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“Mode Switching” as an Interpretational Problem under Articles XVI and XVII of the GATS

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Abstract

Economic studies provide evidence of inter-modal linkages across the different modes in the World Trade Organization (WTO) General Agreement on Trade in Services (GATS) mode of supply framework. Despite the scheduling of specific commitments under each mode, substitutability and complementarity across the modes exist in commercial practices. These cross-modal interdependencies are sometimes referred to as “mode switching”. Article I:2 of the GATS defines the four modes as delivery channels without indicating to any interdependence they may have. The 2001 Scheduling Guidelines of the WTO’s Council of Trade in Services provide modal separability in the scheduling of commitments even when the delivery of a service requires the necessary utilization of two or more modes. Nevertheless, the interpretational implications of such scheduling practices have not been addressed in the literature or the GATS jurisprudence. This article, thus, identifies and examines the interpretational lacunae associated with complementary inter-modal linkages. In order to do so, it utilized GATS jurisprudence to identify whether inter-modal linkages are considered in adjudicating disputed measures. It also used “mode switching” as an analytical lens to evaluate the interpretational challenges posed by cross-modal interdependencies. Accordingly, it argues that complementary inter-modal linkages unfold interpretational issues related to the legal characterization of modes, the internal consistency of commitments, and the interpretation of cumulative obligations. It suggests interpreting Article I:2 and specific schedules of commitments undertaken as per Articles XVI and XVII of the Agreement in accordance with its purpose and objective to maintain the economic function of cross-modal linkages.

Keywords: GATS, inter-modal linkages; inter-modal complementarity, progressive liberalization, services trade

1. Introduction

In the WTO's General Agreement on Trade in Services (GATS) mode of supply framework, services are traded through four modes of supply. While mode 1 is the cross-border supply of services (e.g., digitally), mode 2 refers to the travel abroad of consumers to service providers, mode 3 is the commercial presence of service providers within foreign markets, and mode 4 implies the temporary movement of professionals to consumers in other territories to provide services.¹ The specific schedules of commitments undertaken by WTO Members on the market access (Article XVI) and national treatment (Article XVII) obligations under the GATS are negotiated within these modal compartments.

Inter-modal linkages are sometimes referred to as “mode switching” in the economic literature on services trade. The linkages across the different modes of supply are usually discussed in terms of two facets: substitutability and complementarity. Whether the modes are strictly substitutes or complements to one another has not yet been identified by the literature. Instead, empirical findings indicate substitutability and complementarity across the modes of delivery in various service sectors and sub-sectors. However, it should also be noted that the empirical findings for some authors indicate ambiguity rather than distinct substitutability or complementarity between mode 3 and modes 1, 2, and 4.²

The 2001 Scheduling Guidelines by the WTO's Council of Trade in Services (hereinafter, the Scheduling Guidelines) provide that when specific commitments are undertaken by Members, commitments should fall under each mode. Accordingly, the entry of a specific commitment concerning a service sector or sub-sector in one mode does not guarantee access through the other modes even when the practical delivery of a service requires the utilization of two or more modes.³ Yet, GATS commitments are unclear or “foggy” with superfluous entries.⁴ This practical challenge in scheduling practices is also accompanied by asymmetries in terms of the extent of commitments undertaken by Members across service sectors and sub-sectors.⁵ Furthermore, it's emphasized that the discrepancy between the commitments under the GATS and the practically enforced regulatory regime has created “water” in GATS commitments.⁶ This is mostly due to the fact that the GATS entered into force in 1995, but various domestic regulatory reforms have since unfolded.⁷

It's crucial to note, as expounded earlier, that scheduling inefficiencies often alter how services are supplied across the different modes. The superfluous entries, the existence of asymmetries among the schedules of specific commitments, and unbound or highly circumscribed entries⁸ in schedules induce service providers to shift between modes of supply.⁹

Restrictive barriers also prompt service providers to shift among the modes of supply. Empirical economic studies show how policy, regulatory, or technical barriers affect the behavior of service providers in terms of the modes they utilize to provide services. Thus, studies indicate that restrictions imposed on mode 1 sales induce service providers to adapt as per the restrictions and supply their services through mode 3.¹⁰ Although it's important to mention that a more recent sector-specific study identified complementarity between mode 3 sales and the supply of services through the other modes.¹¹ That is, instead of inducing shifts across modes, the restrictions on foreign affiliate sales negatively affected overall services trade through modes 1, 2, and 4.

