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Rudolf Adlung and Marta Soprana
World Trade Organization

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Rudolf Adlung and Marta Soprana*

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"Small opportunities are often the beginning of great enterprises."

Demosthenes (384-322 BC)

Abstract

Issues related to small- and medium-sized enterprises (SMEs) supplying services have been raised at earlier stages of the Doha Round in various negotiating contexts and, more recently, at meetings of the Council for Trade in Services. It is difficult, however, to find a common denominator as to whether SME-related concerns might merit attention, from a trade policy perspective, under the General Agreement on Trade in Services (GATS). Without proposing any priorities, this paper seeks to provide an overview of issues that Members might want to address in the WTO, from promoting compliance with transparency disciplines under existing provisions to advancing the liberalization and rule-making mandates of the GATS with an SME focus.

Keywords: Trade in Services, GATS, small- and medium-sized enterprises.

JEL Classifications: F13, F53, L16

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I. INTRODUCTION

Studies and policy statements concerning small- and medium-sized enterprises (SMEs) tend to concentrate on manufacturing firms or do not distinguish at all between firms operating in different sectors. Relatively little attention is given to SMEs engaged in services production and trade, and even less to the status of SME-related policies under the General Agreement on Trade in Services (GATS). This may appear surprising for two reasons. First, services SMEs are a major contributor to overall employment in many economies, and, within various sectors, make a significant contribution to export revenue.¹ Second, unlike the GATT rules governing conventional trade agreements, GATS disciplines do not apply only to products (services), but to suppliers as well. Thus, measures affecting different types of suppliers, according to whatever criterion, including size, are within the scope of the Agreement.

What types of government intervention could affect SMEs? In its 2002 report on the State of the Internal Market, the European Commission lists, by way of example, the following types of legal (policy-induced) barriers that services suppliers encounter when engaging in cross-border activities: nationality requirements, minimum capital requirements, quantitative restrictions and restrictions on multi-disciplinary activities.² However, while these barriers may disadvantage exporting SMEs, some might actually benefit their domestic counterparts; nationality and residency requirements or restrictions on small-scale transactions, for example barring construction projects below a specified size, may well serve, unintentionally or otherwise, to protect market outlets for small, domestically-established firms in the sectors concerned.³ A broader picture would also cover support initiatives specifically targeted at SMEs, such as the free provision of market intelligence, trade promotion programmes and the like.

Nevertheless, the sheer economic importance of SMEs and the fact that the GATS is applicable to size-related policies, whenever these affect services trade, do not necessarily imply the need for action under the Agreement.⁴ This paper seeks to contribute to the SME-related literature by discussing trade issues from a GATS perspective.⁵ Without establishing any particular priorities, it intends to provide a basis for further deliberation, if deemed relevant by Members, in whatever WTO forum.

Starting point are empirical observations concerning the involvement of SMEs, in particular services firms, in international trade (Section II). The third Section then provides a brief recount of the treatment to date of SME-related issues in relevant WTO/GATS fora. It is followed, in Section IV, by a discussion of GATS disciplines of various types, whether governing market access, domestic

¹ For instance, in the Netherlands SMEs represent close to 88 per cent of employment in the hotels and restaurants sector, and in Canada, they account for 94 and 98 per cent of exports in professional and construction services, respectively. Sources: Roth, Moritz (2011), *SMEs in the Netherlands: Making a Difference*, Research Briefing, Germany: Deutsche Bank Research, p. 4; RSM International (2011), 'Small and Medium Enterprises in the Global Economy', www.rsmi.com/en/global-challenges/smes-in-the-global-economy---gc.aspx (last accessed 19 March 2012); OECD (2005a), 'Growth in Services - Fostering Employment, Productivity and Innovation', Meeting of the OECD Council at Ministerial Level, p. 5; OECD (2005b), 'OECD SME and Entrepreneurship Outlook', Paris: OECD, p. 9.

² European Commission (2002), 'The State of the Internal Market for Services', Brussels, COM(2002) 441 Final, p. 14f.

³ By the same token, however, such barriers might have a disproportionate impact on other SMEs which rely strongly on imported inputs (including of services) and might find it more difficult to switch to domestic alternatives than larger enterprises.

⁴ Pursuant to its Article I:1, the GATS "applies to measures by Members affecting trade in services".

⁵ While recognizing the importance of the role played by services SMEs in international supply chains, this paper focuses on the direct impact of SME-related policies rather than on their wider economic context.

regulation or transparency, deemed to affect or be of interest to SMEs. This is complemented, in Section V, by an overview of SME-related policy elements as reflected in current commitments under the GATS and regional trade agreements (RTAs). Section VI provides some concluding observations.

In contrast with some other studies, the following discussion will pay no particular attention to genuinely size-related benefits, such as shorter decision-making channels, closer client relations and other flexibility-enhancing factors. Nor will it address inherent size-related constraints such as productivity problems and business risks attributable to a small product and customer base. In the same vein, the fact that many small enterprises deliberately confine their activities to supplying regional rather than international markets is disregarded in the current context. In our view, there is no reason *per se* to be concerned if, for example, three-star restaurants, high-end couturiers or design-furniture shops are dwarfed by the McDonalds, H&Ms or IKEAs of this world.

II. DETERMINANTS OF SME INVOLVEMENT IN EXTERNAL TRADE

As indicated before, the existing literature on small- and medium-sized enterprises focuses primarily on the analysis of manufacturing firms. Few studies have dealt with services SMEs and their involvement in international trade, and the focus tends to be on a limited range of economies, primarily developed countries. While some studies cover a broad range of services, others target specific sectors, such as architectural services in the Netherlands and business services in Germany.⁶

Overall, it appears that services firms engage less in international trade than their counterparts in manufacturing. Exceptions are business, research and development (R&D) and information technology (IT) services, where the share of internationally active service firms reportedly is not much below the average for manufacturing.⁷ Reflecting high levels of firm heterogeneity, however, trade participation varies widely by sector and company size.⁸ For example, a study on UK services firms shows that, over the 1988-2001 period, transport and communication were the most export-oriented sub-sectors, whereas distribution, hotels and catering had the lowest export intensity.⁹ Compared to small firms, large enterprises tend to have more export destinations and trade in more types of services.¹⁰ Still, it remains open whether and to what extent such observations reflect genuine economic factors or, rather, are attributable to policy interventions.

As a general observation across all sectors, whether manufacturing or services, a report by the European Commission notes that the level of a firm's international activity is directly linked to its size and negatively correlated with the size of the home country population.¹¹ The report distinguishes different forms of internationalisation: direct exports, foreign direct investment to set-up a commercial presence abroad, technological co-operation with enterprises abroad, acting as a subcontractor for a

⁶ Masurel, Enno (2001), *Export Behaviour of Service Sector SMEs*, Series Research Memoranda, Research Memorandum 2001 - I6, Amsterdam: Free University; Vogel, Alexander (2011), 'Exporter performance in the German business services sector', *The Service Industries Journal*, Vol. 31, Nos. 7-8.

⁷ Breinlich, Holger and Chiara Criscuolo (2011), 'International Trade in Services: A Portrait of Importers and Exporters', *Journal of International Economics*, 84, p. 189; Hollenstein, Heinz, 'Patterns and Determinants of International Activities: Are SMEs Different?', p. 3, (last accessed 19 March 2012) <http://e-collection.library.ethz.ch/eserv.php?pid=eth:24913&dsID=eth-24913-01.pdf>.

⁸ Breinlich and Criscuolo, *op. cit.*, pp. 189, 201.

⁹ Export intensity is measured as the ratio of export sales to total sales. Gourlay, Adrian, Jonathan Seaton and Joy Suppakitjarak (2005), 'The determinants of export behaviour in UK service firms', *The Service Industries Journal*, 25:7, 879-889, p. 883, 886. See, however, below n 13.

¹⁰ These findings are partly corroborated by a study on Swiss-based SMEs which found that SMEs, regardless of their sector of activity, tend to concentrate their internationalisation efforts on a single type of activity, whereas larger companies more frequently internationalise all business functions, from research and development to distribution. Hollenstein, *op. cit.*, p. 4; Breinlich and Criscuolo, *op. cit.*, p. 201.

¹¹ European Commission (2010), *Internationalisation of European SMEs*, Final Report, Brussels: European Union, pp. 5-6, 15.

foreign main contractor, and having foreign subcontractors. Not all findings thus fit into what might be considered exports within the modal structure of the GATS (Section IV.A).

Empirical evidence from UK and Spanish services firms corroborates the general thrust of these findings, showing that larger enterprises are more likely to be exporters, export more per type of service and destination, and that the intensity of exporting increases (less than proportionally) with firm size.¹² Yet, a study on Canadian knowledge-intensive business services suggests that very small firms are more likely to export than medium-sized firms.¹³ However, the question remains whether such findings are country-specific, possibly reflecting the physical and institutional infrastructure in place, including the availability of export promotion and guarantee schemes, or the particular composition of the service sectors concerned. According to a study on service exports from Central and Eastern European countries, the impact of geographical distance and other factors, such as time differences, varies greatly across different sectors.¹⁴

Service exporters were found to differ from non-exporters.¹⁵ Relevant research by the U.S. International Trade Commission suggests that exporting SMEs are more productive in general and earn more revenue than firms serving only their home market (Box 1). In a similar vein, studies on Spanish services firms, Dutch architectural firms and the German business service sector, found that exporters are generally larger, pay higher wages and are more productive than non-exporters.¹⁶ Yet, according to the latter study, the turnover profitability of exporters remained below that of non-exporters. As a possible explanation, the author refers to the labour-intensity of the sector which might render it more difficult for exporters to absorb, via higher productivity, the extra cost of international trade or paying higher wages.¹⁷ Finally, firms with greater ability to accumulate knowledge were found to be more likely to export.

A closer look at European firms operating in individual sectors suggests that SMEs in wholesale trade tend to rely on direct exports, while those providing transport and communication services prefer subcontracting as their main form of internationalisation. SMEs offering business services were found to focus primarily on foreign direct investment and technical co-operation.¹⁸ Concerning relevant modes of supply, as defined under the GATS, little empirical evidence is available and, if so, the sectoral and geographical scope is quite limited. A study for Denmark suggests that smaller service firms tend to rely more on cross-border deliveries than on establishing

¹² Gourlay, Adrian, Jonathan Seaton and Joy Suppakitjarak (2005), *op. cit.*, pp. 884, 886f; Breinlich and Criscuolo, *op. cit.*, p. 201; González Sanz, María Jesús and Antonio Rodríguez Caloca (2010), *Las características de las empresas españolas exportadoras de servicios no turísticos*, Banco de España, Dirección General del Servicio de Estudios, Boletín Económico, p. 68.

¹³ Chiru, Radu (2007), *Innovativeness and Export Orientation among Establishments in Knowledge-Intensive Business Services* (KIBS), Ottawa: Statistics Canada, Science, Innovation and Electronic Information Division (SIED), Working Paper, p. 20. There is an element of uncertainty surrounding the notion of 'exports' used in some of these studies. It appears, but is not entirely clear in all cases, that cross-border supplies destined to foreign markets are captured, while transactions under other modes of supply, as defined in the GATS, might have been disregarded, i.e. consumption abroad (mode 2), commercial presence (mode 3) and presence of natural persons (mode 4). In some cases, e.g. tourism, firms providing services to foreigners present in the domestic market might not consider themselves to be exporters under the mode concerned (in this case: mode 2). Thus, firm-level data, especially if based on surveys, should be treated with caution. See Section IV.

¹⁴ For instance, for construction services geographical proximity tends to be particularly important whereas for other sectors, such as computer or insurance services, distance appears to have a negligible effect. Kandilov, Ivan T. and Thomas J. Grennes (2010), 'The determinants of service exports from Central and Eastern Europe', *Economics of Transition*, Volume 18(4), 763-794, p. 765.

¹⁵ See above n 13.

¹⁶ Minondo, Asier (2011), 'Exporters of services in Spain', Orkestra, Basque Institute of Competitiveness, Orkestra Working Paper Series in Territorial Competitiveness, Number 2011-R04 (ENG), p. 21; Masurel, *op. cit.*, p. 7; Vogel, *op. cit.*, pp. 1019, 1024. Vogel measures productivity in terms of turnover and value added per person employed.

