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Research article

Assessing the relevance of multilateral trade law to sovereign investments: Sovereign Wealth Funds as "investors" under the General Agreement on Trade in Services

Julien Chaisse*

Faculty of Law and Director of the Centre for Financial Regulation and Economic Development (CFRED), The Chinese University of Hong Kong
*Email: julien.chaisse@cuhk.edu.hk

ABSTRACT

The variety of investments made by powerful Sovereign Wealth Funds (SWFs) is often directed to the globally booming service sector which is regulated by the General Agreement on Trade in Services (GATS). This paper analyses the scope, substance and procedural rights which may benefit SWFs. The basic principles of World Trade Organization (WTO) law provide a legal framework for regulating SWF investment while the members' specific commitments may provide significant liberalization. These positive elements for SWFs are tempered by the existence of exceptions and the relative shortcomings of state-to-state dispute settlement in the WTO and the lack of retroactive remedy. However, the paper shows that far from being perfect and complete, the GATS provides an international basis for SWFs to devise their investment strategies and an ideal forum in which to obtain further liberalization in current negotiations.

Keywords: World Trade Organization, General Agreement on Trade in Services, commercial presence, Mode 3, exceptions

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1. INTRODUCTION

Sovereign Wealth Funds (SWFs) are major investors on the global market.[1] As with any other investors, their investment decisions depend to some extent on the legal framework governing international capital flows as well as on the proactive policy measures to assist companies in their internationalization process. The international regime for foreign investment which regulates and protects SWFs investment is still very fragmented.[2] Despite the rapid increase in the importance of international investment, numerous efforts to conclude an international multilateral investment agreement have failed at the United Nations and the Organization for Economic Cooperation and Development (OECD). The site of the attempt to achieve such a multilateral agreement thereafter shifted to the World Trade Organization (WTO).[3] However, at the 1996 WTO Singapore Ministerial Conference, an agreement was struck to create a committee (the Working Group on Trade and Investment) to analyze the investment issue. Later, this Group was given a new mandate by the Doha Ministerial Conference in 2001. This committee was required to clarify seven specific issues and to launch negotiations "on the basis of a decision to be taken, by explicit consensus."[4] Significant differences of opinion made negotiations impossible and contributed, in part, to the breakdown of the Cancun Ministerial Meeting.[5]

There is no multilateral agreement on investment but there are some multilateral agreements which, to a lesser or greater extent, regulate some aspects of foreign investment. The General Agreement on Trade in Services (GATS)[6] deals mostly with investment issues of all the existing WTO agreements.[7] The GATS modes of supply are: cross-border supply, consumption abroad,

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[1]SWFs can be defined as pools of investment capital (whatever may be the legal form of the SWF: private or public) controlled by a government or central bank and invested in economic activities not only domestically but also and increasingly in other countries. The source of this capital is foreign exchange reserves, which all governments keep (typically in widely traded currencies such as the dollar, euro, or yen). When there is a surplus current account balance, those reserves can be put into an investment fund and used to increase national wealth or diversify sources of revenue. Existing research demonstrates that SWFs are usually set up in order to serve a basic purpose which is to invest surplus State reserves in foreign currency to yield higher returns. The funds improve the liquidity of the financial markets, create long-term growth and jobs and ensure stability for the companies they invest in. These responsible and reliable investors have pursued a long-term, stable policy that has certainly stood the test during the recent turmoil in the financial markets. *See* Joel Slawotsky, *Sovereign Wealth Funds as Emerging Financial Superpowers: How U.S. Regulators Should Respond*, 40 Geo. J. Int'l L. 1239 (2009); *see also* Julien Chaisse, *Sovereign Wealth Funds as Corporations in the Making-Assessing the Economic Feasibility and Regulatory Strategies*, 45 J. World Trade 837 (2011); *see also* Brendan J. Reed, *Sovereign Wealth Funds: The New Barbarians at the Gate? An Analysis of the Legal and Business Implications of their Ascendancy*, 4 Va. L. & Bus. Rev. 98 (2009); *see also* Paul Rose, *Sovereign Wealth Funds-Active or Passive Investors*, Yale L.J. (Nov. 24, 2008), http://yalelawjournal.org/the-yale-law-journal-pocket-part/scholarship/sovereign-wealth-funds:-active-or-passive-investors?/.

[2]The period since the North American Free Trade Agreement's (NAFTA) coming into force has witnessed a literal explosion in the number of international investment agreements (IIAs), in the form of both bilateral investment treatises (BITs) and preferential trade agreements (PTAs) involving all states which were earlier part of the Soviet Union. Primarily North–South in character at the outset, this phenomenon has also registered an important mutation in the 2000s, with an ever-growing number of South–South and South–North IIAs characterizing the evolution of emerging economies. It has been during the last decade that many Asian states, (with China, India, and South Korea being the most active), developed and reinforced their network of IIAs, thereby making investment a key aspect of their economic pacts with third states. *See* Julien Chaisse, *Navigating the Expanding Universe of Investment Treaties–Creation and Use of Critical Index*, 18 J. Int'l Econ. L. 1 (2015). *See also* on the Trans-pacific Partnership (TPP), Julien Chaisse, *The Shifting Tectonics of International Investment Law– Structure and Dynamics of Rules and Arbitration on Foreign Investment in the Asia-Pacific Region*, 47 GEO. WASH. INT'L L. REV. 47 (2015) at 52.

[3]In the three earlier attempts (the International Trade Organization 1948–1950, under the aegis of the UN; the Multilateral Agreement on Investment (MAI) 1972–1992; and the OECD-1995–1997) policymakers were never able to agree even on the objective for such negotiations. In each instance, capital-exporting nations wanted rules to govern entry and post-entry conditions. On the other hand, capital-importing countries wanted obligations that would bind foreign investors as well as investment rules that would help these nations meet their development objectives. *See* Julien Chaisse, *The Regulatory Framework of International Investment: The Challenge of Fragmentation in a Changing World Economy*, *in* The Prospects of International Trade Regulation- From Fragmentation to Coherence 417 (Thomas Cottier & Panagiotis Delimatsis eds., 2011).

[4]On this point, *see* Gavin Boyd & Alan Rugman, The World Trade Organization in the new global economy – trade and investment issues in the Millennium Round (2002).

[5]In the summer of 2004, WTO members conceded that "no work towards negotiations on [investment] will take place within the WTO during the Doha Round." Chaisse at 458, *supra* note 3.

[6]*See* General Agreement on Trade in Services, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 [hereinafter GATS].

[7]*See* Final Act embodying the results of the Uruguay Round of Multilateral Trade Negotiations, pmbl., 15 April, 1994, 1867 U.N.T.S. 14. The WTO and its predecessor organization, the General Agreement on Tariffs and Trade (GATT), have not directly tackled the broad issue of foreign investment rules. Instead, GATT and the WTO have dealt

commercial presence, and the presence of natural persons.[8] Although GATS does not deal officially with investment, it covers foreign direct investment through its commercial presence mode of supply.[9] The establishment of a commercial presence relates substantially and directly to investment. Service obligations that contemplate a "commercial presence" of foreign service providers necessarily imply that the providers will be able to make investments necessary to enjoy the benefits of such a commercial presence. Logically, the existing commitments under the GATS on other services sectors already grant SWFs the right to invest except where explicitly excluded.[10] In other words, SWF investments in the service sector may be subject to GATS rules to that extent, as this paper will review. This point is, however, already important because "for countries receiving inflows from SWFs, concerns are probably greatest where controlling stakes are acquired in sensitive areas – communications, media, energy, and financial and distribution services – which mostly fall in the services sector."[11]

Bilateral investment treaties have proliferated over the last few years and many studies have been published to study the relevance of these treaties to SWFs.[12] What is less known is the role that the WTO law may play with regard to SWF investments in the sector of services. Basically, this paper seeks to find a legal answer to the following legal conundrum: SWFs are growing in number and importance. Most of their home states have ratified the WTO agreement which protects some investment activities. A SWF is willing to acquire (or has acquired) some stakes abroad, in the form of a commercial presence in the services sector (for instance, in an insurance company or in the shipping sector). The host states decide not to allow the operation or put some restrictive conditions on it. Is the GATS, and more broadly the WTO, relevant to solve the issue? The paper provides positive answers to this question.

