofcom.gov.cn/chile/xieyi/xieyizhengwen_en.pdf>, 3 Jan. 2009.

Ministry of Commerce, China, 'China-Chile FTA Service trade Agreement Comes into Effect', <http://fta.mofcom.gov.cn/article/ftanews/201007/3096_1.html>, 13 Aug. 2010.

²³ Free Trade Agreement between China and Singapore (China-Singapore FTA), 23 Oct. 2008, <http://fta.mofcom.gov.cn/singapore/doc/cs_xieyi_en.zip>, 12 Jan. 2009.

²⁴ Agreement on Trade in Services between China and Pakistan (China-Pakistan ATS), 21 Feb. 2009, <http://fta.mofcom.gov.cn/pakistan/xieyi/xiedingwenben_en.pdf>, 21 Oct. 2009.

²⁵ Ministry of Commerce, China, 'China-Pakistan FTA Services Agreement effective on 10 October', <http://fta.mofcom.gov.cn/article/chpakistan/chpakistannews/201006/2887_1.html>, 13 Sep. 2010.

²⁶ Free Trade Agreement between China and Peru (China-Peru FTA), 28 Apr. 2009, <http://fta.mofcom.gov.cn/bilu/annex/bilu_xdwb_en.pdf>, 28 Oct. 2009.

²⁷ Xinhuanet, China-Peru Free Trade Pact Takes Effect, <http://news.xinhuanet.com/english2010/photo/2010-03/02/c_13194351.htm>, 6 Mar. 2010.

In addition to being particular because they are domestic EIAs, the Mainland-Hong Kong and Mainland-Macao CEPAs (two CEPAs) were also 'the first free trade agreement[s] that [were] fully implemented by the Mainland',²⁸ and their rules in services trade are, to a large extent, similar. For both these CEPAs, supplementary agreements that deal with the services trade have been concluded annually since 2004. These supplementary agreements further liberalize the services trade between the Mainland and Hong Kong or Macao by adding new sectors,²⁹ further relaxing controls on market access, abolishing requirements on the control of shares, business scope and premises, and simplifying approval procedures, among other things.³⁰ As these two CEPAs are, to a large extent, alike, the analysis in this paper will focus on the Mainland-Hong Kong CEPA. In comparison with the domestic ones, China's international EIAs are, to some extent, probably less ambitious in their trade liberalization commitments, and there are no annual supplementary agreements that are comparable to the domestic ones. The main reason is that, generally speaking, it is much easier to liberalize trade between the Mainland and Hong Kong and Macao as they are all part of the same nation.

While seeking to give as comprehensive a picture as possible, more emphasis will here be given to China's international EIAs due to the special features of the domestic CEPAs, although reference will of course be made to the CEPAs where their provisions are relevant to the issue of GATS Article V conformity. There are altogether twenty-five schedules of the parties to China's EIAs.³¹ Due to space constraint, the analysis will mainly focus on China's eight schedules (or those of the Mainland in the context of the two CEPAs).³²

3 CHINA'S SERVICES EIAs AND THE GATS: CONFORMITY ANALYSIS

Some disciplines in GATS Article V are irrelevant to China's EIAs or beyond the scope of this paper. Among the former are preferential origin rules,³³ withdrawal from commitments,³⁴ and unavailability of compensation for trade benefits

²⁸ Ministry of Commerce of China, Department of Taiwan, Hong Kong and Macao Affairs, 'Editors' Preface', <<http://tga.mofcom.gov.cn/aarticle/Nocategory/200612/20061204086002.html>>, 20 May 2008.

²⁹ Xinhua, 'Mainland, HK Sign 7th Supplement to CEPA', <http://news.xinhuanet.com/english/2010/business/2010-05/27/c_13319233.htm>, 4 Jul. 2010.

³⁰ Ministry of Commerce of China, *supra* n. 15.

³¹ Each of the ten ASEAN Member Countries to the China-ASEAN ATS has its own schedule.

³² An open issue concerning GATS Article V is how to address the problem if one party's commitments meet the requirement but the other party's do not. One could argue that in this case the whole EIA does not meet the test of Art. V, but others may disagree.

³³ GATS, Art. V: 3(b).

³⁴ *Ibid.*, Art. V: 5.

accruing from the EIAs.³⁵ As for the latter, the GATS also prohibits ‘fortress EIAs’, in which overall trade barrier levels are higher than pre-EIA ones with respect to non-party Members.³⁶ However, most of the EIAs have only been implemented recently, and information is still relatively limited or lacking about trade measures that existed before and after their signature, and information on the extent to which the applied or explicit preferences exist is lacking too.³⁷ In the interest of a focused discussion and due to space constraint, two aspects of GATS conformity will be analysed: coverage and elimination of discrimination.

3.1 COVERAGE

3.1[a] *Overview of China’s EIA Provisions on Coverage*

The requirement to have ‘substantial sectoral coverage’ is a significant restraint on the formation of EIAs.³⁸ It prohibits picking and choosing among services *à la carte* and requires liberalization over a wide range of sectors. It also increases the difficulty of concluding EIAs, which in effect limits their number. Two aspects of coverage are relevant: the coverage of the EIAs and the coverage of the schedules.

As for the coverage of the EIAs, it is usually indicated in EIA stipulations on coverage. Except for the two CEPAs, China’s EIAs exclude certain services. These exclusion provisions can be divided into two categories: those similar to the GATS and those different from the GATS.

Many of China’s EIAs adopt exactly the same or similar coverage as the GATS, excluding air traffic rights and services directly related to the exercise of traffic rights, measures affecting natural persons seeking access to the employment market, and measures regarding citizenship, residence or employment on a permanent basis.³⁹ Services in the exercise of governmental authority are also excluded.⁴⁰ As under the GATS, aircraft repair and maintenance services, the

³⁵ GATS, Art. V:8.

³⁶ *Ibid.*, Art. V:4.

³⁷ Juan A. Marchetti & Martin Roy, ‘Services Liberalization in the WTO and in PTAs’, in *Opening Markets for Trade in Services: Countries and Sectors in Bilateral and WTO Negotiations*, ed. Juan A. Marchetti & Martin Roy (New York: Cambridge University Press, 2008), 94–95.

³⁸ GATS, Art. V:1(a).

³⁹ China-Singapore FTA, Art. 60 (excluding traffic rights and services directly related to the exercise of traffic rights); China-Pakistan ATS, Art. 2:2 (excluding traffic rights or exercise of traffic rights, measures affecting natural persons seeking access to the employment market or measures regarding citizenship, residence or employment on a permanent basis); China-Peru FTA, Art. 105 (excluding traffic rights. No obligation imposed on natural persons’ seeking access to the employment market, employed on a permanent basis); China-NZ FTA, Art. 105:2 (excluding air traffic rights or the exercise of air traffic rights, and measures affecting natural persons seeking access to the employment market).

⁴⁰ China-ASEAN ATS, Art. 2:2(a); China-Chile ATS, Art. 1:4; China-NZ FTA, Art. 105:2(b); China-Pakistan ATS, Art. 2:2(a); China-Peru FTA, Art. 105:5; China-Singapore FTA, Art. 60:2(a).

selling and marketing of air transport services and computer reservation system services are expressly covered in nearly all China's EIAs. Although the China-ASEAN ATS does not expressly stipulate these two kinds of services, they are not excluded and should also be covered. Albeit not expressly indicated in their provisions, GATS coverage and exclusions are expected to be followed in the two CEPAs.

Three of China's international EIAs also exclude certain services or measures, which are not excluded by the WTO from their scope, including cabotage in maritime transport services,⁴¹ financial services,⁴² and air services.⁴³ Some also exclude subsidies and government procurement.⁴⁴ As an exception, the China-Chile ATS excludes the financial service from its scope. It may be due to the fact there are very limited financial services between China and Chile. Financial services are covered by other EIAs of China,⁴⁵ and the financial service commitments under these EIAs are closely connected with their GATS counterparts.⁴⁶

As for EIA schedule coverage, there seems to be a tendency towards increasing sectoral coverage in the more recent EIAs. The commitments in China's EIAs are based on the GATS commitments, and the GATS commitments will apply to the EIA parties who are WTO Members. China's GATS schedules cover nine out of twelve sectors set out in 'W/120',⁴⁷ but not Sectors 8 (health related and social services), 10 (recreational, cultural and sporting services) and 12 (other services). Under the WTO, few Members have made commitments in Sector 12. Under the two CEPAs, the Mainland has opened forty-four and forty-three of (sub)sectors in W/120 to Hong Kong and Macao, consisting of 277 and 261 liberalization

⁴¹ China-Pakistan ATS, Art. 2:2(e).

⁴² China-Chile ATS, Arts 1:2, 4:3.

⁴³ China-Peru FTA, Art. 105:3(b); China-Chile ATS, Art. 1:2(e) (specialty air services, airport operation services and ground handling services are covered by the ATS).

⁴⁴ China-Singapore FTA, Art. 60 (excluding government procurement and subsidies); China-ASEAN ATS, Art. 2:2(b) (excluding government procurement); China-Pakistan ATS, Art. 2:2 (excluding government procurement and subsidies); China-Peru FTA, Art. 105 (excluding government procurement and subsidies); China-Chile ATS, Art. 1:2 (excluding government procurement and subsidies); China-NZ FTA, Art. 105:2 (excluding government procurement and subsidies).

⁴⁵ For an analysis of China's GATS commitments, see Aaditya Mattoo, 'China's Accession to the WTO: The Services Dimension', *Journal of International Economic Law* 6, no. 2 (2003): 302-321.

⁴⁶ For instance, all Cambodia's and Vietnam's commitments under the China-ASEAN ATS reproduce in part or in full their GATS commitments. Carsten Fink, 'PTAs in Services: Friends or Foes of the Multilateral Trading System?', in *Opening Markets for Trade in Services: Countries and Sectors in Bilateral and WTO Negotiations*, ed. Juan A. Marchetti & Martin Roy (New York: Cambridge University Press, 2008), 117.

⁴⁷ Services Sectoral Classification List: Note by the Secretariat ('W/120'), MTN.GNS/W/120, 10 Jul. 1991. This is the document used by many Members to make their commitments during the Uruguay Round.

measures⁴⁸ and has continued to make new commitments under the two CEPAs since they became effective in 2004. The analysis here focuses on Mainland's schedule in the Mainland-Hong Kong CEPA. This schedule first covers eight out of totally twelve sectors in W/120 except for Sectors 5 (educational services), 6 (environmental services), 8, and 10. Sectors 6, 8 and 10 are later covered by Mainland's schedule.⁴⁹ A number of subsectors under Sector 12 are covered in Mainland's CEPA schedule, including logistics services, qualification examinations for professionals, trademark and patent agency, and individually owned stores.⁵⁰ In the Mainland-Hong Kong CEPA, the coverage of Sectors 8, 10 and 12 is a breakthrough as these sectors are not covered in the GATS schedule. For the service (sub)sectors or measures not covered by the Mainland's schedule, the GATS commitments will apply.⁵¹ Sector 5 is covered by the GATS commitments and therefore also covered by the CEPA. Mainland's CEPA schedule actually covers all 12 sectors in W/120, whose subsector coverage may expand with the future CEPA supplements.

In the China-ASEAN ATS, based on its GATS commitments, China's schedule for the first package of commitments covers five sectors such as Sectors 1 (business services), 3 (construction services), 6, and 11 (transport services).⁵² This ATS emphasizes the expansion of scope of services trade with substantial sectoral coverage 'beyond' those undertaken under the GATS,⁵³ and the commitments thereunder are higher-level ones based on the parties' GATS commitments.⁵⁴ Combing with the GATS commitments, China's schedules under China-ASEAN ATS covers 10 sectors, whose coverage may be further expanded in the future.⁵⁵ In the China-NZ FTA, China has made commitments in ten sectors out of twelve sectors in W/120 except Sectors 8 and 12 and has included Sector 10, which is not

⁴⁸ Ministry of Commerce of China, 'Supplement VII to the Mainland-Hong Kong CEPA Signed in Hong Kong', <http://fta.mofcom.gov.cn/article/hongkong/neidineews/201005/2726_1.html>, 14 Dec. 2010; Ministry of Commerce of China, 'Supplement VII to the Mainland-Macao CEPA Signed in Macao', <http://fta.mofcom.gov.cn/article/hongkong/neidineews/201006/2756_1.html>, 14 Dec. 2010.

⁴⁹ Supplement to the Mainland-Hong Kong CEPA, 27 Oct. 2004, <www.tid.gov.hk/english/cepa/legaltext/cepa2.html>, 30 Oct. 2004, Annex 3, 15 (Sector 10). Supplement IV to the Mainland-Hong Kong CEPA, 29 Jun. 2007, <http://fta.mofcom.gov.cn/article/hongkong/xianggang/buchongxiyi/200901/420_1.html>, 1 Jan. 2008, Annex, 17 (Sector 6), 21 (Sector 8).