Other empirical economic studies on services trade and inter-modal linkages also reveal evidence of interdependence across the modes of supply driven by restrictive barriers. Such studies are often segregated by sector-specific analysis. Another empirical study assessed inter-modal switches in financial (banking and insurance) and professional services and identified substitutability between foreign affiliate sales through commercial presence (mode 3), and services trade through the other modes in such sector and sub-sectors.¹² This substitutability is attributed to the negative impact of restrictive barriers that affected the trading patterns of service providers, indicating shifts between modes when faced with barriers.

Lastly, the rapid digital transformation of services trade and e-commerce also enables inter-modal switches. Digitalization catalyzed a significant shift towards mode 1 services due to restrictions on mode 4 supply, namely, stringent labor and immigration policies.¹³ E-commerce, through the virtual delivery of services, has substituted the commercial presence of foreign affiliates within foreign markets and services trade through the temporary travel of professionals.¹⁴ The increasing role of digitalization in services trade is also illustrated by the WTO's Trade in Services by Mode of Supply (TiSMoS) dataset. Accordingly, digital cross-border trade in services escalated between 2019 and 2022, owing partly to the COVID-19 pandemic.¹⁵ In fact, an increase close to 40% was recorded in cross-border digital services trade, while the delivery of mode 4 services plummeted by 60%, implying inter-modal substitution.¹⁶

This article identifies and examines how complementary inter-modal linkages, that is, the simultaneous or sequential utilization of two or more modes, pose challenges to the interpretation of specific commitments undertaken under Articles XVI and XVII of the GATS. Thus, it bridges doctrinal analysis of the GATS mode of supply framework with empirical evidence of inter-modal complementarity across the different modes. This helps to situate such linkages as diagnostic tools to pinpoint interpretational gaps associated with the mode-specific scheduling of commitments under the GATS. This article is structured as follows. Section 2 presents the conceptual framework on inter-

modal linkages. Section 3 provides an overview of empirical studies on inter-modal linkages. Section 4 provides the methodology employed. Section 5 discusses the mode-specific scheduling of commitments under the GATS. Section 6 presents the four modes of supply as legal categories. Section 7 discusses the interpretational challenges inter-modal complementarity poses to the mode-based scheduling of commitments and the implications of the GATS modal taxonomy to the progressive liberalization of services trade. Section 8 concludes the study.

2. Conceptual Framework

Analytical and conceptual economic studies on services trade expound the defining features of linkages across the different modes of supply, in terms of substitutability and complementarity. Inter-modal substitutability is defined as the viable replacement of one mode by another to deliver a service,¹⁷ while inter-modal complementarity is the use of two or more modes simultaneously or sequentially to deliver a service to consumers in another territory. Further, inter-modal complementarity is associated with the trade facilitation role the modes play in relation to one another.¹⁸

It's also elucidated in the literature how the different modes of supply could serve as substitutes, although not always perfect ones, for one another in the supply of services.¹⁹ In addition, inter-modal complementarity across modes is described as most likely feasible in various services trade transactions.²⁰ Although discussed in light of the impact of restrictive policy barriers in services trade, the existence of substitutability and complementarity across the different modes of supply is also discussed in other relevant works on services trade.²¹

3. Empirical Findings on Inter-modal Substitutability and Complementarity

Empirical studies often illustrate the relationship the modes have with one another. Although inter-modal substitutability is less explored than inter-modal complementarity, both exist across modes in commercial practices.²² A key empirical study on inter-modal complementarity assessed fourteen specific sectors and sub-sectors ranging from air transport, maritime transport, courier and telecommunication to logistics services.²³ The empirical analysis using the OECD's Services Trade Restrictiveness Index (STRI) identified complementarity between mode 3 and modes 1, 2, and 4. Therefore, restrictive barriers affecting mode 3 transactions adversely affect overall trade through other modes in accounting, legal services, postal and courier, architecture and engineering, computer, maritime transport, road freight transport, logistics, and telecom services.

The modes can be used in a complementary manner as described in Section 2 to supply a service; that is, the delivery of a service may, for example, require commercial presence and the temporary movement of professionals for its effective supply²⁴. Inter-modal complementarity was, therefore, also identified between foreign affiliate sales and mode 1 services in financial, business, and insurance sectors using the Services Trade Restrictions Index (STRI) of the World Bank.²⁵ In contrast, inter-modal substitutability across modes 3 and 1 was found in transport services.²⁶

In relation to this, though not substantiated by empirical analysis of trade data a study shows the relevance of foreign affiliate presence in facilitating trade through modes 1 and 4.²⁷ Thus, commercial presence facilitates the intra-corporate movement of professionals and the online cross-border delivery of services in sectors such as retail distribution, financial services, education and training, construction and integrated engineering services, and business services.²⁸ Inter-modal substitutability, on the other hand, is present across modes 1 and 4 in Information Technology (IT)-enabled outsourced projects for financial services, and across modes 2 and 3 in education and training, and healthcare services.²⁹ Modes 1 and 3 are also identified as substitutes in retail distribution and accountancy services, in which service providers are increasingly relying on the internet to deliver their services.³⁰