Also, if one considers the GATS as a key agreement in the legal protection of SWFs investments, it is important to look at WTO quasi-universal membership[13] to see whether major SWFs host states have ratified the WTO agreements. Actually, a huge majority (around 95 percent) of SWF states have ratified the WTO agreements (see Annex 1). Only nine SWFs belong to states which have not yet ratified the WTO agreement and which are only observers to WTO,[14] and four SWFs

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Footnote continued
with a narrow set of very specific issues, which has left nations to formulate their own policies, either through domestic legislation or BITs and PTAs. The WTO handles two major agreements that address investment directly: GATS and the Agreement on Trade-Related Investment Measures (TRIMs). Among the issues addressed, GATT and the WTO have dealt with specific aspects of the relationship between trade and investment through the General Agreement on Trade in Services (GATS), which concerns the supply of services by foreign companies, and through TRIMs. To the extent that trade in services may require a commercial presence by a foreign service provider in the territory of another state, the provider may enjoy certain investment rights under the GATS. Additionally, under WTO rules, investment measures, such as local content rules or trade balancing requirements, would be prohibited, to the extent that they impact upon trade and violate the GATT rules on national treatment and quantitative restrictions.

[8] *The General Agreement on Trade in Services (GATS): Objectives, Coverage and Disciplines*, WTO, http://www.wto.org/english/tratop_ e/serv_e/gatsqa_e.htm (last visited Sept. 22, 2014); *see also* Shintaro Hamanaka, *International Services Trade, Domestic Regulations and Reforms: The Case of Tertiary Education of Japan*, 12 J.I.T.L. & P. 204, 225 n.4 (2013).

[9] As the scope of GATS is limited to commercial services, it is not applicable to essential governmental services. *See* Jim Greishaber-Otto & Scott Sinclair, *Bad Medicine: Trade Treaties, Privatization and Health Care Reform in Canada*, Canadian Centre for Policy Alternatives (2004), http://www.policyalternatives.ca/sites/default/files/uploads/publications/National_Office_Pubs/bad_medicine.pdf 23–24 (last visited Sept. 22, 2014).

[10] Aaditya Mattoo & Arvind Subramanian, *Currency Undervaluation and Sovereign Wealth Funds: A New Role for the World Trade Organisation* (Peterson Institute for International Economics, Working Paper No. 8, 2008).

[11] *Id.* at 17.

[12] Claudia Annacker, *Protection and Admission of Sovereign Investment under Investment Treaties*, 10 Chinese J. In't L. 531 (2011); Larry Cata Backer, *Sovereign Investing in Times of Crises: Global Regulation of Sovereign Wealth Funds, State Qwned Enterprieses, and the Chinese Experience*, 19 Transnat'l & Contemp. Probs. 3 (2010); Fabio Bassan, The Law of Sovereign Wealth Funds (2011); Ronald J. Gilson & Curtis J. Milhaupt, *Sovereign Wealth Funds and Corporate Governance: A Minimalist Response to the New Mercantilism*, 60 Stan. L. Rev. 1346 (2008); Ludwig Gramlich, *An International Normative Framework for Sovereign Wealth Funds?*, 2 EYIEL. 43 (2011); Locknie Hsu, *Sovereign Wealth Funds, Recent Legislative Changes and Treaty Obligations*, 43 J. World Trade 469 (2009); Chris Lalonde, *Dubai or not Dubai? A Review of Foreign Investment and Acquisition Laws in the U.S. and in Canada*, 41 Vand. J. Int'l L. 1475, 1502 (2008).

[13] There were 160 members as of Sept. 22, 2014. *See Members and Observers*, World Trade Organization, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Sept. 22, 2014).

[14] Samruk-Kazyna JSC (Kazakhstan), Revenue Regulation Fund (Algeria), Kazakhstan National Fund (Kazakhstan), Libyan Investment Authority (Libya), National Development Fund of Iran (Iran), State Oil Fund(Azerbaijan), National Investment Corporation (Kazakhstan), Development Fund for Iraq (Iraq), Fund for Future Generations (Equatorial Guinea).

belong to states which are neither members nor observers.[15] All these funds represent less than 5 percent of the largest SWFs by assets under management. This also means that 95 percent of the SWFs have their operations potentially covered by WTO law, such as the ten wealthiest SWFs in the world.[16]

The WTO focus on trade has probably left the impression to many that there was no connection between SWFs and multilateral trade disciplines. The aim of this paper is to rectify this misunderstanding and to provide an exhaustive analysis of the substantive and procedural rights of SWFs under the GATS framework. To do so, the paper first discusses the relevance of the WTO to SWFs (Section 2). Secondly, the GATS contains, broadly speaking, two sets of obligations: general obligations and specific commitments. In this regard, the paper thirdly reviews the key principles of WTO law which may benefit SWFs (Section 3). Fourthly, the practice of GATS Mode 3 commitments is further described (Section 4) before the exceptions are explored (Section 5). In the sixth section, the paper looks at the dispute resolution under the WTO to clarify the procedural impediments to SWF claims under GATS (Section 6). Finally, the lessons are drawn in the conclusion.

2. RELEVANCE OF WTO TO SWFS INVESTMENTS

The establishment of a commercial presence relates substantially and directly to investment. To this extent, if SWFs make cross-border investments in the services sector, the GATS may be applicable.[17] Service obligations that contemplate a "commercial presence" of foreign service providers necessarily imply that the providers will necessarily be able to make the investments requisite for enjoying the benefits of such commercial presence. This paragraph first explains why the GATS is to be understood as an agreement on investment and subsequently the concept of commercial presence is clarified further.

2.1. GATS as an agreement on foreign investment

If we focus on the substance and the purpose of this mode of supply, the commercial presence mode of supply is, for all practical purposes, a multilateral agreement on investment. As noted by Howard Mann:

> GATS included provisions on investment liberalization through its language on "commercial presence" – the so-called Mode 3 of trans boundary provision of services. The GATS required a specific listing of sectors or sub-sectors where liberalization commitments would be undertaken by each WTO Member State. Thus, each state could better control the extent of its liberalization commitment through this list-in approach.[18]

One of the key principles of investment treatment (most-favoured-nation treatment) has become a general obligation for dealing with investment in the Agreement. However, market access and national treatment obligations for investment apply only to those sectors and modes of supply that have been put in the schedules of commitments submitted by the members limiting in this way the scope of liberalization for investment in the territory of each WTO member. The commercial presence can directly be linked to the two criteria of GATS, namely, market access and national treatment, in the sense that governments can either restrict market access by limiting the issue of banking licenses in total, irrespective whether or not banks are owned by

[15]Timor-Leste Petroleum Fund (East Timor), Palestine Investment Fund (Palestine), Revenue Equalization Reserve Fund (Kiribati), Turkmenistan Stabilization Fund (Turkmenistan).

[16]Government Pension Fund – Global (Norway), SAMA Foreign Holdings (Saudi Arabia), Abu Dhabi Investment Authority (UAE – Abu Dhabi), China Investment Corporation and SAFE Investment Company (both from China), Kuwait Investment Authority (State of Kuwait), Hong Kong Monetary Authority Investment Portfolio (China – Hong Kong), Government of Singapore Investment Corporation (Singapore), Temasek Holdings (Singapore), Qatar Investment Authority (Qatar), National Social Security Fund (China).

[17]Article I:3(c) of the GATS excludes services "supplied in the exercise of governmental authority." The exact impact of the GATS on public services is subject to vivid and controversial political debate. Krajewski has drawn the attention of the fact that this provision is likely to be interpreted narrowly and that a number of public services will in fact fall within the scope of the GATS; he has also described the consequences in particular with regard to the principle of national treatment. *See* Markus Krajewski, *Public Services and Trade Liberalization: Mapping the Legal Framework*, 6 J. Int'l Econ. L. 341, 360–381 (2003).