⁵⁰ These sectors are named 'Service sectors (sectors not set out in GNS/W/120)' in Annex 4 to the Mainland-Hong Kong CEPA. They arguably could fall into Sector 12 (other services) of W/120.

⁵¹ Mainland-Hong Kong CEPA, Annex 4, para. 3.

⁵² Ministry of Commerce of China, 'China-ASEAN Agreement on Trade in Service', <http://fta.mofcom.gov.cn/dongmeng/dm_fwmy.shtml>, 14 Dec. 2010.

⁵³ China-ASEAN ATS, preamble, third paragraph, Art. 21:1.

⁵⁴ Ministry of Commerce of China, 'China-ASEAN Agreement on Trade in Service', <http://fta.mofcom.gov.cn/dongmeng/dm_fwmy.shtml>, 14 Dec. 2010.

⁵⁵ The second package of commitments is expected to be concluded under Art. 23:2 of the China-ASEAN ATS.

covered in China's GATS commitments. The commitments under this FTA are also based on their WTO counterparts,⁵⁶ and the existing rights and obligations under the WTO are maintained under this FTA,⁵⁷ which should include GATS commitments. In the China-Chile ATS, China has made commitments in seven sectors except Sectors 2, 7, 8, 11 and 12. China and Chile have made further commitments in twenty-three and thirty-seven (sub)sectors, respectively, which are based on their WTO commitments.⁵⁸ GATS commitments have been generally incorporated into this ATS.⁵⁹ In the China-Singapore FTA and China-Peru FTA, China has made commitments in ten sectors (excepting Sectors 8 and 12). These two FTAs affirm the parties' WTO rights and obligations which should include the GATS commitments.⁶⁰ In the China-Pakistan ATS, Pakistan has made commitments in eleven sectors and 102 subsectors, fifty-six of which are newly opened subsectors, and China has made commitments in eleven sectors (excepting Sector 12) and further liberalization commitments in six sectors and twenty-eight subsectors.⁶¹

Several observations could be made here. First, the Mainland's CEPA schedules have actually covered all the twelve sectors in W/120 and have broader coverage than China's schedules under its international EIAs. Second, China's international EIA schedules are based on GATS commitments and seem to expand their coverage. These schedules have similar or broader coverage than China's GATS schedule. China's schedules in the more recent international EIAs, starting from the China-Singapore FTA, cover at least ten of the twelve sectors in W/120. Third, within China's international EIAs, EIAs with developed Members have broader coverage than those with developing ones, in particular for communication and financial services. It is probably due to the fact that the services trade industries in developing Members are generally less developed.

⁵⁶ Under the China-NZ FTA, New Zealand and China has each made commitments in 4 sectors that are higher than their WTO counterparts. Ministry of Commerce of China, 'Bilateral Services Trade under the China-New Zealand FTA', <http://fta.mofcom.gov.cn/newzealand/newzealand_fwmy.shtml>, 31 May 2011.

⁵⁷ China-NZ FTA, Arts 3:1. GATS commitments of China and New Zealand have also been quoted in Annex 10 to the China-NZ FTA.

⁵⁸ Ministry of Commerce of China, 'China and Chile signed Services Trade Agreement of China-Chile Free Trade Area on 13 Apr. 2008', <http://fta.mofcom.gov.cn/article/chinachile/chileneews/201006/2897_1.html>, 14 Dec. 2010.

⁵⁹ China-Chile ATS, Art. 4:3.

⁶⁰ China-Singapore FTA, Art. 112:1; China-Peru FTA, Art. 3:1.

⁶¹ Ministry of Commerce of China, 'China and Pakistan Signed Services Trade Agreement under their Free Trade Area', <http://fta.mofcom.gov.cn/pakistanarticle/chpakistan/pakfwmy/200902/478_1.html>, 14 Dec. 2010.

3.1[b] *Do China's EIAs Satisfy the Coverage Requirement?*

GATS Article V:1(a) establishes the requirement of 'substantial sectoral coverage'. As further elaborated in its footnote, this requirement needs to be construed with respect to 'number of sectors, volume of trade affected and modes of supply'.⁶² However, the interpretation of 'substantial' is crucial. The key issues include whether the sectoral coverage requirement is a quantitative or qualitative test or both, and whether it is GATS consistent to exclude certain services from the scope of EIAs. This part will first probe into these questions and then move on to evaluate China's EIAs.

First, the substantial sectoral coverage requirement seems to be both a quantitative and qualitative test. GATT rules are relevant here.⁶³ In fact it might be inappropriate to consider GATS Article V in isolation from GATT Article XXIV, particularly given that the GATT provides the original framework for the multilateral trading system, which was built around the principle of non-discrimination,⁶⁴ and that GATS rules on EIAs are modelled on GATT and require similar conditions.⁶⁵ During the negotiation, GATS Article V was drafted along the lines of GATT Article XXIV to keep the services framework agreement as parallel to the GATT as possible,⁶⁶ and GATT Article XXIV-type criteria were needed here.⁶⁷ GATT Article XXIV sets out the condition that EIAs shall liberalize 'substantially all the trade' within the EIA.⁶⁸ Although the term 'substantially all the trade' in this GATT Article is different to 'substantial sectoral coverage' in GATS Article V, the former may be relevant to an understanding of

⁶² GATS, Art. V:1(a), n. 1.

GATS Art. I:2 provides for four modes of supply: cross-border supply (mode 1); consumption abroad (mode 2); commercial presence (mode 3); and presence of natural persons (mode 4).

⁶³ Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US—Gambling)*, WT/DS285/AB/R, adopted 20 Apr. 2005, para. 291 (previous decisions under GATT Article XX are found to be relevant to analysis under GATS Art. XIV); Panel Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China—Audiovisual Services)*, WT/DS363/R, adopted 19 Jan. 2010, para. 7.1132 (the statement by the Appellate Body on GATT Art. III:4 is deemed to be relevant to an analysis under GATS Art. XVII).

⁶⁴ Committee on Regional Trade Agreements Twenty-Second Session, Note on the Meetings of 29–30 Apr. and 3 May 1999 ('M/22'), WT/REG/M/22, 4 Jun. 1999, para. 15.

⁶⁵ Markus Krajewski, 'Services Liberalization in Regional Trade Agreements: Lessons for GATS "Unfinished Business"?', in *Regional Trade Agreements and the WTO Legal System*, ed. Lorand Bartels & Federico Ortino (New York: Oxford University Press, 2006), 178.

⁶⁶ Committee on Regional Trade Agreement, Systemic Issues related to 'Substantially all the Trade': Background Note by the Secretariat, Revision, WT/REG/W/21/Rev.1, 5 Feb. 1998, para. 14.

⁶⁷ *Ibid.*, para. 15. Many of the concepts in GATS Art. V have been borrowed from GATT Art. XXIV. Stephenson, *supra* n. 3, at 89.

⁶⁸ GATT, Art. XXIV:8(b). The term 'substantially all' also appears in GATT Art. XXIV:8(a).

the latter as the former provided the background for the latter⁶⁹ and both use the similar term ‘substantial’ and ‘substantially’ in the context of EIA disciplines.

Regarding the GATT term ‘substantially all the trade’, there has been heated debate about whether the criterion should be quantitative, qualitative, or both. Some Members argue for a threshold of at least 80% or 90% liberalization of internal trade. Others argue that both a quantitative test and a qualitative test should apply. In this view, an important sector of the economy, such as agriculture, cannot be left outside the scope of liberalization regardless of its share in trade. Unfortunately the sharp division of positions among the Members has led to very little WTO jurisprudence in terms of the interpretation of ‘substantially all’⁷⁰ and ‘substantially all the trade’ is also one of the ‘systemic issues’ regarding EIAs that the WTO Negotiating Group on Rules highlights.⁷¹ Nevertheless, the Appellate Body in *Turkey-Textiles* indicated that ‘substantially all the trade’ is not the same as all the trade, but is something considerably more than merely some of the trade,⁷² and both the Panel and Appellate Body in this case held that this term appeared to cover both quantitative and qualitative aspects, the quantitative elements being more emphasized in relation to duties.⁷³

The GATS substantial sectoral coverage requirement could also be open to three categories of tests: quantitative, qualitative or hybrid. While the GATT term ‘substantially all the trade’ is given no further clarification,⁷⁴ ‘substantial sectoral coverage’ is elaborated in a footnote to GATS Article V:1(a). This footnote seems to provide an interpretation in both qualitative and quantitative terms, stating that ‘substantial sectoral coverage’ is to be understood in terms of the number of sectors, the trade volume affected and supply modes, and that agreements should not contain *a priori* exclusion of a services supply mode.⁷⁵ The EC proposes that 80% of covered trade is needed to meet this condition,⁷⁶ but it is unclear whether such percentage refers to the trade volume or the Central Product Classification

⁶⁹ Stephenson, *supra* n. 3, at 88.

⁷⁰ Mitsuo Matsushita, ‘Japanese Policies toward East Asian Free Trade Agreements: Policy and Legal Perspectives’, in *Challenges to Multilateral Trade: The Impact of Bilateral, Preferential and Regional Agreements*, ed. Ross Buckley, Vai Io Lo & Laurence Boule (Alphen aan den Rijn, the Netherlands: Kluwer Law International, 2008), 47.

⁷¹ WTO Secretariat, ‘Briefing Notes: Rules’, <www.wto.org/english/tratop_e/dda_e/status_e/rules_e.htm>, 12 Dec. 2010.

⁷² Appellate Body Report, *Turkey-Textiles*, *supra* n. 9, para. 48.

⁷³ *Ibid.*, para. 49.

⁷⁴ Although there is no definition in the GATS, the meaning of the GATT term ‘substantially all the trade’ in terms of sectors (in particular with respect to agriculture), volume or value has been identified as one of the systemic aspects for the examination of RTAs in goods. Committee on Regional Trade Agreements, Checklist of Systemic Issues Identified in the Context of the Examination of Regional Trade Agreements: Note by the Secretariat, WT/REG/W12, 10 Feb. 1997, para. 17.

⁷⁵ GATS, Art. V:1(a).

⁷⁶ Sauv e & Ward, *supra* n. 7, at 22.

list or a combination of both. In the view of the author, the references to number of sectors and trade volume involve quantitative considerations. Meanwhile, the reference to supply modes involves qualitative considerations. The GATS could therefore be deemed to adopt a hybrid test for the sectoral coverage requirement. Given that a quantitative test may not necessarily cover a crucial service sector and a qualitative one may not cover a wide range of service sectors, a hybrid test that incorporates both approaches could be more effective in ensuring a wide coverage of trade by EIAs. Nonetheless, the hybrid test is not devoid of challenges in practice. For instance, for services the quantitative test encounters more difficulties than that for goods. For the GATT term ‘substantially all the trade’, some constructive proposals have been made seeking to apply tariff line, trade volume, and percentage coverage tests to arrive at an applicable formula. However, it would appear to be more difficult to arrive at a similar percentage-type test in the services context.⁷⁷

A second issue is that it could be argued that the exclusion of a single services (sub)sector may still pass the sectoral coverage test. Regarding the GATT term ‘substantially all the trade’, it seems that no ‘major sector of trade’ can be easily excluded.⁷⁸ For the GATS substantial sectoral coverage requirement, one viewpoint is that this test does not allow the exclusion of major service sectors,⁷⁹ and others argue that the test should not permit the exclusion of essential services that function as the infrastructure for economic activity (e.g., transportation services) and that the trade volume affected could be judged from data on domestic economic activities, if data on services trade were not available.⁸⁰ However, such an essentiality test is not expressly mentioned in GATS and the meaning of major or essential services remains vague. Many services may be argued to fall within such a category, and this may make it difficult to apply a test of this sort in practice.⁸¹

However, some light may be shed on whether some sectors may be excluded from EIAs by the GATS provisions. Differing from ‘substantially all’ the trade in the GATT, GATS provides for ‘substantial’ sectoral coverage rather than ‘substantially all’ sectoral coverage. The GATS substantial sectoral coverage requirement sets a lower criterion than its GATT counterpart. Moreover, the wording ‘number of sectors’ in the footnote to GATS Article V:1(a) implies that not all sectors are required to be covered in EIAs. Otherwise, it could simply

⁷⁷ M/22, *supra* n. 64, para. 17.

⁷⁸ Understanding on the Interpretation of Art. XXIV of the General Agreement on Tariffs and Trade 1994, preamble, fourth paragraph.

⁷⁹ M/22, *supra* n. 64, para. 16.

⁸⁰ *Ibid.*, para. 18.