Moreover, others also used the OECD's STRI and found inter-modal complementarity across modes in the supply of financial and professional services, while inter-modal substitutability was identified in telecommunications services.³¹ The Analysis of the OECD's STRI also revealed substitutability between mode 3 and cross-border trade via mode 1 across sectors listed in the OECD's analytical Activities of Multinational Enterprises (AMNE) database.³² The empirical findings suggested restrictive barriers on mode 1 tend to stimulate foreign affiliate sales, indicating substitution between the two modes.

Lastly, Bilateral Investment Treaties (BITs) were used as a proxy for mode 3 to empirically examine the relationship between commercial presence and mode 1.³³ The study underscored the positive impact BITs play in increasing services exports, catalyzing commercial presence, and also compensating for the negative effects of the other modes of supply. This led to a complementarity relationship between BITs and aggregate services exports through modes 1, 2, and 4.³⁴ However, the empirical findings of the study specifically indicated that International Investment Agreements (IIAs), in particular BITs, reduced mode 1 supply, thus showing substitutability between mode 3 and mode 1.³⁵

4. Methodology

This article adopts a doctrinal legal analysis approach that relies on interpreting the pertinent provision of the GATS in line with Article 31 the Vienna Convention on the Law of Treaties (hereinafter, the VCLT). This allows the examination of the mode-specific scheduling of commitments in light of the objective and purpose of the Agreement. Further, it uses the 2001 Scheduling Guidelines to explore if the existing modal framework accommodates inter-modal linkages across the modes of supply. Relevant GATS jurisprudence is also used as interpretative guidance to examine if a requisite complementary cross-modal supply is considered in assessing the impacts of contested trade restrictive measures. Additionally, complementary inter-modal linkages are used as analytical lens to assess the interpretational implications of the mode-based scheduling of specific commitments undertaken in relation to the market access and national treatment obligations under the Agreement.

5. The Mode-Specific Scheduling of Commitments Under the GATS

Article 1:2 of the GATS stipulates that trade in services is undertaken through four specific modes, which rely on the geographic location of the service supplier and consumer. These modal compartmentalisations lay the foundational principle of the GATS. Aside from defining trade in services under four modes, the GATS also provides for the progressive liberalization of services trade through specific commitments undertaken by each Member through successive rounds of negotiations (Article XIX). Nevertheless, it should also be noted that the liberalization commitments are negotiated by WTO Members in the service sectors and sub-sectors of their choice.³⁶

Mode 1, as per Article I:2 (a) of the GATS, is the supply of services from the territory of a Member into the territory of any other Member. Services are traded through this mode without requiring the supplier's physical presence at the consumer's location. Moreover, services traded through this channel accounted for 34.7% of exports and 33.6% of imports in international services trade in 2022.³⁷ Mode 1 services mainly encompass electronically and digitally delivered services through the internet in various sectors, including professional services, healthcare (e.g., telemedicine), and telecommunication services. Further, commitments under mode 1 usually appear to be “unbound”³⁸, which translates to no commitments under this mode which may be due to technical infeasibility or regulatory hurdles associated with the delivery of services.³⁹

Article I:2 (b) of the GATS defines mode 2 services as those delivered to consumers in the territory of the service provider. The consumer, thus, has to travel abroad to consume the service(s) rendered by the service supplier. Tourism, education and

training, and medical services are among the sectors delivered by consumers traveling to the location of the service supplier. Yet, mode 2 services accounted for only 8% of exports and 7.5% of imports in international services trade in 2022.⁴⁰ Despite the relatively lower percentage of this mode in global services trade, commitments under this mode are predominately unrestricted.⁴¹

In contrast, mode 3 services through the commercial presence of the service provider in the territory of the consumer, as provided under Article I:2 (c) of the GATS, accounted for 56.1% in exports and 57.9% in imports of global services trade in 2022.⁴² Although most of the services trade is conducted through this mode, restrictions on opening and operating foreign affiliates are also higher, including discriminatory barriers related to licensing and the number of foreign-owned firms in a market.⁴³