[18]Howard Mann, *Reconceptualizing International Investment Law: Its Role in Sustainable Development*, 17 Lewis & Clark L. Rev. 521, 525 (2013).

non-residents or residents. Alternatively, the number of foreign investors allowed to set up subsidiaries can be restricted, thus affecting national treatment. Furthermore, the three other modes of supply (cross-border supply, consumption abroad, and movement of natural persons) affect the operational part of banking business, for instance, whether foreign banks are allowed to provide services in local currency or from which services they are excluded compared to local banks. The conditions and limitations both for market access and national treatment could be entered in the schedules of commitments, again specific to the sector and the mode of supply. This so-called "positive list approach" of enumerating the specific sectors and modes of supply to be covered, contrasts with the traditional WTO approach based on general principles. GATS uses in large part the selective liberalization approach to provide access to foreign service suppliers, i.e., to foreign investors in the field of services (para. 3.1.).

GATS is very important since it seeks to liberalize and to open national economies to SWFs investment.[19] International Investment Agreements (IIAs) are primarily protective, that is, the vast majority of commitments are intended to protect established investment, whereas only a minority of IIAs contain liberalization commitments. However, the GATS also contains elements of both the national and most-favoured treatment and it relies on the use, both of positive lists of commitments and negative lists of exemptions, for different purposes.

2.2. Commercial presence as a form of SWFs foreign investment

The investment implications of GATS are largely derived from the key definition of Article I:2, which identifies modes by which services can be supplied.[20] Several of these imply a significant presence (referred to as a "commercial presence" in the legal texts) in the country where the service is provided, and provide the basic protections of GATS to the investments that are an integral part of this presence. The supply of trade in services through commercial presence is in essence an investment activity and is covered by the so-called "Mode 3." The notion of commercial presence refers to a situation whereby a service provider establishes or has a presence of commercial facilities in another country in order to render a service. The service itself is supplied by setting up a business or professional establishment, such as a subsidiary corporation or a branch or representative office, in the territory of one member by a SWF acting as service supplier of another WTO member.[21]

Through the provision covering the commercial presence, the GATS is in fact an agreement which aims to open up markets to foreign investment[22] and which can apply to many different sectors of activity: educational services, banking, insurance, telecommunications, etc., in this regard, the GATS is a key international agreement for all SWFs investing in the constantly growing global service industry.

It is only by reference to a country's schedule, and (where relevant) its most-favoured nation (MFN) exemption list, that it can be seen which services sectors and under what conditions the basic principles of the GATS (market access, national treatment, and MFN treatment) apply within that country's jurisdiction. A specific commitment in a services schedule is an undertaking to provide market access and national treatment for the service activity in question on the terms and conditions specified in the schedule. The commitments made in the field of commercial presence are important since with the constitutional principle of MFN obligation, parties to GATS are committed to treating services and service providers from one member in a no less favourable

[19] *See* Pierre Sauvé, *Investment and the Doha Development Agenda: A Look at the Issues, in* The Doha Development Agenda, Perspectives from the ESCAP Region 83 (2003).

[20] Article I:2 GATS reads:

> For the purposes of this Agreement, trade in services is defined as the supply of a service: (a) from the territory of one Member into the territory of any other Member; (b) in the territory of one Member to the service consumer of any other Member; (c) by a service supplier of one Member, through commercial presence in the territory of any other Member; (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

[21] Under Mode III delivery, rather than having the consumer traveling to receive a service, a supplier sets up a commercial presence in a foreign country. Mayo Clinic's opening of an office in Dubai is an example of healthcare delivered. Debra J. Lipson, *GATS and Trade in Health Insurance Services: Background Note for WHO Commission on Macroeconomcis and Health* (CMH, Working Paper No. 4, 2001).

[22] To a lesser extent, Mode 4 also tackles investment issues because it deals with the temporary entry of managerial and other key personnel.

way than like services and service providers from any other as concerns measures affecting trade in services.[23] National treatment, however, is not automatically accorded across the board. It applies only for scheduled sectors when parties agree to provide national treatment in the context of specific market access commitments. GATS also states that a member may maintain a measure inconsistent with MFN treatment provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions.[24] The GATS does not set out any operational conditions directly. This is not surprising because usually bilateral investment treaties (BITs) provisions are only negligibly regulatory,[25] meaning that host countries continue regulating foreign investment through their domestic legislation and not by directly imposing obligations on foreign investors in IIAs.[26]

Nevertheless, there are some general obligations within GATS that certainly affect the investment operational conditions. Such obligations are: domestic regulation, recognition, monopolies and exclusive service suppliers, and business practice obligations. The domestic regulation affects the operation of investment mostly through an authorization process, qualification requirements, technical standards and licensing requirements, where these conditions and procedures are required for the supply of a service. The obligations of recognition affect investment in the supply of a service, where service suppliers need to meet standards or criteria for the authorization, licensing, or certification of their services, or they need to achieve special education or experience. The obligation on monopolies and exclusive service suppliers within the Agreement states that each member shall ensure that any monopoly supplier of a service in its territory does not act in a manner inconsistent with the MFN treatment principle. If a supplier fulfills the condition on monopoly and exclusive service suppliers, then this Agreement will certainly affect the operation of his or her investment in order not to allow such a supplier to abuse its monopoly position.

Regarding the obligations on business practices, the Agreement appeals to the members to eliminate certain business practices of service suppliers that may restrain competition and thereby restrict trade in services. GATS promotes the transparency of investment environments. It is an interesting feature of the WTO since most BITs are only slightly transparent. They contribute to transparency only insofar as the provisions of the agreements themselves are transparent, but they do not require host countries to make their domestic laws transparent. GATS declares that each member shall publish promptly all relevant measures of general application,[27] which pertain to or affect the operation of trade in services. Where the publication is not practicable, the Agreement states that such information shall be made otherwise publicly available.

3. THE BASIC PRINCIPLES

There are a number of general obligations which apply to measures affecting trade in services irrespective of whether a member has undertaken specific commitments in a service sector or a sub-sector. These general obligations have to be understood as the basic protection and regulation offered to SWFs in the context of their cross-border investment in the services sector. The two most important general obligations are the principle of MFN treatment pursuant to Article II and national treatment. However, Article II:2 allows members to list exemptions from the fundamental obligation to grant MFN status to like services and service suppliers (the "opt-out" approach).[28]

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[23]The wording of MFN treatment in GATS is the same as in the North American Free Trade Agreement and the United States bilateral investment treaties, using the negative list approach, once it states that with respect to any measure covered by this Agreement, each member shall accord immediately and unconditionally to services and service suppliers of any other member treatment no less favourable than that which it accords to like services and service suppliers of any other country.

[24]Annex on Article II reads: "This Annex specifies the conditions under which a Member, at the entry into force of this Agreement, is exempted from its obligations under paragraph 1 of Article II."

[25]*See* Julien Chaisse, *The Shifting Tectonics of International Investment Law – Structure and Dynamics of Rules and Arbitration on Foreign Investment in the Asia-Pacific Region*, 47 GEO. WASH. INT'L L. REV. 47 (2015).

[26]Julien Chaisse & Christian Bellak, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Preliminary Reflections on a New Methodology*, 3(4) TRANSNAT'L CORP. REV. 3 (2011). *See also* Julien Chaisse, *Navigating the Expanding Universe of Investment Treaties – Creation and Use of Critical Index*, 18 J. INT'L ECON. L. 1 (2015).

[27]On the central notion of transparency in WTO system and its contribution in ensuring the effectiveness of its law, *see* SHARIF BHUIYAN, NATIONAL LAW IN WTO LAW – EFFECTIVENESS AND GOOD GOVERNANCE IN THE WORLD TRADING SYSTEM 68–75 (2007).

[28]Article II:2 GATS reads: "A Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions."

