Introduction

Since its conception after the Second World War, the General Agreement on Tariffs and Trade (GATT) has always aspired to create a multilateral framework that would regulate international trade and stimulate commerce. This, it is believed, would raise standards of living and progressively develop the economies of the contracting parties. Until today, the objective of having trade flow as freely as possible has remained at the core of the ambitions of the World Trade Organization (WTO). Hence, the WTO's efforts circle around trade and any activity that would affect trade. However, dealing with barriers to the access of services to markets has also engaged domestic regulatory policies and domestic legal systems more than is the case with products. With the General Agreement on Trade in Services (GATS), this has meant a move away from traditional conceptions of sovereign relations in international trade. The liberalization of services trade has thus been claimed to be 'hardly the GATT world of shallow integration but a different world of ever deepening integration and globalization … negotiations center entirely on what were considered domestic policies and even institutional infrastructure, quite alien in terms of GATT tradition'.[1] This has brought matters that were once exclusively within the national domain within the reach of international rule-making.

The overarching regulatory objectives underpinning the European Union and the WTO are clearly quite different. The WTO agreements do not aim at establishing a common market, a customs union or even a free trade area, while the EU is all of that. The WTO is not as openly

[1] S. Ostry, 'Globalization and the World Trading System: the Deeper Integration Policy Agenda', in Canadian Bar Association and Department of Justice Canada, 14th International Trade Law Seminar, 1996.

seeking deregulation of national law as the EU, which has a fitting arsenal of legal principles to achieve this end. Nonetheless, WTO law is built on the same aim and the same philosophy of free trade as has inspired the EU.[2] This analogy goes beyond the well-known fact that what is now Article 28 Treaty on the Functioning of the European Union (TFEU) – the key provision in Union law on the prohibition of quantitative restrictions – was modelled on the GATT. The EU is 'a child of the GATT, a regional integration agreement based on non-discrimination and market access among a number of regionally linked participants'.[3] It has, however, always professed much broader ambitions and has become increasingly preoccupied with matters not (or not exclusively) related to trade, finding expression in the shedding of the central 'E' to become the EC with the Maastricht Treaty, and then the EU with the Lisbon Treaty. The Treaty explicitly refers to European integration as 'the process of creating an ever closer union among the peoples of Europe'. Article 3 Treaty on European Union (TEU) does not only speak of the objective of establishing an internal market, but also mentions peace, freedom, security and justice without internal frontiers, the fight against social exclusion and discrimination, solidarity among its Member States, and the safeguarding of cultural heritage.

At its conception, the GATS was claimed to be one of the major achievements of the Uruguay Round of negotiations and one of the most important legal frameworks for liberalizing trade in services at the multilateral level. Governments were called upon to guarantee 'some' access to their markets by foreign services or service suppliers. The goal of establishing rules in the sector of services at the multilateral level was believed to contribute to the development of the world economy, with success in this area sought by (1) expanding trade under conditions of transparency and progressive liberalization, and (2) promoting economic growth, thus following the same reasoning as the WTO system as a whole. While service sectors per se do not contribute directly to economic growth, as they seek to contribute to increasing the quantity and productivity of capital and labour inputs, they are claimed to have a 'facilitating role'. In other words, the growth of services is deemed 'an

[2] P.-C. Müller-Graff, 'Protectionism or reasonable national regulation?', in S. Griller (ed.), *At the Crossroads: The World Trading System and the Doha Round* (Vienna, New York: Springer, 2008), pp. 147–67 at p. 150.

[3] M. Cremona, 'Neutrality or discrimination? The WTO, the EU and external trade', in G. de Búrca and J. Scott (eds.), *The EU and the WTO: Legal and Constitutional Issues* (Oxford and Portland, OR: Hart Publishing, 2002), pp. 151–84 at pp. 151–2.

important determinant of overall economic growth and development'.[4] The EU has been described as an initially defensive actor at the birth of the GATS, being fearful of having to compromise on its agricultural policy.[5] The European Commission is said to have been a key agent for enhancing the role of the EU in the negotiations, largely motivated by institutional self-interest.[6]

In the EU, services had a slow start within the rules governing the common market. For a long time the freedom to provide services had been considered only subsidiary to the other fundamental freedoms. It gained importance and attention in correspondence with the increasing share of the service sector in the economies of the Member States.[7] As has been noted in the context of the EU Services Directive,[8] 'the production of a car requires many service inputs such as design, marketing, technical analysis and sales, while the sale of the car requires services such as finance, insurance and training'.[9] Therefore, as trade in goods might depend on the degree of market power that is exercised by domestic trade and distribution sectors, an absence of competition in the domestic service sector can serve as an effective import barrier against goods. This links market access conditions for goods with the structure of the domestic service sector. Conversely, services liberalization can provide a boost for the trade in goods,[10] and 'actions taken

[4] See in general, B. Hoekman, 'Liberalizing trade in services: a survey' (2006) Working Paper Series 4030, World Bank, Washington DC, https://openknowledge.worldbank.org/handle/10986/9004.