The GATS provides for the last mode through which services are delivered under Article I:2 (d). Mode 4, as it's called in the literature and WTO documents, requires the temporary movement of natural persons to the territory of a Member to supply services. As indicated for the other modes, this mode also accounted for 1.2% in exports and 0.9% in imports of international trade in services in 2022.⁴⁴ Restrictions on the movement of natural persons, including restrictive immigration and labor policies, are often indicated as barriers limiting the provision of services through this mode.⁴⁵ However, it's important to note that there are instances when mode 4 service deliveries exist only to facilitate services trade through modes 1 and 3.⁴⁶ Also, commitments under this mode are highly circumscribed with horizontal limitations, that is, without preference rendered to sectors that benefit from greater access under mode 4 or limited with preference for highly skilled professionals, and with overall fewer commitments.⁴⁷

These four modes, thus, characterize and underpin the foundational principle of the GATS mode of supply framework. Aside from defining services trade under these distinct modes, the Agreement also stipulates the scheduling of specific commitments (Article XX) to advance the progressive liberalization of services trade. These specific schedules of commitments, in turn, are undertaken in a mode-specific manner.⁴⁸

6. The Modes as Legal Categories

The modes as described under Article I:2 of the GATS are not mere classifications of service delivery channels. Commitments undertaken under each mode limit the scope of the market access and national treatment obligations relating to the services scheduled. Entries in schedules of commitments under each mode consist of “none”, “unbound”, or “limitations”.⁴⁹ While “none” refers to the willingness of a Member to fully commit to liberalization without any limitations on market access or national treatment for the services scheduled, an “unbound” entry indicates a reservation by the

Member to introduce or sustain any legal or regulatory impositions that may restrict the access guarantees.⁵⁰ An entry of “limitations” to national treatment and market access, on the other hand, refers to conditions that apply to the access guarantees, which might be existing national policies, laws, or regulations.⁵¹

These entries are made under each mode, defining the extent of the bindingness of the access guarantees rendered by Members in their schedules of commitments. The mode-specific scheduling of market access and national treatment obligations, thus, is not a mere descriptive classification of committed sectors and sub-sectors under each mode of supply; it also sets the existence, scope, and content of commitments enforceable under each mode. The obligation to enforce, therefore, arises depending on the specific type of entry applicable under each mode. It's also noteworthy that once a sector or subsector is committed under any of the modes, the obligation(s) associated with it are assessed within the specific mode.

Each of the four modes, in conclusion, serves as a legal category that bears the extent of a Member's commitment towards liberalizing its market to foreign service suppliers. It's important to note that a similar service sector or sub-sector may have varying entries across modes and thereby differing levels of protection under each mode. Accordingly, the scheduling of commitments under each mode signifies the attachment of a legal boundary or enforceability zone to the modes beyond simple delivery channels and scheduling categories. Thus, the market access and national treatment obligations as provided under Articles XVI and XVII of the Agreement are enforced and protected to the extent of the specific entries made under each of the static and distinct modes.

6.1. Modes as Legal Categories for Limitations on Market Access (Article XVI)

Article XVI of the GATS under paragraph 2 stipulates that the limitations enumerated from sub-paragraphs (a) to (f) shall not be imposed when a Member undertakes to grant market access for sectors unless specified in its Schedule.⁵² Such limitations include the number of service suppliers, natural persons, total value of transactions, quantity of service outputs, or total service transactions.⁵³ It's also provided that an economic needs test may alternatively be required instead of imposing limitations in terms of quotas and numerical ceilings.⁵⁴ Market access limitations may also take the form of restricting the participation of foreign capital/shareholding, investment, or types of legal entities or joint ventures through which service suppliers may establish commercial presence in a Member's territory.⁵⁵

The Scheduling Guidelines provide that the specific commitments concerning the market access obligation (Article XVI) a Member undertakes in its Schedule should be

mode-specific save for horizontal commitments entered for multiple modes.⁵⁶ The four modes, again, serve not only as categorical compartments for classifying the delivery channels for the sectors and sub-sectors committed but also as legal categories through which the bindingness of entries is established. Unless limited by a horizontal commitment for all modes, entries may vary across modes, and this, in turn, affects the degree of legal protection granted for a sector or sub-sector across the different modes. Thus, the market access guarantee rendered for a sector, for instance, may be a full commitment without limitations, uncommitted with an unbound entry, or it may be committed but with some of the limitations defined under paragraph 2 of Article XVI. This signifies that the modal classification of such entries also shapes the legal character, in terms of protection and enforcement of the guarantees, which are undertaken in schedules. It also affects how the limitations, if imposed, are assessed and interpreted under each mode of supply.

The mode-specific compartmentalization of commitments, therefore, is a legal categorical signal that specifies the extent and degree of bindingness of commitments undertaken by a Member to grant access to its market. It should also be understood that the extent and degree of the market access protection operate within the bounds of the modal category. In fact, some of the limitations such as quotas, numerical ceilings, or economic needs test listed under paragraph 2 are directly related to specific modes. Limitations concerning the number of natural persons fall under mode 4, while limitations on the type of legal entities and the number of service providers that may establish their foreign affiliates within the domestic market of a Member are strictly applicable under mode 3.