3.1. The principle of most-favoured-nation treatment

The history of the concept of MFN treatment shows that, besides the development and proliferation of the concept in international trade relations itself, a decisive distinction needs to be made between the conditional and unconditional application of the principle. Article II of the GATS sets out the principle of MFN treatment for trade in services.[29] Accordingly, WTO members must accord immediately and unconditionally to any other member treatment no less favourable than the treatment which they accord to like services and service suppliers of any other country. This obligation is similar to the MFN clause in the GATT 1994. It applies to all services, independently of the specific commitments made. The principle of MFN treatment under the GATS, however, contains one unique feature. Article II:2 of the GATS permits members to maintain a measure inconsistent with the principle provided that such a measure is listed in, and meets the conditions of the Annex on Article II Exemptions (the "opt-out" approach). It was hence possible for members, at the time of entry into force of the GATS, to claim MFN exemptions in individual schedules. Annex II clearly provides that, in principle, such exemptions may not exceed a period of ten years and should then be phased out. Reality suggests that they are likely to stay and may be further extended.[30]

3.2. The national treatment and market access

Market access for foreign services and service suppliers is the central focus of the GATS. Unlike in the area of goods, it is not brought about by reducing border measures but by gradually granting access to competition on an equal footing with domestic suppliers. The principal means by which such access is achieved is national treatment and the conditions attached to it. By doing so, the GATS fully reflects a model of progressive and individualized liberalization. Access to competition is granted only to the extent that a member has undertaken market access commitments for a specific sector or sub-sector of services by using the four modes of supply set out in Article I:2 of the GATS. Articles XVI and XVII of the GATS adopt an "opt-in" or "positive list" approach.[31] Both provisions refer to national treatment, and their relationship is not entirely clear. Article XVI – termed Market Access – essentially focuses, in paragraph 2, on a number of conditions which members must not live up to unless deliberately and explicitly included in their schedules. These conditions relate, as set out in paragraphs (a) through (f), to quantitative limitations of service suppliers, to limitations of the total value of imported service transactions, to limitations on the total number of service operations, to limitations on the total number of natural persons employed, to measures requiring specific legal qualifications of service operators, and to limitations on foreign capital or shareholding. Article XVII – termed National Treatment – expounds the principle by listing obligations of the national treatment of like services. More importantly, members are at a certain liberty to control and set the degree of liberalization through their commitments, subject to reservations and conditions. In sectors not scheduled by a member, no commitments to liberalize beyond the general obligations are

[29]There are two major exceptions to the principle of MFN treatment in WTO law: regional trade agreements pursuant to Article XXIV of the GATT 1994 and to Article V of the GATS (as well as labour markets integration agreements pursuant to Article V bis of the GATS), and special and differential treatment of developing countries pursuant to the Enabling Clause. *See* William J. Davey & Joost Pauwelyn, *MFN Unconditionality: A Legal Analysis of the Concept in View of its Evolution in the GATT/WTO Jurisprudence with Particular Reference to the Issue of "Like Product", in* Regulatory Barriers and the Principle of Non -Discrimination in World Trade Law 13, 22–25, 368 (Thomas Cottier & Petros C. Mavroidis eds., 2000).

[30]In *EC–Bananas*, the Appellate Body was called upon to elaborate, for the first time, on the nature and scope of the MFN clause in the GATS. It established that "treatment no less favourable" in Article II:1 of the GATS should be interpreted to include *de facto* as well as *de jure* discrimination. Appellate Body Report, *EC—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R 355 (Sept. 9, 1997).

[31]Article XVI:1 GATS reads: "With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule." Article XVII, however, reads:

> In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.

undertaken. The member thus continues to define its own policy of granting market access and national treatment.

The second notion of equal treatment and mainstay of the world trading system under the WTO is the principle of national treatment prohibiting discrimination between products (goods and services) produced domestically and those imported from other member countries. Together with the MFN obligation, it forms the fundamental principle of non-discrimination in WTO law. It is one of the cornerstones of the system and it is applicable throughout the WTO agreements. Article XVII of the GATS contains the principle of national treatment for trade in services. Although the principle also lies as a cornerstone under the GATS, its mechanism and function differ from those under the GATT 1994. In the absence of tariff protection available for goods, market access in services is essentially defined by means of granting or denying national treatment to like services or its conditioning. It is apparent that the general application of the national treatment principle would amount, in one strike, to full-fledged market access in all services alike. The laws and regulations of members, however, are far from granting broad access, and it is important to make use of the principle of national treatment in a process of progressive and gradual liberalization. The GATS therefore provides for an opt-in or a positive list approach. Article XVII of the GATS demands national treatment only with regard to those services and service suppliers that are inscribed in a member's schedule. If a member undertakes specific commitments in a sector or sub-sector, it shall accord to services and service suppliers treatment no less favourable than it accords to its own like services and service suppliers. The basic commitment, however, can be further conditioned for different modes of supply, and Article XVI permits further qualifications and restrictions.

The test of "likeness" is relevant with regard to the application of the principle of national treatment to trade in services.[32] Obviously, the prominent reliance on physical characteristics is not available here. Another approach has to be found. To date, it is unclear what the decisive parameters should be to assess two services or services suppliers as to their likeness. Article XVII:3 of the GATS clarifies, at least, that the "conditions of competition" are equally important as under the GATT 1994.[33] Joel P. Trachtman suggested to question, against the background of balancing and proportionality concerns, whether a distinction can be justified by non-protectionist regulatory policy objectives.[34] WTO jurisprudence in defining likeness under the GATS is still in its infancy.[35]

3.3. Transparency

Barriers to trade in services often stem less from undue border controls than from protectionist domestic regulations and administrative practices. It is against this background that Articles III and IV:2 of the GATS reflect established standards on transparency and independent judicial review.[36] In addition, and in light of the paramount importance of domestic regulations defining

[32]The scope and practical relevance of Article III of the GATT 1994 is to a large extent dependent on the reading of the phrase "like product." Its definition essentially sets the benchmark for national regulatory freedom to treat certain imported products differently from those produced domestically. Not surprisingly, the matter is at the heart of the WTO system, and much attention has been paid to it in jurisprudence and literature. Paragraphs 2 and 4 of Article III both use the phrase "like product." *See* Robert E. Hudec, "*Like Product": The Differences in Meaning in GATT Articles I and III, in* Regulatory Barriers and the Principle of Non - Discriminantion in World Trade Law: Past, Present, and Future 101, 104–399 (Thomas Cottier & Petros C. Mavroidis eds., 2000).

[33]Article XVII:3 GATS reads: "Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member."

[34]J.P. Trachtman, *The "Necessity Test" in Domestic Services Regulation: How to Move Forward in the GATS?* (May 18, 2002) (transcript available at http://www.apecsec.org.sg/download/services).

[35]In *EC–Bananas*, the question of how likeness of services and service suppliers should be established arose for the first time. The panel took a rather broad view without making recourse to the competitive relationship of compared services. Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/USA 408 (May 22, 1997). Moreover, the Appellate Body explicitly rejected, in the same case, the "aims-and-effect" test relevance under Articles II or XVII of the GATS. Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R 409 (Sept. 9, 1997).

[36]Article III GATS reads:

> Each Member shall publish promptly and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application which pertain to or affect the operation of this Agreement. International agreements pertaining to or affecting trade in services to which a Member is a signatory shall also be published.

market access, conditions of competition and safeguarding investments, Article VI – termed "Domestic Regulation" – contains a number of procedural and substantive norms.[37] They all share the purpose of avoiding arbitrary regulation and administration of rules affecting trade in services. These disciplines may be termed disciplines of good government; they are so far largely untested in dispute settlement. Yet, they remain open for interpretation by case law in accordance with established general principles of law and practices developed under the GATT. Thus, the concept of reasonable, objective and impartial administration in paragraph 1 incorporates, in our view, a prohibition of abuse of rights, recognized under Article XX of the GATT 1994.[38] The same holds true for the requirement to process applications within a reasonable period of time.
Provisions relating to technical standards can be construed in the light of criteria developed under the Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary (SPS) Agreements, as well as under the Agreement on Import Licensing Procedures, until special agreements in these fields are developed under the GATS. Furthermore, the principle of proportionality, encompassing necessity and a reasonable relationship between aims and means, will assist in applying Article VI.

4. THE PRACTICE OF SPECIFIC COMMITMENTS

Article XX of the GATS requires each member to maintain a schedule of the specific commitments which it undertakes.[39] As in the area of goods, such schedules are annexed to the agreement and

Footnote continued
Article IV:2 GATS, however, reads:

> Developed country Members, and to the extent possible other Members, shall establish contact points within two years from the date of entry into force of the WTO Agreement to facilitate the access of developing country Members' service suppliers to information, related to their respective markets, 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.