¹⁷ Vogel, *op. cit.*, p. 1020f.

¹⁸ European Commission (2010), *op. cit.*, p. 19.

and supplying through a commercial presence abroad.¹⁹ This finding seems to apply across all service sub-sectors, except financial services, where SMEs operate almost equally strongly through cross-border exports and commercial establishment abroad.²⁰ The study on the export intensity of Spanish service exporters also suggests that larger enterprises rely as well on options other than cross-border exports, such as commercial establishment, to access foreign markets.²¹ Yet these results, as those for other studies on the trade/internationalisation activities of EU firms, may not be fully relevant to other countries insofar as they do not distinguish between intra-EU exports and supplies destined for external markets.

Box 1: USITC-studies on small- and medium-sized enterprises

USITC released three interrelated reports, requested by the United States Trade Representative (USTR), on the performance of SMEs in US exports in 2010. The third report, published in November 2010, analyses the export performance of US-based SMEs, including multinationals, across a broad range of service sectors. (Multinationals are defined to include SMEs that own and operate at least one foreign affiliate.) The report was based on specially tabulated data from the Bureau of Economic Analysis and the U.S. Census Bureau, which reported services trade activity by firm size, as well as on a questionnaire, submitted to over 8,400 US manufacturing and services SMEs, on the most challenging impediments for SME exporters.

Main findings include: (i) albeit relatively few service SMEs export, the firms concerned are fast growing and relatively more export-oriented, measured as a share of export-related in total revenue, than their larger counterparts; (ii) foreign affiliates of service SME multinationals account for only a small percentage of all foreign affiliate sales; (iii) among services SMEs, exporters of finance and insurance services display the highest ratio of export revenue to total revenue, while the share of establishments that actually export is highest among SMEs in information services*; (iv) in terms of total export revenue, SMEs in the portfolio management sector rank first (2007), followed by their peers in architectural, engineering and related services; computer system design and related services; software publishers and management; and scientific and technical consulting services; (v) wholesale trade, 'other' service industries and finance and insurance are the sectors where service SME multinationals derive most of their total sales; (vi) for US service SMEs, the most burdensome export impediments are considered to be insufficient intellectual property protection, foreign taxation and obtaining financing as well as licensing, residency and commercial presence requirements; (vii) more recently established service SMEs tend to report impediments as more burdensome, export to fewer regions and export less intensively than longer-established service SMEs.

* There is an element of uncertainty insofar as some information industries have included exports of goods as well.

Source: United States International Trade Commission (2010), 'Small and Medium-Sized Enterprises: Characteristics and Performance', USITC Publication 4189, Washington D.C.

Studies that seek to identify the main barriers SMEs face in international trade draw attention to the following problems: limited information on foreign markets, shortage of working capital or finance, existence of different regulations in other countries, cultural barriers, and administrative red tape.²² Unsurprisingly, the perception of a barrier seems to vary depending on the international

¹⁹ Henten, Anders and Torben Vad (2001), 'Service Internationalisation – Characteristics, Potentials and Barriers', CTI Working Paper No. 66, CRIC Workshop on Internationalisation, Technology and Services: Analysis of Its Determinants and Implications for Competitiveness, Manchester, p. 11.

²⁰ *Ibid*, p. 7.

²¹ González Sanz and Rodríguez Caloca (2010), *op. cit.*, p. 68.

²² European Commission (2010), *op. cit.*; European Commission (2002), *op. cit.*; Leonidou, Leonidas C. (2004), 'An Analysis of the Barriers Hindering Small Business Export Development', *Journal of Small Business Management*, Volume 42, Issue 3, pp. 279–302; OECD (2009), *Top Barriers and Drivers to SME Internationalization*, Report by the OECD Working Party on SME and Entrepreneurship, OECD; OECD (2008), *Removing barriers to SME access to international markets*, Paris: OECD Publishing; Patel, Priyen and Rosina Robson (2010), 'Made in the UK: small business and an export led recovery', UK: Federation of Small Businesses.

experience of the firm.²³ These findings might be influenced, however, by the particular country and sector focus of the studies concerned.²⁴

Among the few surveys that specifically addressed obstacles affecting small- and medium-sized exporters, one carried out in 28 European countries is of particular interest.²⁵ The main findings confirm that (a) the perceived barriers to SME internationalisation may vary significantly across sectors and (b) their impact may change according to firm size.²⁶ Concerning the former observation, in manufacturing, construction and real estate, renting and other business activities, lack of knowledge of foreign markets is considered the main obstacle to exporting SMEs. In contrast, SMEs in hotel and restaurants complain predominantly about the impact of regulatory differences between EU countries, while firms operating in transport, storage and communication services seem to be most seriously affected by shortage of capital. Interestingly, the share of exporters not reporting any particular trade-related constraint is significantly higher in manufacturing (41 per cent) than in services (31 per cent). As regards the impact of firm size, it appears that lack of capital constitutes a greater obstacle for micro and small enterprises than for large firms, while the existence of regulatory differences within the EU seems to be a particular concern of small- and medium-sized enterprises rather than of micro and large firms.

A more recent challenge for SME exporters has been the rapid evolution of e-commerce, which offers completely new opportunities for cross-border supplies in many service sectors.²⁷ Yet, there is no gain without pain. Empirical evidence, though relatively scarce, points out various firm-internal adjustment problems, which might be compounded by policy-induced impediments affecting on-line deliveries of services. According to the European Commission, EU stakeholders perceive the risk of fraud and non-payments, different national fiscal regulations and intellectual property rights issues as significant deterrents to IT-enabled trade.²⁸ Also, language barriers, logistics and payment problems were mentioned as potential constraints for SMEs. Nevertheless, as far as WTO/GATS is concerned, it is important to put such problems into perspective. There have been initiatives in recent years, including the moratorium on customs duties on electronic supplies and the work programme on e-commerce, intended to facilitate the longer-term evolution of e-trade.²⁹

To our knowledge, however, there is no study that would have explored in a systematic way how potentially relevant remedies within the WTO framework could help overcome barriers deemed to affect SME service exporters. Such remedies might include the scheduling of liberalizing commitments in relevant sectors and modes of supply or, more immediately applicable, stricter compliance with, or more effective use of, existing transparency provisions. For example, given

²³ APEC (2010), *SME Market Access and Internationalization: Medium-term KPIs for the SMEWG Strategic Plan*, APEC Policy Support Unit, Singapore: APEC p. 18; Leonidou, Leonidas C. (2004), *op. cit.*, p. 281.

²⁴ Firm-level data used in the studies were primarily from advanced economies (e.g. European Union, United States). From a sectoral perspective, several studies focused on barriers faced by manufacturing exporters of different size, while others analysed the constraints faced by SMEs, regardless of the sector of activity.

²⁵ The Gallup Organization (2007), 'Observatory of European SMEs: Analytical report', Flash EB Series #196. The survey covered Iceland, Norway, Turkey and 25 EU Members (Bulgaria and Romania were excluded as non-Members of the European Union at the time).

²⁶ *Ibid.*, p. 212.

²⁷ WTO document S/C/W/304 of 18 September 2009.

²⁸ European Commission (2009), 'Report on cross-border e-commerce in the EU', Commission Staff Working Document, Brussels, SEC(2009) 283 final, pp.15-16, 71. A survey on UK small enterprises and an OECD study on 100 SMEs engaged in electronic commerce of goods and services arrive at similar conclusions. See de Groot, Sietske (2011), 'Small businesses and online trading', UK: Federation of Small Businesses, p. 8f; OECD (2000), 'Realising the potential of electronic commerce for SMEs in the global economy', Workshop 3, Conference for Ministers responsible for SMEs and Industry Ministers on 'Enhancing the competitiveness of SMEs in the global economy: strategies and policies', Bologna, Italy, p. 17.

²⁹ In the context of establishing a work programme on e-commerce, the Geneva Ministerial Declaration on global electronic commerce (WT/MIN(98)/DEC/2 of 25 May 1998) commits Members to "continue their current practice of not imposing customs duties on electronic transmissions". The moratorium has been confirmed on various occasions since. For the most recent report on e-commerce related work see WTO document WT/GC/W645 of 18 November 2011.

perceived information problems, the question arises whether developing-country service providers are aware of the existence of contact points in export markets, to be established under Article IV:2 of the GATS (Section IV.F), where they might obtain information, *inter alia*, on the commercial and technical aspects of supply. Also, to what extent are associations representing SME interests informed of the still on-going negotiations on regulatory disciplines under Article VI:4 and the possibility to draw, from their particular perspective, governments' attention to the stakes involved (Section IV.D(i))?

III. DISCUSSION OF SME-RELATED ISSUES IN WTO/GATS FORA

Concerned about trade barriers that might have a disproportionate impact on small service suppliers, several WTO Members raised SME-related issues at early stages of the Doha Round.³⁰ Among the impediments identified in meetings of the *Council for Trade in Services* were discriminatory and non-transparent regulatory frameworks; insufficient information about regulatory conditions; commercial presence requirements; lack of recognition of qualifications; restrictions on movement of personnel; burdensome licensing requirements that raise costs and impede access to the Internet; uncertainties surrounding the applicable legal framework, payment modalities and conditions governing the electronic delivery of services; and difficulties in obtaining related services (e.g. legal services, advertising, accounting services).³¹ SMEs were also deemed to suffer from genuine financial and human resource constraints, which limit their capacity to enter foreign markets other than via cross-border supplies (modes 1) and the movement of personnel (mode 4).³²

While these concerns appear to be widely shared in principle, it was also noted that the definitional delimitation of SMEs varies significantly between Members, reflecting the overall size of the economy and sectoral specificities.³³ Some delegations would have liked to develop a common understanding on the classification and definition of SMEs.³⁴ Number of employees, asset value and annual sales were the criteria most frequently referred to in this context, but market share has also been mentioned.³⁵ Annex 1 provides an overview of the definitions used by various Members, competent institutions and research bodies.

By the same token, several delegations cautioned against adopting a size-related negotiating perspective; trade rules that discriminate between enterprises of different size would hinder competition and compromise the efficient allocation of resources.³⁶ Yet, there were also voices, especially from developing countries, advocating a differentiated approach that takes into account the size of the supplier as well as the type of economy involved.³⁷ Accordingly, preferential treatment should be extended in particular to SMEs established in developing countries.³⁸ After some intensive discussions in 2001, the issue seems to have lost traction over time, despite some intermittent initiatives in 2005.³⁹ In September 2011, the Swiss delegation sought to reanimate the debate with a communication on the role of SMEs in the Swiss services economy, complemented in early 2012 by a submission discussing issues surrounding the electronic delivery of services from the perspective of SME exporters.⁴⁰ In addition, Turkey provided an informal document containing data on Turkish

³⁰ WTO documents S/CSS/M/9 of 22 June 2001; S/CSS/M/10 of 21 September 2001; S/CSS/M/12 of 28 November 2001; TN/S/W/5 of 1 October 2002; and TN/S/W/36 of 22 February 2005.

³¹ WTO documents S/CSS/M/8 of 14 May 2001; TN/S/W/5 of 1 October 2002; S/C/W/345 of 5 March 2012.

³² WTO document S/CSS/W/49 of 14 March 2001.

³³ WTO document S/CSS/M/10 of 21 September 2001.

³⁴ WTO document TN/S/M/4 of 11 February 2003.

³⁵ WTO document S/CSS/M/10 of 21 September 2001.

³⁶ WTO document S/CSS/M/12 of 28 November 2001.

³⁷ WTO documents S/CSS/M/10 of 21 September 2001 and TN/S/M/4 of 11 February 2003.

³⁸ WTO document TN/S/M/4 of 11 February 2003.

³⁹ WTO document TN/S/W/36 of 22 February 2005.

⁴⁰ WTO documents S/C/W/340 of 20 September 2011 and S/C/W/345 of 5 March 2012.