In conclusion, the market access obligation is a liberalizing commitment undertaken in specific schedules annexed to the GATS. While commitments concerning this obligation are scheduled in a mode-specific manner, the scope of enforceability and legal protection rendered to the committed services are also interpreted under each mode.

6.2. Modes as Legal Categories for Conditions and Qualifications on National Treatment (Article XVII)

The national treatment obligation is stipulated in paragraphs 1 and 2 of Article XVII of the GATS.⁵⁷ A Member is obliged to provide formally identical or formally different treatment that places services and service providers of foreign origin on an equal footing with its domestic services and service providers. The limitations to the “no less favorable treatment” requirement embedded under this Article, according to the Scheduling Guidelines, are also to be listed in a mode-based approach unless horizontal commitments are undertaken affecting several modes.⁵⁸ The applicability of the

limitations providing the qualifying conditions for national treatment, therefore, is to be construed within the bounds of the specific mode in which the entry is made. Thus, the legal effects of the entries are interpreted in light of the modal compartments.

Furthermore, the “likeness” benchmark, used to assess the similarity of foreign and domestic services and service providers, is also conducted within the modes of supply concerned. That is, the comparability of the services and service providers is limited within the scope of the mode of supply under which it is entered. Hence, the comparative assessment of “likeness” and its legal effects is examined in the context of the mode in which the limitations are listed. The modes, thus, are formal legal delimiters of the extent of discriminatory (if listed) measures that will be enforced upon foreign services and service providers.

Moreover, mode-specific scheduling reinforces the varying legal effects of the national treatment limitations listed across modes. A service sector may encounter a lawful differential treatment in one mode, while the same differential treatment may be unlawful in another mode. This indicates that the legal effects of national treatment limitations in schedules of commitments are applicable within modal categories. The modes of supply are also legal categories that determine the scope and enforceability of the national treatment limitations listed in schedules of commitments as binding access guarantees. This apparently anchors the argument that the modes in the GATS mode of supply framework transcend the common understanding that they are delivery channels through which services are supplied to consumers in Members’ territories.

Lastly, it’s important to mention the relevance of the *China – Electronic Payments* case to indicate the varying degree of legal protection mode-based scheduling entails.⁵⁹ In this particular case, China’s enactment of certain measures favoring its domestic electronic payment service providers violated its obligations under Articles XVI and XVII of the GATS. The panel’s ruling found China’s measures to be inconsistent with its undertakings under mode 3 for market access and modes 1 and 3 for national treatment in its Schedule of commitments.⁶⁰

However, the claim by the United States that mode 1 commitments for market access were violated was declined by the panel. Mode 1 in the Schedule has a predominantly “unbound” entry with an “except for” qualifier for the sub-sectors, which are to be delivered in conjunction with the sub-sectors listed under an entry of “none” within the same mode.⁶¹ Thus, the contested measures affecting market access under mode 1 by the United States were found to be strictly applicable to the sub-sectors falling within the “unbound” entry as independently supplied services.⁶² This is an important example indicating the role of the modes as legal categories limiting the scope

of legal protection and enforceability provided to committed services even within a single mode of delivery.

7. Inter-Modal Linkages and the GATS Mode-Specific Scheduling of Commitments

Section 3 of this article outlined empirical economic studies that provide evidence of inter-modal linkages as opposed to the static and distinct definition of services trade under Article I:2 of the GATS. The textual reading of Article I:2 of the Agreement establish the formal distinctiveness and mutual exclusivity of the four modes of supply.⁶³ The same can be construed from reading the Scheduling Guidelines, as it supports the contextual reading of Article I:2 of the GATS.⁶⁴ The Scheduling Guidelines in paragraph 35 state that the scheduling of commitments on market access and national treatment obligations should be mode-specific, even when the practical delivery of a service requires the use of more than one mode.

The mode of supply framework of the GATS, thus, does not indicate that the modes may be interdependently utilized by service providers. Inter-modal linkages across modes in terms of substitutability and complementarity in commercial practices lack doctrinal recognition under the Agreement. Article I:2 neither explicitly restricts nor endorses the alternate or cumulative use of any of the modes in the delivery of services.

In the scheduling Guidelines and in the Schedules of commitments themselves, as can be seen from the schedules of specific commitments found in the WTO and World Bank's I-TIP Services database, the modes are treated as separate categories through which service sectors and sub-sectors are committed. Such practices further consolidate the established norm that commitments under the GATS are undertaken separately for each mode without express or implicit indication that the modes may have inter-modal linkage amongst each other.