⁸¹ Fink & Molinuevo, 2008, *supra* n. 12, at 660, n. 34.

specifically require that all sectors be covered. Likewise, the footnote to Article V:1(a) specifies that no supply mode can be *a priori* excluded but the same requirement is not extended to sectors or volumes of trade. This may imply that the exclusion of certain (sub)sectors is not prohibited. Therefore, the exclusion of limited sectors, in itself, would not necessary fail the test if an EIA satisfies the trade volume affected and supply mode requirements. The challenge is where to draw the line, and the test would need to be applied on a case-by-case basis as one services EIA could differ substantially from another. For instance, the trade affected by a services EIA among developed Members may be dominated by services provided by commercial presence (mode 3), while presence of natural persons (mode 4) may dominate if the EIA is among developing Members.

It seems likely that China's EIAs are consistent with the substantial sectoral coverage requirement. This part will first analyse the coverage of its EIA agreements and then the coverage of the EIA schedules. As shown above, China's EIA coverage exclusion provisions can be divided into two categories: coverage exclusion stipulations similar to the GATS and those different from the GATS. As far as the former are concerned, they should meet the substantial coverage requirement since the excluded sectors are also outside the coverage of the GATS and therefore are beyond the scope of GATS Article V too. As concerns the latter, it is not immediately clear whether they are GATS-consistent. The (sub)sectors that China's EIAs exclude are cabotage in maritime transport services in the China-Pakistan ATS,⁸² financial services in the China-Chile ATS,⁸³ and air services in the China-Peru FTA.⁸⁴ These exclusions cannot be found in the GATS. However, the footnote to Article V indicates that substantial sectoral coverage is to be understood in terms of, among others things, the trade volume. The trade volume in the excluded services is relatively low and not substantial between China and the relative developing members and so these exclusions could be argued to be GATS-consistent. In contrast, there is no exclusion of service (sub)sectors in China's EIAs with New Zealand and Singapore. As the EIAs have broad coverage, they should be able to satisfy the number of sectors and supply mode requirements. As for the exclusion of government procurement and subsidies from the EIAs, one may argue that this meets the sectoral coverage requirement as this exclusion is not related to the exclusion of any particular sector. Moreover, China's EIAs provide for future GATS disciplines on subsidies to be taken into consideration.⁸⁵ These exclusions are probably due to the facts that

⁸² China-Pakistan ATS, Art. 2:2(e).

⁸³ China-Chile ATS, Arts 1:2, 4:3.

⁸⁴ China-Peru FTA, Art. 105:3(b); China-Chile ATS, Art. 1:2(e) (Specialty air services, airport operation services and ground handling services are covered by the ATS).

⁸⁵ China-Singapore FTA, Art. 60:3(b).

there are no specific rules in the GATS that impose stringent multilateral obligations in these areas, and GATS provisions on MFN treatment, market access and national treatment do not apply to government procurement.⁸⁶ Future GATS provisions on government procurement and subsidies will obviously apply to China and the other parties to its EIAs who are Members.

Concerning the coverage of China's EIA schedules, it could similarly be argued that China meets the requirement. In quantitative terms (number of sectors and trade volume), a number of sectors that should involve a considerable trade volume are covered. Some of the EIAs cover eleven of the twelve sectors in W/120. Moreover, the Mainland-Hong Kong CEPA actually covers all twelve sectors in W/120 including Sector 12 (other services).⁸⁷ The CEPA schedule coverage may also keep on expanding. However, it is notable that insufficient statistics are available for the evaluation of this criterion of trade volume, which is a challenge for nearly all the EIAs in the world. For the requirement in qualitative terms, none of the EIAs exclude any supply mode.

If the GATS consistency argument for the coverage of the schedules and/or EIAs is rejected, one may contend that China's EIAs satisfy the substantial sectoral coverage requirement. First, as these EIAs are based on GATS commitments⁸⁸ and the GATS commitments are also applicable to the EIA parties who are Members, the coverage of the EIAs is in fact as broad as China's GATS commitments, which are much wider than those of other developing Members and are even close to the coverage of the GATS commitments of the United States and EU. The reason why not all of these sectors are listed in the schedules of the earlier EIAs (e.g., China-ASEAN ATS) may be due to a lack of experience and a lack of services trade between the developing EIA parties. Second, GATS Article V:3(a) provides for flexibility for developing Members on the sectoral coverage requirement in accordance with their development level in overall and individual (sub)sectors. It is notable that some of the parties to China's EIAs listed above are developing countries (China, Chile, Pakistan and Peru) and, therefore, are entitled to this preferential treatment. Third, the substantial sectoral coverage requirement is highlighted in some of China's EIAs.⁸⁹ These specific EIAs in services are more likely to be compliant with the GATS. One may argue that they are consistent

⁸⁶ GATS, Arts XV, XIII.

⁸⁷ Supplement to the Mainland-Hong Kong CEPA, Annex 3, 21–24.

⁸⁸ For instance, China-NZ FTA, preamble ('Building on their rights, obligations and undertakings under the Marrakesh Agreement Establishing the World Trade Organization and other multilateral, regional and bilateral agreements and arrangements'); China-ASEAN ATS, preamble, third paragraph (expansion of the depth and scope of services trade with substantial sectoral coverage 'beyond' that undertaken by the parties under the GATS).

⁸⁹ See, e.g., preamble of China-ASEAN ATS (expand the depth and scope of such trade with substantial sectoral coverage).

with the sectoral coverage requirement ‘on the basis of a reasonable time-frame’ as provided by GATS Article V:1, since China’s EIAs provide for progressive liberalization. For instance, Article 23 of the China-ASEAN ATS provides for progressive liberalization. However, the ‘reasonable time-frame’ remains vague and needs to be elaborated.

However, the above analysis is not without controversy and the sectoral coverage issue is not peculiar to China’s EIAs but is relevant to the agreements of other Members. In fact, no East Asian EIA provides for universal sectoral coverage.⁹⁰ For example, the exclusion of financial services can also be found in the Korea-Chile FTA and the Trans-Pacific CEPA, and excluding the air and maritime transport subsectors is common practice.⁹¹ Therefore, several questions need to be clarified further. One issue is the degree to which the exclusion of services fails the substantial coverage requirement. Another issue is how the flexibility on sectoral coverage provided in GATS Article V:3(a) for developing countries is to be applied in terms of the exclusion of service (sub)sectors. A third issue is whether factors other than those indicated in the footnote to Article V are to be considered in interpreting the sectoral coverage requirement.

3.2 ELIMINATION OF DISCRIMINATION

GATS Article V:1 contains a two-layer test on EIAs. Besides the requirement for substantial sectoral coverage, the other part is the elimination of discrimination. EIAs must ensure the absence or elimination of ‘substantially all discrimination’ in the sense of national treatment⁹² through the elimination of current discriminatory measures,⁹³ and/or by prohibiting new or more discriminatory measures.⁹⁴ Unlike the trade in goods, a Member could refuse to grant market access and national treatment to other Members’ services and services suppliers if it has not made such commitments under GATS Articles XVI (market access) and XVII (national treatment). The elimination of discrimination requirement only applies to discrimination in the sense of Article XVII rather than Article XVI. Therefore, measures falling purely into the discipline of market access are not subject to this provision. Like the GATS, measures inconsistent with both market access and national treatment are inscribed in the market access column under

⁹⁰ Carsten Fink & Martín Molinuevo, ‘East Asian Free Trade Agreements in Services: Roaring Tigers or Timid Pandas?’, <http://siteresources.worldbank.org/INTEAPSUMEASPR/Resources/2576847-1163691185244/East_Asian_FTAs_in_Services.pdf>, 1 Jul. 2010, 70.

⁹¹ Cottier & Molinuevo, *supra* n. 3, 131.

⁹² GATS Art. V:1(b). This approach differs from GATT Arts XXIV:8(a)(i) and XXIV:8(b), which require duties and other restrictive regulations of commerce to be eliminated.

⁹³ GATS, Art. V:1(b)(i).

⁹⁴ *Ibid.*, Art. V:1(b)(i).

some of China's EIAs and in some cases it may be difficult to differentiate measures relating to national treatment from those relating to market access.⁹⁵ Furthermore, even some of the market access limitations listed in GATS Article XVI:2 may theoretically and under certain circumstances constitute limitations on national treatment if they modify the conditions of competition.⁹⁶ This makes the determination of substantially all discrimination under the national treatment discipline more complicated. The following analysis mainly focuses on the elimination of discrimination by China (or the Mainland in the context of the domestic CEPAs).

To determine whether there is an absence or elimination of discrimination under the national treatment discipline in the EIAs, it is relevant to study the status of limitations on national treatment under the GATS. Nearly all the signatories of China's EIAs are WTO Members. Moreover, its commitments under China's EIAs are actually based on its GATS commitments. Thus, the level of discrimination under the WTO could therefore constitute the backdrop or a kind of benchmark for a discussion of the elimination of substantially all discrimination in China's EIAs. In China's WTO commitments, usually no restriction exists on national treatment for cross-border supply (mode 1) and consumption abroad (mode 2), apart from a few sectors such as distribution, education services, and motor vehicle financing by non-bank financial institutions. There are also only very limited restrictions on national treatment for mode 3, such as the residence requirement for representatives in legal services. There are, however, some limitations under mode 4. These limitations are either unbound except as indicated in horizontal commitments or else are qualification requirements. In the former case, it means that national treatment is not available 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. In general, upon China's WTO accession 'surprisingly few' limitations were made on national treatment, and in fact China's commitments on national treatment have been found to be deeper and wider than those of all other country groups.⁹⁷ In other words, a striking aspect of China's WTO services commitments is a willingness to commit across modes and sectors to full national treatment for foreign providers.⁹⁸ Under WTO law, China's

⁹⁵ For examples of frequently scheduled national treatment restrictions, see Council for Trade in Services, Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS), S/L/92, 23 Mar. 2001, Attachment 1.

⁹⁶ Measures inconsistent with national treatment obligations may be listed in the market access column of these schedules. For an analysis of the relationship between GATS Arts XVI and XVII, see Petros C. Mavroidis, 'Highway XVI Re-visited: The Road from Non-discrimination to Market Access in GATS', *World Trade Review* 6, no. 1 (2007): 1–23.

⁹⁷ Mattoo, *supra* n. 45, 304, 321.

⁹⁸ *Ibid.*, 304.

permitted discriminatory measures in the national treatment discipline are relatively limited in comparison with other Members.

3.2[a] *Domestic CEPAs*

Among China's EIAs, the two CEPAs have made the most substantial progress in eliminating discrimination. This is mainly due to the fact that they are both arrangements within China's own borders. The Mainland-Hong Kong CEPA stipulates at the outset that services trade shall be progressively liberalized through the 'reduction or elimination of substantially all discriminatory measures'⁹⁹ and closely follows the wording of GATS Article V. The schedules of this CEPA are not divided into two columns of national treatment and market access as in the GATS schedules. Discrimination in the senses of national treatment and market access are thus more difficult to distinguish from each other. In recent years, annual supplements have been added, which highlight the services trade.¹⁰⁰ In these new supplements, new sectors are added and new commitments in previously listed sectors are made,¹⁰¹ progressively eliminating discrimination in the sense of national treatment. From the CEPA in 2003 to its Supplement IV in 2007, 192 liberalization measures were implemented to cover thirty-eight sectors, such as legal, accounting, construction and medical, and two thirds of the measures allow Hong Kong businesses national treatment.¹⁰² Some examples are: the residency requirement is waived for Hong Kong representatives stationed in the Mainland representative offices of Hong Kong law firms (offices);¹⁰³ when Hong Kong accountants apply for a license to practice in the Mainland, the length of auditing experience that they have acquired in Hong Kong is considered equivalent to the length of auditing experience the applicant would have acquired in the Mainland;¹⁰⁴ television dramas co-produced by the Mainland and Hong Kong are subject to the same standard on the number of episodes as that applicable to Mainland-produced ones;¹⁰⁵ relevant enterprises established by Hong Kong

⁹⁹ Mainland-Hong Kong CEPA, Art. 1:2.

¹⁰⁰ Starting from Supplement III to these CEPAs in 2006, there are only annexes on services trade and no annex on the trade in goods.

¹⁰¹ Taking the Supplementary Agreement VII to the CEPA signed in May 2010 as an example, new sectors of 'technical testing, analysis and product testing' and 'specialty design' are added. Xinhuanet, *supra* n. 29.

¹⁰² Xinhua, 'Chinese Mainland, Hong Kong Sign Expanded Economic Accord', <http://news.xinhuanet.com/english/2008-07/29/content_8835431.htm>, 4 Jul. 2010.

¹⁰³ Supplement III to the Mainland-Hong Kong CEPA, 27 Jun. 2006, <www.tid.gov.hk/english/cepa/legaltext/cepa4.html>, 17 Dec. 2006, Annex, 1.

¹⁰⁴ Supplement to the Mainland-Hong Kong CEPA, Annex 3, 2.