SMEs. However, despite repeated requests from the WTO Secretariat⁴¹, apart from some references to existing studies and the issues raised by the Swiss delegation, no evidence was provided of barriers actually encountered by service-trading SMEs and no links were established between perceived SME-related policy challenges and potential remedies under the GATS.

In general terms, SME-related issues have also been raised, in a particular context, in the *Working Party on GATS Rules*. In explaining their position concerning the desirability and feasibility of an emergency safeguard mechanism (ESM) in services trade, delegations from ASEAN countries (except Singapore) provided the hypothetical example of a situation where SMEs in retail trade were threatened by the sudden entry of large department stores capitalizing on the elimination of access barriers under mode 3 (commercial presence). Foreign majority-owned chains might then replace small independent stores, causing injury to their owners and employees.⁴² According to the proponents, an emergency safeguard mechanism would provide breathing space for the latter suppliers, enabling them to create, for instance, cooperatives in the same locality with a view to benefitting from economies of scale.⁴³ Other delegations remained unconvinced of the need for safeguard action to address what they considered to be mostly a structural problem for which, if deemed necessary, other instruments (e.g. changes in zoning laws) would be available.⁴⁴

The *Committee on Government Procurement* was another WTO forum to address the treatment of SMEs. Specifically, participants in the recent renegotiation of the plurilateral Agreement on Government Procurement (GPA) raised the issue of 'set-asides' and other preferential procurement programmes or provisions maintained by some Parties in respect of their SMEs.⁴⁵

Following this discussion, a work programme regarding the treatment of small- and medium-sized enterprises was included in a set of Future Work Programmes adopted by the Committee.⁴⁶ The agreed terms of the work programme provide, *inter alia*, for an exchange of information on Parties' measures relating to SMEs and a survey of all Parties to be undertaken by the Committee. Following the completion of the survey, the Committee will endeavour to identify best practices for promoting and facilitating the participation of Parties' SMEs in government procurement. The work programme, which covers both goods- and services-supplying SMEs, includes a separate commitment that Parties "shall avoid introducing discriminatory measures that favour only domestic SMEs and shall discourage the introduction of such measures and policies by acceding Parties".⁴⁷

In a recent communication on its strategy for supporting SMEs in international markets, the EU pledged "to make the interests of small businesses in access to international procurement markets

⁴¹ WTO documents S/C/M/105 of 6 June 2011 and S/C/M/106 of 14 July 2011.

⁴² WTO document S/WPGR/M/41 of 12 March 2003.

⁴³ WTO document S/WPGR/M/44 of 28 October 2003.

⁴⁴ WTO document S/WPGR/M/42 of 19 June 2003.

⁴⁵ Inside US Trade (2011), 'GPA Meetings Yield No Final Deal, But Parties Aim to Deliver by December', 30 September.

⁴⁶ The coverage of the Agreement with regard to each Party is defined in so-called Appendix I Annexes. Annexes 1 to 3 contain specifications of the central and sub-central government entities as well as other entities, such as public utilities, that have been committed to complying with the Agreement, as well as the applicable minimum threshold values. Annexes 4 and 5 specify each Party's covered services and construction services, respectively. The structure of the Appendix will be changed with the coming into force of the revised agreement. See www.wto.org/english/tratop_e/gproc_e/appendices_e.htm#appendixI (last accessed 19 March 2012). For background see also ICTSD (2011), 'Finish Line "Clearly in Sight" for WTO Govt Procurement Deal: Chair', Bridges Weekly, <http://ictsd.org/i/trade-and-sustainable-development-agenda/116642/> (last accessed 19 March 2012).

⁴⁷ Decision of the Committee on Government Procurement on a Work Programme on SMEs, reprinted in 'Adoption of the results of the Negotiations under Article XXIV:7 of the Agreement on Government Procurement, Following their Verification and Legal Review, As Required by the Ministerial Decision of 15 December 2011' (WTO document GPA/113 of 2 April 2012), Appendix 2, Annex C, pp. 439-441.

a priority in the WTO negotiations".⁴⁸ To what extent are other Members prepared to respond? According to Article II of the GPA, the agreement applies only to purchases above or equal to the threshold values specified in the Parties' annexes to Appendix I, usually around SDR 130,000 for central government entities. And this appears to be well beyond the reach of many SMEs.

IV. POLICIES AFFECTING SMEs - THEIR STATUS UNDER THE GATS

A. General Framework

The disciplines governing conventional merchandise trade under the GATT essentially focus on the treatment of products traded cross-border between WTO Members. In contrast, reflecting the GATS' extension to three additional modes of supply, consumption abroad (mode 2), commercial presence (mode 3) and presence of natural persons (mode 4), key disciplines extend as well to the treatment of service suppliers and their staff, either indirectly through measures operating on the consumer (e.g. tourists, students or patients) or directly in the form of investment grants, equity ceilings, work permits and the like. For each subsector inscribed in its schedule of commitments, a Member must specify the levels of market access and national treatment accorded under the four modes of supply. While market access commitments relate to the absence of six types of restrictions operating on services or service suppliers, listed in Article XVI:2 of the GATS, national treatment commitments, governed by Article XVII, essentially guarantee the absence of any measure that would modify the competitive conditions between domestic services and service suppliers and their foreign equivalents. In addition, pursuant to Article XVIII, Members may undertake additional commitments with regard to measures not falling under Articles XVI or XVII; such commitments could consist of 'positive' undertakings relating, for example, to the adoption of international standards or specified competition disciplines.

To protect the right to depart from unfettered market access and national treatment, governments need to inscribe the measures they might want to maintain or introduce as limitations in their respective schedules of commitments. Article XVI:2 provides that four of the six types of restrictions concerned - quotas on the number of suppliers, total value of transactions or assets, total number of operations (e.g. establishments) or quantity of service output, and total number of natural persons involved - might also be maintained in the form of an economic needs test.⁴⁹ In non-scheduled sectors, Members are free to completely deny market access or national treatment albeit they remain subject to the most-favoured-nation (MFN) clause, that is the requirement not to discriminate between trading partners. MFN treatment must thus be extended regardless of the existence of commitments, though the possibility of departures exists in specified circumstances, including among participants in regional trade agreements.⁵⁰ Similarly, even in scheduled sectors, individual modes can be completely exempt from any bindings concerning market access or national treatment. There is one important caveat, however: scheduled limitations protect a Member's right to maintain or introduce the specified measure(s), but do not necessarily reflect the actually prevailing trade regime which might be more open at any point in time.⁵¹

⁴⁸ European Union (2011), 'Small Business, Big World: a new partnership to help SMEs seize global opportunities', Europa, Press Release RAPID, (last accessed 19 March 2012), <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/765&format=HTML&aged=0&language=EN&guiLanguage=en>.

⁴⁹ The two remaining categories of measures, for which such tests are not foreseen as an option, concern restrictions on the form of legal incorporation or joint venture requirements (governed by Article XVI:2(e)) as well as restrictions on foreign capital participation (Article XVI:2(f)).

⁵⁰ Another option that existed only at the WTO Agreement's date of entry into force or, in the case of acceding countries, date of acceptance, was the possibility for individual Members to list MFN exemptions. For example, one of the exemptions listed by the United States, applying across all service sectors, provides that "Canadian small businesses, but not small businesses of other countries, may use simplified registration and periodic reporting forms with respect to their securities".

⁵¹ For example, Albania's GATS schedule contains in various sectors the following limitation on national treatment under mode 3: "None, except that licensing is done only in cooperation with an Albanian professional

The flexibility of the GATS allows Members to exempt sectors or market segments from commitments that are typically served by small suppliers. However, such cases are relatively rare. Certainly more frequent are limitations that, without directly targeting suppliers of different size, do have size-specific effects. For example, restrictions on cross-border supply tend to render it more difficult for smaller firms to compete effectively with larger companies, which may find it easier to mobilize the necessary financial and human resources to establish a permanent presence. Similar effects may arise from limitations that require the parent company abroad to have been established for a certain minimum number of years, thus effectively precluding relatively young firms, which are likely to be smaller than their older peers, from moving into the market concerned.⁵² In addition, a variety of policy measures that may have size-specific effects are not subject to scheduling at all, including minimum-capital and other minimum-size requirements.⁵³ The status of certain other measures, such as local-presence requirements, may need to be assessed case-by-case in the light of potentially relevant provisions (Section IV.D(i)). For example, it could be argued that the latter requirements modify the conditions of competition between domestic and foreign service suppliers in the sense of Article XVII whenever (i) the services concerned could easily be provided cross-border and (ii) relevant rules are more difficult/costly for foreigners to comply with than for domestic firms.

B. SME-related policies as reflected in schedules of commitments

SME-related policy interests may be reflected in schedules of commitments through (a) the exclusion of 'sensitive' sector segments from any access obligations or (b) limitations on market access or national treatment that provide scope for size-related policies which would otherwise be inconsistent with full, that is unqualified, commitments. Albeit Article XVIII would allow Members to undertake additional commitments in pursuit of SME-related policy objectives, it has not played a particular role to date, in whatever sector, with the possible exception of telecommunication services.⁵⁴

(i) Sector column

In the Scheduling Guidelines⁵⁵, Members are called upon to rely on the Sectoral Classification List (MTN.GNS/W/120) developed by the then GATT Secretariat in 1991. The list distinguishes some 160 sub-sectors, allocated to 12 'mega-sectors', which cover the full services spectrum from business services, communication services and so forth to a residual category of other services. While expressly recognizing that Members may use their own classifications or definitions, the Scheduling Guidelines recommend in such cases to provide sufficient detail so as to avoid ambiguities. A number

whether this professional is a partner or an employee in the foreign company". However, according to a notification, circulated by Albania in 2005 under GATS Article III:3 (see Section IV.F), relevant measures have been removed with respect, *inter alia*, to hospital and other health services. See WTO document S/C/N/335 of 10 June 2005.

⁵² It might also be argued, from a slightly different perspective, that SMEs are disadvantaged by such entries since their life expectancy is inferior to that of large firms. See Mason, Moya K, 'Research on Small Businesses', <http://www.moyak.com/papers/small-business-statistics.html> (last accessed 19 March 2012); OECD, 'Management Training in SMEs' (2002), Paris: OECD, p. 7; Lazera, Edward P. and Kathryn Shaw (2008), *The structure of wages: an international comparison*, Chicago: University of Chicago, p. 33.

⁵³ This is explicitly clarified in the Scheduling Guidelines, adopted by the Council for Trade in Services in 2001 (WTO document S/L/92 of 28 March 2001, para 11).

⁵⁴ The vast majority of the Members that undertook additional commitments confined these to the competition safeguards, interconnection guarantees and other good-governance principles contained in the so-called reference paper on telecommunications that had been agreed in post-Uruguay Round negotiations. Overall, 92 Members assumed the disciplines contained in the paper as additional commitments, in seven cases with some country-specific modifications (situation as at end-2011). The paper contains SME-related elements insofar as it protects the interests of entrants that seek to gain a foothold in previously monopolised telecom markets. For a detailed discussion of the reference paper, see Bronkers, Marco and Pierre Larouche (2008), 'A Review of the WTO Regime for Telecommunications Services', in Kern Alexander and Mads Andenas (eds), *The World Trade Organization and Trade in Services*, Leiden and Boston: Martinus Nijhoff, pp. 319-379.

⁵⁵ See above n 53.

of Members have used this element of flexibility to simply exempt sector segments served by SMEs from their specific commitments, thus retaining the right to operate whatever protective measures, from outright entry prohibitions to exclusions from domestic subsidy schemes, they feel needed. For example, some Members confined their commitments on hotel and lodging services to the luxury category (three- or four-stars and above), thus implicitly excluding from access obligations segments that consist mostly of more modest, and normally smaller, facilities.⁵⁶

(ii) Market access

Most size-related limitations can be found in the market access column, either in the horizontal section that applies across all sectors scheduled by the Member concerned or in individual sectors.⁵⁷ For example, under mode 3 (commercial presence), several Caribbean countries have maintained the right, in all committed sectors, to reserve "a number [of not further specified] small business opportunities for nationals". Accordingly, the governments retained full policy discretion to adopt measures falling under Article XVI, from complete entry prohibitions to quantitative restrictions on market shares, which would protect domestically-owned SMEs from foreign entrants.