Although GATS jurisprudence, in particular the *US– Gambling* case⁶⁵, may have indirect relevance to examining modal overlap in the delivery of services, it lacks significant importance in discerning inter-modal linkages. Scholars argued against the simplistic classification of Internet services as mode 1 in whatever medium such services may be supplied (technological neutrality).⁶⁶ Instead, they point out that the “push and pull” characteristics of how information is disseminated through the Internet and how services are actually delivered in the cyber space proves that Internet services fall far beyond the domain of mode 1 services.⁶⁷ That is, Internet services could be “pulled” by the consumer from the service provider (mode 1), or they could be “pushed” by the service supplier to the consumer and hence deemed as mode 2 services.

Therefore, the absence of GATS jurisprudence directly relevant to inter-modal linkages adds yet another strain, as the interpretational implications of the

substitutability and complementarity across the modes of supply in market practices have not been entertained.

7.1. Inter-Modal Complementarity and Its Interpretational Challenges

Inter-modal complementarity across the modes poses interpretational challenges to the GATS mode of supply framework. Given the modes also function as legal categories that limit the legal effects of the commitments undertaken by Members, the existence of complementarity across them puts interpretational challenges to the framework. The GATS does not incorporate a guiding principle that may be utilized to assess cross-modal linkages and how obligations arising out of commitments should be treated when services are delivered through the complementary use of the modes.

The assumption in the Scheduling Guidelines is that each services sectors and sub-sectors can be committed distinctly in any of the four modes. The market access obligation, for example, is only enforceable in any of the modes when the relevant mode is committed. Although these assumptions are plausible in the treaty text, commercial practices show otherwise concerning how the modes are practically used to provide services to consumers, and the treaty lacks governing provisions concerning cross-modal deliveries.

Having this in mind, a single service may, for example, be delivered through a combination of market access guarantees provided under mode 1 via remote infrastructure (including digital supply) and under mode 3 via a foreign affiliate. The service supplier may also, at a later time, shift to full remote delivery if restrictions are imposed limiting the delivery of the service through commercial presence or if remote delivery is cost-effective due to digitalization. In another circumstance, a service may require the simultaneous use of the temporary movement of personnel (mode 4), combined with commitments under mode 3 through foreign affiliate presence, and the transmission of requisite data (mode 1) for the foreign affiliate to undertake its local operations.

Now, if a service may be delivered in the cross-modal manner described above, there would be interpretational lacunae as the GATS or the Scheduling Guidelines haven't provided any normatively coherent answer that enables a panel to address the legal effects of functional cross-modal linkages. Unlike the modal compartmentalization of commitments, inter-modal linkages reveal interpretational issues in terms of the legal characterization of modes, internal consistency of commitments and the applicability of cumulative obligations across modes.

I. The Legal Characterization Problem

Any dispute involving services trade includes a panel identifying the services affected by a measure, along with the modes of supply concerned. This enables the panel to assess whether a contested measure violates a Member's obligations under the market access and/or national treatment obligations. Although this might appear to be a simple task at first glance, cases that involve the simultaneous or sequential use of multiple modes require a thorough assessment. That is, assume that the supply of a service requires the remote transmission of data (mode 1), a local subsidiary that relies on cross-border data transmissions, and the temporary intra-corporate movement of professionals. If a measure is introduced limiting services trade through mode 1, should the panel examine the legal effects and consistency of the measure within the bounds of the affected mode only, or all three of the modes? Should the single service be disaggregated in accordance with the modes of supply involved, even when the modes are requisite components for the supply of a single unit of service?

Classification is important to separately identify the measure, modes, and service (s) at issue. However, the adjudication of a case, such as in the above scenario, first requires the classification of a single service transaction delivered through multiple modes. The assessment of whether a contested measure contradicts Articles XVI and/or XVII first requires the classification of the services against which a measure is imposed and the legal characterization of the appropriate modes relevant to the dispute. However, in a composite service, such characterization diminishes the economic functionality of cross-modal delivery. Besides, any interpretation confined to the mode in dispute without taking into account the complementary mode would not make the adjudication complete and also adversely affect the service transaction concerned.

Despite the apparent scarcity of disputes involving services trade in general, if one has to turn to jurisprudence, none of the two closely relevant cases, i.e. the US – Gambling or the China – Electronic Payments cases address such issues. In fact, the contested measure in the former precisely fall under mode 1, while the latter involved modes 1 and 3, but the delivery of the contested financial services in the case did not necessarily require the simultaneous or sequential utilization of the two modes. In addition, as is the rule, the panel characterized each mode distinctly and entertained the legal effects of the contested measures in separation. Thus, these makes the cases insignificant to serve as references for disputes concerning a service that functionally relies on simultaneous or sequential cross-modal supply.