¹⁰⁵ Supplement II to the Mainland-Hong Kong CEPA, 18 Oct. 2005, <www.tid.gov.hk/english/cepa/legaltext/cepa3.html>, 3 Nov. 2005, Annex 2, 6.

service providers in the Mainland are subject to the same registered capital requirement as Mainland enterprises in a number of areas (air transport sales agencies,¹⁰⁶ wholly owned job intermediaries in Guangdong Province,¹⁰⁷ printing enterprises providing services in respect of packaging materials,¹⁰⁸ publication distribution enterprises¹⁰⁹); Hong Kong service suppliers must follow the same conditions that are applicable to Mainland practitioners when opening individual clinics.¹¹⁰

Moreover, the Mainland-Hong Kong CEPA contains commitments for other service sectors, such as trademark agencies, patent agencies, and individually owned stores.¹¹¹ These commitments also help to eliminate discrimination in the national treatment discipline. One example is that the waiver of the residence requirement firstly applies to Hong Kong representatives stationed in the Mainland representative offices of Hong Kong law firms in Shenzhen and Guangzhou¹¹² and is then expanded to Hong Kong representatives in such offices throughout the Mainland.¹¹³ Similarly, enterprises established by Hong Kong service suppliers to provide air transport sales agency services are subject to an equal registered capital requirement. Such treatment was originally applied to enterprises in the form of equity joint ventures or contractual joint ventures, and then expanded to wholly owned ones.¹¹⁴ The Mainland-Hong Kong CEPA expressly requires that existing restrictive measures against services and service suppliers shall be progressively reduced or eliminated,¹¹⁵ and generally, new or more discriminatory measures are prohibited.¹¹⁶

3.2[b] *International EIAs*

With regard to the international EIAs, several observations can be made. First, compliance with GATS Article V is highlighted in their wording. Such compliance is either by means of a direct declaration or by means of the adoption of similar wording to the GATS. Although it cannot be considered conclusive,

¹⁰⁶ *Ibid.*, 12; Supplement III to the Mainland-Hong Kong CEPA, Annex, 8.

¹⁰⁷ Supplement V to the Mainland-Hong Kong CEPA, 29 Jul. 2008, <www.tid.gov.hk/english/cepa/legaltext/cepa6.html>, 2 Sep. 2008, Annex, 5.

¹⁰⁸ *Ibid.*, 7.

¹⁰⁹ Supplement VI to the Mainland-Hong Kong CEPA, 9 May 2009, <www.tid.gov.hk/english/cepa/legaltext/cepa7.html>, 3 Jul. 2009, Annex, 12.

¹¹⁰ Supplement IV to the Mainland-Hong Kong CEPA, Annex, 2.

¹¹¹ Supplement to the Mainland-Hong Kong CEPA, Annex 3, 21–24.

¹¹² Mainland-Hong Kong CEPA, Annex 4, Table 1, 4.

¹¹³ Supplement III to the Mainland-Hong Kong CEPA, Annex, 1.

¹¹⁴ *Ibid.*, 8; Supplement II to the Mainland-Hong Kong CEPA, Annex 2, 12.

¹¹⁵ Mainland-Hong Kong CEPA, Art. 11:1.

¹¹⁶ See, for instance, Mainland-Hong Kong CEPA, Annex 4, para. 5.

such expressions of compliance show an intention to fit within GATS Article V and could support the EIAs being interpreted as WTO-compliant. For instance, the China-Singapore FTA also indicates that the liberalization and promotion of services trade is to be consistent with GATS Article V;¹¹⁷ the China-Peru FTA confirms consistency with GATS Article V as the underlying principle for the establishment of the free trade area;¹¹⁸ and the China-ASEAN ATS begins by requiring the elimination of ‘substantially all discrimination’ and/or the ‘prohibition of new or more discriminatory measures with respect to trades in services’.¹¹⁹ This provision closely follows GATS Article V:1(b).

Second, the commitments in these EIAs are built on WTO commitments. The China-Singapore FTA expressly reaffirms the desire to ‘build upon [the parties’] commitments’ to the WTO.¹²⁰ In the China-Chile ATS, the two parties’ GATS schedules are incorporated, except for financial services.¹²¹ Similarly, the commitments in respect of mode 4 in the GATS schedules of the two signatories are incorporated into the China-NZ FTA.¹²² In the other EIAs, the practice is similar: the Free Trade Agreement between China and Pakistan (China-Pakistan FTA) affirms their rights and obligations with respect to each other under the WTO Agreement;¹²³ and the China-Pakistan FTA is built on their respective rights and obligations under the WTO Agreement and other multilateral, regional and bilateral instruments of cooperation.¹²⁴ The same approach seems to exist in the China-Pakistan ATS.

Third, for some service (sub)sectors, there is an elimination of discrimination in the sense of national treatment. For instance, services incidental to mining, which are not found in China’s WTO commitments, are added to China’s schedule under the China-Peru FTA and limitations on national treatment for modes 2 and 3 are abolished for this service subsector.¹²⁵ China has also made commitments on national treatment under China-Pakistan ATS, which is not found in China’s GATS commitments.¹²⁶ More substantial progress can be found

¹¹⁷ China-Singapore FTA, Art. 2:(b).

¹¹⁸ China-Peru FTA, Art. 2.

¹¹⁹ China-ASEAN ATS, preamble, para. 3.

¹²⁰ China-Singapore FTA, preamble, para. 11.

¹²¹ China-Chile ATS, Art. 4:3.

¹²² China-NZ FTA, Annex 10, Part A, para. 2, Part B, para. 3.

In the China-NZ FTA, specific commitments under modes 1, 2 and 3 are collected in Annex 8. Separated from other modes, the specific commitments in respect of mode 4 are set out in Annex 10.

¹²³ Free Trade Agreement between the Government of the People’s Republic of China and the Government of the Islamic Republic of Pakistan (China-Pakistan FTA), 24 Nov. 2006, <http://fta.mofcom.gov.cn/pakistan/xieyi/fta_xieyi_en.pdf>, 1 Jan. 2007.

¹²⁴ *Ibid.*, preamble, third paragraph.

¹²⁵ China-Peru FTA, Annex 6, Section A, 14.

¹²⁶ For instance, China-Pakistan ATS, China’s Schedule of Specific Commitments, 30 (Sector 5, for modes 2 and 4).

in the commitments of some of the partners. For instance, Pakistan has eliminated the limitations on national treatment as well. In the China-Pakistan ATS, it opens fifty-six services sectors and subsectors that are not committed under the WTO,¹²⁷ and for many of the newly opened sectors and subsectors, there is an elimination of discriminatory measures in the sense of national treatment, particularly for modes 1 and 2, and sometimes for mode 3. These newly opened sectors include distribution services,¹²⁸ educational services,¹²⁹ transport services,¹³⁰ and recreational, cultural and sporting services.¹³¹ Elimination of discrimination in the discipline of national treatment can also be found in newly opened subsectors such as computer and related services,¹³² courier services,¹³³ architectural services,¹³⁴ veterinary services,¹³⁵ printing and publishing,¹³⁶ and services provided by midwives, nurses, physiotherapists, and para-medical personnel.¹³⁷ These commitments are consistent with the observation that the China-Pakistan ATS is the most liberal and comprehensive services FTA ever signed by either China or Pakistan with other countries.¹³⁸

3.2[c] *Do China's EIAs Satisfy the Requirement on Eliminating Discrimination?*

Based on the above cursory review of the actual level of liberalization provided in these agreements, two features are found in terms of eliminating discrimination in the national treatment discipline. One is that generally there are not many new commitments by China on national treatment in China's EIAs, except in the two CEPAs. More commitments are embodied in terms of market access. The reason for this is probably that China's WTO commitments at its WTO accession on national treatment are much deeper and wider in comparison with other Members. Given this, it is not surprising to find that the service commitments in China's EIAs do not go much further. In current EIA practice, it is in fact rare to have full national treatment in service EIAs. For instance, none of the East Asian preferential trade agreements provide for full national treatment across all sectors

¹²⁷ Ministry of Commerce of China, Ministry of Commerce Answering Questions on Agreement on Trade in Services between China and Pakistan, <www.gov.cn/gzdt/2009-02/23/content_1240315.htm>, 30 Feb. 2009.

¹²⁸ China-Pakistan ATS, Pakistan's Schedule of Specific Commitments, 28.

¹²⁹ *Ibid.*, 29.

¹³⁰ *Ibid.*, 46–50.

¹³¹ *Ibid.*, 45.

¹³² *Ibid.*, 11–13.

¹³³ *Ibid.*, 18.

¹³⁴ *Ibid.*, 8.

¹³⁵ *Ibid.*, 10.

¹³⁶ *Ibid.*, 16.

¹³⁷ *Ibid.*, 11.

¹³⁸ Ministry of Commerce of China, *supra* n. 127.

and modes.¹³⁹ The other feature of China's EIAs in terms of eliminating discrimination is that its WTO commitments are the basis for its EIA commitments, indicating that new or more discriminatory measures are not allowed.

The GATS requires the absence or elimination of 'substantially all discrimination' in the sense of national treatment through the elimination of current discriminatory measures¹⁴⁰ (liberalization obligation)¹⁴¹ 'and/or' prohibiting new or more discriminatory measures (standstill obligation).¹⁴² This has to be looked at 'in the sectors covered under subparagraph (a)', that is, substantial sector coverage. A main issue is whether an exclusively forward looking agreement is adequate to meet the elimination of discrimination condition. One possible interpretation is that compliance with the liberalization or standstill obligation alone will entail compliance with the elimination of discrimination requirement, that is, that Members may choose the standstill obligation and refrain from taking new discriminatory measures to meet the elimination of discrimination requirement. Such an interpretation can hardly be justified. First, it would make no sense for GATS Article V to set elimination of discrimination requirement for EIAs, which can be fulfilled by a standstill obligation since the GATS multilateral disciplines already prohibit Members from withdrawing their commitments on the elimination of discrimination.¹⁴³ Second, such an interpretation is also against the aims of the EIAs. EIAs typically aim to achieve higher levels of liberalization between or among their parties than that achieved among WTO Members.¹⁴⁴ Third, a standstill obligation by itself does not always guarantee the 'absence or elimination of substantially all discrimination' as required by GATS Article V. Theoretically, there could be numerous discriminations and a standstill obligation only indicates that the number of discriminations will not increase in the future. Finally, such an interpretation is against the context of GATS Article V: the GATT 1994.¹⁴⁵ Under GATT Article XXIV:4, Members recognize the desirability of increasing the freedom of trade by the development of closer integration between parties, and the purpose of EIAs is to facilitate trade

¹³⁹ Fink & Molinuevo, 2008, *supra* n. 12, 662.

¹⁴⁰ GATS, Art. V:1(b)(i).

¹⁴¹ *Ibid.*, Art. V:1(b)(i).

¹⁴² *Ibid.*, Art. V:1(b)(ii).

¹⁴³ Under GATS Art. XXI:2(a), Members may withdraw or modify their commitments but need to make compensatory adjustment and to maintain a general level of mutually advantageous commitments not less favorable to trade than that originally provided for in schedules.

¹⁴⁴ Panel Report, *Canada-Autos*, *supra* n. 8, para. 10.271.

¹⁴⁵ Appellate Body Report, *US-Gambling*, *supra* n. 63, para. 291 (previous decisions under GATT Art. XX are found to be relevant for the analysis under GATS Art. XIV); Panel Report, *China-Audiovisual Services*, *supra* n. 63, para. 7.1132 (the statement by the Appellate Body on GATT Art. III:4 is deemed to be relevant to an analysis under GATS Art. XVII).

between the parties. A standstill obligation alone could not easily fit in this context.

Therefore, both a liberalization obligation and a standstill obligation are the means of providing the ‘absence or elimination of substantially all discrimination’ in GATS Article V:1(b). It has been suggested that the liberalization obligation applies to sectors and modes in which many discriminatory measures are in force, and the standstill obligation applies in sectors and modes that are being liberalized or have previously been subject to unilateral liberalization (i.e., the absence of discrimination will be maintained).¹⁴⁶ It might therefore be reasonable to assume that Members may choose the standstill obligation to justify their EIAs only if they can prove the ‘absence or elimination of substantially all discrimination’.

However, reading the article as a whole,¹⁴⁷ it seems to be the drafter’s intention to strike a proper balance between two extreme situations. One of these is an over-strict interpretation of ‘substantially all discrimination’ (given that the article uses the expression ‘and/or’ and theoretically the language indicates the possibility of satisfying the requirement with a standstill obligation, and that the Doha Ministerial Declaration recognizes negotiations must take into account the ‘developmental’ aspects of EIAs, which may be interpreted as not imposing too harsh a requirement on EIAs¹⁴⁸) and the other is a mere prohibition of new or more discrimination (because the requirement of eliminating substantially all discrimination has to be satisfied). Logically, there should be a slight preference for the former as the ‘elimination of substantially all discrimination’ is the object of this paragraph. Similarly, economic integration is the title of Article V, which must surely mean more than merely standing still. Nevertheless, it should be noted that Article V:1(b)(i) does not say the elimination of *all* or even *substantially all* existing discriminatory measures. An over-emphasis on either of the two extremes may be against the principle of effective interpretation and the GATS principle of progressive liberalization. Weighing and balancing different factors may be necessary.