Concerning mode 4 (presence of natural persons), the level of commitments, mostly inscribed in the horizontal section of the schedules and, thus, applying across all covered sectors, is quite shallow in virtually all schedules. This is particularly true for categories that tend to be particularly important for foreign-based SMEs, such as independent professionals and contractual service suppliers whose access is not linked to commercial presence.⁵⁸ A somewhat higher incidence of these categories can be found in the commitments of newly acceded WTO Members.⁵⁹ One of the very few entries under this mode that is explicitly SME-related has been scheduled by Venezuela; it modifies the otherwise existing mode-4 restrictions for employment of foreign personnel by SMEs.⁶⁰

Of course, similar effects to such mode-related limitations could have been achieved by excluding relevant sectors or sector segments altogether from the scope of a commitment as described before. By its very nature, such exclusion would have covered national treatment and the other modes of supply as well. The difference might be of negligible commercial importance in many cases, since denials of market access under mode 3 already exempt the lion's share of potentially feasible transactions in a large number of sectors. To be able to protect *domestic* SMEs, the discriminatory application of any minimum size barrier would also need to be indicated in the market access column.⁶¹

A closer look also reveals limitations, though relatively rare, which focus on small-scale projects that could be carried out on a cross-border basis, thus providing niches for foreign-based SMEs. For example, concerning architectural services, South Africa's schedule provides under modes 1 and 2 that the services of a locally registered architect have to be utilised for building plans of 500

⁵⁶ Guatemala's schedule is a case in point (WTO document GATS/SC/36 of 15 April 1994).

⁵⁷ In certain cases, entries might have been misplaced. For example, some measures that seem to fall under market access show up in the national treatment column and *vice versa*. As far as possible, we have treated such cases as if the measures concerned had been inscribed in conformity with relevant GATS provisions.

⁵⁸ WTO document, S/C/W/301 of 15 September 2009.

⁵⁹ *Ibid.*

⁶⁰ Venezuela inscribed the following limitation in the horizontal section under market access for mode 4: "[...] 90% of the personnel of an enterprise, whether employees or manual workers, must be Venezuelan nationals [...] The Ministry of Labour may authorize temporary exceptions to the above provision after having examined a particular case:[...] c) In the case of small and medium sized enterprises - When foreign personnel are recruited, preference will be given to persons having children born on Venezuelan territory, or married to Venezuelans, or who have established their domicile in Venezuela or who have the longest period of residence in the country".

⁶¹ Pursuant to GATS Article XX:2, measures inconsistent with both Articles XVI and XVII are to be inscribed under market access only; this is considered to provide a condition or qualification to Article XVII as well. However, it appears quite likely that a number of quota restrictions that have been inscribed under Article XVI are actually applied in a discriminatory manner without this being reflected in the schedule.

m² and over. In other words, foreign architects involved in smaller projects could directly interact with their South African clients. While possibly motivated by other (liability-related) considerations, relevant measures, if actually implemented, would certainly have size-related implications.⁶²

In contrast, a few Members have explicitly spelled out size-related criteria in relation to the economic needs tests (ENTs) they scheduled under market access for mode 3. Cases in point are references to floor space or number of rooms, geographical spread, type of neighbourhood, distance between existing facilities and the like.⁶³ It is important to bear in mind, however, that a significant share of ENTs, over one-third, does not indicate any criteria, contravening a recommendation in the Scheduling Guidelines ("the entry should indicate the main criteria on which the test is based", para 9), while many more such tests provide only vague indications. In turn, this implies that size-related policy intentions might be pursued with a far higher number of ENTs than those setting out relevant criteria.

Another scheduling issue that might warrant attention are relatively frequent denials of bindings on cross-border trade in sectors such as hotel, restaurant or hospital services. In a number of schedules, this is attributed, in related footnotes, to the technical non-feasibility of such supplies. However, pursuant to Article XXVIII of the GATS, "supply of a service includes the production, distribution, marketing, sale and delivery" - and in most sectors at least marketing and sale can easily be conducted cross-border. The absence of bindings in these particular cases of (perceived) technical non-feasibility is indicative of the fact that many current commitments are out-dated, reflecting the technical and commercial reality some 20 years ago when e-trade was in its infancy.⁶⁴ While it could be argued that the emergence of IT-enabled services, overall, has tended to benefit SMEs (Section II) and that there is considerable scope for potentially relevant changes in commitments, without progress in the Doha Round, would Members be prepared to reconsider the schedules they submitted in the (electronic) Stone Age?

(iii) National treatment

The most frequent national treatment limitations that are explicitly size-specific relate to subsidies under mode 3, sometimes in combination with one or more other modes. For example, under mode 3, Mexico has denied bindings "for research and development subsidies and incentives to small service enterprises" owned by its nationals. As in many other cases, an element of uncertainty remains insofar as there is no further clarification of the definitional scope of 'small service enterprises'.

As indicated before, a variety of Members have scheduled residency, local partnership and local presence requirements as limitations, mostly under modes 1, 2 and 4, to protect themselves from challenges under Article XVII of the GATS. Relevant entries have been inscribed, for example, by Poland, Slovenia and Sweden regarding travel agencies, tour operators and the like. Such limitations, though possibly well justified for overriding policy reasons, including prudential concerns in financial services, may prove more burdensome for SMEs, which tend to serve an export market only occasionally and/or mostly on a cross-border basis, than for larger suppliers that can afford to invest in a permanent presence (Section II). While it might still be possible to access a market via modes 1 and 2, using the local office as a conduit, the cost of doing so is certainly higher than in the case of unfettered access.⁶⁵

⁶² In a similar vein, Bulgaria has inscribed under architectural and engineering services that foreigners must provide these "only in partnership with, or as subcontractors of, local service suppliers [if] the project is of national or regional significance".

⁶³ Korea has inscribed an ENT for wholesale trade services, applicable, *inter alia*, to markets and large stores with floor space of more than 3,000 m².

⁶⁴ Many pieces of national regulation might also have been rendered obsolete by technical progress. WTO document S/C/W/304, *op. cit.*, p. 13.

⁶⁵ With this in view, only those requirements that affect services which could normally be supplied without local assistance have been taken into account in Table 1. Local recruitment requirements in sectors that mainly rely

Training requirements, typically scheduled under modes 3 and 4, may have similar effects if enforced in practice, that is tilting the playfield against small foreign service providers. Such requirements are contained in the horizontal section of 12 schedules (Botswana, Cambodia, Cape Verde, Gambia, Guatemala, Honduras, Kuwait, Lesotho, Nicaragua, Papua New Guinea, Qatar and Solomon Islands).⁶⁶ Further examples can be found in a sectoral context, including in tourism services (Egypt and Niger).

C. Situation in non-scheduled services ('missing sectors')

In non-scheduled sectors, as indicated before, governments remain free to operate whatever restrictions, discriminatory or not, for whatever policy purposes. These may include, of course, the perceived need to create or maintain protected outlets for domestically-owned SMEs or otherwise to promote their business activities. The scope for any such interventions, disciplined only by the MFN obligation, varies widely between Members, reflecting the range of sectors covered by or, rather, excluded from their schedules of commitments.⁶⁷ While the current schedules of a few LDCs, submitted at the end of the Uruguay Round in 1993/94, contain only one sub-sector, i.e. less than 1 per cent of the 'services universe' as defined by the Sectoral Classification List, some transition economies that acceded since 2000 inscribed 130 and more sub-sectors, that is over 80 per cent of the total. (Nepal and Cambodia, two recently acceded LDCs, scheduled 77 and 94 sub-sectors, respectively.) On average across all Members, no more than one-third of all sub-sectors are currently subject to specific commitments.⁶⁸

Members' scheduling decisions may also be viewed from a sectoral perspective. Overall, tourism is clearly in the lead, with one or more of the relevant sub-sectors (hotel and restaurants, travel agencies and tour operators, tourist guides, and a not further specified category of other services) showing up in 95 per cent of all schedules.⁶⁹ Financial services, a broad range of professional and other business services, as well as telecommunication services follow, trailing by some 15 to 25 percentage points. In contrast, educational and health services are the least popular sectors, for scheduling purposes, committed by less than 40 per cent of Members. It is interesting to see sectors among the most frequently scheduled services, such as financial and telecommunication services, which are typically dominated by larger firms, while sectors such as health, education or distribution services, normally made up of smaller entities, feature far less prominently.⁷⁰ This particular pattern could imply that size-related considerations have been part of the sensitivities and constraints governing WTO Members' sector selection for scheduling.

D. Policy discretion in fully liberalized sectors/modes ('missing disciplines')

The preceding observations are not meant to suggest that a Member's scope for employing size-related policy schemes depends on either the scheduling of potentially relevant limitations or otherwise not undertaking any commitments at all. Quite the contrary. A wide range of such policies

on commercial presence (hospitals, hotels, restaurants, etc.) have not been counted, although size-related effects, possibly of a more indirect nature, may exist as well.

⁶⁶ Two typical examples: "Enterprises must also provide for training in higher skills for Zambians to enable them to assume specialized roles"; "Investors are required to train citizens in order to enable them to assume senior management positions over time" (Botswana).

⁶⁷ In turn, given the various possibilities to depart from most-favoured-nation treatment in one or more sectors, the MFN obligation under Article II may be compared to a "cornerstone with fuzzy edges". See Adlung, Rudolf (2006), 'Services Negotiations in the Doha Round: Lost in Flexibility?', *Journal of International Economic Law*, 9(4), p. 868.

⁶⁸ Adlung, Rudolf and Martin Roy (2005), 'Turning Hills into Mountains? Current Commitments under the General Agreement on Trade in Services and Prospects for Change', *Journal of World Trade*, 39(6), p. 1168.

⁶⁹ *Ibid.*, p. 1170.

⁷⁰ At first glance, the most frequently scheduled sector, tourism, seems to defy this pattern since it is normally composed of relatively small enterprises. However, tourism accounts for a very significant share of the SME-related limitations.

may well be maintained despite the existence of full commitments, that is unfettered liberalization in terms of market access and national treatment, in the areas concerned. Five potentially relevant categories of measures are discussed below.

(i) Market regulation and control

Among the many policies that define the framework conditions of market entry and market participation, with potentially size-related effects, the following tend to favour small-scale entities *vis-à-vis* larger competitors:

- (a) strict zoning laws, including restrictions on maximum service areas, and opening hours;⁷¹
- (b) obligations on providers of infrastructural services, in particular financial services, to prioritize SMEs, for example via preferential lending⁷²;
- (c) competition disciplines that seek to ensure continued market contestability and prevent abuse of dominant positions (merger controls, prohibition of collusive practice, etc.); and, in a similar vein,
- (d) prohibitions/restrictions on performing multi-product activities (for example, prohibition of partnerships between lawyers and non-lawyers such as accountants and tax consultants).⁷³

In contrast, SMEs tend to be adversely affected by:

- (a) high licensing fees, administrative red-tape and similar regulatory requirements that tend to increase the fixed cost of market entry/participation (Section II);
- (b) minimum capital and comparable minimum size requirements which, while possibly serving public policy purposes (reliability and stability of supplies), effectively exclude small or occasional suppliers from the markets concerned; and
- (c) universal service obligations on suppliers of telecom, transport, health and other public services with similar intentions and effects.

As noted before, any such measures would not need to be scheduled as long as they cannot be associated with any of the restrictions falling under Article XVI or with competitive distortions between like foreign and domestic services/suppliers within the meaning of Article XVII. Referring especially to minimum requirements, such as minimum capital requirements for the establishment of a corporate entity, the Scheduling Guidelines (para 11) explicitly clarify that these do not fall within the scope of Article XVI. However, the borderline between such cases and restrictions that might be deemed to exclude particular market segments from access commitments (hotels of less than 200 rooms, etc.) may be blurred in some instances. Thus, possibly in the interest of legal certainty, Vietnam scheduled a market-access limitation providing that “[t]he minimum investment capital for a commercial presence in hospital services must be at least US\$20 million for a hospital, US\$2 million for a polyclinic unit and US\$200,000 for a specialty unit.” Similar limitations can be found in other

⁷¹ For example, according to press reports, Korea has recently introduced laws providing that, without the local communities' consent, smaller urban supermarkets cannot open within 1 km of small stores and banning large retailers from running certain types of stores between midnight and 8 a.m., when small stores generally cannot compete. (Christian Oliver (2012), 'Tesco attacks Seoul retail policy', Financial Times, 29 February.)