II. Problem in the Internal Consistency of Commitments

The disaggregated interpretation of the mode-specific scheduling of commitments faces yet another interpretational challenge from the functional economic utility perspective of two or more modes. This time, in the form of internal consistency of the commitments entered across modes. Since the Scheduling Guidelines allow a Member to fully commit, commit with limitations and/or leave any of the modes uncommitted, there might not be internal consistency with the levels of liberalizing commitments across modes.

The issue, however, surfaces when, as in the above scenario under sub-section (I), a single service requires the necessarily complementary use of two or more modes. Let's again assume that modes 1 and 3 are simultaneously required to deliver a service. Since mode 1 is not fully committed, a Member may introduce restrictive measures affecting the cross-border flow of services. If a dispute is to arise regarding the consistency of the measure under Articles XVI and/or XVII, should the interpretative reading of the commitments concerned overlook the economic functions of the complementary modes by adhering to the disaggregated treatment of modes? Would the internal cross-modal consistency of the commitments be maintained if the functional utility of the modes were taken into consideration? Again, would internal consistency be reserved if the measures were taken as affecting not only the specific mode that faced restrictions but also the complementary mode integral to the delivery of a service?

Apparently, as discussed above in sub-section (I), the GATS jurisprudence shows that each mode is assessed independently in light of the restrictive measures imposed. Though the modes of delivery involved in the China – Electronic Payments case were not simultaneously required for the effective supply of the services committed in the Schedule, it still shows the disaggregated approach the panel employed to examine the validity of the measures.

Needless to say, the GATS and the Scheduling Guidelines haven't provided normative guidance that can resolve such interpretative challenges. If an adjudicatory panel is to consider cross-modal interdependence, then internal consistency of commitments across modes would be maintained. This, in turn, allows a panel to cumulatively gauge the effects of a contested measure not only against the mode (mode 1, in the above instance) but also the complementary mode required for delivery of the service at issue. A segregated approach undermines the composite character of a service delivered through two modes. In addition, compartmentalizing and reinforcing the applicability of the restrictive measure against the single mode (as in the example above) would also undermine the economic functionality of the modes.

III. The Problem of Cumulative Obligations

Even when sector-specific commitments are undertaken in a mode-specific manner, they become cumulative when a service necessarily requires the simultaneous or sequential use of two or more modes. The commitments entered under each mode are cumulative since the delivery of a composite service relies on the complementary utilization of multiple modes. Let's consider an example where the delivery of a single service requires the simultaneous use of modes 1 and 3. Let us also assume that while mode 1 is committed with limitations, mode 3 is fully committed. If a regulatory measure restricts cross-border data flow, should a dispute involving the consistency of this measure with Articles XVI and/or XVII be limited to mode 1 only? Should the functional cumulateness of the obligations be taken into consideration when a panel adjudicates such disputes? If an adjudicatory panel is to employ modal separability, would the decisions adversely affect the functional economic utility of the modes and negatively hamper the delivery of the service at issue?

Again, the GATS and the Scheduling Guidelines do not provide normative guidance that may resolve such interpretational tensions. The strict applicability of modal compartmentalization, however, impedes the practical operability of the service. That is, if the viability of the contested measure, when assessed against market access and national treatment obligations, is to be confined to the specific mode upon which a measure is imposed, it poses the danger of negatively neutralizing the service delivery through the other complementary mode as well. This, in effect, would make the scheduling of commitments in separate modes for services requiring cross-modal delivery an unnecessary legal encumbrance. Furthermore, if a panel finds the contested measure to be consistent with the Member's market access and/or national treatment obligations, it would also hinder the delivery of the service altogether. If the supply of the service is to be halted, it would mean a rigid application of the mode-based interpretation of commitments would unfold results against the primary objective of the GATS; enabling free trade in the services sector.

The available GATS jurisprudence, as discussed in sub-sections (I) and (II) above, is barely relevant to examine cumulative obligations in disputes involving cross-modal interdependence. The panel in the China –Electronic Payments case assessed the commitments entered in modes 1 and 3 separately. The services involved in the dispute were also not delivered in a compulsorily simultaneous or sequential cross-modal manner. Thus, it would be futile to use this particular case as a benchmark to evaluate the interpretational impacts of functional inter-modal linkages on the reading of cumulative obligations in service supply.