Returning to China’s EIAs, the elimination of discrimination is usually to be found in the EIA schedules rather than in the EIA agreement. One may argue that they meet the requirement of eliminating discrimination for the following reasons.

¹⁴⁶ Cottier & Molinuevo, *supra* n. 3, 136–137.

¹⁴⁷ One main interpretative issue – at least according to views expressed by Members – is whether the test is either (a) the absence or elimination of substantially all discrimination (where a liberalization obligation and a standstill obligation are just examples of means to achieve that goal) or (b) a liberalization obligation and/or a standstill obligation. However, this seems to artificially segment the elimination of discrimination requirement and there seem to be no words such as ‘including’ in Art. V which indicate that a liberalization obligation and a standstill obligation are just examples of means to realize the goal.

¹⁴⁸ Doha Ministerial Declaration, *supra* n. 10, para. 29.

First, China's EIAs make eliminations of discriminatory rules, particularly for national treatment, as found in the Mainland-Hong Kong CEPA and the China-Pakistan ATS. Some of the EIAs also expressly provide for the elimination of substantially all discrimination.¹⁴⁹ Moreover, one may argue that they are consistent with the discrimination elimination requirement 'on the basis of a reasonable time-frame' as provided by GATS Article V:1, since China's FTAs provide for progressive liberalization. For instance, Article 23 of China-ASEAN ATS provides for progressive liberalization.

Second, consideration 'may be given' to the relationship of the EIAs to a wider process of economic integration or trade liberalization among the parties concerned.¹⁵⁰ This consideration is subject to different or even controversial interpretations.¹⁵¹ The drafting history of GATS Article V:2 supports the argument that a 'wider process of economic integration' could be construed as one involving the elimination of trade barriers not only in services but also in goods.¹⁵² For the 'wider process of integration' involving services trade, China's market access commitments, higher transparency and good governance requirements, and others aspects (e.g., provisions and commitments on the movement of natural persons, MFN treatment, improved safeguard provision, stricter payments and transfers requirements, closer links between investment and services) of its EIAs could potentially be relevant. For trade in goods, the 'wider process of economic integration or trade liberalization among the countries concerned' should include, at least, EIAs identified in the goods area, such as customs unions, free-trade areas and interim agreements leading to the formation of customs unions or free-trade areas, all of which are covered by GATT Article XXIV.¹⁵³ Reading the provision carefully, the parallel reference to 'economic integration' and 'trade liberalization' seems to indicate areas other than trade, such as investment. Therefore, the bilateral investment treaties (BITs) that China and its other EIA parties have signed may constitute such a wider process of economic integration or trade liberalization. The BITs deal with mode 3 for services trade.¹⁵⁴ These BITs may be invoked by China to argue its compliance with the elimination of discrimination requirement.¹⁵⁵

¹⁴⁹ See, e.g., preamble of China-ASEAN ATS (eliminate substantially all discrimination and/or prohibition of new or more discriminatory measures with respect to services trade between the Parties).

¹⁵⁰ GATS, Art. V:2.

¹⁵¹ Cottier & Molinuevo, *supra* n. 3, 139–140.

¹⁵² Committee on Regional Trade Agreements, Synopsis of 'Systemic' Issues related to Regional Trade Agreements ('Synopsis of RTA "Systemic" Issues'), WT/REG/W/37, 2 Mar. 2000, para. 85(a).

¹⁵³ M/22, *supra* n. 64, para. 18.

¹⁵⁴ Federico Ortino & Audley Sheppard, 'International Agreements Covering Foreign Investment in Services: Patterns and Linkages', in *Regional Trade Agreements and the WTO Legal System*, ed. Lorand Bartels & Federico Ortino (New York: Oxford University Press, 2006), 212.

¹⁵⁵ The great majority of BITs deal with post-establishment.

Third, and more importantly, the special treatment allowed for developing Members may be invoked to prove GATS consistency. Developing Members are expressly allowed flexibility regarding the elimination of discrimination in consistency with their development level both overall and that of individual (sub)sectors.¹⁵⁶ Given that this flexibility is provided ‘particularly’ with reference to the elimination of discrimination, such flexibility could be substantial.

Given the special treatment allowed to developing members, China’s EIAs may be argued to be compliant with the GATS since they prohibit the introduction of new or more discriminatory measures and eliminate certain discriminatory measures. Moreover, discriminatory measures justified under GATS Articles XI (payments and transfers), XII (restrictions to safeguard the balance of payments), XIV (general exceptions) and XIV *bis* (security exceptions) are exempted under GATS Article V.¹⁵⁷

Having said this, the interpretation of the discrimination elimination requirement deserves more attention, and GATT jurisprudence may be relevant. However, the concept of ‘substantially all discrimination’ in GATS Article V:1(b) is probably a little more difficult to interpret than the concept of ‘substantially all the trade’ in GATT Article XXIV.¹⁵⁸ More illustration is also needed on how to understand the flexibility in discrimination elimination that developing Members enjoy under GATS Article V:3(a).

3.3 CONCLUSION

The above analysis indicates that a number of open issues exist in the interpretation of GATS Article V in terms of the sectoral coverage and elimination of discrimination requirements. The ambiguity may lead to different or even opposite readings of this article. Therefore some sort of tests for Article V need to be further articulated.

4 MORE THAN THE GATS: GATS COMMITMENTS AS A THRESHOLD IN INTERPRETING ARTICLE V?

4.1 WHY COULD GATS COMMITMENTS BE A POSSIBLE THRESHOLD?

The substantial sectoral coverage and elimination of discrimination requirements are probably the most difficult challenges in interpreting GATS Article V and a test for conformity with them is needed. There is no previous case-law or practice.

¹⁵⁶ GATS, Art. V:3(a).

¹⁵⁷ *Ibid.*, Art. V:1(b).

¹⁵⁸ M/22, *supra* n. 64, para. 17.

A similar issue has arisen in the GATT. For instance, the GATT term ‘substantially all the trade’ is among the most contentious issues,¹⁵⁹ and neither the GATT Contracting Parties nor the Members have ever reached an agreement on the interpretation of the term ‘substantially’ in GATT Article XXIV.¹⁶⁰ Interpreting the GATS substantial sectoral coverage requirement will be equally if not more contentious. I argue that WTO commitments may serve as a benchmark (GATS commitments test) for evaluating the GATS substantial sectoral coverage and elimination of discrimination requirements. Such an evaluation can probably be conducted on a case-by-case basis.

Both substantial sectoral coverage and the elimination of substantially all discrimination focus on ‘substantial’ or ‘substantially’. Practically it will be very difficult, if not impossible, for over 153 Members to decide the meaning of these terms – a key issue for services EIAs. They are stipulated in GATS Article V:1 and share similar ordinary meaning, contexts, and purposes. This part, therefore, focuses on interpreting the term ‘substantial’ in ‘substantial sector coverage’ and the discussion can also generally be applied to ‘substantially’ in the elimination of discrimination requirement.

To start with, the Vienna Convention on the Law of Treaties (VCLT), and in particular its Articles 31 and 32, have the status and form part of the ‘customary rules of interpretation of public international law’ provided by Article 3:2 of Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).¹⁶¹ Under VCLT Article 31:1, a treaty must be construed in good faith in accordance with the ordinary meaning to be given to the treaty terms, read in their context and in the light of its object and purpose.

Interpretation starts from the ordinary meaning of the ‘raw’ text of the treaty provisions and then endeavours to construe it in its context and in the light of the treaty’s object and purpose.¹⁶² The words of the treaty form the foundation for the interpretative process, and interpretation shall be based ‘above all upon the text of the treaty’.¹⁶³ If the meaning imparted by the text is equivocal or inconclusive or if confirmation of the correctness of a reading of the text is desired, light from

¹⁵⁹ Thomas Cottier & Marina Foltea, ‘Constitutional Functions of the WTO and Regional Trade Agreements’, in *Regional Trade Agreements and the WTO Legal System*, ed. Lorand Bartels & Federico Ortino (New York: Oxford University Press, 2006), 59.

¹⁶⁰ Appellate Body Report, *Turkey–Textiles*, *supra* n. 9, para. 48.

¹⁶¹ Appellate Body Report, *United States–Standards for Reformulated and Conventional Gasoline (US–Gasoline)*, WT/DS2/AB/R, adopted 20 May 1996, 15; Appellate Body Report, *Japan–Taxes on Alcoholic Beverages (Japan–Alcoholic Beverages II)*, WT/DS10/AB/R, WT/DS11/AB/R, WT/DS8/AB/R, adopted 1 Nov. 1996, 9.

¹⁶² Panel Report, *United States–Sections 301-310 of the Trade Act of 1974 (US–Section 301 Trade Act)*, WT/DS152/R, adopted 27 Jan. 2000, para. 7.22.

¹⁶³ Appellate Body Report, *Japan–Alcoholic Beverages II*, *supra* n. 161, 10.

the object and purpose of the treaty as a whole may be sought.¹⁶⁴ The elements codified in Article 31:1 – text, context, object-and-purpose, and good faith – are to be viewed as ‘one holistic rule of interpretation rather than a sequence of separate tests to be applied in a hierarchical order’.¹⁶⁵ Interpretation pursuant to the customary rules referred to in VCLT Article 31 cannot be mechanically subdivided into rigid components.¹⁶⁶

Therefore, it is necessary to examine the ordinary meaning of ‘substantial’ read in its context and in the light of the object and purpose. To identify the ordinary meaning, we may start with the dictionary definitions of the terms to be interpreted.¹⁶⁷ The interpreter begins with and focuses on the text of the particular provision in question.¹⁶⁸ ‘Substantial’ is defined as ‘being largely but not wholly that which is specified’¹⁶⁹ or ‘of considerable importance, size, or worth’.¹⁷⁰ Similar definitions can be found in other dictionaries. However, the ordinary meaning of ‘substantial’ can hardly help to explain whether service (sub)sectors can be excluded and if so where the line should be drawn. Moreover, dictionaries alone are not necessarily able to resolve complex interpretation questions,¹⁷¹ since they typically catalogue all meanings of words – be they common or rare, universal or specialized.¹⁷²

Regarding the context of GATS Article V:1(a), it is necessary to analyse the remaining items under Article V:1 and the other sub-paragraphs of Article V.¹⁷³ As regards the former, Article V:1(b) refers to the absence or elimination of

¹⁶⁴ Appellate Body Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products (US–Shrimp)*, WT/DS58/AB/R, adopted 6 Nov. 1998, para. 114.

¹⁶⁵ Panel Report, *US–Section 301 Trade Act*, *supra* n. 162, para. 7.22.

¹⁶⁶ Appellate Body Report, *European Communities–Customs Classification of Frozen Boneless Chicken Cuts (EC–Chicken Cuts)*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 Sep. 2005, para. 176.

¹⁶⁷ Appellate Body Report, *US–Gambling*, *supra* n. 63, para. 164.

¹⁶⁸ Appellate Body Report, *US–Shrimp*, *supra* n. 164, para. 114.

¹⁶⁹ Merriam Webster Dictionary, ‘Substantial’, <www.merriam-webster.com/dictionary/substantial>, 25 Nov. 2000.

¹⁷⁰ Compact Oxford English Dictionary, ‘Substantial’, <http://english.oxforddictionaries.com/view/entry/m_en_gb0825470#m_en_gb0825470>, 25 Nov. 2000.

¹⁷¹ Appellate Body Report, *United States–Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada (US–Softwood Lumber IV)*, WT/DS257/AB/R, adopted 17 Feb. 2004, para. 59; Appellate Body Report, *Canada–Measures Affecting the Export of Civilian Aircraft (Canada–Aircraft)*, WT/DS70/AB/R, adopted 20 Aug. 1999, para. 153; Appellate Body Report, *European Communities–Measures Affecting Asbestos and Asbestos-Containing Products (EC–Asbestos)*, WT/DS135/AB/R, adopted 5 Apr. 2001, para. 92.

¹⁷² Appellate Body Report, *US–Gambling*, *supra* n. 63, para. 164.

¹⁷³ The Article itself is an important context for one of its sub-paragraph, and the Appellate Body has taken the Article as the context: ‘Looking to the context of sub-paragraph (a), we observe that the chapeau to Article XVI: 2, refers to the purpose of the sub-paragraphs that follow, namely, to define the measures which a Member shall not maintain or adopt for sectors where market access commitments are made.’ Appellate Body Report, *US–Gambling*, *supra* n. 63, para. 232.