[5] J. A. Marchetti and P. C. Mavroidis, 'The genesis of the GATS (General Agreement on Trade in Services)' (2011) 22(3) *The European Journal of International Law* 689–721 at 695.

[6] Marchetti and Mavroidis, 'The genesis of the GATS', 696.

[7] See V. Hatzopoulos, *Regulating Services in the European Union* (Oxford University Press, 2012), pp. vii–viii; and V. Robertson, *Perspectiven für den grenzüberschreitenden Dienstleistungshandel: Das EU-Dienstleistungsrecht und sein Verhältnis zum GATS* (Baden-Baden: Nomos, 2012), pp. 32–6.

[8] Directive 2006/123/EC of the European Parliament and the Council of 12 December 2006 on services in the internal market, OJ 2006 No. L376/36. The Services Directive, unlike the GATS, does not apply to goods. See Rec. 76 of Directive 2006/123/EC.

[9] See C. Barnard, 'Unravelling the Services Directive' (2008) *Common Market Law Review* 323–94 at 335.

[10] See also J. F. Francois, and I. Wooton, 'Market structure, trade liberalization, and the GATS' (2001) 17(2) *European Journal of Political Economics* 389–402 at 402. See also J. F. Francois, and I. Wooton, 'Market structure and market access' (2008) World Bank Policy Research Working Paper No. 4151, http://ssrn.com/abstract=965604. They argue that the trade volume effect of a tariff reduction in the goods sector depends on the underlying trade volume and hence on the degree of competition in the domestic distribution sector. To some extent, therefore, tariff reductions may simply lead to a

in services markets can affect competition in goods markets and vice versa'.[11] Therefore, in regulating the market, it is important to consider fully this interaction in order to ensure that one set of regulations does not undermine the other. At the same time, the inherent overlap between goods and services regulation does not necessarily undermine the coherence of the overall framework, but they may rather be mutually reinforcing.

It has been argued for the EU that because of the more diverse nature of services regulations, the more complex objectives involved and the involvement of sub-state or non-state entities, private measures are more readily tackled by the Court of Justice in the field of services than in the field of goods.[12] As also noted by Hatzopoulos, 'services regulations rarely concern the service itself; instead they fulfil the conditions that the service providers should themselves fulfil (qualifications, authorizations, entry into registers, deontology rules, provider's liability) or the circumstances under which the providers may offer their services (opening hours and days, location, price-fixing, access subject to a devolution system etc.).'[13] In other words, services rules are not of a technical, but rather of a social, environmental and qualification-related nature.[14] While this may have been argued for the EU, it equally holds for the WTO.

Our fundamental premise is therefore that both in WTO law and in EU law there is a dichotomy between a regulatory model based on market access on the one hand, and one aimed at domestic regulation on the other hand. This refers to the fact that, as a matter of principle, both the GATS and the EU subject measures that affect market access to more scrutiny than measures that do not concern market access. Moreover, because of this approach, both regimes share the dilemma of how to distinguish 'benign' domestic measures from 'problematic' ones. This places the problem of balancing the autonomy of Member

greater exercise of market power by the domestic distribution sector and vice versa, 'nullifying expected direct benefits from tariff reductions in export markets'.

[11] See B. Hoeckman and P. A. Maeserlin, 'Liberalizing trade in services: reciprocal negotiations and regulatory reform', in P. Sauvé and R. Stern (eds.), *GATS 2000: New Directions in Services Trade Liberalization* (Washington DC: Brookings, 2000), pp. 487–508 at p. 91.

[12] V. Hatzopoulos, 'Forms of mutual recognition in the field of services', in I. Lianos and O. Odudu (eds.), *Regulating Trade in Services: Trust, Distrust and Economic Integration* (Cambridge University Press, 2012), pp. 59–98 at p. 61.

[13] Hatzopoulos, 'Forms of mutual recognition in the field of services', p. 63.

[14] See Hatzopoulos, 'Forms of mutual recognition in the field of services', p. 65.

States with the need and mandate to liberalize at the core of both regimes, informing the fiercest debates in WTO and EU law alike.[15] Such a common regulatory goal pursued by each regime and a shared 'regulatory DNA' suggests that we cannot simply consider EU law in general and EU law on services in particular as fundamentally different from WTO law. For instance, the *Keck* doctrine, introduced by the Court of Justice to address the aforementioned distinction, has been deemed to represent 'a "bending" of the EC towards the National Treatment rationale of the GATT'.[16] Therefore, we submit that an effort to search for further analogies between the two regimes is not entirely fanciful and we are therefore not 'comparing the incomparable'.