[37]Article VI GATS reads:

> 1. In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner. 2. (a) Each Member shall maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services. Where such procedures are not independent of the agency entrusted with the administrative decision concerned, the Member shall ensure that the procedures in fact provide for an objective and impartial review. (b) The provisions of subparagraph (a) shall not be construed to require a Member to institute such tribunals or procedures where this would be inconsistent with its constitutional structure or the nature of its legal system. 3. Where authorization is required for the supply of a service on which a specific commitment has been made, the competent authorities of a Member shall, within a reasonable period of time after the submission of an application considered complete under domestic laws and regulations, inform the applicant of the decision concerning the application. At the request of the applicant, the competent authorities of the Member shall provide, without undue delay, information concerning the status of the application. 4. With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, inter alia: (a) based on objective and transparent criteria, such as competence and the ability to supply the service; (b) not more burdensome than necessary to ensure the quality of the service; (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service. 5. (a) In sectors in which a Member has undertaken specific commitments, pending the entry into force of disciplines developed in these sectors pursuant to paragraph 4, the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which: (i) does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c); and (ii) could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made. (b) In determining whether a Member is in conformity with the obligation under paragraph 5(a), account shall be taken of international standards of relevant international organizations (3) applied by that Member. 6. In sectors where specific commitments regarding professional services are undertaken, each Member shall provide for adequate procedures to verify the competence of professionals of any other Member.

[38]*See* Appellate Body Report, *US – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R 170 (Oct. 12, 1998).

[39]Article XX GATS reads:

> Each Member shall set out in a schedule the specific commitments it undertakes under Part III of this Agreement. With respect to sectors where such commitments are undertaken, each Schedule shall

form an integral part thereof. Also, "once made, a commitment on liberalization under the GATS cannot be rolled back unless equivalent value in other liberalization commitments is agreed with other Member States."[40] These specific commitments are the necessary complement to the GATS basic principles since they detail the exact degree of openness of a service sector. Some WTO members may have agreed to let SWFs invest in the future, while some other members may have set some restrictions of different forms. In both cases, specific commitments provide the details of states' commitments vis-à-vis SWFs projects.

4.1. Horizontal commitments and sector-specific section

Article XX provides in some detail, the design of the schedules. Under GATS, all schedules have two sections.[41] First, "horizontal" commitments which stipulate limitations that apply to all of the sectors included in the schedule; these often refer to a particular mode of supply, notably commercial presence and the presence of natural persons.[42] Any evaluation of sector-specific commitments must therefore take the horizontal entries into account. In the second section of the schedule, the "sector-specific section" contains entries that apply only to a particular sector (twelve sectors, representing about 160 sub-sectors, can be distinguished under the GATS).[43] In determining a country's sector-specific commitment, consideration must also be given to the overall horizontal commitments.[44] The "horizontal commitments" are those commitments that apply across-the-board to all the services sectors listed in the country's "schedule of specific commitments." These commitments are usually written at the beginning of the schedule. They can refer to economic considerations that may be applicable to all the services sectors and sub-sectors listed in the schedule.

All WTO member states are expected to have a schedule of specific commitments under the GATS. This is the list of commitments for every selected service sector that WTO members came up with during negotiations. WTO members opened up their market in an asymmetric way reflecting their perceptions about how open (or, conversely, how closed) an economy should be to foreign investment. This serves as a guarantee to service providers in other countries that market entry conditions will not become less restrictive, as they can only be improved. A Mode 3 request, offer, or commitment, like those for the other modes, can be for a specific sector or sub-sector, or it can be horizontal. A WTO member can, for each service sector or sub-sector, request for, or offer, different levels of commitment. That of course applies for each mode of supply even if we focus here on Mode 3. The commitments and the limitations to market access and national treatment are entered in the service schedule with respect to each of the modes of supply. A Mode 3 request, offer, or commitment is essentially about liberalizing the conditions under which the service providers of Switzerland, for example, can invest and set up branch offices, joint ventures, or subsidiaries in the territory of another WTO member. It can however have different levels. Indeed, the Mode 3 commitments can lead to a full liberalization, a limited liberalization, or a retained liberalization.

Footnote continued
specify: (a) terms, limitations and conditions on market access; (b) conditions and qualifications on national treatment; (c) undertakings relating to additional commitments; (d) where appropriate the time-frame for implementation of such commitments; and (e) the date of entry into force of such commitments. 2. Measures inconsistent with both Articles XVI and XVII shall be inscribed in the column relating to Article XVI. In this case the inscription will be considered to provide a condition or qualification to Article XVII as well. 3. Schedules of specific commitments shall be annexed to this Agreement and shall form an integral part thereof.

[40]Mann, *supra* note 18, at 525.

[41]Thomas L. Brewer & Stephan Young, *Investment Issues at the WTO: the Architecture of the Rules and the Settlement of Disputes*, 1 J. Int'l Econ. L. 457, 460–462 (1998).

[42]Carsten Fink & Martin Molinuevo, *East Asian Preferential Trade Agreements in Services: Liberalization Content and WTO Rules*, 7 World Trade Rev. 641 (2008).

[43]Philippe Gugler, European Integration and Uruguay Round Results on Trade in Services, Outsider's response to European Integration 157–160 (Hirsch Seev & Almor Tamar eds., 1999).

[44]*See* Laurel Terry & Jonathan Goldsmith, *GATS General Agreement on Trade in Services: A Handbook for International Bar Association Member Bars*, int'l bar association, http://www.personal.psu.edu/faculty/l/s/lst3/IBA%20GATS%20Handbook%20final.pdf (last visited Sept. 122, 2014).

4.2. Full liberalization

A WTO member can request, offer, or commit to full liberalization. This means that there will not be any limitation on market access or national treatment for the service sector and mode of supply in which this commitment is written. In this hypothesis, a WTO member writes "none" in its schedule of commitments. This means that it is committing itself to provide full liberalization of such service sector. It commits itself to allowing the services and service providers of other WTO members full access to the country's market of service consumers and that it will not impose any regulations that would restrict such access or discriminate in favour of domestic services or service suppliers.[45] Australia advertising services stipulates "none" for both market access and national treatment.[46] The full liberalization is the best scenario for SWFs as it means that the host state has committed to open up its national economy to foreign investment. It may provide the right to SWFs to invest in the host economy.

4.3. Limited liberalization

A WTO member can describe and write specific limitations or conditions to market access or national treatment in its schedule of specific commitments.[47] Such a scenario makes SWFs commercial presence rights more unpredictable as each WTO member may have its own policy. In making their commitments, WTO members can specify the limitations or conditions under which they will allow foreign services and service providers under Mode 3 into their domestic market and compete with domestic services and service providers. These limitations or conditions can be with regard to "market access" or to "national treatment." They can, for example, limit the number of economic operators (GATS Article XVI). These "market access limitations" are restrictions on the entry of foreign services or service suppliers into the domestic market. They can take exceptions from the obligations to accord MFN treatment to foreign service suppliers or from the obligation to accord national treatment (GATS Article II:2 and Article XVII).[48] A country's commitments may be limited by its MFN exemptions (i.e., the maintenance of measures inconsistent with the MFN obligation). Since MFN is a general obligation that applies to all trade in services, exemptions are listed in a separate schedule indicating: (i) the sectors to which the exception applies; (ii) the measure and why it is inconsistent with the MFN obligation; (iii) the countries to which the measure applies; (iv) the duration of the exemption; and (v) the need for the exemption. Exemptions, in principle may not last longer than ten years. The national treatment limitations take the form of laws or regulations that effectively discriminate against foreign in favor of domestic services and service suppliers, or provide for market competitive conditions that favour domestic over foreign services and service providers. Also:

> [S]ome countries have explicitly excluded foreign government ownership from the scope of their GATS commitments in a few sectors. The United States' commitment states that government-owned or -controlled insurance companies, whether U.S. or foreign, are not authorized to conduct business in a large number of states, and in basic telecommunications and radio or television broadcast services licenses may not be granted to or held by foreign governments or representatives thereof. In other words, these countries have retained the right to disallow SWF-controlled acquisitions in these sectors.[49]

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[45]However, there are certain exceptional circumstances, such as those in GATS Article XIV and XIV bis, under which WTO members can justify the imposition of regulations that violate their GATS obligations.