As regards the interpretation of subparagraph (a) of GATS Art. I:2, the panel turned to subparagraphs (c) and (d) for support. Panel Report, *Mexico–Measures Affecting Telecommunications Services (Mexico–Telecoms)*, WT/DS204/R, adopted 1 Jun. 2004, para. 7.31.

substantially all discrimination in the sense of national treatment of Members' WTO commitments. As regards the latter, GATS Article V:5 refers to GATS 'schedules' as regards the withdrawal of commitments. Both contexts clearly indicate that EIAs are actually based on or related to the WTO commitments of the EIA parties. WTO commitments could be the basis for interpreting substantial sectoral coverage. Moreover, GATS Article V:4 requires that EIAs shall not raise the overall level of barriers to services trade compared to the level applicable prior to their agreement. As the level of trade barriers prior to the establishment of EIAs are in many cases based on GATS commitments, it seems that Article V:4 also supports using WTO commitments as the baseline for interpreting Article V.

Another important context is GATT 1994, but the term 'substantially all the trade' in GATT Article XXIV is equally vague. Members' schedules and the provisions of agreements covered other than the GATS could constitute the context.¹⁷⁴ The schedules themselves do not help to explain the meaning of 'substantial'. Context could also refer to an agreement or acceptance of the parties to the treaty. Only when there exists sufficient evidence of an 'agreement relating to the treaty' between the parties or of their 'accept[ance by the parties] as an instrument related to the treaty', can the document be deemed as context.¹⁷⁵ There is no such document for the interpretation of 'substantial'.

The object and purpose should also be considered. In the phrase 'read in their context and in the light of its object and purpose', the use of the singular word 'its' preceding the term 'object and purpose' in VCLT Article 31:1 indicates that it refers to the treaty as a whole, but the object and purpose of particular treaty terms could also be considered if this assists in determining the treaty's object and purpose as a whole.¹⁷⁶ The object and purpose of the entire treaty and a treaty provision should be brought together¹⁷⁷ and should not be isolated from each other.¹⁷⁸ The objects of the GATS as stated in its preamble include transparency, the progressive liberalization of services trade, and Members' right to regulate services trade provided that they respect other Members' rights under the GATS.¹⁷⁹ The GATS preamble indicates the Members' wish for progressive liberalization and desire for the achievement of progressively higher levels of liberalization.¹⁸⁰ The purpose of GATS Article V is to allow for 'ambitious liberalization to take place at a regional level, while at the same time guarding

¹⁷⁴ Appellate Body Report, *US–Gambling*, *supra* n. 63, para. 178.

¹⁷⁵ *Ibid.*, para. 175.

¹⁷⁶ Appellate Body Report, *EC–Chicken Cuts*, *supra* n. 166, para. 238.

¹⁷⁷ Appellate Body Report, *European Communities–Conditions for the Granting of Tariff Preferences to Developing Countries (EC–Tariff Preferences)*, WT/DS246/AB/R, adopted 20 Apr. 2004, paras 91–103.

¹⁷⁸ Appellate Body Report, *EC–Chicken Cuts*, *supra* n. 166, para. 239.

¹⁷⁹ Appellate Body Report, *US–Gambling*, *supra* n. 63, n. 271, paras 188–189.

¹⁸⁰ GATS, preamble.

against undermining the MFN obligation by engaging in minor preferential arrangements'.¹⁸¹ As indicated by the WTO Secretariat, the substantial sectoral coverage requirement 'is designed to prevent the conclusion of regional agreements with limited coverage, for example covering one or few sectors, or exchanging preferential treatment in limited domains such as foreign direct investment'.¹⁸² The substantial sectoral coverage requirement promotes trade creation and tries to contain trade diversion, to which randomly agreed sectoral agreements are likely to contribute.¹⁸³ The objectives of EIAs and those of the WTO are complementary and should be interpreted consistently with each other, with a view to increasing trade and to not raising trade barriers.¹⁸⁴ As EIAs typically aim to achieve higher levels of liberalization between or among their parties than that achieved among WTO Members,¹⁸⁵ EIAs whose sectoral coverage is narrower than the GATS commitments are probably not consistent with the objective of the progressive liberalization of services trade. The above interpretation is consistent with the object and purpose of GATS Article V.

As another important aspect of the general rules of interpretation, subsequent agreements, practices and relevant international rules are also to be considered with the context.¹⁸⁶ Moreover, a special meaning can be given to a term if the parties so intended.¹⁸⁷ The practice here must be based on 'a common, consistent, discernible pattern of acts or pronouncements', which imply agreement on the relevant provision's interpretation.¹⁸⁸ Not even panel reports adopted by the GATT or WTO constitute the subsequent practice, since an isolated act generally does not suffice to establish subsequent practice.¹⁸⁹ We find no such subsequent agreement, practice, international rules or special meaning to help construe the term 'substantial'.

To sum up, the ordinary meaning of 'substantial' is inconclusive, but the context, object and purpose support GATS commitments as a benchmark. The general rule of interpretation, taking all factors into consideration, could help to interpret the term 'substantial' by setting GATS commitments as a threshold. There seems to be no need to turn to the supplementary means of interpretation pursuant to VCLT Article 32, which is used to determine meaning when interpretation according to Article 31 leaves a term's meaning 'ambiguous or

¹⁸¹ Panel Report, *Canada—Autos*, *supra* n. 8, para. 10.271.

¹⁸² WTO Secretariat document, <www.wto.org/english/thewto_e/whatis_e/eol/e/wto06/wto6_17.htm>, 10 Apr. 2006, cited in Ortino and Sheppard, *supra* n. 154, 211.

¹⁸³ Cottier & Molinuevo, *supra* n. 3, 132.

¹⁸⁴ Panel Report, *Turkey—Textiles*, *supra* n. 5, para. 9.163.

¹⁸⁵ Panel Report, *Canada—Autos*, *supra* n. 8, para. 10.271.

¹⁸⁶ VCLT, Art. 31:(3).

¹⁸⁷ *Ibid.*, Art. 31:(4).

¹⁸⁸ Appellate Body Report, *US—Gambling*, *supra* n. 63, para. 192.

¹⁸⁹ Appellate Body Report, *Japan—Alcoholic Beverages II*, *supra* n. 161, 11–13.

obscure' and which includes the 'preparatory work of the treaty and the circumstances of its conclusion'. Moreover, the Doha Ministerial Declaration stresses the commitment to the WTO as the unique forum for global trade rule-making and liberalization, while recognizing that EIAs can play an important role in promoting the liberalization and expansion of trade and in fostering development.¹⁹⁰ This statement also supports the view that EIAs should further liberalize trade and the WTO commitments could be a baseline. The multilateral and preferential liberalization of services trade also inform each other in many ways.¹⁹¹ The EIA parties' compliance with GATS Article V cannot be assessed in isolation, and the scope and depth of their GATS commitments matter as well.¹⁹²

Therefore, it seems fair to argue that GATS commitments could be the possible threshold for interpreting substantial sectoral coverage. Similarly, WTO commitments could also serve as a baseline for interpreting the elimination of discrimination requirement as the interpretation of 'substantially' here is similar to that of 'substantial' in the substantial sectoral coverage requirement.¹⁹³

4.2 HOW COULD GATS COMMITMENTS WORK AS A THRESHOLD?

This section considers the application of a GATS commitments test in practice. It first discusses the technical details and then moves on to a consideration of its feasibility and reasonableness. The key aspects covered by the test are sectoral coverage, the elimination of discrimination, and the flexibility that is to be accorded to developing Members.

4.2[a] *Substantial Sectoral Coverage*

Pursuant to a GATS commitments test, EIAs should not exclude (sub)sectors from their coverage under the sectoral coverage requirement. There are two scenarios under which the GATS commitments test may be applied. One is the coverage of EIAs whose GATS counterpart is the GATS coverage. The other is the coverage of EIA parties' EIA schedules whose GATS counterpart is the Members' GATS schedules. The substantial sectoral coverage requirement is applicable under both scenarios. Footnote 1 to GATS Article V:1(a) indicates that the sectoral coverage

¹⁹⁰ Doha Ministerial Declaration, *supra* n. 10, para. 4.

¹⁹¹ Marchetti & Roy, *supra* n. 37, 62.

¹⁹² Adlung & Morrison, *supra* n. 12, 1106.

¹⁹³ In view of the large gap between EIA commitments and GATS offers for a number of Members, one may wonder whether the ongoing EIA development has not incited some Members to make minimal offers to retain further negotiating chips (i.e., bindings) to offer in EIA negotiations. See Martin Roy, Juan Marchetti, & Hoe Lim, 'Services Liberalization in the New Generation of Preferential Trade Agreements (PTAs): How Much Further than the GATS?', *World Trade Review* 6, no. 2 (2007): 186.

requirement is to be understood ‘in terms of number of sectors, volume of trade affected, and modes of supply’, among others. The reference to ‘number of sectors’ seems to indicate that substantial sectoral coverage needs to apply to EIA schedules. The phrase ‘such an agreement has substantial sectoral coverage’ in GATS Article V:1 also indicates that this condition applies to the EIAs themselves. For the first scenario, the GATS applies to Members’ measures affecting trade in ‘services’¹⁹⁴ and the term ‘service’ includes any service with very limited exceptions.¹⁹⁵ Therefore, the GATS provides for quite a wide sectoral coverage. EIAs should be able to pass the sectoral coverage test if they do not exclude (sub)sectors included in the GATS coverage. Moreover, sectors excluded by the GATS do not fall within the coverage of GATS Article V. For EIAs modelled on the GATS (e.g., China’s international EIAs), WTO-plus general obligations and disciplines, if any, will apply to sectors not listed in the schedules. Therefore, when EIAs generally have at least the same coverage as the GATS agreement, it makes sense that even sectors that are not covered in the schedules could be subject to WTO-plus obligations.¹⁹⁶

For the second scenario, the coverage of EIA schedules theoretically should be considered in terms of number of sectors, trade volume, and supply modes when it is compared with GATS ones. Due to the technical difficulties in trade volume data, the number of sectors and supply modes are more practical considerations here. Meanwhile, a good number of sectors presumably may mean a considerable amount of trade. In terms of supply mode, the GATS commitments test means that the EIA schedules should cover four modes. In terms of the number of sectors, the test requires that the coverage of EIA parties’ schedules should in fact be at least as broad as their GATS counterparts, and that the term ‘substantial’ should be at least more than ‘half’, and substantial sectoral coverage could mean EIA schedules need to, in fact, cover at least half of the twelve sectors listed in W/120,¹⁹⁷ which means around six sectors. One may doubt that seeing how many of the twelve sectors are committed is very telling as there could be only commitments in one sub-sector of a specific sector (e.g., only legal services commitments under the sector of business services, which could even be ‘unbound’ for modes 1 and 2). On the one hand, the footnote to Article V:1 only

¹⁹⁴ GATS, Art. I:1.

¹⁹⁵ *Ibid.*, Art. I:3 (the GATS is not applicable to services supplied in the exercise of governmental authority); *Ibid.*, Annex on Air Transport Services, para. 2 (the GATS is not applicable to traffic rights and services directly related to the exercise of traffic rights).

¹⁹⁶ For instance, China’s EIAs contain some GATS-plus general obligations such as enhanced transparency and good governance requirements. See, for instance, China-Chile ATS, Arts 8:2, 10:2 and Annex I, para. 4 (b); China-Peru FTA, Arts 114, 113:2; China-ASEAN ATS, Art. 5:3; China-Singapore FTA, Arts 65:3, 82; China-NZ FTA, Arts 111:3, 115.

¹⁹⁷ W/120, *supra* n. 47.

requires the number of sectors and there is no explicit requirement that the commitments be made in every or most subsectors, and the coverage requirement seems to have no relationship with the limitations of specific commitments. On the other hand, it may be difficult to satisfy the sectoral coverage requirement if a schedule only covers one subsector of every sector. Therefore, a review of subsectors is needed on a case-by-case basis.

4.2[b] *Elimination of Discrimination*

Under the GATS commitments test, the elimination of discrimination requirement could mean that EIA parties should at least go further than their GATS commitments and make new WTO-plus commitments in the sense of national treatment. As regards how many new WTO-plus commitments are required, this would have to be tackled on a case-by-case basis and the factors summarized below should be taken into consideration. According to the Appellate Body, 'substantially all' is not the same as all, but is something considerably more than merely some.¹⁹⁸ As the above analysis has shown, there is a need to strike a proper balance between an overly strict interpretation of 'elimination of substantially all discrimination' and the mere prohibition of new or more discrimination, with perhaps a slight preference for the former as it is the object of the paragraph in question.

As GATS Article V:2 expressly indicates, the elimination of discrimination evaluation may need to consider the relationship of EIAs and 'a wider process of economic integration or trade liberalization' among the Members concerned. As shown above, the parallel indication of 'economic integration' and 'trade liberalization' seems to indicate that non-trade areas such as investments may also be relevant here. Therefore, EIAs in goods, BITs, and so forth, among the EIA parties could also be considered.