⁷² Nevertheless, some Members have inscribed limitations that appear to cover such obligations. For example, according to Korea's GATS schedule, banks might be required to lend to small and medium-sized companies.

⁷³ Small businesses might benefit from such measures if the resulting market segmentation deprives larger (potential) competitors of size-related economies.

schedules as well. Of course, in the absence of further indications, such entries do not allow for discriminatory application that would create niches for domestic small-scale investors. However, they might ease the adjustment pressure on incumbent suppliers, possibly relatively large and mostly domestically-owned facilities, on a commitment's entry into force.

There is an additional aspect to be kept in mind: the still on-going negotiation on domestic regulatory disciplines as foreseen under Article VI:4 of the GATS. The relevant mandate provides for the development of any necessary disciplines to ensure that licensing and qualification requirements and procedures, and technical standards "do not constitute unnecessary barriers to trade in services". The ensuing disciplines shall aim to avoid, *inter alia*, that relevant requirements be "more burdensome than necessary to ensure the quality of the service". This mandate is certainly broad enough to address barriers such as those mentioned above (excessively high licensing fees, minimum capital requirements, etc.) if deemed necessary by Members. However, given the wider context of the Doha Round (non-)negotiations, no outcome is currently in sight.

(ii) Investment- and production-related support schemes

According to information contained in WTO Trade Policy Review (TPR) reports over the period 1995-2007, a number of Members provided subsidies and similar incentives that, directly or indirectly, had size-related effects.⁷⁴ In some cases, it was explicitly clarified that the measures were extended on a non-discriminatory basis. For example, in 1996-1998 the Indian Central Government offered special interest subsidies to national and foreign investors in one-, two-, and three-star hotels.⁷⁵ Of course, despite the apparent absence of discriminatory elements, it is fair to assume that such projects were carried out predominantly by nationals. India's prioritizing of small projects contrasts with policy schemes in other countries, such as Gambia, which, among other considerations, sought to promote the development of four- and five-stars hotels.⁷⁶

Further information on support schemes targeting SMEs, whether in tourism or beyond, are contained in the TPR reports on Barbados (2002), Japan (2006), Nicaragua (2006), Korea (2004), Sri Lanka (2004), Slovak Republic (2001), Switzerland (2004), Senegal (2003), and Chinese Taipei (2006)⁷⁷. Support was granted predominantly in the form of subsidized loans, various tax incentives related to investment or training, and import duty exemptions for materials used. In most instances, the reports provide no indication as to the nature, discriminatory or not, of the incentives granted. Concerning tourism services, all of the above Members, save Barbados, have undertaken commitments under the GATS, and in virtually all cases these are without national treatment limitations for subsidies under mode 3.⁷⁸

Two questions remain, in particular. First, do such SME-promoting policies suffice to balance the impact of other interventions that might benefit large-scale suppliers? And, second, do they serve

⁷⁴ The following information is based on an overview of relevant observations prepared by the WTO Secretariat at the request of the Working Party on GATS Rules. See WTO documents S/WPGR/W/25, including addenda 1 to 5, from 26 January 1998 to 27 March 2007.

⁷⁵ WTO document WT/TPR/S/33 of 5 March 1998, para. 184.

⁷⁶ WTO document WT/TPR/S/127 of 5 January 2004, para 17. Information on other countries, such as Solomon Islands, Ghana, Thailand, St. Kitts and Nevis, and St. Vincent and the Grenadines, points out the existence of support schemes directed at larger-scale hotels in terms of number of beds or rooms. See WTO documents WT/TPR/S/45 of 9 September 1998; WT/TPR/S/81 of 29 January 2001; WT/TRP/S/85/KNA of 7 May 2001; WT/TPR/S/85/VCT of 7 May 2001; WT/TPR/S/123 of 15 October 2003.

⁷⁷ The respective reports have been circulated as WTO documents WT/TPR/S/101 (Barbados), WT/TPR/S/175 (Japan), WT/TPR/S/167/Rev.1 (Nicaragua), WT/TPR/S/137 (Korea), WT/TPR/S/128 (Sri Lanka), WT/TPR/S/91 (Slovak Republic), WT/TPR/S/141 (Switzerland), WT/TPR/S/119 (Senegal) and WT/TPR/S/165/Rev.1 (Chinese Taipei).

⁷⁸ A few Members maintain horizontal limitations concerning subsidies for research and development, and Switzerland's schedule provides that eligibility for subsidies may be limited to persons established in particular regions of the country.

their intended purpose in a reasonably efficient manner? However, this is in the end for the individual governments to consider.

(iii) Export-related support

Unlike the GATT, its counterpart in merchandise trade, the GATS does not restrict Members' ability to curtail or promote exports. There is neither a services equivalent to GATT Article XI which, subject to certain caveats, bans the use of export quotas, nor to the prohibition of export subsidies pursuant to Article 3(a) of the Agreement on Subsidies and Countervailing Measures. While the GATS' modal structure is defined in a neutral way, regardless of the direction of trade, its key obligations, most-favoured-nation treatment, market access and national treatment, refer exclusively to the treatment of foreign services and service suppliers.

It is conceivable, hypothetically at least, that rules be created that would rein in governments' scope for employing export-related measures of whatever type. In particular, the negotiating mandate on subsidies, under GATS Article XV, provides for the development of multilateral disciplines that might be necessary to prevent subsidies from having-trade distortive effects. And export subsidies certainly are a potential candidate. However, Members are still far from agreeing on the need for and focus of any such disciplines.

Given the particular scope of the GATS, there is thus no possibility, for example, to infer from the existence of MFN exemptions or the inscription of market-access or national-treatment limitations on the existence of export-related policy schemes.⁷⁹ Such schemes might provide, for example, for direct financial support, export guarantees or professional training intended to improve the export performance of services SMEs. Relevant information, though not systemically collected, may be contained in WTO Trade Policy Review (TPR) reports. Cases in point are Argentina's Export-Ar Foundation, which provides SMEs with relevant training and assistance by creating sector-level exporter groups or consortia⁸⁰, and Australia's Export Market Development Grants (EMDG) scheme which aims to encourage small- and medium-sized Australian businesses to develop export markets. Reportedly, EMDG reimburses up to 50 per cent of eligible export promotion expenses incurred by Australian residents.⁸¹ Another example is Costa Rica's 'Creando Exportadores' programme, a training initiative covering, *inter alia*, exporting SMEs in sectors such as audiovisual services, software, architecture, engineering, and health tourism.⁸² However, it has also been observed that certain qualification criteria under export promotion schemes could disadvantage small suppliers.⁸³

As noted in a study by the European Commission, internationally active SMEs might not be informed of existing support schemes or hesitate to apply.⁸⁴ For example, the relevant procedural requirements might be considered too burdensome or time-consuming. In view of such impediments, EU initiatives to promote the internationalisation of SMEs, in whatever sector, reportedly seek to

⁷⁹ Of course, this applies only as long as the eligibility criteria under a Member's export promotion schemes do not discriminate between foreign-owned firms of different nationality or, where national-treatment obligations exist, between foreign- and domestically-owned exporters.

⁸⁰ WTO document WT/TPR/176/Rev.1 of 23 April 2007.

⁸¹ Eligible are "[a]ny Australian individual, partnership, company, association, co-operative, statutory corporation or trust that [...] have: (i) income of not more than \$50 million in the grant year, (ii) incurred at least \$20,000 of eligible export expenses under the scheme (first-time applicants can combine two years expenses); (iii) principal status for the export business (some exceptions apply, e.g. event promoters)". (Austrade, 'Who Can Apply for EMDG?', www.austrade.gov.au/Who-can-apply/default.aspx (last accessed 19 March 2012)); Austrade, 'What is EMDG?', www.austrade.gov.au/What-Is-EMDG/default.aspx (last accessed 19 March 2012); WTO document WT/TPR/178/Rev.1 of 1 May 2007.

⁸² PROCOMER, 'Programa Creando Exportadores', (last accessed 19 March 2012), www.procomer.com/contenido/programa-creando-exportadores.html.

⁸³ For example, the APEC Business Advisory Council noted that stringent minimum size requirements for eligibility under export assistance programmes might act as a barrier in certain circumstances. APEC Business Advisory Council (2004), 'Supporting APEC SME Service Exporters: A Handbook of Best Practices', p. 14.

⁸⁴ European Commission (2010), *op. cit.*, p. 63.

improve awareness of available support services, ensure consistency of existing schemes, promote clusters and networks for SME internationalisation, better communicate the benefits of trading internationally, and the like.⁸⁵

(iv) Preferences in government procurement

Within the WTO's remit, the main existing disciplines on government procurement are contained in the plurilateral Agreement on Government Procurement (GPA, see Section III). Currently, the GPA covers only a limited number of Members, mostly economically advanced, and the commitments are subject to exemptions and minimum threshold values.⁸⁶ However, the recent conclusion of the GPA renegotiation might facilitate accession to the Agreement by additional WTO Members, such as China, Jordan and Ukraine, which have commenced the acceding process, and possibly others.⁸⁷

The GATS does not impose any effective disciplines on a government's use of procurement for whatever policy purposes. Article XIII provides that the MFN (Article II), market access (Article XVI) and national treatment (Article XVII) obligations do not apply to the purchase of services by governmental agencies for governmental purposes. Thus, GATS Members' schedules of commitments do not capture any discriminatory elements contained in, or arising from, national procurement laws, regulations or requirements. Article XIII also calls for multilateral negotiations on government procurement to be conducted, but no tangible progress has been achieved to date in these negotiations.

Relevant information on SME-related procurement practices may be derived from a variety of other sources, including TPR reports and Notes submitted under the GPA. As a case in point, the United States provides for set-asides for small and minority businesses, that is it reserves the procurement of supplies or services valued between US\$3,000 and US\$100,000 exclusively for small business concerns.⁸⁸ These set-asides, which ranged from 12.5 per cent of covered federal procurement in 1992 to 22 per cent in 2007, are granted only to domestically incorporated firms.⁸⁹ Exemptions for small business set-asides from GPA coverage have been also listed by Canada and Korea.

In contrast, according to a 2005 survey, among 28 countries in Europe only Greece had a regulation expressly favouring SMEs in public procurement.⁹⁰ Under relevant legislation, companies were registered in classes depending on their size and the level of the budget of contracts sought; lower-class registered companies could compete for smaller contracts while higher-class registered

⁸⁵ European Union (2011), *op. cit.*

⁸⁶ In early 2012, the GPA had 15 Parties, covering 42 WTO Members (including EU 27).

⁸⁷ For related details see Report (2011) of the Committee on Government Procurement (WTO document GPA/110 of 16 November 2011).

⁸⁸ This applies unless the contracting officer determines there is "not a reasonable expectation of obtaining offers from two or more responsible small business concerns that are competitive in terms of market prices, quality, and delivery". Concerning acquisitions exceeding US\$100,000, these are to be reserved for small business participation when there is "a reasonable expectation that offers will be obtained from at least two responsible small business concerns and awards will be made at fair market prices". See Federal Acquisition Regulation, 19.501(a) and Federal Acquisition Regulation, 19.502-2. See above n 46.

⁸⁹ The target group are business entities "organized for profit, with a place of business located in the United States and which operate[s] primarily within the United States or which make[s] a significant contribution to the US economy through payment of taxes or use of American products, materials or labour", that are independently owned and operated and meet the size criteria established by the Small Business Administration, which vary from industry to industry. (Code of Federal Regulations, 13 CFR 121.105; Federal Acquisition Regulation, 19.102(a); WTO document WT/TPR/S/16 of 21 October 1996, p. 88); WTO documents WT/TPR/S/16 of 21 October 1996; and WT/TPR/S/235/Rev.1 of 29 October 2010.