[46]*Australia Schedule of Specific Commitments*, GATS sch. 6

[47]Such limitations can be those that are required by existing national laws or regulations. Moreover, they can always impose restrictions with respect to commercial presence.

[48]Article XVII GATS reads:

> 1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers. 2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers. 3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

[49]Mattoo & Subramanian, *supra* note 10, at 17.

In the sector of audiovisual services and the sub-sector of "Radio and Television Transmission Services," the US has set some restrictions on the nature of the foreign investors which implicitly exclude SWFs from the sector. In the US schedules, it is stated that:

> Radio and television broadcast licenses may not be held by: a foreign government; a corporation chartered under the law of a foreign country or which has a non-US citizen as an officer or director or more than 20 per cent of the capital stock of which is owned or voted by non-US citizens; a corporation chartered under the laws of the United States that is directly or indirectly controlled by a corporation more than 25 per cent of whose capital stock is owned by non-US citizens or a foreign government or a corporation of which any officer or more than 25 per cent of the directors are non-US citizens.[50]

Also, in the sector of financial services (and all subsectors), "[f]oreign ownership of Edge corporations is limited to foreign banks and U.S. subsidiaries of foreign banks, while domestic non-bank firms may own such corporations."[51]

Many other WTO members have set restrictions as to the nature of the foreign investors. For instance, with regard to Australia, for the same sector of business services (legal services) there is a first series of limitations on market access: "Natural persons practising foreign law may only join a local law firm as an employee or as a consultant and may not enter into partnership with or employ local lawyers."[52] Combined with limitations on national treatment "[a]t least one equity partner in a firm engaged in advising on foreign law matters must be a permanent resident (NSW, Victoria); at least one equity partner in a foreign law firm must be resident for a minimum period of 180 days per calendar year (Queensland)."[53] Also, "[a]cquisition, by foreign interests, of control of any of Australia's four main banks (Commonwealth Bank of Australia, National Australia Bank, Westpac Banking Corporation and Australia and New Zealand Banking Group) is not permitted."[54]

4.4. Retained liberalization

It is finally possible for a member to keep control of a service sector and to decide not to liberalize it. In that case, a WTO member must indicate "unbound" in its schedule of commitments for a given sector or mode of supply if it wishes to remain free to introduce or maintain laws or regulations that limit market access or national treatment or favour domestic over foreign firms in that sector or mode of supply. That option will result in a retained liberalization for given services sector. Since there is no commitment to grant market access, there is no right granted to SWFs to establish a commercial presence in the host state.

5. EXCEPTIONS

Through the exceptions, the WTO system explicitly addresses deviations from key trade principles and from all provisions. A WTO member may deviate from its Mode 3 commitments if such deviation can be justified under one of these exceptions. Of course, the regime of the WTO exceptions is to SWF investors something which directly calls into question the rights initially granted in the schedules. However, as emphasized by Professor Guiguo Wang:

> [T]he objective and purpose of the general exceptions are to maintain a balance of the right of any Member to invoke an exception — taking a measure inconsistent with the substantive provisions of another article — and the substantive rights of other Members. This is so because the application of any exception means an erosion of the rights of other Members.[55]

There are first some "general exceptions" which may apply in certain circumstances, however, there are also the "national security" exceptions, which may even be more relevant to SWFs investment in the service sector.

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[50] *U.S. Schedule of Specific Commitments*, GATS sch. 90.
[51] *Id.*
[52] *Australia Schedule of Specific Commitments*, GATS sch. Õ
[53] *Australia Schedule of Specific Commitments*, GATS sch. Õ
[54] *Australia Schedule of Specific Commitments*, GATS sch. Õ
[55] Guiguo Wang, Radiating Impact of WTO on its Members' Legal System: The Chinese Perspective, Martinus Nuhoff Publishers (2010).

5.1. General exceptions: GATS Article XIV

Article XIV of the GATS is one which provides for general exceptions of trade in services.[56] It is modelled on Article XX of the GATT 1994 and permits members to deviate from obligations set forth in the agreement[57] and to adopt measures necessary to protect public morals (paragraph (a)), measures necessary to protect human, animal or plant life and health (paragraph (b)), and – different from Article XX of the GATT 1994 – measures necessary to prevent deceptive and fraudulent practices or to deal with the effect of a default on services contracts and measures necessary to protect privacy and confidentiality in connection with the transmission of data (paragraph (c)). Moreover, paragraph (e) refers to agreements on the avoidance of double taxation. Article XIV of the GATS also contains an introduction "chapeau" that applies to all measures referred to in paragraphs (a) through (e).[58]

Article XIV of the GATS was never invoked and therefore little is known of its possible impact with regard to SWF investments. One can, however, extrapolate on the basis of the GATT Article XX case law. In the WTO context, Article XX has served as a last-resort stopgap measure, not as a proactive environmental or a health policy instrument. This type of clause puts the burden of proof on the party accused of violating non-discrimination principles, and success with using the Article in the GATT has not been high.[59] As a result, it may be anticipated that states willing to deviate from their GATS Mode 3 commitments may not have an easy time. Article XIV of the GATS may not be a major breach of the market opening agreed under Mode 3 which also means that SWF operations are relatively well-protected.

5.2. National security exceptions (GATS Article XIVbis)

Trade regulation is an important component of foreign policy. To bring about peaceful and prosperous relations is an end in itself, trade liberalization may conflict with the goals of national security and with measures against states adopted under the UN Charter. Trade restrictions amount to a major tool in the pursuit of non-economic goals relating to security. Market access rights under WTO law may therefore be subject to restrictions adopted both unilaterally and multilaterally. The two avenues operate under different conditions and rules. Both, however, are

[56]In the practice of WTO law, Article XX of the GATT 1994 is one of the most important provisions. It justifies deviations from other rules, in particular, but not exclusively, from the principle of national treatment and from the prohibition of quantitative restrictions. Article XX is composed of two distinct parts: Firstly, it contains an enumeration of specific motives and conditions for restricting trade, listed in paragraphs (a) through (j). Not all of them are of equal practical importance. The critical provisions which are frequently invoked in practice – as WTO members have become increasingly concerned with environmental and human health issues as well as with the protection of intellectual property rights – refer to measures necessary to protect human, animal or plant life and health (paragraph (b)), measures necessary to secure compliance with laws relating to the protection of patents, trademarks and copyrights, and the prevention of deceptive practices (paragraph (d)), and measures relating to the conservation of exhaustible natural resources (paragraph (g)). Moreover, protection of public morals is provided for (paragraph (a)). This latter paragraph may gain, along with banning imports from prison labour (paragraph (e)), increased importance in relation to the protection of human rights. These paragraphs are examined in detail in this Chapter. Secondly, Article XX contains a general provision, the so-called "chapeau," which applies in addition to the specific motives.

[57]On the regime of Article XX GATT, *see* Julien Chaisse, *Investment or Health? Can exception clauses play a role in balancing foreign investment protection and domestic tobacco control ?*, 39 Am. J.L. & Med. 332 (2013).

[58]Article XIV GATS reads:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures: (a) necessary to protect public morals or to maintain public order; (5) (b) necessary to protect human, animal or plant life or health; (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to: (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts; (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; (iii) safety; (d) inconsistent with Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective (6) imposition or collection of direct taxes in respect of services or service suppliers of other Members; (e) inconsistent with Article II, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound.

[59]Wang, *supra* note 55.

characterized by a relative laxness, thereby allowing security considerations to easily prevail. It is here that the traditions of classic foreign policy, barely limited by law, still persist on the national, regional and global level. Accordingly, legal remedies against such measures are scarce, and ideas of compensation of economic operators for losses incurred on the basis of security measures have not been further developed. This field has remained one of unfettered national sovereignty.

Article XXI of the GATT 1994 contains a general exception for measures taken by a member necessary for the protection of essential security interests.[60] The same wording is used in Article 73 of the TRIPs Agreement[61] and Article XIV bis of the GATS.[62] Moreover, paragraph (c) of the three provisions exempts sanctions taken in the fulfilment of obligations under the UN Charter.