The development of developing countries is indicated in the GATS preamble and could be argued to be one of the objects of the GATS. The progressive liberalization of services trade is also recognized as one of its objects.¹⁹⁹ Combining these objects and the consideration of broader economic integration, GATS Article V may be interpreted as allowing some trade-offs both within and between agreements (i.e., deeper/higher level of national treatment versus another aspect) covering services, goods and TRIPs liberalization, and one may even further argue, trade-offs between trade and investment liberalization. Having said that, caution as to the difference between trade and investment is needed.

¹⁹⁸ Appellate Body Report, *Turkey-Textiles*, *supra* n. 9, para. 48.

¹⁹⁹ Appellate Body Report, *US-Gambling*, *supra* n. 63, n. 271, paras 188–189.

Furthermore, the footnote to GATS Article V:1(a) as analysed above is a context of the elimination of the ‘substantially all discrimination’ requirement, and the factors indicated in this footnote (i.e., number of sectors, trade volume affected, and supply modes) may be used as a reference.

It should be noted that the elimination of discrimination requirement and the substantial sectoral coverage requirement are not separate but related. The elimination of discrimination requirement is applicable to discrimination ‘in the sectors covered under [the substantial sectoral coverage requirement]’. A (sub)sector seemingly needs first to be covered under the substantial sectoral coverage requirement and then may also be subject to the elimination of discrimination requirement.²⁰⁰

4.2[c] *Flexibility*

Under GATS Article V, developing Members may enjoy flexibility in accordance with the level of development of the Members concerned, both overall and in individual (sub)sectors. This needs to be considered on a case-by-case basis. First, there seems to be a higher degree of flexibility available in Article V:1(b) than Article V:1(a), especially since GATS V:3(a) particularly refers to Article V:1(b) rather than Article V:1(a) by stating that ‘the flexibility shall be provided . . . particularly with reference to’ Article V:1(b).

Second, the special features of different Members’ schedules may be considered. As GATS commitments are the threshold and the schedule is mentioned in GATS Article V, the features of these commitments could be taken into consideration in this process. A typical example is that of developing Members who are recently acceded Members (RAMs). As the Hong Kong Ministerial Declaration recognizes, the special situation of RAMs who have undertaken ‘extensive’ commitments will be taken into account in GATS negotiations.²⁰¹ RAMs not only make commitments in the same sectors as developed countries but have also been more forthcoming in areas such as audiovisual, courier, education, health and postal services, due to the accession process and other reasons.²⁰² It could be fair to argue that RAMs may be allowed reasonable flexibility if their WTO commitments are taken as the benchmark for the sectoral coverage and elimination of discrimination requirements, as they generally have made more commitments than the original Members.

²⁰⁰ For different views on the relationship between the requirements on substantial sectoral coverage and on the elimination of discrimination, see Compendium of RTA Issues, *supra* n. 11, paras 58–59.

²⁰¹ Hong Kong Ministerial Declaration, WT/MIN(05)/DEC, adopted 18 Dec. 2005, para. 58.

²⁰² Marchetti & Roy, *supra* n. 37, 66.

Third, developing Members' EIA schedules could be considered together with their GATS commitments to prove their compliance with the sectoral coverage requirement. Thus, developing Members' EIA schedules in themselves do not necessarily need to cover at least six sectors under the GATS commitments test. The coverage of developing parties' GATS schedules may be counted together with their EIA schedules to meet the requirement if the GATS schedules are respected by the EIA parties and the EIA is based on the GATS. In other words, for the GATS commitments to be considered together with developing Members' EIA schedules, EIAs need to specifically provide that WTO law is to be respected and there should be no evidence contrary to the GATS commitments remaining effective in the EIA. There seems to be no provision in GATS Article V, which is against such a combination in the evaluation of sectoral coverage. A rigid interpretation of sectoral coverage that overemphasizes the number of sectors in EIA schedules could be inconsistent with the trade volume consideration and may not make much sense in reality. In particular, for EIAs among developing Members, there may not be substantial trade in high-tech and capital-intensive sectors such as financial services and it may make little sense to require every EIA to liberalize nearly every subsector by using headline-checking, counting each subsector including sectors where there is little trade among the EIA parties. In fact, the GATS is drafted in a more flexible way than the GATT, and the positive GATS scheduling approach allows Members to opt into service sectors according to their conditions and the requests of their trading partners. Even if a rigid approach is adopted, this formal requirement may not have much practical effect: the EIA parties may simply duplicate their GATS commitments in the EIA schedules to satisfy this requirement. It may therefore be a wise choice for the EIA review to focus more on the substance than on the form. In this sense, one may argue that substantive sectoral coverage may be more of a qualitative than quantitative requirement and should focus more on the main service sectors of EIA parties.

4.2[d] *Soft Interpretation?*

The probably intentionally drafted 'soft' nature of GATS Article V may provide a hint against an overly strict interpretation of the Article (and also the GATS commitments test). For the review requirement, GATS Article V:7(a) indicates that the examination of services EIAs is, in contrast with the mandatory review of EIAs in goods, optional. A working party 'may' be established to examine the consistency of EIAs with Article V.²⁰³ One may argue that the optional review

²⁰³ GATS, Art. V:7(a).

requirement indicates the intention of the drafter to soften the discipline and that the interpretation of GATS Article V should probably not be overly strict. For the implementation time frame, both the sectoral coverage and discrimination elimination requirement could be met 'on the basis of a reasonable time-frame' under GATS Article V:(1). GATT Article XXIV:7(b) requires that if the plan or schedule in an interim agreement is unlikely to result in a GATT consistent EIA, its parties shall not establish the agreement 'if they are not prepared to modify it in accordance with these recommendations'. GATS Article V does not impose such a condition. For the coverage requirement, the term 'substantial sectoral coverage' of GATS Article V differs from 'substantially all' trade in GATT Article XXIV, suggesting that the intention of the drafters of Article V was perhaps to be more permissive than that of those drafting GATT Article XXIV.²⁰⁴ For the elimination of discrimination requirement, as shown above, a similar argument may be made based on the wording in GATS Article V:1(b), which seems to indicate the possibility of satisfying the elimination of discrimination requirement solely by a standstill obligation. In contrast, GATT Article XXIV imposes much higher obligation by requiring the elimination of duties and other restrictive regulations for substantially all the trade among EIA parties. The reasons of the soft nature of Article V may be linked to the major EIAs negotiated before or during the drafting of the GATS²⁰⁵ and the sensitivity of services trade, among others.

4.2[e] *Burden of Proof*

The burden of proof plays an important role in interpreting GATS Article V. It rests upon the Member, whether complaining or defending, who asserts the affirmative of a particular claim or defence.²⁰⁶ As an exemption from the MFN obligation,²⁰⁷ GATS Article V is a positive rule, which in itself establishes obligations and in particular the obligation to eliminate discrimination. Therefore Article V could be a positive obligation (when Member A alleges that Member B

²⁰⁴ Aaditya Mattoo & Pierre Sauvé, 'Regionalism in Services Trade', in *A Handbook of International Trade in Services*, ed. Aaditya Mattoo, Robert M. Stern & Gianni Zanini (Oxford: Oxford University Press, 2007), at 263.

²⁰⁵ In the view of Mattoo and Sauvé, it can be speculated that the drafting of article was linked to the 1989 Canada–United States Free Trade Agreement, which largely consisted of a standstill agreement applied to a finite list of services. The need to 'protect' the services outcome of the North American Free Trade Agreement, which at the time of drafting GATS Art. V was in the midst of being negotiated and whose outcome in terms of sectoral coverage and liberalization was unclear, also influenced the drafting of Art. V. *Ibid.*, 266, n. 43.

²⁰⁶ Appellate Body Report, *United States–Measure Affecting Imports of Woven Wool Shirts and Blouses from India (US–Wool Shirts and Blouses)*, WT/DS33/AB/R, adopted 23 May 1997, 14.

²⁰⁷ Panel Report, *Canada–Autos*, *supra* n. 8, para. 10.271.

violates Article V)²⁰⁸ or an affirmative defence²⁰⁹ (when Member A does not invoke Article V but Member B invokes Article V as a defence to a claim of violation of MFN obligation).²¹⁰ In the former scenario, Member A bears the burden of proof to establish a prima facie case of inconsistency with Article V, and the burden of showing consistency with Article V may later be shifted to Member B.²¹¹ In the latter scenario, Member B bears the burden of proving GATS consistency.²¹² From a broader perspective, the role of the judge is also involved, which requires more study.

4.2[f] *Practicality*

GATS commitments could be deemed a feasible and reasonable baseline. Generally speaking, this should not make unreasonable requirements of EIAs. Members have generally included no more than one third of the around 160 subsectors subject to negotiations in their GATS schedules, and the generally low level of sectoral coverage is the ‘most striking and sobering feature’ of WTO schedules.²¹³ GATS commitments in terms of sectoral coverage have not expanded substantially with the offers under the Doha Development Agenda (DDA). As the WTO pointed out, ‘if the current offers were to enter into force, the average number of sub-sectors committed to by Members would only increase from 51 to 57’.²¹⁴ The

²⁰⁸ For the burden of proof issue in an arguably similar situation, see Appellate Body Report, *Brazil–Export Financing Programme for Aircraft (Brazil–Aircraft)*, WT/DS46/AB/R, adopted 20 Aug. 1999, paras 134–141.

²⁰⁹ GATT Arts XX and XI:(2)(c)(i) are regarded as affirmative defences. See Appellate Body Report, *US–Wool Shirts and Blouses*, *supra* n. 206, 16.

²¹⁰ This is the situation in the WTO dispute of *Canada–Autos*.

²¹¹ For a ruling in a similar scenario, see Appellate Body Report, *European Communities–EC Measures Concerning Meat and Meat Products (Hormones) (EC–Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 Feb. 1998, para. 104.

²¹² For the relevant WTO jurisprudence that the burden of establishing an affirmative defence rests with the party raising the issue, see, for instance, Appellate Body Report, *US–Wool Shirts and Blouses*, *supra* n. 206, 14; Appellate Body Report, *Brazil–Aircraft*, *supra* n. 208, para. 137; Appellate Body Report, *Brazil–Export Financing Programme for Aircraft (Brazil–Aircraft), Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/AB/RW, adopted 23 Aug. 2001, para. 66; Panel Report, *Brazil–Export Financing Programme for Aircraft, Second Recourse by Canada to Article 21.5 of the DSU (Brazil–Aircraft (Article 21.5–Canada II))*, WT/DS46/RW/2, adopted 23 Aug. 2001, para. 5.63.

²¹³ Marchetti & Roy, *supra* n. 37, 66.

²¹⁴ Council for Trade in Services, Report by the Chairman to the Trade Negotiations Committee (‘S/20’), TN/S/20, 11 Jul. 2005, para. 3.

The lack of substantial progress in sectoral coverage seems to be unchanged due to a number of factors including the lack of progress in other areas of negotiations especially in agriculture and non-agricultural market access (NAMA). Council for Trade in Services, Report by the Chairman to the Trade Negotiations Committee (‘S/32’), TN/S/32, 24 Jul. 2007; Council for Trade in Services, Report by the Chairman to the Trade Negotiations Committee, TN/S/28, 31 Jul. 2006, para. 1.

By the beginning of 2008 the content of offers submitted is ‘shallow’. Marchetti and Roy, *supra* n. 37, 70.

WTO schedule coverage under DDA offers would only increase by about 8% and 6% for developed and developing Members, respectively, and the proportion of subsectors bound, across all Members, would remain below 40% on average.²¹⁵ EIAs are usually supposed to provide better treatment than that granted under the multilateral regime. It therefore makes sense to at least cover the same sectors in the EIAs.

GATS commitments as a threshold for the elimination of discrimination is a reasonable and feasible baseline also because the development of eliminating discrimination in the sense of national treatment does not seem to be making much substantial progress. With few exceptions in sectors such as basic telecommunications, GATS 'standstill' commitments remain essentially confined to binding existing regimes in a limited number of sectors, and even the majority of developed Members have no commitments in postal-courier and audiovisual services.²¹⁶ The content of the offers submitted in DDA is 'shallow',²¹⁷ and as the WTO indicated, there is 'no significant change to the pre-existing patterns of sectoral bindings'.²¹⁸

Moreover, given the mushrooming of EIAs and the limited capacity of the WTO system, a possible test for GATS Article V interpretation needs to be clear, practical and efficient. One may think that the application of a GATS commitments test may be labour- and time-intensive. The burden of proof, as analysed above, may help to reduce the workload of the WTO. The GATS commitments test seems to keep the workload to a reasonable level while aiming to provide an objective assessment of EIAs.