⁹⁰ The survey covered EU 25 (excluding the Netherlands) as well as Croatia, Iceland, Liechtenstein and Norway. It was carried out by Public Procurement Network, an informal European-wide co-operation initiative. Full membership is open to all EU member States; associate membership to EEA countries, acceding countries and candidate countries committed to applying the EU-rules. The European Commission has observer status. See www.publicprocurementnetwork.org (last accessed 19 March 2012).

companies would not.⁹¹ However, regulations in a few other countries (e.g. France, Germany, Norway and Sweden) may have benefited SMEs indirectly. Relevant provisions ranged from decentralisation of procurement and simple notification procedures for contracts with low thresholds (Norway) to the obligation to accept groups or associations of bidders and treat them as a single bidder (Germany) in order to facilitate the participation of SMEs in public tenders. An EU survey on SMEs' access to public procurement noted that "breaking down tenders into lots is commonly seen as one of the most important tools that help SMEs accessing public tenders"⁹²; Cyprus, Slovenia, France and Poland reportedly are the most frequent users of this approach.⁹³

(v) Recognition measures under Article VII

Recognition measures relating to foreign educational degrees, professional training, etc. may facilitate access of the beneficiary suppliers, not least independent professionals and employees of SMEs, and help level the playing field *vis-à-vis* the sector incumbents. However, little information on such measures is available as Members apparently have ignored relevant notification requirements under the GATS. (Pursuant to Article VII:4, the Council for Trade in Services must be promptly informed of the opening of negotiations on recognition agreements or the adoption of (autonomous) recognition measures.) Between January 2000 and December 2011, no more than 19 such notifications were made, 10 of which came from one Member only, Switzerland. It is quite unlikely that this is a reasonably comprehensive picture.⁹⁴

E. Policy discretion under ill-specified commitments ('missing clarity')

Apart from unspecified economic needs tests, there are more entries in GATS schedules that are difficult to interpret. A recent study deals specifically with 'foggy commitments' that cannot be clearly associated with provisions of the Agreement, but might be deemed by the governments concerned, possibly erroneously, to allow for a wide range of policy restrictions.⁹⁵ These might include measures intended to protect the interests of SMEs.

Overall, 'foggy entries' are contained in close to 100 schedules, accounting for about one-fifth of all commitments inscribed under market access for mode 3 (counting horizontal limitations as if they had been inscribed sector-by-sector). The most frequent categories of such entries are references to licensing and qualification requirements that are not further specified, and similarly vague references to the titles of laws and regulations rather than to the measures concerned. These two categories represent some 70 and 20 per cent, respectively, of all 'fog' in schedules. In case of a legal challenge, however, it is well conceivable that the Panel ruling in *Mexico - Telecoms* proves relevant. According to the Panel, an entry referring to the requirement of a permit (concession) does not indicate the existence of a quantitative limitation and, thus, serves no legal purpose in the sense of

⁹¹ Public Procurement Network (2005), 'National Public Procurement regulations favouring SME', www.publicprocurementnetwork.org/index.php?option=com_content&view=article&id=76&Itemid=54 (last accessed 19 March 2012).

⁹² GHK (2010), 'Evaluation of SMEs' Access to Public Procurement Markets in the EU', DG Enterprise and Industry, Final Report, pp. 36 and 42, (last accessed 19 March 2012), http://ec.europa.eu/enterprise/policies/sme/business-environment/files/smes_access_to_public_procurement_final_report_2010_en.pdf.

⁹³ *Ibid.*, p. 42.

⁹⁴ The poor notification record under Article VII might be due, in part, to a perception that recognition measures agreed in the context of RTAs do not need to be notified separately. However, there is nothing in Article V (Economic Integration) to suggest that its scope would extend to, and obviate compliance with, Article VII. See Adlung, Rudolf and Antonia Carzaniga (2009), 'MFN Exemptions under the General Agreement on Trade in Services', *Journal of International Economic Law*, 12(2), p. 361.

⁹⁵ Adlung, Rudolf, Peter Morrison, Martin Roy and Weiwei Zhang (2012), 'FOG in GATS Commitments - Why WTO Members Should Care', *World Trade Review* (forthcoming).

Article XVI of the GATS. In other words, there would be no scope for operating measures restricting market access with a view to protecting outlets for whatever type of domestic suppliers.⁹⁶

F. Potentially relevant transparency disciplines

In consulting schedules it is important to bear in mind, as noted before (Section IV.A), that limitations serve to protect a Member's right to maintain or introduce the measure concerned. Like GATT-bound tariffs, they define the outer limits of legitimate protection, but must not be equated with prevailing market conditions which can be more liberal at any time. And, of course, scheduled limitations provide no indication of regulatory measures or recognition initiatives that, depending on the sectors and modes concerned, may affect access as much as, or even more, than limitations in the sense of Articles XVI and XVII.

Pursuant to Article III:3 of the GATS, any changes to laws, regulations or guidelines that "significantly affect" trade in committed sectors would need to be notified to the Council for Trade in Services. This is regardless of whether such changes fall under the provisions of Articles XVI or XVII of the GATS (market access and national treatment, respectively) or whether they consist of domestic regulatory adjustments that are not subject to scheduling. It might thus be expected that the notifications received over the years, at least in committed sectors, would indicate directions of policy change, including in areas relevant to SMEs. However, Article III:3 has been widely ignored.⁹⁷

Over the past decade, some 350 pertinent notifications have been received, of which more than one-half originated from three Members only (Albania, China, and Switzerland). With possibly the sole exception of Brazil, there is no indication in any of these notifications that the measures taken would have been prompted by, or directly contributed to, SME-related policy objectives or concerns.⁹⁸ Other notifications concerned reductions in minimum-size requirements, in terms of employees, for foreign-invested securities companies (China)⁹⁹; and changes to capital requirements in various sectors (China and a few other Members). Some further notifications concerned measures, such as changes to residency requirements in the case of Japan and Canada, which may have SME-specific effects as well.¹⁰⁰

Moreover, as already indicated (Section II), the GATS contains transparency provisions that might prove directly relevant to developing-country SMEs seeking to explore access opportunities abroad. Pursuant to Article IV:2, developed country Members and, to the extent possible, other Members are required to operate contact points through which developing-country suppliers can obtain potentially relevant commercial and technical information.¹⁰¹ It might be assumed that in

⁹⁶ For details see the Panel Report, Mexico – Measures Affecting Telecommunications Services (*Mexico – Telecoms*), WT/DS204/R, adopted 1 June 2004. In particular, the Panel refers to Article XX:1 which, in its view, "provides useful context" for the interpretation of Article XVI:2 (para 7.359). Article XX:1 states that "[e]ach Member shall set out in a schedule the specific commitments it undertakes under Part III of the Agreement. With respect to sectors where such commitments are undertaken, each schedule shall specify: (a) terms, limitations and conditions on market access; [...]"

⁹⁷ In turn, this may be for various reasons, including country-internal information and coordination problems and the vagueness of the terms used. (How to draw the borderline between significant and insignificant trade effects?) For example, the European Commission takes the view that the scope of potentially relevant measures is extremely broad, no reliable and up-to-date statistics are available in services, and no clear standards allow to determine which trade effects are 'significant'. See WTO document WT/TPR/S/248 of 1 June 2011.

⁹⁸ A notification received by the delegation of Brazil, dated 4 May 2001, describes two measures governing the constitution and functioning of small entrepreneur finance companies. See WTO document S/C/N/145 of 4 May 2001.

⁹⁹ WTO document S/C/N/530 of 30 October 2009.

¹⁰⁰ WTO documents S/C/N/205 of 13 November 2002 (Japan) and S/C/N/89 of 14 December 1998 (Canada).

¹⁰¹ The Article mentions in particular information concerning "(a) commercial and technical aspects of the supply of services; (b) registration, recognition and obtaining of professional qualifications; and (c) the availability of services technology". Special priority is to be given to LDC suppliers in the implementation of these obligations (Article IV:3).

practice these contact points provide information to any interested foreign supplier, whether from a developing or a developed country. Nevertheless, this issue might deserve Members' further attention - not least from an SME perspective.

Close to 90 Members have notified the Council for Trade in Services of the establishment of such contact points.¹⁰² In most cases, these are the same entities as those serving as enquiry points, foreseen under Article III:4, through which other governments may request further information on the policy changes notified under Article III:3 and any other measures pertaining to or affecting the operation of the GATS. However, while the creation of such contact and enquiry points is well documented, very little is known about their operation in practice.¹⁰³

V. OVERVIEW OF SIZE-RELATED COMMITMENTS - GATS AND RTAs

The following observations are based on the GATS schedules in force in late March 2012. Apart from the full range of horizontal limitations, the limitations inscribed for a pre-selected sample of sectors were taken into account. The sample focuses on services considered to be particularly relevant for SMEs: professional services; other business services¹⁰⁴; distribution services; construction and related engineering services; hospital services; other human health and social services; hotel and restaurants; other tourism and travel-related services¹⁰⁵; insurance services; and banking services.

In counting limitations, a distinction was made between measures that are directly size-related and those that may have size-related (side-)effects.¹⁰⁶ The former category comprises four types of measures: (a) reservations and/or exclusions of SMEs from commitments, such as the explicit protection of business opportunities for small companies and modifications of otherwise existing mode 4-restrictions for employees of foreign SMEs; (b) prescribed minimum amounts of foreign investment and/or capital; (c) size-related ENTs; and (d) subsidy-related preferences in favour of domestic SMEs.

Size-related (side-)effects might be associated with entries allowing for restrictions to be imposed on cross-border trade or the entry of service professionals independent of existing company links; residency requirements; discriminatory (i.e. national-treatment inconsistent) training requirements, which tend to disadvantage smaller relative to larger foreign companies; poorly specified economic needs tests and the like.

A. GATS commitments

(i) Horizontal limitations

In total, 28 Members have inscribed explicitly size-related limitations in the horizontal section of their schedules: 17 under market access, 8 under national treatment and the remaining 3 in both columns (Table 1).¹⁰⁷ The focus is on mode 3 which accounts for 19 limitations, followed by mode 4 (6 limitations).¹⁰⁸ The most frequently scheduled measures are explicit reservations of business

¹⁰² The EU and its member States are counted individually.

¹⁰³ Available evidence, though limited in scope, is not particularly encouraging. In the context of a research project on mutual recognition agreements under GATS Article VII, Marchetti and Mavroidis sought to obtain copies of such agreements from the contact points of 18 WTO Members. However, their repeated emails remained without reply in all cases. Marchetti, Juan and Petros Mavroidis (2012), 'I now recognize you (and only you) as equal: an anatomy of (mutual) recognition agreements in the GATS', in Lianos, Ioannis and Okeoghene Odudu (eds.), *Regulating Trade in Services in the EU and the WTO*, Cambridge University Press, p. 428.

¹⁰⁴ Covering computer and related services, research and development services, real estate services, rental/leasing services without operators, and other business services.

¹⁰⁵ Covering travel agencies and tour operators services, tourist guides services and other.