The problem with national security issues is that there is no way of clearly defining what types of investment invoke these concerns and what types of investments do not. Whereas it may be clear that foreign investment in a country's defence industries would raise national security concerns, there are many other industries that do not fall within the traditional notion of defence but are nonetheless essential to a country's security.[63] If any action taken under such legislation violates the recipient country's GATS obligations, would the Article XIV bis security exception apply? This provision has never been invoked and therefore does not give any insight on its applicability,[64] and the capacity of governments to prohibit SWF investment on this ground.[65] The prospects are however very limited and not encouraging.

It is indeed clear from the wording that the GATS (Article XIV, *chapeau*) introduce a requirement that such measures shall not constitute, or be applied in a manner which would constitute arbitrary or unjustifiable discrimination. In addition, the measures may not serve as "disguised restrictions." But the GATS qualification noted above is not carried over to the security provisions of the GATS *per se* (Article XIV bis), so that as it concerns national security, the measures remain entirely self-judging. The security exception is to preserve members' freedom of action in areas relating to national defence and security. Trade liberalization and international regulation do not prevail over members' vital interests in maintaining the core of sovereignty and cannot restrain members' freedom to preserve, and defend their very existence. Moreover, it should be recalled that the GATS provide only for state-to-state dispute settlement and that, as concerns investment matters, what is probably another limit to the possibility to control national protectionism towards SWFs on the basis of the GATS.

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[60]To date, no clear interpretation of the scope of permissible security exceptions has emerged. While other provisions of the GATT were refined by side agreements or understandings, members preferred to remain silent on security exceptions in order to ensure maximum leeway. Moreover, it has been argued that panels and the Appellate Body should not be empowered to meticulously review members' decisions to invoke Article XXI of the GATT 1994, thus leaving it essentially to members to decide on their "security interests" under this provision. Hannes L. Schloemann & Stefan Ohlhoff, *"Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence*, 93 Am. J. Int'l L. 425, 442–447 (1999).

[61]*See* Julien Chaisse & Puneeth Nagaraj, *Changing Lanes: Intellectual Property Rights, Trade and Investment*, 37 Hastings Int'l & Comp. L. Rev. 223 (2014).

[62]Article XIV bis of the GATS reads:

> 1. Nothing in this Agreement shall be construed: (a) to require any Member to furnish any information, the disclosure of which it considers contrary to its essential security interests; or (b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests: (i) relating to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment; (ii) relating to fissionable and fusionable materials or the materials from which they are derived; (iii) taken in time of war or other emergency in international relations; or (c) to prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security. 2. The Council for Trade in Services shall be informed to the fullest extent possible of measures taken under paragraphs 1(b) and (c) and of their termination.

[63]*See* Anthony Wang, *Sovereign Wealth Funds and the Problem of Assymetric Information: The Santiago Principles and the International Regulations*, 34 Brook. J. Int'l L. 1096 (2009).

[64]Andrew Emmerson, *Conceptualizing Security Exceptions: Legal Doctrine or Political Excuse ?*, 11 J. Int'l Econ. L. 135–154 (2008).

[65]Cottier Thomas & Delimatsis Panagiotis, *Article XIV bis GATS: Security Exceptions*, *in* 6 Max Planck Commentaries On World Trade Law, WTO – Trade In Services 329–48 (Rüdiger Wolfrum, Peter-Tobias Stoll & Clemens Feinäugle eds., 2008).

6. DISPUTE RESOLUTION IN THE WTO

The private sector, as well as non-governmental organizations, (NGOs, including producer, consumer, environmental and other organizations, both national and international) have no direct voice in, or access to, the work of the WTO or its meetings. Nonetheless, both groups have become significant players in trade and trade-related issues governed by the WTO and to a large extent, shape the organization's perception by the general public. They have the potential to substantially influence the organization's agenda by using various channels in order to lobby for the matters of their concern. Private companies and domestic NGOs usually stay in close contact with national governments and parliaments and seek representation of their interests by official national representatives. In addition, transnational channels are used to bring about coordination among delegations. Transnational NGOs with central administration and a global, rather than national, constituency (such as WWF, Greenpeace, Médecins Sans Frontières) act close to the WTO and its various committees and bodies and try to directly and publicly influence their work.[66]

The WTO dispute settlement system functions exclusively between members and precludes SWFs from playing any official role. It is, typically in the tradition of the GATT 1947, designed as government-to-government dispute resolution. Panel and Appellate Body proceedings are confidential. Only the representatives of the parties (including mandated attorneys) are permitted at the hearings. Members other than the parties may participate as third parties. Pursuant to Article 10 of the Dispute Settlement Understanding (DSU), they need to have a "substantial interest" in the matter before a panel. They are obliged to notify their interest to the Dispute Settlement Body (DSB).[67] As a third party, they are heard once by the panel and can make written submissions as well as receive the submissions given by the parties to the first panel meeting. Case law reveals that a member's interest in the matter is normally not challenged. In particular, large delegations with sufficient resources participate as third parties quite frequently on the grounds of systemic interests and in light of precedential effects of adopted panel and Appellate Body reports.

Non-state actors are formally excluded from the dispute settlement process. Producer interests are often strongly present informally as they are the driving force behind complaints and thus support the effort to make a successful case. Organizations representing non-trade concerns, however, do not enjoy similar (informal) access in many countries. They express concerns that their government, or the dispute settlement process at large, would not adequately represent the various views on a matter. In particular, globally operating non-governmental organizations argue that decisions arrived at behind closed doors undermine their interests and the legitimacy of the mechanism as a whole. They claim that enlarged access to WTO processes is required in order to ensure the full representation of all constituencies affected. As a consequence, NGOs and individuals have begun to submit *amicus curiae* briefs to panels and the Appellate Body in order to make their views and arguments heard. *Amicus curiae* briefs are unsolicited documents which are submitted by sources other than the parties and third parties to a dispute without having been requested by a panel or the Appellate Body. The DSU is basically silent on *amicus curiae* briefs.[68]

Private actors and individuals such as industries, consumers and NGOs cannot initiate a formal dispute resolution proceeding, let alone have standing before panels or the Appellate Body. Governments alone decide whether a complaint shall be brought before the WTO dispute settlement system.[69] This mechanism reflects the classic diplomatic protection of individuals and groups by nation states as developed under general public international law.[70] Traditionally, decisions to exercise diplomatic protection are a matter of political expediency.

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[66]The General Council set up specific guidelines on the relationship between NGOs and the WTO pursuant to Article V:2 of the WTO Agreement: General Council Decision, *Guidelines for arrangements on relations with Non-Governmental Organizations*, WT/L/162 82 (July 18, 1996).

[67]See Julien Chaisse and Mitsuo Matsushiota, *Maintaining the WTO Supremacy in the International Trade Order – A Proposal to Refine and Revise the Role of the Trade Policy Review Mechanism*, 16 J. Int'l Econ. L. 9 (2013) at 12.

[68]In *US – Shrimps*, the Appellate Body fundamentally settled the issue by finding that panels have the discretionary power to either accept and consider or to reject *amicus curiae* briefs. Appellate Body Report, *US – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R 170 (Oct. 12, 1998).

[69]Ernest-Ulrich Petersmann, *The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System since 1948*, 31 Common Mkt. L. Rev. Rev. 1157 (1994).