7.2. The Modal Taxonomy and the Liberalization of Services Trade

The modal taxonomy in the GATS mode of supply framework operates without interpretational setbacks until inter-modal linkages are made part of the picture. It's well established by the Scheduling Guidelines that commitments undertaken as part of the progressive liberalization of services trade are scheduled in a mode-based manner. It's important to question at this point, however, whether mode-specific scheduling of market access and national treatment obligations optimally promotes the liberalization agenda of the treaty Agreement. When considering the functional interdependence of the modes in the delivery of services, as evidenced by empirical and non-empirical economic studies, the rigidity of the mode-based allocation and interpretation of market access and national treatment obligations becomes less persuasive.

Instead, Article I:2 and the schedules of specific commitments undertaken by Members as per Articles XVI and XVII of the GATS should be interpreted in accordance with Article 31(1) of the VCLT. Accordingly, the purpose of the GATS as a treaty document and its objective of removing barriers to free trade in services are further enhanced if it integrates economically functional cross-modal interdependences. Moreover, when one considers the inoperability of services that may require the interdependent use of modes, explicit incorporation of inter-modal linkages becomes even clearer. It's also crucial to consider how modal compartmentalization may enable regulatory carve-outs in one mode while neutralizing commitments in the complementary mode. Thus, the interpretational challenges panels may encounter, as discussed in sub-section 7.1., would require the integration of the functional relation and utility the modes have to one another.

8. Conclusion

Undoubtedly, modal compartmentalization is an integral part of the liberalization commitment Members undertake. These commitments are undertaken to ensure access to Members' domestic markets and to render "no less favorable" treatment to foreign services & service suppliers with their domestic counterparts. This article, however, argues that inter-modal linkages, in the form of cross-modal complementarity, in the GATS mode of supply framework pose interpretational challenges to the mode-based scheduling of specific commitments. It also presents the modes not only as delivery channels stipulated under Article I:2 of the GATS for the supply of services but also as legal categories that delimit the scope and enforceability of the commitments undertaken by Members.

Although modal separability is largely assumed in the GATS treaty text and the Scheduling Guidelines, this article identifies and discusses three of the interpretational challenges the simultaneous or sequential cross-modal delivery of services entails. Accordingly, cross-modal linkages in terms of the necessarily complementary use of more than two modes unravel problems in the legal characterization of modes, challenge the internal consistency of the commitments, and raise issues with the interpretation of cumulative obligations across modes. Such interpretational gaps pinpoint loopholes in the mode of supply framework of the Agreement. Thus, it suggests the interpretation of Article I:2 of the GATS and the specific commitments undertaken according to this mode of supply framework under Articles XVI and XVII in accordance with the objective and purpose of the Agreement to enable and enhance the liberalization of global trade in services. Such interpretation, in turn, allows adjudicatory panels to consider the cross-modal effects of contested measures even when imposed against a single mode of supply.

Endnotes

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³ Scheduling Guidelines, *supra* note 1, 10, para. 35.

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⁵ R. Adlung and A. Mattoo, 'The GATS', in A. Mattoo *et al.*, (eds), *A Handbook of International Trade in Services* (2007), 48, 54.

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¹¹ T. Khachaturian and S. Oliver, 'The Role of Mode Switching in Services Trade', U.S. International Trade Commission Office of Economics Working Paper No. ID-21-071, 34.

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- ¹⁸ *Ibid.*, 7.
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- ²⁰ *Ibid.*, 101-102.
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- ²⁴ B. M. Hoekman and M. M. Kostecki, *The Political Economy of the World Trading System: The WTO and Beyond*, 3rd ed. (2009). See also, J. Nielson and D. Taglioni, ‘A Quick Guide to the GATS and Mode 4’, Background Paper prepared for Session I, OECD–World Bank–IOM Seminar on Trade and Migration, Nov. 12, 2003, 6, para. 9. E.V.D. Marel and B. Shepherd, ‘*Services Trade, Regulation, and Regional Integration: Evidence from Sectoral Data*’, MPRA Paper No. 34343, Oct. 27, 2011, 15-16.
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- ²⁷ The author used data acquired from interviews, surveys, companies, developed and developing countries.
- ²⁸ Chanda, *supra* note 15, 11-15.
- ²⁹ *Ibid.*, 29-30.
- ³⁰ *Ibid.*, 30.
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- ³² A. Andrenelli *et al.*, ‘Multinational Production and Trade in Services’, OECD Trade Policy Paper No. 212, 2018.
- ³³ Morcillo, *supra* note 14.
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- ⁵⁰ Scheduling Guidelines, *Supra* note 1,12, para. 42- 43, 46. See also, Adlung and Mattoo, *supra* note 5, 55.
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- ⁵³ *Ibid.* art. XVI:2 (a) – (f).
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- ⁶³ *Vienna Convention on the Law of Treaties*, May 23, 1969, Art. 31:1, 1969, 1155 UNTS 332, 340 [VCLT].
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