4.2[g] *Conclusion*

To sum up, the GATS commitments test means that (i) for the sectoral coverage requirement, EIA agreements should generally not exclude (sub)sectors that are covered by the GATS agreement, and the EIA schedules should, in fact, cover at least half of the sectors listed in W/120; (ii) under the elimination of discrimination requirement, EIAs should make at least some GATS-plus commitments to eliminate some if not all discrimination in the sense of national treatment; (iii) the flexibility accorded to developing Members should be

²¹⁵ *Ibid.*, 70.

²¹⁶ *Ibid.*, 62–63.

²¹⁷ *Ibid.*, 70.

²¹⁸ S/20, *supra* n. 214, para. 3.

The lack of substantial progress in elimination of discrimination in the sense of national treatment seems to be unchanged. See S/32, *supra* n. 214.

interpreted on a case-by-case basis. The use of a GATS commitments test may have the effect of reducing GATS-minus commitments in EIAs.

4.3 ARE CHINA'S EIAs GATS-CONSISTENT UNDER THE GATS COMMITMENTS TEST? A BRIEF ANALYSIS

For the substantial sectoral coverage requirement, this part will first analyse the EIA agreements and then the EIA schedules. Due to space constraint, it will not attempt to compare the commitments of all China's EIAs with their GATS counterparts.

Some of China's EIAs with developing countries exclude certain (sub)sectors covered by the GATS from their coverage. At first sight, the GATS commitments test would indicate this is not GATS-consistent. However, as analysed above, China may invoke two justifications to prove these EIAs are consistent with GATS Article V. One is the footnote to GATS Article V:1(a), which provides that the condition should be considered in terms of number of sectors, trade volume affected and supply modes. As the (sub)sectors excluded in China's EIAs are not substantial in terms of their trade volume, they may satisfy the test. As China and other parties to the EIAs in question are developing Members, the other possible justification is the flexibility that developing Members enjoy under GATS Article V:3(a) and even the two relevant purposes of the GATS embodied in its preamble (the development of developing countries, and progressive liberalization).

In terms of China's EIA schedules, they generally cover over six of the sectors indicated in W/120. It has been suggested that GATS-minus commitments exist in the China-ASEAN ATS.²¹⁹ However, this argument appears to fail to take into account the explicit references in the texts of the EIAs to the parties' GATS commitments. For example, the China-ASEAN ATS emphasizes the elimination of substantially all discrimination and/or prohibition of new or more discriminatory measures and expansion of the depth and scope of services trade with substantial sectoral coverage 'beyond' that undertaken by China and the ASEAN Member Countries under the GATS.²²⁰ The China-ASEAN ATS commitments are higher-level ones based on their GATS counterparts.²²¹ It indicates that this ATS is a GATS-plus one and is built on GATS commitments. GATS commitments remain effective here. The parties also reaffirm their commitment to abide by the WTO rules.²²² For instance, although subsidies are

²¹⁹ Adlung & Morrison, *supra* n. 12, 1135.

²²⁰ China-ASEAN ATS, preamble, third paragraph; Art. 21:1.

²²¹ Ministry of Commerce of China, 'China-ASEAN Agreement on Trade in Service', <http://fta.mofcom.gov.cn/dongmeng/dm_fwmy.shtml>, 14 Dec. 2010.

²²² China-ASEAN ATS, Art. 15.

excluded from the China-ASEAN ATS, the WTO disciplines will apply to subsidies in these parties.

Similarly, China's other EIAs would seem to be promulgated with a view to WTO consistency, and they build on the parties' rights, obligations and undertakings in the WTO.²²³ Starting from the two CEPAs, the WTO rules have been expressly referred to in the preamble,²²⁴ the articles on WTO disciplines,²²⁵ the relation to other (international) agreements,²²⁶ and the establishment of a free trade area.²²⁷ More specifically, the substantial sectoral coverage and elimination of discrimination requirements are expressly highlighted by some of the EIAs.²²⁸ Future developments and amendments of the WTO agreements can also be automatically incorporated. If any provision of the WTO Agreement is amended and accepted by the Parties at the WTO, the amendment shall be deemed to be automatically incorporated in the China-Peru FTA.²²⁹ China's EIAs indicate a will to respect other multilateral, regional and bilateral trade agreements.²³⁰ For domestic regulation disciplines, the FTA may incorporate the relevant negotiation

²²³ For instance, China-NZ FTA, preamble ('Building on their rights, obligations and undertakings under the Marrakesh Agreement Establishing the World Trade Organization and other multilateral, regional and bilateral agreements and arrangements').

²²⁴ Mainland-Hong Kong CEPA, Art. 2:2 ('to be consistent with the rules of the World Trade Organization'); Mainland-Macao CEPA, Art. 2:2; China-Peru FTA, preamble ('to strengthen and enhance the multilateral trading system as reflected by the World Trade Organization'), Art. 3:1 ('affirm their existing rights and obligations with respect to each other under the WTO Agreement'); China-NZ FTA, preamble ('Building on their rights, obligations and undertakings under the Marrakesh Agreement Establishing the World Trade Organization and other multilateral, regional and bilateral agreements and arrangements').

²²⁵ China-NZ FTA, Art. 3:1 (Nothing in this Agreement shall derogate from the existing rights and obligations of a party under the WTO Agreement or other multilateral or bilateral agreement to which it is a party); China-ASEAN ATS, Art. 15.

²²⁶ China-Singapore FTA, Art. 112 (affirm their existing rights and obligations with respect to each other under existing bilateral and multilateral agreements . . . including the WTO Agreement); China-Pakistan FTA, Art. 3 (affirm their existing rights and obligations with respect to each other under the WTO Agreement and other agreements to which both Parties are parties); China-Peru FTA, Art. 3:1 (affirm their existing rights and obligations with respect to each other under the WTO Agreement and any other agreements related to trade to which the Parties are party). Free Trade Agreement of China and Chile, 18 Nov. 2005, <<http://fta.mofcom.gov.cn/chile/xieyi/freetradexieding2.pdf>>, 5 May 2006, Art. 3.

²²⁷ China-Peru FTA, Art. 2.

²²⁸ See, e.g., preamble of China-ASEAN ATS.

²²⁹ China-Peru FTA, Art. 3:3.

²³⁰ For instance, China-Singapore FTA, Art. 112 (affirm their existing rights and obligations with respect to each other under existing bilateral and multilateral agreements to which both Parties are parties); China-Pakistan FTA, Art. 3 (affirm their existing rights and obligations with respect to each other under the WTO Agreement and other agreements to which both Parties are parties); China-Peru FTA, preamble (reaffirm their consent to strengthen and enhance the multilateral trading system as reflected by the WTO and other multilateral, regional and bilateral instruments of cooperation regarding trade), Art. 3 (affirm their existing rights and obligations with respect to each other under the WTO Agreement and any other agreements related to trade to which the Parties are party); Framework Agreement on Comprehensive Economic Co-Operation between China and ASEAN, 4 Nov. 2002, <<http://gjs.mofcom.gov.cn/aarticle/Noategory/200212/>

results undertaken in other multilateral fora in which China and Peru participate.²³¹ In the recent China-Peru FTA, consistency with the WTO is highlighted repeatedly in the preamble and articles on the establishment of a free trade area and the relation to other international agreements.²³² The relationship between the EIA and trade agreements other than the WTO agreements is also emphasized. It seems to be the view of the Chinese government that regionalism supplements the WTO system, even if the latter would be its preferred choice.²³³

Perhaps China's EIAs in services could be deemed GATS-plus EIAs whose major features include lenient origin rules as well as higher transparency and good governance provisions. Those involving only developing countries have not provided for more favourable treatment to juridical persons owned or controlled by natural persons of the parties. Such preferential origin rules are expressly allowed by the GATS, but China and its other developing-country partners have not taken advantage of them.²³⁴ From this perspective, these EIAs set a level playing field and are pro-liberalization. They are more likely to be a building block rather than a stumbling stone for multilateral economic governance.

For the elimination of discrimination requirement, China's EIAs have made GATS-plus commitments to eliminate discrimination in the sense of national treatment and could satisfy the GATS commitments test. Moreover, one may invoke the flexibility available to developing countries (GATS Article V:5(3)(a)), the consideration of a wider progress of economic integration or trade liberalization (GATS Article V:5(2); issues such as EIAs in goods, and BITs), among others.

5 CONCLUSION

The interpretation of GATS Article V is likely to attract increasing attention in dispute settlement, trade negotiations, WTO reviews of EIAs, coordination of multilateralism and regionalism, and so forth. As an example of the spread of EIAs, China's practice is undoubtedly significant. Several conclusions can be drawn here.

20021200056711.html>, 2 May 2003, preamble (reaffirm the rights, obligations and undertakings of the respective parties under the WTO, and other multilateral, regional and bilateral agreements and arrangements).

²³¹ China-Peru FTA, Art. 110:5.

²³² *Ibid.*, Arts 2, 3:1.

²³³ Ministry of Commerce of China, 'Minister Interview: Vice Minister Yi Xiaozhun's Analysis on China's Choice and Efforts under the Trend of Regional Economic Integration', <<http://yixiaozhun.mofcom.gov.cn/aarticle/speeches/200705/20070504725234.html>>, 30 May 2007.

²³⁴ GATS, Art. V:3(b).

China's EIAs in services can be argued to be generally consistent with GATS Article V.²³⁵ In particular, the Article allows flexibility since China and many other parties to its EIAs are developing countries.²³⁶ However, different viewpoints regarding the GATS conformity of certain provisions may exist, as some GATS rules are open to different and even controversial interpretations. This uncertainty is, to a large extent, due to the vagueness of the language used and the relative lack of jurisprudence on the GATS.

It has been argued that GATS commitments may be an appropriate threshold for interpreting GATS Article V and in particular the substantial sectoral coverage and elimination of discriminations requirements, which are probably among the major challenges. This test helps interpreters to apply Article V in a clear and predictable way. It should be noted that certain complementary criteria are proposed to address the limit of GATS commitments. For instance, as there is no requirement for substantial sectoral coverage imposed as regards GATS schedules and there is much variation across the membership in terms of the number of sectors committed to or levels of treatment bound, it is proposed that EIA schedules should cover at least half of the sectors listed in W/120 to meet the sectoral coverage requirement. The GATS commitments test could be seen as a minimum benchmark to be eventually updated. With necessary adjustments, such a test may also be relevant to goods. This test may help to further clarify and provide more predictability to EIA disciplines.

The GATS conformity analysis of EIAs needs to look at the 'qualitative aspect' of the sectors and to factor in the flexibility for agreements between developing Members, but the assessment of compatibility with Article V may not be that straightforward. Many areas of research obviously deserve further attention. Is an EIA consistent with GATS Article V if some party's commitments meet its requirements, but the other party's do not?²³⁷ How many GATS-plus national treatment commitments should EIA parties make? In how many sectors do EIAs need to prohibit new or more discriminatory measures?²³⁸ How should the trade volume criterion in GATS Article V be applied? A further issue is the

²³⁵ In reality, various provisions of different EIAs have been challenged under both the GATT and WTO dispute settlement systems, but none has been found invalid. Henry S. Gao, 'Legal Issues under WTO Rules on the Closer Economic Partnership Arrangement (CEPA) between Mainland China and Hong Kong', *Chinese Journal of International Law* 2, no. 2 (2003): 640.

²³⁶ GATS, Art. V:3(a).

²³⁷ One may assert that this EIA violates Art. V. Others may argue that GATS Article V does not explicitly require every single schedule of a specific EIA to satisfy its requirements. Therefore, the whole agreement of a specific EIA is not inconsistent with GATS Art. V if all the schedules, read together as a whole, meet its requirements. In practice, the WTO Appellate Body and panels may continue to take a piecemeal approach, not targeting EIAs as such but rather particular measures.

²³⁸ It is sometimes difficult to know from positive-list type agreements, as commitments undertaken – like in GATS – do not necessarily reflect the applied level of restrictions.

interpretation or application of other aspects of GATS Article V, such as the origin rules and the prohibition of 'fortress EIA',²³⁹ requirements. The latter obviously requires a thorough review of the pre- and post-EIA regulatory frameworks of the parties and their trade restrictiveness towards third parties.²⁴⁰ Theoretically it is possible that such agreements may expressly create additional barriers to services trade involving non-parties, and reviewing them will require careful attention to the practices, present and future, of the parties involved.

Beyond the technical aspects of measuring GATS consistency, further thought also needs to be given to questions in a broader sense. For instance, how should GATS-inconsistent EIAs be handled? How should the relationship between Article V and other GATS provisions (e.g., the 'open-ended integration' in terms of recognition in Article VII and the 'close-ended integration' under Article V) be addressed? How should the intersection of services trade and investment in EIAs be handled? Future developments both at the level of the WTO and its Members should therefore be watched closely. In the long run, the interpretation of GATS Article V could help to better coordinate multilateralism and regionalism by clarifying the EIA disciplines and reducing GATS-minus EIA commitments.

²³⁹ GATS, Art. V:4.

²⁴⁰ Fink & Molinuevo, 2008, *supra* n. 12, 664.