[70]James Cameron & Kevin R. Gray, *Principles of International Law in the WTO Dispute Settlement Body*, 50 Int'l & Comp. L.Q. 248 (2001). *See also* William J. Davey, *WTO Dispute Settlement: Segregating the Useful Political Aspects*

Particular mechanisms, however, exist in the European Communities (EC) in the United States and in China. Section 301 of the US Trade Act introduced procedural rights of private operators in 1974. In 1994, the EC adopted its Trade Barriers Regulation (TBR, Regulation 3286/94) in order to provide a mechanism for private actors to bring their allegations of violations of international trade law to the attention of the Commission.[71] This regulation was part of the legislative package implementing the Uruguay Round results. It replaced the New Commercial Policy Instrument (Regulation 2641/84) introduced in 1984 to deal with foreign unfair trade practices which was only rarely applied.[72] The TBR establishes rights for private parties to complain about illegal trade practices of third countries.[73] In China, an hybrid instrument initially appeared to prefer the American approach by adopting the Rules on Trade Barrier Investigation, which empowers domestic firms to petition the government directly to launch investigation against foreign trade barriers. However, since 2005, China seems to have shifted to the European approach by adopting a "Quadrilateral Coordination" system, which pools together the resources of the Ministry of Commerce, local government, and relevant industry associations to help affected individual firms to fight foreign trade barriers.[74]

Home states of SWFs may have already established such national mechanisms in order to be informed of any obstacles in foreign markets. Should that be the case, the home state can decide to endorse the claim of a SWF. Actually, even if no formal mechanism exists at the national level, one can imagine that the home state will always listen to the SWF representatives and possible issues on foreign markets. SWFs are not official WTO members but, by definition, SWFs are controlled by a government or central bank. Since the role of governments through and within SWFs is at least important and often essential,[75] one can safely assume that in case of obstacles faced in a foreign country, it will be easy for the SWF to communicate to the home government the details of the problem. If the SWF interests are negatively affected by a foreign country, one can also assume that the home state will consider bringing the case to the WTO.

As a result, although SWFs cannot initiate a formal dispute resolution proceeding and have no standing before panels or the Appellate Body, one can assume that it remains relatively easy for the home state to take up the claim and formally file it at the WTO. The WTO dispute settlement mechanism does not favour the standing of SWFs but nothing precludes the WTO from one day having to deal with a case which relates to SWFs service-related investments in foreign countries.

Footnote continued
and Avoiding "Over-Legalization", in International Economic Law, Essays in Honour of J.H. Jackson 291 (Marco C.E.J. Bronckers & Reinhard Quick eds., 2000).

[71]Council Regulation 3286/94, 349 O.J. 71–78 (EC), *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31994R3286 (laying down community procedures in the field of the Common Commercial Policy in order to ensure the exercise of the community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization 147).

[72]Most operators preferred to have their interests defended directly by national governments in the Comité 113 and the Council. In addition, the weaknesses of GATT 1947 dispute settlement and enforcement – subject to veto powers – discouraged operators to take up such procedures and incur costs. One of the few cases it was explicitly invoked was when the Commission rejected a complaint brought by a producers' association called Fediol to initiate a procedure to examine commercial practices of Argentina allegedly being inconsistent with GATT 1947 law. Case C-70/87, *Fédération de l'Industrie de l'Huilerie de la CEE (Fediol) v. Commission*, 1989 E.C.R. I-1781.

[73]To justify the opening of the TBR's formal examination procedure, they need to set out a sufficient *prima facie* case of WTO inconsistency. The TBR was not invoked frequently during the first years of its existence. Rather, private companies and other actors have used informal channels to let their own governments bring allegedly unfair trade practice to the Commission's attention. Marco Bronckers and Natalie McNelis ask why the TBR is not yet the preferred instrument and highlight the reasons for this practice. Marco C.E.J. Brocnckers & Natalie McNelis, *Fact and Law in Pleadings Before the WTO Appellate Body*, *in* Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of Other International Courts and Tribunals 321 (Friedl Weiss ed., 2000).

[74]Henry Gao, *Public-Private Partnership: The Chinese Dilemma*, 48 J. World Trade 983 (2014). The article analyses the pros and cons of the two systems, the political and social reasons for the shift, and how the new system has worked in practice with case studies. The article concludes with thoughts on the lessons we can draw on the relationship between the government and private firms in China, as well as how the public-private partnership will develop in China in the future.

[75]Julien Chaisse, *The Regulation of Sovereign Wealth Funds in the European Union – Can Supranational level limit the rise of national protectionism?*, *in* Sovereign Investment: Concerns and Policy Reactions 462–95 (Karl P. Sauvant & Lisa Sachs eds., 2012).

7. CONCLUSION

This paper has demonstrated that the law of the WTO, through the GATS and its Mode 3, is relevant to the SWFs foreign investments. As a matter of law, the establishment of a commercial presence relates directly to foreign investment. All the WTO services obligations that contemplate a "commercial presence" of foreign service providers necessarily imply that the providers will be able to make investments necessary to enjoy the benefits of such a commercial presence. This means that the WTO retains an untapped resource which may be used by SWFs, especially when we note the quasi universal membership of the WTO.[76]

In terms of substantive rights, the two most important general obligations are the principle of MFN treatment pursuant to Article II and transparency pursuant to Article III. These key principles must be combined with a detailed reading of members' commitments in order to know the real rights which may benefit SWFs. In this regard, the paper found that GATS Mode 3 commitments can reach different degrees. Retained and limited liberalization basically signifies that no right is granted to foreign investors. Retained liberalization means that there is no commitment while the limited liberalization may take the form of non-binding commitments which, by definition, cannot be subject to litigation (because they are not binding). SWFs cannot rely on the absence of such promises. However, in the event of full liberalization, the existing commitments (which are binding) grant SWFs the right to invest.

Although, the Mode 3 commitments of a member may be (or may become) very liberal, it does not mean that there is an automatic right for the SWFs to invest. In this regard, the greater the rights granted, the more important it becomes to look at the regime of exceptions. In this connection, the general exceptions clause of Article XIV does not seem to play a major role. However, Article XIV bis which deals with security exception, represents the major concern for SWFs. Although a WTO member could be provided with full market access and no restriction on Mode 3 commitment in the official binding schedules, these would still be subject to Article XIV bis. On the ground of national security, a member may then seek to deviate from the principles. This however does not extinguish the legal scenario as the SWFs home state could decide to lodge a complaint for the breach of Mode 3 commitments and ask the panel and/or the appellate body to review the meaning and application of Article XIV bis.

The possibility of seeing investment disputes at the WTO is perhaps not so attractive for a reason directly related to the very nature of the Dispute Settlement Mechanism (DSM) system. One feature of many investment agreements, which has contributed to calls for a balancing of investor rights with responsibilities, has been the grant of direct legal personality to investors; i.e., enabling them to mount an international arbitration against host states. Most recent investment agreements provide recourse to so-called investor-state arbitration.[77] This novel device has permitted investors to challenge government measures, policies or actions which are thought to contravene the substantive provisions of a given treaty. The investor state mechanism has given rise to a substantial volume of litigation in recent years. In stark contrast, the WTO dispute settlement rules are exclusively reserved for state-to-state disputes, which makes it less operative for investors. Also, the WTO judicial policy has its shortcomings. In particular, it is limited to prospective measures and fails to address retroactive action.[78] Basically, a home state which would endorse a SWF claim for the breach of Mode 3 commitments could only expect the defending party to remove the measure in breach with the GATS commitments. Only if the defending party refuses to comply with the ruling (and to allow the SWF to conduct business) would it be subject to further retaliation.

Last but not least, although the strict analysis of the law rather tends to conclude that the impact of WTO law is limited for SWF activities, one must observe that the multilateral framework

[76]Russian membership adds to the importance of all these questions (August 22, 2012).

[77]In principle, foreign investors may choose to initiate legal proceedings in the domestic courts of the host country, i.e., a right they never lose. Alternatively, they may initiate international arbitration proceedings that can be more favourable to them; this is because it is easier to know international law and practice and because international tribunals are not subject to domestic political pressure. *See* Julien Chaisse, *Promises and Pitfalls of the European Union Policy on Foreign Investment – How Will the New EU Competence on FDI Affect the Emerging Global Regime,* 15 J. Int'l Econ. L. 51 (2012).

[78]Julien Chaisse, Deconstructing the WTO conformity obligation: A theory of compliance as a process, 38 Fordham Int'l L.J. 57 (2015) at 82–83.

and the rights attached could also be used to simply threaten the host state with litigation and bad publicity. Also, the GATS establishes the multilateral framework for long-term progressive liberalizations of services which means that further liberalization by members must pay attention to the possible ramifications for SWFs. Vice versa, SWF host countries (such as UAE, Qatar, Norway etc.) should try, in the context of current WTO negotiations, to negotiate greater and more substantive Mode 3 commitments which would favour the projects of their rising SWFs.

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