These analogies have of course not gone unnoticed in the past. However, a sizable amount of comparative analysis to this date has focused on the nature of the 'necessity test' under WTO law, and to the transfer of the proportionality principle as applied in the EU common market to the GATT[17] and the GATS.[18] We will show that it verges on denial to ignore the variety of concepts and terms – the 'common legal vocabulary'[19] – that feature prominently in both regimes. We will show

[15] See W. Weiß, 'GATS and domestic regulation: a threat to democracy?', in S. Griller (ed.), *At the Crossroads: The World Trading System and the Doha Round* (Vienna, New York: Springer, 2008), pp. 369–83 at p. 371, on the domestic regulation making 'GATS particularly sensitive for democracy concerns as the national regulatory autonomy comes under greater scrutiny'.

[16] J. H. H. Weiler, 'Epilogue: Towards a Common Law of International Trade', in J. H. H. Weiler (ed.), *The EU, the WTO, and the NAFTA* (Oxford University Press, Collected Courses of the Academy of European Law, 2001), pp. 201–32 at 230.

[17] See Müller-Graff, 'Protectionism or reasonable national regulation?', p. 150.

[18] See the discussion at M. Krajewski, *National Regulation and Trade Liberalization in Services: The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* (The Hague: Kluwer, 2003), pp. 141–5. However, for a notable exception, see the profound comparison of the approach to (de)regulating tax measures within the EU and the WTO by Weiler, 'Epilogue', especially at pp. 204–16. See also D. J. Neven and J. Weiler, 'One bad apple? A comment on Japan – Measures Affecting the Importation of Apples – AB-2003–4', in D. Horovitz, D. Moulis and D. Steger (eds.), *Ten Years of WTO Dispute Settlement* (London: International Bar Association, 2007), pp. 235–57, drawing analogies between the WTO Agreement on Sanitary and Phytosanitary Measures and the *Dassonville* case law of the ECJ on targeting non-discriminatory, non-protectionist measures.

[19] See the rallying call for a better mutual understanding among the lawyers dealing with the two systems by J. H. H. Weiler, 'Cain and Abel: Convergence and Divergence in International Trade Law', in Joseph H.H. Weiler (ed.), *The EU, the WTO, and the NAFTA* (Oxford University Press, Collected Courses of the Academy of European Law, 2001), pp. 1–4 at 1.

that experiences in the EU such as with the delimitation between market access and domestic regulation might be instructive for the path that should be taken by the WTO. At the same time, in the WTO the debate on the various forms of discrimination in particular seems to have been more fully explored than in the EU. Here, it is EU law that might take some cues from WTO law. Note that WTO and EU law differ in one important and obvious respect. The EU services regime has only recently been modified in a fundamental manner with the entry into force of the Services Directive 2006/123/EC.[20] This reformed area of EU law might thus require some time before we are fully able to judge its effects and effectiveness. In contrast, the GATS and the negotiations for which it should provide the forum are effectively stalled by the demise of the Doha Round of negotiations under the umbrella of the WTO.

Distinguishing the dichotomies between a prohibition of discrimination and the more intrusive prohibition of non-discriminatory national measures on the one hand, and market access regulation and (equally intrusive) domestic regulation on the other hand, might be faulted for overly simplifying a very complex and casuistic regime. However, they arguably serve as an appropriate frame under which to assess the Services Directive, and are also useful when comparing the GATS with the EU law regime. In addition to the parallels between EU law and WTO law, on which we will draw in this book, we will also take account of the differences. When comparing the ways through which the EU and the GATS deal with the services sector, it is apposite to highlight the rationale behind different regulatory approaches chosen for similar goals and objectives pursued in both systems. On the other hand, when the goals pursued by lawmakers differ yet similar outcomes are achieved, it is apposite to determine why each system has failed or succeeded in attaining those objectives. When, finally, there are both dissimilar goals and dissimilar outcomes for the regimes examined, these contrasts and differences may not only disclose important facts about the systems themselves, but may also pave the way for identifying the strengths and weaknesses of each system.

In Chapter 1 we will provide a discussion of the structure and basic principles of the GATS, including its effect on the national laws of its

[20] Directive 2006/123/EC of the European Parliament and the Council of 12 December 2006 on services in the internal market, OJ 2006 No. L376/36.

members. Where appropriate, we will already make some cross-references to the situation in the EU. As mentioned, we will not always follow an orthodox pattern when describing the GATS.

Chapter 2 will deal with the relationship between the EU and the WTO on several accounts. We will analyse differences in the organizational structure of both systems, their respective capacities to set standards and the functioning of their adjudication regimes. We will also specifically discuss the effect of WTO law within the EU legal order, as well as give an overview of the EU's commitments undertaken and offered under the GATS.