¹⁰⁶ Not all of the measures taken into consideration operate in favour of small service suppliers; some may have an adverse impact.

opportunities for small companies and/or SME-specific employment criteria, with 18 cases in the horizontal section.¹⁰⁹

Table 1: Entries in GATS schedules potentially benefitting domestically-owned SMEs

| Measure | Most relevant column/mode | Number of Members/Schedules | | |
|---|---------------------------|-----------------------------|--------------------|---|
| | | Total | Horizontal Section | Sector Section ^(a) (Three most frequent cases) |
| (i) Explicitly size-related limitations | | | | |
| Reservations/exclusions of SMEs from commitments | MA / 3 | 42 | 18 | Banking (13) Hotels and restaurants (11) Insurance; distribution; prof. serv. (4) |
| NT-inconsistent minimum capital or investment requirements | NT / 3 | 17 | 7 | Banking (8) Insurance (4) Hotels & rest.; other business serv. (1) |
| Economic needs test with size-related criteria | MA / 3 | 9 | 1 | Distribution (3) Hotels & restaurants (2) - |
| NT-inconsistent taxes/subsidies benefitting SMEs | NT / 3 | 3 | 3 | 0 |
| (ii) Potentially relevant limitations | | | | |
| No bindings on cross-border trade ^(b) | MA, NT / 1, 2 | 122 | 0 | Other business services (72) Hotels & restaurants (68) Professional services (62) |
| No mode-4 commitments unrelated to establishment | MA, NT / 4 | 87 | 87 | 0 |
| Residency and commercial presence requirements ^(c) | MA, NT / 1, 4 | 42 | 3 | Other business services (18) Insurance (18) Professional services (14) |
| Economic Needs Test without precise criteria ^(d) | MA / 3 | 39 | 7 | Insurance (13) Hospitals (12) Banking (10) |
| Local incorporation and joint venture requirement | MA / 3 | 35 | 18 | Insurance (14) Banking (13) Distribution; other business services (2) |
| NT-inconsistent training requirements | NT / 3 | 15 | 12 | Hotels & restaurants (2) Distribution (1) - |
| No bindings for taxes, subsidies, etc. | NT / 1, 2, 3 | 13 | 13 | 0 |

(a) Numbers of the most frequently affected sectors in parenthesis.

(b) See the discussion in Section IV.B(ii).

(c) Includes local-partnership requirements.

(d) Includes unspecified ENTs and other tests if relevant criteria allow for SME-related interventions.

¹⁰⁷ EC member States are counted individually.

¹⁰⁸ This count covers only size-related limitations inscribed either under mode 3 or mode 4. Not included are limitations that apply across more than one mode of supply.

¹⁰⁹ For example, El Salvador entered the following limitation in the horizontal section under market access for mode 4: "Foreigners may not hold the positions of administrator, director, manager or representative of a small-scale enterprise in the trade, industrial or services sector". Chile scheduled under national treatment for mode 3: "[...] As regards all other services listed in this Schedule, at least 85 per cent of the staff employed by a supplier of services established in Chile must be Chilean, except in the case of enterprises with fewer than 15 employees". Similar entries have been inscribed by Bulgaria, Colombia, Ecuador and Panama.

Overall, these limitations are largely outnumbered by entries that provide scope for measures which, albeit not directly linked to company size, are potentially relevant. First and foremost, close to 90 Members provide no scope, whatsoever, for mode 4 access that is unrelated to commercial presence. Independent service suppliers or employees of foreign-based firms that seek entry to perform a contract could thus be denied access (Section IV.B(ii)). Local incorporation and/or joint venture requirements, scheduled primarily under market access for mode 3, rank second in this regard; they have been inscribed in some 20 schedules (Section IV.B(iii)). In addition, the horizontal sections of a similar number of schedules contain 'foggy entries' that cannot be associated with any of the measures falling under Articles XVI and XVII (Section IV.E). However, the latter have been omitted from Table 1 since their link with SME-related policies appears quite remote and their legal value is at least debatable.

(ii) Sector patterns

Overall, the following sectors are particularly prone to explicitly size-related limitations: banking services (20 schedules), hotels and restaurants (14), insurance services (8) and distribution services (6).¹¹⁰ In contrast, professional services (4), hospital services (3), other business services (2), other health services (1) and construction services (1) are sectors featuring relatively few such measures. The most frequent types of entries are, predictably, size-related reservations or exclusions in commitments (29 schedules), followed by discriminatory minimum capital or minimum investment requirements (13). In contrast, size-related economic needs tests are relatively rare (8 cases).

Looking more closely at individual sectors, banking services account for the highest number of explicit reservations or exclusions from commitments that might prove relevant for SMEs (13) as well as discriminatory (i.e. national-treatment inconsistent) minimum capital and investment requirements (8). Again, a note of caution is needed: especially in financial services, many such limitations may not be motivated by SME-related policy objectives, but reflect public-policy (prudential) concerns. This is certainly not the case for sectors such as tourism, however. Several entries inscribed for hotel and restaurant services clearly target suppliers on the basis of size, possibly with a view to providing niches for domestically-owned SMEs.¹¹¹ As regards hotels, the commercially most important segment of tourism, most relevant entries unequivocally specify the size brackets concerned (number of hotel rooms or stars).

The terms used to express size-related limitations, and the levels of clarity and precision, may well vary across sectors and schedules. For example, entries concerning construction and related engineering services refer to minimum contract values or, more vaguely, to the geographical significance of projects as a pre-requisite for access. Similar types of limitations can also be found in architectural services, a sub-category of professional services. For instance, Qatar confined access under mode 3 to these services as well as to construction and related engineering services to "projects of over \$100 million or the equivalent amount in other currencies". In banking services, size-related entries are expressed, among other criteria, in terms of total assets, deposits or lending value, net worth ranking or capital.

Not surprisingly, commercial presence (mode 3) is mostly affected in this context, accounting for nine and eight of the market access limitations and one and eight of the national treatment limitations inscribed under hotel and restaurant services and banking services, respectively.

With regard to limitations potentially benefitting domestically-owned SMEs, it is problematic to provide a ranking of the sectors particularly prone to such entries, given that the actual effects of

¹¹⁰ The numbers recorded are not directly comparable with those given in Table 1 since a single schedule might contain several types of explicitly size-related limitations for the same sector.

¹¹¹ While eleven Members have combined their commitments for hotels and restaurants with SME-related reservations or exclusions, no such limitations exist in other sub-sectors of tourism (travel agencies and tour operators; tourist guides; and not further specified other tourist and travel related services).

many measures, if enforced, might vary widely. Still, a rough indication of the most commonly used measures and the relevant sectors can be given. Non-bindings on cross-border trade constitute the most frequent type of entry, to be found in over 120 schedules, among those that can be potentially relevant to SMEs; they are particularly widespread in the other-business services and hotel and restaurant services sub-sectors (see also Section IV.B(ii)). Residency and commercial-presence requirements, scheduled by about 40 Members primarily under other business services, insurance services and professional services, are also relatively widespread. As noted before, any size-related effects that may be associated with these requirements are indirect in nature; due to their intrinsic financial and human resource constraints, small suppliers may find it relatively more challenging than larger entities to establish abroad.

B. Regional Trade Agreements

Issues related to small- and medium-sized enterprises have also been addressed in some regional trade agreements (RTAs) covering trade in services. Out of a sample of 66 RTAs, 46 agreements contain SME-related elements of different scope and depth, 20 of which refer specifically to trade in services.¹¹² Of these, about a dozen agreements deal with SME-related issues in the main text, often in general terms, in addition to the respective schedules of commitments. Relevant provisions refer mainly to facilitating SME's use of electronic commerce, promoting a favourable environment for the development of SMEs, and the like. While a few RTAs further elaborate on the objectives, scope and modalities of co-operation, the content generally remains vague¹¹³, and there is no further definition of what constitutes a small- or medium-sized enterprise, barring a few exceptions.¹¹⁴ It appears, in some cases at least, that relevant entries are intended mainly to address popular policy concerns, rather than being informed by well-developed analytical concepts.

The majority of the RTA schedules in the sample contain explicitly size-related limitations (29 instances in 17 RTAs). They are almost equally distributed between market access and national treatment commitments. In 17 schedules, horizontal (cross-sectoral) limitations have been used, mostly consisting of reservations or exclusions of SMEs from commitments (14 schedules). Such horizontal limitations are more easily identifiable, overall, than many of those inscribed for individual sectors. For example, Lao's schedules under the ASEAN-Australia-New Zealand Free Trade Agreement (FTA) and the ASEAN-Korea FTA contain a provision under national treatment, mode 3 (commercial presence), clarifying that "tax measures generally pertaining to small and medium enterprises" may benefit domestic services and service suppliers. Similarly, under the EC-CARIFORUM Economic Partnership Agreement, several small Caribbean economies (Grenada, Saint Lucia, and Saint Christopher and Nevis) have repeated their GATS-scheduled market access limitation providing that a number of small business opportunities are reserved for nationals. Not surprisingly, such similarities with GATS-scheduled limitations can be found in many other RTAs as well.¹¹⁵

¹¹² The sample has been taken from among the 84 RTAs notified to the WTO under the relevant GATS provision, Article V:7, by late August 2011 (excluding the EC Treaty and subsequent EC enlargements) and covers all agreements in which China, India or an OECD country participate. For more details see Adlung, Rudolf and Sébastien Miroudot (2012), 'Poison in the Wine? Tracing GATS-minus Commitments in Regional Trade Agreements', WTO Staff Working Paper ERSD 2012-04.

¹¹³ Chile-EC Association Agreement, Part III, Title I, Article 19:1: "The Parties shall promote a favourable environment for the development of small and medium-sized enterprises [...]"; Stabilisation and Association Agreement between the EC and the Former Yugoslav Republic of Macedonia, Title VIII, Article 86: "The Parties shall aim to develop and strengthen private sector small and medium-sized enterprises [...]"; Japan-Malaysia EPA, Chapter 12, Article 140(e) "The fields of co-operation under this Chapter shall include [...] the small and medium enterprises".

¹¹⁴ The only cases found in the context of this study are the EC-CARIFORUM EPA, concerning the schedule of Dominica, and El Salvador's and Honduras's schedules under Central America-Dominican Republic-US FTA; see Annex 1.

¹¹⁵ For example, the US-Jordan Free Trade Agreement (FTA) includes a national treatment limitation in the horizontal section establishing for the United States that commercial presence is "[u]nbound for measures at the federal, state or local levels that accord rights or preferences to members of socially or economically

Concerning individual services, hotels and restaurants again account for the lion's share of the sector-related limitations, contained in 11 schedules of our sample, followed by financial services (4) and distribution services (2).¹¹⁶

Relatively frequent, in ten of the reviewed RTAs, are references, mostly in general terms, to small- and medium-sized enterprises with respect to *government procurement*. For example, Article 127:3 of the Economic Partnership Agreement between Japan and Mexico establishes that the parties, with a view to maximizing access to their procurement markets, develop concrete measures for co-operation and, in doing so, give special attention to small businesses. Yet, as in virtually all other cases, no further details are given as to the modalities and measures to be taken, nor benchmarks for SME involvement.¹¹⁷

C. Size-related effects of scheduling preferences across modes - GATS vs. RTAs

An ever increasing number of publications deals, in a comparative way, with the obligations assumed by different WTO Members under the GATS and, generally more recently, under regional trade agreements. One study stands out in the current context insofar as it focuses on SME-related implications to be expected from differences in scheduling patterns between the two sets of commitments.¹¹⁸ Starting point is the assumption, based on existing small-business studies and other sources, that SMEs typically prefer exporting through 'soft' modes of supply, de-linked from commercial presence (e.g. cross-border supply and movements of contractual service suppliers (CSS)). In contrast, large companies are deemed to rely more strongly on foreign direct investments and movements of intra-corporate transferees which, in turn, are contingent on the supplier being established abroad.

The study compares the number of commitments, per mode of supply, offered in the Doha Round context by 49 WTO Members in 51 sub-sectors with the same Members' RTA schedules.¹¹⁹ In this context, for each country only the best RTA was chosen, based on the number of commitments for contractual service suppliers (CSS). The 51 sub-sectors were selected according to their presumed relevance for CSS and the relative importance of cross-border trade. The DDA offers and RTA commitments were not analysed in terms of specific content, implying that their mere existence is indicative of economically meaningful substance. On this basis, the study compares the number of commitments per mode of supply contained in the DDA offers with the same Members' best RTAs. The results show that the gap between the number of commitments for modes de-linked from commercial presence and those linked to commercial presence is significantly smaller in RTAs than in DDA offers. (The latter, in turn, are largely comparable to existing GATS commitments.) This suggests that RTAs tend to level the playing field between SMEs and larger enterprises insofar as they improve market access not only with regard to commercial presence, but also in modes presumably

disadvantaged groups in the United States, including: Federal Small Business Administration [...] Maine - The Maine Veterans Small Business Loan Guarantee Program [...] The Small Business Loan Guarantee Program in Maine [...]"

¹¹⁶ As a case in point, Indonesia's commitments on tourism and travel related services under the EPA with Japan only cover 3-, 4- and 5-star hotels. Mirroring scheduling patterns under the GATS, RTAs tend to specify size-related limitations for tourism services more clearly, in terms of star categories or number of rooms, than for other sectors.

¹¹⁷ Chile-Australia FTA, Chapter 15, Article 15.24 (3): "[...]The Parties shall also exchange information on their respective approaches to maximise access for small and medium enterprises to the government procurement market"; Singapore-Australia FTA, Chapter 6, Article 16: "Nothing in this Chapter shall prevent the Parties from using government procurement to promote industry development including measures to assist small and medium enterprises (SMEs) within their territory to gain access to the government procurement market".

¹¹⁸ Persin, Daniela (2011), 'Market Access for Small versus Large Service Enterprises: The Preferential and Multilateral Trade Liberalization Tracks Compared', *Journal of World Trade*, 45(4).

¹¹⁹ The following selection criteria were used: membership of an Economic Integration Agreement signed between 2000 and 2008 and notified to the WTO under Article V of GATS by the end of 2009, and submission of an offer under the DDA. The 27 EU members were treated individually.

preferred by SMEs (i.e. de-linked from commercial presence). Again, however, as in all such studies, the findings are based on the assumption that scheduled commitments (or offered improvements) and any observed differences between schedules are indicative of actually existing (or improved) trading conditions.

An additional note of caution might be warranted: the comparison between RTAs and GATS commitments/offers could have been influenced by a time factor. Most current RTAs were concluded after 2003/4, when the majority of Doha Round offers already had been submitted. It is thus conceivable that the observed differences are attributable, *inter alia*, to prevailing policy perceptions at the time and that the scheduling patterns in any future GATS offers could come closer to what can be observed in RTAs.

VI. CONCLUDING OBSERVATIONS

Given its broad policy coverage, including the extension from product trade to the treatment of suppliers, the GATS offers more scope to address SME-related issues than possibly any other multilateral agreement within the remit of the WTO. Pursuant to Article I:1, the GATS applies to government measures affecting trade in services and such trade is defined to include the activities that foreign suppliers, via commercial presence or presence of natural persons, perform in a host market. This implies that the Agreement's reach extends to any measure, whether explicitly access-related or of a domestic regulatory nature, that might differentiate between suppliers of different size. Accordingly, WTO Members could pursue a SME-related negotiating perspective in services if they so wish.

Starting point for a discussion of SME-related issues in WTO fora would need to be information - and this means information not only of the contribution of SMEs to production, employment and trade, but on trade problems/barriers that are (a) perceived to impede their economic performance and (b) could be addressed within the framework of GATS. An exercise generating such information would still have to be launched. It is true that past experience does not augur particularly well in this regard, given many Members' hesitation, if not aversion, to live up to their notification obligations under Article III:3 of the GATS. Nevertheless, a more focused initiative with a clearly defined purpose, as in the current context, might prove more productive. In particular, the objective would be to identify SME-related information deficits or access barriers as they are encountered abroad rather than problems potentially associated with a Member's own trade regime, or any changes thereof.

In the absence of a common definition of what constitutes a small- or medium-sized enterprise (in China, the US, Barbados, New Zealand, and ...), the information generated would necessarily remain impressionistic in nature. However, definitional uncertainties should not distract attention from a variety of policy issues genuinely related to firm size. These include, in particular, the economic importance for many SMEs of a smoothly functioning regulatory and technical infrastructure for trade. The smaller a company, the greater the benefits it derives from low-cost market entry and participation. In a similar vein, efficient communication links tend to be more important for small firms, which access foreign markets only occasionally and/or mostly on a cross-border basis, than for their larger counterparts that can more easily afford to establish abroad and offset existing infrastructural deficiencies with in-house substitutes. While technical progress has dramatically increased the potential for cross-border trade through electronic means, however, other (policy-induced) impediments - including various types of regulatory barriers - have remained. They might now deserve even more attention than one or two decades ago.

The impediments that could or, rather, should be addressed range from size-related restrictions falling under the market-access or national-treatment provisions of GATS to regulatory measures not subject to scheduling. The former category includes local presence requirements, denials of access to SME-sensitive sector segments, restrictions on the movement of independent service professionals, and the like. Examples of regulatory measures are excessive minimum-equity

standards, high licensing fees, non-recognition of relevant professional training and experience, and so forth. Obviously, this could lead to two strands of action: liberalization initiatives within the meaning of Article XIX and development of regulatory disciplines pursuant to Article VI:4 of the GATS. In addition, there might be scope for measures promoting the operation of the contact points for developing countries' service suppliers that are to be established under GATS Article IV:2 as well as the notification and, possibly, extension to third countries of recognition measures taken under Article VII. The latter initiatives could be launched at any time, regardless of the fate of the Doha Round.

Ideally, Members might also want to reflect on whether and to what extent current policies to promote their own SME interests are contravened by similar efforts abroad. Is there scope for 'mutual disarmament', e.g. parallel reductions of SME-related entry barriers, termination of discriminatory subsidy schemes, procurement restrictions and the like by larger groups of Members? By the same token, are there alternatives to heavy regulatory interventions (high minimum equity requirements, etc.) that could achieve similar objectives with a less deterrent impact on SMEs?

If there is a will, one might expect that there is a way...

Annex 1: How small are small- and medium-sized enterprises?

The definition of SMEs tends to vary across countries and, sometimes, sectors. Nevertheless, there are some widely used criteria such as number of employees, annual turnover and, occasionally, sales, asset values, market shares or investment. According to a definition applied by the *World Bank Group*, small enterprises have total assets and annual sales between US\$100,000 and US\$3 million, while the assets and sales of medium enterprises fall within a bracket of up to US\$15million.¹²⁰

In *India*, under a law of 2006, service enterprises are classified as micro, small or medium if their investment in equipment does not exceed US\$20,000, US\$400,000 or US\$1 million, respectively.¹²¹ The *European Commission* considers micro enterprises to have fewer than 10 employees and total annual turnover or balance sheet below €2 million, followed by small enterprises of up to 49 employees and annual turnover/balance below €10 million, while medium enterprises have fewer than 250 employees and annual turnover or balance sheet of up to €50 million or €43 million, respectively.¹²² In contrast, in a comparatively small country such as *Barbados*, micro enterprises are defined to have fewer than 5 employees and annual turnover inferior to US\$25,000 whereas small firms have fewer than 25 employees and no more than BB\$1 million as stated or paid up capital or BB\$2 million in annual sales.¹²³ (There is no particular category of medium enterprises.) Similarly, in *New Zealand* enterprises of up to 19 employees are classified as SMEs.¹²⁴

The definition of SMEs may also vary by the sector of economic activity.¹²⁵ For example, in *Argentina* a manufacturing enterprise qualifies as SME if it has fewer than 300 employees, while a services SME has fewer than 100 employees.¹²⁶ Moreover, productive assets may be used as an additional criterion to define manufacturing SMEs whereas equity is used in the case of services SMEs. In *Japan*, enterprises in the manufacturing, construction and transportation sectors qualify as SME if they employ fewer than 300 persons and their capital or total amount of investment is inferior to 300 million yen. In contrast, SMEs operating in retail trade have fewer than 50 employees and capital or total amount of investment below 50 million yen.¹²⁷ In *China* a construction firm with up to 600 employees, 30 million renminbi in total sales and 40 million renminbi in total assets is considered to be small, while its medium-sized equivalent has up to 3000 employees and total sales and total assets of up to 300 million and 400 million renminbi, respectively. In wholesale trade, small firms

¹²⁰ WTO document TN/S/W/5 of 1 October 2002; Independent Evaluation Group - IEG (2008), *Financing Micro, Small, and Medium Enterprises: An Independent Evaluation of IFC's Experience with Financial Intermediaries in Frontier Countries*, Washington D.C.: International Financial Corporation (IFC), p. 5.

¹²¹ Ghatak, Shambhu, 'Micro, Small and Medium Enterprises (MSMEs) in India: An Appraisal', p. 2, www.esocialsciences.com/data/eSSResearchPapers/eSSWPArticle20091126151144.pdf (last accessed 19 March 2012); Ministry of Law and Justice, The Micro, Small and Medium Enterprises Development Act, 2006, New Delhi, the 16th June, 2006/Jyaistha 26, 1928 (Saka), Chapter III:7 (1) (b).

¹²² European Commission, 'Small and medium-sized enterprises (SMEs) - SME Definition', http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/sme-definition/index_en.htm (last accessed 19 March 2012).

¹²³ WTO document TN/S/M/4 of 11 February 2003; Government of Barbados, Small Business Development Act, CAP. 318C (3) (1) (b), 1999.

¹²⁴ Ministry of Economic Development (2010), 'SMEs in New Zealand: Structure and Dynamics 2010', New Zealand: New Zealand Government, p. 9.

¹²⁵ OECD (2004), 'SME Statistics: Towards A More Systematic Statistical Measurement of SME Behaviour', 2nd OECD Conference of Ministers Responsible for Small and Medium-Sized Enterprises (SMEs), Promoting Entrepreneurship and Innovative SMEs in a Global Economy: Towards a More Responsible and Inclusive Globalisation, Istanbul, Turkey, p. 11.

¹²⁶ Ministerio de Economía de Argentina, Resolución N. 208/93, Artículo 1°, <http://infoleg.mecon.gov.ar/infolegInternet/anexos/30000-34999/34469/norma.htm> (last accessed 19 March 2012).

¹²⁷ OECD (2004), *op. cit.*, p. 11f.

have fewer than 100 employees and total sales inferior to 30 million renminbi, and medium-sized firms have up to 200 employees and no more than 300 million renminbi in total sales.¹²⁸

Similarly, various size brackets are used by the *United States'* Small Business Administration (SBA). In manufacturing and mining industries upper size limits for SMEs are set at 500 employees; the same applies in wholesale trade as far as small business federal contracts are concerned (otherwise 100 employees). In contrast, average annual receipts are used in most retail and service industries (US\$7 million), computer programming, data processing and systems design (US\$25 million) and general building and heavy construction contractors (US\$33.5 million).¹²⁹ In turn, USITC classifies enterprises as micro, small or medium if they employ, respectively, up to 19, 99 and 499 staff.¹³⁰

In *Germany*, small- and medium-sized enterprises are commonly defined in line with the European Commission's approach (see above). However, the government also refers to a definition used by a specialized research institute, IfM Bonn.¹³¹ Accordingly, small firms have fewer than 10 employees and have annual turnover of up to €1 million, whereas medium enterprises remain below 499 persons and annual turnover of €50 million.

Though various *GATS schedules* contain explicit references to small businesses and similar concepts, the underlying definitions are not normally spelled out. However, two of the reviewed *RTAs* do contain relevant information for at least some signatories. Dominica's schedule under the EC-CARIFORUM EPA uses one or more of the following criteria to define small business investments: an initial investment of below Eastern Caribbean Dollars (ECD) 2 700 000 (US\$1 million); up to 50 initial employees; and projected annual sales of less than ECD 2 700 000 (US\$1 million) in the first year. The above criteria are to be reviewed from time to time. In turn, the schedules of Honduras and El Salvador under the Central America-Dominican Republic-US Free Trade Agreement provide that a 'small scale enterprise' is an enterprise with a capitalization not greater than US\$200,000 (El Salvador) and that 'small-scale industry and trade' means an enterprise with capital of less than 150,000 Lempiras, excluding land, buildings and vehicles (Honduras).

¹²⁸ APEC (2010), *SME Market Access and Internationalization: Medium-term KPIs for the SMEWG Strategic Plan*, APEC Policy Support Unit, Singapore: APEC, p. 35f.

¹²⁹ U.S. Small Business Administration, 'Summary of Size Standards by Industry', (last accessed 19 March 2012), www.sba.gov/content/summary-size-standards-industry.

¹³⁰ United States International Trade Commission (2010), *op. cit.*, p. 1-1 and 1-4

¹³¹ IfM Bonn is the Institute for Small Business Research Bonn. It is funded out of the federal budget and the budget of the State of North Rhine-Westphalia. See www.ifm-bonn.org (last accessed 19 March 2012).