Chapter 3 will sketch the fundamentals of the Treaty freedom to provide services and the Treaty freedom of establishment, without yet taking into account the rules of the Services Directive 2006/123/EC. This chapter also discusses the delimitations between the two mentioned freedoms and other fundamental freedoms in EU law, as well as the EU regime on what will broadly be called public services.

In Chapter 4 the regulatory principles underlying EU law on services and establishments such as the concepts of discrimination, restrictions and market access will be analysed in greater depth. Thus the current state of affairs of integrating the common market in services will be presented from a different perspective and with a higher degree of abstraction than in Chapter 3.

This is followed by Chapter 5, where we show the diverse ways in which the regulation of different service sectors in the EU is approached. This will be shown to range from minimum harmonization and mutual recognition to a combination of soft law and case law, such as with respect to the 'regulation' of services of general economic interest.

Chapter 6 will then address the Services Directive 2006/123/EC in detail, laying particular focus on the screening mechanisms and the variety of instruments foreseen to regulate different kinds of measures pertaining to services and establishments respectively. This chapter will also include an assessment of the ways the Services Directive interacts with the pre-existing Treaty regime, and of the implications for the fragmentation of the EU services regime both from a substantive and a sectoral perspective.

Chapter 7 will discuss the implementation of the Services Directive in the EU Member States, where the points of single contact and the

key liberalizing provision for services in particular have raised difficult issues.

Finally, Chapter 8 will bring together several threads from previous chapters in examining the diverse approaches, concepts and regulatory standards that exist in EU law and WTO law on services.

1 WTO law on services: a starter kit

1.1 Introduction

The GATS forms Annex 1B to the Marrakesh Agreement on the WTO and entered into force on 1 January 1995. As a multilateral WTO agreement, Members are obliged to accede to it. Its creation was largely at the behest of the United States in order to protect its interests in an area where it had comparative advantages. Marchetti and Mavroidis have explained that it actually was the threat that new barriers to trade would be set up, mainly by developing countries, to counter the opening of foreign markets such as in financial services and telecoms through technology that prompted the USA to drive the GATS forward.[1] In the meantime, a number of developing countries have closed the gap and now account for a considerable amount of international trade in services.[2]

The target of the GATS is trade restrictions set up by the parties other than tariffs such as under the GATT. To achieve this end, the GATS primarily offers the prescription of market access and the prohibition of discrimination, which in WTO language is called national treatment.[3] It has been claimed that the GATS is not about the 'deregulation' of national markets, and that national rules applying to services or service

[1] J. A. Marchetti and P. C. Mavroidis, 'The genesis of the GATS (General Agreement on Trade in Services)' (2011) 22(3) *The European Journal of International Law* 689–721 at 692.
[2] See M. J. Trebilcock, R. Howse, and A. Eliason, *The Regulation of International Trade*, 4th edn (London and New York: Routledge, 2013), p. 473.
[3] Arts. XVI and XVII GATS.

providers after the crossing of the border remain the prerogative of the Members.[4] In 'official' language:

> Rather, the Agreement explicitly recognizes governments' right to regulate, and introduce new regulations, to meet national policy objectives and the particular need of developing countries to exercise this right.[5]

However, there is also the provision on domestic regulation in Article VI GATS, which specifically concerns this sphere of national regulatory autonomy.

In contrast to the GATT, profound liberalization in the GATS is subject to specific commitments by the WTO Members. Article XX GATS obliges WTO Members to submit a schedule of specific commitments according to defined services sectors. WTO Members can decide autonomously which concessions in which sectors they want to enter into. These commitments take the form of binding (scheduled) promises to all other Members either to grant market access or not to discriminate in a specific services sector or sub-sector. If a sector is so committed, this is binding on the respective WTO Member in the sense of providing a guaranteed minimum standard awarded to foreigners. Treatment that is more favourable is subject to the Most Favoured Nation principle (MFN) pursuant to Article II:1 GATS, requiring each Member to extend this treatment immediately and unconditionally to services and service suppliers of any other Member, unless this right is expressly excluded.

The GATS works only as a framework agreement for negotiating these specific and detailed obligations among the Members. Without such bilateral negotiations on services under the GATS, even the MFN principle is not able to work its magic as it does under GATT. The reason for this is that, despite its general application irrespective of specific (scheduled) commitments of Members, it requires bilateral deals on the liberalization of the trade in services to enter into effect. Only on these grounds are the best access conditions that have been conceded to one country multilateralized and thus automatically extended to all other WTO Members.

In the rest of this chapter, we will take a closer look at the way GATS liberalizes trade in services and at the tools that it provides for Members to commit to this end. Note that we do not aim at offering

[4] C. Herrmann, W. Weiß and C. Ohler, *Welthandelsrecht*, 2nd edn (Munich: Beck, 2007), p. 384.
[5] See www.wto.org/english/tratop_e/serv_e/cbt_course_e/c1s2p1_e.htm.